Tape 9 - Side 1 - 530 to end
Side 2 - 1 to end (Tape begins p. 5)
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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 3

June 2, 1972

Minutes

Members Present: Judge James M. Burns, Chairman
Mr. Donald R. Blensly
Representative Norma Paulus (Delayed)

Excused: Mr. Donald E. Clark

Staff Present: Mr. Donald L. Paillette, Project Director

Others Present: Mr. John W. Osburn, Solicitor General, Department of Justice
Mr. Charles Carnese, Deputy District Attorney, Multnomah County
Mr. M. Chapin Milbank, Chairman, Oregon State Bar Committee on Criminal Law and Procedure
Captain George W. McCloud, Department of Public Safety, Hillsboro
Deputy Sheriff William R. Probstfield, Department of Public Safety, Hillsboro

Agenda: PRE-TRIAL DISCOVERY (Attorney General's Draft)

The meeting was called to order at 10:15 a.m. by Judge James M. Burns, Chairman, in Room 315 State Capitol.

PRE-TRIAL DISCOVERY (Attorney General's Draft) [See Appendix A]

Chairman Burns indicated that the Attorney General's draft on Pre-Trial Discovery had been prepared by Mr. John Osburn and asked him to proceed with an explanation of it.

Mr. Osburn recapitulated the basic provisions of Preliminary Draft No. 1 on Pre-Trial Discovery discussed at the meeting of Subcommittee No. 3 on March 16, 1972, which essentially provided for reciprocal discovery upon motion by the defendant. Following that meeting the Attorney General's draft was prepared which provided for discovery not based upon motion but based upon the concept that it was the pre-trial obligation of both parties to the court and to each other to provide information that would be made available at the time of trial. It contained provisions for protective orders in certain kinds of cases, for exclusion of legal research and work product type of papers and

for nondisclosure of confidential informants who were not intended to be produced at time of trial. Because the procedure under the draft did not require a motion, it would not be invoked by the parties themselves but would be invoked as a matter of law.

Mr. Osburn explained that there were two theories in the modern pre-trial discovery statutes under which the defendant may be required to produce evidence. One was the type of reasoning in Williams v. Florida, 399 US 78 (1970), which said that if the state must produce something, the defendant must also produce something and that the obligation to disclose is based upon the right to discover what the state has. That theory, he said, was embodied in Preliminary Draft No. 1 prepared by Mr. Paillette. Mr. Osburn's draft presented the subcommittee with an alternative theory and provided that the defense must produce what it intends to produce at the time of trial, the premise being that the defense is ultimately required to disclose certain things and the draft only requires them to do that prior to trial rather than on the morning of trial.

Section 1. Applicability. Because the procedure set forth in this draft is relatively automatic, Mr. Osburn said it appeared to be necessary to provide some means of eliminating pre-trial discovery in routine traffic cases. Consequently, section 1 provided that the provisions of this Article shall apply in any case in which an indictment or information is filed in the circuit court charging the defendant either with a felony or a misdemeanor. In other criminal prosecutions, such as misdemeanors in district court and justice court, the provisions of the Article may be invoked by the defendant, but it would obviate the situation where the state would be required, in a violation of the basic rule trial in district court, to provide 10 days in advance of trial all of the information required by this Article.

Chairman Burns asked if the second sentence of section 1 was intended to apply to misdemeanors in district, justice and municipal courts and received an affirmative reply from Mr. Osburn.

Mr. Paillette asked Mr. Osburn if he believed it was necessary to provide for discovery, either by motion or in some other manner, in misdemeanor cases and was told that he did not. Chairman Burns commented that discovery in misdemeanor cases would raise a problem in connection with cases that were routinely tried less than 10 days after a charge was filed. A defense lawyer could well argue that he did not get discovery because the cases were set less than 10 days after the charge was filed. A further problem in misdemeanor cases could be created if the defense were to use an automatic request as a kind of general harassment technique.

Mr. Paillette stated that Preliminary Draft No. 1 was not restricted to felony prosecutions and the subcommittee had discussed that point at the March meeting in connection with the ABA recommendation that pre-trial discovery should apply to all "serious" criminal cases.

Mr. Milbank said for certain types of traffic cases he presently requested pre-trial discovery and it was routinely granted. One was a DUIL charge where he asked for the field breathalyzer report and also copies of the officer's certification. He was of the opinion that the five major traffic offenses should be subject to discovery but it was unnecessary for minor traffic offenses. Mr. Carnese expressed agreement with Mr. Milbank's view that the major traffic offenses should be subject to discovery and said he could also foresee the need for discovery arising in other than major traffic offense cases. He could see no obstacle to discovery in misdemeanor cases from the district attorney's standpoint.

Chairman Burns asked if discovery in misdemeanor cases might not result in a flood of requests for discovery and was told by Mr. Blensly that all that would be required in most cases would be to supply a copy of the officer's report. Ordinarily, there was little else involved in the case.

Mr. Blensly was critical of imposing a duty to carry out discovery procedures involving felonies in the proposed Article without motion. Basically, he said, discovery was taken care of on an informal basis and when it was not, he believed there should be a requirement for a motion procedure.

Mr. Osburn advised that the draft did not include discovery of all information required by Brady v. Maryland, 373 US 83 (1963), the reason being that there was some question as to when Brady material must be provided. The draft took the position that it must be provided at a time when the defendant would be able to use it, but it would not necessarily have to be included in pre-trial discovery.

Chairman Burns commented that perhaps the draft contained the best approach by requiring that discovery would apply in misdemeanor cases, only when requested by the defendant. Mr. Carnese said he could see no objection to it provided some written notice was given to the prosecution, although not necessarily by motion. Chairman Burns replied that this could be accomplished by stating, "If the defendant serves upon the prosecutor a written request for discovery . . . . "

Mr. Blensly remarked that if one of the alternatives to not complying with the request was an expression by the court as to what was to be done, it would be more proper to require that the request for discovery be filed with the court rather than with some deputy district attorney who might resign, go out of town or lose the request, resulting in an argument as to whether the request was actually filed.

Chairman Burns said that as a practical matter, if the requests were reasonable and there was no continuing abuse of the number of requests filed, the court would never know about them. He believed it was unnecessary to clutter up the court records with such requests.

Chairman Burns noted that the first sentence of section 1 would need to be amended to conform to the Commission's proposed constitutional amendment relating to grand juries making the filing of an information optional with the district attorney. Mr. Osburn replied that this would be accomplished by striking "on waiver of indictment" and inserting "in the circuit court." The subcommittee consented to that revision.

Mr. Carnese said that "other criminal prosecutions" as used in the second sentence of section 1 would include the filing of an information on a felony in the lower courts. He did not believe that on a felony matter discovery should be mandatory upon request or court order in the lower courts prior to bind-over until an indictment was found or a waiver of indictment filed. There should, he said, be an exception for filing an information of either a felony or a misdemeanor in that situation. His contention was that absent a bind-over, discovery as a right should not attach prior to indictment, one reason being that many times the investigation was not complete before indictment and the state therefore could be in violation of the law if more information were gathered after whatever time period elapsed following the original disclosure.

Mr. Paillette pointed out that section 6 provided for a continuing duty to disclose. Mr. Carnese replied that every time the police officer interviewed another witness, it would require an additional letter or telephone call to the defense attorney to apprise him of that fact. That was an awkward situation that could be avoided by not requiring discovery until the investigation was basically complete, which in Multnomah County in a misdemeanor matter was at the time the complaint was issued and in a felony situation was at the time of indictment.

Chairman Burns commented that Mr. Carnese's suggestion again raised the 10 day problem because preliminary hearings were normally held less than 10 days after filing of the charge. He added that another problem was inherent in the phrase, "In other criminal prosecutions," in that there was a question as to whether discovery would be available in a case involving an ordinance violation in a municipal court. Mr. Paillette advised that if the offense carried a jail sentence, it was a crime under the Criminal Code which specifically defined an offense to include not only violations of state law but also violations of any law or ordinance of a political subdivision.

In reply to a question by the Chairman as to what action the subcommittee should take with respect to preliminary hearings, Mr. Milbank said that since there were no preliminary hearings in Marion County, he was perfectly satisfied to trade an expanded right of discovery for a preliminary hearing.

