

June 13, 2019

The Honorable Joel Blue  
Guernsey County Prosecuting Attorney  
627 Wheeling Avenue  
Cambridge, Ohio 43725

SYLLABUS:

2019-017

1. Providing discovery to defense counsel through the Matrix system or permitting defense counsel to inspect and copy discovery material at the prosecutor's office both satisfy a prosecutor's obligations under Crim. R. 16(B) to provide copies or photographs of discovery material or permit defense counsel to copy discovery material upon demand.
2. A county prosecutor is not required to provide defense counsel with discovery in a particular format, so long as the prosecutor provides copies or photographs of discovery material to defense counsel or permits defense counsel to inspect and copy such material at the prosecutor's office.
3. A court may, in a particular case, order a prosecutor to provide discovery to defense counsel in a particular format, such as on paper or a thumb drive. The court's order is subject to an abuse-of-discretion standard of review.
4. Whether a trial court may adopt a local rule requiring court-appointed defense attorneys to utilize the Matrix system requires an opinion as to the propriety, interpretation, and application of such a rule, and falls squarely within the province of the judicial branch. As such, and, in view of the constitutional doctrine of separation of powers, the Attorney General's Office will refrain from addressing this inquiry.
5. Whether the adoption of a particular local rule would lead to the appearance of judicial impropriety is a question the consideration of which is reserved to the advisory opinion function of the Ohio Board of Professional Conduct. The Attorney General's office will, accordingly, refrain from opining on such a question.



# DAVE YOST

OHIO ATTORNEY GENERAL

Opinions Section  
Office 614-752-6417  
Fax 614-466-0013

30 East Broad Street, 15<sup>th</sup> Floor  
Columbus, Ohio 43215  
[www.OhioAttorneyGeneral.gov](http://www.OhioAttorneyGeneral.gov)

June 13, 2019

OPINION NO. 2019-017

The Honorable Joel Blue  
Guernsey County Prosecuting Attorney  
627 Wheeling Avenue  
Cambridge, Ohio 43725

Dear Prosecutor Blue:

You have requested an opinion regarding the applicability of Rule 16 of the Ohio Rules of Criminal Procedure to the Matrix system. Criminal Rule 16 governs the discovery process in criminal cases. Matrix is a program that allows prosecuting attorneys and criminal defense attorneys to communicate with one another electronically during the discovery process. A defense attorney may make a demand for discovery through the Matrix system, and the prosecuting attorney may respond through Matrix. You have indicated that your office prefers to use the Matrix system, and would like to make it a systematic part of the discovery process. You indicate that, historically, your office has provided discovery in paper form or in electronic format, such as on a thumb drive, or permitted defense counsel to inspect and copy discovery material at your office. Under these circumstances, you ask the following five questions:

1. Does the use of Matrix comply with Crim. R. 16? Alternatively, does permitting defense counsel to inspect and copy discovery material at the prosecutor's office fully comply with Crim. R. 16?
2. Is our office required to comply with a defense attorney's request that discovery be provided in a specific format?
3. Does a court have authority to require our office to provide discovery in a specific format, such as on a thumb drive or paper, or in a format other than Matrix or copying and inspecting discovery material at our office?
4. Does a court have authority to adopt a local rule requiring defense attorneys to use Matrix if the attorneys wish to accept court appointments to criminal, juvenile, and Child Support Enforcement Agency (CSEA) cases?

5. If the court has authority to adopt such a local rule, would the adoption of the rule raise issues as to the court's impartiality on motions regarding discovery?

**Question 1: Use of Matrix and Compliance with Crim. R. 16**

Criminal Rule 16 provides, in relevant part, as follows:

**(A) Purpose, Scope and Reciprocity.** This rule is to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large. All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal. Once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures.

**(B) Discovery: Right to Copy or Photograph.** Upon receipt of a written demand for discovery by the defendant, and except as provided in division (C), (D), (E), (F), or (J) of this rule, *the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph*, the following items [omitted here] related to the particular case indictment, information, or complaint, and which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, or reasonable available to the state, subject to the provisions of this rule:

...

**(L) Regulation of discovery.**

(1) The trial court may make orders regulating discovery not inconsistent with this rule.

