

West's Vermont Statutes Annotated
West's Vermont Court Rules
Rules of Criminal Procedure
IV. Arraignment and Preparation for Trial

Vermont Rules of Criminal Procedure, Rule 16.2

RULE 16.2. REGULATION OF DISCOVERY

Currentness

(a) Investigations Not To Be Impeded. Except as is otherwise provided as to matters not subject to disclosure and protective orders, neither the attorneys for the parties nor other prosecution or defense personnel shall advise persons having relevant material or information (except the defendant) to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.

(b) Continuing Duty To Disclose. If, subsequent to compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the party shall promptly notify the other party or that party's attorney of the existence of such additional material, and if the additional material or information is discovered during the trial, the court shall also be notified.

(c) Custody of Materials. Any materials furnished to an attorney pursuant to these rules shall be used only for the purposes relating to the preparation and trial of the case, and shall be subject to such other terms and conditions as the court may provide.

(d) Protective Orders. Upon a showing of cause, the court may at any time order that specified disclosures be denied, restricted, or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit the party's attorney to make beneficial use thereof.

(e) Excision. When some parts of certain material are discoverable under these rules, and other parts are not discoverable, the nondiscoverable parts may be excised by order under subdivision (d) of this rule. Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the Supreme Court in the event of an appeal.

(f) In Camera Proceedings. Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or portion of such showing, to be made in camera. A record shall be made of such proceedings. If the court enters an order granting relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the Supreme Court in the event of an appeal.

(g) Sanctions.

(1) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery

of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances.

(2) Willful violation by counsel of an applicable discovery rule or order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

Credits

[Amended March 12, 2013, eff. May 13, 2013.]

Editors' Notes

REPORTER'S NOTES--2013 AMENDMENT

Subsection (c) is amended to remove the limitation that materials furnished pursuant to these rules remain in the attorney's exclusive custody and control. An attorney may disclose such materials to third parties as long as such disclosure is in furtherance of the preparation of the defense. Under subsection (d) of this rule, the prosecution may seek a protective order for good cause as to any materials whose disclosure to or possession by third parties would create a risk of harm to other persons, other prosecutions or the public. As provided for in Rule 54, a pro se defendant is treated as an attorney for purposes of receiving discovery and complying with discovery restrictions.

This amendment follows the revision to the ABA Standards for Criminal Justice Discovery, Third Edition. Former ABA Standard 4.3 has been replaced by Standard 11-6.4, which is consistent with this amendment. The court retains authority under subsection (d) to limit disclosure of material produced in discovery or to authorize broader disclosure as may be requested.

REPORTER'S NOTES

This rule is taken from ABA Minimum Standards §§ 4.1-4.7. It is in general similar to [Federal Rule 16 and the January 1970 proposed amendments thereto, 48 F.R.D. 553, 587 \(1970\)](#), submitted to the Supreme Court in November 1972 Proposed Amendments to the Federal Rules (Mimeograph, Admin. Ofc. U.S. Courts, 1972). The rule has no precise equivalent in prior Vermont law, although many of its provisions were probably within the inherent power of the Vermont courts in their application of [13 V.S.A. § 6727](#), repealed by Act No. 118 of 1973, § 25. See [State v. Miner, 128 Vt. 55, 72-73, 258 A.2d 815, 825-26 \(1969\)](#).

Rule 16.2(a), taken from ABA Minimum Standards § 4.1, is primarily hortatory in nature but it is enforceable against counsel under Rule 16.2(g)(2) and as a matter of professional responsibility. See ABA Code of Professional Responsibility, rules 7-104, 7-109. A warning to defense witnesses to consult with prosecution personnel only as provided in Rule 16.1(c) should be considered an exception to this provision.

Rule 16.2(b), taken from ABA Minimum Standards § 4.2, is similar to Federal Rule 16(g) [Rule 16(c) in November 1972 Proposed Amendments, *supra*]. See also Civil Rule 26(e). The continuing duty to disclose applies to any matter required to be disclosed by any provision of Rules 16 and 16.1. The duty operates automatically in order to minimize paperwork and hearings. Failure to comply with the duty may be remedied under Rule 16.2(g).

Rule 16.2(c), taken from ABA Minimum Standards § 4.3, is intended primarily to assure prosecutors that defense counsel will not make improper use of materials furnished to them pursuant to these rules. The rule also applies to prosecutors, however. See ABA Minimum Standards § 4.3, Commentary.

Rule 16.2(d), taken from ABA Minimum Standards § 4.4, is similar to Federal Rule 16(e) [Rule 16(d)(1) in November 1972 Proposed Amendments, *supra*]. The provision is critical to the operation of the discovery rules, because all disclosures under Rules 16 and 16.1 should be made as specified in those rules without court intervention unless the disclosing party moves for

a protective order. This is in sharp contrast to practice under [13 V.S.A. § 6727](#), repealed by Act No. 118 of 1973, § 25, which required a court order for any discovery and which permitted the court to include any necessary protective provisions in its order.