Mr. Blensly was of the opinion that the time to trigger discovery was not the trial date which was an uncertain date. The date that was certain and material was the date the defendant was arraigned. He contended that the trigger date for discovery should be a given number of days after arraignment.

Chairman Burns commented that if the preliminary hearing was strictly a probable cause hearing and not a truncated discovery device, perhaps there was no need for discovery at the probable cause stage. Mr. Blensly agreed that the defendant especially was not in a position to give much information at that point and both Mr. Milbank and Mr. Carnese concurred.

Mr. Osburn commented that the concept of this Article was not entirely to aid everyone's investigation in a case but rather to assist the court and the system in having as much thrashed out in advance of trial as possible. Mr. Paillette observed that if a motion was not required, the thing that would trigger discovery should be tied in with the trial objective and that would be at the indictment or information stage.

Tape 9 - Side 2

Mr. Milbank asked how section 1 would affect juvenile proceedings which were quasi-criminal in nature when a remand was involved. He asked if discovery was intentionally being excluded from that field of the law. Mr. Paillette commented that sooner or later discovery was always available in a juvenile case, and Mr. Blensly added that there was discovery at the present time of all the files in juvenile cases other than the police reports. After further discussion, the subcommittee decided to leave the matter of discovery in juvenile cases to the Juvenile Code Revision Committee.

Chairman Burns asked if the language in the second sentence of section 1 clearly indicated that it referred to matters in courts inferior to the circuit court. Mr. Osburn advised that when he was drafting the section, he had not considered municipal courts and had therefore used the term "criminal prosecutions."

Chairman Burns asked Mr. Blensly if he thought the request for discovery should be filed with the court or with the prosecutor. Mr. Blensly said that as long as the court was controlling discovery and would be required to make a decision if there was a failure to disclose under the provisions of the Article, he believed it should be triggered by a motion with the court. Mr. Carnese felt it was imperative that the prosecutor should also have a copy of the request. Chairman Burns said there might well be places in the state where local court rules would not require that a motion filed with the court also be served on the opposing party and suggested that if a motion was to be required, the proposed statute should specify that the defendant must serve a copy on the prosecutor.

Mr. Paillette pointed out that the whole thrust of this Article centered around good faith on both sides and asked what was accomplished by filing the request for discovery in the circuit court. Furthermore, if Mr. Blensly's suggestion were adopted, the defense instead of filing one paper would be filing two -- one with the judge and one with the prosecutor. He could see no reason why the defense should not be permitted to merely make his request to the prosecutor. Mr. Carnese said

he would have no objection so long as the prosecutor received the request in writing. Chairman Burns indicated that would be accomplished by inserting "if the defendant serves upon the prosecutor a written request for discovery" in the second sentence of section 1.

Mr. Blensly asked if the language should be "prosecutor" or "district attorney" and was told by Mr. Paillette that it should be "prosecutor" in order to include city attorneys as well as district attorneys.

Mr. Blensly asked what the subcommittee wanted to do about the question concerning informations in district court and was told by Mr. Osburn that the problem could be resolved in section 4. Mr. Carnese contended that section 4 should be tied into section 1. Chairman Burns suggested that the second sentence of section 1 begin with the phrase "Except as provided in section 4,". [For further discussion of this subject, see page 24 of these minutes.]

As approved by the subcommittee, section 1 would read:

> "Section 1. Applicability. The provisions of this Article are applicable to all prosecutions in which an indictment has been found by a grand jury, or in which an information has been filed in the circuit court. Except as otherwise provided in section 4, in other criminal prosecutions, the provisions of this Article shall be applicable if the defendant serves upon the prosecutor having jurisdiction of the prosecution a written request for discovery of any of the items discoverable under this Article."

Section 1 was later amended to delete "Except as otherwise provided in section 4,". (See page 24 of these minutes.) Also, "district attorney" was reinstated in place of "prosecutor." (See page 21 of these minutes.)

Section 2. Disclosure to defendant. Mr. Osburn noted that section 2 excluded the provisions of sections 5 and 7. The disclosure under section 2, he said, was not of everything the prosecution had and was not of Brady v. Maryland information which may or may not as a matter of policy be required to be disclosed prior to trial. The items to be revealed by the district attorney were listed in subsections (1) through (6). Omitted from section 2 was a definition of who the prosecutor intends to call as a witness at the trial and also omitted was a decision as to what should be done about the situation where the prosecutor decides he will not use a certain witness at trial and later changes his mind and wants to call him. If a rule were to be drawn to cover such a situation, he said it would of necessity be very lengthy. The draft, therefore, took the position that if the prosecutor believes there is a reasonable chance that he might call a particular witness and if he does not give the name of that witness to the defense, he assumes the risk that that witness may not be allowed to testify. Provisions were included for the court to provide for later disclosure

upon good cause shown. Mr. Milbank asked if this last statement applied to a rebuttal situation and received an affirmative reply from Mr. Osburn.

Mr. Osburn did not contemplate that the Discovery Article would alter the present rules on alibi or on insanity when notice was given that either defense was going to be relied upon. In the case of alibi witnesses, they would have to be disclosed by both sides, and this would cure the problem of nondisclosure by the state raised in State v. Wardius, 93 Adv Sh 147, ____ Or App ____ (1971).

Subsection (1). Mr. Osburn noted that subsection (1) of section 2 did not include memoranda of any oral statements in the possession of the prosecutor nor did it include grand jury minutes. Chairman Burns commented that frequently in Multnomah County the only written statements consisted of the police report which was a boiled down version of the officer's interview with the witness. If the district attorney didn't intend to call the police officer as a witness, then under section 2 he would not be required to disclose the police report. Mr. Blensly remarked that the same was true on the defense side. The defense attorney would probably only have his notes of examination of the witnesses and those too would be exempt from discovery.

Mr. Osburn said the objections just made could be cured by inserting "or memoranda of any oral statements" at the end of subsection (1). He informed the subcommittee that there were several kinds of information that could be required: (1) the name of the witness, which was the practice presently followed on indictments where only the names of the witnesses were endorsed thereon; (2) the name and address of the witness; (3) name, address and a summary of what the witnesses will testify to, although he believed this latter course could become very cumbersome.

Chairman Burns said there were basically three types of situations involved. One was where the police officer investigated the crime and wrote a report which contained a summary of what the witnesses told him. Second, the situation where the witness was interviewed by an attorney for either side, and this was close to the work product area. The third area was where an investigator for either side took statements from witnesses.

Mr. Osburn pointed out that the ABA standards excluded statements made to investigators from their definition of a work product, but it was his opinion that it was an indefensible exclusion. Chairman Burns said the police officer's report in Multnomah County was routinely shown to the defense at the present time and no one objected to that procedure. However, when the deputy sent out an investigator, it was very much like an extension of the attorney, and it did pose a problem as to whether his report should be considered a work product. Mr. Carnese commented that the defendant would have very little to offer in the way of discovery to the state if investigator's reports were excluded because that was all there would be in many cases.

Mr. Osburn said he did not consider a statement made to an attorney or to an investigator to be a work product. To him, he said, a work product was legal research, office memoranda, letters, etc.

Mr. Carnese remarked that a deputy district attorney might question a witness, yet make no notes of the meeting, and there would be nothing available other than what he remembered from the interview. Mr. Osburn stated that if the statement was not reduced to writing, there would be nothing to disclose other than the name and address of the witness. It would be virtually impossible, he said, to write a statute requiring that not only written reports, statements and memoranda be given but also a summary of anything the witness said. Both Mr. Carnese and Mr. Blensly expressed agreement and Mr. Blensly added that both sides would want to interview the witnesses in any case.

Mr. Carnese pointed out that subsection (1) of section 2 required only the names and addresses of officers who were going to testify at trial and asked if the names should also be given of officers who had taken statements.

Chairman Burns commented that the typical police report was not covered by subsection (1) but he believed it should be. To correct that problem Mr. Osburn suggested adding at the end of subsection (1), "or memoranda of any oral statements of such persons." This proposal was adopted.

Mr. Carnese agreed that the proposed amendment would be an improvement but it would still get the district attorney into the situation of Xeroxing portions of police reports. He urged that the draft state a specific policy as to whether an entire police report would be open for discovery. If a Brady problem were involved in a case where a witness was contacted by the district attorney who would not be called by the state because he was favorable to the defendant, he asked if the copy of that report could then be deleted from the reports given to the defendant. Mr. Osburn explained that the draft contained no requirement to disclose that type of information prior to trial, but the district attorney would take some risk if he disclosed it too late.

