

## 2013 - 2014 Alaska Rules of Criminal Procedure

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### **Rule 16. Discovery.**

(a) **Scope of Discovery.** In order to provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protection of persons, effective law enforcement, and the adversary system.

#### **(b) Disclosure to the Accused.**

(1) *Information within Possession or Control of Prosecuting Attorney.* (A) Except as is otherwise provided as to matters not subject to disclosure and protective orders, the prosecuting attorney shall disclose the following information within the prosecuting attorney's possession or control to defense counsel and make available for inspection and copying:

(i) The names and addresses of persons known by the government to have knowledge of relevant facts and their written or recorded statements or summaries of statements;

(ii) Any written or recorded statements and summaries of statements and the substance of any oral statements made by the accused;

(iii) Any written or recorded statements and summaries of statements and the substance of any oral statements made by a co-defendant;

(iv) Any books, papers, documents, photographs or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused; and

(v) Any record of prior criminal convictions of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.

(B) *Expert Witnesses.* Unless a different date is set by the court, as soon as known and no later than 45 days prior to trial, the prosecutor shall inform the defendant of the names and addresses of any expert witnesses performing work in connection with the case or whom the prosecutor is likely to call at trial. The prosecutor shall also make available for inspection and copying any reports or written statements of these experts. With respect to each expert whom the prosecution is likely to call at trial, the prosecutor shall also furnish to the defendant a curriculum vitae and a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion. Failure to provide timely disclosure under this rule shall entitle the defendant to a continuance. If the court finds that a continuance is not an adequate remedy under the circumstances of the case, the court may impose other

sanctions, including prohibiting the prosecutor from calling the expert at trial or declaring a mistrial.

**(2) *Information Provided by Informant – Electronic Surveillance.*** The prosecuting attorneys shall inform defense counsel:

(A) of any relevant material or information relating to the guilt or innocence of the defendant which has been provided by an informant, and

(B) of any electronic surveillance, including wiretapping, of

(i) conversations to which the accused or the accused's attorney was a party,

(ii) premises of the accused or the accused's attorney.

**(3) *Information Tending to Negate Guilt or Reduce Punishment.*** The prosecuting attorney shall disclose to defense counsel any material or information within the prosecuting attorney's possession or control which tends to negate the guilt of the accused as to the offense or would tend to reduce the accused's punishment therefor.

**(4) *Information Within Possession or Control of Other Members of Prosecuting Attorney's Staff.*** The prosecuting attorney's obligations extend to material and information in the possession or control of

(A) members of the prosecuting attorney's staff, and

(B) any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to the prosecuting attorney's office.

**(5) *Availability of Information to Defense Counsel.*** Whenever defense counsel designates and requests production of material or information which is not in the possession or control of the prosecuting attorney but would be discoverable if in the possession or control of the prosecuting attorney, the court shall issue suitable subpoenas or orders to cause such material to be made available to defense counsel.

**(6) *Information Regarding Searches and Seizures -- Statements From the Accused -- Relationship of Witnesses to Prosecuting Attorney.*** Except as otherwise provided the prosecuting attorney shall, upon request of defense counsel, disclose and permit inspection, testing, copying and photographing of any relevant material and information regarding:

(A) Specified searches and seizures;

(B) The acquisition of specified statements from the accused; and

(C) The relationship, if any, of specified witnesses to the prosecuting authority.

(7) *Other Information.* Upon a reasonable request showing materiality to the preparation of the defense, the court in its discretion may require disclosure to defense counsel of relevant material and information not covered by subsections (b)(1), (b)(2), (b)(3), and (b)(6).

(8) *Legal Research and Records of Prosecuting Attorney.* Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the prosecuting attorney or members of the prosecuting attorney's legal staff.

