in juror notebooks and, by the pre-trial conference or other date set by the court, shall make a joint submission to the court of items to be included in a juror notebook. In non-felony trials, juror notebooks shall be optional.

Part V. Time Schedules and Discovery Procedures

(a) Mandatory Discovery.

The furnishing of the items discoverable, referred to in Part I (a), (b) and (c) and Part II (b)(1), (c) and (d) herein, is mandatory and no motions for discovery with respect to such items may be filed.

(b) Time Schedule.

(1) In the event the defendant enters a plea of not guilty or not guilty by reason of insanity, or asserts the defense of impaired mental condition, the court shall set a deadline for such disclosure to the prosecuting attorney of those items referred to in Parts II (b) (1) and (c) herein, subject to objections which may be raised by the defense within that period pursuant to Part III (d) of this rule. In no case shall such disclosure be less than 35 days before trial for a felony trial, or 7 days before trial for a non-felony trial, except for good cause shown.

(2) If either the prosecuting attorney or the defense claims that discoverable material under this rule was not furnished, was incomplete, was illegible or otherwise failed to satisfy this rule, or if claim is made that discretionary disclosures pursuant to Part I (d) should be made, the prosecuting attorney or the defense may file a motion concerning these matters and the motion shall be promptly heard by the court.

(3) For good cause, the court may, on motion of either party or its own motion, alter the time for all matters relating to discovery under this rule.

(c) Cost and Location of Discovery.

The cost of duplicating any material discoverable under this rule shall be borne by the party receiving the material, based on the actual cost of copying the same to the party furnishing the material. Copies of any discovery provided to a defendant by court appointed counsel shall be paid for by the defendant. The place of discovery and furnishing of materials shall be at the office of the party furnishing it, or at a mutually agreeable location.

(d) Compliance Certificate.

(1) When deemed necessary by the trial court, the prosecuting attorney and the defense shall furnish to the court a compliance certificate signed by all counsel listing specifically each item furnished to the other party. The court may, in its discretion, refuse to admit into evidence items not disclosed to the other party if such evidence was required to be disclosed under Parts I and II of this rule.

(2) If discoverable matters are obtained after the compliance certificate is filed, copies thereof shall be furnished forthwith to the opposing party and, upon application to the court, the court may either permit such evidence to be offered at trial or grant a continuance in its discretion.

Source: Entire rule repealed and readopted March 15, 1985, effective July 1, 1985; Part I IP(a)(1), (a)(1)(I), and (b)(1) and Part V (d)(1) amended September 9, 1985, effective January 1, 1986; Part I (a)(1) and (b)(1) and Part III (b) amended and adopted September 4, 1997, effective January 1, 1998; Part IV (e) amended and Part IV (f) added June 25, 1998, effective January 1, 1999; Part IV (f) corrected, effective January 7, 1999; Part I (a)(1)(VI) corrected, effective March 2, 1999; Part I (a)(1)(I) and (a)(1)(VII), Part II (c), and Part V (a) and (b)(1) amended and Part I (a)(1)(VIII) and (d)(3) and Part II (b)(2) added November 4, 1999, effective January 1, 2000; entire rule amended and adopted May 17, 2001, effective July 1, 2001; entire rule amended and effective January 17, 2008; Part III (c) amended and effective April 6, 2009; Part I (b)(1), (b)(2), and (b)(3), Part II (c) and (d), Part IV (b)(3), and Part V (b)(1) amended and adopted December 14, 2011, effective July 1, 2012.

Cross references: For furnishing names and addresses of witnesses, see § 16-5-203, C.R.S.

ANNOTATION

I. General Consideration.
II. Disclosure to Defendant.
III. Disclosure to Prosecution.
IV. Regulation.
V. Procedure.

I. GENERAL CONSIDERATION.

Law reviews. For case note, "A Proposed Rule of Criminal Pretrial Discovery", see 49 U. Colo. L. Rev. 443 (1978). For article, "Attacking the Seizure — Over-coming Good Faith", see 11 Colo. Law. 2395 (1982). For article, "Governmental Loss or Destruction of Exculpatory Evidence: A Due Process Violation", see 12 Colo. Law. 77 (1983). For article, "Discovery and Admissibility of Police Internal Investigation Reports", see 12 Colo. Law. 1745 (1983). For comment, "'Twenty Questions' Doesn't Yield Due Process: Chaney v. Brown and the Continued Need to Open Prosecutor's Files in Criminal Proceeding", see 62 Den. U. L. Rev. 193 (1985). For comment, "Limiting Prosecutorial Discovery Under the Sixth Amendment Right to Effective Assistance of Counsel: Hutchinson v. People", see 66 Den. U. L. Rev. 123 (1988).

Trial court must rule on motion for disclosure of the names of confidential informants. A trial court cannot delay ruling on a defendant's motion for disclosure of the names of confidential informants, notwithstanding the agreement of the parties, on the theory that the motion would be moot if the court were to deny defendant's motion to suppress evidence because reasonable suspicion justified an investigatory stop even absent the information obtained from the confidential informants. The court must rule on the disclosure motion so that the basis for the investigatory detention can be considered in light of the totality of the circumstances. People v. Saint-Veltri, 945 P.2d 1339 (Colo. 1997).

Right to pretrial discovery was nonexistent under the common law. People ex rel. Shinn v. District Court, 172 Colo. 23, 469 P.2d 732 (1970); Roybal v. People, 177 Colo. 144, 493 P.2d 9 (1972); Sergent v. People, 177 Colo. 354, 497 P.2d 983 (1972).

Trial court's authority to grant discovery is limited to the categories expressly set forth in this rule. Richardson v. District Court, 632 P.2d 595 (Colo. 1981).

Scope of discovery prior to preliminary hearing is specifically limited by this rule. People v. Kingsley, 187 Colo. 258, 530 P.2d 501 (1975).

Categories of discoverable material do not include compelled physical examination of child victim of sexual abuse. People v. Chard, 808 P.2d 351 (Colo. 1991); People v. Melendez, 80 P.3d 883 (Colo. App. 2003), aff'd on other grounds, 102 P.3d 315 (Colo. 2004).

But rule is not designed to convert preliminary hearing into a mini trial. People v. Kingsley, 187 Colo. 258, 530 P.2d 501 (1975).

Defendant and prosecution granted independent rights. This rule is not conditional, but rather grants independent discovery rights to both the prosecution and the defendant. People v. District Court, 187 Colo. 333, 531 P.2d 626 (1975).

Exemption from discovery under the attorney work-product doctrine is intended to ensure the privacy of a party's attorney from unnecessary intrusion by opposing parties and counsel, but this privilege is not absolute; it is not personal to the client, and it can be waived by an attorney's course of conduct. People v. Small, 631 P.2d 148 (Colo. 1981).

The decision of whether to order disclosure is committed to the sound discretion of the trial court, and the court's exercise of that discretion is entitled to strong deference. People v. Vigil, 729 P.2d 360 (Colo. 1986).

Technical non-compliance with rule does not constitute reversible error, and evidence is generally not improperly withheld if the defense has knowledge of it. People v. Graham, 678 P.2d 1043 (Colo. App. 1983), cert denied, 467 U.S. 1216, 104 S. Ct. 2660, 81 L. Ed. 2d 366 (1984); People v. Rivers, 727 P.2d 394 (Colo. App. 1986).

Although prosecution violated this rule by the untimely disclosure of expert's report to defendant, it did not necessarily follow that the trial court's denial of defendant's motion for a continuance was reversible error, since failure to comply with discovery rules is not reversible error absent a demonstration of prejudice to the defendant. Salazar v. People, 870 P.2d 1215 (Colo. 1994).

The work product doctrine, although most frequently asserted as a bar to discovery in civil litigation, applies with equal, if not greater, force in criminal prosecutions. People v. District Court, 790 P.2d 332 (Colo. 1990); People v. Ullery, 964 P.2d 539 (Colo. App. 1997), aff'd in part and rev'd in part on other grounds, 984 P.2d 586 (Colo. 1999).

Witness statements in prosecutor's notes and work sheets of the prosecuting attorney or members of the prosecutor's staff are ordinarily considered non-discoverable work product because they are prepared for litigation. People v. District Court, 790 P.2d 332 (Colo. 1990).

Report of an interview of a witness by a lay investigator is not prosecutor's work product and, hence, is automatically discoverable under section (I)(a)(1)(I). People v. Alberico, 817 P.2d 573 (Colo. App. 1991).

Section 19-1-307 (2) does not provide equal access to social services records in a criminal case, and it changes the automatic disclosure process contemplated by section (I)(a)(1) of this rule. People v. Jowell, 199 P.3d 38 (Colo. App. 2008).

