CRIMINAL LAW REVISION COMMISSION
311 State Capitol
Salem, Oregon

CRIMINAL PROCEDURE

PART III. ARRAIGNMENT AND PRE-TRIAL PROVISIONS

ARTICLE 7. PRE-TRIAL DISCOVERY

Preliminary Draft No. 1; March 1972

Reporter: Donald L. Paillette Subcommittee No. 3

PART III. ARRAIGNMENT AND PRE-TRIAL PROVISIONS

ARTICLE 7. PRE-TRIAL DISCOVERY

Preliminary Draft No. 1; March 1972

Section 1. Discovery; definitions. As used in this Article, unless the context requires otherwise:

(1) "Order of discovery" means an order of a court in which a criminal action is pending, issued upon motion of a party thereto, directing the adverse party to permit the moving party to inspect property and to copy or photograph it.

(2) "Property" includes any tangible real or personal property.

(3) "Exempt property" means:

(a) Reports, memoranda or other internal documents or work papers made by or at the direction of a district attorney, peace officer or other law enforcement agent, or by a defendant or his attorney or agent in connection with the investigation, prosecution or defense of a criminal action; and

(b) Records of statements made to any of the persons specified in paragraph (a) of this subsection (3) by a witness or prospective witness in the case.

COMMENTARY

A. Summary

This section defines three terms that are incorporated into the later sections in the draft.

Subsection (1). An "order of discovery" would be issued only upon motion of one of the parties to the action, and would permit the party to inspect and to copy or photograph "property" as that term is defined in subsection (2).

Subsection (2). "Property" is defined very broadly and would include statements, records of testimony, reports of physical or mental examinations, papers, books, accounts, letters, photographs or other tangible objects or things. The inspection of property is limited, however, by excluding certain things through the use of the definition in subsection (3).

Subsection (3). The definition serves to exclude certain internal documents and work products from the operation of the discovery provisions.

B. Derivation

The section is substantially the same as New York Criminal Procedure Law s. 240.10 (1971).

C. Relationship to Existing Law

The relationship of the provisions of this Article to Oregon law is discussed in the commentary to subsequent sections.

Section 2. Discovery; when required. Upon motion of a defendant against whom an indictment, information or complaint has been filed, the court shall issue an order of discovery as provided in sections 3, 4 and 5 of this Article.

COMMENTARY

A. Summary

This is the basic section in the Article and would require the court, upon motion of a defendant against whom a formal criminal charge has been filed, to order discovery as provided in the sections that follow.

B. Derivation

The language is derived for the most part from New York Criminal Procedure Law s. 240.20. The New York statute, which is patterned after the Federal Rules of Criminal Procedure (Rule 16), however, combines most of its provisions into one section and employs a "must order" and "may order" approach in defining the responsibilities of the court. The instant draft separates the one section into four separate sections.

C. Relationship to Existing Law

The criminal procedure code now provides for very limited discovery in criminal cases. ORS 133.755, enacted in 1961, is the only statutory change that has occurred in discovery since 1864. The statute provides:

> "133.755. (1) Upon motion of a defendant, at any time after the filing of the indictment or information, and upon a showing that the items sought are material to the preparation of his defense and that the request is reasonable, the court may order the district attorney to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant, including written statements or confessions made by the defendant. The order shall specify the time, place and manner of making the inspection and of taking copies or photographs and may prescribe such terms and conditions as are just.

> "(2) Inspection of the items described in subsection (1) of this section may be made in criminal actions in accordance with the provisions of subsection (1) of this section and no other."

Inspection of objects or tangible things in criminal cases is governed by ORS 133.755, and the civil discovery statute, ORS 41.615, does not apply. State v. Little, 249 Or 297, 431 P2d 810 (1968), cert den, 390 US 955.

In State v. Foster, 242 Or 101, 407 P2d 901 (1965), the Oregon Supreme Court, although reversing on other grounds, upheld the trial court's disallowance of a defense motion for pre-trial examination of witnesses' written statements to the prosecution, stating:

> "It is said that pre-trial discovery permits an accused to fabricate evidence for his defense. More important, however, . . . to allow the defendant to compel production when the prosecution could not in its turn compel production from the defendant because of the privilege against self incrimination would unduly shift to the defendant's side a balance of advantages already heavily weighted in his favor . . . . We recognize that the rule restraining pre-trial discovery is the subject of debate and criticism . . . . We are not convinced that the rule is unsound." At 105.

The Foster case is indicative of the traditional view regarding discovery expressed by the Oregon court. See, also, State v. Little, supra; Ellis, "Discovery in Oregon Criminal Cases," 4 Will L J 167 (1966).

In two very recent opinions, the Oregon Supreme Court and the Court of Appeals both have discussed an aspect of discovery. State v. Wardius, 93 Adv Sh 147, ___ Or App ___ (1971), was a case involving a charge of unlawful sale of narcotics. At trial the defendant called an alibi witness whose testimony was stricken on motion of the state on the grounds that the defendant failed to give notice of intent to rely upon alibi as required by ORS 135.875. The defendant alleged error in striking the testimony on the grounds that the statute:

(1) Compelled him to be a witness against himself.

(2) Deprived him of the right to confrontation because it did not guarantee him reciprocal discovery rights.

(3) Abridged his right to testify in his own behalf; and

(4) Denied him the effective benefit of his right to compulsory process to obtain witness in his own behalf.

The Court of Appeals cited with approval Williams v. Florida, 399 US 78 (1970), which held that the privilege against self-incrimination is not violated by a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses to the prosecutor. The court adopted this language from Williams:

> "We need not linger over the suggestion that the discovery permitted the State against petitioner in this case deprived him of 'due process' or a 'fair trial.' Florida law provides for liberal discovery by the defendant against the State, and the notice-of-alibi rule is itself carefully hedged with reciprocal duties requiring state disclosure to the defendant. Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate. Reflecting this interest, notice-of-alibi provisions, dating at least from 1927, are now in existence in a substantial number of States . . . .
>
> "We do not, of course, decide that each of these alibi-notice provisions is necessarily valid in all respects; that conclusion must await a specific context and an inquiry, for example, into whether the defendant enjoys reciprocal discovery against the State."

The court continued:

> "Thus, we do not find it necessary to decide whether under ORS 135.875 the defendant is entitled to reciprocal discovery rights as authorized by Florida Rule of Criminal Procedure 1.200. There has been no denial thereof here. We, too, deem it appropriate in the language of Williams v. Florida, supra, to 'await a specific context' in which that issue is necessary to a decision." At 150-152. (Emphasis supplied.)

In State v. House, 93 Adv Sh 571, 575 (1971), a case in which the Oregon Supreme Court reversed both the trial court and the Court of Appeals in their judgments that the indictment in the case was insufficient to charge first degree murder, the Supreme Court took note of Chief Judge Schwab's comment on discovery in his dissenting opinion, saying:

> "As expressly recognized by the dissenting opinion in the decision by the Court of Appeals in this case . . . , it may be that criminal pretrial discovery is desirable in Oregon, particularly in cases such as this. This, however, is primarily a legislative matter." At 575.

In spite of the language in the Wardius case that the Oregon court would "await a specific context" in which to decide whether a defendant with an alibi defense is entitled to reciprocal discovery rights, it seems highly improbable that any appreciable change in criminal discovery will be fashioned other than by the legislature.

