POLK COUNTY ATTORNEY
JAMES A. SMITH

171

SEP 0 7 1988

August 31, 1988

Mr. Gordon F. Proudfoot
BOYNE CLARKE
Barristers & Solicitors
Suite 700, Belmont House
33 Alderney Drive
P.O. Box 876
Dartmouth, Nova Scotia B2Y 3Z5

RE: Canadian Bar Submission to the Royal Commission on the Prosecution of Donald Marshall, Jr.

Dear Mr. Proudfoot:

David Funkhouser, President of the Iowa State Bar Association, has directed me to answer your inquiries concerning exculpatory statements in criminal prosecutions. I am the chairman of the Criminal Law Committee for the Iowa State Bar Association and a prosecutor.

Iowa follows the standard set forth in United States v. Bagley, 473 U.S. 667 (1985), which holds that "undisclosed evidence is material for (suppression) purposes only if the defendant shows a reasonable probability that, if the evidence had been produced, the outcome would have been different." See State v. Anderson, 410 N.W.2d 231 (Iowa 1987) and State v. Schatz, 414 N.W.2d 840 (Iowa App. 1987). The defense attorney has the burden to show that the trial would have turned out differently for the defendant if the prosecutor had produced the exculpatory evidence. A prosecutor's failure to turn over the exculpatory evidence alone is not enough to reverse a verdict, suppress evidence or grant a new trial.

I have enclosed a copy of the Bagley, Schatz, and Anderson decisions as well as a copy of Brady v. Maryland, another case often cited by the courts.

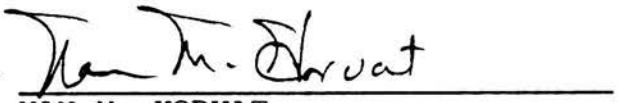
Additionally, I have enclosed select pages from our prosecutor's handbook which should give you a cursory understanding of the law on exculpatory evidence from 1983 to 1988 in Iowa. All of the attorneys in Iowa are governed by the Code of Professional Responsibility and that is also enclosed.

408 POLK COUNTY COURTHOUSE • 5TH & MULBERRY •DES MOINES, IOWA 50309 •PHONE 515 286-3737

Please feel free to call me if you have any further questions.
Best wishes with your research project.

Sincerely,

JAMES A. SMITH
POLK COUNTY ATTORNEY

By 
NAN M. HORVAT
Assistant Polk County Attorney

NMH/tg
enclosure

Iowa [illegible] of Professional Responsibility for Lawyers

DR 7-102 Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:
(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.
(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
(4) Knowingly use perjured testimony or false evidence.
(5) Knowingly make a false statement of law or fact.
(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.
(8) Knowingly engage in other illegal conduct or conduct contrary to a disciplinary rule.

(B) A lawyer who receives information clearly establishing that:
(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal in all circumstances except when barred from doing so by section 622.10, The Code. If he is barred from doing so by section 622.10, he shall immediately withdraw from representation of the client unless the client fully discloses the fraud to the person or tribunal.
(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal. [Court Order January 21, 1980]

Referred to in DR 7-101

DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.

(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

DR 7-104 Communicating With One of Adverse Interest.

(A) During the course of his representation of a client a lawyer shall not:
(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.
(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

§ 2672(a) DISCOVERY--NONCOMPLIANCE WITH DISCOVERY RULES OR ORDER--SANCTIONS. See § 3237(d), infra.

V. EXCULPATORY EVIDENCE.

§ 2681(b) EQUAL ACCESS BY PROSECUTION AND DEFENSE. When defendant has been offered complete access to the State's files, evidence contained in the file has not been withheld for purposes of due process. State v. Schatz, 414 N.W.2d 840 (Iowa App. 1987).

PRACTICE AID: It is not necessary for the State to point out to the defense precisely what evidence might be exculpatory if the State allows the defense access to its files. See State v. Todden, 364 N.W.2d 195 (Iowa 1985).

