Supreme Court's Advisory Committee on the Rules of Criminal Procedure

Webex video conferencing
September 15, 2020
12:00 p.m. - 2:00 p.m.

AGENDA

1.	Welcome and approval of minutes	-	Doug Thompson/Brent Johnson
2.	Rule 17.5	-	Judge Hruby-Mills /Brent Johnson
3.	Discussion from criminal rules subcommittee	-	Doug Thompson/ Brent Johnson/Keisa Williams
4.	Rule 16 public comments	-	Doug Thompson/Brent Johnson
5.	Expungement rule	-	Brent Johnson
6.	Update on probation consolidation	-	Doug Thompson/Brent Johnson
7.	Other business		

Supreme Court's Advisory Committee
on the Rules of Criminal Procedure

MEETING MINUTES

WebEx Video Conferencing
July 21, 2020 – 12:00 p.m. to 1:30 p.m.

DRAFT

MEMBERS:	PRESENT	EXCUSED
Douglas Thompson, *Chair*	•	
Judge Patrick Corum	•	
Jeffrey S. Gray	•	
Judge Elizabeth Hruby-Mills		•
Blake Hills	•	
Craig Johnson		•
Joanna Landau	•	
Keri Sargent	•	
Judge Kelly Schaeffer-Bullock	•	
Ryan Stack	•	
Cara Tangaro	•	
Matthew Tokson	•	

GUESTS:

Jacqueline Carlton
Keisa Williams
Michael Drechsel

STAFF:

Brent Johnson - excused
Minhvan Brimhall (recording secretary)

1. **Welcome ad approval of minutes:**
Douglas Thompson welcomed the committee members to the meeting. The Committee discussed the May 19, 2020 minutes. There being no changes to the minutes, Judge Corum moved to approve the minutes. Ryan Stack seconded the motion. The motion was unanimously approved.

2. **Rule 6 – proposed amendment:**
The Third District Court judges raised concerns that probable cause statements (PCS) are not being reviewed when a warrant is issued for failing to appear on a summons. As currently written, the rule is not clear on when review is required to determine whether an information establishes probable cause. The committee discussed that the rule was amended to allow judges to issue a summons without review of the information in cases where the defendant was not in custody.

Judge Corum presented amendments to paragraph (e) of rule 6 to clarify that a judge must review the probable cause statement when issuing a warrant for arrest in paragraphs (c) or (d). The committee discussed and recommended amending Judge Corum's proposed language from "under either subsection (c) or (d)" to "including (c) and (d)."

With no further discussion, Jeff Gray move to approve the proposed amendments to rule 6 as set forth in the materials packet, and as modified. Ryan Stack seconded the motion. The motion unanimously passed.

3. Rule 16 – approved for public comment:

Mr. Thompson has had several meetings with the Supreme Court regarding rule 16. Mr. Thompson has ironed out recommended language changes by the Court and clarified with the Court the intentions of the committee's proposals. The Court has approved the modified proposed amendments for public comment. Mr. Gray recommended posting a "clean" version of the proposals, along with the legislative version, on the website for easier review.

Mr. Thompson thanked all who participated on the subcommittee and for those who assisted in drafting proposed language of rule 16.

With no further discussion, Mr. Grey moved to approve the proposed amendments for public comment. Mr. Stack seconded the motion.

4. Expungement rule:

Mr. Johnson discussed a proposed rule and memorandum to the Supreme Court regarding automatic expungement. The court's IT department would identify cases that are eligible for expungement. Those cases would then be sent to the prosecutor for review. If the prosecutor does not object to the case being expunged a judge's signature will be affixed to the order. This process will occur statewide. Some judges are not thrilled about this as they will most likely not see the expungement orders come. A defendant would never receive notice that their case is expunged, however, they have access to their records and they will be able to contact the court to determine whether their case has been expunged. Expungement cases are not accessible to the general public.

The committee discussed that the statute is unclear as to the criteria of cases that are eligible for expungement and this could potential place additional burden on the court. Mr. Thompson would like to invite an immigration attorney to a future meeting to share their views on how this process would affect immigration cases. Michael Drechsel stated that the court's Administrative Office of the Courts is currently only able to address cases that are dismissed or acquitted. The rule needs to focus on cases that are acquitted or dismissed for the time being. Clean slate eligible cases are more

complicated and additional work is needed to identify and review those cases for expungement.

The committee determined it would be best to focus on acquittal s and dismissed to be identified for automatic expungement and hold off discussion on clean slate eligible cases for the time being. Mr. Johnson will work with Mr. Drechsel and the IT department on additional proposals to the rule. Mr. Johnson will provide an update on this item at a future meeting. No motion was taken on this item.

5. Update on restitution rule:

Mr. Johnson is currently working on review of the restitution rule and does not have a proposal for the committee at this time. Mr. Johnson noted that concerns have been raised regarding cases in which the victim's attorney is stepping in and taking over restitution matters. The question then becomes what types of burden this places on defense counsel.

The committee discussed that criminal cases with restitution are being sought out by intervening attorneys and sometimes they don't know if the case ever got resolved. There is statutory mechanism to enter restitution judgments on the civil docket and that gives the victim the right to be heard under the Crime Victim Restitution Act. The committee discussed what the court can do for victims when restitution is ordered. Mr. Johnson will meet with IT to see what process could be added in CORIS to alter restitution enforcement calendars. Mr. Johnson would like to have a prosecutor participate in review of the rule and provide input on potential controversies related to the rule.

Mr. Drechsel noted that there have been two special legislative sessions. A bill revising the restitution statutes was intended to be brought before the legislature, but it did not get on the list, and may not be on the list for the August special session. If approved the bill would not convert restitution to civil judgment until after criminal jurisdiction is terminated.

The committee decided that a restitution rule should be tabled until after the legislature addresses restitution.

6. Update on probation consolidation:

Mr. Thompson did not have an update on a probation consolidation rule. Mr. Thompson is inclined to head towards a collaborative effort between defense counsel, the prosecutor, and the court in making a decision on probation, in lieu of the decision solely being made by the judge. Mr. Thompson noted that given the nature of JRI and probation, it may make sense to have a rule addressing which court should supervise a defendant's cases. Mr. Thompson will continue to give more thought into the rule and hopes to have additional information for discussion at a future meeting.

7. Other business:

a. Rules of Criminal Procedure rules –

Mr. Johnson discussed that several rules of criminal procedure rules require review due to statutory changes from HB 206.

A working group is being put together to review those proposals. Keisa Williams from the AOC will be on the working group as many of the rules address pretrial services. HB 206 requires a pay analysis prior to bail or bond hearings. The Pretrial Release Committee is drafting proposals for forfeiture procedures related to unsecured bonds. A rule related to the amendments will be proposed as well. There are 11 criminal rules that are affected by HB 206 and the working group needs to have proposals by October 1. The subcommittee will be meeting in August and early September and hope to have proposals approved for public comments by the end of September. Judge Corum, Mr. Thompson, Joanna Landau, and Blake Hills volunteered to participate in the subcommittee as representatives from this committee.

b. Rules 17.5 and 18 –

Rules 17.5 and 18 are being considered for changes or suspension in response to COVID-19.

Rule 18:

Mr. Thompson expressed several concerns with the proposed changes to rule 18. Modifications to rule 18(d) would allow peremptory challenges in non-capital cases to be heard by fewer members of the jury. This would allow the courts to pool less people to serve. Mr. Johnson noted that the main concern is getting enough people to show up to be screened for jury duty. Courts in other jurisdictions have seen only about 1/5 of people showing up due to COVID-19 concerns. The idea of the rule change is the court would be more relaxed in dismissing people for cause in exchange for fewer peremptory challenges. The Supreme Court is reluctant to issue any temporary orders at this time.

The committee discussed at length proposed language changes to the rule. Following the discussion, the committee determined that making a rule change at this time might create greater disadvantages to the defendant.

With no further discussion, Cara Tangaro moved to not make any changes to rule 18 at this time and wait to see how things move forward once in-person trials resume. Mr. Stack seconded the motion. The motion unanimously passed.

Rule 17.5:

The committee considered proposed changes to rule 17.5 that would allow a witness to be excused from testifying in court due to COVID-19 health concerns. The witness would

be allowed to provide testimony via video transmission from a different location. The health concerns would outweigh the defendant's right to confront the witness in person.

The committee discussed several concerns with the proposals. One concern is that it places the judge in a position to hold a jury trial that may be challenged later on because the witness was not present at the hearing. The committee discussed issues surrounding constitutional rights under Crawford that arose from the Maryland v. Craig case. The committee discussed findings from the case that may cause issues for Utah courts if proposed amendments to rule 17.5 were approved. The committee discussed that even with procedural safeguards in place during a hearing many defendants may opt for a resolution that would get them out of jail quicker. Mr. Thompson noted that a defendant already has the right to waive to confront a witness in court, however, if concurrence is added to the rule it would also add safeguards. This would place a trial judge in a tough situation in having to say that holding a trial outweighs the witness's safety. The committee also discussed changes to rule 17.5 that would affect preliminary hearings.

The committee considered several proposals for language changes to rule 17.5. Mr. Thompson will review the rule and proposals made by the committee during today's discussions, and see if language from Maryland v. Craig could be incorporated into rule 17.5. Mr. Thompson will present the committee with a draft proposal of rule 17.5 and invite a vote through email.

8. Adjourn:

With no other business, the meeting adjourned without a motion. The meeting adjourned at 1:50 p.m. Next meeting is September 15 at 12 p.m. via Webex.

UTAH STATE COURTS

Minhvan Brimhall <minhvanb@utcourts.gov>

Criminal rules committee September 15 meeting

Douglas Thompson <dougt@utcpd.com> Thu, Aug 27, 2020 at 10:38 AM
To: Minhvan Brimhall <minhvanb@utcourts.gov>
Cc: Brent Johnson <brentj@utcourts.gov>

Minhvan and Brent,

Please add Judge Hruby to the agenda on Rule 17.5, along with Brent. She contacted me wondering whether we could address 17.5(a) and (b) to allow for non-in-person hearings without a waiver beyond those currently in the rule. She said she would consider preparing a proposal. I'll pass it along as soon as I see it.

Also, there is a chance I will not be available to attend the meeting on the 15th. If so, Brent, are you available to take the lead?

[Quoted text hidden]
[Quoted text hidden]
<Rules of Criminal Procedure Committee Meeting Agenda - 9-15-20 - proposed.docx>

Douglas J. Thompson
Utah County Public Defender Assoc.
Appeals Division
180 North University Ave., Suite 140
Provo, Utah 84601
dougt@utcpd.com
T: (801) 852.1070
F: (801) 852.1078

UTAH STATE COURTS

Minhvan Brimhall <minhvanb@utcourts.gov>

Fwd: Rule 17.5

Brent Johnson <brentj@utcourts.gov> Fri, Jul 31, 2020 at 4:38 PM
To: Minhvan Brimhall <minhvanb@utcourts.gov>

Put this on the agenda for our next crim pro meeting.

Thank you.

---------- Forwarded message ---------
From: **Judge Todd Shaughnessy** <tshaughnessy@utcourts.gov>
Date: Wed, Jul 29, 2020 at 1:39 PM
Subject: Fwd: Rule 17.5
To: Brent Johnson <brentj@utcourts.gov>
Cc: <mnoonan@utcourts.gov>

Brent,
Judge Jones brought up with me the other day the potential conflict between the admin order (and its requirements re remote hearings) and Rule 17.5 of the criminal rules. So far as I'm aware, no defendant has raised this issue. Linda is, I think, bracing for when that happens. My response to her was that for as long as the admin order is in effect, it trumps the rules where they directly conflict. I believe this was clearly the intent though the order never explicitly says that. I also told Linda that I thought the court would be reluctant to amend the rules to deal with a pandemic issue and thought it more likely that something would be added to the admin order making clear that it controls where there's a direct conflict.

To be honest, I'm not sure whether this is anything more than theoretical. As I said, I have not heard of it being raised and I told Linda that if it is raised before me I plan to say the order controls for as long as it's in effect.

Linda took a stab at an amended 17.5 that could also operate in a post-Covid world. I'm passing it along because I told her I would. Happy to discuss if you'd like.

Hope all is well.

Todd

Sent from my iPad

Begin forwarded message:

> **From:** Judge Linda Jones <lmjones@utcourts.gov>
> **Date:** July 29, 2020 at 10:01:51 AM MDT
> **To:** Judge Todd Shaughnessy <tshaughnessy@utcourts.gov>
> **Subject: Rule 17.5**
>
> Todd,
> At the risk of sounding like a broken record, I took a stab at proposing language for rule 17.5 that both preserves whatever concern I believe the rule was meant to address in a precovid world and also would work well in a covid/postcovid world.
> Of course, some may disagree.
> Nevertheless, if you think it would be appropriate to address the matter with the judicialF council or supreme court or whoever is gathering to make important decisions about our work, that would be great.
> I always appreciate your insights and guidance.
> Thanks much,
> Linda
>
> P.S. I promise I am not losing sleep over this...

