



Rule 16:

Obtaining Reverse Discovery

AVOIDING TRIAL BY AMBUSH

Disclosure prevents last minute surprises and enables the prosecution to make a full and thorough investigation of the merits of the defense.

- STATE V. PEREA, 2013 UT 68, ¶88.

Rule 16(c)

The defense shall disclose to the prosecutor such information as required by statute

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Alibi

- Utah Code 77-14-2

Insanity

- Utah Code 77-14-4

Entrapment

- Utah Code 76-2-303

Experts – Generally

- Utah Code 77-17-13

Experts – Mental State

- Utah Code 77-14-3

Alibi

Utah Code 77-14-2



Notice

- 10 days prior to Trial
- Must contain:
 - Location of Defendant
 - Names and Addresses of Witnesses

Penalty

- Witnesses may be excluded
- No exclusion of Defendant's own testimony about Alibi

Insanity

Utah Code 77-14-4



"Paying my fee will also help as evidence for our insanity defense."

Notice

- Not less than 30 days prior to trial.
- Written

Mental Examination

- Utah Code 77-16a-301
- Failure to fully cooperate with the examination bars expert testimony about defendant's mental illness at trial.

Entrapment

Utah Code 76-2-303



Notice

- Written Motion
- 10 days prior to trial, except for good cause

Hearing

Expert Witness - Generally

Utah Code 77-17-13

Notice

- Applies to any felony case
- Not less than 30 days before trial, 10 days prior to evidentiary hearing

Contents of Notice

- Name and Address of Expert
- A curriculum vitae for the Expert
- One of the following:
 - A copy of the Expert's report
 - A written explanation of the proposed testimony sufficient to give notice
 - A notice that the expert is available to cooperatively consult with the opposing party.

Failure to Provide Notice

- Continuance
- Sanctions may be imposed, if non-compliance is done in bad faith
- Exclusion occurs, only if the court finds a deliberate violation.

GREAT SCOTT!!

IT'S THE FUTURE!!

Expert Witness – Mental State

Utah Code 77-14-3



Notice

- *Any* trial or hearing.
- *Not less than* 30 days before trial, 10 days before hearing

Contents

- Name and Address of Expert
- Expert's curriculum vitae
- Copy of expert's report

Expert's Report

- Expert *shall* prepare a written report relating to the proposed testimony.
- If the report fails to adequately inform, then there should be a written explanation of the anticipated testimony, and a copy of any report prepared by the expert.

Remedy

- Continuance
- Other appropriate sanctions, if done in bad faith

Any other item of evidence

URCP 16(c)



Good Cause

- Rule 16(c) good cause means that “when requesting discovery from the defense, the prosecution need only demonstrate the materiality of the evidence to the issues to be raised at trial.” McNearney, at ¶ 11.

Investigation of Defense Merits / Prevent Surprise

State v. Perea, 2013 UT 68

Trial Courts Manage Discovery

- “District courts ***must*** manage discovery in such a way as to prevent unfair prejudice to either party”

Holding

- “Fairness afforded the State an opportunity to fully investigate the witnesses’ stories. Such a decision is not an abuse of discretion when it ‘prevents last minute surprises and enables the prosecution to make a full and thorough investigation of the merits of the defense.’”

Prepare Effective Cross- Examination

Discovery Minimizes Risk of Erroneous Judgment

- “Discovery, like cross-examination, minimizes the risk that a judgement will be predicated on incomplete, misleading, or even deliberately fabricated testimony.”
- “State’s interest in protecting itself against an eleventh-hour defense” is merely one component of the broader public interest in a full and truthful disclosure of critical facts.”
- “To vindicate that interest we have held that even the defendant may not testify without being subjected to cross-examination.”
- “The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth.” *Washington v. Texas*, 388 U.S. 14, 19 (1967)

Protect the Integrity of the Judicial Process

More than Prejudice to Prosecution

- In reaching the holding, the US Supreme Court stated that, “More is at stake than possible prejudice to the prosecution. We are also concerned about the impact on this kind of conduct on the integrity of the judicial process itself.”
- After all, the court, as well as the prosecutor, has a vital interest in protecting the trial process from the pollution of perjured testimony.
- “The defendant’s right to compulsory process is itself designed to [ensure that] judgments [are not] founded on a partial or speculative presentation of the facts. *Rules that provide for pretrial discovery of an opponent’s witnesses serve the same high purpose . . . [and] minimize [] the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony.*” Taylor v. Illinois 484 U.S. 400, 411. (1988)

Content of Motion for Reciprocal Discovery

Cite to Rule

- Utah R. Crim. P. 16(c)

Cite to State and Federal Precedent

- McNearney, Spry, Perea, Taylor v. Illinois, Washington v. Texas

Clearly Identify Requested Disclosures

- Enumerate and Specifically Categorize Requests
 - Witness Lists,
 - Exhibit Lists,
 - Access to physical evidence in possession of the defendant for purpose of inspection and testing

Establish Materiality to Each Request

Preemptively Address Privileges and Constitutional Challenges

Highlight State/City Disclosure to Defense

Obtain an Order

Written Order

- Prepare a proposed Order compelling the requested disclosures.