The reluctance of the court to broaden discovery in criminal cases has not gone unnoticed by its critics, one of whom wrote:

> "It is regrettable that as the federal courts and many state courts move vigorously towards recognition of the legitimate discovery needs of both defense and prosecution, the Oregon court, like a ship passing in the night, is proceeding in the direction of curtailing already existing discovery rights and refusing to develop new ones. Procedural reform is logically a concern for the courts sua sponte as much as it is a responsibility of the legislature. Particularly in the area of criminal procedure should courts initiate development. The legislative process is not inherently sensitive to needs of criminal procedural reform. No major lobbies or interest groups make such reform a condition of their support. Nor do legislators implement personally and daily criminal procedure with which courts are inevitably more familiar.
>
> "In resisting change in this area both the court and the legislature appear to have accepted several dubious premises. First, justice is not necessarily served by artificially balancing the impediments to discovery by the prosecution and by the defense, as though partially blinding each side will make the trial more "fair" albeit less

> accurate. The reasons applicable to each side for and against a particular discovery power should be assessed independently. Where the reasons for limitation are not sufficient to outweigh the need for disclosure the restrictions should be removed without regard to balance. The balancing argument in any event should recognize advantages held by the prosecution as well as the Fifth Amendment rights of the accused. For example, immunity statutes, power to search and seize, professional detective staffs and elaborate research and laboratory facilities, and limitation on the self-incrimination privilege to testimonial compulsion not including fingerprints, blood samples and witness views, all are rights enjoyed by the prosecution. Second, the reasons against more liberal discovery may not exist in every case or in all phases of any particular case. Although raising a delicate question of equal protection, consideration should be given to according trial judges substantially greater discretion, and requiring a significant showing by the side seeking to limit discovery. Third, courts and legislatures should not approach discovery as a polarized question; there are numerous techniques whereby substantial additional discovery can be permitted by degrees subjecting the litigants to control only where needed." Ellis, "Discovery in Oregon Criminal Cases," 4 Will L J 187, 188 (1966).

A prosecutor's duty to disclose was first recognized in cases holding that the prosecutor's deliberate failure to correct the perjured testimony of his own witness, which the prosecutor knew to be perjured, violated due process. Mooney v. Holohen, 294 US 103 (1935). Giles v. Maryland, 386 US 66 (1967), held that the prosecutor must reveal any known, contrary statements of his own witnesses even though he may believe their current testimony to be true.

In the major case of Brady v. Maryland, 373 US 83 (1963), the court noted that the duty to disclose was not solely limited to clarification of testimony of the prosecution witnesses. The majority opinion observed that, at least where defense counsel requested disclosure "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of the good or bad faith of the prosecution."

In Brady, although the request for disclosure of the statement of a co-defendant was first made prior to trial,

Brady and other similar disclosure opinions deal mainly with disclosure at trial. However, disclosure of certain kinds of "material evidence favorable to the accused" may be of little help unless made far enough prior to trial to allow defense counsel to seek additional evidence.

Some lower courts have suggested that, at least as to such "material evidence favorable to the accused," Brady might grant defendant a constitutional right to pre-trial discovery. See, U. S. v. Gleason, 265 F Supp 880 (SDNY 1967).

Section 3. Property subject to order of discovery. An order of discovery shall be issued with respect to property consisting of a written or recorded statement or a record of testimony given by the defendant to a public servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with the public servant, which statement is within the possession, custody or control of the district attorney, and is known by him to exist or should by the exercise of due diligence on his part become known to him to exist.

COMMENTARY

A. Summary

This section gives the defendant pre-trial inspection of any written or recorded statements made by the defendant to law enforcement officials or their agents. The discovery order with respect to such statements would be an unconditional one.

B. Derivation

The section is based on New York Criminal Procedure Law s. 240.20 (subdivision 1), but does not separately refer to testimony given by the defendant before the grand jury.

C. Relationship to Existing Law

Discovery allowed under ORS 133.755 includes "written statements or confessions made by the defendant." The states have been the most liberal in granting this type of criminal discovery. See e.g., Florida Rules Crim Proc, Rule 1.220; N J Rules of Crim Practice, Rule 3:13-3.

In Clewis v. Texas, 386 US 707 (1967), the Supreme Court stated "in some circumstances, it may be a denial of due process for a defendant to be refused any (pre-trial) discovery of his statements to the police."

Section 4. Property subject to conditional order of discovery. Subject to the provisions of sections 5 and 6 of this Article, the court may issue an order of discovery with respect to:

(1) Property consisting of reports and documents, or copies or portions thereof, concerning physical or mental examinations or scientific tests and experiments made in connection with the case which are within the possession, custody or control of the district attorney, the existence of which is known, or by the exercise of due diligence should become known to the district attorney.

(2) Other property specifically designated by the defendant, except exempt property, which is within the possession, custody or control of the district attorney, upon a showing by the defendant that:

(a) Discovery with respect to such property is material to the preparation of his defense; and

(b) The request is reasonable.

COMMENTARY

A. Summary

Section 4 is permissive in nature, and would permit the court to issue an order of discovery with respect to reports, documents, examinations, tests or other property. The discovery of "other property" specified in subsection (2) would necessitate a showing by the defendant that discovery was material to the preparation of his defense and that the request was reasonable.

The discovery order would be subject to the provisions of ss. 5 and 6, infra. Section 5 would permit the court, upon motion of the district attorney showing that it was material to the preparation of the state's case and that the

request was reasonable, to condition its order upon discovery of similar material by the state. The section would not apply to "exempt property." Section 6 provides for a showing in opposition by the adverse party and for further modification or qualification of the order.

B. Derivation

Section 4 is derived from New York Criminal Procedure Law s. 240.20 (subdivisions 2 and 3).

C. Relationship to Existing Law

ORS 133.755 provides that upon a showing that the items sought are material to the preparation of the defense, and that the request is reasonable, the court may order the district attorney to permit the defendant to inspect and copy or photograph: (1) Books, (2) papers, (3) documents, (4) tangible objects and (5) written statements or confessions made by the defendant. However, the statute applies only to items "obtained from or belonging to the defendant."

Subsection (1) of the proposed section would include reports, documents, tests, etc. "made in connection with the case," with no limitation that the items be obtained from the defendant.

Two statutes combine to permit inspection of the medical investigator's post-mortem examination report, but they are not actually "discovery" statutes, as such. See ORS 146.560, 432.130.

Section 5. Order of discovery; special conditions. Upon granting a defense motion for discovery with respect to the kinds of property specified in section 4 of this Article, the court may, upon motion of the district attorney showing that such is material to the preparation of the state's case and that the request is reasonable, condition its order of discovery by further directing discovery by the state of property, other than exempt property, of the same kind or character as that authorized to be inspected by the defendant, which is in the possession, custody or control of the defendant and which he intends or is likely to produce at the trial.

COMMENTARY

A. Summary

Section 5 authorizes the court to condition defense discovery of any property specified in section 4 upon an order directing similar discovery by the state.

B. Derivation

This section is based on New York Criminal Procedure Law s. 240.20 (subdivision 4). Federal Rule 16 (c), Florida Rules of Criminal Procedure (1968), Rule 1.220 (c) and New Jersey Criminal Practice Rule 3:13-3 (d) all contain comparable provisions.

C. Relationship to Existing Law

The existing discovery statute does not provide for reciprocal discovery by the state; however, the underlying policy that would require disclosure of materials to the state is closely akin to that policy that now requires disclosure to the state of alibi witnesses' names and addresses. (See ORS 135.875 and discussion of State v. Wardius, supra.) Williams v. Florida, supra, in holding constitionally valid Florida's notice-of-alibi requirement,

specifically recognized the Florida rule as a provision for "a limited form of pre-trial discovery by the State."

The ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft 1970), while providing for certain disclosure to the prosecution by the defendant in ss. 3.1-3.3, do not approve of the federal reciprocity policy:

> "[T]he Advisory Committee, in formulating this standard as to the policy for discovery, has rejected the notion of conditional discovery embodied in the federal rule. The principle consideration is, again, to serve the procedural needs identified in section 1.1. If disclosures to the accused promote finality, orderliness, and efficiency in prosecutions generally, these gains should not depend upon the possibly capricious willingness of the accused to make reciprocal disclosures. Indeed, there is considerable doubt whether, in practice, the imposition of a condition will accomplish anything but denial of disclosures to the accused. Certainly, the usual reasons for denying disclosures to the accused -- dangers of 'perjury or intimidation of witnesses -- are not alleviated by forcing the defendant to make discovery, nor are they heightened by his failure to disclose.'" United States v. Fratello, 44 F.R.D. 444, 448 (SDNY 1968).
>
> "An additional difficulty was noted -- that of framing a standard that would be useful in actual practice. The condition provided for by Federal Rule 16 would require disclosure of material 'which the defendant intends to produce at the trial.' Prior to trial, it is quite possible that defense counsel may have evidence available for production at trial. But because of the prosecution's high burden of proof, it is a rare case in which defense counsel can honestly be said to 'intend' to produce such evidence until he has heard all of the prosecution's case. By contrast, the prosecuting attorney ordinarily formulates in advance a rather definite trial plan designed to meet his heavy burden. Moreover, such evidence as the defense holds in readiness will

> often be relevant only to credibility of the prosecution's evidence, and this sort of rebuttal evidence is generally free from disclosure requirements.
>
> "The Advisory Committee does not, however, reject the notion that there can be required disclosure to the prosecution. It believes, however, that such discovery should be independent of that granted to the accused and clearly no broader than is constitutionally permitted. In its view such discovery would be the kind of non-testimonial disclosures by the accused which can be compelled at the trial (see s. 3.1) and reports prepared by independent experts (see s. 3.2), subject to constitutional limitations which may depend upon the facts of the particular case." Id. at 45-46.

The ABA argument against conditional discovery appears specious. Under a conditional discovery statute a defendant would not be denied discovery unless he so chose. It would simply amount to the defendant and his attorney deciding whether the disclosure to the state was too great a price to pay for the discovery sought by the defendant. Also, any requirement of disclosure by the defendant would be subject to constitutional limitations, regardless of whether discovery is framed in conditional terms or under independent discovery by the state, as proposed by the ABA. The ABA objection to the federal requirement of disclosure of material "which the defendant intends to produce at the trial" is overcome by the language in the instant section, "intends or is likely to produce at the trial."

It is submitted that expanded pre-trial criminal discovery will not come about in this state in the absence of a realistic approach that makes it a "two-way street" as much as possible.

Chief Justice Traynor, in discussing Jones v. Superior Court, 58 Cal 2d 56, 372 P2d 919, 22 Cal Rptr 879 (1962), stated:

> "Since the defendant could not be compelled to testify or produce private documents in his possession, we recognized that ordinarily the prosecution could not require him to reveal his knowledge of the existence of possible witnesses and the existence of reports and X-rays for the purpose of preparing its case against him. Did

it therefore follow that the defendant could not be required to reveal in advance the witnesses he intended to call at the trial and the evidence he intended to produce? A number of states by statute require a defendant specifically to plead certain defenses such as insanity or alibi and to reveal in advance of trial the names of the witnesses who will be called in support of such defenses. These statutes have been sustained over the objection that they violate constitutional privileges against self-incrimination, for they do not compel the defendant to reveal or produce anything, but merely regulate the procedure by which he presents his case. We found this reasoning persuasive. The trial court's order that the defendant reveal the names of witnesses he intended to call and produce reports and X-rays he intended to introduce in evidence simply required him to disclose information that he would shortly reveal in any event. He was thus required only to decide at a point earlier in time than he would ordinarily have to whether to remain silent or to disclose the information. He lost only the possible tactical advantage of taking the prosecution by surprise at the trial, an advantage that in any event would easily have gone for naught given the probability that the trial court would have granted the prosecution a continuance to prepare a rebuttal." Traynor, "Ground Lost and Found in Criminal Discovery," 39 NYUL Rev 228, 247 (1964).

The Committee note to Florida Rule 1.220 (c) contains this statement:

"This is new and affords discovery to the State within the trial judge's discretion by allowing the trial judge to make discovery under (a) (2) and (b) conditioned upon the defendant giving the State some information if he has it. This affords the State some area of discovery which it did not previously have with respect to (b). A question was raised concerning the effect of (a) (2) on F.B.I. reports and the reports which are submitted to a prosecutor as 'confidential' but it was agreed that the interests of justice would be better served by allowing this rule and that after the appropriate governmental authorities are made aware of the fact that their reports may be subject to compulsory disclosure, no harm to the State will be done." (See full text of Florida rules infra.)

Section 6. Order of discovery; showing in opposition by adverse party. (1) Upon a motion for discovery the adverse party must be accorded an opportunity to be heard in opposition to the motion.

(2) At any time after issuance of an order of discovery and before complete compliance therewith, the court, upon a sufficient showing by the party ordered to permit inspection, may vacate, restrict, qualify or defer the order of discovery or make any other order which it considers just and appropriate.

(3) Upon application by the district attorney, the court may permit the state to make a showing in opposition to a motion for discovery, or in support of an application to restrict, qualify or defer an order of discovery, wholly or partly in the form of a written statement to be inspected by the court in camera. In such case, the statement must be sealed and preserved in the records of the court. Upon an appeal from an ensuing judgment of conviction in the action, the statement constitutes a part of the record to the extent that it must be made available to the appellate court for inspection.

COMMENTARY

A. Summary

This section gives the court authority to deny, restrict or defer discovery upon a sufficient showing. This permits the court to control or prevent possible abuses of the expanded discovery privileges authorized by this Article.

Among the considerations to be taken into account by the court would be the safety of witnesses and others, or a particular danger of perjury or witness intimidation.

Subsection (3) provides a procedure the court may permit the state to make its showing, in whole or in part, in a written statement to be inspected by the court in camera. If the court grants relief based on the state's showing, the statement is to be sealed and would be part of the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

B. Derivation

The section is drawn from New York Criminal Procedure Law s. 240.20 (subdivision 5). Federal Rule 16 (e) is almost identical. Florida and New Jersey rules all provide for "protective orders" under similar circumstances. The ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft 1970) provide for protective orders "provided that all material and information to which a party is entitled must be disclosed in time to permit his counsel to make beneficial use thereof." (S. 4.4).

C. Relationship to Existing Law

The provision is new.

Section 7. Discovery; when motion made. A motion for an order of discovery by a defendant must be made with due diligence before the commencement of trial, and if not so made, may be summarily denied by the court. In the interest of justice and for good cause shown, the court may in its discretion entertain and rule on such a motion at any time before trial or at any time during trial before the conclusion of the evidence.

COMMENTARY

This section is based on New York Criminal Procedure Law s. 240.30 and is comparable to Federal Rule 16 (f). ORS 133.755 permits defendant's motion to be made "at any time after the filing of the indictment or information."