Rule 17.5

(a) The court, in its discretion, may conduct the arraignment, bail hearing, and/or initial appearance with a defendant attending by contemporaneous transmission from a different location without the agreement of the parties or waiver of the defendant's attendance in person.

(b) For any other type of hearing, the court may conduct the hearing with a defendant attending by contemporaneous transmission from a different location except when proceeding by contemporaneous transmission would affect a substantial right. ~~only if the parties agree and the defendant knowingly and voluntarily waives attendance in person~~.

(c) For good cause and with appropriate safeguards the court may permit testimony in open court by contemporaneous transmission from a different location if permitting such testimony would not affect a substantial right ~~if the party not calling the witness waives the right to confront the witness in person~~.

(d) Nothing in this rule precludes or affects the procedures in rule 15.5.

Rule 16. Discovery.

(a) **Disclosures by prosecutor.**

(a)(1) Mandatory disclosures. ~~Except as otherwise provided,~~ The prosecutor ~~shall~~ must disclose to the defense ~~upon request~~ the following material or information related to the case of which the ~~prosecutor~~ prosecution team has knowledge and control:

(a)(1)(A) ~~relevant~~ written or recorded statements of the defendant ~~or~~ and any codefendants, and the substance of any unrecorded oral statements made by the defendant and any codefendants to law enforcement officials;

(a)~~(2)~~(1)(B) the criminal record of the defendant and any co-defendants;

(a)(1)(C) reports and results of any physical or mental examination, of any identification procedure, and of any scientific test or experiment;

(a)~~(3)~~(1)(D) physical and electronic evidence, including any warrants, warrant affidavits, books, papers, documents, photographs, and digital media recordings ~~seized from the defendant or codefendant~~;

(a)(1)(E) written or recorded statements of witnesses;

(a)(1)(F) reports and notes prepared by law enforcement officials;

(a)~~(4)~~(1)(G) evidence ~~known to the prosecutor~~ that must be disclosed under the United States and Utah constitutions, including all evidence favorable to the defendant that is material to ~~tends to negate the~~ guilt ~~of the accused, mitigate the guilt of the defendant,~~ or ~~mitigate the degree of the offense for reduced~~ punishment; and

(a)~~(5)~~(1)(H) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare a defense.

~~(b)~~(a)(2) Timing of ~~prosecutor's~~ mandatory disclosures. The prosecutor's duty to disclose under subsection (a)(1) is a continuing duty as the material or information becomes known to the prosecutor. The prosecutor's ~~shall make all~~ disclosures must be made as soon as practicable following the filing of an Information. ~~charges and before~~ In every case, all material or information listed under subsection (a)(1) that is presently and reasonably available to the prosecutor must be disclosed before the preliminary hearing, if applicable, or before the defendant is required to plead or go to trial. ~~The prosecutor has a continuing duty to make disclosure.~~

(a)(3) Disclosures upon request. Upon request, the prosecutor must obtain and disclose to the

defense any of the material or information listed above which is possessed by another governmental agency and may be shared with the prosecutor under Title 63G, Chapter 2, Government Records Access and Management Act.

(a)(4) Trial disclosures. The prosecutor must also disclose to the defense the following information and material no later than 14 days, or as soon practicable, before trial:

(a)(4)(A) Unless otherwise prohibited by statute or rule, a written list of the names, current contact information, and criminal records, if any, of all persons whom the prosecution intends to call as witnesses at trial; and

(a)(4)(B) Any exhibits that the prosecution intends to introduce at trial.

(a)(5) Information not subject to disclosure. Unless otherwise ordered by the court on a showing of constitutional, statutory, or regulatory right, the prosecution's disclosure obligations do not include information or material that is privileged or attorney work product. Attorney work product protection is not subject to the exception in Rule 26(b)(5) of the Utah Rules of Civil Procedure.

~~(c)~~(b) **Disclosures by defense.**

(b)(1) Mandatory disclosures. ~~Except as otherwise provided or as privileged,~~ The defense ~~shall~~ must disclose to the prosecutor ~~such information as required by statute relating to alibi or insanity and~~ any ~~other~~ item of evidence which the court determines on good cause shown should be made available to the prosecutor in order for the prosecutor to adequately prepare the prosecutor's case for trial.

(b)(2) Other disclosures required by statute. The defense must disclose to the prosecutor such information as required by statute relating to alibi or insanity.

(b)(3) Trial disclosures. The defense must also disclose to the prosecutor the following information and material no later than 14 days, or as soon as practicable, before trial:

(b)(3)(A) A written list of the names and current contact information of all persons, except for the defendant, whom the defense intends to call as witnesses at trial; and

(b)(3)(B) Any exhibits that the defense intends to introduce at trial.

(b)(4) Information not subject to disclosure. The defendant's disclosure obligations do not include information or material that is privileged or attorney work product. Attorney work product protection is not subject to the exception in Rule 26(b)(5) of the Utah Rules of Civil Procedure.

~~(d) **Timing of defense disclosures.** Unless otherwise provided, the defense attorney shall make all disclosures at least 14 days before trial or as soon as practicable. The defense has a continuing duty to make disclosure.~~

~~(e)~~(c) **Methods of disclosure.** When convenience reasonably requires, the prosecutor or defense may make disclosure by notifying the opposing party that material and information may be inspected, tested or copied at specified reasonable times and places.

(d) **Disclosure limitations and restrictions.**

(d)(1) The prosecutor or defense may impose reasonable limitations on the further dissemination of sensitive information otherwise subject to discovery to prevent improper use of the information or to protect victims and witnesses from harassment, abuse, or undue invasion of privacy, including limitations on the further dissemination of ~~videotaped~~ recorded interviews, photographs, or psychological or medical reports.

~~(f)~~(d)(2) ~~**Restrictions on disclosure.**~~ Upon a sufficient showing the court may at any time order that discovery or inspection be denied, restricted, or deferred, that limitations on the further dissemination of discovery be modified or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

~~(g)~~(e) **Relief and sanctions for failing to disclose.**

(e)(1) ~~If at any time during the course of the proceedings it is brought to the attention of the court that~~ When a party fails ~~has failed~~ to comply with the disclosure requirements of this rule, a court may, subject to constitutional limitations and the rules of evidence, take the measures or impose the sanctions provided in this subsection that ~~order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as~~ it deems ~~just~~ appropriate under the circumstances. If a party has failed to comply with this rule, the court may take one or more of the following actions:

(e)(1)(A) order such party to permit the discovery or inspection of the undisclosed material or information;

(e)(1)(B) grant a continuance of the proceedings;

(e)(1)(C) prohibit the party from introducing evidence not disclosed; or

(e)(1)(D) order such other relief as the court considers just under the circumstances.

(e)(2) If after a hearing the court finds that a party has knowingly and willfully failed to comply with an order of the court compelling disclosure under this rule, the nondisclosing party or attorney may be held in contempt of court and subject to the penalties thereof.

(f) **Identification evidence.**

(f)(1) Subject to constitutional limitations and upon good cause shown, the trial court may order the defendant to appear in a lineup; speak for identification; submit to fingerprinting or the making of other bodily impressions; pose for photographs not involving reenactment of the crime; try on articles of clothing or other items of disguise; permit the taking of samples of blood, hair, fingernail scrapings, and other bodily materials which can be obtained without unreasonable intrusion; provide specimens of handwriting; submit to reasonable physical or medical inspection of the accused's body; and cut hair or allow hair to grow to approximate appearance at the time of the alleged offense.

~~(h) **Additional requirements that may be imposed on the accused.** Subject to constitutional limitations, the accused may be required to:~~

~~(h)(1) appear in a lineup;~~

~~(h)(2) speak for identification;~~

~~(h)(3) submit to fingerprinting or the making of other bodily impressions;~~

~~(h)(4) pose for photographs not involving reenactment of the crime;~~

~~(h)(5) try on articles of clothing or other items of disguise;~~

~~(h)(6) permit the taking of samples of blood, hair, fingernail scrapings, and other bodily materials which can be obtained without unreasonable intrusion;~~

~~(h)(7) provide specimens of handwriting;~~

~~(h)(8) submit to reasonable physical or medical inspection of the accused's body; and~~

~~(h)(9) cut hair or allow hair to grow to approximate appearance at the time of the alleged offense.~~

(f)(2) Whenever the personal appearance of the ~~accused~~ defendant is required for the foregoing purposes, reasonable notice of the time and place of such appearance ~~shall~~ must be given to the ~~accused~~ defendant and the ~~accused's~~ defendant's counsel.

(f)(3) Unless relieved by order of the court, failure of the ~~accused~~ defendant to ~~appear or to~~ comply with the requirements of this ~~rule~~ subsection~~, unless relieved by order of the court,~~

without reasonable excuse shall be grounds for revocation of pretrial release and will subject the defendant to such further consequences or sanctions as the court may deem appropriate, including allowing the prosecutor to offer as evidence at trial the defendant's failure to comply with this subsection ~~may be offered as evidence in the prosecutor's case in chief for consideration along with other evidence concerning the guilt of the accused and shall be subject to such further sanctions as the court should deem appropriate~~.

URCrP 16 comments, comment period closed September 5, 2020

1) Russell Shane Johnson
July 22, 2020 at 3:11 pm

You got one right.

2) Mike
July 22, 2020 at 3:46 pm

Overall, I think this is an improvement on the rule. Although the State and the criminally accused are not in equally positioned, reciprocity regarding pre-trial disclosures is discussed in case law and seems appropriate. However, subsections (a)(5) and (b)(4) are incongruous. While it is important to address the applicability of Civil Rule 26 (via Rule 81) to Criminal Procedure, the premise seems faulty. The civil rules of discovery are much more robust than criminal, yet the rules do not reflect the disparity. Nothing could be more in need of protection than a person's liberty in the State's attempt to deprive its citizens of that liberty. Consequently, the criminally accused must be afforded tools no less than what's afforded civil complaintants. What is really unsettling is (a)(5) seems to protect the State from not disclosing information claimed as work product – without exception. Work product has never been an absolute protection, but it is now. Certainly the reasoning for having an exception to the work product protection in the civil rules would apply to the State in criminal cases. There are times when hardship calls for work product to be reviled. Absolutely exempting the State and the criminally accused from divulging opinions and mental impressions is appropriate, but "work product" can be broadly defined and the State's protections should be very narrowly tailored. Conversely, however, the absolute exception is appropriate for the criminally accused because it will have a chilling effect on investigations.

3) Lisa M Estrada
July 23, 2020 at 5:17 am

What is the purpose of changing "shall" to "must"? My understanding is "shall" is the highest form of obligation/requirement. Is the purpose to lower the requirement by use of a different term?

4) Ryan
July 23, 2020 at 11:56 am

The rule presents significant practical challenges – particularly to the prosecution (because it imposes new additional burdens on the prosecution which are not imposed on the defense)

16(a)(1)(D) makes no exception for discovery of illicit images (like child pornography). It should.

16(a)(1)(E): this new rule lacks reciprocity. If the new rule is going to recognize the need for witness statements to prepare for trial or consider in resolution, it needs to apply to both parties. This rule doesn't. There is a fair argument from both sides that witness interviews may include work product. As such, witness statements which contain work product would be exempt under (a)(5) and (b)(4). Either there is a need to presumptively include witness statements, subject to work product exemption, or not. The point is reciprocity.
Please consider how the federal rules handle this issue: Rules 16, 26.2 and 18 U.S.C.S. 3500. Case law is fairly clear on this issue: witness statements from both parties are discoverable, subject to work product

privileges (which may mean redacting portions of statements). If the rule is going to recognize that fact from one side, it needs to recognize it from both.

16(a)(3) imposes an impossible burden upon the prosecution. The State can obtain almost anything pursuant to the government to government GRAMA provision, but may be aware of none of it. Should a defense request be broad enough (to include "all information regarding the defendant's history, the witnesses' history, and impeachment material of any witness," for example) the State would be in the impossible position of having to find and obtain it. This information may be in reports held by agency in the State. The way the rule is written dumps the burden of investigation onto the prosecution and holds them accountable if they fail. To put in the language of the Utah Supreme Court: "Such a rule would place a herculean burden on the prosecutor to search through records of every state agency looking for exculpatory evidence on behalf of the defendant." State v. Pliego, 974 P.2d 279 (Utah 1999).
I think this consequence could be limited by adding a line to make clear that it applies only to "material or information of which the prosecution team has knowledge and control." Alternatively, it could require that the defense request be particular as to the agency involved, date of the record, and the individual who is the subject of the record.

(a)(4)(a) includes "criminal records" of witnesses. It is unclear what this means. Does it mean BCI criminal history, Xchange criminal history (which is superior to BCI generally), all police reports involving the witness, police agency records (like Spillman)?