CHAPTER FOUR

Trial

I. PROCEDURE.

A. Jury Selection.

§ 3032(d) VOIR DIRE--REPORT OF PROCEEDINGS. A defendant's request that voir dire be reported must be granted, but failure to do so is not per se reversible. Defendant must demonstrate prejudice from the lack of a record. Prejudice is shown when the absence of a verbatim record precludes the appellate court from reviewing the claimed error in jury selection. State v. Woodyard, 414 N.W.2d 654 (Iowa App. 1987) (reversal ordered because claims of error during voir dire could not be resolved without a record of process).

PRACTICE AID: The Court distinguished State v. Oshinbanjo, 361 N.W.2d 318 (Iowa App. 1984), and State v. Newman, 326 N.W.2d 796 (1982), on the basis that the records in those cases, although not verbatim, allowed the appellate court to identify and address the challenged error.

B. Final Argument.

§ 3125(b) COMMENT ON FAILURE TO TESTIFY. Prosecutor's comment that nontestifying defendant "could have taken the stand and explained it to you" was proper rebuttal to defense counsel's argument that the government had not allowed defendant to explain his side of the story, and thus the comment did not violate defendant's right against self-incrimination. United States v. Robinson, 99 L. Ed. 2d 23 (1988).

submitted in support of defendant's motion for change of venue, not obtained by an independent scientific survey, were "neither helpful nor persuasive" in determining the general public's exposure to the publicity.

§ 2529(d) APPELLATE REVIEW--WAIVER. A defendant alleging actual jury prejudice is required to provide the reviewing court with a record disclosing such prejudice. State v. Misner, 410 N.W.2d 216 (Iowa 1987) (defendant's failure to have voir dire reported waived actual prejudice claim based on comments allegedly made there).

V. DISCOVERY.

A. SPECIFIC SUBJECTS.

1. Depositions.

§ 2664 SPECIAL CIRCUMSTANCES (IOWA R. CR. P. 12(2)). A defendant has no right to depose prospective witnesses who are not listed as witnesses for the State unless necessity is established; i.e., that the evidence hoped to be obtained will be material and favorable to the defense, and not merely cumulative of other testimony. State v. Wagner, 410 N.W.2d 207 (Iowa 1987) (here, defendant failed to demonstrate need to depose individuals not listed as prosecution witnesses, which included some of the victims of a group kidnapping).

PRACTICE AID. The proper standard of review of discovery issues is abuse of the trial court's discretion. To the extent that the issue raises a constitutional compulsory process claim, review is de novo.

VI. EXCULPATORY EVIDENCE.

A. MATERIALITY.

§ 2676 STANDARD APPLICABLE. Iowa expressly adopts the materiality standard proposed by the plurality decision in United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985), holding that "undisclosed evidence is material for Brady purposes only if the defendant shows a reasonable probability that, if the evidence had been produced, the outcome would have been different." State v. Anderson, 410 N.W.2d 231 (Iowa 1987).

PRACTICE AID. This standard is anologous to the ineffective assistance of counsel standard set out in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

§ 2676(c) BURDEN OF PROOF. A defendant claiming a Brady violation bears the burden of proving materiality. State v. Anderson, 410 N.W.2d 231 (Iowa 1987).

PRACTICE AID. Defendant must "make a threshold showing of how the withheld evidence would have affected his case."

§ 2677(c) DEFENDANT'S RIGHT TO DISCLOSURE--CONFIDENTIAL RECORDS. A defendant is not entitled to disclosure of the full criminal history records, or "rap sheets," of the State's witnesses. State v. Anderson, 410 N.W.2d 231 (Iowa 1987).

PRACTICE AID. Criminal history data is deemed confidential by statute, and a defendant is not entitled to disclosure.