Section 19-1-307 (2)(f) limits defendant's access to items that the court, after an in camera review, determines necessary for the resolution of an issue. Therefore, defendant cannot expect automatic disclosure of records within the possession and control of prosecuting attorney. Instead, defendant must request an in camera review, identify the information sought, and explain why disclosure is necessary for resolution of an issue. To achieve the broadest possible disclosure, defendant should explain the relevance and materiality of the information sought. People v. Jowell, 199 P.3d 38 (Colo. App. 2008).

Prosecutor has full access to records while investigating a report of known or suspected incident of child abuse or neglect. Section 19-1-307 (2)(f) does not suspend prosecutor's obligation to disclose information that is materially favorable to defendant, but it does change it. The duty to disclose is subject to the in camera review process in § 19-1-307 (2)(f). Therefore, if the prosecutor believes a social services record contains information it must disclose, the prosecutor must ask the trial court to conduct an in camera review of the information to determine if disclosure is necessary for the resolution of an issue. If the trial court determines the information is necessary, then it is disclosed to the defendant. The prosecutor does not have the right to offer the material into evidence without first obtaining the trial court's approval. People v. Jowell, 199 P.3d 38 (Colo. App. 2008).

Section 19-1-307 (2)(f) places the trial court in the middle of a procedural issue that normally would have been handled by counsel through the automatic disclosure requirements under section (I)(a)(1) of this rule. The trial court must review the records to determine whether the records are necessary for the resolution of an issue. Although the determination of whether the records should be disclosed must be made on case-specific circumstances, there are three principles that apply generally. First, under due process considerations, the trial court must disclose any information that is materially favorable to defendant because it is either exculpatory or impeaching. Second, the trial court should disclose inculpatory information when the information would materially assist in preparing the defense. Finally, it may be significant, although not determinative, that the information would be otherwise subject to automatic disclosure under section (I)(a)(1) of this rule. People v. Jowell, 199 P.3d 38 (Colo. App. 2008).

Neither the state rules of criminal procedure, the federal constitution, nor any statute provided the trial court authority to grant the criminal defendant or anyone else access to a non-party's private home for an investigation without consent. Defendant sought an order allowing defense counsel and her investigator access to the private property of a non-party to view and photograph the crime scene. People in Interest of E.G., 2016 CO 19, 368 P.3d 946; People v. Chavez, 2016 CO 20, 368 P.3d 943.

For history of this rule, see People v. Adams County Court, 767 P.2d 802 (Colo. App. 1988).

Applied in Oaks v. People, 161 Colo. 561, 424 P.2d 115 (1967); People v. Couch, 179 Colo. 324, 500 P.2d 967 (1972); People v. Smith, 179 Colo. 413, 500 P.2d 1177 (1972); People v. Manier, 184 Colo. 44, 518 P.2d 811 (1974); People v. Smith, 185 Colo. 369, 524 P.2d 607 (1974); People v. Steed, 189 Colo. 212, 540 P.2d 323 (1975); People v. Pearson, 190 Colo. 313, 546 P.2d 1259 (1976); People v. Henderson, 38 Colo. App. 308, 559 P.2d 1108 (1976); People v. Bloom, 195 Colo. 246, 577 P.2d 288 (1978); Goodwin v. District Court, 196 Colo. 246, 588 P.2d 874 (1979); People v. Davenport, 43 Colo. App. 41, 602 P.2d 871 (1979); People v. Schlegel, 622 P.2d 98 (Colo. App. 1980); People v. Callis, 666 P.2d 1100 (Colo. App. 1982), aff'd in part and rev'd in part, 692 P.2d 1045 (Colo. 1984); Denbow v. Williams, 672 P.2d 1011 (Colo. 1983); People v. Aalbu, 696 P.2d 796 (Colo. 1985); People v. Madsen, 743 P.2d 437 (Colo. App. 1987).

II. DISCLOSURE TO DEFENDANT.

Remedial purpose of automatic disclosure requirement in section (I)(a)(1) is broader than merely to ensure disclosure of evidence known to prosecution but unknown to defense. Disclosure of evidence within scope of rule is required whether or not material to the case, whether or not requested by defense, and whether or not it pertains to witnesses endorsed by the defense or who would be called by prosecution only for rebuttal purposes. Rule is designed to avoid loss of defendants' rights through inadvertent failure to make timely requests and to minimize court's supervisory role in basic discovery process, and to this end disclosure must be automatic unless prosecution takes specified action. People v. Alberico, 817 P.2d 573 (Colo. App. 1991).

Written notification expressly required if prosecutor deems material not discoverable. People v. Alberico, 817 P.2d 573 (Colo. App. 1991).

This rule governs the obligation of the prosecutor to cooperate with the defendant in the securing of evidence. Thus the prosecutor is obligated to give the names and addresses

of witnesses as well as reports, statements, etc., of experts it intends to use. People v. Diefenderfer, 784 P.2d 741 (Colo. 1989).

Duty of prosecution and courts to disclose evidence favorable to defendant. It is the duty of both the prosecution and the courts to see that no known evidence in the possession of the state which might tend to prove a defendant's innocence is withheld from the defense before or during trial. Cheatwood v. People, 164 Colo. 334, 435 P.2d 402 (1967); People v. Millitello, 705 P.2d 514 (Colo. 1985); People v. Terry, 720 P.2d 125 (Colo. 1986).

The prosecution is obligated to disclose to the defendant evidence favorable to the accused. People v. Austin, 185 Colo. 229, 523 P.2d 989 (1974).

This rule does not conflict with § 18-6-403 (3)(b). Therefore the prosecution was required to provide the defense an opportunity to examine photographs under the same conditions as the prosecution. People v. Arapahoe County Court, 74 P.3d 429 (Colo. App. 2003).

Scope of discovery includes names, photographs, and statements. Where the defense seeks discovery, the defense should be given access to the names of those whose prints have been compared, photographs of the crime scene, and statements which the defendant has made prior to the time he testifies at trial. Hervey v. People, 178 Colo. 38, 495 P.2d 204 (1972).

This rule clearly grants defense counsel the right to obtain names of witnesses and any statements which they might have given prior to the preliminary hearing. People v. Kingsley, 187 Colo. 258, 530 P.2d 501 (1975).

This rule requires that every statement made by the accused which is in the possession or control of the district attorney and which relates in any way to the series of events from which the charges pending against the accused arose must be disclosed to the defense upon an appropriate motion. People v. McKnight, 626 P.2d 678 (Colo. 1981).

And appropriate portions of grand jury minutes. A prosecuting attorney shall disclose to defense counsel those portions of grand jury minutes containing testimony of the accused and relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial. Parlapiano v. District Court, 176 Colo. 521, 491 P.2d 965 (1971).

This rule permits discovery of grand jury testimony of a party. Robles v. People, 178 Colo. 181, 496 P.2d 1003 (1972).

Even where trial is upon a direct information. Examination of the grand jury testimony of a witness testifying at the trial is to be permitted whether the trial is upon an indictment or upon a direct information when the grand jury has not returned any indictment. Norman v. People, 178 Colo. 190, 496 P.2d 1029 (1972).

Disclosure not dependent on showing of particularized need. A disclosure of grand jury testimony should be granted without a showing of a particularized need. Parlapiano v. District Court, 176 Colo. 521, 491 P.2d 965 (1971); McNulty v. People, 180 Colo. 246, 504 P.2d 335 (1972).

Although automatic disclosure of grand jury testimony not required. The liberal discovery rights which have been granted to a defendant in this state do not guarantee automatic access to everything that transpires before the grand jury. Parlapiano v. District Court, 176 Colo. 521, 491 P.2d 965 (1971); People v. District Court, 199 Colo. 398, 610 P.2d 490 (1980).

Refusal to allow examination of grand jury testimony held not error. Robles v. People, 178 Colo. 181, 496 P.2d 1003 (1972).

Generally, defendant has no constitutional right to compel disclosure of a confidential informant, but consideration of fundamental fairness sometimes requires that identity of such informant be revealed. People v. Dailey, 639 P.2d 1068 (Colo. 1982); People v. Vigil, 729 P.2d 360 (Colo. 1986).

In determining whether the government's privilege of not disclosing informants should yield in a particular case, court must balance the public's interest in protecting the flow of information to law enforcement officials about criminal activity against the defendant's need to obtain evidence necessary for the preparation of a defense. People v. Bueno, 646 P.2d 931 (Colo. 1982); People v. Vigil, 729 P.2d 360 (Colo. 1986).

Defendant not entitled to the disclosure of informant based on assertion that his defense requires it, but such disclosure may be ordered only where the defendant has established a reasonable basis in fact to believe the informant is a likely source of relevant and helpful evidence to the accused. People v. Bueno, 646 P.2d 931 (Colo. 1982); People v. Vigil, 729 P.2d 360 (Colo. 1986).

A defendant is presumptively entitled to cross-examine a prosecution witness as to the witness's address and place of employment. Absent sufficient justification for withholding this information, a defendant's right to it is unqualified, and the defendant is under no obligation to provide reasons for seeking it. People ex. rel Dunbar v. District Court, 177 Colo. 429, 494 P.2d 841 (1972); People v. Thurman, 787 P.2d 646 (Colo. 1990).