Crim. R. 16 (emphasis added). Accordingly, Crim. R. 16 provides that a prosecutor shall provide discovery to a criminal defendant upon written demand of the defendant. The provision of discovery is to be effected by providing copies or photographs of the discovery material, or by permitting defense counsel to copy or photograph the discovery material. The rule enumerates several categories of discovery that must be provided to the defendant upon demand, including “[a]ny written or recorded statement by the defendant,” Crim. R. 16(B)(1), and “[a]ny evidence favorable to the defendant and material to guilt or punishment.” Crim. R. 16(B)(5). The rule gives the court authority to issue orders regulating discovery that are not contrary to Crim. R. 16. *See* Crim. R. 16(L)(1). In general, “[t]he philosophy of the Criminal Rules is to remove the element of gamesmanship from a trial. The purpose of discovery rules is to prevent surprise and the secreting of evidence favorable to one party. The overall purpose is to produce a fair trial.”

*State v. Palmer*, 112 Ohio St. 3d 457, 2007-Ohio-374, 860 N.E.2d 1011, at ¶ 18 (internal quotation marks and citations omitted).

Ohio courts have been relatively silent on a prosecutor's particular obligations under Crim. R. 16. Accordingly, we look for guidance to federal cases interpreting the analogous provision under the Federal Rules of Criminal Procedure. "Rule 16 'is intended to prescribe the minimum amount of discovery to which the parties are entitled, and leaves intact a court's discretion to grant or deny the broader discovery requests of a criminal defendant.'" *United States v. Richards*, 659 F.3d 527, 543 (6th Cir. 2011) (quoting *United States v. Jordan*, 316 F.3d 1215, 1249 n.69 (11th Cir. 2003)). Discovery in criminal cases is generally more limited than discovery in civil cases. See *United States v. White*, No. 15-6193, 2016 U.S. Dist. LEXIS 67739, at \*3-4 (D. Md. May 24, 2016). For example, the Sixth Circuit has determined that a trial court does not abuse its discretion when it declines to order prosecutors to provide an organization or index to voluminous discovery. The court has stated that "Federal Rule of Criminal Procedure 16, which governs discovery in criminal cases, is entirely silent on the issue of the form that discovery must take; it contains no indication that documents must be organized or indexed." *United States v. Warshak*, 631 F.3d 266, 296 (6th Cir. 2010). Noting the lack of authority on the question of a prosecutor's particular discovery obligations under Rule 16, the court concluded that "if we are to find that the district court abused its discretion, we must do so despite a pronounced dearth of precedent suggesting that the district court was wrong." *Id.* Therefore, although Rule 16 sets forth the minimum requirements of a prosecutor when providing discovery to a criminal defendant, both the state and federal rules are silent on what is specifically required.

As noted above, Matrix is a system that allows defense counsel to make discovery demands and prosecutors to share discovery material with defense counsel through the system. The prosecutor's office pays for use of the system. The system is available to defense counsel to use without charge, so long as the attorney creates an account on the Matrix system and has access to e-mail. Prosecutors may share videos, photographs, and other discovery material through the system. Defense counsel is then alerted electronically that the prosecutor's office has shared material and the defense attorney can then view the material by logging on to his or her Matrix account. We are of the opinion that fulfilling discovery demands through the Matrix system satisfies a prosecutor's obligations under Crim. R. 16 to "provide copies or photographs" of discovery material upon demand. Alternatively, a prosecutor may permit defense counsel to inspect and copy discovery material at the prosecutor's office in a manner, and pursuant to arrangements, reasonably fashioned to accomplish the discovery requirements under the rule. Such inspection and copying at the prosecutor's office satisfies the prosecutor's obligations under Crim. R. 16 to "permit counsel for the defendant to copy or photograph" discovery material upon demand.<sup>1</sup>

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<sup>1</sup> It is our opinion that a prosecutor must provide defense counsel the option to inspect and copy discovery material at the prosecutor's office. Prior to July 1, 2010, a prosecutor had only to permit inspection of discovery material, rather than provide copies or photographs of discovery material. The rule was amended to expand the prosecutor's duties to provide copies or