(9) *Restriction on Availability of Certain Material.* Notwithstanding (b)(1)(A)(iv) of this rule, the court shall deny any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any material prohibited under AS 11.41.455(a) or defined as "child pornography" under 18 U.S.C. 2256, if the prosecuting attorney makes the material reasonably available for inspection by the defendant and defense counsel. The material shall be considered to be made reasonably available to the defendant or defense counsel if the prosecuting attorney provides, at a law enforcement or prosecution facility, ample opportunity for inspection, viewing, and examination of the material by the defendant and the defendant's attorney. If the defendant is not represented by counsel and demonstrates a need to view the material, the court shall make arrangements for the defendant to be supervised while viewing the material. If the defendant or the defendant's attorney identifies an expert who must view the material, the court shall make arrangements for the court or the law enforcement agency that possesses it to send the material directly to the expert.

**(c) Disclosure to the Prosecuting Attorney.**

(1) *Non-Testimonial Identification Procedures -- Authority.* Upon application of the prosecuting attorney, the court by order may direct any person to participate in one or more of the procedures specified in subsection (c) (2) of this rule if affidavit or testimony shows probable cause to believe that:

(A) An offense has been committed by one of several persons comprising a narrow focal group that includes the subject person;

(B) The evidence sought may be of material aid in identifying who committed the offense; and

(C) The evidence sought cannot practicably be obtained from other sources.

(2) *Non-Testimonial Identification Procedures -- Scope.* An order issued under subsection (c)(1) of this rule may direct the person to do or submit to any and all of the following:

(A) Appear in a line-up;

(B) Speak words, phrases or sentences relevant to the case for identification by witnesses;

(C) Be fingerprinted;

(D) Pose for photographs not involving reenactment of a scene;

(E) Try on articles of clothing;

(F) Permit the taking of specimens of material under the person's fingernails;

(G) Permit the taking of samples of blood, hair and other materials of the person's body which involve no unreasonable intrusion thereof;

(H) Provide specimens of the person's handwriting;

(I) Submit to a reasonable physical or medical inspection of the person's body.

(3) *Right to Counsel.* When issuing an order under subsection (c) (1) of this rule, the court shall also order that the person be represented by counsel or waive the right to be represented by counsel before being required to appear in a lineup, give a specimen of handwriting, or speak for identification by witnesses to an offense.

(4) *Expert Witnesses.* Unless a different date is set by the court, no later than 30 days prior to trial, the defendant shall inform the prosecutor of the names and addresses of any expert witnesses the defendant is likely to call at trial. The defendant shall also make available for inspection and copying any reports or written statements of these experts. For each such expert witness, the defendant shall also furnish to the prosecutor a curriculum vitae and a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion. Failure to provide timely disclosure under this rule shall entitle the prosecutor to a continuance. If the court finds that a continuance is not an adequate remedy under the circumstances of the case, the court may impose other sanctions, including prohibiting the defendant from calling the expert at trial. Information obtained by the prosecutor under this rule may be used only for cross-examination or rebuttal of defense testimony.

(5) *Notice of Defenses.* Unless a different date is set by the court, no later than 10 days prior to trial, the defendant shall inform the prosecutor of the defendant's intention to rely upon a defense of alibi, justification, duress, entrapment, or other statutory or affirmative defense. Failure to provide timely notice under this rule shall entitle the prosecutor to a continuance. If the court finds that a continuance is not an adequate remedy under the circumstances of the case, the court may impose other sanctions, including prohibiting the defendant from asserting the designated defense. The defendant shall give notice of an insanity defense or a defense of diminished capacity due to mental disease or defect in compliance with AS 12.47.

(6) *Physical Evidence.* If defense counsel or defense counsel's agent acquires physical evidence of the offense, defense counsel must immediately notify the prosecutor and must make arrangements to turn over the evidence to the prosecutor within a reasonable time. Differences concerning what amount of time is "reasonable" shall be resolved by the court. Defense counsel must not test or substantively alter the evidence, unless defense counsel has first notified the prosecutor and given the prosecutor a reasonable opportunity to seek court action. Defense counsel must reveal all information concerning the manner in which the evidence was obtained and handled unless that information is privileged. When physical evidence is disclosed by the

defense, the prosecutor cannot reveal to the jury that the evidence was obtained from the defense.