The trial court, in exercising its sound discretion, is in the best position to assess the basis for and seriousness of the witness's apprehension. When such apprehension is expressed, the key consideration for a trial court in assessing a defendant's constitutional claim to a witness's identity, address or place of employment is whether in absence of that information the defendant will have sufficient opportunity to place

the witness in his proper setting. People v. Thurman, 787 P.2d 646 (Colo. 1990).

The rule that an adequate showing by the prosecution that the witness legitimately fears for his safety requires some showing in turn by the defendant that the disclosure is so material as to outweigh the matter of the safety of the witness followed by a balancing of interests by the trial court should not be interpreted as requiring a threshold demonstration by the defendant that the information to be developed from learning the witness's identity, address and place of employment would prove highly material. The defendant's burden extends only to showing that the confidential informant is a material witness on the issue of guilt and that nondisclosure would deprive the defendant of a fair opportunity to test the witness's credibility. People v. Thurman, 787 P.2d 646 (Colo. 1990); People v. Turley, 870 P.2d 498 (Colo. App. 1993).

A witness's assertion of concern for personal safety does not have a talismanic quality automatically giving the witness the right to withhold information about identity, address and place of employment. Rather, the proper resolution of such issues requires careful attention to the facts of each case and application of the law concerning the right of an accused to confront adverse witnesses. People v. Thurman, 787 P.2d 646 (Colo. 1990).

Witnesses' personal safety outweighs defendant's confrontation right, as evidenced by the delay in the disclosure of their identities until they had been placed under witness protection. Witnesses' former addresses and telephone numbers should not be disclosed. People v. District Court, 933 P.2d 22 (Colo. 1997).

Dismissal of an action may be ordered in proper circumstances if the government declines to disclose a confidential informant in accordance with the court's order. People v. Martinez, 658 P.2d 260 (Colo. 1983); People v. Vigil, 729 P.2d 360 (Colo. 1986).

Dismissal was not warranted where the evidence that the prosecution failed to disclose was not exculpatory to the defendant, and the trial court's proposed remedy was a continuance conditioned on defendant's waiver of speedy trial until the date of the continuance. People v. Loggins, 981 P.2d 630 (Colo. App. 1998).

Trial court properly granted defendant additional time at trial to review previously undisclosed bank records for which summaries had been provided. Material was not exculpatory to defendant, there was no prejudice to defendant, and the information was relevant to show what defendant did with the victim's money. People v. Pagan, 165 P.3d 724 (Colo. App. 2006).

The decision to order disclosure of a witness's address and place of employment was committed to the sound discretion of the trial court. If there is evidence in the record to support the trial court's order compelling disclosure despite the witness's apprehension, the prosecution's willful refusal to comply with that order was properly sanctioned by the trial court under part III (g). People v. Thurman, 787 P.2d 646 (Colo. 1990).

The trial court acted within the bounds of its discretion in dismissing an information against the defendants where no actual threat was made against a witness, the trial court attempted to accommodate all parties by limiting disclosure to defense counsel alone, both the witness's and place of employment were withheld, and without the sought-after information the defense could not place the witness in her proper setting. People v. Thurman, 787 P.2d 646 (Colo. 1990).

Dismissal was appropriate sanction where disclosure of investigator's report of interview of victim was not made until after victim had testified, defense was in the midst of presenting its case, and alternative sanction of striking victim's testimony would have been tantamount to dismissal. People v. Alberico, 817 P.2d 573 (Colo. App. 1991).

Written statements outside possession and control of prosecution cannot be discovered pursuant to this rule. Dickerson v. People, 179 Colo. 146, 499 P.2d 1196 (1972); People v. Garcia, 690 P.2d 869 (Colo. App. 1984).

However, statements in possession of police are within "possession or control" of the prosecuting attorney so as to meet the requirement of this rule. Ortega v. People, 162 Colo. 358, 426 P.2d 180 (1967).

Material in possession of the police is constructively in the possession of the prosecution. People v. Lucero, 623 P.2d 424 (Colo. App. 1980).

Offense report not within scope of discovery. An offense report, although signed by a complaining witness, is not within the scope of a pretrial discovery order as it is not a statement of a witness; it is, in fact, a compilation of information relating to the commission of crimes. People v. Morgan, 189 Colo. 256, 539 P.2d 130 (1975).

As internal police documents are not within purview of pretrial discovery order. People v. Morgan, 189 Colo. 256, 539 P.2d 130 (1975); Losavio v. Mayber, 178 Colo. 184, 496 P.2d 1032 (1972).

When contents of police records discoverable. Where the district attorney's office regularly receives information from police records, defense attorneys, including public defenders, are entitled to obtain such information in possession of prosecution. Losavio v. Mayber, 178 Colo. 184, 496 P.2d 1032 (1972).

Prosecution's failure to provide defendant with a written police incident report violated

this section, but a new trial was not required because the report was either cumulative to information provided to the defense or was immaterial to the outcome of the trial, and the judge allowed defendant a continuance to study the document and the opportunity to examine witnesses as to its contents. People v. Banuelos, 674 P.2d 964 (Colo. App. 1983).

Failure by prosecution to provide defendant statement codefendant made to federal drug enforcement administration agent harmless error because defendant was not tried jointly with codefendant who had already pled guilty and been sentenced prior to defendant's trial and because defendant knew of the statement and its contents but failed to request it. People v. Montalvo-Lopez, 215 P.3d 1139 (Colo. App. 2008).

Discovery costs. Prior to requiring the public defender's office to pay costs of copying a police officer's file for an in camera review by the court, the court should make the following specific findings: Was the defendant's subpoena unreasonable or oppressive and were the city's proffered concerns as to use and possible loss justified? The court should consider whether adequate safeguards could be provided for an initial in camera review of the original documents and whether any payment should be limited to actual costs. In doing so, the court must balance the government's interests against defendant's interests in disclosure. People v. Trujillo, 62 P.3d 1034 (Colo. App. 2002), rev'd on other grounds, 83 P.3d 642 (Colo. 2004).

Where defendant received forensics report linking him to tire slashing incident prior to trial and the court allowed the defendant to interview the report's introducing witness prior to testifying, court's admission of the evidence in an arson prosecution was not reversible error even though defendant claimed the evidence had not been disclosed to him. People v. Copeland, 976 P.2d 334 (Colo. App. 1998), aff'd on other grounds, 2 P.3d 1283 (Colo. 2000).

Notes of interviews with witnesses discoverable. This rule includes not only materials which have been signed or adopted by the government's witness, but also notes taken by officers when talking to the witness. Ortega v. People, 162 Colo. 358, 426 P.2d 180 (1967).

Defendant's right to discovery of a witness's statement includes the right to examine notes which are substantial recitals of the statement and were reduced to writing contemporaneously with the making of the statement. People v. Shaw, 646 P.2d 375 (Colo. 1982).

All that is required is that notes be substantially verbatim recitals of the oral statement. Ortega v. People, 162 Colo. 358, 426 P.2d 180 (1967); People v. Thatcher, 638 P.2d 760 (Colo. 1981).

Notes must not contain the interpretations, impressions, comments, ideas, opinions, conclusions, evaluations, or summaries of the person transcribing the notes. Ortega v. People, 162 Colo. 358, 426 P.2d 180 (1967).

Destruction of notes not necessarily violation of rule. Destruction of written notes made by a government agent during the taping of a phone conversation is not a violation of this rule when the substance of that conversation is set forth in the agent's formal report and made available to the defendant. People v. Alonzi, 40 Colo. App. 507, 580 P.2d 1263 (1978), aff'd, 198 Colo. 160, 597 P.2d 560 (1979).

Failure to disclose prosecutor's notes of an interview with a defense expert witness before the prosecutor relied on the notes when cross-examining the witness was harmless error, even if assumed to be a discovery violation, where the notes were provided to defense counsel during the cross-examination in time for redirect examination of the witness the next day. People v. Pasillas-Sanchez, 214 P.3d 520 (Colo. App. 2009).

Right to discover statements of prosecution witnesses not absolute. The defendant does not have an absolute right to discover statements of prosecution witnesses under any and all circumstances. People v. Smith, 185 Colo. 369, 524 P.2d 607 (1974).

Witness statements included in prosecution's notes and emails are not automatically discoverable. Those statements are only provided to the defense if they contain exculpatory information or if the trial court, exercising its discretion, finds the information is relevant, unavailable from any other source, and request is reasonable. People v. Vlassis, 247 P.3d 196 (Colo. 2011).

Court granted discretion to require disclosure. This rule vests in the trial court discretion to require disclosure prior to trial of any relevant material and information. People ex rel. Shinn v. District Court, 172 Colo. 23, 469 P.2d 732 (1970).