Chairman Burns said the area that caused him concern was where the police report mingled what the witness said along with the officer's impressions of the witness. If the draft were to require that a summary of witnesses' statements were discoverable, probably what would happen would be that there would be two reports -- one covering what the witness said and another dealing with the officer's impressions of the witness.

Mr. Osburn said the ABA standards contained a provision not included in the draft which provided for excising a portion of a report, not all of which was subject to disclosure. Perhaps that type of provision should be added to this draft, he said.

Chairman Burns said another answer to the problem would be to apply to the court, under the section on protective orders, for permission to excise certain portions of the report and have the court look at the matter in camera.

Mr. Paillette noted that section 4.5 of the ABA standards reads:

> "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."

In reply to the Chairman's question, Mr. Carnese said that such a provision would be acceptable to him but pointed out that under the ABA standard the district attorney was excising the material rather than the court.

Judge Burns suggested that section 4.5 of the ABA standards be inserted into section 7 along with the provisions concerning protective orders. Mr. Osburn said he would prefer to put it in section 5, "Property not subject to discovery," and probably all that would be needed was to add the first sentence of 4.5 as subsection (3) of that section. The subcommittee approved this proposal, the only change in the sentence being to substitute "this Article" for "the standards" where applicable.

Mr. Carnese said that when a police officer was to be called as a witness by the prosecutor and that officer had stated in a report his specific opinion concerning the veracity of a witness, that portion of the report normally would not be discoverable; yet subsection (1) of section 2 clearly indicated that it was. He asked if the officer's personal opinions were to remain discoverable under this draft.

Mr. Milbank said that he had seen officers' reports expressing the opinion that the witness had mental problems. That information, he said, was extremely helpful to the defense. Chairman Burns was doubtful that the officer could so testify when he was on the witness stand and Mr. Milbank said he had asked officers on the stand if they had formed an opinion about the mental capacity of the witness and they had been permitted to answer. Mr. Carnese commented that if that type of statement were to be allowed in court, there was no reason to exclude it as to a party who was not a witness. In other words, if an opinion by an officer who was the witness was to be permitted, even though normally not admissible, it was inconsistent not to permit also the opinion of an officer who was not a witness. Mr. Blensly contended

that situation embodied a Brady problem and if the opinion was favorable to the defendant, the information would have to be disclosed.

Chairman Burns was of the opinion that a lay witness had to be an intimate acquaintance before he could give an opinion as to sanity, and the normal rule of admissibility would therefore take care of the situation under discussion.

Following a brief recess, Mr. Milbank asked if subsection (2) of section 2 meant that the defense necessarily received written copies of the material outlined in the section or if it allowed inspection of the records with authority for the defense to make copies at his own expense of whatever portions he wanted. Mr. Osburn replied that the draft did not specifically answer that question. Mr. Milbank commented that as a defense attorney, he would be satisfied with authority to inspect and record by whatever means he chose the information he needed. The Bar committee had discussed, he said, the cost to counties of keeping a separate file of that which was discoverable to the defense, furnishing copies, etc. He could foresee the Association of Oregon Counties submitting to the legislature an estimated cost of such a procedure that could be damaging to passage of the bill. He said he could live with visual inspection and a right to make copies, recordings, etc. of whatever material he wanted.

Mr. Osburn called attention to the sentence in section 4 which said, "The court may supervise the exercise of discovery to the extent necessary to ensure that it proceeds properly and expeditiously." It was his contention that under the terms of that sentence the court could solve whatever problems of this type that might arise.

Mr. Blensly noted that the opening paragraph of section 2 should read "prosecutor" rather than "district attorney" in order to include city attorneys and the members agreed. The same revision was approved in the opening paragraph of section 3. However, this decision was later revoked. See page 21 of these minutes.

Representative Paulus inquired as to the meaning of "relevant written or recorded statements" as used in subsection (1) of section 2 and was told by Mr. Osburn that the provision referred not to any information which the prosecutor had but that which he intended to use at trial and which was relevant to the charge. Mr. Carnese asked if "relevant" referred only to the legal concept of relevancy and whether it would include the results of a lie detector test which, though relevant, were incompetent in a legal sense. Mr. Osburn noted that subsection (3) covered reports or statements of experts "including results of physical or mental examinations and of scientific tests" which would include a lie detector test.

Mr. Paillette stated that the ABA commentary spoke to the question raised by Mr. Carnese and read from the commentary to section 2.1, "Prosecutor's obligations." In summation, the ABA concluded that

discovery would be unworkable without the criterion of relevancy and said, "To implement full discovery, the system envisions that the prosecution and the trial judge should not be stingy in interpreting the meaning of relevancy." Mr. Paillette said the ABA obviously recognized some of the difficulties in the use of the term but apparently believed it would cause more problem to leave it out than to include it.

Subsection (2). Mr. Osburn noted that subsection (2) of section 2 was taken from the ABA standards. The statement made by a co-defendant, he said, would necessarily be included for discovery purposes if the prosecutor intended to call the co-defendant as a witness even though the trial were not joint. It it were a joint trial, the statement would still be included.

Mr. Blensly recalled that Mr. Osburn had said earlier that the minutes of grand jury proceedings were not included in section 2. Mr. Osburn stated that under subsection (1) an argument could well be made that if there were written or recorded statements of grand jury proceedings, they were included, particularly under the amended language "memoranda of any oral statements." Mr. Blensly said that if a court reporter transcribed proceedings of the grand jury, that would certainly be a memoranda of oral statements and Mr. Osburn agreed. Mr. Blensly was most reluctant to open up grand jury proceedings to a right of discovery. Mr. Osburn said the ABA standards specifically included grand jury minutes, but that provision was not contained in this draft. Mr. Blensly contended that the same result was achieved indirectly and objected to making grand jury minutes discoverable.

Mr. Blensly then pointed out that section 2 required the information to be disclosed by the prosecutor to be "within his possession and control" and asked why "knowledge" was not also included in that phrase. He said the prosecutor could, for example, be aware of police reports that were not within his possession and control, but he could get them if he needed to do so. Mr. Osburn replied that under the common law, knowledge was an element of possession. Judge Burns added that there had been no trouble in the Brady and Hansen types of cases. Hansen specifically cited those cases where the deputy did not have the knowledge but the police did and held that that information should have been disclosed.

Mr. Blensly questioned whether an exception to that ruling was being included in the proposed statute by the language "within his possession and control." Chairman Burns replied that if the police had the information, it was within the control of the prosecutor. Representative Paulus suggested that it would resolve the problem raised by Mr. Blensly to revise the phrase to read "possession or control." The subcommittee adopted this amendment and also approved the same amendment in the opening paragraph of section 3.

With respect to the question raised earlier as to whether grand jury minutes should be disclosed, Chairman Burns asked Mr. Blensly if he was concerned specifically with cases where a court reporter took verbatim minutes of grand jury proceedings. Mr. Blensly replied that he was concerned with minutes written by the clerk which involved a summary of the witnesses' testimony. Mr. Osburn suggested that this matter be discussed under section 5, "Property not subject to discovery." [For further consideration of this subject, see page 25 of these minutes.]

Subsection (3). Mr. Osburn advised that subsection (3) of section 2 should be discussed together with section 3. It raised the problem of whether the defense must disclose information which would tend to incriminate the accused which the defense did not intend to use at the time of trial. The basis for disclosure under this draft by the defense to the state was that if the defendant intended to use the information at trial in any event, there was nothing wrong with requiring him to do it prior to trial. Consequently, section 2, subsection (3), with respect to reports of experts, provided that any expert's report or statement must be disclosed regardless of whether the prosecutor intended to use it. That, he said, was consistent with Brady v. Maryland. In the case of disclosure to the state by the defense, only evidence which the defense intended to use in the trial was included.

Chairman Burns asked if subsection (3) included lie detector tests and was told by Mr. Osburn that it did.