Section 8. Discovery; continuing duty to disclose; failure to comply. (1) If, after complying with an order of discovery, a party finds, either before or during trial, additional property which is subject to or covered by the order, he must promptly notify the other party of the existence thereof.

(2) Upon being apprised of any breach of the duty imposed by the provisions of this Article, the court may order the violating party to permit inspection of the additional property, or grant a continuance, or refuse to receive such property in evidence, or enter such other order as it considers appropriate.

COMMENTARY

This section is based on New York Criminal Procedure Law s. 240.40 and is substantially the same as Federal Rule 16 (g). Its purpose is to make effective the preceding sections.

Subsection (1) creates a continuing obligation on a party subject to a discovery order with respect to property he was not aware of at the time of initial compliance with the discovery order. The duty imposed is to notify the other party of the existence of the material so that further discovery may be had.

Subsection (2) gives wide discretion to the court to deal with the failure of either party to comply with a discovery order, depending upon the nature of the material, the extent of the prejudice to the other party, stage of the proceedings and other relevant circumstances.

TEXT OF OTHER DISCOVERY RULES AND STANDARDS

Text of Federal Rules of Criminal Procedure (As amended 1966)

Rule 16.

DISCOVERY AND INSPECTION

(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

(b) Other Books, Papers, Documents, Tangible Objects or Places. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a) (2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.

(c) Discovery by the Government. If the court grants relief sought by the defendant under subdivision (a) (2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to

Text of Federal Rules of Criminal Procedure (As amended 1966) (Cont'd)

scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

(d) Time, Place and Manner of Discovery and Inspection. An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

(e) Protective Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the government the court may permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the court *in camera.* If the court enters an order granting relief following a showing *in camera,* the entire text of the government's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

(f) Time of Motions. A motion under this rule may be made only within 10 days after arraignment or at such reasonable later time as the court may permit. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

(g) Continuing Duty to Disclose; Failure to Comply. If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.
As amended Feb. 28, 1966, eff. July 1, 1966.

# # # #

Text of New York Criminal Procedure Law

ARTICLE 240 -- DISCOVERY

§ 240.10 Discovery; definitions of terms

As used in this article, the following terms have the following meanings:

1. "Order of discovery" means an order of a court in which a criminal action is pending, issued upon motion of a party thereto, directing the adverse party to permit such moving party to inspect property and to copy or photograph it.

2. "Property" means any tangible personal or real property, including books, records and papers.

3. "Exempt property" means (a) reports, memoranda or other internal documents or work papers made by district attorneys, police officers or other law enforcement agents, or by a defendant or his attorneys or agents, in connection with the investigation, prosecution or defense of a criminal action, and (b) records of statements made to such parties, attorneys or agents by witnesses or prospective witnesses in the case.

§ 240.20 Discovery; when authorized

Upon motion of a defendant against whom an indictment is pending, the court, under circumstances prescribed in this section, must or may issue an order of discovery:

1. Such discovery must be ordered with respect to property consisting of:

(a) A record of testimony given by such defendant before the grand jury which filed the indictment; or

(b) A written or recorded statement made by the defendant to a public servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him, which statement is within the possession, custody or control of the district attorney, and is known by him to exist or should by the exercise of due diligence on his part become known to him to exist. This paragraph does not apply to a statement made in the course of an intercepted communication, as that term is defined in subdivision three of section 700.05.

2. Subject to the provisions of subdivisions four and five, such discovery may be ordered with respect to property consisting of reports and documents, or copies or portions thereof, concerning physical or mental examinations or scientific tests and experiments made in connection with the case which are within the possession, custody or control of the district attorney, the existence of which is known, or by the exercise of due diligence should become known, to such district attorney.

Text of New York Criminal Procedure Law (Cont'd)

Sec. 240.20 (Cont'd)

3. Subject to the provisions of subdivisions four and five, such discovery may be ordered with respect to any other property specifically designated by the defendant, except exempt property, which is within the possession, custody or control of the district attorney upon a showing by the defendant that (a) discovery with respect to such property is material to the preparation of his defense, and (b) the request is reasonable.

4. Upon granting a defense motion for discovery with respect to property of a kind specified in subdivisions two and three, the court may, upon motion of the people showing such to be material to the preparation of their case and that the request is reasonable, condition its order of discovery by further directing discovery by the people of property, other than exempt property, of the same kind or character as that authorized to be inspected by the defendant, which is within the possession, custody or control of the defendant and which he intends or is likely to produce at the trial.

5. Upon a motion for discovery, whether made by a defendant or made by the people pursuant to subdivision four, the respondent party must be accorded an opportunity to be heard in opposition to the motion. At any time after issuance of an order of discovery and before complete compliance therewith, the court may, upon a sufficient showing by the party ordered to permit inspection, vacate, restrict, qualify or defer the order of discovery or make any other order which is appropriate. Upon application of the people, the court may permit the people to make a showing in opposition to a motion for discovery, or in support of an application to restrict, qualify or defer such order, wholly or partly in the form of a written statement to be inspected by the court *in camera*. In such case, such statement must be sealed and preserved in the records of the court. Upon an appeal from an ensuing judgment of conviction in the action, such statement constitutes a part of the record to the extent that it must be made available to the appellate court for inspection thereby.

§ 240.30 Discovery; when motion made

A motion for discovery by a defendant against whom an indictment is pending must be made with due diligence prior to the commencement of trial, and if not so made may be summarily denied. In the interest of justice and for good cause shown, however, the court may in its discretion entertain and determine such a motion at any time before trial or at any time during trial prior to the conclusion of the evidence.

Text of New York Criminal Procedure Law (Cont'd)

§ 240.40 Discovery; continuing duty to disclose; failure to comply

If after complying with an order of discovery a party finds, either before or during trial, additional property which is subject to or covered by such order, he must promptly notify the other party or the latter's attorney or the court of the existence thereof. Upon being apprised of any breach of such duty, the court may order the violating party to permit inspection of the subsequently discovered property, or grant an adjournment, or refuse to receive such property in evidence, or take any other appropriate action.

# # #

Text of New Jersey Rules Governing Criminal Practice

3:13-3. Discovery and Inspection

(a) Materials Discoverable by Defendant as of Right. Upon motion made by a defendant, the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any relevant

(1) designated books, tangible, objects, papers or documents obtained from or belonging to him;

(2) records of statements or confessions, signed or unsigned, by the defendant or copies thereof;

(3) defendant's grand jury testimony;

(4) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies thereof, which are known by the prosecuting attorney to be within his possession, custody or control;

(5) reports or records of prior convictions of the defendant.

(b) Materials Discoverable by Defendant in the Court's Discretion—Books, Papers and Tangible Objects. Upon motion made by a defendant, which shall be as specific as possible under the circumstances, absent a showing of good cause to the contrary the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph relevant books, papers, documents or tangible objects, buildings or places or copies thereof, which are within the possession, custody or control of the State.

Text of New Jersey Rules Governing Criminal Practice (Cont'd)

(c) Materials Discoverable by Defendant in the Court's Discretion—Witnesses' Names and Statements. Upon motion made by a defendant, which shall be as specific as possible under the circumstances, absent a showing of good cause to the contrary the court shall order the prosecuting attorney

(1) to disclose to the defendant the names and addresses of any persons whom the prosecuting attorney knows to have relevant evidence or information, and to indicate which of those persons he may use as witnesses;

(2) to permit the defendant to inspect and copy or photograph any relevant records of statements, signed or unsigned, by such persons or by codefendants which are within the possession, custody or control of the prosecuting attorney and any relevant record of prior convictions of such persons if known to the prosecuting attorney;

(3) to permit the defendant to inspect and copy or photograph any relevant grand jury testimony of such persons or codefendants.