Trial court must exercise sound discretion in permitting discovery under part I (e)(1) (now (d)(1)), guided by the standards suggested in part I (e)(2) (now (d)(2)). People v. Maestas, 183 Colo. 378, 517 P.2d 461 (1973); People v. Smith, 185 Colo. 369, 524 P.2d 607 (1974).

And in granting discovery, court may enter appropriate protective orders under part III (d). People v. Smith, 185 Colo. 369, 524 P.2d 607 (1974).

And trial court's discovery ruling may consider judicial economy as long as constitutional rights are not violated. People v. Thatcher, 638 P.2d 760 (Colo. 1981).

Defendant must prove prejudice to show abuse of discretion. To show an abuse of discretion in not permitting discovery, the facts must reveal that the defendant was prejudiced.

People v. Macestas, 183 Colo. 378, 517 P.2d 461 (1973).

When court may refuse discovery of relevant testimony. It is within the sound discretion of the court to refuse to compel discovery of what may be relevant testimony where defense counsel had the opportunity and failed to institute timely discovery. People v. Thatcher, 638 P.2d 760 (Colo. 1981).

But discovery compelled when information of material importance to defense. Where the defense has made a specific request for certain information in the possession or control of the prosecution, discovery of that information is constitutionally compelled, not only when it is exculpatory, but also when it is of material importance to the defense. People v. Thatcher, 638 P.2d 760 (Colo. 1981); Chambers v. People, 682 P.2d 1173 (Colo. 1984).

Discovery material used for impeachment purposes is of material importance. The use of discovery material for impeachment purposes implicates the due process rights of the defendant and is of material importance to the defense. People v. Thatcher, 638 P.2d 760 (Colo. 1981); People v. Hamer, 689 P.2d 1147 (Colo. App. 1984).

Material to be used for impeachment purposes is subject to the discovery provisions of this rule. People v. Rivers, 727 P.2d 394 (Colo. App. 1986).

"Material" defined. In the context of a completed trial, "material," constitutionally, means evidence which, when evaluated in light of the entire record, likely would have affected the outcome of the trial. People v. Shaw, 646 P.2d 375 (Colo. 1982); People v. Hamer, 689 P.2d 1147 (Colo. App. 1984); People v. Wilson, 841 P.2d 337 (Colo. App. 1992).

And refusal to disclose such evidence mandates reversal. Where information sought on discovery by a defendant might have affected the outcome of the trial, failure to disclose that information mandates reversal of trial court's guilty verdict. People v. Thatcher, 638 P.2d 760 (Colo. 1981).

Minimal showing of necessity required of defendant. A defendant seeking disclosure must make a minimal showing of necessity, and mere speculation concerning the need for disclosure will not suffice. People v. McLean, 633 P.2d 513 (Colo. App. 1981).

Defense counsel to determine relevance and usefulness of statement to defense. Generally, defense counsel is the appropriate party to make the determination that a statement is relevant to the conduct of the defense. People v. Gallegos, 644 P.2d 920 (Colo. 1982).

Determination of usefulness of evidence under part I (c) (now (d)) is a defense function, not a prosecutorial function, as only the defense can determine what will be material and helpful to its case. People v. Smith, 185 Colo. 369, 524 P.2d 607 (1974).

And statement need not be admissible to be relevant. A witness' statement, to be relevant, need not contain information admissible at trial, as long as the contents of the statement are relevant to the conduct of the defense. People v. Gallegos, 644 P.2d 920 (Colo. 1982).

But must tend to prove or disprove fact of consequence. Information which would not tend to prove or disprove any fact that is of consequence to the defendant's guilt or innocence is not relevant and need not be disclosed under part I (a)(1)(I). People v. Gallegos, 644 P.2d 920 (Colo. 1982).

Whether nondisclosure is erroneous depends on all circumstances of case, the nature of the crime charged, and possible defenses, as well as the possible significance of the informant's testimony. People v. Peterson, 40 Colo. App. 102, 576 P.2d 175 (1977).

Since this rule imposes disclosure obligations for information only obtained before or during trial by the prosecution, the rule's disclosure obligation does not apply to information acquired in response to defendant's post-conviction claims. People v. Owens, 2014 CO 58M, 330 P.3d 1027.

Prosecution not required to furnish statements of anticipated witnesses. A discovery order does not impose an affirmative obligation on the prosecution to reduce the oral statements of anticipated witnesses to writing and to furnish the substance of their testimony to the defense. People v. Garcia, 627 P.2d 255 (Colo. App. 1980).

Section (a)(1) of part I specifically requires disclosure only of the substance of oral statements made by the accused, or, if a joint trial is to be held, by a codefendant, and, aside from these specified situations, additional disclosure of oral statements is not mandated. People v. Garcia, 627 P.2d 255 (Colo. App. 1980).

Prosecution fulfilled its discovery obligations by providing notice that officer would testify and providing officer's written report. Prosecution was not required to reduce the substance of the officer's anticipated testimony to writing and furnish it to the defense before trial. People v. Knight, 167 P.3d 141 (Colo. App. 2006).

Section (I)(a)(1)(I) requires the prosecution to provide the defense only with the written statements of witnesses or any written reports that quote or summarize oral statements made by witnesses. If the supreme court had intended the disclosure of unrecorded oral statements, then it would have so specified. People v. Denton, 91 P.3d 388 (Colo. App. 2003).

No abuse of discretion where trial court found prosecution had not committed a discovery violation by failing to disclose certain

oral statements that the victim made to a police officer and to the prosecutor. The victim's statements were not exculpatory, and nothing in the record suggests that the prosecutor or the police officer deliberately refrained from reducing the victim's statements to writing in order to avoid a discovery obligation. People v. Denton, 91 P.3d 388 (Colo. App. 2003).

When disclosure of rebuttal witness unnecessary. The requirement, contained in part (II)(c), that the prosecution disclose the identity of its rebuttal witnesses under certain circumstances, is inapplicable where the rebuttal testimony is not introduced to refute a defense, but is introduced solely to impeach the credibility of a defense witness. People v. Vollentine, 643 P.2d 800 (Colo. App. 1982).

The disclosure requirements of this rule are not applicable to impeachment testimony which does not contradict alibi evidence but does attack the credibility of defense witnesses on matters collateral to the alibi defense. People v. Muniz, 622 P.2d 100 (Colo. 1980).

And prosecution not required to disclose which witnesses will be called for rebuttal. Neither this rule nor § 16-5-203 specifically requires the prosecution to endorse or to disclose which of the endorsed witnesses it will call for rebuttal. People v. Hamrick, 624 P.2d 1333 (Colo. App. 1979), aff'd, 624 P.2d 1320 (Colo. 1981); People v. Avila, 944 P.2d 673 (Colo. App. 1997).

Disclosure of identity of confidential informant. The prosecution's privilege to refuse to disclose the identity of a confidential informant is subject to a defendant's right to disclosure of the identity of an informant when the informant's testimony or identity is relevant or helpful to the defense of the accused or is necessary to a fair determination of the cause. People v. McLean, 633 P.2d 513 (Colo. App. 1981).

When determining whether the identity of a confidential informant should be disclosed, the trial court must balance the needs of law enforcement officials to preserve the anonymity of the informant with the defendant's right to obtain evidence necessary for the preparation of his defense. People v. Gable, 647 P.2d 246 (Colo. App. 1982).

When informant's identity to be disclosed. The interests of a fair trial require disclosure of the informant's identity if the facts reveal that he is "so closely related" to the defendant as to make his testimony highly material. People v. Peterson, 40 Colo. App. 102, 576 P.2d 175 (1977).

When informant's identity not be disclosed. There was no prejudicial error in the denial of appellant's motion to disclose the informer's identity where the trial judge concluded that the public's and the informer's interest in preserving his anonymity outweighed appellant's interest in disclosure. People v. Mulligan, 193 Colo. 509, 568 P.2d 449 (1977).

This rule does not require the prosecution to specifically identify that a witness is an expert witness, although that is the better practice. People v. Greer, 262 P.3d 920 (Colo. App. 2011).

Under reciprocal discovery order, defendant was not entitled to disclosure of police interview with witness which concerned crime other than that with which the defendant was charged. People v. Green, 759 P.2d 814 (Colo. App. 1988).

Prosecution's duty is to keep in contact with witness to offense. The prosecution is under a duty to make reasonable and good faith efforts to keep in contact with an eye and ear witness to an alleged criminal offense from the time the decision to file charges is made. People v. Velasquez, 645 P.2d 850 (Colo. 1982); People v. Rodriguez, 645 P.2d 851 (Colo. 1982); People v. Wandel, 696 P.2d 288 (Colo. 1985), cert. denied, 474 U.S. 1032, 106 S. Ct. 592, 88 L. Ed. 2d 572 (1985).

However, this duty does not include the obligation to establish and employ a regularized method of maintaining contact with the informant. People v. Wandel, 696 P.2d 288 (Colo. 1985), cert. denied, 474 U.S. 1032, 106 S. Ct. 592, 88 L. Ed. 2d 572 (1985).