**Question 2: Particular Format of Discovery**

There is little authority that affords guidance on the particular format criminal discovery must take under Crim. R. 16. Likewise, the federal counterpart to Crim. R. 16, Rule 16 of the Federal Rules of Criminal Procedure, is “entirely silent on the issue of the form that discovery must take.” *United States v. Warshak*, 631 F.3d 266, 296 (6th Cir. 2010). Other federal courts agree with the Sixth Circuit. See *United States v. Phillips*, No. 2:14-CR-76, 2015 U.S. Dist. LEXIS 193687, at \*12 (E.D. Tenn. Sept. 25, 2015) (“[w]hile Rule 16 provides what should be disclosed, it does not speak to the form that the disclosure should take”); *United States v. Briggs*, No. 10CR184S, 2011 U.S. Dist. LEXIS 101415, at \*15-17 (W.D.N.Y. Sept. 8, 2011). In situations of voluminous criminal discovery, some courts have required a prosecutor to provide a meaningful index or organization to the discovery provided to defense counsel. See, e.g., *United States v. O’Keefe*, 537 F. Supp. 2d 14, at 18-20 (D.D.C. Feb. 18, 2008) (requiring voluminous discovery be produced in the form those documents are ordinarily maintained or organized and labeled so as to correspond with the categories of the request for production, following the standard set forth in Fed. R. Civ. P. 34(b)). However, in the absence of a court order, Crim. R. 16 does not by itself require that discovery material be provided in a specific format. As the Sixth Circuit has noted, the federal rule is entirely silent on the particular format in which discovery must be produced; the state rule is similarly silent. Therefore, a prosecutor has no obligation to comply with a request from a criminal defendant to provide discovery in a particular format, such as on paper or a thumb drive, absent a court order. As long as the prosecutor provides discovery in some format that complies with Crim. R. 16, such as through Matrix, or permits defense counsel to inspect and copy discovery material at the prosecutor’s office, the prosecutor has satisfied his or her obligations under Crim. R. 16.

**Question 3: Court’s Authority to Order Discovery be Provided in a Particular Format**

Your third question is whether a court has the authority, in a particular case, to order the prosecutor’s office to provide defense counsel with discovery in a format other than through Matrix or by inspection and copying of discovery material at the prosecutor’s office. As noted above, “Rule 16 [of the Federal Rules of Criminal Procedure] ‘is intended to prescribe the

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photographs of discovery material upon demand, in addition to permitting defense counsel to inspect discovery material. See Staff Notes, Crim. R. 16(B) (July 1, 2010 Amendments) (“[t]his division expands the State’s duty to disclose materials and information beyond what was required under the prior rule .... This division also requires the materials to be copied or photographed as opposed to inspection as permitted under the prior rule”). Accordingly, in the situation you have described, Crim. R. 16(B) is best interpreted as giving defense counsel a choice: receive copies or photographs through Matrix or inspect and copy discovery material at the prosecutor’s office.

minimum amount of discovery to which the parties are entitled, and leaves intact a court's discretion to grant or deny the broader discovery requests of a criminal defendant.” *United States v. Richards*, 659 F.3d 527, 543 (6th Cir. 2011) (quoting *United States v. Jordan*, 316 F.3d 1215, 1249 n.69 (11th Cir. 2003)). A trial court's decisions on discovery matters are reviewed under an abuse of discretion standard. *See State v. Darmond*, 135 Ohio St. 3d 343, 2013-Ohio-966, 986 N.E.2d 971, at ¶¶ 33-34; *City of Toledo v. Strickland*, 2016-Ohio-8385, 72 N.E.3d 668, at ¶¶ 13-15 (Lucas County) (“[a]n abuse of discretion connotes more than a mere error of law or judgment, it requires demonstration that the trial court's decision was arbitrary, unreasonable, or unconscionable”). A trial court, therefore, has broad authority to issue discovery orders that respond to the circumstances of a particular case and that do not contradict rules promulgated by the Supreme Court. *Accord* Crim. R. 16(L)(1). As noted above, certain courts have ordered that voluminous discovery be accompanied by a meaningful index or organized in such a way so as to provide defense counsel with a reasonable means of sorting through the discovery material. *See, e.g., United States v. Briggs*, No. 10CR184S, 2011 U.S. Dist. LEXIS 101415, at \*25-26 (W.D.N.Y. Sept. 8, 2011); *United States v. O'Keefe*, 537 F. Supp. 2d 14, at 18-20 (D.D.C. Feb. 18, 2008). Other courts, such as the Sixth Circuit, have decided that an index of discovery material is not necessary when there is evidence that the prosecution has provided defense counsel “with something of a guide” to the discovery material provided. *See Warshak, supra*, at 296-297. Therefore, if the particular facts of a case warrant, a court has authority to issue an order requiring a prosecutor's office to provide discovery in a particular format, such as on paper or thumb drive, subject to an abuse of discretion standard of review.