Mr. Blensly said that section 2 began on the premise that Brady was not being codified and then went into areas where it appeared to cover Brady, subsection (6) being a specific example of the latter. He asked Mr. Osburn if he had decided whether as a matter of policy the draft codified Brady. Mr. Osburn replied that he had made no conscious effort to cover Brady. That being the case, Mr. Blensly asked why a distinction was made in the area of discovery of experts' reports between the defense and the prosecution.

Mr. Milbank replied that in some cases the scientific report would destroy the evidence seized. To illustrate, he said that if a blood-stain were tested, that piece of evidence would no longer be available because the stain would be taken out of the piece of cloth and put through a series of tests. By the very nature of pre-trial discovery, he said, the Brady type of disclosure was inherent in the draft.

Mr. Blensly said that as he understood the basic philosophy of this Article, it was drafted not to cover Brady situations necessarily but to apprise the defense of what the prosecutor was going to present in his case. If the defense were not required to show the prosecutor results of his tests that were unfavorable to the accused, he said he would object to requiring the prosecutor by statute to disclose results of tests to the defense that were unfavorable to the prosecution. He contended that the draft should contain parallel requirements for both sides.

Mr. Osburn advised that he had taken this language from the prosecution section of P. D. #1 which required reciprocal information. Mr. Blensly agreed that the state should have a duty to disclose this information because it had more facilities and personnel than the defense in the majority of cases, but he maintained that the provision should be reciprocal. In his opinion placing this requirement on the defendant would not raise a Fifth Amendment problem, except perhaps in the case of a lie detector test.

Chairman Burns commented that it came very close to a Fifth Amendment problem when the defendant's test showed him to be guilty. Mr. Blensly believed it did not so long as the test did not involve testimony.

Mr. Osburn explained that the draft limited disclosure of reports of experts which the defendant did not intend to use at trial. On a constitutional basis he believed it was difficult to justify a requirement that the defendant report evidence tending to show him guilty which he did not intend to produce at trial. Mr. Carnese remarked that in some situations such a requirement would be tantamount to requiring the defendant to hang himself and would certainly raise a constitutional question if he were compelled to do so. Under certain circumstances it would require the defendant to present evidence which the state did not have regarding results of tests the state had not made or requested, and that was different from requiring him to disclose results of tests that the state had also conducted.

Mr. Osburn said he did not know of any statute that could be enacted that would be constitutional and still require the defense to disclose the names of witnesses who would convict him -- for example, an eyewitness to the crime he had committed.

Mr. Paillette commented that the Advisory Committee on Federal Rules had proposed a change to Federal Rule 16 which followed essentially the same rationale as that set out in the draft with respect to this question.

Mr. Osburn pointed out that subsection (2) of section 3 required the defendant to disclose experts' reports which the defendant intended to use at the time of trial. In other words, if the defendant were going to have a report prepared by an expert for use at trial for the purpose of cross examination, even though he had no intention of introducing the report, he was required to disclose that information. Chairman Burns commented that this would be a difficult area to police. Mr. Osburn conceded it might be difficult to police, but it was part of the rationale behind expanding the state's disclosure to obtain broader discovery and to include other than that which the defendant intended to introduce as evidence.

Chairman Burns remarked that even though discovery tended to even out both sides of a case, there was still a tremendous disparity in

the state's favor in the vast majority of criminal cases. Mr. Paillette added that whatever was included in this draft requiring disclosure to the state was in all probability going to be challenged in the courts on Fifth Amendment grounds in any event.

Mr. Blensly asked why Brady was not codified in the draft and was told by Mr. Osburn that one reason involved the pre-trial aspect of Brady which said that the material had to be disclosed at a time when the defendant could use it. This caused problems because there were many cases where evidence was disclosed during the course of trial. Chairman Burns added that if Brady were included in the statute, it would be necessary to write in a time frame, and this was a virtual impossibility as demonstrated by the Supreme Court's attempt to do so in Dooley v. Connall.

The subcommittee recessed for lunch and reconvened at 1:30 p.m. with the same three members present as attended the morning session. Also in attendance were Mr. Osburn, Mr. Milbank and Mr. Carnese.

Discussion continued on the question raised by Mr. Blensly concerning mutuality of discovery with respect to experts' reports. He contended that the proposed discovery statute should not codify the Brady decision and that if it were not codified, the discovery requirements should be as parallel as possible for the defense and the prosecution.

Chairman Burns commented that the question being discussed involved a basic policy decision which might better be made by the full Commission and suggested that the draft be submitted to the Commission with the present provision plus an alternative proposal that would make discovery bilateral to the defense and the prosecution insofar as possible.

Representative Paulus expressed concern over the difficulty of enforcing and policing a provision requiring discovery of reports that were not placed in evidence. Chairman Burns noted that under section 6, subsection (2), the court had authority to take care of any situation where a party attempted to skirt the purpose and intent of the statute.

After further discussion the subcommittee agreed that an alternative subsection (3) should be drafted to be included in section 2 which would provide for parallel discovery so far as the reports and statements of experts were concerned.

Mr. Osburn commented that upon hearing Mr. Blensly's reasons for including mutuality, he was inclined to agree with him. Mr. Paillette added that Mr. Blensly's argument was also sound from the standpoint of the practical aspects of getting the Discovery Article through the Commission and the legislature. Furthermore, any disclosure requirement imposed upon the defendant would sooner or later be challenged in the courts.

Subsection (4). Mr. Osburn explained that subsection (4), section 2, was aimed not at material which the prosecutor intended to use at the trial but that which he intended to offer in evidence. It would refer to any documents the state intended to offer and also those items the defendant should be able to inspect which belonged to him or were obtained from him even though the prosecutor decided not to use them at trial. Mr. Osburn suggested that subsection (4) be amended by inserting "to offer in evidence at the trial" in place of "to use in the trial."

Mr. Blensly said it would be better draftsmanship to include a separate subsection to deal with the items obtained from or belonging to the defendant. Mr. Paillette proposed that subsection (4) be broken into subparagraphs (a) and (b):

"(4) Any books, papers, documents, photographs or tangible objects:

"(a) Which the district attorney intends to offer in evidence at the trial; or

"(b) Which were obtained from or belong to the defendant;"

The subcommittee unanimously approved subsection (4) as set forth above.

Mr. Carnese asked if "books" as used in subsection (4) was intended to include textbooks and received a negative reply from Chairman Burns. Mr. Carnese asked if the subsection was clear that it did not include textbooks which the defendant, for example, would use to cross examine the state's expert witness. Mr. Blensly replied that the words "to offer in evidence" should make it clear that textbooks were not included in the term, "books."

Subsection (5). Mr. Osburn explained that subsection (5) had been placed in the draft for the purpose of discussion. It was included in the ABA standards, but it raised a question as to whether disclosure of any record of prior criminal convictions should be restricted to prior conviction records of specified persons so that the district attorney would not as a matter of course have to run an FBI check on everyone who testified at trial.

Chairman Burns commented that if the state had the conviction information and did not disclose it, it would fall under the Brady decision. Mr. Blensly said that even FBI records were not always complete and if the disposition of a case was pending, it would impose a further burden on the prosecution to make a second or possibly a third and fourth call to the FBI to find out the final disposition of a particular case. Mr. Carnese added that the FBI did not like to have its information given to other than a police agency which posed a further problem.

Chairman Burns called attention to the New Jersey rules on page 25 of Preliminary Draft No. 1 which provided that if there was a motion, the prosecutor must permit the defendant to inspect and copy "any relevant record of prior convictions of such persons if known to the prosecuting attorney."

Chairman Burns said that the problem with such a provision was that if the defendant's lawyer failed to inspect and copy this information and the defendant was convicted, he would be subject to a post-conviction charge of incompetence of counsel, so the automatic response would be to ask for a rap sheet in every case.

Mr. Paillette pointed out that the recommended language for the proposed change in Federal Rule 16 said:

> " . . . with any record of prior felony convictions of any such witness which is within the knowledge of the attorney for the government."

