

December 12, 2024

Hon. Elizabeth Harris
Colorado Court of Appeals
Chair, Committee on Rules of Criminal Procedure
elizabeth.harris@judicial.state.co.us

RE: Request for Amendment to Colo. R. Crim. P. 16 – updating language for modern forms of communication

Dear Judge Harris:

We are asking that the Committee on Colorado’s Rules of Criminal Procedure recommend adoption of an amendment to Colo. R. Crim. P.16 (hereinafter “Rule 16”) that updates the disclosure requirements to explicitly include modern forms of communication to alleviate some current confusion in the courts.

As technology in communication evolves, so too should Rule 16. Enacted in 1985, with relevant sections last amended in 2001, Rule 16’s wording should be more precise to capture what constitutes a statement, document, or recorded message. In the twenty-plus years since the rule was previously amended, we have dramatically changed how we communicate with each other with the advent of daily, frequent text messages, emails, and other forms of electronic communication. Like everyone, law enforcement personnel use that technology every day in interactions with witnesses, defendants, and others.

We propose to amend Rule 16 to include the terms “emails,” “text messages” and “other electronic communication” in the rule. The language could be added in the definition of “statements” (1)(I)(a)(1)(I), “documents” (1)(I)(a)(1) (IV), and “electronic surveillance...of conversations” (1)(I)(a)(1) (VI). One option would be to insert language in these subsections referencing emails, text messages or other electronic communications. Another option would be to add a category, Crim. P. (1)(I)(a)(1)(IX), to require production of “any email(s), text message(s) or other forms of electronic communications of all witnesses, the accused, or co-defendant in a case.”

Our practice has revealed a variety of ways this is currently being handled. Some courts rule that emails and texts between witnesses and law enforcement falls under the category of “statements” of a witness and are subject to disclosure under the rule. Other courts determine that such evidence is discoverable but require the defense to serve a subpoena duces tecum on the law enforcement agencies for production of the communications. *Solano v. Newman*, No. 23CA1406, 2024 COA 93 (Colo. App. 2024), recently held that a subpoena should not be required to obtain statements or documents from a law enforcement agency involved in the case.

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Our practice is a mix of both criminal and civil litigation, and our civil practice includes representing clients who are victims in criminal cases. In our civil practice, we find little confusion over whether emails, text messages, or other forms of electronic communication are subject to the disclosure or discovery rules. The differing approaches and unnecessary litigation in criminal cases about the mandatory discovery of witness statements in those same formats is therefore particularly vexing.

We ask that the Rules of Criminal Procedure be updated to capture 21st century communications and to provide clarity where now there is confusion in the trial courts as to whether current forms of communication constitute witness statements.

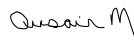
Sincerely,



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2024-12-11 Request for Amendment to Colo. R. Crim. P. 16 (streamlined)[81]

Final Audit Report

2024-12-12

Created:	2024-12-12
By:	Iris Eytan (iris@eytanlawfirm.com)
Status:	Signed
Transaction ID:	CBJCHBCAABAAAtcwW_BQiEbDVVtjcrCfN7XfZM5B1tjTL

"2024-12-11 Request for Amendment to Colo. R. Crim. P. 16 (streamlined)[81]" History

-  Document created by Iris Eytan (iris@eytanlawfirm.com)
2024-12-12 - 2:30:07 AM GMT
-  Document emailed to Qusair Mohamedbhai (qm@rmlawyers.com) for signature
2024-12-12 - 2:30:11 AM GMT
-  Email viewed by Qusair Mohamedbhai (qm@rmlawyers.com)
2024-12-12 - 2:32:41 AM GMT
-  Document e-signed by Qusair Mohamedbhai (qm@rmlawyers.com)
Signature Date: 2024-12-12 - 2:33:46 AM GMT - Time Source: server
-  Agreement completed.
2024-12-12 - 2:33:46 AM GMT