CHAPTER FOUR--TRIAL

I. PROCEDURE.

A. JURY SELECTION.

§ 3032(c) VOIR DIRE--CHALLENGE FOR CAUSE--EMPLOYMENT BY THE STATE. State employee is not subject to cause strike merely by virtue of employment with the State. State v. Deierling, 406 N.W.2d 793 (Iowa 1987) (Court declines to construe Iowa R. App. P. 17 (5)(e) as implying or presuming bias of all State employees).

B. PRETRIAL MOTIONS.

§ 3069(d) MOTION TO STRIKE/CURATIVE INSTRUCTION. Witness' testimony that defendant had refused to take polygraph examination did not require mistrial where the court (1) sustained defendant's objection to the testimony, (2) struck the objectionable answer, and (3) admonished the jury to disregard it. Evidence regarding defendant's refusal to submit to polygraph is not necessarily "so prejudicial that the jury could not heed the court's admonition to disregard it." State v. Mayberry, ___ N.W.2d ___ (Iowa 7/22/87) (Sup. Ct. No. 85-1879) (Distinguishing State v. Green, 254 Iowa 1379, 121 N.W.2d 89 (1963), on the ground that reversal was based on other errors as well).

PRACTICE AID. Only in "extreme instances where it is manifest that the prejudicial effect of the evidence on the jury remained" is a curative instruction and admonition insufficient. See State v. McGonigle, 401 N.W.2d 39, 43 (Iowa 1987); State v. Brotherton, 384 N.W.2d 375, 381 (Iowa 1986); State v. Hamilton, 335 N.W.2d 154, 160 (Iowa 1983); State v. Peterson, 189 N.W.2d 891, 896 (Iowa 1971).

178

KENTUCKY BAR ASSOCIATION

W. MAIN AT KENTUCKY RIVER

FRANKFORT, KENTUCKY 40601

(502) 564-3795

KENTUCKY BAR ASSOCIATION 1871

JUN 29 1988

June 21, 1988

Mr. Gordon F. Proudfoot
Boyne Clarke
Barristers & Solicitors
Suite 700, Belmont House
33 Alderney Drive
P. O. Box 876
Dartmouth, Nova Scotia
B2Y 3Z5

Re: Canadian Bar Submission to the Royal Commission on the Prosecution of Donald Marshall, Jr.

Dear Mr. Proudfoot:

Pursuant to your request, I am enclosing several documents that may assist you in this matter. Attached are the ABA Standards of Discovery, the Federal Rules of Discovery, Inspection and Disclosure, and the Kentucky Rules of Civil Procedure regarding discovery and inspection along with a treatise under §21.36 which deals with disclosure of exculpatory material.

I hope you find these items helpful and wish you the best in instituting guidelines that will help to keep any innocent person from going to prison due to the withholding of exculpatory information. If I can be of any further assistance to you, please feel free to contact me.

Very truly yours,

George E. Long II

GEL/sf
Encs.
G-22

mation to make an informal plea and/or prepare for trial, and promotion of procedural efficiency underlie the Discovery Standards.[11]

The ABA Discovery Standards impose a broad obligation upon the prosecutor to provide pretrial discovery to defense counsel.[12] Standard

---

[11] ABA DISCOVERY STANDARDS, 11-1.1 states:

Standard 11-1.1. Procedural needs prior to trial

(a) Procedures prior to trial should:

(i) promote an expeditious as well as a fair disposition of the charges, whether by diversion, plea or trial;

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

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

(iv) reduce interruptions and complications during trial and repetitious trials by identifying and resolving prior to trial any procedural, collateral, or constitutional issues;

(v) eliminate as much as possible the procedural and substantive inequities among similarly situated defendants; and

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

(b) These needs can be served by:

(i) full and free discovery;

(ii) simpler and more efficient procedures; and

(iii) procedural pressures for expediting the processing of cases.