Chairman Burns said he would be opposed to making subsection (5) that broad. Mr. Blensly expressed approval of the New Jersey language, ". . . prior convictions of such persons if known to the prosecuting attorney." Mr. Paillette asked Mr. Osburn if he thought it was imperative to include knowledge of prior convictions in the draft at all and received a negative reply. Mr. Paillette commented that the defense attorney would know the names of the prosecution's witnesses and furthermore the defense could ask the witness on cross examination if he had ever been convicted of a crime if he really wanted to know. Mr. Milbank said that not all courts would permit such a question on cross examination. Chairman Burns agreed and added that there was also the possibility that the witness would not answer truthfully. Mr. Milbank commented that the federal courts were leaning toward blocking testimony regarding prior crimes on the theory that it added nothing to the particular issue and they were trying to encourage a showing of relevancy. However, if such a provision were to be included in the draft, the information should be available to both sides, particularly since it was information that the state could obtain much more easily than could the defense.

Mr. Paillette was opposed to a rule that would force the district attorney to run a records check on every witness. Mr. Blensly believed the problem could be resolved by saying "known" to the prosecutor and by adding a statement to the commentary that "knowledge" was intended to be actual knowledge and not constructive knowledge.

Mr. Osburn commented that Brady did not require the prosecutor to obtain information he did not have. Mr. Carnese said that if Brady was not being codified, there was no particular advantage to retaining subsection (5). Mr. Osburn replied that the provision should not necessarily be excluded because of Brady even though the draft made no attempt to include everything covered by that decision.

Chairman Burns suggested that subsection (5) be drafted to require actual knowledge by the prosecutor with commentary to make it clear that the subsection did not mean to require the prosecutor to run a records check on every potential witness. The subcommittee unanimously consented to the Chairman's proposal.

Subsection (6). Mr. Osburn explained that subsection (6) was included because there is a feeling in the prosecution of a state case that if a matter is not raised, that is the end of it. However, the federal rules on habeas corpus provide that the test of whether something can be raised in federal court is whether there was a deliberate by-pass of state procedures and, if not, question regarding the acquisition of a statement from the defendant or the validity of a search and seizure may be raised in federal court. Therefore, the problem is merely postponed until the Oregon Supreme Court decides the case at which time it becomes subject to a federal habeas corpus proceeding. To resolve this problem the draft states that where the defendant requests information regarding a specific search or regarding a specific statement by the defendant, this information must be provided.

Chairman Burns was of the opinion that the reason given by Mr. Osburn for inclusion of subsection (6) was sound, but both he and Mr. Blensly were agreed that the language did not accomplish what it was intended, i.e., to raise the issue at the earliest level and shut out the habeas corpus proceeding. The draft attempted to say that if the defendant specified that he wanted to know, for example, all about the execution of a search warrant on the night of April 4, he should be given that information. However, if there had been three search warrants, the by-pass problem would still exist. Mr. Osburn agreed that the provision did not resolve the entire problem. Chairman Burns suggested that it might be better to require disclosure of the matters relating to searches or seizures so long as they were conducted on premises where the defendant was located at the time. Mr. Blensly's suggestion was to allow depositions of those persons involved in the taking of statements or involved in the search and seizure. Chairman Burns replied that Mr. Blensly's proposal would result in deposing every policeman who arrested a defendant.

Mr. Carnese said that another problem involved the time factor because the information had to be disclosed 10 days before trial. A motion to suppress in Multnomah County, he said, was held well before trial and not immediately before trial. Chairman Burns replied there was nothing to prevent a local court from imposing different time requirements.

Mr. Osburn said that if the prosecutor knew this matter was to be raised on a motion to suppress, there was a strong likelihood that he would follow the statute, i.e., disclose as soon as practicable after the charges are brought and not wait until 10 days prior to trial.

Mr. Carnese asked whether the provision was triggered by a specific request or whether it imposed a duty upon the prosecutor to disclose. Mr. Osburn replied that the language was taken from the ABA standards and he had intended it to mean "specified by the defense." Mr. Blensly suggested that it might better be made a separate section if it were to be triggered by a request by the defense. Chairman Burns called attention to section 2.3 of the ABA standards set forth on page 36 of Preliminary Draft No. 1 which contained the added provision for disclosure of "the relationship, if any, of specified persons to the prosecuting authority."

Mr. Carnese noted that the validity of the identification of the defendant was also inherent in this issue; whether it was made in a line-up, by a mug shot, etc.

Chairman Burns commented that if disclosure of materials relative to search and seizure, etc., were to be required, and if it were only to be applicable to that specified by defense counsel, subsection (6) would have to be rewritten to contain language comparable to section 2.3 of the ABA standards. On the other hand, it might be advisable to require the prosecutor to disclose whatever he had concerning search and seizure, etc., whether or not the material was specifically requested by defense counsel.

Representative Paulus was of the opinion that it was unnecessary to include "specified" in view of the word "relevant." She suggested subsection (6) read, "Any relevant material or information regarding searches and seizures . . . " Mr. Blensly was concerned that such language would open up a situation where every case would be subject to attack forever afterward to which Mr. Osburn replied that such was the case at the present time.

Mr. Carnese expressed the view that information should be disclosed to the defense such as the type of identification, whether or not any statements were made, whether or not a search was involved and, if so, what kind, etc. If the defense wanted further details, they should be discoverable in response to a specific request but the general information should be disclosed by the state as a matter of course.

Mr. Milbank said he had never had a case where he had not found out about a search or a confession on the first interview with his client. Mr. Blensly replied that there could have been a search the defendant was not aware of or identification could have been made by means of a photograph of which he was not aware. The defense would be at a disadvantage in attacking identification at trial if he didn't know the defendant was identified through mug shots.

Mr. Osburn said one difficulty arose because no one knew until the witness took the stand whether he was able to identify the accused at that time. Perhaps, he said, that issue should not be tried 10 days in advance of trial inasmuch as present identification could not be determined until trial.

At a later point in the meeting Chairman Burns suggested the following subparagraph be added to subsection (6):

"(c) Identification of the defendant."

The proposal was unanimously approved.

Mr. Osburn urged that the discovery draft include some provision requiring the state to disclose information regarding searches and seizures. Chairman Burns proposed to delete "specified" before "searches and seizures" in subsection (6) (a). Mr. Blensly was concerned about making the requirement too broad and specifically objected to the language "any relevant information." Without requiring a specific request for information on the part of the defendant, he was fearful the statute would require disclosure of information not being given at the present time.

Chairman Burns asked Mr. Blensly if the proposed statute would be more acceptable to him if "written or recorded" were inserted after "Any relevant" in subsection (6). Mr. Blensly replied that he had no objection to turning over the police report to the defense.

Chairman Burns commented that in some situations there may be a necessity to inspect physical objects, such as a gun, and Representative Paulus stated that the proposed revision would eliminate that possibility. Mr. Blensly was in favor of giving the court power to supervise such disclosure.

Mr. Paillette advised that Preliminary Draft No. 1 took the approach of permitting "the moving party to inspect property and to copy or photograph it." Chairman Burns suggested that the problem might be solved by including a definition of "disclose" particularly since the same question would arise under subsection (3) of section 3.

Mr. Carnese asked if "searches or seizures" might be preferable to "searches and seizures." Chairman Burns said there were situations where a search was conducted without a seizure. Mr. Osburn advised that the language of the Constitution was "searches, or seizures" but the comma was unnecessary. After Mr. Paillette suggested that the terms be stated in the singular, the subcommittee agreed to revise paragraph (a) to read:

"Search or seizure; and".

Mr. Carnese asked if the subcommittee wanted to require disclosure of all information relating to a search or seizure or merely the fact that there was a search or seizure and require the defendant to come back with a request for further information. As drafted, he said, the provision required this information from the prosecution without motion. The prosecutor might thereby be prohibited from introducing evidence he failed to disclose, and he could very easily overlook something under the broad language of the proposed statute.

Chairman Burns proposed to specify that the prosecutor must disclose the fact of search or seizure and the acquisition of Miranda statements and the fact of identification procedures and then require that upon request of the defendant, he must provide relevant written or recorded material or information as to those things the defendant specifies in his request. Mr. Osburn expressed approval of this suggestion.

Mr. Blensly contended that the defendant should ask for specifics regarding the particular information. Chairman Burns asked Mr. Blensly what information the prosecutor would have in his file following a search and was told that there would be a search warrant, an affidavit, a return and an unfinished report requiring that he call the police to get further information before it could be completed. Chairman Burns said that as he understood the proposed statute, the prosecutor would only need to turn over that material in the file if the defendant asked for the relevant information. Mr. Blensly asked if "Any written or recorded material or information" would be construed to mean that which was within the prosecutor's possession or control and received an affirmative reply from Mr. Osburn with the added proviso that the subsection applied to witnesses that were not intended to be called at trial. For witnesses that the state intended to call, the information would have to be disclosed in any event.