(d) Discovery by the State. If the court grants discovery or inspection to a defendant

(1) pursuant to R. 3:13-3(a) (4) or (b), it may condition its order by requiring the defendant to permit the State to inspect, copy or photograph any material within the scope of such paragraphs which the defendant intends to use at trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the State's case and that its request is reasonable.

(2) pursuant to R. 3:13-3(c), it may condition its order by requiring the defendant to disclose to the prosecuting attorney the names and addresses of those persons, known to defendant, whom he intends to use as witnesses at trial and their written statements, if any.

(e) Documents Not Subject to Discovery. Except as heretofore specifically provided, this rule does not authorize discovery by a party of reports, memoranda or internal documents made by any other party, his attorneys or agents in connection with the investigation, prosecution or defense of the matter or discovery by the State of records of statements, signed or unsigned, by a defendant made to defendant's attorney or agents.

(f) Time, Place and Manner of Discovery and Inspection. An order of the court granting relief under this rule shall specify

Text of New Jersey Rules Governing Criminal Practice (Cont'd)

the time, place and manner of making the discovery and inspection and such terms and conditions as the interest of justice requires.

(g) Protective Orders.

(1) Grounds. Upon motion and for good cause shown the court may at any time order that the discovery or inspection sought pursuant to R. 3:13-3(b) (c) or (d) be denied, restricted, or deferred or make such other order as is appropriate. In determining the motion, the court may consider the following: protection of witnesses and others from physical harm, threats of harm, bribes, economic reprisals and other intimidation; maintenance of such secrecy regarding informants as is required for effective investigation of criminal activity; protection of confidential relationships and privileges recognized by law; any other relevant considerations.

(2) Procedure. The court may permit the showing, in whole or in part, to be made in the form of a written statement to be inspected by the court alone, and if the court thereafter enters a protective order, the entire text of the State's statement shall be sealed and preserved in the records of the court, to be made available only to the appellate court in the event of an appeal.

(h) Time of Motions. A motion under R. 3:13-3 shall be made after the indictment or accusation and within 30 days after the entry of a plea or at such reasonable later time as the court permits. The motion shall include all relief sought under this rule. Additional relief may be granted upon a subsequent motion only on a showing of good cause.

(i) Continuing Duty to Disclose; Failure to Comply. If subsequent to compliance with an order issued pursuant to R. 3:13-3 and prior to or during trial, a party discovers additional material previously requested or ordered subject to discovery or inspection, he shall promptly notify the other party or his attorney or the court of the existence thereof. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, it may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems appropriate.

# # #

Text of Florida Rules of Criminal Procedure

VI DISCOVERY

RULE 1.220 DISCOVERY

(a) **Production of Statement or Confessions, or Results or Reports of Physical or Mental Examinations, and of Defendant's Recorded Testimony Before Grand Jury.**—When a person is charged with an offense, upon motion of such person, at any time after the filing of the indictment, information, or affidavit upon which the defendant is to be tried, the court shall order the prosecuting attorney:

(1) To permit the defendant to inspect and copy or photograph the defendant's written or recorded statements or confessions, if any, whether signed or unsigned.

(2) To permit the defendant to inspect and copy or photograph results and reports of physical or mental examinations, and of scientific tests, or experiments made in connection with the particular case, or copies thereof, which are known by the prosecutor to be within the possession, custody, or control, of the state; and,

(3) To permit the defendant to inspect and copy or photograph the recorded testimony of the defendant before a grand jury, if any.

The order shall specify the time, place and manner of making the inspections and of making copies or photographs and may prescribe such terms and conditions as are just.

(b) **Production of Other Documents and Things for Inspection, Copying or Photographing.**—

When a crime is alleged to have been committed and the evidence of the state shall relate to ballistics, firearms identification, fingerprints, blood, semen, or other stains, or documents, papers, books, accounts, letters, photographs, objects, or other tangible things of whatsoever kind or nature, the court shall order the state to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated papers, books, accounts, letters, photographs, objects, or other tangible things. At any examination to be conducted by representatives of the state, as to ballistics, firearms identification, fingerprints, blood, semen, and other stains, the defendant, upon motion and notice, shall be permitted by order of court, to be present, or have present an expert of his own selection, or both, during the course of such examination. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs, and may prescribe such terms and conditions as are just.

(c) **Reciprocal Discovery.**—If the court grants relief sought by the defendant under (a) (2), or (b) of this rule, it shall condition its order by requiring that the defendant permit the state to inspect, copy or photograph scientific or medical reports, books, papers, documents, or tangible objects, which the defendant intends to produce at the trial and which are within his possession, custody, or control.

(d) **Disclosure of Witnesses Supplying Basis for Charge.**—It shall not be necessary to endorse on any indictment or information, the names and addresses of the witnesses on whose evidence the same is based, but upon motion of the defendant the court shall order the prosecuting attorney to furnish the names and addresses of such witnesses.

(e) **Exchange of Witness Lists.** — In addition to, or instead of, the practice described in Rule 1.220 (d) when a person is charged with an offense he may at any time after the filing of the indictment or information against him, or the affidavit upon which the defendant is to be tried, file in the cause an offer in writing (a copy of which offer shall be furnished to the prosecuting attorney) to furnish to the prosecuting attorney a list of all witnesses with their addresses and whereabouts if known whom the defendant expects to call as defense witnesses at the trial, whereupon, within five days after receipt of same by the prosecuting attorney, or within six days after the mailing of same to the prosecuting attorney, whichever shall be earlier, the prosecuting attorney shall file with the clerk and furnish to the person charged, a list of all witnesses known to the prosecuting attorney to have information which may be relevant to the offense charged, and to any defense of the person charged with respect thereto; and, within five days after the prosecuting attorney files with the clerk and furnishes such

Text of Florida Rules of Criminal Procedure (Cont'd)

list of witnesses to the defendant, or within six days after the mailing of same to the defendant, whichever shall be earlier, the defendant shall file with the clerk and furnish to the prosecuting attorney a list of all witnesses whom the defendant expects to call as defense witnesses at the trial.

The prosecuting attorney may, prior to filing his list of witnesses, move the court for a protective order as provided in subsection (h) of this rule. The filing of a motion for a protective order will automatically stay the times provided for in this sub-section. If a protective order is granted the defendant may, within two days thereafter, or at any time before the prosecuting attorney files a list as required herein, withdraw his offer and not be required to furnish his list of witnesses.

(f) **Discovery Depositions.** When a person is charged with an offense, upon motion of such person, at any time after the filing of the indictment, information, or affidavit upon which the defendant is to be tried and after notice to the prosecuting attorney, the court shall order the taking of the deposition of any person (other than a confidential informer who will not be a witness at the trial) who may have information relevant to the offense charged and the defense of the person charged with respect thereto, on showing that the testimony of the witness may be material or relevant on the trial, or of assistance in the preparation of the defense of the person charged, and on showing that the witness will not cooperate in giving a voluntary, signed, written statement to the person charged or his attorney. The person charged shall give to the prosecuting attorney written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of the prosecuting attorney, the court ordering the deposition may, for good cause shown, extend or shorten the time and may change the place of taking. A deposition under this section shall be taken in the manner provided in the Florida Rules of Civil Procedure, and the scope of examination, on such deposition, and as to the written statement above shall be the same as that provided in the Florida Rules of Civil Procedure. Any deposition taken pursuant hereto may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. An order to take depositions authorizes the issuance of subpoenas by the clerk of the court for the persons named or described therein. A resident of the state may be required to attend an examination only in the county wherein he resides, or is employed, or regularly transacts his business, in person. A person who refuses to obey a subpoena served upon him may be adjudged in contempt of the court from which the subpoena issued.