[12] ABA DISCOVERY STANDARD 11-2.1 provides for prosecutorial disclosure:

(a) Upon the request of the defense, the prosecuting attorney shall disclose to defense counsel all of the material and information within the prosecutor's possession or control including but not limited to:

(i) the names and addresses of witnesses, 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;

(iii) those portions of grand jury minutes containing testimony of the accused and relevant testimony of witnesses;

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

(v) any books, papers, documents, photographs, tangible objects, buildings, or places 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 the defendant or of any codefendant.

11–2.1 provides that, upon request, the prosecutor should provide open file disclosure to the defense and lists those items to be provided, items which are routinely disclosed by the prosecution.[13] The ABA Discovery Standards also impose an ethical obligation on the prosecutor to disclose information relevant to possible pretrial motions by the defense, such as the existence of grand jury testimony which was recorded but was not transcribed,[14] the existence of wiretap or electronic surveillance evidence,[15] and the possibility of scientific tests, experiments, or comparisons to be performed which may destroy physical evidence.[16]

The major contribution of the ABA Discovery Standards is its provision that the prosecution shall disclose to the defense upon request "all of the material and information within the prosecutor's possession and control."[17] The ABA Discovery Standards also support disclosure or dis-

---

* * *

(c) The prosecuting attorney shall disclose to defense counsel any material or information within the prosecutor's possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment of the accused.

(d) The prosecuting attorney's obligations under this standard extend to material and information in the possession or control of members of the prosecutor's 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 the prosecutor's office.

[13] *Id*. (a). *See also* ABA DISCOVERY STANDARDS, std. 11–2.1, commentary (Supp. 1982).

[14] *Id*. (b)(i).

[15] *Id*. (b)(ii).

[16] *Id*. (b)(iii).

[17] *Id*. (a). The Standard's shift to open file discovery is a major substantive change from the original standard; a result, in part, of changing attitudes toward discovery. For example, discovery was traditionally restricted due to fear that disclosure would lead to abuse of witnesses and victims, or destruction of important evidence. However, thorough analysis of the effect of broad discovery in practice suggests that such disclosure does not ordinarily create such problems, and protective orders can effectively deal with the exceptional case in which the integrity of the case *will* be adversely affected. *See* HOUSE COMMITTEE ON THE JUDICIARY, COMMENTS OF THE UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF CALIFORNIA, FEDERAL RULES OF CRIMINAL PROCEDURE AMENDMENTS ACT, H.R. REP. NO. 94–247, 94th Cong., 1st Sess. 12, 14 (1975), *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 674, 686.

The open file rule also facilitates processing cases to comply with the speedy trial requirements, minimizing the need for judicial supervision of basic discovery, mitigating delays, and assisting in the dissemination of relevant information thereby contributing to

by cross reference to the Federal Rules of Evidence, restores the Supreme Court proposal.

The Conference adopts the Senate provision.

1987 AMENDMENT

The amendments are technical. No substantive change is intended.

Rule 16. Discovery and Inspection

(a) Disclosure of Evidence by the Government.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements 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; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of that testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which the witness was involved.

(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is 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.

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are 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 which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) Grand Jury Transcripts. Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

[(4) Failure to Call Witness.] (Deleted Dec. 12, 1975)

(b) Disclosure of Evidence by the Defendant.

(1) Information Subject to Disclosure.

(A) Documents and Tangible Objects. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdi-

vision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any 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 or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony.

(2) Information Not Subject To Disclosure. Except as to 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 the defendant's 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, the defendant's agents or attorneys.

[(3) Failure to Call Witness.] (Deleted Dec. 12, 1975)

(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.

(d) Regulation of Discovery.

(1) Protective and Modifying 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 a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party'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.

