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TEN COMMONLY ASKED QUESTIONS About Ohio Criminal Rule 16

A substantial amount of time has passed since new Ohio Criminal Rule 16 went into effect. With its purpose being to broaden discovery exchange in criminal cases, a complete shift in the way that cases were processed across Ohio was expected. Also expected were questions and challenges that inevitably come with virtually all changes in the law. Below are ten commonly asked questions that have been identified and/or presented since the effective date of the new rule.

1. **QUESTION:** *Under what circumstances might defense counsel be precluded from inspecting the evidence prior to trial?*

ANSWER: The Staff Notes as of July 1, 2010 to the Amendments of Ohio Criminal Rule 16 provide: The purpose of the revisions to Criminal Rule 16 is to provide for a just determination of criminal proceedings and to secure the fair, impartial, and speedy administration of justice through the expanded scope of materials to be exchanged between the parties. There is no circumstance that can prevent a lawyer from inspecting the evidence prior to trial.

2. **QUESTION:** *The prosecutor's office is designating the majority of evidence as "Counsel Only" or "Non-Disclosure." Is this proper?*

ANSWER: No. The prosecutor's discretion to withhold evidence in certain instances is guided by Ohio Criminal Rule 16(C), (D), and (E). They are titled, respectively, as follows: Prosecuting Attorney's Designation of "Counsel Only" Materials; Prosecuting Attorney's Certification of Nondisclosure; and Right of Inspection in Cases of Sexual Assault. The prosecution must use great discretion and specificity when seeking the provided protection. The Staff Notes to the Amendments of Ohio Criminal Rule 16 expressly state: The limitations on disclosure permitted under this rule are believed to apply to the *minority* of cases. (Emphasis added).

3. **QUESTION:** *If a criminal case began before July 1, 2010, which was the effective date of the new discovery rule, but has continued beyond that date, can the government withhold the evidence relying upon the old rule?*

ANSWER: Most likely not. Ohio Criminal Rule 59(Y), entitled, "Effective date of amendments," provides that the rules recently adopted (including Crim.R. 16) "govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies."

So, unless the prosecution can establish convincingly that providing full discovery would not be feasible or would work an injustice, all evidence must be shared. In light of the spirit of the rule, withholding of the evidence by the state should be difficult.

4. **QUESTION:** *If a client was charged in state court as a result of the work of a joint task force consisting of state and federal agents, is the defendant entitled to the reports generated by the federal government for use during the state prosecution?*

ANSWER: Yes. Ohio Criminal Rule 16(B)(6), entitled "Discovery: Right to Copy or Photograph," provides that upon a written demand for discovery by the defendant, the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph, all reports from peace officers, the Ohio State Highway Patrol, and federal law enforcement agents.

5. **QUESTION:** *Evidence has been stamped "Counsel Only." The defense needs to have the evidence reviewed by a doctor who may serve as an expert in the case. Can the defense forward the material to the doctor and, if so, what is the procedure?*

ANSWER: Yes. Ohio Criminal Rule 16 is intended to ensure that there is a full and fair adjudication of the facts of the case. See Rule 16 (A), entitled "Purpose, Scope and Reciprocity." Rule 16 (C), entitled "Prosecuting Attorney's Designation of 'Counsel Only'" Materials, dictates that while this evidence may not be shown to the defendant or any other person, it "may be disclosed only to defense counsel, or the agents or employees of defense counsel."

Under authority of Rule 16(C), the prospective expert witness should not be prohibited or hindered in any way from reviewing the evidence marked "Counsel Only." It may be prudent for defense counsel to advise the prospective expert in writing that they must comply with the provision of the rule and not allow inspection by the defendant.

6. **QUESTION:** *The state is withholding evidence after verbalizing that the evidence has been classified as "Non Disclosed." Is a verbal representation sufficient notice?*

ANSWER: Answer: No. The Staff Notes as amended on July 1, 2010, require that a non-disclosure based upon one of the reasons specified in Rule 16(D)(1) thru (5), "must be certified in writing to the court." While the certification need not disclose the contents or meaning of the non-disclosed material, the prosecution is required to describe the material with sufficient particularity to identify it during the later judicial review.

Additionally, the prosecution must include in the certified writing the basis for the non-disclosure classification. As such, reference to the specific concerns found in Rule 16(D)(1) thru (5) must be included in the certified writing. A boilerplate and/or standard filing by the prosecution is not sufficient for purposes of this rule.

7. **QUESTION:** *The state has designated evidence as "Non-Disclosure" and the court has determined that there was no prosecutorial abuse. Can the defense still inspect the evidence and, if so, when?*

ANSWER: Yes. Rule 16(F)(5) provides that where the court finds no abuse of discretion by the prosecuting attorney, a copy of any discoverable material that was not disclosed before trial shall be provided to the defendant no later than commencement of trial. It must be known that this is the latest time at which defense counsel may review the evidence. Pre-trial preparation, including inspection by a prospective expert, would require the disclosure of such evidence prior to this time under seal.

