

MEMORANDUM

To: The Colorado Municipal Court Rules Subcommittee

From: Laurie L Cole, Attorney at Law

Date: October 11, 2019

Re: COMMENTS ABOUT C.M.C.R. 216

I write to express support for a revised Municipal Court Rule 216. As a defense attorney, I have experienced significantly divergent discovery disclosure in different jurisdictions. The current rule does not ensure fairness across jurisdictions. The accused in some jurisdictions and courtrooms receive greater pretrial disclosure based upon each jurisdiction's or court's differing orders and/or city attorneys' "open file" policies. The result is different standards of justice and "due" process among the municipalities in Colorado. Discovery Disclosure should be standard and mandated across all municipalities in Colorado to ensure equal protection and due process.

REASONS TO CHANGE C.M.C.R. 216:

1. Accused "domestic violence offenders" in municipal court are currently entitled to less disclosure than domestic violence offenders in state court. However, the consequences of a conviction are significant, whether in state court or municipal court. Municipal ordinance violations carry up to three hundred and sixty-four days in jail in many jurisdictions. A municipal ordinance conviction which has a factual basis of domestic violence can be used to aggravate a subsequent domestic violence misdemeanor to a felony in state court (C.R.S. §18-6-801 (7)). The underlying municipal ordinance conviction used to aggravate a misdemeanor is often obtained with fewer discovery disclosure requirements than in state court. For example, Under C.M.C.R. 216, the prosecution is not required to disclose a witness' criminal history to the defense. In state court, C.R.Crim. P. 16 requires disclosure of witnesses' criminal histories. The discrepancy between Rule 16 and Rule 216 increases the likelihood that an accused who is facing an aggravated domestic violence charge under C.R.S §18-6-801(7) in state court would not have known about the complaining witness' had out-of-state convictions for felonies, domestic violence, or dishonesty, when the accused was tried for the underlying offense of domestic violence in municipal court. The accused may only learn about a complaining witness' out-of-state felony conviction, years *after* he or she went to trial on the municipal ordinance violation. Failure to disclose impeachment information causes reversal of a conviction if the failure to disclose the impeachment information affected the outcome of a trial, and the defendant could not have discovered the information

through diligent efforts. Defense attorneys do not have access to NCIC. Failure to disclose such information is error (though not always grounds for overturning a conviction), and it remains potentially a *Brady* violation. Therefore, disclosure should be mandated by the rules. Equal protection and due process are implicated.

2. Assault is a serious crime, whether it is charged in municipal court, county court, or district court. A conviction for domestic violence assault imposes a life-time ban on the right to carry a firearm. The right to full disclosure in preparation of trial is essential to due process. The risk of erroneous conviction is tremendous, without full disclosure.
3. Some municipalities also have ordinances which are similar to child abuse. A conviction for an offense like child abuse often results in exclusion from professions such as day care, teaching, and health care. An erroneous conviction would be devastating. Having less disclosure may result in erroneous conviction.
4. Currently, some jurisdictions read CMCR 216 literally, despite guidance from the Colorado Court of Appeals:

“The municipal rules by their own terms are intended “to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.” C.M.C.R. 202. To this end they are to be read as a whole and liberally construed. *Patterson v. Cronin*, 650 P.2d 531 (Colo.1982); see *Rowe v. Watered Down Farms*, 195 Colo. 152, 576 P.2d 172 (1978).”

City of Englewood by & on Behalf of People v. Mun. Court In & For City of Englewood, 687 P.2d 521, 522 (Colo. App. 1984).

When the CMCR is read literally, some municipal courts have denied the discovery of evidence because it is in the police department’s possession, rather than in the prosecution’s possession, despite case law to the contrary. Some courts do not turn to C.R.Crim.P. 16 for guidance, though the Municipal Rules permit it. This creates an unfair advantage for the prosecution and denies the accused the right to prepare an adequate defense.

TIMING OF DISCLOSURE

1. The timing of disclosure should be mandated, with exceptions for good cause. Many times, video recordings and photographs are not disclosed to the defense until a few days before trial. This negatively impacts the accused person’s ability to confront the evidence against him or her. Disclosure within seven to ten days of the first appearance before a judge, is appropriate because there is a twenty-one-day deadline for filing a request for a jury trial.
2. The timing for defense should be one week before trial. The defense needs exceptions for good cause, as well, because investigation by the defense occurs late in the process, after discovery has been provided, downloaded (a time-consuming process), or copied (also time-consuming), and after meetings with clients have occurred at the jail or the in the office. Contacting witnesses takes time and often, several attempts.

Finally, the argument that “it is difficult to provide discovery early in the process because some defendants do not want it or will plead guilty without it,” misses the point of due process. It permits some jurisdictions to hinder the ability of the accused to confront the evidence against him. Delay in providing discovery runs the risk the accused will lose the ability to uncover exculpatory evidence (i.e. without early discovery providing details about the evidence against the accused, the defense is often deprived of the opportunity to obtain other video evidence which is potentially exculpatory, because it is recorded over every thirty or sixty days by private businesses, or to obtain witnesses because they disappear.). Therefore, Rule 216 should be changed.

Thank you for your consideration of this memorandum.

Sincerely,

/s/ Laurie L Cole

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