#### **Question 4: Court's Authority to Adopt a Local Rule Requiring Court-Appointed Defense Attorneys to Use Matrix**

Your fourth question is whether a court may adopt a local rule requiring court-appointed defense attorneys to use Matrix if those attorneys wish to accept appointments for criminal, juvenile, and CSEA cases. “Under the Ohio Constitution, courts may adopt rules governing local practice in their respective courts. However, these local rules must not be inconsistent with any rules governing procedure and practice promulgated by the Supreme Court, such as the Rules of Criminal Procedure.” *State ex rel. Henneke v. Davis*, 25 Ohio St. 3d 23, 24, 494 N.E.2d 1133 (1986); *see* Crim. R. 57(A)(1). The Ohio Constitution authorizes courts to adopt rules that do not contradict rules promulgated by the Supreme Court, providing that “[t]he supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right,” and that “[c]ourts may adopt additional rules concerning local practice in their respective courts which are *not inconsistent with* the rules promulgated by the supreme court.” Ohio Const. art. IV, § 5(B) (emphasis added).

Question 4, therefore, implicates matters which fall squarely within the discretion, control, and interpretation of Ohio courts under the ultimate control and direction of the Ohio Supreme Court. A fundamental principle of constitutional law dictates that the legislative, executive, and judicial branches of government are separate and distinct, and that one branch may not impinge upon the rights or authority of the others. *See* 1992 Op. Att'y Gen. No. 92-038; *see also State ex rel. Finley v. Pfeiffer*, 163 Ohio St. 149, 126 N.E.2d 57 (1955); *Knapp v.*

*Thomas*, 39 Ohio St. 377, 391 (1883) (“each [branch of government] can best preserve the jurisdiction and power confided to it, by carefully abstaining from all interference with the rightful authority of the others”). The Attorney General is a member of the executive branch of government. See Ohio Const. art. III, § 1; *State ex rel. Doerfler v. Price*, 101 Ohio St. 50, 128 N.E. 173 (1920). There is no express grant of constitutional or statutory authority for the Attorney General to review determinations of the judicial branch of government. See 1992 Op. Att’y Gen. No. 92-038; 1984 Op. Att’y Gen. No. 84-077; 1972 Op. Att’y Gen. No. 72-097; 1928 Op. Att’y Gen. No. 2304, vol. III, p. 1648 at 1649; see also Ohio Const. art. III. It is improper for the Attorney General to review the judgments and proceedings of a court of competent jurisdiction. See 1928 Op. Att’y Gen. No. 2304, vol. III, p. 1648, at 1649. We consider it an inappropriate impingement upon judicial authority and prerogatives for the Attorney General to afford instruction on the interpretation or application of procedural rules adopted by a court under the direction and supervision of Ohio’s highest court. On that basis, we refrain from addressing the issues which are the subject of this portion of your inquiry.

***Question 5: Impartiality of a Court in Adopting a Local Rule Requiring Use of Matrix by Criminal Defense Attorneys***

Your fifth question is whether the issuance of a local rule by the court requiring criminal defense attorneys to use Matrix for discovery purposes if those attorneys wish to accept appointments for criminal, juvenile, and CSEA cases would raise issues about the court’s impartiality on motions regarding discovery. The Ohio Board of Professional Conduct, rather than our office, has jurisdiction to issue advisory opinions regarding issues of judicial impartiality. See Ohio Gov. Bar. R., App. II, Reg. 15. Such questions should, accordingly, be directed to the Board of Professional Conduct. See, e.g., 2019 Op. Att’y Gen. No. 2019-012, slip op., at 3-4 n.1.

**Conclusions**

Based on the foregoing, it is our opinion, and you are hereby advised as follows:

1. Providing discovery to defense counsel through the Matrix system or permitting defense counsel to inspect and copy discovery material at the prosecutor’s office both satisfy a prosecutor’s obligations under Crim. R. 16(B) to provide copies or photographs of discovery material or permit defense counsel to copy discovery material upon demand.
2. A county prosecutor is not required to provide defense counsel with discovery in a particular format, so long as the prosecutor provides copies or photographs of discovery material to defense counsel or permits defense counsel to inspect and copy such material at the prosecutor’s office.

3. A court may, in a particular case, order a prosecutor to provide discovery to defense counsel in a particular format, such as on paper or a thumb drive. The court's order is subject to an abuse-of-discretion standard of review.
4. Whether a trial court may adopt a local rule requiring court-appointed defense attorneys to utilize the Matrix system requires an opinion as to the propriety, interpretation, and application of such a rule, and falls squarely within the province of the judicial branch. As such, and, in view of the constitutional doctrine of separation of powers, the Attorney General's Office will refrain from addressing this inquiry.
5. Whether the adoption of a particular local rule would lead to the appearance of judicial impropriety is a question the consideration of which is reserved to the advisory opinion function of the Ohio Board of Professional Conduct. The Attorney General's office will, accordingly, refrain from opining on such a question.

Respectfully,



DAVE YOST  
Ohio Attorney General