Lack of full name or current address not violation of disclosure obligation. Although the prosecution is obligated to provide all pertinent information in its possession which might assist the defense in locating the informant, if such information does not contain the informant's full name or current address, the disclosure obligation may, nonetheless, still be satisfied. People v. Velasquez, 645 P.2d 850 (Colo. 1982); People v. Rodriguez, 645 P.2d 851 (Colo. 1982).

Charges dismissed for failure to disclose informant's address. People v. Velasquez, 645 P.2d 850 (Colo. 1982); People v. Rodriguez, 645 P.2d 851 (Colo. 1982).

Prosecution must disclose to the defense any evidence within the prosecution's possession or control that tends to negate the guilt of the accused as to the offense charged, or tends to reduce the punishment therefor. People v. Bradley, 25 P.3d 1271 (Colo. App. 2001).

Tangible evidence must be preserved and made available to defendant, where it may assist defense. People v. Morgan, 199 Colo. 237, 606 P.2d 1296 (1980).

Requirements of part I (a)(1)(IV) (now (a)(1)(III)) met. Where the trial court denied a defense motion to allow the defense's expert to examine a sample of the alleged cocaine in the expert's lab, but did allow the defense expert to examine a sample of cocaine in the forensic laboratory at the Denver general hospital and also ordered the disclosure of the test results of

the people's expert, this met the requirements of part I (a)(1)(IV) (now (a)(1)(III)). People v. Brown, 185 Colo. 272, 523 P.2d 986 (1974).

Test to determine whether destruction of evidence violates due process. There is a three-prong test to determine whether the loss or destruction of evidence by the state, with the result that the defendant is denied access to that evidence, violates a defendant's right to due process of law: (1) Whether the evidence was suppressed or destroyed by the prosecution; (2) whether the evidence is exculpatory; and (3) whether the evidence is material to the defendant's case. People v. Garries, 645 P.2d 1306 (Colo. 1982).

For the imposition of a judicial sanction in connection with a defendant's due process claim based upon the loss or destruction of evidence, the record must show that the destroyed evidence is constitutionally material. People v. Shaw, 646 P.2d 375 (Colo. 1982). (See note above, with the catchline "'Material' defined.")

No due process violation where mere claim that evidentiary material could have been subjected to tests and a failure to preserve that evidence, unless an accused can show bad faith on the part of the police. People v. Wyman, 788 P.2d 1278 (Colo. 1990); People v. Apodaca, 998 P.2d 25 (Colo. App. 1999).

Failure to comply with this rule is not reversible error unless the withheld evidence was material to guilt or punishment. No due process violation unless the accused can show bad faith by the police or the prosecution. People v. Bradley, 25 P.3d 1271 (Colo. App. 2001).

Where testimony about destroyed evidence suppressed, defendant not entitled to dismissal of complaint. Where all physical evidence collected by law enforcement officers in the investigation of a crime was destroyed or released prior to the defendant's arrest, so it was unavailable to him at trial, and the defendant is granted an order suppressing testimony by officers about the missing evidence, he is not entitled to a dismissal of the complaint against him. People v. Archuleta, 43 Colo. App. 474, 607 P.2d 1032 (1979).

Discovery during trial of prior out-of-court statement. Under this rule defense counsel is provided with access to a witness' out-of-court statements immediately after the witness testifies on direct examination. Robles v. People, 178 Colo. 181, 496 P.2d 1003 (1972).

Notes of district attorney are not within ambit of this rule and are not to be furnished to defense counsel. Hopper v. People, 152 Colo. 405, 382 P.2d 540 (1963); Rapue v. People, 171 Colo. 324, 466 P.2d 925 (1970); Norman v. People, 178 Colo. 190, 496 P.2d 1029 (1972).

Prosecution's notes on voir dire are protected by the work product doctrine even under a Batson challenge. People v. Trujillo, 15 P.3d 1104 (Colo. App. 2000).

Record of witnesses' oral statement not protected as work product. Where the majority of notes are in substance a record of oral statements made by witnesses, such notes are not protected by the work-product exception. People v. Thatcher, 638 P.2d 760 (Colo. 1981).

Finding of denial of fair trial because of violation of rule. People v. Edgar, 40 Colo. App. 377, 578 P.2d 666 (1978).

Where district attorney learned of physician's opinion in an oral interview, and it appeared that the interview was not recorded in any manner, and the defense learned of physician's opinion before trial and did not request a continuance, the district attorney was under no duty to furnish the opinion to the defendant, and there was no prejudice to defendant. People v. Graham, 678 P.2d 1043 (Colo. App. 1983), cert. denied, 467 U.S. 1216, 104 S. Ct. 2660, 81 L. Ed. 2d 366 (1984).

A compelling reason or need for an involuntary psychological examination of a victim must be shown before the trial court will grant such a motion by the defense. The defendant's right to a fair trial must be balanced against the victim's privacy interests. People v. Chard, 808 P.2d 351 (Colo. 1991); People v. Turley, 870 P.2d 498 (Colo. App. 1993).

Defendant failed to show he was prejudiced by the late disclosure of the prosecution's expert's report where, at the time the report was disclosed, defendant had already obtained the services of an expert witness to examine evidence and 25 days still remained to review prosecution's expert's report and perform additional tests if desired. Salazar v. People, 870 P.2d 1215 (Colo. 1994).

Defendant's failure to move for continuance, after admission of incriminating evidence at trial, discredited any claim of prejudice arising from alleged discovery violation. People v. Wieghard, 727 P.2d 383 (Colo. App. 1986).

Mere speculation regarding the court's disposition of a motion for a continuance or to recall a witness does not obviate the defendant's duty to seek such procedures if the defendant is to base his claim of prejudice on the inability to prepare new theories of defense or to cross-examine past witnesses in light of previously undisclosed evidence. Salazar v. People, 870 P.2d 1215 (Colo. 1994).

Information in possession of detective concerning drug use and crimes of prosecution witness is covered by this rule, and failure of prosecution to disclose such information violates this rule even if prosecutor had no actual knowledge of the information. People v. District Court, 793 P.2d 163 (Colo. 1990).

Trial court's refusal to order the prosecution to obtain and disclose the criminal histories of all prosecution witnesses, including

police officers, was not in error. Trial court's order requiring the prosecution to disclose any criminal history of a police officer witness of which it is aware was also held to not be in error. People v. Fox, 862 P.2d 1000 (Colo. App. 1993).

The sanction for nondisclosure applies only against the prosecution and not against a co-defendant; a co-defendant in a joint trial should be able to use prior felony convictions to impeach the testimony of a defendant who chooses to testify. People v. Lesney, 855 P.2d 1364 (Colo. 1993).

No mistrial resulted when the prosecution refused to provide defendant with the readouts printed by the instruments used to reach the test results. This rule requires only that the expert's report and the results be provided, and defendant had the results for four months before trial and did not file a motion indicating the results were incomplete or inadequate. People v. Evans, 886 P.2d 288 (Colo. App. 1994).

Defendant's statement was not subject to the mandatory disclosure provisions of part I (a)(2), or the constitutional obligation to disclose exculpatory information where the trial court found defendant's testimony implausible and essentially made a finding of fact that the statement was not made. Salazar v. People, 870 P.2d 1215 (Colo. 1994).

Prosecution not required to disclose derivative trial exhibits of identical content that prosecution prepared from disclosed material. People v. Armijo, 179 P.3d 134 (Colo. App. 2007).

Protection against disclosure extends to opinion work product prepared by the prosecution in anticipation of any criminal prosecution. Trial court erred in ordering prosecution to disclose materials that the prosecution prepared in anticipation of a different but related criminal investigation. Court must conduct ex parte, in camera review to determine whether contested materials constitute opinion work product prepared in anticipation of a criminal prosecution. People v. Angel, 2012 CO 34, 277 P.3d 231.

Juvenile adjudications are not part of a witness's criminal history and therefore not subject to automatic disclosure. People v. Corson, 2016 CO 33, 379 P.3d 288.

Applied in People v. Shannon, 683 P.2d 792 (Colo. 1984); People v. Doss, 782 P.2d 1198 (Colo. App. 1989); People v. Cobb, 962 P.2d 944 (Colo. 1998).

III. DISCLOSURE TO PROSECUTION.

Part II (b) is constitutional on its face, as it does not violate the privilege against self-incrimination. People v. District Court, 187 Colo. 333, 531 P.2d 626 (1975).

Part II (c) is constitutional on its face, as it does not violate the privilege against self-incrimination. People v. District Court, 187 Colo. 333, 531 P.2d 626 (1975).

Trial court to determine whether discovery will violate defendant's constitutional rights. The trial court, in ruling on the prosecution's motions under this rule, must first determine whether discovery which has been objected to will constitute a violation of the defendant's constitutional rights. People v. District Court, 187 Colo. 333, 531 P.2d 626 (1975); People v. Castro, 854 P.2d 1262 (Colo. 1993).