**(d) Regulation of Discovery.**

**(1) *Advice to Refrain From Discussing Case.*** Except as is otherwise provided as to matters not subject to disclosure and protective orders, neither counsel for the parties nor other prosecution or defense personnel shall advise persons (except the accused) having relevant material or information 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.

**(2) *Additional or Newly Discovered Information.*** If, subsequent to compliance with these rules or orders issued pursuant thereto, a party discovers additional material or information which is subject to disclosure, that party shall promptly notify the other party or the other party's counsel of its existence. If the additional material or information is discovered during trial, the court shall also be notified.

**(3) *Materials to Remain in Custody of Attorney.***

**(A)** Materials furnished to an attorney pursuant to these rules shall be used only for the purpose of conducting the case. The following materials must remain in the custody of the defense attorney, the attorney's staff, investigators, experts, and others as necessary for the preparation of the defendant's case, and shall be subject to other terms and conditions that the court may provide. The materials listed in this paragraph shall not be provided to the defendant, but the information in the materials may be shared with the defendant to the extent necessary to prepare the defense of the case:

- (i) a criminal history record of a victim or witness;
- (ii) a medical, psychiatric, psychological, or counseling record of a victim or witness;
- (iii) an adoption record;
- (iv) a record that is confidential under AS 47.12.300 or a similar law in another jurisdiction;
- (v) a report of a presentence investigation of a victim or witness prepared pursuant to Criminal Rule 32.1 or a similar law in another jurisdiction;
- (vi) a record of the Department of Corrections other than the defendant's own file and any other incident report relating to the crime with which the defendant is charged; and
- (vii) any other record that the court orders be kept in the exclusive custody of the attorney.

**(B)** An attorney shall not disclose to a defendant the residence or business address or telephone number of a victim or witness, obtained from information provided under this rule, even if the defendant is acting as co-counsel. If the address and telephone

numbers of all victims and witnesses have been obliterated, materials that had contained the address or telephone number of a victim or witness may be provided to a defendant proceeding without counsel only as allowed by AS 12.61.120.

(C) Notwithstanding a defendant's status as co-counsel, materials covered by subsection (d)(3)(A) shall remain in the custody of the defendant's attorney, the attorney's staff, investigators, experts, and others as necessary for the preparation of the defendant's case, and shall be subject to other terms and conditions that the court may provide.

(D) If a defendant is proceeding without counsel, materials covered by subsection (d)(3)(A) may be provided to the defendant. If materials are provided to an unrepresented defendant under this paragraph, the court shall order that the materials remain in the defendant's exclusive custody, be used only for purposes of conducting the case, and be subject to other terms, conditions, and restrictions that the court may provide. Upon a showing of good cause, the court may impose specific terms, conditions, or restrictions concerning inspection of the materials by other persons involved in the preparation of the case, such as staff, investigators, experts, witnesses, or others. The court shall also inform the defendant and such other persons involved in the preparation of the case that violation of an order issued under this paragraph is punishable as a contempt of court.

*(4) Restriction or Deferral of Disclosure of Information.* Upon a showing of cause, the court may at any time order that specified disclosure be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled shall be disclosed in time to permit the party's counsel to make beneficial use thereof.

*(5) Material Partially Discoverable.* When some parts of certain material are discoverable under these rules, and other parts are not discoverable, as much of the material shall be disclosed as is consistent with this rule. Excision of certain material and disclosure of the balance shall be preferred to withholding of the whole. Material excised pursuant to court order shall be sealed and preserved in the records of the court, and shall be made available to the court of appeals and the supreme court in the event of an appeal.