Utilization of Rule 16(F)(5) requires an assessment by the trial court of the right to a fair trial versus the concern for witness and/or victim protection. This test will be performed on a case by case basis. In the event that defense counsel does not move the court to permit an expert to evaluate the evidence or seek its release in order to explore other avenues of defense, the evidence would be received prior to the commencement of trial. At this time, the trial court retains the discretion to determine how long before trial the evidence is to be shared. The court needs to recognize, however, that pursuant to subsection (A) of the Staff Notes, it provides that the limitations on disclosure permitted under this rule are believed to apply to the minority of criminal cases. The Staff Notes at subsection (D) dictate that the state's certification need not disclose the contents or meaning of the non-disclosed material, but it must describe it with sufficient particularity to identify it during judicial review as described in division (F). It is then incumbent upon defense counsel to detail on the record how the client has been prejudiced by the Certification of Non-Disclosure and seek a continuance of the proceedings to cure any such prejudice.

8. **QUESTION:** *The state has designated evidence as "Non-Disclosure." The trial court ordered that the evidence be disclosed after finding an abuse of prosecutorial discretion. The state then moved to perpetuate the witness's testimony. At trial, the witness appeared and testified in contravention to the testimony previously provided at the hearing. Can the witness be impeached with the prior inconsistent statement?*

ANSWER: Yes. Ohio Evidence Rule 613 allows for impeachment of a witness utilizing a prior inconsistent statement. Nothing in Ohio Criminal Rule 16 precludes the ability of the defense to impeach a witness with the testimony provided pursuant to Criminal Rule 16(G), to wit: Perpetuation of Testimony.

9. **QUESTION:** *A private investigator retained by the defense has obtained several statements from witnesses claiming to have personal knowledge of the alleged crimes. The statements are very favorable for the defendant. Is the defense required to turn over the statements to the prosecution prior to trial?*

ANSWER: Yes. The new rule imposes a duty upon defense counsel requiring disclosure of evidence as specified in Criminal Rule 16(H)(1) thru (5). In accordance with Criminal Rule 16(H)(3), defense counsel shall provide the prosecution with copies or photographs, or permit the prosecution to copy or photograph any evidence that tends to negate the guilt of the defendant, is material to punishment, or tends to support an alibi. Moreover, defense counsel must provide any written or recorded statement by a witness in the defendant's case-in-chief, or any witness that it reasonably anticipates calling as a witness in surrebuttal.

It is easy to understand this rule if two main points are remembered. First, if the recorded evidence is exculpatory, it must be turned over. Second, if the defense intends to call the recorded witness to testify at trial, the statement must be provided to the prosecution. Nothing in the rule requires the disclosure by defense counsel of material that is subject to work product protection, privilege, confidentiality, or may otherwise be prohibited from disclosure. See Criminal Rule 16(J). Defense counsel is not expected to share information that may be considered inculpatory. This would necessitate some excising or redaction. Finally, a private investigator retained by the defense is not obligated to reduce a non-recorded verbal statement to writing.

10. QUESTION: *The prosecution has called a police officer to testify about subject matter where his/her opinion was based upon prior "on the job" experience. In line with Ohio Evidence Rule 702, the testimony relates to matters beyond the knowledge and experience possessed by lay persons. Can the police officer submit this testimony if the prosecution did not comply with Ohio Criminal Rule 16(K) entitled Expert Witnesses; Reports?*

ANSWER: No. Ohio Criminal Rule 16(K) mandates that where testimony which is considered expert in nature is intended to be offered, the proponent party must have prepared a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. This written report and summary of qualifications must be provided to the opposing party no later than twenty-one days prior to trial. This time restriction may be modified by the court for good cause shown but failure to disclose the written report shall preclude the expert's testimony at trial.

This is an interesting topic that will certainly be litigated extensively in the future. The defense practitioner must now assess whether expected testimony should be considered expert in nature when considering Evidence Rule 702. Even the most routine law enforcement tactics or investigatory methodology may be considered beyond the knowledge or experience possessed by a lay person. As such, challenges to admissibility without compliance with Criminal Rule 16(K) should be raised with greater frequency.

Ohio Criminal Rule 16 is considered sweeping reform. As a result, prosecutors, defense counsel, and judges will encounter many new questions and situations. It is important that the rule not be read or interpreted in isolated sections. The rule is very comprehensive and is meant to be read as a fluid process. It does account for all foreseeable situations faced in the criminal justice process. When coupled and applied with the Staff Notes as Amended on July 1, 2010, the rule does protect the integrity of the justice system and the rights of the defendant. ■

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