Findings

- Ensure that the Findings:
 - Address the materiality of the disclosures
 - The application of any privileges, if asserted by defense; and
 - State/City compliance with Defense disclosure requests.

Deadlines

Prospective Remedies/Sanctions



Common Objections to Reciprocal Discovery

“Did you not plan for this contingency? I mean the Starship Enterprise had a self-destruct button. I’m just saying.” – Saul Goodman

Right Against Self-Incrimination



What Does the Privilege Protect?

- The privilege against compulsory self-incrimination “adheres . . . to the person, not to information that may incriminate him.” *McNearney*, at ¶ 13.

Only Protects Against Testimonial Disclosure

- The privilege “protects only against forced individual’s disclosure of a ‘testimonial or communicative nature.’” *Id.*

Only Protects Against Incriminating Testimonial Disclosure

Self- Incrimination Continued

Consider the Implications of Utah R. Crim. P. 16(h)

- “When we consider that it is well-established that the State has the right to fingerprint the defendant, to photograph him, to examine him physically, to take samples of blood, hair and other like materials from his body, and to secure samples of his handwriting, *it can scarcely be argued that to ask for a list of witnesses he expect to produce at trial is an invasion of his constitutional right against self-incrimination.*” People v. Boyd, 74 A.D.2d 647, 425 N.Y.S.2d 134, 137 (App.Div.1980).

Due Process Violation



Wardius v. Oregon

- 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973).
- “It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.” *Id* at 476.

Application

- If the State/City requests reciprocal discovery from a defendant, the State/City must disclose to the Defense the same category of information.
- It is a two-way road, we cannot expect the Court to compel discovery if we have not disclosed the same category of evidence to the Defense.

Work-Product Privilege

What is Work-Product?

- (1) Documents and tangible things otherwise discoverable,
- (2) Prepared in anticipation of litigation or for trial,
- (3) By or for another party or by or for that party's representative.
- *Gold Standard, Inc. v. American Barrick Res. Corp.*, 805 P.2d 164, 168 (Utah 1990).

Ut. R. Civ. P. 81 and 26

- Ut. R. Civ. P. apply when “there is no other applicable statute or rule” (Rule 81).
- When analyzing the work-product privilege consider the Rule 26 required disclosures.

Work Product Privilege - Waiver

Waiver

- Like other privileges, it may be waived. U.S. v. Nobles, 422 U.S. 225, at 239.

What Constitutes Waiver?

- Electing to Present Witness
 - When Defense seeks to admit the testimony of witness, he waives the privilege with respect to matters covering the witness's testimony. Id. at 239-240.
- Utah R. Evid. 510
 - (1) Voluntarily Discloses or consents to disclosure of any significant part of the matter or communication, or
 - (2) Fails to take reasonable precautions against inadvertent disclosure.
- Gold Standard, Inc. v. American Barrick Resources Corp., 805 P.2d 164 (Utah 1990)

Attorney-Client Privilege

Utah Rule 504(b)

- Protects communications between attorney and client as confidential.

Definition of “Confidential Communication”

- “...[C]ommunication not intended to be disclosed to third persons...” UT. R. Evid. 504(a)(8).

Be Vigilant

Get a Scheduling Order

- “Unless otherwise provided, the defense attorney shall make all disclosures at least 14 days before trial or as soon as practicable.” Rule 16(d).

Enforce the Order

- Create a reminder to ensure discovery is provided.
- As disclosure deadline gets close, send written reminder to opposing attorney/party.
- Maintain records of efforts to obtain discovery.

File Notice of Non-Compliance

- Rule 16(g) – Bring the non-compliance to the attention of the court. Do so timely, don’t wait until the last minute.

Remedies for Non- Disclosure

Order to Compel Discovery

- Timing is Important

Grant a Continuance

- Ensure that you have adequate time to prepare to disclosed evidence.

Exclusion of Non-Disclosed Evidence

- Be careful – this may create an Ineffective Assistance of Counsel Claim.

Other Order the Court Deems Just

- This could include sanctions against counsel, not an order affecting the case.