*(6) Denial or Regulation of Disclosure -- Disclosure to Court in Camera -- Record of Proceedings.* Upon request of any party, the court may permit:

(A) any showing of cause for denial or regulation of disclosure, or

(B) any portion of any showing of cause for denial or regulation of disclosure to be made to the court in camera ex parte. A record shall be made of such proceedings. If the court enters an order granting relief following such a showing, the entire record of the proceedings shall be sealed and preserved in the records of the court, to be made available to the court of appeals and the supreme court in the event of an appeal.

**(e) Sanctions.**

(1) *Failure to Comply with Discovery Rule or Order.* 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 shall order such party to permit the discovery of material and information not previously disclosed or enter such other order as it deems just under the circumstances.

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

**(f) Omnibus Hearing.**

(1) *Time for Hearing – When Set.* If the defendant is charged with a felony, the court shall set a time for an omnibus hearing when a plea of not guilty is entered. The omnibus hearing shall be scheduled for a time when the briefing of pretrial motions should be complete.

The omnibus hearing may be cancelled by the court only upon the stipulation of counsel that there are no motions which require hearing and that discovery is complete. Counsel shall also provide the information outlined in section (f)(2)(D).

The court may set an omnibus hearing in a misdemeanor case.

(2) *Duties of Trial Court at Hearing.* At the omnibus hearing the court shall:

(A) ensure that discovery under this rule is complete;

(B) rule on any pending motions which are ripe for decision;

(C) schedule any necessary evidentiary hearings; and

(D) obtain case management information from the parties, including the expected length of trial, the likelihood of trial, and any anticipated scheduling difficulties.

(Adopted by SCO 4 October 4, 1959; amended by SCO 157 effective February 15, 1973; by SCO 211 effective July 15, 1975; by SCO 212 effective July 15, 1975; by SCO 329 effective January 1, 1979; by SCO 331 effective January 1, 1979; by SCO's 640 and 641 effective September 15, 1985; by SCO 1086 effective July 15, 1992; by SCO 1092 effective July 15, 1992; by SCO 1126 effective July 15, 1993; by SCO 1153 effective July 15, 1994; by SCO 1191 effective July 15, 1995; by SCO 1269 and 1274 effective July 15, 1997; by SCO 1444 effective October 15, 2001; by SCO 1717 effective April 15, 2011; and by SCO 1806 effective nunc pro tunc July 1, 2013)

**Note:** AS 12.61.120, added by ch. 57, § 13, SLA 1991, amended Criminal Rule 16 by restricting discovery available to criminal defendants.

**Note:** Criminal Rule 16 was repealed and reenacted by chapter 95 SLA 1996. In *State v. Summerville*, 926 P.2d 465 (Alaska App. 1996), the Alaska Court of Appeals found that the legislature's version of the rule was unconstitutional. This decision was affirmed

by the Alaska Supreme Court in **State v. Summerville**, 948 P.2d 469 (Alaska 1997). Thus, the pre-existing version of the rule remains in effect.

**Note:** Chapter 43, SLA 2013 (SB 22), effective nunc pro tunc to July 1, 2013, amended Criminal Rule 16(b) by adding a new paragraph (9) relating to requests by defendants to copy, photograph, duplicate, or otherwise reproduce certain prohibited material. This rule change is adopted for the sole reason that the legislature has mandated the amendment.

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## **Rule 17. Subpoena.**

### **(a) For Attendance of Witnesses--Form-- Issuance.**

(1) Subpoenas shall be issued by the clerk under the seal of the court, and shall be signed and sealed but otherwise in blank. The party requesting a subpoena shall fill in the blanks before the subpoena is served.

(2) A subpoena shall

(i) state the name of the court and the title, if any, of the proceeding, and

(ii) state whether the witness is to testify on behalf of the state, a municipality, city or borough, and order any witness testifying on behalf of the state, a municipality, city or borough, to appear without the prepayment of any witness fee, and

(iii) command each per