I have done a fair amount of research on this topic and I would be happy to share case law with members of the committee if you would like.

5) Tricia Lake
July 23, 2020 at 1:09 pm

Proposed section (a)(4)(A) should be reconciled with UCA 53-10-108 which are currently incongruent.

6) Timothy Taylor
July 23, 2020 at 3:49 pm

Below are a few items that are seem to be unclear and could possibly cause confusion for both law enforcement and attorneys.

1) "Mandatory disclosures:
(a)(1)(A) relevant written or recorded statements of the defendant or and any codefendants, and the substance of any unrecorded oral statements made by the defendant and any codefendants to law enforcement officials;"

Comment:What does "the substance of any unrecorded oral statements" actually entail? For example, a suspect may talk to officers about several things which may or may not be relevant to the matter which is being investigated. Are officers required to put in their reports "the substance" of everything a suspect says–even irrelevant items? In addition, if these are unrecorded oral statements, how can a prosecutor be required to disclose items which may not even be relevant? This language is extremely broad and appears to require law enforcement and prosecutors to disclose statements regardless of whether or not those statements have any bearing on a case.

"(a)(1)(F) reports and notes prepared by law enforcement officials;"

Comment: “Notes” prepared by law enforcement officials may contain thoughts, work product, leads for other cases, etc. Why can’t law enforcement officials be trusted to include relevant and/or exculpatory information in their reports without defense attorneys being able to examine an officer’s cryptic handwritten messages on a piece of paper? If this is the new standard, then investigators for defense attorneys should be required to turn over their notes from their investigations.

“(a)(3) Disclosures upon request. Upon request, the prosecutor must obtain and disclose to the defense any of the material or information listed above which is possessed by another governmental agency and may be shared with the prosecutor under Title 63G, Chapter 2, Government Records Access and Management Act.”

Comment: This requirement appears to be at odds to State v. Spry, 2001 UT App 75 and State v. Pliego, 1999 UT 8. The court stated in Spry, “Requiring the State to disclose to the defense all information to which it has “access” under GRAMA “would place a herculean burden on the prosecutor to search through [the] records of every state agency” looking for relevant written or recorded statements on behalf of the defendant simply because the State has access to the records under GRAMA. Pliego, 1999 UT 8 at P18.”

How can prosecutors ever completely comply with this requirement? This discovery request would be part of every defense attorney’s request for discovery and where does the prosecutor begin to look? Do we send a discovery request to every state and local government agency in order to find out whether these agencies have any “material” or “information”? Does this requirement apply not only to “material” or “information” pertaining to a defendant but to any witness? If this is the case, the term “Herculean burden” doesn’t even begin to describe the efforts that would be required by the prosecutor. In addition, if a defense attorney believes that a government agency has some “material” or “information” that the defense attorney desires, why can’t the defense attorney obtain it? Why do prosecutors have to do their jobs for them? This rule is so fraught with potential abuse that there is a reasonable and rational basis that our appellate court rejected this requirement.

7) Randall McUne
July 23, 2020 at 4:41 pm

Overall, this puts an enormous burden on the prosecution to provide mandatory discovery in all criminal cases including traffic cases once an Information is filed, even if no request is made. While I don’t see much of a problem requiring most of these disclosures “upon request,” requiring this extensive list of disclosures when the defense does not ask for and sometimes specifically does not want all of it before a plea hearing/arraignment is overly burdensome and serves little purpose other than to invite fights over procedural rather than substantive issues and to invade the privacy of individuals while often providing no substantive benefit to the defendant (or requiring any showing that it would benefit the defendant).

I question what the remedy is if the prosecution fails to get all of this information to a defendant, especially when a defense attorney specifically says they don’t want it or a defendant, before the defendant is arraigned (e.g., while in custody only days after being arrested on the offense), pleads guilty, and is sentenced. Is the appropriate “other relief” to reverse the conviction and withdraw the plea since none of the other remedies (order discovery, grant a continuance, or prohibit its introduction) could even apply? Would we then have to argue harmless error and guess as to whether this information (often not even relevant) would have convinced the defendant to have not entered a guilty plea? Would this be allowed as a collateral attack in a subsequent case where this case is being used as a qualifying prior conviction for enhancement, similar to how URCrP Rule 11 is used now? Does the prosecution then need to provide every detail of the discovery to the Court (rather than the generic ones provided by most

prosecutors now), so the Court's records can show that this obligation was fully met and that the Court determined that it was before the Court required the defendant to plead? If I have to fear later reversals of convictions and subsequent collateral attacks in later cases, often by different prosecutors and different courts, due to arguments that I didn't provide this mandatory discovery, I'm going to provide 100% of this discovery to the judge and ask the judge to make a finding on all of it before accepting a plea. This is essentially what the judges have to due for UTCrP 11 (in detail) and more generically on immigration questions. Why are we adding a whole new list of landmines that either won't be seen until it's too late (e.g., on a 3rd DUI five years later) or require detailed pretrial findings, along with needing to provide extensive factual disclosures to the Court long before trial, to avoid later contrary determinations?

Beyond the overall not-upon-request problem and more specific to some of the items listed, many will cause serious problems. Under (a)(1)(A), depending on the not-yet-defined meaning of "substance," a prosecutor would need to essentially depose all officers involved in the investigation to determine anything that might, possibly become relevant later or risk being penalized when an unexpected issue comes up later. I'm happy to continue handing over the unredacted police reports and all audio/video recordings, but expecting me to predict what the defense may later argue is "the substance" of (or substantive/relevant to) the conversation stretches to clairvoyance. This would include conversations with every co-defendant (e.g., all 30+ plus minors at an alcohol party). This is made substantially overbroad when your proposal removes the word "relevant" and (arguably) replaces it with "related to the case." I'm also not sure how this plays out when compared to attorney work product: if I'm only summarizing in my own words what the officer told me, doesn't that become work product?

Under (a)(1)(B) and (a)(4)(A), we've been instructed under UCJIS guidelines to not provide criminal histories for anyone other than the defendant without a court order. (a)(4)(A) includes an exception if it's "otherwise prohibited by statute or rule," but no such exception exists for co-defendants. Thus, I'm required, again without a request, to provide a criminal history for all co-defendants (including sometimes dozens of co-defendants at an alcohol party) even when those histories would have no relevance to this defendant. So we're to invade the privacy of tens, if not hundreds, of thousands of co-defendants across the state every year even when the defense has not asked for it, nor shown why it's relevant to the defendant's case or defense?

And speaking of an invasion of privacy, (a)(1)(C) requires, again without request or proof of relevance, the disclosure of physical and mental examinations in any way "related to the case." Under this, any victim, witness, etc. that obtains medical help, whether physical or mental, and any of that information is provided to a government actor (the officers, the jail, etc.) will now have those examinations disclosed to every defendant related to the case. For example, if a defendant is charged with a simple open container charge as a passenger, how is he/she entitled to the EMT and other medical providers' reports and examinations (assuming we get any of it, which we often do) for a party injured or killed in the related car accident? I can think of many cases that I've prosecuted where providing this kind of information to a defendant when it has no relevance to any possible defense would be a clearly unwarranted invasion of a person's privacy. I have no problem telling the defense we have the information or could get it, but no protection or exception is provided in this rule other than only the defendant and the attorney get to invade the other party's privacy. The prosecutor has no grounds under this rule to object to it. And, again, this is required in every case, not just when the defense makes a request and a claim that it could be relevant.

(a)(3) This should be reworded to only require the prosecutor to obtain GRAMA information that the defense cannot get on their own and only to the extent it can be shown to be relevant to a plausible defense. The State should not be required to obtain records for the defense that the defense can obtain just as easily on its own. For example, warrant information is easily accessible on XChange and directly from

the courts. Why does the State need to do that for the defense when we have no more access than they do? As for relevance, a fishing expedition into a co-defendant's mental health records held by the State of Utah, for example, would be allowed under your proposed rules even if it has no clear relevance to this defendant or the defendant's plausible defenses.

The "upon request" should be added back in. As should the requirement that requests be "relevant" to a plausible defense. This will reduce the burden on the State and, even more importantly, limit the invasion of unrelated co-defendants privacy rights.

8) Edward A Berkovich
August 18, 2020 at 7:55 pm

I agree with Randall McCune, the proposed amendment creates an "auto-mandatory disclosure" requirement (my phrase) for all cases, without defendant/the defense ever even requesting discovery.

Since I can't do strike-through on here, I'm using brackets for that.

In the redline version of the proposed amendment to rule 16:

At line 3, it says, "Mandatory disclosures. The prosecutor must disclose to the defense [upon request, which is struck through] the following material or information related to the case of which the prosecutor prosecution team has knowledge and control:"

[then it lists the content to be mandatorily disclosed]

Then, at line 25, under Timing of mandatory disclosures: … "The prosecutor's disclosures must be made as soon as practicable following the filing of an Information." [and it continues]

Then, at line 31, it says, "Disclosures upon request. Upon request…."

Discussion

The strikethrough of "upon request" at line 4, compared with line 31, which requires a request, suggests to me there will be an auto-disclosure requirement to defendant, even pro se defendants soon after an information is filed. If that's correct, in every retail theft, POCS, PARA, you name it, our misdemeanor prosecutor offices will be auto-disclosing/sending discovery to pro se defendants regardless whether defendant requested discovery.

That's a lot of burden on support staff, a lot of reviewing of (hopefully allowed) redactions of witness contact info in domestic violence cases, for example.

Plus, under this mandatory auto-disclosure requirement, some defendants will have discovery sent them, then when they come to their first pretrial conference, then ask for appointment of the public defender, I foresee them not providing what we sent them to their public defender, then the public defender will ask us for discovery that we already mandatorily sent out to defendant when s/he was unrepresented.

I think "upon request" should be put back into the final version where it's currently struck through at line 4 of the red line version.

EAB

9) Edward A Berkovich
August 18, 2020 at 8:01 pm

I obviously favor providing discovery to pro se defendants. I've provided our very straightforward request form twice recently if memory serves. My point is they should need to make a request for discovery and so should counsel. EAB

10) Conrad Hafen
July 27, 2020 at 1:37 pm

I am in agreement with the concerns expressed in each comment as it relates to the additional burdens these changes place on the prosecutor. Additionally, the requirement that the prosecutor provide "…and notes from a law enforcement official" is vague and problematic. What constitutes a note? Is it every piece of paper an officer writes on? If the officer discards or misplaces the note, will the prosecutor be sanctioned? if the prosecutor is unaware that a note exists prior to a hearing or trial, but it is mentioned during the officer's testimony, what is the remedy? If that same note is no longer available, what is the remedy? Is a prosecutor required to gather every piece of paper from an officer in order to comply with this rule? Overall, the proposed rule changes place an undue burden on the prosecutor.

11) Brian Page
August 17, 2020 at 9:02 am

I completely agree with the comments about the increased burdens on the prosecutor. It seems this places a massive burden on prosecutors to scour not only all governmental databases for records that may not be relevant, but also to pray that officers took useful notes and preserved them after compiling their reports and recall all unrecorded oral statements made during an investigation. This would make even a minor traffic case an absurd task. Prosecutors would be required to turn over discovery of things they are not even in a position to be aware of existing even when possibly not relevant. Protecting the rights of defendants is important, but the proposed rule change seems to unduly burden prosecutors to the point of making discovery a sisyphean process.

12) Ivy
August 17, 2020 at 2:34 pm

a(1)(F) – "reports and notes prepared by law enforcement officials;"
This does not comport with Trombetta, 467 U.S. 479, "If the agents' notes . . . were made only for the purpose of transferring the data thereon . . . , and if, having served that purpose, they were destroyed by the agents in good faith and in accord with their normal practices, it would be clear that their destruction did not constitute [****15] an impermissible destruction of evidence nor deprive petitioner of any right." Id., at 242." (citing Killian v. United States, 368 U.S. 231 (1961)).

a(3) – The fact that a record kept by a different agency "may" be shared with the prosecution under GRAMA, doesn't always mean that agency will share it. This section's language should be changed from "the prosecution must obtain and disclose to the defense…" to language less burdensome on the prosecution in those instances where the outside agency refuses to provide the record. Perhaps something along the lines of: "the prosecution must request and, upon obtaining, disclose to the defense…"

a(4)(A) – I do not usually have our paralegals pull criminal histories for every witness in the case unless requested by defense counsel and ordered by the court per BCI's guidance. Has this committee requested any input from BCI on this requirement? I feel that they should advise as to whether or not there should be a process for this. Otherwise, this requirement could overly burden smaller prosecution offices that do not have the resources to pull histories on all witnesses in every case.

Removed (d) – Removing "The defense has a continuing duty to make disclosure" – I cannot understand why this portion was removed. Having dealt with unethical defense counsel, I feel that this section should NOT be removed. Defense should have an ongoing duty to disclose, especially if specifics requests for discovery have been made/filed by the prosecution.