A balancing approach may be used to measure the state's interest in enforcing discovery rules against the defendant's right to call witnesses in his favor. The factors considered in such approach include: (1) Whether the discovery violation was willful or in bad faith; (2) the materiality of the evidence excluded; (3) the extent to which the prosecution will be surprised or prejudiced; (4) the effectiveness of less severe sanctions; and (5) whether the defendant himself knew of or cooperated in the discovery violation. People v. Pronovost, 756 P.2d 387 (Colo. App. 1987).

Balancing approach applied in People v. Pronovost, 756 P.2d 387 (Colo. App. 1987).

Discovery of statements of nonexpert defense witnesses not authorized. Part II (c) neither explicitly nor implicitly authorizes trial courts to grant prosecution motions for pretrial discovery of statements of nonexpert defense witnesses. Richardson v. District Court, 632 P.2d 595 (Colo. 1981).

Scope of part II (c) does not purport to extend to work product. People v. District Court, 187 Colo. 333, 531 P.2d 626 (1975).

But discovery of defense theories and names of supporting witnesses permitted upon condition. By its direct and uncontradicted terms, part II (c) permits discovery of defense theories and the names of supporting witnesses only when the defendant intends to introduce them at trial. People v. District Court, 187 Colo. 333, 531 P.2d 626 (1975).

Demonstrative, nontestimonial evidence. While the privilege against self-incrimination does not extend to demonstrative evidence obtained from a defendant or from a witness, demonstrative evidence is limited to nontestimonial evidence such as fingerprints, blood specimens, handwriting examples, photographs and other evidence of similar character. Richardson v. District Court, 632 P.2d 595 (Colo. 1981).

When request for disclosure by prosecution invalid. The request for disclosure by the prosecution under this rule may be overbroad and, therefore, invalid if it seeks information which might serve as an unconstitutional link in a chain of evidence tending to establish the accused's guilt of a criminal offense. People v.

District Court, 187 Colo. 333, 531 P.2d 626 (1975); Richardson v. District Court, 632 P.2d 595 (Colo. 1981).

This rule governs a prosecution request for nontestimonial identification once judicial proceedings against a defendant have been initiated. People v. Angel, 701 P.2d 149 (Colo. App. 1985).

A prosecuting attorney has both a statutory and a constitutional obligation to disclose to the defense any material, exculpatory evidence he possesses; however, failure to disclose information helpful to the accused results in a violation of due process only where the evidence is "material" either to guilt or punishment. Salazar v. People, 870 P.2d 1215 (Colo. 1994).

More specifically, there must be a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Salazar v. People, 870 P.2d 1215 (Colo. 1994).

"Reasonable time" requirement of rule violated when defendant failed to respond to prosecution's specification for several months or until actual commencement of trial unless there is a showing of unusual circumstances. People v. Hampton, 696 P.2d 765 (Colo. 1985) (decided under former Crim. P. 12.1).

Factors for determining when exclusion of alibi testimony is proper are discussed in People v. Hampton, 696 P.2d 765 (Colo. 1985) (decided under former Crim. P. 12.1).

The trial court, after applying the factors for determining when exclusion of alibi testimony is proper, determined that the exclusion of the alibi evidence was appropriate under the facts of the case and the trial court's exercise of its discretionary authority will not be overturned on appeal because the trial court did not abuse its discretion. People v. Hampton, 758 P.2d 1344 (Colo. 1988) (decided under former Crim. P. 12.1).

No abuse of discretion when court prohibited defense witness from testifying when the defense did not disclose the witness within the time period in the rule and failed to articulate why the disclosure was made late. In addition, the witness was not a key witness, and the evidence that the witness was going to rebut was rebutted by another defense witness. People v. Carmichael, 179 P.3d 47 (Colo. App. 2007), rev'd on other grounds, 206 P.3d 800 (Colo. 2009).

Although a prosecutor's duty to disclose potentially exculpatory evidence is not limited by the circumstances of known defense theories or considerations of relevancy, reversible error did not exist since the only evidence linking gun to the shooting in question was its discovery in the back seat of the suspects' vehicle and there was no reasonable probability that had the evidence been disclosed, the result of the trial would have been different. Salazar v. People, 870 P.2d 1215 (Colo. 1994).

Although an alibi defense not an affirmative defense so as to place on the People the burden of proof to rebut, and trial court did not err by refusing a theory of case instruction treating alibi as an affirmative defense, defendant was entitled to a properly worded instruction setting forth his theory of the case. People v. Nunez, 824 P.2d 54 (Colo. App. 1991).

Notice of alibi is admissible as a prior inconsistent statement when a defendant testifies at trial in a manner inconsistent with such notice. People v. Lowe, 969 P.2d 746 (Colo. App. 1998).

Defendant's statement to psychiatrist that was provided to the prosecution under this rule loses its confidential nature and cross-examination of the defendant concerning such statements as prior inconsistent statements is proper impeachment, even if the psychiatrist did not testify at the defendant's trial. Use of such statements do not violate the attorney-client privilege or the right to effective assistance of counsel. People v. Lanari, 811 P.2d 399 (Colo. App. 1989), aff'd, 827 P.2d 495 (Colo. 1992).

Purpose of the rule is fulfilled by the entry of a not guilty plea followed by no further disclosure of defenses, which operates to inform the prosecution that the defense is a general denial. People v. Castro, 835 P.2d 561 (Colo. App. 1992), aff'd, 854 P.2d 1262 (Colo. 1993).

Nor does the rule require disclosure of intent to cross-examine prosecution witnesses. People v. Castro, 835 P.2d 561 (Colo. App. 1992), aff'd, 854 P.2d 1262 (Colo. 1993).

Exclusion of a defense witness by the court as a sanction against the defense attorney, for failing to disclose such witness to the prosecution in violation of this rule, was excessive and violated defendant's right to challenge a prosecution witness's credibility through cross-examination based on testimony that would have been given by the excluded witness. People v. Cobb, 962 P.2d 944 (Colo. 1998).

Although the trial court has broad discretion in deciding the appropriate course of action in response to a violation of this rule by the defense, it must consider: (1) The reason for and degree of culpability associated with the violation; (2) the extent of resulting prejudice to the other party; (3) any events after the violation that mitigate such prejudice; (4) reasonable and less drastic alternatives to exclusion; and (5) any other relevant facts. People v. Cobb, 962 P.2d 944 (Colo. 1998).

Because the error violated the defendant's right under the sixth amendment to confront the witnesses against him and caused material prejudice to his defense, the error was not

harmless beyond a reasonable doubt and required a new trial. People v. Cobb, 962 P.2d 944 (Colo. 1998).

Prosecution could not be sanctioned for police conduct in which it did not participate. Trial court may not preclude prosecution from applying for and obtaining order for nontestimonial identification evidence though blood and hair samples obtained by police through a warrantless search were suppressed. People v. Diaz, 55 P.3d 1171 (Colo. 2002).

IV. REGULATION.

Rule relates only to pretrial discovery and not to posttrial discovery. Roybal v. People, 177 Colo. 144, 493 P.2d 9 (1972).

Preservation of evidence upon motion for protective order. If the government seeks a protective order regarding grand jury testimony, the court should first examine "in camera" the material sought to be protected before making its ruling, and if material is withheld from the defendant under such an order, it should be sealed by the court and preserved for consideration on appeal. Parlapiano v. District Court, 176 Colo. 521, 491 P.2d 965 (1971).

Introduction of identification testimony within court's discretion. But where a trial judge, after considering the totality of the circumstances at an "in camera" hearing, permits the introduction of identification testimony, he does not abuse his discretion, and a reviewing court will not substitute its judgment for that of the trial court. People v. Knapp, 180 Colo. 280, 505 P.2d 7 (1973).

Trial court properly allowed witness endorsed as a perceiving witness to testify as an expert witness after defense raised the issue related to the expertise at trial. People v. Jowell, 199 P.3d 38 (Colo. App. 2008).

In camera review of documents obtained only by showings of necessity and undue hardship. Although section (f) of part III allows for in camera review of documents to determine whether they are covered by attorney work-product doctrine, the party seeking inspection in camera of confidential portions of the attorney's documents must show necessity and that obtaining the information through other means would cause undue hardship. People v. Madera, 112 P.3d 688 (Colo. 2005).

If, however, parties in a discovery dispute must resort to court intervention, the moving party must show that other means of resolving the dispute have been exhausted and that the requested relief is narrowly tailored to fit the implied waiver of the attorney-client privilege involved. People v. Madera, 112 P.3d 688 (Colo. 2005).