(g) **Continuing Duty to Disclose; Failure to Comply.**—If, subsequent to compliance with an offer or order for discovery under these rules, and prior to or during trial, a party discovers additional material which he would have been under a duty to disclose or produce at the time of such previous compliance, if it was then known to the party he shall promptly notify the other party or his attorney of the existence of the additional material in the same manner as required under these rules for initial discovery. If, at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from calling a witness not disclosed, or introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

(h) **Protective Orders.**—Upon a sufficient showing the court may, at any time, grant a protective order whereby the discovery contemplated by paragraphs (d), (e) and (f) hereof, is denied, restricted, or deferred, or make such other order as is appropriate and may alter the time of compliance provided for herein. Upon motion by the prosecuting attorney the court may permit the state to make such showing, in whole or in part, in the form of a written statement to be inspected by the court alone. If the court enters an order granting relief following a showing to the court alone, the entire text of the state's statement shall be sealed and preserved in the records of the court to be made available to the Appellate Court in the event of an appeal by the defendant.

Text of Florida Rules of Criminal Procedure (Cont'd)

(i) **Cost of Indigents.**—After a defendant is adjudged insolvent, the reasonable costs incurred in the operation of these rules shall be taxed as costs against the county.

(j) **Application of Rule to County Judge's and Justice of the Peace Courts Having Irregular or No Prosecutors.**—In a county judge's court or a court of a justice of the peace in which there is no prosecutor who can be required to meet the obligations of the state as provided for in this rule, the judge or justice of the peace shall meet such obligations in so far as it is reasonable to do so, including the issuance of appropriate orders to the affiant responsible for making the affidavit upon which the defendant is to be tried.

Committee Note: (a)(1) This is substantially the same as 925.05.

(a)(2) This is new and allows a defendant rights which he did not have, but must be considered in light of rule (c).

(a)(3) This is a slight enlargement upon the present practice; however, from a practical standpoint, it is not an enlargement, but merely a codification of 925.05 with respect to the defendant's testimony before a grand jury.

(b) This is a re-statement of 925.04, except for the change of the word "may" to "shall."

(c) This is new and affords discovery to the State within the trial judge's discretion by allowing the trial judge to make discovery under (a)(2) and (b) conditioned upon the defendant giving the State some information if he has it. This affords the State some area of discovery which it did not previously have with respect to (b). A question was raised concerning the effect of (a)(2) on F.B.I. reports and other reports which are submitted to a prosecutor as "confidential" but it was agreed that the interests of justice would be better served by allowing this rule and that after the appropriate governmental authorities are made aware of the fact that their reports may be subject to compulsory disclosure, no harm to the State will be done.

(d) and (e). This gives the defendant optional procedures. (d) is simply a codification of 906.29 except for the addition of "addresses." The defendant is allowed this procedure in any event. (e) affords the defendant the additional practice of obtaining all of the State's witnesses, as distinguished from merely those on whose evidence the information, or indictment, is based, but only if the defendant is willing to give the State all of his witnesses which he must do if he takes advantage of this rule. The confidential informer must be disclosed if he is to be used as a witness; but it was expressly viewed that this should not otherwise over-rule present case law on the subject of disclosure of confidential informants, either where disclosure is required or not required.

(f) This is new and is a compromise between the philosophy that the defendant should be allowed unlimited discovery depositions and the philosophy that he should not be allowed any discovery depositions at all. The purpose of the rule is to afford the defendant relief from situations where witnesses refuse to "cooperate" by making pretrial disclosures to the defense. It was determined to be necessary that the written signed statement be a criterion because this is the only way witnesses can be impeached by prior contradictory statements. The word "cooperate" was intentionally left in the rule, although the word is a loose one, so that it can be given a liberal interpretation, i.e., a witness may say that he is making himself available and yet never actually submit himself to an interview. Some express the view that the defendant is not being afforded adequate protection because the cooperating witness will not have been under oath, but the sub-committee felt that the only alternative would be to make unlimited discovery depositions available to the defendant which was a view not approved by a majority of the sub-committee. Each minority is expressed by the following alternative proposals:

Alternative Proposal (1): Where a person is charged with an offense, at any time after the filing of the indictment or information, or affidavit, upon which the defendant is to be tried, such person may take the deposition of any person by deposition upon oral examination for the purpose of discovery. The attendances of witnesses may be compelled by the use of subpoenas as provided by law. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes. The scope of examination and the manner and method of taking such deposition shall be as provided in the Florida Rules of Civil Procedure and said deposition may be used for the purpose of contradicting or impeaching the testimony of a deponent as a witness.

Alternative Proposal (2): If a defendant shall sign and file a written waiver of his privilege against self-incrimination, and if he shall submit himself to interrogation under oath by the prosecuting attorney, then he shall be entitled to compulsory process for any or all witnesses to enable him to interrogate them under oath, before trial, for discovery purposes.

A view was expressed that some limitation should be placed on the State's rights under 27.04 and 32.20 Florida Statutes, which allow the prosecutor to take all depositions unilaterally at any time. It was agreed by all members of the sub-committee that this right should not be curtailed until some specific time after the filing of an indictment, information, or affidavit, because circumstances sometime require the filing of the charge and a studied marshalling of evidence thereafter. Criticism of the present practice lies in the fact that any time up to and during the course of the trial the prosecutor can subpoena any person to the privacy of his office without notice to the defense and there take a statement of such person under oath. The sub-committee was divided, however, on the method of altering this situation and the end result was that this subcommittee itself should not undertake to change the existing practice, but should make the Supreme Court aware of this apparent imbalance.

(g) This is new and is required in order to make effective the preceding rules.

(h) This is new and although it encompasses relief for both the State and the defense, its primary purpose is to afford relief in situations where witnesses may be intimidated and where a prose-

Text of Florida Rules of Criminal Procedure (Cont'd)

cuting attorney's heavy docket might not allow him to comply with discovery within the time limitations set forth in the rules. The words "sufficient showing" were intentionally included in order to permit the trial judge to have discretion in granting the protective relief. It would be impossible to specify all possible grounds which can be the basis of a protective order. This verbiage also permits a possible abuse by a prosecution minded trial judge, but the sub-committee felt that the Appellate Court would remedy any such abuse in the course of making appellate decisions.

(i) This is new and although it will entail additional expense to counties, it was determined that it was necessary in order to comply with the recent trend of federal decisions which hold that due process is violated when a person who has the money with which to resist criminal prosecution gains an advantage over the person who is not so endowed. Actually, there is serious doubt that the intent of this sub-section can be accomplished by a rule of procedure; a statute is needed. It is recognized that such a statute may be unpopular with the legislature and not enacted. But, if this sub-section has not given effect there is a likelihood that a constitutional infirmity (equal protection of the law) will be found and either the entire rule with all sub-sections will be held void, or confusion in application will result.