Chairman Burns pointed out that subsection (6) should be reworded. Paragraph (a) should read "The existence of search or seizure; and" with an added requirement that upon written request by the defendant, further information would have to be furnished by the prosecutor.

Mr. Paillette was of the opinion that subsection (6) should be drafted as a section entirely apart from section 2. That was the approach taken by the ABA, and in that manner it would clearly be treated separately which would highlight the fact that this was a different situation from the other provisions of section 2. Chairman Burns agreed and was also of the opinion that a definition of "disclose" should be included. Mr. Paillette concurred that such a definition would be desirable to indicate that it would cover an inspection in appropriate circumstances without necessarily requiring that the material had to be turned over to the other side.

The subcommittee was agreed that subsection (6) should be redrafted as section 3 with the additional requirement that upon request by the defense, the prosecutor must furnish the specific information requested.

Mr. Milbank pointed out that the provision as approved thus far was a one-way street for the defendant and was not subject to reciprocity. It was generally pointing toward a pre-trial hearing of some sort such as a motion to suppress or a pre-trial determination of the voluntariness of a confession, etc., rather than toward trial. It was his understanding that when the defense requested specific information permitted under the new section 3, he would not be met with a request by the prosecutor for some type of reciprocal information from the defense.

Mr. Paillette concurred with Mr. Milbank's interpretation of the section and noted that the provisions of the following section, "Disclosure to the state," contained the parallel provisions for the defense.

Mr. Blensly said he would prefer to use the term "prosecuting attorney" in this Article rather than "prosecutor." Mr. Osburn stated that the subcommittee had changed "district attorney" to "prosecutor" throughout the draft in order to include city attorneys within its provisions. A better approach, he suggested, would be to leave "district attorney" in the proposed statute and define the term to include city attorneys. Mr. Paillette pointed out that "prosecutor" and "district attorney" were used interchangeably throughout ORS. He indicated that there were other sections in the procedure code where district attorney would be applicable to the city courts and suggested that it be defined in the general definition section of the procedure code. It was possible, he said, that there might be instances where "district attorney" should also include the Attorney General. The subcommittee agreed to include a definition of "district attorney."

Representative Paulus asked if the proposed definition of "disclose" would cover physical evidence that would not be introduced into evidence and was told by Mr. Paillette that the term would take care of those items if it were drafted to include an inspection.

The committee unanimously agreed to redraft subsection (6) in accordance with the above discussion, to insert a definition of "disclose" and to renumber the subsequent sections. Throughout the balance of these minutes the sections are referred to by their revised number.

Section [3] 4. Disclosure to the state. Chairman Burns proposed to equate subsection (1) of section 4 with equivalent language in subsection (1) of section 2 by adding "or memoranda of any oral statements of such persons." The suggestion was unanimously approved.

The subcommittee also unanimously consented to amend subsection (3) to make it parallel to subsection (4) of section 2 by revising subsection (3) of section 4 to read:

> " . . . which the defendant intends to offer in evidence at the trial."

Mr. Carnese pointed out that again the problem was raised in subsection (1) of section 4 concerning memoranda of oral statements involving either the defense attorney's work product or his investigator's work product.

Mr. Milbank asked what the situation would be where he, as a defense attorney, interviewed three witnesses and talked to them at some length but did not write anything down. Mr. Osburn replied that the discovery rule in that situation would be the same as that applicable to prosecutors.

Mr. Carnese stated that the deputies in his office made a memorandum following a bind-over which contained both the testimony introduced and the deputies' private opinions. It was the type of document, he said, they would prefer to treat as a work product but asked whether it would be discoverable under section 7 (1) inasmuch as it would contain oral statements made by the witness when his attorney was present.

Chairman Burns replied that memoranda of oral statements would not necessarily include the memoranda of an oral statement when in court. If the prosecutor and the defense lawyer were present when a witness testified at the preliminary hearing and the deputy wrote a memo to the file covering the witness's statements, there was no necessity for furnishing that memorandum to the other side because both sides were present at the time. Mr. Carnese commented that a statement in the commentary to that effect would adequately take care of the problem. Mr. Blensly thought it would be preferable to include such a provision in section 6, "Property not subject to discovery."

Mr. Milbank asked if the use of unsworn statements would get into impeachment aspects or into problems when the witness needed to refresh his memory by looking at his earlier statements. He questioned the effect the draft would have on evidentiary rules in a situation where, for example, the defense had a court reporter take the statement of a police officer who later died and the state then tried to get that statement from the defense for use in a subsequent trial. Chairman Burns replied that the records could be subpenaed. Mr. Milbank asked if the defense attorney's notes could be subpenaed and was told by Mr. Carnese that they would be exempt under section 6.

Chairman Burns told Mr. Milbank that he did not believe this draft would change any of the rules as to former testimony, refreshing memory or impeachment.

Mr. Paillette said that since the draft already stated that the statements of witnesses and memoranda of their statements were subject to disclosure, it seemed unnecessary to include language in section 6 concerning "opinions, theories or conclusions." That material, he said, should be written in as a work product exclusion. He noted that Preliminary Draft No. 1 included in the definition of exempt property "reports, memoranda or other internal documents or work papers." Mr. Osburn agreed that the language in section 6 might not be necessary but difficulties arose in attempting to exclude certain things, one example being whether a district attorney's notes made at a preliminary hearing of a co-defendant would be discoverable or whether they would be considered a work product. Mr. Carnese commented that discovery of information given in open court should not be necessary. The judge, the clerk, etc. were all adequate witnesses to the testimony given.

Mr. Blensly asked if there should be something specific in subsection (1) of section 4 to exclude the defendant or perhaps

a statement to that effect should be added to section 6, "Property not subject to discovery." Chairman Burns replied that it was implicit in the entire draft that if the defendant is interviewed by his lawyer and the lawyer then makes a memo of the interview, that material is not available to the state. Chairman Burns suggested that the commentary contain a statement to the effect that disclosure of material of this type was discretionary.

Section [4] 5. Time of disclosure. Mr. Osburn explained that the ABA standards relating to time of disclosure referred to hearing or trial whereas the draft was confined to trial. It tried to suggest that the obligation to disclose should be performed as soon as practicable after charges were filed and suggested an arbitrary cut-off time of 10 days prior to trial without a recommendation as to whether this was or was not an appropriate length of time. It provided that the court may require later disclosure for good cause shown and that the court may supervise discovery to the extent necessary which was intended to refer to the court's consideration of motions that one side was not disclosing or fulfilling its obligations under disclosure. Section 7 contained provisions for a continuing duty to disclose which tied in with this section, he said.

In order to permit more flexibility, Chairman Burns suggested insertion of the following parenthetical statement after "not later than 10 days prior to trial": "(or earlier, as provided by local court rule)". Mr. Blensly expressed objection to a statute that would permit state law to be changed by court rules.

Mr. Paillette suggested that the problem would be resolved by placing a period after "defendant" and deleting the balance of the sentence. This would also solve some of the problems discussed earlier where 10 days was impractical in misdemeanor cases.

Mr. Osburn explained that he had included the 10 day language for two reasons: (1) there was a close analogy to the 10 day alibi situation and (2) to give the court a firm rule to follow. Judge Burns replied that there was no particular magic in 10 days and it should be assumed that the court would set up a sensible time table. If the judge found that his time table operated prejudicially to the detriment of the defendant in a given case, he would increase the time period in any event.

Mr. Blensly stated that the statute operated not by motion but by a requirement on both sides or on the filing of a request with the district attorney. Court rules were admittedly not uniforn throughout the state and, in fact, many courts had no rules at all. He was of the opinion that it created too much of an open-ended situation to delete the 10 day requirement. Chairman Burns replied that as soon as the court began getting complaints that the other side didn't start as soon as practicable, there would be some court rules on the subject.

Chairman Burns and Representative Paulus agreed to adopt Mr. Paillette's suggestion to place a period after "defendant" and delete the balance of the first sentence of section 5.