(2) Failure To Comply With a Request. 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, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(e) *Alibi* Witnesses. *Discovery of alibi witnesses is governed by Rule 12.1.*

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(20)-(28), 89 Stat. 374, 375; Dec. 12, 1975, Pub.L. 94-149, § 5, 89 Stat. 806; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 9, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES

Whether under existing law discovery may be permitted in criminal cases is doubtful, *United States* v. *Rosenfeld*, 57 F.2d 74, C.C.A.2d, certiorari denied, 286 U.S. 556, 52 S.Ct. 642, 76 L.Ed. 1290. The courts have, however, made orders granting to the defendant an opportunity to inspect impounded documents belonging to him, *United States* v. *B. Goedde and Co.*, 40 Fed.Supp. 523, 534, E.D.Ill. The rule is a restatement of this procedure. In addition, it permits the procedure to be invoked in cases of objects and documents obtained from others by seizure or by process, on the theory that such evidential matter would probably have been accessible to the defendant if it had not previously been seized by the prosecution. The entire matter is left within the discretion of the court.

1966 AMENDMENT

The extent to which pretrial discovery should be permitted in criminal cases is a complex and controversial issue. The problems have been explored in detail in recent legal literature, most of which has been in favor of increasing the range of permissible discovery. See, e.g. Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth, 1963 Wash.U.L.Q. 279; Everett, Discovery in Criminal Cases—In Search of a Standard, 1964 Duke L.J. 477; Fletcher, Pretrial Discovery in State Criminal Cases, 12 Stan.L.Rev. 293 (1960); Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149, 1172-1198 (1960); Krantz, Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice, 42 Neb.L.Rev. 127 (1962); Louisell, Criminal Discovery: Dilemma Real or Apparent, 49 Calif. L.Rev. 56 (1961); Louisell, The Theory of Criminal Discovery and the Practice of Criminal Law, 14 Vand.L.Rev. 921 (1961); Moran, Federal Criminal Rules Changes: Aid or Illusion for the Indigent Defendant? 51 A.B.A.J. 64 (1965); Symposium, Discovery in Federal Criminal Cases, 33 F.R.D. 47-128 (1963); Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L.Rev. 228 (1964); Developments in the Law—Discovery, 74 Harv.L.Rev. 940, 1051-1063. Full judicial exploration of the conflicting policy considerations will be found in *State* v. *Tune*, 13 N.J. 203, 98 A.2d 881 (1953) and *State* v. *Johnson*, 28 N.J. 133, 145 A.2d 313 (1958); cf. *State* v. *Murphy*, 36 N.J. 172, 175 A.2d 622 (1961); *State* v. *Moffa*, 36 N.J. 219, 176 A.2d 1 (1961). The rule has been revised to expand

RULE 7.24 DISCOVERY AND INSPECTION

(1) On motion of a defendant the court may order the attorney for the commonwealth to disclose the substance of any oral incriminating statement known by the attorney for the commonwealth to have been made by a defendant to any witness, and to permit the defendant to inspect and copy or photograph any relevant (a) written or recorded statements or confessions made by the defendant, or copies thereof, that are known by the attorney for the commonwealth to be in the possession, custody, or control of the commonwealth, and (b) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are known by the attorney for the commonwealth to be in the possession, custody or control of the commonwealth.

(2) On motion of a defendant the court may order the attorney for the commonwealth to permit the defendant to inspect and copy or photograph books, papers, documents or tangible objects, or copies or portions thereof, that are in the possession, custody or control of the commonwealth, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. This provision does not authorize pretrial discovery or inspection of reports, memoranda, or other documents made by officers and agents of the commonwealth in connection with the investigation or prosecution of the case, or of statements made to them by witnesses or by prospective witnesses (other than the defendant).

(3) [*Effective until January 1, 1988. See also amended text following this paragraph.*] If the court grants relief sought by the defendant under this rule it may condition its order by requiring that the defendant permit the commonwealth to inspect, copy or photograph statements, scientific or medical reports, books, papers, documents or tangible objects which the defendant intends to produce at the trial and are in his possession, custody or control.