Overall I think the rest of the proposed changes are great. Thanks.

13) Sean
August 18, 2020 at 8:28 am

Knowing the interests represented by the Committee membership, this is a spectacular piece of work, and much needed. My only comment to the text of the rule would be under (a)(1): The prosecutor must disclose to the defense the following material or information related to the case of which the prosecution team has knowledge and control:…

I might suggest a change to the effect of "must disclose to the defense the following material or information [in its control] related to the case[, and must disclose to the defense the existence and custodian of material or information related to the case, of which the prosecution has knowledge.]

I fear that the reciprocal pre-trial disclosures of witnesses and exhibits runs the risk of being un-critically read by trial judges as suggesting something other than the unquestionable truth that the defense need not present any case; and has no burden, under both the U.S. and Utah Constitutions. The defense case only exists at all in rebuttal to the State's burden. The "good cause" standard in (b)(1) will be the cause of a great deal of appellate litigation, that will remain unsettled for a long time. The standard for defense counsel disclosing his client's trial defense should be much, much higher. Likewise, (b)(3) et seq. ought to be properly read that I would be required to disclose only those witnesses I knew as a matter of law were required to make an argument I have a legal duty to raise. (Much like alibi or insanity…) An alternative reading would say that, like other exhibits, I would have to show opposing counsel my witness information immediately before I called that witness; but that seems superfluous. Instead, defense counsel is going to be required, by judges of lesser experience or intellectual gifts, to expose the contours of their defense, disclose their client's strategies, and surrender their rights because the State just needs to win at all costs. Put another way: the defense case is *supposed to be a surprise*. Until it cannot be, beyond a reasonable doubt, the State has not met its responsibilities under any Constitution that respects the idea of due process.

As to the 'other government agencies' complaint voiced by other commenters, GRAMA, and general State policies make information transfers between agencies a matter of course, and in several instances, of right. If an officer is investigating a crime, and doesn't recognize a connection to other State agencies, perhaps that is why we require highly-educated and ethical prosecutors to be the final arbiters of when an investigation is ready to be presented to the Judiciary as a criminal prosecution, and when, on the other hand, an officer ought to be guided to prepare an actually complete investigation.

The only other comment would be to observe that the prosecution commenters seem to have forgotten that neither the State nor 'The Public' has rights. It has powers, and the Constitutions and the laws and

rules that flow from them, exist primarily as a check on those powers. Defendants have rights; which should be vindicated and protected by the Courts. The repeated complaints of unworkability and 'Sisyphean burdens' smack of a person with all the cards complaining that they still have to show them. If the refrain is 'fairness!', well, then make warrants equally available to defense counsel and investigators. Give investigators qualified immunity, and punish resistance as a felony. Provide a taxpayer funded, nationwide database of criminal information available only to defense attorneys and their agents. Let them kick down the doors of people they think might know relevant information (including police officers' homes and stations), and sustain their inherent and qualifiedly-immune power to chase them down in the streets. It is astounding that the primary beneficiaries of our taxation complain that accepting a government job, investigating reports of crime, making a full, complete, and public record of that investigation (using government resources and powers), and then presenting that to a Jury, without having to hide the ball, conceal, ignore, cut corners, or put themselves out too much is just too much to bear.

14) Dain
August 18, 2020 at 10:03 am

I am in favor of these amendments, and, as a private defense attorney, I think the best and most needed revision made here is the addition of subsection a(3). Judging by the comments above, that also seems to be a provision causing consternation among my prosecutor colleagues (many of whom I know and respect, just for the record).
First, let me give my perspective on why that addition is necessary: for many years in my practice, my standard operating procedure was sending out GRAMA requests to all the relevant agencies in addition to my standard discovery request to the prosecutor. I took the oft-cited argument at face value and assumed it's just as easy for me to try and get this information independently than to try and make the prosecutor do it. Well, it's not. The GRAMA request that went smoothly, where the agency searched for and identified my requested records, charged me a reasonable fee, and gave me the records in a timely manner was the exception rather than the rule.
Common excuses for not complying with GRAMA included:
"There's a criminal case ongoing so you should go through the prosecutor for discovery."
"There's a criminal case ongoing so giving you records would interfere with an 'active investigation.'"
"You need to submit a notarized release from your client and all the other individuals in the [videos or reports]."
"We need to redact portions of the [audio or video] and we don't have the technology for that."
Many of these excuses for not complying are contrary to the plain language of GRAMA, but litigating all these cases through the GRAMA appeals process and through a separate district court case is prohibitively expensive, slow, and inefficient; particularly when the agencies are usually more than willing to quickly hand over relevant records to the prosecutor. (I realize there are exceptions to this–but I don't think it's debatable that, generally speaking, it's MUCH easier for a prosecutor to get a record from a LEA than a defense attorney.)
That's why a rule requiring the prosecutor to get relevant, GRAMA-able records from LEAs upon request is simpler and more efficient–which is what the rules of criminal procedure should promote.
The counter-arguments against a(3) mostly seem to be the "parade of horrors" type, based on the most extreme and burdensome reading imaginable. But the remedies baked into this rule are discretionary and based on reasonableness. See proposed e(1). As such, they range from the very mild (an order for discovery, a continuance), to, at the most extreme, a contempt finding for willful disregard of a previously issued order for discovery. To suggest that a Utah judge would ever order a prosecutor to send out blind and broadly-worded GRAMA requests to every agency in the State to fish for entirely hypothetical information that may be relevant under the rule–let alone hold a prosecutor in contempt for not doing it–does not reflect courtroom reality that I've ever seen.
In other words, the rule already has a de-facto requirement for us defense attorneys to be reasonably specific in our requests under a(3), because we're not going to get any remedy beyond that "appropriate

under the circumstances." This seems to me a good balance of burden, efficiency, and consequence in the discovery process.

15) Edward A Berkovich
August 19, 2020 at 1:37 am

I agree with Randall McCune, the proposed amendment creates an "auto-mandatory disclosure" requirement (my phrase) for all cases, without defendant/the defense ever even requesting discovery. I think "upon request" should be put back in at line 4, as follows:

Since I can't do strike-through on here, I'm using brackets for that.

In the redline version of the proposed amendment to rule 16:

At lines 3-4, it says, "Mandatory disclosures. The prosecutor must disclose to the defense [upon request, which is struck through] the following material or information related to the case of which the prosecutor prosecution team has knowledge and control:"

[then it lists the content to be mandatorily disclosed]

Then, at line 25, under Timing of mandatory disclosures: … "The prosecutor's disclosures must be made as soon as practicable following the filing of an Information." [and it continues]

Then, at line 31, it says, "Disclosures upon request. Upon request…."

Discussion

The strikethrough of "upon request" at line 4, compared with line 31, which requires a request, suggests to me there will be an auto-disclosure requirement to defendant, even pro se defendants soon after an information is filed. I

f that's correct, in every retail theft, POCS, PARA, you name it, our misdemeanor prosecutor offices will be auto-disclosing/sending discovery to pro se defendants regardless whether defendant requested discovery, and regardless whether pro se defendants even want discovery.

That's a lot of burden on support staff, a lot of reviewing of (hopefully allowed) redactions of witness contact info in domestic violence cases, for example.

Plus, under this mandatory auto-disclosure requirement, if that's what it is intended to be, some defendants will have discovery sent them, then when they come to their first pretrial conference, then ask for appointment of the public defender, I foresee them not providing what we sent them to their public defender, then the public defender will ask us for discovery that we already mandatorily sent out to defendant when s/he was unrepresented.

Obviously I support all defendants including pro se defendants receiving discovery to use in defending their case. I'm guessing our office is one of many that has a brief, straightforward form for pro se defendants to use when requesting discovery.

My point is I think defendants, pro se and represented, should be required to request discovery, rather than there be an auto-disclosure requirement on the part of prosecutors.

I think “upon request” should be put back into the final version where it’s currently struck through at line 4 of the red line version.

EAB

16) Scott Burns
August 19, 2020 at 2:45 pm

As the Executive Director of the Utah Sheriffs Association, and i believe i speak for most if not all of the elected Sheriffs, I’ll be brief: I concur with Ed Berkovich, Randall McCune, Ryan and several other who have already posted their concerns in detail

This opposition has nothing to do with full-disclosure, which is always the goal of law enforcement and prosecutors, but rather the additional burden placed upon the officer(s) and the prosecutor. I hope legislators will provide an opportunity for live testimony from seasoned practitioners so they (legislators) can get a sense of what the result will be “in real life” if this passes as drafted.

17) Rob
August 21, 2020 at 9:11 pm

While maybe based on proper principles, the practical impossibilities of these proposed amendments overwhelm this proposal.

First, (a)(1) imputes knowledge of a ‘prosecution team’ to a prosecutor. The limits of the ‘prosecution team’ are not defined. Is it the prosecutor and the case officer? Any officer who responded to the criminal event? Support staff of the prosecutor and/or police officer? Unless properly limited, strict compliance with the mandatory disclosures within subsection (a) would require not only that the prosecutor undertake the ‘herculean efforts’ previously discussed but also that all members of the amorphous ‘prosecution team’ undertake these herculean efforts. In complex cases that prosecution may be comprised of dozens of persons, whose obligation would attach upon filing of an information and would be mandatory prior to the preliminary hearing, which by Rule could occur within 14 days of the date of arrest.

Another series of problems arises in the removal of any exception to the mandatory disclosure requirements of (a). For instance, (a)(1)(B) creates a mandatory disclosure of the criminal history of all co-defendants but creates no exception for instances where the prosecutor is barred from disclosing the criminal history of a co-defendant, as is the case with minor co-defendants. While a seemingly minor issue, this is just one example of the conflicts with law or rules that may be created by enacting an amendment to this Rule which contains no exception clause.

Furthermore, the lack of limitation for a reasonable scope creates an issue in (a)(1)(D), which requires the disclosure of “physical and electronic evidence, including any warrants, warrant affidavits, books, papers, documents, photographs, and digital media recordings” but specifically removes the language which limits this to a disclosure of information obtained from a defendant or co-defendant. This touches on and exacerbates an issue of national concern — what privacy rights do witnesses and victims have in data that is not relevant to a criminal case but may be necessarily disclosed to the State as part of an investigation. For instance, a witness may have received text communications from a defendant and either due to investigative overreach or investigative necessity, a complete forensic download of the witness’ device

may be made. However, the complete forensic download may contain information that is in no way relevant to the criminal case such as bank records, private communications, or personal photos. A victim of a sexual crime may not want to turn over personal photographs of their body to a criminal defendant when those photographs have nothing to do with the case at hand. However, no attempt has been made to limit the scope of disclosures to relevant, admissible evidence and pursuant to the plain language of the amendment, that would become necessary.

The problems with the mandatory disclosure of 'notes' under (a)(1)(F) has been previously noted, but is very problematic.

Amended (a)(1)(G) also is vague and seems like it will lend itself to vexatious litigation. What is 'evidence favorable to a defendant?' Some evidence would be obviously favorable, but would also be covered under the mandatory disclosure provisions of Brady and Giglio and their progeny. However, this subsection appears to expand the obligation beyond Brady and Giglio. It places a burden on the prosecution to divine the defense strategy of the Defendant and provide the Defendant with anything that the Defendant may find favorable under the Defendant's theory.

Amended (a)(2) also creates a burden on the prosecution to not only provide any evidence that the prosecutor possesses, but also that is 'reasonably available' to the prosecutor. Reasonable availability is not defined. Is this evidence that the State may get through a GRAMA request? That the State may get through a search warrant? That the State may get through further interview and investigation with a victim or other witness? This added language places the burden of the defense investigation on the prosecution for all 'reasonably available' evidence.

Amended (a)(4)(A) presents a similar problem to the issues created by other amendments in not limiting disclosures to relevant and admissible evidence. Under the language of the amendment, the State is required to provide the criminal history of all witnesses, including law enforcement and expert witnesses, regardless of the admissibility of that evidence under Rules 608, 609, 404, or any other Rule of Evidence.

The practical problems with expanding the burden on the prosecution overwhelm the positive elements of this amendment. If the purpose behind the amendment is to ensure that the Defendant has all evidence that the prosecutor possesses and that the prosecution complies with their burden under Brady and Giglio, those modifications could be made with far less sweeping changes which would not be so practically problematic.

18) David Ferguson
August 25, 2020 at 8:42 pm

I am in favor of striking the language "upon request" for the sake of pro se litigants. I can appreciate the concern that automatic disclosures might make prosecutors more busy.

I say "might" because the rules on timing of disclosures are so lax that in reality a prosecutor can quite easily provide the initial report and inform the defendant that x,y, and z are forthcoming, getting that information to the defendant as part of the normal course of ongoing disclosures as the case progresses. But I digress.