The grounds for limitation of discovery will frequently be violations of constitutional right, evidentiary privilege, or provisions of these rules limiting disclosure, discussed in the Reporter's Notes to Rules 16 and 16.1. Rule 16.2(d) may also apply, however, where a disclosure would result in intimidation of or harm to witnesses, would thwart a continuing investigation being carried on by the prosecution, or would lead to expense that would be unnecessary if no trial were held. The final proviso requiring disclosure in time for beneficial use is meant to convey a flexible power to the court to adjust the time of discovery to accommodate such situations. See ABA Minimum Standards § 4.4, Commentary. That proviso does not apply where the ground of the protective order is a constitutional or other right, the result of which is that the opposing party is not "entitled" to the disclosure sought. Similarly, disclosures may be absolutely denied where discovery requests are plainly intended to harass a party or burden him with completely unnecessary expense. Cf. Civil Rule 26(c). Note that, as in the Civil Rule, a protective order may be sought on behalf of a nonparty whose rights or interests are invaded by a proposed disclosure. See ABA Minimum Standards § 4.4, Commentary. Protective orders under Rule 16.2(d) should be carefully drawn to allow the maximum disclosure consistent with the interest sought to be protected. For this purpose excision under Rule 16.2(e) and in camera proceedings under Rule 16.2(f) should be relied upon.

Rule 16.2(e) is based on ABA Minimum Standards § 4.5 and is similar to a provision of the federal Jencks Act, [18 U.S.C. § 3500\(c\)](#), permitting excision of portions of a witness' prior statements. The rule should be applied in accordance with guidelines suggested in the Standards and omitted from the rule for drafting reasons. Section 4.5 provides that when some portions of certain material are not discoverable, "as much of the materials should be disclosed as is consistent with the standards. Excision of certain material and disclosure of the balance is preferable to withholding the whole." Excision on grounds of constitutional or other right ordinarily should be sought in proceedings for a protective order under Rule 16.2(d). The materials to be excised may be presented to the court for in camera inspection under Rule 16.2(f). While this is the better practice, the rules permit a disclosing party to excise matter on his own without court order under this subdivision, a practice that might be followed where it is likely that the excision will not be contested. The disclosing party in such a case should describe the excised portions in a statement accompanying his disclosure, so that the other party may move for an order compelling disclosure of some or all of the excised matter under Rule 16.2(g)(1). Failure to supply such a descriptive statement would subject the disclosing party or his counsel to more serious sanctions under Rule 16.2(g)(1) or (2).

Rule 16.2(f) is taken from ABA Minimum Standards § 4.6 and is similar to Federal Rule 16(e) [Rule 16(d)(1) in November 1972 Proposed Amendments, *supra*]. The provision is an essential aid in implementing the protective order and excision provisions of Rule 16.2(d), (e). See, generally, ABA Minimum Standards § 4.6, Commentary.

Rule 16.2(g) is taken from ABA Minimum Standards § 4.7 and is similar to Federal Rule 16(g) [Rule 16(d)(2) in November 1972 Proposed Amendments, *supra*]. The provision in large measure carries forward the discretion as to sanctions recognized by the Vermont court in *State v. Miner*, *supra*. A motion for an order that disclosure be made under Rule 16.2(g)(1) is a means of testing the validity of a refusal to allow automatic disclosure under one of the provisions of Rules 16 and 16.1. Such a motion is the equivalent of a motion to allow discovery under [13 V.S.A. § 6727](#), repealed by Act No. 118 of 1973, § 25. Under the rules, however, the disclosing party should ordinarily assume the burden of seeking a protective order under Rule 16.2(d), rather than simply refusing to disclose. Routine or willful refusals should lead to serious sanctions against the party or counsel under Rule 16.2(g)(1) or (2), especially if the ground of refusal is frivolous.

A difficult problem exists as to the appropriateness of other sanctions upon a defendant, whether to be applied because of willful noncompliance with the rules or because of noncompliance with an order to disclose issued under this subdivision. The constitutionality of sanctions was left open in *Williams v. Florida*, [399 U.S. 78 \[90 S.Ct. 1893\] \(1970\)](#), because the defendant in that case had complied. See Reporter's Notes to Rules 12.1, 16, 16.1. The constitutional problems arise with regard to exclusion of evidence, including testimony, that has not been disclosed and particularly with regard to exclusion of defendant's own testimony. To avoid such problems, the courts should look to expedients such as granting a continuance to permit the prosecution

to have time to meet undisclosed evidence and, in an extreme case, placing penal sanctions upon counsel. Only where such sanctions would be ineffective to give the prosecution a fair trial should the court resort to the exclusion of evidence. In any event, the defendant's own testimony should not be limited or excluded, in order to avoid possible due process questions. See Reporter's Notes to Rule 12.1.

Rules Crim. Proc., Rule 16.2, VT R RCRP Rule 16.2

State court rules are current with amendments received through June 1, 2022.

End of Document

© 2022 Thomson Reuters. No claim to original U.S. Government Works.