(3) [*Effective January 1, 1988. See also former text preceding this paragraph.*] (A) If the defendant requests disclosure under Rule 7.24, upon compliance to such request by the commonwealth, and upon motion of the commonwealth, the court may order that the defendant permit the commonwealth to inspect, copy, or photograph:

(i) books, papers, documents or tangible objects which the defendant intends to introduce into evidence and which are in the defendant's possession, custody, or control;

(ii) any 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 defendant, which the defendant intends to introduce as evidence or which were prepared by a witness whom the defen-

dant intends to call at trial when the results or reports relate to the witness's testimony.

(B) (i) If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of his guilt, he shall, at least 20 days prior to trial, or at such later time as the court may direct, notify the attorney for the commonwealth in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(ii) When a defendant has filed the notice required by paragraph (B)(i) of this rule, the court may, upon motion of the attorney for the commonwealth, order the defendant to submit to a mental examination. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, shall be admissible into evidence against the defendant in any criminal proceeding. No testimony by the expert based upon such statement, and no fruits of the statement shall be admissible into evidence against the defendant in any criminal proceeding except upon an issue regarding mental condition on which the defendant has introduced testimony.

(C) If there is a failure to give notice when required by this rule or to submit to an examination ordered by the court under this rule, the court may exclude such evidence or the testimony of any expert witness offered by the defendant on the issue of his guilt.

(D) Evidence of an intention as to which notice was given pursuant to this rule, but later withdrawn, shall not be admissible, in any civil or criminal proceeding, against the person who gave said notice.

(4) If the case has been set for trial, a request for relief under this rule shall be made a reasonable time in advance of the trial date, and the granting of a continuance by reason of such request shall lie within the sound discretion of the court.

(5) An order 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.

(6) On 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. On motion the court may permit the commonwealth to make such showing, in whole or part, in the form of a written statement to be inspected by the court privately; and if the court thereupon grants relief following such private inspection the entire text of the commonwealth'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.

(7) One (1) motion shall exhaust the relief available to the movant under this rule, except that a subsequent motion may be sustained on a showing of just cause.

(8) 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 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 thereof.

(9) 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 an order issued pursuant thereto, the court may direct 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 may be just under the circumstances.

[Adopted effective January 1, 1965; amended effective January 1, 1986; January 1, 1987; January 1, 1988.]

RULE 7.26 DEMANDS FOR PRODUCTION OF STATEMENT AND REPORTS OF WITNESSES

(1) Before a witness called by the Commonwealth testifies, the attorney for the commonwealth shall produce any statement of the witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony and which (a) has been signed or initialed by him or (b) is or purports to be a substantially verbatim statement made by him. Such statement shall be made available for examination and use by the defendant.

(2) If the Commonwealth claims that a statement to be produced under this Rule 7.26 does not relate to the subject-matter of the witness's testimony, the court shall examine the statement privately and, before making it available for examination and use by the defendant, excise the portions that do not so relate. The entire text of the 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.

[Adopted effective January 1, 1965; amended effective September 1, 1981; January 1, 1986.]

VIII. ARRAIGNMENT AND PLEADINGS

RULE 8.01 INITIAL APPEARANCE AFTER INDICTMENT OR INFORMATION

Upon the appearance of a defendant the judge shall proceed as provided in Rule 3.05 and shall also proceed with or set a time for arraignment.

[Adopted effective September 1, 1981.]

of the Commonwealth to produce a requested report until trial may not be reversible error.[7]

§ 21.33 Reports of Examinations and Tests—Form

[9.] That the defendant, through his attorney, be allowed to inspect and/or copy any results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with this case, or copies thereof, which are within the possession, custody or control of the Commonwealth. RCr 7.24(1).

§ 21.34 Notification of Persons Present at Time of Offense—Informants

The Commonwealth may refuse to disclose its knowledge of informants based on the privilege to conceal their identity. This privilege is counterbalanced by the right of the defendant to have notice of a material witness to the crime.[1]

§ 21.35 Notification of Persons Present at Time of Offense—Informants—Form

[10.] That the defendant, through his attorney, be furnished the names and addresses of all persons known to the Commonwealth's Attorney or other law enforcement officers to have participated in or been present at the time and place of the alleged offense. See Burks v. Commonwealth, 471 S.W.2d 298 (Ky.1971).