Mr. Carnese recalled that the second sentence of section 1 had been amended to read "Except as otherwise provided in section [4] 5," with the understanding that when section 5 was considered, the subcommittee would discuss whether or not the duty to disclose arose upon the filing of an information in district court or in circuit court upon the return of an indictment. Chairman Burns was of the opinion that section 5 should not apply up to the preliminary hearing stage. Mr. Carnese said that could be accomplished by revising "filing of charges" to "filing of an indictment or a misdemeanor complaint." Mr. Osburn said it should probably read "indictment, information or complaint."

After further discussion, Mr. Osburn proposed to delete the reference to section 5 that had been added to section 1 and revise section 5 to read:

> "The obligations to disclose shall be performed as soon as practicable following the filing of an indictment or information in the circuit court or the filing of a complaint charging a misdemeanor or violation of a city ordinance."

The subcommittee agreed to this revision, and the Chairman explained that the result would be that the section would not apply to a bind-over in felony cases in a magistrate's court.

Section [5] 6. Property not subject to discovery. [Note: This section was amended earlier in connection with the discussion on section 2. See page 9 of these minutes.]

Mr. Paillette reiterated his earlier suggestion to make the material referred to in subsection (1) a work product exclusion and delete the language, "to the extent that they contain the opinions, theories or conclusions." He further suggested that "work product" be inserted into subsection (1), and Mr. Blensly expressed agreement with the latter proposal.

Mr. Osburn referred to the phrase "memoranda of the attorneys or members of their legal staffs" and pointed out that under the proposed amendment the memorandum of an investigator from the district attorney's office who talked to a witness would be exempt.

Representative Paulus said she could see no reason to include subsection (1). Mr. Blensly explained that the statements should be turned over but an attempt was being made to say that the personal opinions or the research of the interviewer should not be discoverable.

Representative Paulus suggested that Mr. Paillette be asked to draft language that would include a work product and that the section be made applicable to the legal staff but not to the investigative staff.

Mr. Blensly asked why the work product of the investigative staff should not also be included in section 6. If a defense attorney hired an investigator, he would want to know not only the facts but also the investigator's opinion of the reliability of the witnesses. He would not, however, want the state to know the investigator's opinions nor should they be entitled to that information. Mr. Carnese said that information would not be discoverable in any case. All the defense would be required to give was the memorandum with respect to the interview; anything else was surplusage. If the investigator wrote the report so that the opinions and the facts could be separated, under section 2 he would only have to give the memo of the oral statement.

Mr. Paillette conceded that Mr. Blensly's reasoning was correct and withdrew his proposal to delete the phrase in subsection (1) concerning opinions and theories. After further discussion, the subcommittee agreed to insert "Work product," at the beginning of subsection (1) and leave the balance of the language undisturbed.

With respect to subsection (2) Mr. Osburn commented that there were ample constitutional cases saying the prosecution did not have to disclose the identity of a confidential informant and the draft therefore advocated that confidentiality should be retained.

Mr. Carnese inquired as to the procedure in the case of a confidential informant who was to be available at trial but whose identity the state did not wish to disclose beforehand. Mr. Blensly replied that in that case the state would go to court and ask for an exclusion.

Chairman Burns questioned the necessity of the second sentence of subsection (2). An unwary person reading the second sentence, he said, might conclude that it somehow watered down the powers of the court to issue protective orders under section 8. He suggested adding at the end of the sentence, "unless a protective order is issued" or words to that effect. Mr. Paillette proposed to begin the second sentence with the phrase "Except as provided in section 8," and the subcommittee unanimously approved that suggestion.

With respect to the question raised earlier by Mr. Blensly concerning exclusion of grand jury minutes, Mr. Carnese commented that the minutes of the grand jury were in the court's custody and not in the custody of the district attorney. However, statements that were court reported would be available to the prosecution.

Chairman Burns asked Mr. Blensly if it was his position that he would in every case want to prevent the defendant from getting the

testimony before the grand jury when it was recorded by a court reporter. Mr. Blensly replied that he wanted to prevent the defendant from getting any minutes as a matter of right. He believed the grand jury proceedings should remain secret and inviolate and the grand jurors should not be subject to having either side reveal their testimony except under the exclusions set out in the Article relating to grand juries.

Mr. Osburn asked if grand jury minutes were available under State v. Foster, 242 Or 101, 407 P2d 901 (1965). Chairman Burns replied that as he understood that case, the requirement did not exist until the close of the direct examination.

Mr. Osburn explained that the reason grand jury minutes had been held secret in the past was (1) to prevent disclosure of information in cases where the grand jury failed to indict and (2) to prevent attacks upon the sufficiency of the indictment or the procedure by which a person was indicted. Chairman Burns said another reason was to offer protection to the grand jurors, and he could see good reason to maintain that policy.

Mr. Blensly commented that if the draft said that a court reporter's transcript of grand jury minutes were discoverable but the minutes taken by the clerk were not, the result would be that district attorneys simply would not bring in a court reporter.

Chairman Burns agreed but added that in the ordinary case where a court reporter was brought into the grand jury, the prosecutor had a specific reason for doing so and those cases were relatively infrequent. He was of the opinion that once having brought the reporter in, it was unlikely that there would be a compelling purpose to keep the testimony secret at that point. If the prosecutor felt there was an urgent reason not to disclose the transcript, he could go to the court and get a protective order.

Mr. Blensly said the thing he feared most was opening the door of the grand jury room. Once it was opened a crack, there would be a great many arguments in court to open it all the way.

Judge Burns suggested that this policy decision be submitted to the full Commission for final determination by addition of subsection (4) to section 6 which would read:

> "Transcripts or recordings of testimony of witnesses before the grand jury."

Mr. Carnese advised that about a year and a half ago Multnomah County began to use tape recorders in the grand jury, and in any case that went to trial the state routinely disclosed that fact and allowed the defense to listen to those tapes. The practice began by court order, he said, and thereafter was routine.

The subcommittee agreed to adopt Chairman Burns' proposal to add subsection (4) as set forth above in order that the full Commission could decide the issue as to whether grand jury testimony should be subject to discovery.

Mr. Carnese said he was not convinced that "work product" as used in subsection (1) covered what was intended by the subcommittee. The draft did not state specifically that statements made by a client to his attorney or by a witness to a state attorney were not subject to disclosure.

Mr. Paillette explained that such statements were specifically excluded by the draft he had prepared (Preliminary Draft No. 1), and it was his understanding that this was not acceptable to the subcommittee when the matter was discussed at the meeting in March.

Mr. Carnese said he failed to understand why a statement given by a defense witness to the defendant's attorney could be discovered whereas a statement given by the defendant to his attorney could not be.

Chairman Burns suggested that the purpose of the draft might be clarified by amending subsection (1) of section 4 to read, "The names and addresses of persons other than himself . . . "

In view of the Chairman's proposal Mr. Carnese said he therefore concluded that it was the intent of the subcommittee to say that if the defendant's attorney interviewed a defense witness, his memorandum of that interview was not discoverable. Mr. Blensly confirmed that this was the intent to the extent that the memorandum included the attorney's opinions.

Section [6] 7. Continuing duty to disclose; failure to comply with requirements. Mr. Carnese questioned the necessity of retaining the continuing duty to disclose inasmuch as the time requirements had been deleted in section 5. Chairman Burns explained that if the party complied with the disclosure requirements of this Article and thereafter came into additional information, this section would take care of that situation. He suggested that it might be preferable to move subsection (1) of section 7 to section 5.

Mr. Osburn concurred with the Chairman's proposal and added that the subsection be amended to read, "If ...a party finds... additional property or information which is subject to or covered by this Article . . . . "

Mr. Milbank asked what effect this statute would have on a situation where a person was convicted and two days following trial a witness turned up with information that the accused was innocent. Chairman Burns replied that such a circumstance would be covered by Brady v. Maryland, and Mr. Osburn concurred.

The subcommittee agreed that subsection (1) of section 7 should become subsection (2) of section 5 and should read:

> "(2) If, after complying with the provisions of this Article, a party finds, either before or during trial, additional property or information which is subject to or covered by this Article, he must promptly notify the other party of the existence thereof."

Subsection (2) of section 7 would become section 7.

Chairman Burns suggested that section 7 contain a statement granting the court authority to refuse to permit a witness to testify, and Mr. Osburn agreed that everything was not covered that should be covered under the section as drafted.