Sanction within discretion of trial court. Whether the sanction imposed by the trial court for failure to comply with section (c) of part II is appropriate, under the facts and circumstances of a case, is a matter which is within the sound discretion of the trial court. People v. Lyle, 200 Colo. 236, 613 P.2d 896 (1980); People v. Madsen, 743 P.2d 437 (Colo. App. 1987).

A trial judge has broad discretion in considering motions to endorse additional witnesses and fashioning remedies for violations of a discovery order under this rule. People v. District Court, 664 P.2d 247 (Colo. 1983).

Trial court need not prevent district attorney from using evidence that was not disclosed to defendant when the court recessed for the day to permit defense time to investigate evidence and the substance of the evidence was similar to other statements which had been disclosed. People v. Hammons, 771 P.2d 1 (Colo. App. 1988).

When exercising its discretion in fashioning remedies for violations of this rule, the trial court should impose the least severe sanction that will ensure full compliance with the court's discovery orders. People v. District Court, 793 P.2d 163 (Colo. 1990); People v. Castro, 854 P.2d 1262 (Colo. 1993); People v. Lee, 18 P.3d 192 (Colo. 2001).

The trial court should also take into account the reason why disclosure was not made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances. People v. District Court, 793 P.2d 163 (Colo. 1990); People v. Castro, 854 P.2d 1262 (Colo. 1993); People v. Lee, 18 P.3d 192 (Colo. 2001).

Sanction held to abridge right to fair trial. Discovery sanction which substantially prevents the negation of the prosecution's direct testimony, abridges defendant's right to a fair trial and constitutes an abuse of discretion. People v. Willis, 667 P.2d 246 (Colo. App. 1983).

Sanction held not to be abuse of discretion. An order preventing the district attorney from using certain evidence is a harsh sanction, but it is not necessarily an abuse of discretion. People v. District Court, 664 P.2d 247 (Colo. 1983).

Sanction of excluding presentation of evidence by a defendant is a matter of judicial discretion to be preceded by adequate inquiry into circumstances of defendant's noncompliance with court's discovery order and effect of exclusion. People v. Reger, 731 P.2d 752 (Colo. App. 1986).

Factors pertinent to sanction of excluding evidence for noncompliance with a discovery order include reason for and degree of culpability associated with failure to timely respond to prosecution's request for discovery, whether and to what extent nondisclosure prejudiced prosecution's opportunity effectively to prepare for trial, whether events occurring subsequent to noncompliance mitigate prejudice to pros-

ecution, whether there is a reasonable and less drastic alternative to preclusion of evidence, and any other relevant factors arising out of circumstances of the case. People v. Reger, 731 P.2d 752 (Colo. App. 1986).

Monetary sanction payable from public funds for violation of discover rules is beyond authority of district court. People v. District Court, 808 P.2d 831 (Colo. 1991).

Preclusion is proper method to assure compliance with discovery order. People v. Patterson, 189 Colo. 451, 541 P.2d 894 (1975).

Sanction of a continuance held to be abuse of discretion where delay was not attributable to the defendant and he was thereby denied his right to a speedy trial. People v. Castro, 835 P.2d 561 (Colo. App. 1992), aff'd, 854 P.2d 1262 (Colo. 1993).

Decision whether to continue trial is within court's sound discretion, even when a defendant asserts a need to prepare to meet unexpected or newly discovered evidence or testimony. Trial court properly denied defense motion for continuance where prosecution's toxicologist had been endorsed two months before trial and materials used by toxicologist during his testimony were made during trial. People v. Scarlett, 985 P.2d 36 (Colo. App. 1998).

A balancing approach may be used to measure the state's interest in enforcing discovery rules against the defendant's right to call witnesses in his favor. The factors considered in such approach include: (1) The reason for and the degree of culpability associated with the failure to timely respond to the prosecution's specification of time and place; (2) whether and to what extent the nondisclosure prejudiced the prosecution's opportunity to effectively prepare for trial; (3) whether events occurring subsequent to the defendant's noncompliance mitigate the prejudice to the prosecution; (4) whether there is a reasonable and less drastic alternative to the preclusion of alibi (or other defense) evidence; (5) and any other relevant factors arising out of the circumstances of the case. People v. Hampton, 696 P.2d 765 (Colo. 1985); People v. Pronovost, 773 P.2d 555 (Colo. 1989); cert. denied, 785 P.2d 611 (Colo. 1990).

Exclusion or suppression of exculpatory evidence which should have been disclosed by prosecution to defense does not further search for truth and is not merited by the possible deterrence of prosecutorial misconduct, where the prosecutor had no actual knowledge of the evidence, where the evidence is crucial to the case, where a continuance would cure any prejudice suffered by the defendant because of the violation of the rule, and where the prosecutor did not willfully act in bad faith. People v. District court, 793 P.2d 163 (Colo. 1990).

No prosecutorial misconduct exists where the prosecutor leaves it to the discretion of the potential witness as to whether the witness talks to the defendant's investigator. People v. Antunes, 680 P.2d 1321 (Colo. App. 1984).

It was an abuse of discretion to exclude DNA evidence when record supported prosecutor's explanation that she was complying with court's earlier directives, when such exclusion could have a potentially distorting effect on truth finding, and when record shows that continuance may have been adequate to cure any prejudice suffered by defendant. People v. Lee, 18 P.3d 192 (Colo. 2001).

It was an abuse of discretion to impose sanctions that were tantamount to dismissal of the charges where trial court had found no bad faith or willful violation of this rule and determined that dismissal would be inappropriate. People v. Daley, 97 P.3d 295 (Colo. App. 2004).

Defendant's counsel's decision to provide defendant with limited access to selected discovery materials, though the defendant wants to review all discovery materials, does not create a conflict warranting substitution of counsel. Counsel's sharing of some discovery materials with defendant and summarizing of other discovery materials for defendant were appropriate "other methods" for having defendant review discovery. People v. Krueger, 2012 COA 80, 296 P.3d 294.

V. PROCEDURE.

Discovery rules not applicable to extradition proceedings. Allowing full discovery in extradition proceedings would defeat the limited purpose of the habeas corpus hearing. Temen v. Barry, 695 P.2d 745 (Colo. 1984).

Evidentiary hearing on disclosure. Once a defendant has made an initial showing of the necessity for disclosure, the issue becomes an evidentiary matter for resolution by the trial court and an evidentiary hearing normally will be required. People v. McLean, 633 P.2d 513 (Colo. App. 1981).

Rule not guide as to when discovery to take place. This rule is only intended to create a cut-off time for the filing of discovery motions, and offers no guidance as to when the discovery should take place. People v. Quinn, 183 Colo. 245, 516 P.2d 420 (1973).

Procedure for exchange of statements from prosecution to defense counsel established. Howe v. People, 178 Colo. 248, 496 P.2d 1040 (1972).

Informally or through in camera proceedings, the trial court should have examined the requested medical files to determine which portions, if any, were defense counsel's work product and therefore entitled to protection from discovery. On completing the examination, the

trial court should have protected confidential or privileged material, only allowing disclosure of the files after defense counsel had an opportunity to excise any confidential or privileged material. People v. Ullery, 984 P.2d 506 (Colo. 1999).

The court erred by allowing the jurors to take juror notebooks home, but the error was not a structural error requiring reversal. The error was not a fundamentally serious error that would prevasively prejudice the entire of the proceedings. People v. Willcoxon, 80 P.3d 817 (Colo. App. 2002).

Failure to allow defense counsel to review juror notebooks prior to trial is harmless error if counsel is allowed to review the notebook during trial and make objections. People v. Baird, 66 P.3d 183 (Colo. App. 2002).

Jury notebooks are not to supplant the requirement of Crim. P. 30 that jurors be orally instructed prior to closing arguments. People v. Baenziger, 97 P.3d 271 (Colo. App. 2004).

Part V (c) applies only to materials that are discoverable and actually received by the requesting party. Any other reading would require a requesting party to pay for materials that requesting party might not be allowed to review. People v. Trujillo, 114 P.3d 27 (Colo. App. 2004).

District court erred in suppressing statements in a case in one county made by defendant during lawful investigation of a crime in another county. Because defendant effectively waived his fifth and sixth amendment right to counsel through a knowing and voluntary Miranda waiver as to the particular crime being investigated, there was no duty pursuant to part II of this rule for the officers in the second county to notify counsel in the first county of the time and place of the Crim. P. 41.1 identification procedure. This rule applies to judicial proceedings, and there was no judicial proceeding initiated against defendant in the second county for the crime being investigated. People v. Luna-Solis, 2013 CO 21, 298 P.3d 927.

Rule 17. Subpoena

In every criminal case, the prosecuting attorneys and the defendant have the right to compel the attendance of witnesses and the production of tangible evidence by service upon them of a subpoena to appear for examination as a witness upon the trial or other hearing.

(a) **For Attendance of Witnesses — Form — Issuance.** A subpoena shall be issued either by the clerk of the court in which case is filed or by one of counsel whose appearance has been entered in the particular case in which the subpoena is sought. It shall state the name of the court and the title, if any, of the proceedings, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein.