I'm a public defender who has often been in court witnessing pro se litigants try to navigate the court process with a great deal of frustration and confusion. This is typically an issue for low income defendants in justice court who don't qualify for a PD but as a practical matter can't afford an attorney. Also, obviously, this happens in traffic cases. Some judges are a little helpful for these people in guiding

them through the process. Other judges can't be bothered and give them a poker face when the defendant asks questions about how they're supposed to do anything. A virtuous prosecutor might be helpful. But our rules of discovery are meant to protect against abusive or unfair practices, and not to hope for virtue.

The danger is that the pro se litigant shows up to trial with essentially no information aside from a citation. These litigants don't know what they don't know so they can't even appreciate how disadvantaged they are. I've sat by, idly, unable to step in as friend of the court, watching this process unfold at a Bench Trial where the litigant testified in his case in chief, "I had no idea the officer was going to say any of that stuff. All I have is this citation." Needless to say he was convicted. The justice system failed that individual, much like it routinely fails so many other pro se defendants. And it failed because Rule 16 as it is currently written isn't made to help pro se individuals. If anything, the words "upon request" are a hurdle that those individuals have to jump over without knowing that it exists. I fully support excising those words from the rule.

I don't think that (a)(1)(G) captures the Brady requirement as well as it should. Brady encompasses both tangible and intangible evidence. If an officer has an impression that a complainant was drunk while telling their story, that's Brady material even if the officer doesn't write it down. Same goes for the prosecutor. If he/she has an unrecorded conversation with a witness where the witness admits some doubts or inconsistencies about prior testimony, the substance of that conversation falls under Brady. The Rule should make that clearer. Sure, prosecutors are supposed to know about their Brady obligations regardless of what the Rule says, but to the extent that the Rule is supposed to have a comprehensive approach to criminal discovery, there ought to be a great deal more particularity so that parties don't have to dig through caselaw to supplement the Rule.

For that matter, I think it's a backwards step to put the word "material" back into (a)(1)(G). It's easy enough for a prosecutor to say, "Well, X information isn't Brady because it isn't material to the defendant's case." What that means is that the disclosure of exculpatory information depends on how willing the prosecutor is to come up with the defense's strategy without knowing it before deciding what ought to be disclosed. This is a common problem with Brady material, and if you look at Brady's progeny (especially Kyles v. Whitney) you'll notice that this is an entirely unintended problem with Brady. Nevertheless, the word "material" remains thorny. The old formulation of "tends to negate" is clearly quite broad, which is what Brady was designed to be. That language should remain.

19) William J. Carlson
August 27, 2020 at 10:36 am

In fiscal year 2020 ending June 30, the Salt Lake County District Attorney's Office filed 25,871 criminal charges against defendants, including over half of the 1,460 first degree felonies filed statewide. By way of comparison, the prosecuting agency which filed the second largest number of charges was Utah County at 7,938 charges in the same timeframe. As the largest prosecuting agency in Utah, the proposed revisions to Rule 16 will affect our office more than any other. The Salt Lake County District Attorney's Office applauds many of the proposed revisions to Rule 16. Even before the COVID-19 pandemic put an abrupt pause to jury trials across Utah, the proportion of cases resolved by plea deal grossly outweighed the cases which went to trial. Considering that reality, ensuring that both parties have complete discovery as soon as practicable will ensure the courts continue to serve their truth searching function even when a case resolves short of trial. There are some proposed revisions to Rule 16 which may not help and, in some cases, will interfere with the truth-seeking function of the criminal justice system. Accordingly, the Salt Lake County District Attorney's Office submits the following seven recommendations.

1. Define “prosecution team” in subsection 16(a)(1). The proposed revision extends the duty to disclose from information and material a “prosecutor has knowledge” about to what a “prosecution team has knowledge and control” over. Although clearly intended an expansion beyond the individual prosecutor, it is unclear what the outer reaches of this “prosecution team” are. Current Utah Code and Rules make no reference to the “prosecution team.” In 1984 the Utah Supreme Court cited the 4th Circuit when it concluded that it was concerned with more than what the prosecutor knew regarding witness credibility and declared that “officers are part of the prosecution team.” State v. Shabata, 678 P.2d 785, 788 (Utah 1984). But in 2005, the Utah Supreme Court pointed out that FBI reports about a key prosecution witness which the defense had obtained “were never in the possession of the prosecutorial team handling [the Defendant’s] case.” State v. Pinder, 2005 UT 15, ¶ 31, 114 P.3d 551, 558. Expanding the rule’s application from the prosecutor to the “prosecution team” without defining the prosecution team will only invite confusion and litigation rather than clarity regarding the duties of prosecutors. One alternative expansion which would not require a definition could be to replace “prosecution team” with “prosecutor’s office.”

2. Proposed subsection 16(a)(1)(A)’s requirement to turn over the substance of any unrecorded oral statements of codefendants combined with the new timeframe for disclosures will complicate cases where one codefendant is cooperating with the police/prosecution. In some cases, prosecutors become aware of information from a codefendant but want police or prosecution office investigators to conduct further investigation to confirm or disprovee the new information. The disclosed information may also be about other potential defendants. If that information does not lead to a prosecutable case against the other potential codefendant(s) within the new time frames for required disclosure, disclosing the substance of the statements risks alerting the other potential codefendants they are being investigated (especially if the potential codefendant is higher “up the chain”). This issue could be mitigated or eliminated by either including the word “relevant” to the part of the sentence related to unrecorded statements to police, or by replacing the “related to the case” phrasing in subsection (a)(1) with “relevant” since there is a legal meaning to what is “relevant.”

3. Clarify proposed subsection 16(a)(1)(D) to require prosecutors to disclose relevant information rather than to provide all physical evidence to the defense. The current rule requires a prosecutor to disclose material or information of which the prosecutor has knowledge. The proposed revision extends that disclosure requirement to any material the prosecution team has control over. By expanding “prosecutor” to “prosecution team” and “knowledge” to “knowledge and control,” the new version of the rule expands the possible interpretations of “disclose” and may imply that physical evidence, such as a phone or bloody shirt, must be provided to the defense. While defense counsel should certainly be informed of the nature and quality of physical evidence under the control of the prosecution, disclosing information about that material will be practicable in a way that providing the material itself will not.

4. Consider eliminating the reference to officers’ notes in subsection 16(a)(1)(F). All parties have a better understanding of a case when the case has complete and accurate police reports. While technology allows officers to write reports in more locations than ever before, the dynamic and field-oriented nature of police work still prevents officers from writing reports contemporaneously to their field work such as interviewing witnesses or making arrests. Because of the inevitable gap between the officer’s lived experience and written report, note-taking serves an important role in helping officers write complete and accurate reports. Ironically, in hopes of getting more accurate information by demanding that officers retain and provide their notes even after writing a report, the proposed revision will have a chilling effect on note-taking generally and a deleterious effect on the quality and accuracy of police reports. Any attorney who has handled criminal cases after an agency has implemented body-worn cameras has had the unfortunate experience of reading a single-sentence police report which simply states “see the body cam.” Requiring officers to retain and requiring prosecutors to disclose all notes taken in preparation for a report

in addition to the report itself will only serve to discourage note-taking by officers. While pointing out spelling errors and incomplete sentences could serve for a few "gotcha" questions by defense counsel during cross-examination, report accuracy will decrease and defendants will ultimately suffer from reports being less detailed and accurate because officers will decline to take any contemporaneous notes for fear of looking foolish later.

5. Remove references to preliminary hearings in the subsection on the timing of mandatory disclosures in Subsection 16(a)(2). Proposed subsection 16(a)(2) states "In every case, all material or information listed under subsection (a)(1) that is presently and reasonably available to the prosecutor must be disclosed before the preliminary hearing, if applicable…" The previous sentence already requires prosecutor disclosures to be made as soon as practicable following the filing of an Information (incidentally, by replacing "charges" with "Information" this draft rule suggests there is no duty for prosecutors to provide evidence after a charge by citation or a grand jury indictment). Not only is a preliminary hearing inapplicable to cases involving a grand jury indictment, an admittedly rare occurrence, but most criminal Informations are not subject to a preliminary hearing. In fiscal year 2019 most criminal charges in Utah (46,245) were filed as infractions, class C misdemeanors, and class B misdemeanors, none of which are subject to preliminary hearing. And as much as defense counsel may pine for the days when a preliminary hearing served as a discovery device, that secondary purpose was eliminated in 1995. See State v. Aleh, 2015 UT App 195, ¶14 ("a constitutional amendment eliminated this secondary purpose in 1995"). Preliminary hearings serve as a probable cause determination equivalent to the determination made by judges before issuing a search warrant. Just as a defendant is not entitled to complete discovery prior to the execution of a search warrant, the preliminary hearing should not operate as a deadline by which all discovery must be provided. The reference to preliminary hearings should be removed from subsection 16(a)(2).

6. Do not turn prosecutor offices into defense attorneys' Government Records Access and Management Act ("GRAMA") agents. Subsection 16(a)(3) would require prosecutors to ask any state or local government agency for any government record the defense requests regardless of relevance. Beyond turning prosecutor offices into defense attorney's investigative agents, this is a blatant attempt by defense attorneys to circumvent any GRAMA inconvenience on the backs and budgets of prosecutors. GRAMA allows a governmental entity to provide private, controlled, or protected records to another government entity that enforces or litigates criminal law. Utah Code Ann. §63G-2-206. Accordingly, prosecutor offices may be able to obtain government records which are classified as private, controlled, or protected. This proposed subsection tries to leverage that prosecutor access to require disclosure of any record requested by defense without any showing of relevance. The rule also doesn't address who would have to bear the costs of complying with these GRAMA requests. Additionally, the proposed rule ignores the impracticality of requiring prosecutors to go digging for information the defense is looking for without knowing what specifically the defense is trying to find. Consider a recent GRAMA request by a defense attorney to the Utah Transit Authority (UTA) for some emails. Upon receiving the original request, UTA estimated that 15,000 emails would be covered and informed the defense attorney of the cost involved in gathering those emails. Based on that response, the defense attorney was able to communicate directly with UTA and narrow the focus of the request to mitigate the burden on UTA as well as the amount of irrelevant information the defense attorney had to sort through. If Subsection 16(a)(3) is implemented, the narrowing of overbroad records requests which is a frequent feature of the GRAMA process will be circumvented because the prosecutor isn't really the person seeking the records, so the prosecutor won't be able to narrow overbroad requests without violating this rule by not requesting what the defense attorney asked for. Defense counsel has "an affirmative duty to make a reasonable investigation" that is independent of the prosecution's disclosure duties. State v. Kallin, 877 P.2d 138, 143 (Utah 1994). Part of that duty is to gather critical defense evidence. See id. Defendants may subpoena records pursuant to Rule 14(b) and that rule is the appropriate vehicle for defendants to obtain records not possessed by the prosecution. Pliego, 1999 UT 8, ¶ 20; State v. Spry, 2001 UT App 75, ¶ 16 n.3, 21 P.3d 675; e.g., State v.

Hansen, 2002 UT 114, ¶ 6 n.1, 61 P.3d 1062. The fact that the prosecution may have access to materials sought by the defendant is immaterial so long as the defendant can obtain the records by judicial process. Spry, 2001 UT App 75, ¶ 16; see Pliego, 1999 UT 8, ¶¶ 15-28 (declining to follow State v. Mickelson, 848 P.2d 677, 687-89 (Utah App. 1992)

7. Consider mirroring defense discovery obligations to the prosecutors' obligations and severing the defense deadline to disclose from the trial date. Subsection 16(b)(1) refers to the mandatory disclosures of defense counsel, but unlike the prosecution's subsection which requires specific disclosures as soon as practicable after filing charges, this subsection only requires the defense to provide what the judge finds good cause to provide and does not offer a deadline other than "no later than 14 days, or as soon as practicable, before trial" in subsection 16(b)(3). In striving for truth, the rule should impose a similar obligation on the defense to provide reciprocal discovery covering the same evidence required by prosecutors and requiring disclosure as soon as practicable.

The Salt Lake County District Attorney's Office supports the intent behind the proposed changes to Rule 16, ensuring that all parties have a complete and accurate understanding of the events that transpired before a plea or trial occurs. While some of the proposed changes interfere with that intent, as explained above, we remain committed to ensure that all charged defendants receive complete discovery, including exculpatory evidence, as soon as practicable following the filing of charges.

20) Jerry D. Jaeger
September 2, 2020 at 9:52 am

As the Washington City Prosecutor, there are two proposed changes to the Rule 16 which cause me concern.