(j) This provision is necessary since the prosecutor is required to assume many responsibilities under the various subsections under the Rule. There are no prosecuting attorneys, either elected or regularly assigned, in justice of the peace courts. County judge's courts, as distinguished from county courts, do not have elected prosecutors. Prosecuting attorneys in such courts are employed by county commissions and may be handicapped in meeting the requirements of the Rule due to the irregularity and uncertainty of such employment. This subsection is inserted as a method of achieving as much uniformity as possible in all of the courts of Florida having jurisdictions to try criminal cases.

# # #

Text of American Bar Association

Standards Relating to Discovery and Procedure Before Trial

(Approved Draft, 1970)

PART I. GENERAL PRINCIPLES

1.1 Procedural needs prior to trial.

(a) Procedures prior to trial should serve the following needs:

(i) to promote an expeditious as well as fair determination of the charges, whether by plea or trial;

(ii) to provide the accused sufficient information to make an informed plea;

(iii) to permit thorough preparation for trial and minimize surprise at trial;

(iv) to avoid unnecessary and repetitious trials by exposing any latent procedural or constitutional issues and affording remedies therefor prior to trial;

(v) to reduce interruptions and complications of trials by identifying issues collateral to guilt or innocence, and determining them prior to trial; and

(vi) to effect economies in time, money, and judicial and professional talents by minimizing paperwork, repetitious assertions of issues, and the number of separate hearings.

(b) These needs can be served by (i) fuller discovery, (ii) simpler and more efficient procedures, and (iii) procedural pressures for expediting the processing of cases.

Text of ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) (Cont'd)

1.2 Scope of discovery.

In order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protection of persons, effective law enforcement, the adversary system, and national security.

1.3 Procedural concept.

Effective procedure prior to trial should normally encompass three successive stages:

(a) meetings between defense counsel and the prosecuting attorney where, without court intervention, they will engage in required discovery, explore additional discretionary discovery, conduct investigation as needed, and enter upon plea discussions;

(b) court hearings with counsel to ensure the proper conduct of required discovery, rule on matters of discretionary discovery, expose and determine latent procedural or constitutional issues, and obviate cumbersome motion practices; and

(c) preparation for trial which, in cases where the trial is likely to be protracted or unusually complicated, should include a pretrial conference.

Text of ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) (Cont'd)

1.4 Responsibilities of the trial court and of counsel.

(a) Trial court. The trial court should, on its own initiative, provide for the exercise of discovery automatically, without the filing of formal requests or supporting documents. The court should supervise the exercise of discovery to the extent necessary to ensure that it proceeds properly, expeditiously and with a minimum of imposition on the time and energies of the court, counsel, and prospective witnesses. In any event, the court should encourage effective and timely discovery conducted voluntarily and informally between counsel. The court should take the initiative at appropriate times in ensuring that any latent procedural or constitutional issues are exposed and determined prior to trial. To these ends, the court should provide appropriate check-list forms, time schedules, and hearings; and hearings should be consolidated, if possible, with any other hearings to be held in the case prior to the trial.

(b) Counsel. Prosecution and defense counsel should take the initiative and conduct required discovery willingly and expeditiously, with a minimum of imposition on the time and energies of the court, counsel, and prospective witnesses. Counsel should be astute and diligent in defining issues which can most efficiently be disposed of prior to trial, and should engage in plea discussions in an effective and timely manner. Only through the initiative and cooperation of counsel in effecting these standards can criminal cases be fairly and timely disposed of, as justice requires.

Text of ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) (Cont'd)

1.5 Applicability.

These standards should be applied in all serious criminal cases.

PART II. DISCLOSURE TO ACCUSED

2.1 Prosecutor's obligations.

(a) Except as is otherwise provided as to matters not subject to disclosure (section 2.6) and protective orders (section 4.4), the prosecuting attorney shall disclose to defense counsel the following material and information within his possession or control:

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with their relevant written or recorded statements;

(ii) any written or recorded statements and the substance of any oral statements made by the accused, or made by a codefendant if the trial is to be a joint one;

(iii) 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;

(iv) any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons;

Text of ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) (Cont'd)

2.1 Prosecutor's obligations (Cont'd).

(v) any books, papers, documents, photographs or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused; and

(vi) any record of prior criminal convictions of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.

(b) The prosecuting attorney shall inform defense counsel:

(i) whether there is any relevant recorded grand jury testimony which has not been transcribed; and

(ii) whether there has been any electronic surveillance (including wiretapping) of conversations to which the accused was a party or of his premises.

(c) Except as is otherwise provided as to protective orders (section 4.4), the prosecuting attorney shall disclose to defense counsel any material or information within his possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce his punishment therefor.

(d) The prosecuting attorney's obligations under this section extend to material and information in the possession or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office.

Text of ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) (Cont'd)

2.2 Prosecutor's performance of obligations.

(a) The prosecuting attorney should perform his obligations under section 2.1 as soon as practicable following the filing of charges against the accused.

(b) The prosecuting attorney may perform these obligations in any manner mutually agreeable to himself and defense counsel or by:

(i) notifying defense counsel that material and information, described in general terms, may be inspected, obtained, tested, copied or photographed, during specified, reasonable times; and

(ii) making available to defense counsel at the time specified such material and information, and suitable facilities or other arrangements for inspection, testing, copying and photographing of such material and information.

(c) The prosecuting attorney should ensure that a flow of information is maintained between the various investigative personnel and his office sufficient to place within his possession or control all material and information relevant to the accused and the offense charged.

2.3 Additional disclosures upon request and specification.

Except as is otherwise provided as to matters not subject to disclosure (section 2.6) and protective orders (section 4.4), the prosecuting attorney shall, upon request of defense counsel, disclose and permit inspection, testing, copying and photographing of any relevant material and information regarding:

Text of ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) (Cont'd)

2.3 Additional disclosures upon request and specification (Cont'd).

(a) specified searches and seizures;

(b) the acquisition of specified statements from the accused; and

(c) the relationship, if any, of specified persons to the prosecuting authority.

2.4 Material held by other governmental personnel.

Upon defense counsel's request and designation of material or information which would be discoverable if in the possession or control of the prosecuting attorney and which is in the possession or control of other governmental personnel, the prosecuting attorney shall use diligent good faith efforts to cause such material to be made available to defense counsel; and if the prosecuting attorney's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to defense counsel.

2.5 Discretionary disclosures.

(a) Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to defense counsel of relevant material and information not covered by sections 2.1, 2.3 and 2.4.

Text of ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) (Cont'd)

2.5 Discretionary disclosures (Cont'd).

(b) The court may deny disclosure authorized by this section if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweighs any usefulness of the disclosure to defense counsel.

2.6 Matters not subject to disclosure.

(a) Work product. Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the prosecuting attorney or members of his legal staff.

(b) Informants. Disclosure of an informant's identity shall not be required where his identity is a prosecution secret and a failure to disclose will not infringe the constitutional rights of the accused. Disclosure shall not be denied hereunder of the identity of witnesses to be produced at a hearing or trial.

(c) National security. Disclosure shall not be required where it involves a substantial risk of grave prejudice to national security and a failure to disclose will not infringe the constitutional rights of the accused. Disclosure shall not thus be denied hereunder regarding witnesses or material to be produced at a hearing or trial.

Text of ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) (Cont'd)

PART III. DISCLOSURE TO PROSECUTION

3.1 The person of the accused.

(a) Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, a judicial officer may require the accused to:

(i) appear in a line-up;

(ii) speak for identification by witnesses to an offense;

(iii) be fingerprinted;

(iv) pose for photographs not involving reenactment of a scene;

(v) try on articles of clothing;

(vi) permit the taking of specimens of material under his fingernails;

(vii) permit the taking of samples of his blood, hair and other materials of his body which involve no unreasonable intrusion thereof;

(viii) provide specimens of his handwriting; and

(ix) submit to a reasonable physical or medical inspection of his body.