(b) **Pro Se Defendants.** Subpoenas shall be issued at the request of a pro se defendant, as hereinafter provided. The court or a judge thereof, in its discretion in any case involving a pro se defendant, may order at any time that a subpoena be issued only upon motion or request of a pro se defendant and upon order entered thereon. The motion or request shall be supported by an affidavit stating facts supporting the contention that the witness or the items sought to be subpoenaed are material and relevant and that the defendant cannot safely go to trial without the witness or items which are sought by subpoena. If the court is satisfied with the affidavit it shall direct that the subpoena be issued.

(c) **For Production of Documentary Evidence and of Objects.** A subpoena may also command the person to whom it is directed to produce the books, papers, documents, photographs, or other objects designated therein. The subpoenaing party shall forthwith provide a copy of the subpoena to opposing counsel (or directly to the defendant if unrepresented) upon issuance. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents, photographs, or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents, photographs, or objects or portions thereof to be inspected by the parties and their attorneys.

(d) **Service on a Minor.** Service of a subpoena upon a parent or legal guardian who has physical care of an unemancipated minor that contains wording commanding said parent or legal guardian to produce the unemancipated minor for the purpose of testifying before the court shall be valid service compelling the attendance of both said parent or

legal guardian and the unemancipated minor for examination as witnesses. In addition, service of a subpoena as described in this subsection shall compel said parent or legal guardian either to make all necessary arrangements to ensure that the unemancipated minor is available before the court to testify or to appear in court and show good cause for the unemancipated minor's failure to appear.

(e) Service. Unless service is admitted or waived, a subpoena may be served by the sheriff, by his deputy, or by any other person who is not a party and who is not less than eighteen years of age. Service of a subpoena may be made by delivering a copy thereof to the person named. Service may also be made in accordance with Section 24-30-2104(3), C.R.S. Service is also valid if the person named has signed a written admission or waiver of personal service, including an admission or waiver signed using a scanned or electronic signature. If ordered by the court, a fee for one day's attendance and mileage allowed by law shall be tendered to the person named if the person named resides outside the county of trial.

(f) Place of Service.

(1) **In Colorado.** A subpoena requiring the attendance of a witness at a hearing or trial may be served anywhere within Colorado.

(2) **Witness from Another State.** Service on a witness outside this state shall be made only as provided by law.

(g) For Taking Deposition — Issuance. A court order to take a deposition authorizes the issuance by the clerk of the court of subpoenas for the persons named or described in the order.

(h) Failure to Obey Subpoena.

(1) **Contempt.** Failure by any person without adequate excuse to obey a duly served subpoena may be deemed a contempt of the court from which the subpoena issued. Such contempt is indirect contempt within the meaning of C.R.C.P. 107. The trial court may issue a contempt citation under this subsection (1) whether or not it also issues a bench warrant under subsection (2) below.

(2) **Trial Witness — Bench Warrant.**

(A) When it appears to the court that a person has failed without adequate excuse to obey a duly served subpoena commanding appearance at a trial, the court, upon request of the subpoenaing party, shall issue a bench warrant directing that any peace officer apprehend the person and produce the person in court immediately upon apprehension or, if the court is not then in session, as soon as court reconvenes. Such bench warrant shall expire upon the earliest of:

(i) submission of the case to the jury; or

(ii) cancellation or termination of the trial.

(B) Upon the person's production in court, the court shall set bond.

Source: (d) amended June 19, 1986, effective January 1, 1987; (c) amended and effective October 31, 1996; (d) to (h) amended November 4, 1999, effective January 1, 2000; entire rule amended and effective September 4, 2003; (e) amended and adopted October 15, 2009, effective January 1, 2010; (h) amended and adopted April 23, 2012, effective July 1, 2012; (e) amended and effective May 15, 2013; (e) amended and effective November 3, 2015.

Cross references: For fees of witnesses, see §§ 13-33-102 and 13-33-103, C.R.S.

ANNOTATION

A defendant is not entitled to issue ex parte subpoenas duces tecum by leave of the court. The fifth and sixth amendments to the federal constitution do not give the defendant the right to engage in this type of discovery without providing the information to the prosecution. People v. Baltazar, 241 P.3d 941 (Colo. 2010).

Effect of failure of subpoenaed witness to appear. Under some circumstances, failure of court to grant continuance or to order mistrial when witness who has been subpoenaed fails to appear requires reversal. People v. Lee, 180 Colo. 376, 506 P.2d 136 (1973).

A trial court does not abuse its discretion in

denying a continuance because the defendant's psychiatric witness who had not been served with a subpoena failed to appear. People v. Mann, 646 P.2d 352 (Colo. 1982).

Order of court should be required before a subpoena duces tecum is issued. Digiallonardo v. People, 175 Colo. 560, 488 P.2d 1109 (1971).

During the course of a criminal prosecution, the prosecution may compel production of telephone and bank records through the use of a subpoena duces tecum so long as the defendant has the opportunity to challenge the subpoena for lack of probable cause. Use of a subpoena duces tecum for such records is not an unreasonable search and seizure provided that it is supported by probable cause and is properly defined and executed. People v. Mason, 989 P.2d 757 (Colo. 1999).

Probable cause for issuance of a subpoena duces tecum for obtaining telephone and bank records exists if there is a reasonable likelihood that the evidence sought exists and that it would link the defendant to the crime charged. People v. Mason, 989 P.2d 757 (Colo. 1999).

District attorney has standing to challenge defense subpoena of third party. As the prosecuting party, the district attorney has an independent interest in ensuring the propriety of third-party subpoenas as part of the management of the case and the prevention of complainant or witness harassment through improper discovery. People v. Spykstra, 234 P.3d 662 (Colo. 2010).

To withstand challenge to criminal pretrial third-party subpoena, defendant must demonstrate: (1) A reasonable likelihood that the subpoenaed materials exist, by setting forth a specific factual basis; (2) that the materials are evidentiary and relevant; (3) that the materials are not otherwise procurable reasonably in advance of trial by the exercise of due diligence; (4) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (5) that the application is made in good faith and is not intended as a general fishing expedition. People v. Spykstra, 234 P.3d 662 (Colo. 2010).

In addition to this basic test, for subpoenas issued for materials that may be protected by privilege or a right to confidentiality, a balancing of interests is necessary and the defendant must make a greater showing of need. In camera review may be necessary in some instances, but is not mandated. People v. Spykstra, 234 P.3d 662 (Colo. 2010).

District attorney has standing to move to quash defense subpoena of alleged victim to appear at preliminary hearing. The district attorney has an independent interest in ensuring the propriety of subpoenas and in preventing witness harassment. People v. Bros., 2013 CO 31, 308 P.3d 1213.

Trial court abused discretion in failing to rule on motion to quash witness subpoena prior to preliminary hearing. Court may quash witness subpoena prior to hearing prosecution's evidence at preliminary hearing. With respect to a defense subpoena of a child victim, the prosecution indicated that the child's testimony would not be required for the probable cause determination and that the child could suffer harm by preparing for and attending the preliminary hearing, even if not ultimately required to testify. People v. Bros., 2013 CO 31, 308 P.3d 1213.

Witnesses for indigent defendants. The expenses of obtaining the testimony of witnesses for an indigent defendant must be paid by the state. People v. McCabe, 37 Colo. App. 181, 546 P.2d 1289 (1975).

Defendant must establish indigency to satisfaction of court. People v. McCabe, 37 Colo. App. 181, 546 P.2d 1289 (1975).

No authority to quash properly issued subpoena. There is no authority under this rule to quash a subpoena if the district attorney has complied with the technical requirements. People v. Ensor, 632 P.2d 641 (Colo. App. 1981).

Mailing a subpoena to a witness, without more, does not comply with the requirements in section (e). The record does not indicate that the prosecution exercised diligence in trying to obtain the witness' presence. People v. Stanchieff, 862 P.2d 988 (Colo. App. 1993).

Subpoena served by mail insufficient to invoke contempt. A subpoena served by mail, pursuant to an administrative order, is insufficient to invoke the sanction of contempt under section (h). People v. Mann, 646 P.2d 352 (Colo. 1982).

For in camera examination of subpoenaed bank records, see Pignatiello v. District Court, 659 P.2d 683 (Colo. 1983).

Discovery costs. Prior to requiring the public defender's office to pay costs of copying a police officer's file for an in camera review by the court, the court should make the following specific findings: Was the defendant's subpoena unreasonable or oppressive and were the city's proffered concerns as to use and possible loss justified? The court should consider whether adequate safeguards could be provided for an initial in camera review of the original documents and whether any payment should be limited to actual costs. In doing so, the court must balance the government's interests against defendant's interests in disclosure. People v. Trujillo, 62 P.3d 1034 (Colo. App. 2002), rev'd on other grounds, 83 P.3d 642 (Colo. 2004).