First, removing upon request from (a)(1) and moving it to (a)(3), opens the door for potential ambiguity in interpretation and places the prosecution at a disadvantage. As stated by other commenters, cases are, at times, resolved without the exchange of the police report and other discovery. This is especially true in justice court cases where the report is limited to a citation. Requiring the prosecutor to supply the police report in all cases before resolution would create an additional burden to the prosecutor that will do little more than further the case backlog already experienced in many courts. It also carries the potentially for liability for the prosecution in terms of defendant privacy and BCI compliance. The discovery request, whether from an attorney or a defendant, provides the prosecution with all information needed to ensure the proper delivery of said discovery to the correct individual. Especially in this day of electronic delivery of discovery, this information is needed to ensure documents containing sensitive information are only delivered to the parties involved and entitled to see said documents

Second, as stated in several comments, an officer's notes are tools used in the creation of the officer's report and then destroyed, an act that is supported by case law. The notes are often cryptic jottings of the officer that he or she understands and uses to create an organized report detailing his or her findings which is supplied to the defense through discovery. Requiring officers to include their notes in the police report is ineffective and burdensome. With this requirement, when taking notes on a case, an officer would have to do so in a manner that could be understood by all parties and possibly read in court instead of allowing the officer to create notes in a personal effective and efficient shorthand. As an officer handles multiple cases in one shift, does he or she have to use a separate sheet of paper for each case, instead of efficiently maintaining notes in one place that will be used to create professional reports as is currently allowed by case law? This requirement also doesn't recognize the availability of the defense to file a bill of particulars requesting additional notes the officer may have taken and not destroyed in the uncommon occurrence that further information is requested.

In short, the wording of upon request should not be removed from (a)(1) and the requirement of an officer's notes should be removed from (a)(1)(F).

21) Richard Larsen
September 2, 2020 at 11:12 am

We, the below listed prosecutors from the Davis County Attorney's Office, are providing the following comments and feedback in response to the proposed changes to Rule 16 of the Utah Rules of Criminal Procedure. As prosecutors in Davis County, we believe that we are at the forefront in the State of Utah for providing discovery in the most ethical, fair, and complete manner possible. We have maintained an open file policy with defense counsel for years, providing full access to any and all information and evidence that we possess that does not qualify as attorney work product. It is in this light that we provide the following feedback on the proposed changes to Rule 16, not as an attempt to avoid complying with our obligation to provide full and meaningful discovery, but instead to demonstrate the difficulty, and in some cases impossibility, of complying with the proposed rule changes. In our view, many of the proposed changes make it impossible for even the best intentioned prosecutors to fully comply with the proposed rule as currently written.

Timing of disclosures

The current language of the proposed Rule 16 creates ambiguities as to when discovery must be provided. We are aware of and appreciate that the committee was attempting to create flexibility in not making an absolute requirement that full discovery be provided by a preliminary hearing. However, the current version of the proposed rule still states that discovery "must" be provided "before the defendant is required to plead." See proposed Rule 16(a)(2), line 29 of the redline version. As the rule does not clarify what is meant by when a "defendant is required to plead," it could reasonably be interpreted as requiring discovery by the first time that a court asks a defendant to enter a plea of guilty or not guilty. As this is typically asked by all courts at a defendant's initial appearance, the prosecutor would be under a mandatory obligation to provide full discovery prior to defendant's initial appearance under the currently proposed language. Thus, the current language of the rule arguably requires production of discovery even prior to a preliminary hearing.

To remedy this specific problem, the language should be changed to state "… prior to defendant entering a guilty or no contest plea or prior to trial, unless otherwise waived by the defendant." This language would clear up the timing ambiguity as well as allow for a waiver if a defendant chooses to proceed without receiving full discovery, which a defendant may have an interest in doing, especially in a justice court setting.

Another problem that this timing requirement creates, which cannot be as easily fixed through a wording change, deals with Brady/Giglio disclosures. Under proposed Rule 16(a)(1)(G) (line 18 of the redline version), a prosecutor is required to disclose this information, which is appropriate. The problem is the timing requirement of this disclosure. As currently proposed, this disclosure would still have to be prior to a preliminary hearing as well as prior to the defendant being required to plead (which, as noted, under the current proposed language is arguably as soon as a defendant's initial appearance). To comply with this requirement, a prosecutor would have to prepare his or her case prior to filing to a point that the prosecutor could identify all possible witnesses, including chain and custody witnesses, to determine if one of those witnesses had Brady/Giglio issues. This would put far too much burden on a prosecutor in the early stages of a case and would almost certainly result in situations where potentially dangerous criminals were left out in the public without charges being immediately filed, in spite of the existence of

probable cause, because a prosecutor did not have sufficient information at the filing stage to comply with this discovery disclosure requirement.

While we take our responsibility to disclose Brady/Giglio material seriously and provide this information as soon as reasonably practicable as part of discovery, the timing requirement that is currently being proposed is overly burdensome and unreasonable.

Mandatory disclosures without requiring a specific request for discovery

Proposed Rule 16(a)(1) requires mandatory disclosures without a request by a defendant or his counsel. See proposed Rule 16(a)(1), lines 3-5 of the redline version. While mandatory disclosures are more feasible in district court cases, providing discovery without first receiving a specific request becomes nearly impossible to comply with in the justice court setting. We have already noted the timing issues that currently exist with pleas being entered, but three additional issues present themselves in justice courts that don't generally arise in district courts.

First, because defendants are referred to a justice court by citation and a prosecutor is not involved in the initial charging decision, a prosecutor does not know about the existence of a prosecution until after a defendant has already appeared in court and contested the citation. In such a setting, where the prosecutor did not initiate the prosecution, it would require the prosecutor to constantly be independently monitoring what citations were submitted to the court in an effort to comply with the mandatory disclosure requirement. This would be extremely difficult, time consuming, and burdensome to the point of being arguably unworkable upon justice court prosecutors and cost prohibitive upon the jurisdictions who would have to foot the bill for this constant monitoring.

Second, a large portion of justice court cases are never contested by the cited defendant. Rule 16, as currently written, still requires that discovery be sent to a defendant even when it is not needed by that individual. The prior suggested language of "unless otherwise waived by the defendant" would help resolve this issue.

Finally, because the majority of cases in justice court involve pro se litigants, it is much harder to deliver discovery or make it available to these defendants when the prosecutor does not have the defendants' contact information readily available, when it would have otherwise been included in a formal discovery request. While an address for a defendant is often included on the defendant's citation, generally this contact information is pulled from state records and is frequently either not the best contact information for the defendant and is outright incorrect all together.

It is for these reasons that we suggest that mandatory disclosure, if adopted, be limited only to class A misdemeanors and felonies. For class B and C misdemeanors and Infractions, a discovery requests should still be required. However, as we will demonstrate in the next section, limiting mandatory discovery to district court cases would still not eliminate all of the problems created by such a mandate.

Criminal history dissemination violations

Proposed Rule 16 requires that the prosecution provide the criminal record of "the defendant," "any co-defendants," and "of all persons whom the prosecution intends to call as witnesses at trial." See proposed Rule 16(a)(1)(b), line 9 of the redline version, and 16(a)(4)(A), lines 37-39 of the redline version. Utah Code Annotated § 53-10-108 controls the dissemination of criminal histories and makes it a class B misdemeanor to disclose a criminal history unless specifically authorized for purposes listed in the statute (see UTAH CODE ANN. § 53-10-108(12)(a)).

While § 53-10-108(5)(c) allows for the disclosure of "[a] criminal history of a defendant . . . by the prosecutor to a defendant's defense counsel, upon request during the discovery process," no such other exception exists to allow a prosecutor to obtain and disseminate criminal histories of co-defendants or other witnesses in the case. So, compliance with the proposed Rule 16 would mandate prosecutors to violate the law. While we recognize that the requirement for providing criminal records of other witnesses has a provision that states "unless otherwise prohibited by statute or rule," no such exclusion exists for criminal histories of co-defendants. And even with the exception for non-co-defendant witnesses, where they do not need to be actually provided if prohibited by law, including this language into the proposed rule will almost certainly create unnecessary litigation when the information is not initially provided by prosecutors.

Finally, even providing a defendant's criminal history would be illegal if a defendant relies on mandatory disclosure under the proposed rule amendment rather than by making a formal request for the defendant's criminal history. This is because, as previously quoted, a criminal history of a defendant can only be disclosed "upon request" during the discovery process. Without a specific request first, disclosure of a defendant's criminal history is currently illegal even when only supplied to defense counsel. This is an example of why mandatory disclosure without a discovery request requirement is problematic even when limited to just district court cases.

Disclosure of officers' notes

Officers' notes would now have to be provided as part of the proposed Rule 16 changes. See Rule 16(a)(1)(F), line 16 of the redline version. This creates two potential problems. The first would be the burden of creating a mechanism to collect all notes of any law enforcement officer involved in the case, no matter how irrelevant and/or duplicative that information may be. Such a requirement would almost certainly become unworkable in a case of any significant complexity. The second problem is that such a requirement would likely lead to officers taking fewer notes, which could in turn lead to worse investigations and reports, thus discouraging the search for truth, rather than promoting it.

Dissemination of physical or mental examinations

Proposed Rule 16(a)(1)(c), see line 10 of the redline version, mandates disclosure of "reports and results of any physical or mental examination" that the prosecution has knowledge and control of. This requirement is significantly overbroad. This requirement does not limit disclosure to only examinations performed during investigation of the present case in which discovery is sought. It does not limit whose physical or mental examinations must be supplied. It requires no showing of relevance prior to the prosecutor providing the records. Finally, it contains no limiting language, like "unless otherwise prohibited by statute or rule," to allow a prosecutor to avoid providing protected and inadmissible medical and mental health records.

The currently proposed language in many instances will directly conflict with Rule 14(b) of the Utah Rules of Criminal Procedure which is designed to safeguard and restrict the production of "medical, mental health, school, or other non-public records pertaining to a victim." It also would also conflict frequently with Utah Rules of Evidence 412, which limits the admissibility of a victim's other sexual behavior or predisposition. The impasse between proposed Rule 16(a)(1)(c) and Rule 14(b) would put the prosecutor in a no win situation where he or she cannot comply with both rules. To cure this issue, Rule 16(a)(1)(c) should add the language "unless otherwise prohibited by statute or rule."

Fishing expeditions by defense counsel at the expense of time and resources of the prosecution

Proposed Rule 16 will require the prosecutor to obtain and disclose "upon request" evidence not currently in the prosecutor's or even the investigating agency's possession if the information sought is "possessed by another governmental agency and may be shared with the prosecutor" under GRAMA. See proposed Rule 16(a)(3), lines 31-34 of the redline version. Note that the proposed rule requires no relevancy or good faith showing prior to the prosecutor being required to obtain this information once it is requested by a defendant or defense counsel. Without a relevancy or good faith requirement, proposed Rule 16(a)(3) is ripe for abuse, requiring the prosecution to spend its limited resources to track down voluminous information, where this information would already be available to a defendant through GRAMA.

For example, this rule change will almost certainly prompt most defense attorneys to file a discovery request in every case asking for all police reports where a potential witnesses in the current case has been a witness or filed a report or made statements in another case. The defense would do so in hopes of finding some inconsistent statement somewhere in a prior case in which to impeach the witnesses in the present case. This would generally be a significant long shot, but where it would be the prosecution that was required to do the research and comply with the request, defense counsel stands to lose nothing by making such a request. The prosecution would then have to contact every governmental agency in existence to see if one of the witnesses made a report or statement in a case in that jurisdiction. And for many law enforcement witnesses or crime lab witnesses, they may have been involved in hundreds, if not thousands, of investigations. The prosecution would have the burden of collecting all of this information under the currently proposed Rule 16(a)(3).

Just to contact all law enforcement agencies in the State of Utah, a prosecutor would need to contact over 90 municipal or multi-municipal law enforcement agencies, 29 county sheriff's departments, nine college or university law enforcement agencies, three institutional law enforcement agencies (UTA police, Veterans Administration police, and Salt Lake City Airport police), 30 separate Utah Highway Patrol offices, six Adult probation and parole regions, the Department of Wildlife Resources, the Department of Environmental Quality, the Utah Division of Homeland Security, and the Utah Bureau of Investigations. Additionally, because the rule change would apply to obtaining any government agency records, prosecutors would also have to contact additional government entities including the Department of Health, the Department of Child and Family Services, and all 41 of the state's school districts.

The Utah State Supreme Court has already recognized the unreasonableness of requiring such a "herculean burden" of searching through records of every governmental agency "looking for exculpatory evidence on behalf of [a] defendant." State v. Pliego, 1999 UT 8, ¶ 18. And yet, that is exactly what proposed Rule 16(a)(3) will result in, a herculean and unreasonable burden in almost every case that the prosecution handles. This would be a burden that no prosecutor or prosecutors' office would be able to reasonably comply with.