(b) Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given by the prosecuting attorney to the accused and his counsel. Provision may be made for appearances for such purposes in an order admitting the accused to bail or providing for his release.

Text of ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) (Cont'd)

3.2 Medical and scientific reports.

Subject to constitutional limitations, the trial court may require that the prosecuting attorney be informed of and permitted to inspect and copy or photograph any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons.

3.3 Nature of defense.

Subject to constitutional limitations, the trial court may require that the prosecuting attorney be informed of the nature of any defense which defense counsel intends to use at trial and the names and addresses of persons whom defense counsel intends to call as witnesses in support thereof.

PART IV. REGULATION OF DISCOVERY

4.1 Investigations not to be impeded.

Except as is otherwise provided as to matters not subject to disclosure (section 2.6) and protective orders (section 4.4), neither the counsel for the parties nor other prosecution or defense personnel shall advise persons having relevant material or information (except the accused) to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.

Text of ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) (Cont'd)

4.2 Continuing duty to disclose.

If, subsequent to compliance with these standards or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, he shall promptly notify the other party or his counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

4.3 Custody of materials.

Any materials furnished to an attorney pursuant to these standards shall remain in his exclusive custody and be used only for the purposes of conducting his side of the case, and shall be subject to such other terms and conditions as the court may provide.

4.4 Protective orders.

Upon a showing of cause, the court may at any time order that specified disclosures be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit his counsel to make beneficial use thereof.

Text of ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) (Cont'd)

4.5 Excision.

When some parts of certain material are discoverable under these standards, and other parts not discoverable, as much of the material should be disclosed as is consistent with the standards. Excision of certain material and disclosure of the balance is preferable to withholding the whole. Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

4.6 In camera proceedings.

Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or portion of such showing, to be made in camera. A record shall be made of such proceedings. If the court enters an order granting relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

4.7 Sanctions.

(a) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances.

Text of ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) (Cont'd)

4.7 Sanctions (Cont'd).

(b) Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

PART V. PROCEDURE

5.1 General procedural requirements.

(a) Procedure prior to trial should recognize the possible need for three successive stages: (i) an exploratory stage, initiated by counsel and conducted without court supervision (see section 5.2); (ii) an omnibus stage, supervised by the trial court and entailing court appearances as necessary (see section 5.3); and (iii) a trial planning stage, entailing pretrial conferences as necessary (see section 5.4). The various stages should be adapted to the needs of the particular case and eliminated or combined as appropriate.

(b) Essential to the proper expediting of proceedings prior to trial are (i) effective judicial calendar control, and (ii) a requirement (by rule or statute) that criminal charges be brought to trial or otherwise disposed of within a specific time period running from a specified event.

5.2 Exploratory stage and setting of Omnibus Hearing.

(a) Procedures prior to trial should not interfere with but should afford the opportunity for counsel to expedite a fair disposition of the case using, without court intervention, discovery,

Text of ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) (Cont'd)

5.2 Exploratory stage and setting of Omnibus Hearing (Cont'd).

investigation and plea discussions, as appropriate in the particular case. Wherever such opportunity does not now exist, procedures should be adapted to encourage counsel to exercise their initiative in these matters.

(b) At such time as a plea is first called for in the court having jurisdiction to try the accused, if a plea of guilty is not entered, the court shall then set a time for an Omnibus Hearing.

(c) The time set for the Omnibus Hearing shall allow sufficient time for counsel to (i) initiate and complete discovery required by sections 2.1 and 2.3, and such additional discovery as in their judgment will expedite the proceedings; (ii) conduct further investigation of the case, as needed; and (iii) continue plea discussions.

5.3 Omnibus Hearing.

(a) At the Omnibus Hearing, the trial court on its own initiative, utilizing an appropriate check-list form, should:

(i) ensure that standards regarding provision of counsel have been complied with;

(ii) ascertain whether the parties have completed the discovery required in sections 2.1 and 2.3, and if not, make orders appropriate to expedite completion;

(iii) ascertain whether there are requests for additional disclosures under sections 2.4, 2.5 and 3.2;

Text of ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) (Cont'd)

5.3 Omnibus Hearing (Cont'd).

(iv) make rulings on any motions, demurrers or other requests then pending, and ascertain whether any additional motions, demurrers or requests will be made at the hearing or continued portions thereof;

(v) ascertain whether there are any procedural or constitutional issues which should be considered;

(vi) upon agreement of counsel, or upon a finding that the trial is likely to be protracted or otherwise unusually complicated, set a time for a Pretrial Conference; and

(vii) upon the accused's request, permit him to change his plea.

(b) All motions, demurrers and other requests prior to trial should ordinarily be reserved for and presented orally at the Omnibus Hearing unless the court otherwise directs. Failure to raise any prior-to-trial error or issue at this time constitutes waiver of such error or issue if the party concerned then has the information necessary to raise it. Check-list forms should be established and made available by the court and utilized at the hearing to ensure that all requests, errors and issues are then considered.

(c) Any and all issues should be raised either by counsel or by the court without prior notice, and if appropriate, informally disposed of. If additional discovery, investigation or preparation, or evidentiary hearing, or formal presentation is necessary for a fair

Text of ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) (Cont'd)

5.3 Omnibus Hearing (Cont'd)

and orderly determination of any issue, the Omnibus Hearing should be continued from time to time until all matters raised are properly disposed of.

(d) Stipulations by any party or his counsel should be binding upon the parties at trial unless set aside or modified by the court in the interests of justice.

(e) A record should be made of all proceedings at the hearing; such a record may be either a verbatim record, or a summary memorandum (dictated or written on an appropriate court-established form) indicating disclosures made, rulings and orders of the court, stipulations, and any other matters determined or pending.

5.4 Pretrial Conference.

(a) Whenever a trial is likely to be protracted or otherwise unusually complicated, or upon request by agreement of counsel, the trial court may (in addition to the Omnibus Hearing) hold one or more Pretrial Conferences, with trial counsel present, to consider such matters as will promote a fair and expeditious trial. Matters which might usefully be considered include:

(i) making stipulations as to facts about which there can be no dispute;

(ii) marking for identification various documents and other exhibits of the parties;

(iii) waivers of foundation as to such documents;

Text of ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) (Cont'd)

5.4 Pretrial Conference (Cont'd).

(iv) excision from admissible statements of material prejudicial to a codefendant;

(v) severance of defendants or offenses;

(vi) seating arrangements for defendants and counsel;

(vii) use of jurors and questionnaires;

(viii) conduct of voir dire;

(ix) number and use of peremptory challenges;

(x) procedure on objections where there are multiple counsel;

(xi) order of presentation of evidence and arguments where there are multiple defendants;

(xii) order of cross-examination where there are multiple defendants; and

(xiii) temporary absence of defense counsel during trial.

(b) Conferences should be recorded. At the conclusion of a conference, a pretrial order, or memorandum of the matters agreed upon, should be signed by counsel, approved by the court and filed, which should be binding upon the parties at trial, on appeal, and in post-conviction proceedings unless set aside or modified by the court in the interests of justice. However, admissions of fact by an accused if present should bind the accused only if included in the pretrial order and signed by the accused as well as his attorney.