After further discussion the subcommittee agreed to amend section 7 to read:

> " . . . or grant a continuance, or refuse to permit such witness to testify, or refuse to receive in evidence the material not disclosed, or enter such other order as it considers appropriate."

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The subcommittee discussed the advisability of including a section similar to section 4.7 (b) of the ABA standards:

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

Mr. Osburn commented that as an officer of the court, if an attorney violated his duty under this Article, the court could find him in contempt. After further discussion, the members decided not to include a specific sanction relating to contempt.

Section [7] 8. Protective orders. Mr. Osburn advised that the original draft on protective orders was many pages in length and the more precise they attempted to make the language, the more problems they encountered. For that reason section 8 was somewhat sketchy and was basically the same as section 6 of Preliminary Draft No. 1.

Subsection (1). Mr. Carnese noted that "denied" was not included in subsection (1) and Mr. Osburn stated it should be inserted. Mr. Blensly said that if "denied" were added, the last "provided that" clause should be taken out. Mr. Osburn disagreed that the phrase should be deleted because it was intended to mean that the appropriate information must be disclosed prior to trial. Mr. Blensly contended that there would be some situations where witnesses for their own protection should not be disclosed until they testified at time of trial and the phrase "in time to make beneficial use thereof" might have the opposite effect.

Chairman Burns agreed that if the court denied disclosure, counsel would not be entitled to disclose in time for the opposing party to make beneficial use of the material and there was consequently no need to retain the proviso in the last clause of subsection (1).

After further discussion, the subcommittee unanimously agreed to amend subsection (1) of section 8 to read:

> "(1) Upon a showing of cause, the court may at any time order that specified disclosures be denied, restricted or deferred, or make such other order as is appropriate."

Subsection (2). Chairman Burns asked Mr. Osburn why subsection (2) used "person" rather than "party" and Mr. Osburn agreed that it should be revised in accordance with the Chairman's suggestion. The subcommittee consented to this revision.

Mr. Osburn brought up the question of the meaning of "in camera." In some circumstances, he said, he understood the term to mean "in chambers," but in the context in which it was used in section 8 it appeared to relate to a situation where the state was revealing to the court what information it had. Judge Burns said that in a situation where the state did not want to disclose the name of a witness in order to protect him from harm, the judge would review that matter in camera with a court reporter to record the proceedings. It would not necessarily be done in chambers, he said. It could also be done ex parte; on the other hand, it might well be adversarial.

Mr. Paillette commented that section 6 of Preliminary Draft No. 1, on which this section was based, was taken from the New York Criminal Procedure Law. "In camera," he said, was also used in the ABA standards and their commentary clearly showed that the term was not directed to an adversarial proceeding with the defense attorney present to argue with the state's attorney. It contemplated submission of either an oral or written statement to the court.

Mr. Carnese pointed out that section 8 did not require the state to show the court its evidence but merely required the state to show cause. Mr. Osburn replied that it wasn't necessary for the court to actually see the evidence. That being the case, Mr. Carnese inquired as to the purpose of the requirement to seal the evidence. Representative Paulus replied that the requirement to seal related to the record of the showing on which the judge based his decision. Furthermore, it would protect the witness's identity when the material was sealed.

Chairman Burns was of the opinion that section 8 adequately covered any situation that might arise. If the district attorney did not want the defense attorney to know the factual basis for the protective order, he could make his showing in camera and ex parte and there would be a record kept of that proceeding. On the other hand, there might be occasions where both attorneys were before the judge and

the state disclosed the reason for requesting a protective order. In that instance the judge would make a ruling on the matter and there too there would be a record. It also covered the situation where, with both attorneys present, the state handed a written statement to the court containing his reasons for requesting that the material not be disclosed and the judge would inspect that statement in camera.

Subsection (3). Mr. Carnese expressed the view that subsection (3) invited appeal because it created a new right and a new ground for appeal. Judge Burns noted that many of the other recently enacted codes contained language very similar to subsection (3).

Mr. Blensly asked if the fact that a protective order had been issued should be made available to the other party subsequent to trial. Chairman Burns was of the opinion that if a protective order was obtained ex parte and in camera of which the other side was not aware, somewhere along the way the opposing party should be told that it was obtained.

Mr. Blensly suggested that subsection (3) contain a requirement for notice to the defendant and provision that the material be made available for his inspection subsequent to trial. Chairman Burns explained that Mr. Blensly's position was that if there was a conviction, the defendant was entitled to have the records of the proceedings made available to him for the purpose of perfecting his appeal.

After further discussion, Chairman Burns commented that the ABA standards did not speak to the question of what should be disclosed to the defendant following trial and conviction. He said there was some merit in Mr. Carnese's contention that in most cases the trial judge would unseal the record so the defense lawyer could decide whether he wanted to appeal on the basis of that record. Conceivably, there could be rare circumstances where even after the trial the judge might decide he could not open the record in which event the defendant would have to appeal on the ground that it was error to issue the protective order. However, in the vast majority of cases the defendant would find out about the information in the protective order at the time of trial and in that case the only issue for appeal would be whether the timeliness of disclosure was prejudicial to the defendant.

Mr. Carnese pointed out that the proposed statute made no provision for unsealing the record but only required that it be sealed and preserved. Chairman Burns replied that he saw nothing in the statute to prevent the trial court from unsealing it following trial and conviction if the reason for sealing the material had been settled.

Mr. Blensly suggested that a specific provision be included to permit the judge to open those records. After further discussion, the subcommittee agreed to add the following sentence to subsection (3):

"The trial court in its discretion may, after trial and conviction, unseal for defendant matters previously sealed."

Vote was taken on a motion to approve the entire draft as amended. The motion carried unanimously.

The meeting was adjourned at 4:45 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Creiminal Law Revision Commission

PRE-TRIAL DISCOVERY ATTORNEY GENERAL'S DRAFT

ARTICLE 7

Section 1. Applicability

The provisions of this Article are applicable to all prosecutions in which an indictment has been found by a grand jury, or in which an information has been filed on waiver of indictment. In other criminal prosecutions, the provisions of this Article shall be applicable if defendant files in the court having jurisdiction of the prosecution, a request for discovery of any of the items discoverable under this Article.

Section 2. Disclosure to defendant

Except as otherwise provided in section 5 relating to matters not subject to disclosure, and in section 7 relating to protective orders, the district attorney shall disclose to defendant the following material and information within his possession and control:

(1) The names and addresses of persons whom he intends to call as witnesses at the trial, together with their relevant written or recorded statements;

(2) Any written or recorded statements or memoranda of any oral statements made by the defendant, or made by a codefendant if the trial is to be a joint one;

(3) 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;

(4) Any books, papers, documents, photographs or tangible objects which the district attorney intends to use in the trial or which were obtained from or belong to the defendant;

(5) Any record of prior criminal convictions of persons whom the district attorney intends to call as witnesses at the trial; and

(6) Any relevant material or information regarding:

(a) specified searches and seizures; and

(b) the acquisition of specified statements from the defendant.

Section 3. Disclosure to the state

Except as otherwise provided in section 5 relating to matters not subject to disclosure, and in section 7 relating to protective orders, the defendant shall disclose to the district attorney the following material and information within his possession and control:

(1) The names and addresses of persons whom he intends to call as witnesses at the trial, together with their relevant written or recorded statements;

(2) 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, which defendant intends to use in the trial; and

(3) Any books, papers, documents, photographs or tangible objects which the defendant intends to use in the trial.

Section 4. Time of disclosure

The obligations to disclose shall be performed as soon as practicable following the filing of charges against the defendant, and not later than 10 days prior to trial, unless later disclosure is authorized and permitted by the court for good cause shown. The court may supervise the exercise of discovery to the extent necessary to ensure that it proceeds properly and expeditiously.

Section 5. Property not subject to discovery

The following property and information shall not be subject to discovery under this Article:

(1) Legal research, records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the attorneys or members of their legal staffs.

(2) The identity of a confidential prosecution informant 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 trial.

Section 6. Continuing duty to disclose; failure to comply with requirements

(1) If, after complying with the provisions of this Article, 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.

Section 7. Protective orders

(1) 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.

(2) 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.

(3) 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.