Proposed Rule 16(a)(3), like Rule 16(a)(1)(c), also lacks the language "unless otherwise prohibited by statute or rule." As such, it would have the same problems of potentially requiring the prosecution to disseminate protected and inadmissible records under Rule 14(b) of the Utah Rules of Criminal Procedure and Rule 412 of the Utah Rules of Evidence in many cases involving victims. And these requests will come, as they are already being filed presently in cases. We have examples of these sorts of discovery requests already from actual cases. This proposed rule change would likely cause these sorts of requests in almost all cases.

In light of the forgoing issues created by the proposed Rule 16(a)(3), Rule 16(a)(3) should be removed entirely, as it is far too burdensome upon prosecutors and too problematic with other existing rules.

Fairness in reciprocal discovery

Finally, under the currently proposed version of Rule 16(b)(1), lines 47-51 of the redline version, reciprocal discovery is only supplied to a prosecutor after a "court determines on good cause shown" that the information is necessary "in order for the prosecutor to adequately prepare the prosecutor's case for trial." Requiring a court review and order prior to the prosecutor being able to obtain reciprocal discovery causes a waste of judicial resources and time, where the prosecutor is only seeking evidence and information that the defendant will be using at trial. Utah should adopt the approach of Rule 16 of the Federal Rules of evidence which states "Where the government agrees to an open-file policy, the defendant must provide reciprocal discovery. . . ." See Fed. R. Crim. P. 16(c). This reciprocal discovery is automatic on the condition that the government maintains an open-file policy with defense counsel. In such circumstances, no separate motion or order is necessary. This system functions efficiently and fairly in the federal system and should be adopted in Utah.

Sincerely,

Richard Larsen
Troy Rawlings
David Cole
Jason Nelson
Jeff Thompson
Rick Westmoreland
Nathan Lyon
Ryan Perkins
Kathi Sjoberg
Gage Arnold
Matt Janzen
Benjamin Willoughby
Joshua Wayment

22) Lisa Romney
September 4, 2020 at 7:27 am

I am the City Attorney for Centerville City. I agree with the comments and concerns submitted by the Davis County Attorney's Office and prosecutors regarding the proposed changes to Rule 16. These proposed rule changes will have a significant impact on the operation of our Justice Court and prosecutors.

23) Garrett Wilcox
September 3, 2020 at 7:55 am

The proposed changes to Rule 16 will slow the operation of municipal justice courts and have a significant financial impact for municipal prosecutors' offices. In most municipal justice courts, a significant number of the cases are traffic cases. Defendants are often taking off work to request a plea in abeyance, have a late fee waived, or to ask for clarification about their case. They are primarily concerned about reducing the impact of their ticket and resolving the case without having to come back to court. Many do not even interact with a prosecutor in order to resolve their case. If municipal prosecutors are required under the proposed rule to provide discovery to every defendant before they enter a plea (see proposed Rule 16(a)(1) and (a)(2)), municipal justice courts would slow dramatically. Every defendant would need to meet with the prosecutor to receive discovery before they appeared before a judge for their arraignment. If a prosecutor was unable to receive material information—likely body or dash cam footage—from one of the several law enforcement agencies serving their jurisdiction by the date of

arraignment, defendants' hearings would have to be continued. This would be a significant inconvenience for defendants who have taken off work to resolve a ticket that averages $120 in fines or less.

The proposed changes to Rule 16(a)(1) and (a)(2) would significantly increase the workload of municipal prosecutor offices and have a correspondingly significant financial impact. Even during the current pandemic, the Midvale City Attorney's Office will handle 463 arraignments, 171 pretrial conferences, and 8 virtual trials or evidentiary hearings during the month of September. Under the current requirements of Rule 16, our office ensures that discovery is available for every pretrial, trial, evidentiary hearing, or upon request by the defendant or their counsel. This requires 1 FTE prosecutor and 1 FTE legal assistant to handle this caseload. Under the proposed rule change, our office would also need to prepare discovery for every arraignment. This represents nearly a 230% increase in our caseload, and would require at least 2, if not 2.5, additional FTE legal assistants to meet the mandatory requirements of the proposed Rule 16. This would represent a $90,000 to $115,000 impact on Midvale's budget without taking into account benefits, retirement, and office equipment. When court activity returns to normal, this impact could be more substantial as more arraignments are held in person.

We recognize the constitutional importance of these disclosures especially for felony-level and misdemeanor-level offenses. However, the proposed changes represent a fundamental change in the way justice courts and municipal prosecutor offices operate. We request, at a minimum, that one of the following alternatives is considered:

1. Discovery must be provided at the first pretrial conference or 7 calendar days before a trial; or

2. Discovery is available by request only for cases that consist only of infraction or class C misdemeanor charges; or

3. Municipal justice courts are exempt from the proposed changes to Rule 16.

24) Kevin
September 3, 2020 at 4:02 pm

In the hope that due regard is given to the blood, sweat, and tears that go into drafting language to which an entire community may give its endorsement, and with thanks to those who've made that effort, please consider the following observations:

GRAMA Concerns:

The electronic footprint of any one individual is immense and growing in size. Materials theoretically available for request under GRAMA create an equally immense and growing field ripe for harvesting information. The suggestion that some information may exist carries credence upon mere mention. A shrewd defender trades in possibilities. Therefore, a judge, working through a likely-very-sizeable law and motion calendar could easily be persuaded that material, requested under the proposed obligation to provide any government record available through GRAMA, might exist. Rest assured that what reasonably appears to the judge upon mere suggestion to be the probable existence of a record will result in an order for its production. The result will require ceaseless efforts by the prosecution to prove to the defense via the court that materials do not exist. This shall be — as one commenter noted — a Sisyphean task. If there were a provision that the defense show that materials relevant to an issue in the case in fact do exist, certainly, the prosecution will be interested in locating, examining, and providing them.

Criminal History Concerns:

Other comments have addressed both the legality and impropriety of furnishing a defendant's criminal history absent a formal request let alone for all who course through a courtroom. The concerns over the privacy implications are echoed here.

Unrecorded Statements Concerns:

Whether an unrecorded statement is material thus requiring it to be highlighted in discovery will leave a hole in the record of every trial taking place under the proposed amendment. Post-conviction litigation will explode based upon post hoc ruminations over whether an unrecorded statement divulged at trial was or was not material for the purposes of discovery. The desire to expose every nuance to every fact, as one professor used to note "to a metaphysical certitude," cannot be met by discovery. Such is the purpose and function of trial. Being placed under oath before the court upon a witness stand frequently provides stunning variations from what either side anticipated to proceed from a witness' mouth. The unintended consequence of the proposed change is that claims of discovery abuse will be lodged just as soon as verdicts are delivered.

Investigator Notes Concerns:

Investigative note taking is an evolving formulation of an investigator's understanding of events as they become known to her. That formulation is complicated by the breadth and depth of human nature, which may result in initial misapprehensions, informational dead-ends, and loose-ends which may or may not lead to either useful information or valueless assumptions — until the investigation is complete. Many claims by witnesses (or those who claim to be witnesses) may prove to provide nothing more than hearsay or irrelevant information. Such might be adulterated by the potential witness' motivations. Investigative leads, hunches, and just plain old guesses may be noted as the investigator endeavors to form up an understanding of disparate threads of information. The value in the investigator's notes exists in what the investigator intends the note to convey — value which is likely unintelligible and without any apparent scheme to anyone but the one whom pens the note. The actual intention to communicate the information to others is finally realized in a formal report. Since notes are not intended to be a communication but are rather more akin to mnemonics, they should not be discoverable. Regardless, it can hardly be denied that investigations will suffer from dis-incentivizing note-taking.

Providing Discovery Without Request:

The first practical implication arises from the necessity to send information: to whom and to where? A simple request provides the most accurate and efficient way to effect the exchange of discovery.

Again, with thanks to the drafters responsible for changes.

Layton City Attorney's Office
Gary Crane
Steve Garside
Mason Kjar
Katie Ellis
Kevin McGaha

25) Craig L. Barlow
September 4, 2020 at 9:40 am

The Utah Attorney General's Office proposes this amendment to Rule 16(a)(3)[lines 25 – 28].
(a)(3) If the government agency refuses to share with the prosecutor the material or information requested under paragraph (a)(3)(A), or if the prosecutor is prohibited by statute from disclosing to the defense the material or information shared by the governmental agency, the prosecutor shall promptly notify the court and the defense. The defense may thereafter file an appropriate motion seeking an order requiring the governmental agency to disclose the material or information.
This amendment provides a remedy for the conflict between the "shall" language for the prosecutor to disclose information to the defense and the "may"language in the sharing information section of GRAMA, Title 63G, Chapter 2.

26) Dominique
September 4, 2020 at 11:34 am

(a)(1): I'd like to see "upon request" remain in the rule. Without that phrase, there will be issues with respect to pro se defendants, especially in justice courts, and the prosecutors' offices will have to act as a secretary for all pro se defendants. This could be especially burdensome where some defendants do not have access to email, box drop, etc., and everything would have to be printed and packaged. It isn't that prosecutors' offices are unwilling to do that, as they rightfully should have to, upon request, but without there being a request, the rule would require secretaries to track down each defendant to make sure they are provided discovery. This will not only be the case when the prosecutor first receives the case, but also when there is additional information/discovery to provide as the case progresses. Also, what is a "prosecution team?" That should be clearly defined.

(a)(1)(F): I believe "and notes" needs to be struck from line 16. Law enforcement already provides reports, pictures, audio recordings, video recordings, physical evidence, and the like, in addition to its many hours waiting and testifying inside the courtroom. The main purpose of discovery is to provide the defendant with all evidence, including exculpatory evidence, so that he or she can craft and present a defense. They also have the opportunity to cross examine the officers. I do not see how requiring officer notes, which are typically scribbles of reminders or tidbits of information for the report, are of any exculpatory value for defendants given everything else law enforcement is required to provide. The large majority of law enforcement understands it is to provide defendants, via prosecutor offices, any exculpatory evidence and it already includes (or should include) that in the report. To require notes will usually be inconsequential to defendants and places another burden on law enforcement in an already stressful and cumbersome field. When law enforcement and prosecutors do not provide exculpatory evidence, there are already rules and punishments in place to address that.

(a)(1)(G): It seems that the language is moving backwards, from clear to vague.

(a)(2): What does "reasonably available" mean? To me, the prosecutor either has the information, or he/she does not. If the prosecutor then receives additional information, he/she is already under a duty to continue to forward that information to the defendant.

Thank You,
Carbon County Attorney's Office
Christian Bryner
Dominique Kiahtipes

27) Sandi Johnson
September 4, 2020 at 1:42 pm

As attorneys with the Utah County Attorney's office, we have concerns with the proposed amendments to Rule 16. We share the position of every prosecutor throughout the State, that our obligation is to provide full discovery to ensure that a defendant has a fair trial. We also agree with the United States Supreme Court that "[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." Taylor v. Illinois, 484 U.S. 400, 409 (1988) This is equally true for both the prosecution and the defense. Id. Many of the concerns raised are not with the idea behind the change, but instead with the consequences of the actual application of the rule as it is proposed. This rule, if enacted as proposed, is likely to suffer the same issues that came about when Rule 15A was enacted, and later repealed. Rule 15A was passed to try and streamline the process related to production of "foundation and chain of custody witnesses." The rule attempted to "streamline" the process. Instead, the rule was used as a sword that created infinitely more motion practice, bogged down the system, and was eventually repealed. Rule 16 is making the same attempt, and is likely to suffer the same problems.

Mandatory Disclosures: while we understand the committee's goal to encourage the disclosure of information without the defense filing a motion and a court order, in some applications this becomes problematic. With some discovery, there still needs to be a request, a court determination, and a court order.
(a)(1)(A) – this provision is exceedingly broad. It requires the "substance of any unrecorded oral statements made by the defendant and any codefendants to law enforcement officials" be disclosed. We understand that if these statements are intended to be used, they should be disclosed. However, "any" statement is so broad, that it could be read to include a request to use the restroom.
(a)(1)(B) – we share the same concerns addressed by other prosecutors, that this provision which adds co-defendant criminal records as mandatory disclosures is requiring prosecutors to violate state statute. See Utah Code 53-10-108. Some have argued that under Utah Code 53-10-108(2)(d) that information can be released if authorized by "court rule". However, Utah Code 53-10-108(4)(e) specifically limits the information released under (2)(d) can only be used for individuals involved in the "hiring or background investigation of the job applicant." If the information is released for any other purposes, then not only is the person subject to criminal penalties, but civil penalties as well. The statute only authorizes the release of the defendant's criminal history. See Utah Code 53-10-108(5)(c) Putting this language into Rule 16 does not overrule the clear statutory prohibition on the dissemination of the records. We would note that this would not preclude a defendant from obtaining criminal records of non-defendants. A motion along with an accompanying court order can still get the information, in a way that effectuates the privacy interests the statute is trying to protect.

(a)(1)(D) – again, another provision that is extremely broad and does not understand the actual process. Once a warrant is submitted to the court through the e-warrant system, and the officer files a return of service, the officer no longer has access to the warrants and affidavits. These are within the control of the courts. Once this happens, how is the prosecution in a better position to obtain the records than the defense? Regarding digital media recordings, the mandatory disclosure requirement does not contemplate that many digital media recordings are themselves protected records. For example, a CJC video is a digital media recording. But under 77-37-4(6)(b)(ii) the CJC video may only be released to the defense attorney "pursuant to a valid request for discovery" and the recording cannot be released to the defendant. There are many other disclosures where a protective order would need to be put in place, but if left under the "mandatory" disclosure, this would no longer be possible and disclosure would be required prior to any court proceeding to address the issue.
(a)(1)(F) – we share the same concerns as other prosecutors regarding the "notes" prepared by law

enforcement officials. Again, this is really broad. The purpose is to make sure that investigating officers provide the information they know. However, requiring the disclosure of the mental impressions of officers would discourage note-taking, which would lead to greater inaccuracies. Further, how far removed does this requirement go? Would this be any notes that a supervisor writes to herself after reviewing the report? Would this require officers to save everything they wrote, even if they put it into the report?
(a)(1)(H) – it states any other item which the court determines should be made available. This is directly contradictory to "mandatory" disclosures. Mandatory disclosures imply no discretion, but this requirement is left to the discretion of the court.

Disclosures upon request
(a)(3) – we echo the many concerns raised by other prosecutors about this provision. First, requiring the prosecution to affirmatively search out and obtain materials (which includes "books, papers, documents, photographs, and digital media recordings") from any other governmental agency is not feasible. As other comments have noted, if you limited the interpretation of "governmental agency" to be just police departments, that would be over 100 agencies. There is no limit to if the information is known to the prosecution or within their control. The wording of this rule only requires a defense attorney ask the prosecution to go get the information, and the State must go get it. And what happens if the State files the GRAMA request and it is denied. Is the State now required to litigate the appeal on behalf of the defendant? Currently, both the defense and the State can file a GRAMA request to obtain information. That information can be given to the State and the defense, only if certain requirements are met. The processes and procedures are put in place to balance the privacy interests in records. In many cases, it requires a court order. If the State does obtain records that they would then have knowledge and control over, they could disclose those to defense. But shifting the statutory requirements from both parties equally, to requiring the State to obtain the information for the defense, regardless of the State's position on materiality or relevance, is a burden that should not be borne by the prosecution.

We also share the concerns that this would require the disclosure of information that is otherwise prohibited by rules or statute, especially victim information. There is no judicial review of this provision, or good cause, or a requirement that any request comply with other rules or statutes. For example, this provision would allow the defendant to skirt Rule 14 to obtain school records, mental health records, police reports, etc. of victims if they are in the possession of a governmental agency. Rule 14 exists to balance the need for information against the invasion of a victim's privacy, and requires requests to be relevant. A defendant should have to go through the established process in Rule 14, and not just obtain the information through a discovery request.

Reciprocal discovery
(b)(1) – under this provision, it requires the court to determine that any discovery provided to the prosecution is based on good cause. This similar requirement is absent from the mandatory disclosures to the defense. The United States Supreme Court recognizes that both the prosecution and the defense need discovery to "develop all relevant facts" and this requires "full disclosure" of all the facts. The committee has recognized that to adequately prepare a case, the defense needs the items listed in part (a) just as much as the prosecution does. Why should the good cause change, just because the direction of disclosure changes? The requirements should remain truly reciprocal.

Disclosure limitations
(d) – this subsection does not correct the problems with the "mandatory" disclosures. Historically, a defendant has filed a motion for discovery, and in the State's response, the State could then notify the defendant of the restrictions or refusal to comply with the request. Shifting the posture to "mandatory" disclosures now would require the prosecution to file a proactive motion to request the court excuse the

prosecution from providing discovery or allow the prosecution to impose limitations on the dissemination of the materials. The prosecution would have to file that motion in almost every case, even if it was not an issue the defendant was contesting. This is exactly the problem that persisted with Rule 15A, and required its repeal.

Sincerely,

Utah County Attorney's Office

28) Eric Clarke
September 4, 2020 at 8:42 pm

We, the below listed prosecutors of the Washington County Attorney's Office, appreciate the depth in which the Davis County Attorney's Office (DCAO) addressed the issues created by the proposed changes to Rule 16. We, too, are committed to providing ethical and complete discovery to the defense, and we believe these issues do more to hamper the effective and efficient delivery of discovery rather than improve it.

We voice our agreement and support of all their comments and concerns and add the following.

At the minimum, the new rule should still require a discovery request in cases only involving charges of B misdemeanors and lower, as suggested by the DCAO. This can be accomplished by exempting municipal courts from the mandatory disclosure. Another option is to add that in municipal courts, discovery must be provided upon request. Overall, though, we feel the words "upon request" should remain in (a)(1).

Officers' notes in an investigation involve a myriad of information—some of which is based on solid evidence, some that may be based on speculation, possible leads, or statements later proven to be false, most of which is written in a personal shorthand that may be difficult for others to accurately interpret. The notes serve the purpose of helping the officer to fully investigate the incident and then to create an organized report presenting their evidence-based findings to all parties, which is often sufficient for case resolution. This allows an officer to destroy meaningless notes once they are incorporated into the reports and evidence. For notes of deeper meaning that are not destroyed, there is already a system in place, through filing a bill of particulars, for the defense to request any notes the officer has available when necessary. Inclusion of all officers' notes should not be required by Rule 16.

Under the current discovery rules, our office provides all material evidence of which we are aware from any agency involved in an investigation. Yet, we have received burdensome and irrelevant requests for additional discovery. Rule (a)(3) removes our ability to deny these requests based on relevance and believe those requests would increase and be abused if this section remains in the new rule. This will create a burden on prosecuting office's that will only further delay cases and increase the backlog in the courts.

Sincerely,

Eric Clarke
Ryan J. Shaum
Natalie Nelson
Brian R. Graf
Zachary J. Weiland

Jerry D. Jaeger
Angela Adams
James R. Weeks
Rachael Beckstrom
Rachelle Shumway
Eric R. Gentry
M. Rick Erickson
Mark A. Barlow
Joseph M. Hood
Rebekah-Anne Gebler

29) Edward Montgomery
September 5, 2020 at 9:40 am

Mandatory Disclosures in Infraction, Class C, and Class B Cases

The vast majority of criminal cases filed in the State of Utah are filed in Justice Courts. The vast majority of those case are traffic cases. As the Davis County Attorney's Office correctly recognizes, requiring mandatory disclosure in those cases is practically and economically unworkable. Perhaps even more problematic is the unnecessary burden this new requirement would place on defendants who, one would hope, are the people the court is attempting to protect. Consider a simple no insurance case. Driver gets a ticket for driving without insurance. Driver admits to driving without insurance and just wants to pay the ticket. Driver appears at the arraignment and waits an hour and a half to see the judge. Driver tells the court that driver did not have insurance and just wants to plead guilty and pay the ticket. The Judge asks driver if driver has received discovery and driver says, "No, I have not received anything from the prosecutor and don't want anything from the prosecutor. I did not have insurance and I just want to pay the fine and be done with this. I had to take a half day off work for this hearing and I can't afford to take another day off. I am guilty. I didn't have insurance." The judge tells driver the court cannot accept a plea because discovery has not been provided and that driver will have to come back in a month. The court explains to driver how important it is for driver to have discovery in order to protect driver's rights. The court tells driver that while it may seem inconvenient to have to come back it this really is in driver's best interest to review the discovery so that driver can make an informed and intelligent decision. Over the next month driver gets a copy of the ticket which driver already had, a copy of driver's driving record, which driver was fully aware of, and a copy of the body cam where once again the driver admits to driving without insurance, something driver has admitted numerous times. Driver then takes another half day off of work, waits another hour to see the judge, and the judge finally allows driver to plead guilty.

The courts should make every effort to assure that defendants know and understand their rights and allow defendants time to carefully consider those rights. Prosecutors are willing and active partners in that pursuit. However, the court goes too far when it takes away a defendant's right to choose how to exercise those rights.

Disclosure of Officer Notes

The proposal that Rule 16 be modified to require the prosecution to disclose "officer notes" presents several problems. First, there does not seem to be any objective data to suggest that such a change is necessary or would even be helpful in the truth finding process. We laud the court for its efforts over the past several years to attempt to make decisions, where possible, based on objective and reliable data rather than on speculation and gut feel. The courts should continue that practice when considering Rule changes. In the event the objective data shows providing officer notes benefits the truth finding process

the court should adopt the Rule. If a study shows officer notes have little to no value the Rule should remain the same. Where, as here, no objective study of any kind has been done the court should very cautions of amending Rule 16 or any other rule based solely on how a select group of individual “think” or “feel” about what should or should not be done.

Significantly more troubling is the fact that the proposed Rule 16 creates a special Rule for police officers that does not apply to any other class or category of witness. There are dozens and dozens of categories of witnesses who may prepare reports for the prosecution which are subject to disclosure. Witnesses who prepare reports include police officers, fingerprint experts, accountants, doctors, nurses, coroners, experts in every conceivable field, and forensic examiners from countless areas. When those witnesses prepare reports we can safely assume that some will take notes along the way. Although some or all of those witnesses may have notes, only one class of witness is required to preserve and produce those notes. Under the proposed change to Rule 16 the prosecution would not have to disclose the notes made by a coroner during an autopsy in a murder case but would have to turn over the irrelevant notes from an officer who wrote a citation to a driver for running a stop sign.

Equally if not more disturbing about proposed Rule 16(a)(1)(F) is the message the court will be sending by creating special rules for the police. Certainly the court does not believe police officers are inherently unreliable and therefore need special rules to ensure fidelity. However, by creating special rules and requirements that only apply to police officers that is exactly the message the court would be sending. If notes are in fact necessary to truth finding process that conclusion should be applied universally to all witnesses and not to just one very specific type of witness. Singling out police officers as a special class because that may seem popular is bad policy.

30) Tom
September 5, 2020 at 5:05 pm

I’m happy with the requirement for mandatory disclosure of all material known to the “prosecution team” as well as a vehicle to obtain material from other state agencies. In this digital age, why not require that discovery be transmitted electronically, when feasible?

Rule _____. Automatic Expungement

(a) Definitions

(a)(1) "AOC" means the Administrative Office of the Court.

(a)(2) "Bureau" means the Bureau of Criminal Identification of the Department of Public Safety.

(a)(3) "Clean slate eligible case" means the same as defined in Utah Code §77-40-102.

(a)(4) "Conviction" means a judgment by a criminal court on a verdict or finding of guilty after trial, a plea of guilty, or a plea of nolo contendere.

(a)(5) "Expunge" means to seal or otherwise restrict access to the individual's record when the record includes a criminal investigation, detention, arrest, or conviction.

(b) Cases eligible for automatic expungement

(b)(1) Records in the following case types may be expunged automatically:

(b)(1)(A) a case that resulted in an acquittal on all charges;

(b)(1)(B) except as provided in paragraph (b)(2), a case that is dismissed with prejudice; and

(b)(1)(C) a clean slate eligible case.

(b)(2) A case that is dismissed after completion of a plea in abeyance agreement is not eligible for automatic expungement.

(c) Identifying eligible cases

(c)(1) Once a month the AOC must identify for each court the cases that are eligible for automatic expungement. The AOC must separately identify the cases that are clean slate eligible.

(c)(2) A person may also submit a written request to the AOC to have the person's case included on the list of cases eligible for expungement. The request must include the person's name, court where the case is located, case number, and person's date of birth. The AOC must confirm eligibility before including the case on the list.

(d) Notice to prosecuting entities

(d)(1) The AOC must email a list of clean slate eligible cases to the entity that prosecuted the case. The information for each clean slate eligible case must include, at a minimum, the individual's first name, last name, date of birth, and case number.

(d)2) Every prosecuting entity in the state must provide to the AOC a single email address where notices will be sent. The prosecuting entity must immediately notify the AOC if they want the notices sent to a different email address.

(d)(3) The AOC is not required to send the prosecuting entity the lists of cases to be expunged under paragraphs (b)(1)(A) and (b)(1)(B).

(e) Objection by prosecuting entities

(e)(1) If the prosecuting entity objects to the expungement of a clean slate eligible case, the prosecuting agency must e-file an objection within 35 days of the date notice was sent under paragraph (c)(2). If an objection is received, the AOC must remove the case from the list of clean slate eligible cases.

(e)(2) Failure to properly e-file an objection will result in the objection being rejected.

(e)(3) After the period for objections has expired, the AOC will provide each court with a list of the remaining clean slate eligible cases.

(f) Expungement orders

(f)(1) Upon receiving the lists of cases eligible for automatic expungement, the court must issue an expungement order for each eligible case.

(f)(2) The AOC must provide copies of the expungement orders to the bureau and the prosecuting entity.

Effective _____