§ 21.36 Disclosure of Exculpatory Material

The Commonwealth has a constitutional obligation to disclose evidence which is exculpatory in nature, either as to guilt or as to punishment.[1] Under the authority of United States v. Agurs,[2] the degree of relief for failure to disclose information was highly dependent on whether there had been a request for exculpatory information and the degree of specificity of the request. If there was no request or only a general "boiler plate" request, a reversal for nondisclosure would occur only if the omitted evidence created a reasonable doubt that did not otherwise exist. A specific re-

7. Spencer v. Commonwealth, 554 S.W.2d 355 (Ky.1977) (test results inconclusive and prosecutor unaware of test results' existence).

§ 21.34

1. See § 18.28.

§ 21.36

1. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

2. 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

quest, on the other hand, was of value if nondisclosure might have affected the outcome of the trial.[3]

In 1985, the United States Supreme Court decided the case of United States v. Bagley,[4] which altered the scope and nature of the earlier tests. First, the Court stated that impeachment evidence as well as exculpatory evidence is part of a prosecutor's constitutional duty to disclose.[5] Second, a reversal for failure to disclose is to be determined by one standard regardless of whether there is no request, a general request, or a specific request for information: whether there was "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[6] Despite the comprehensive nature of the new standards, it is probably just as important under *Bagley* as it was under *Agurs* to make the request for information as specific as possible. *Bagley* noted the greater potential for prejudice in a specific request case, wherein an incomplete response by the prosecution might cause the defense to abandon lines of investigation, defenses or trial strategies that it otherwise would have pursued.[7]

The failure to disclose evidence, with or without a court order, is reversible error when it could have completely discredited the prosecution's key evidence.[8] However, if the value of the withheld evidence is cumulative of what the defendant proved, the failure to disclose is harmless.[9] If the Commonwealth refuses an order to provide potentially exculpatory evidence in an unauthenticated form, the defendant is entitled to a recess to subpoena the necessary witnesses and documents to prove the matter properly.[10]

3. Id. These standards apply regardless of the prosecutor's good faith. See Timmons v. Commonwealth, 555 S.W.2d 234 (Ky.1977).

4. 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986).

5. Id. See Williams v. Commonwealth, 569 S.W.2d 139 (1978) (although the Court classified the failure to disclose as perjury, it could have been characterized as the failure to disclose impeachment evidence).

6. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986).

7. Id. Nevertheless, defense counsel is precluded from searching the prosecutor's files for exculpatory evidence or framing a specific request. See Pankey v. Commonwealth, 485 S.W.2d 513 (Ky. 1972). Nor is the court required to examine records where the existence of exculpatory evidence is mere conjecture. Commonwealth v. Key, 633 S.W.2d 55 (Ky.1982).

8. See Rolli v. Commonwealth, 678 S.W.2d 800 (Ky.App.1984).

9. Cope v. Commonwealth, 645 S.W.2d 703 (Ky.1983).

10. Pennington v. Commonwealth, 577 S.W.2d 19 (Ky.App.1978); see Romans v. Commonwealth, 547 S.W.2d 128 (Ky.1977).

The disclosure of exculpatory evidence must be made to the defendant in time for a due investigation to be made.[11] However, the trial court may conduct an in camera review of the materials to determine the materiality and confidentiality of the information.[12]

The Commonwealth has no constitutional duty to preserve evidence which possesses no immediately apparent exculpatory value and when comparable evidence can be obtained by the defendant by other reasonable means.[13]

§ 21.37 Disclosure of Exculpatory Material—Form

[11.] Pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the defendant requests any and all evidence in possession of the Commonwealth or in the possession of any governmental agency that might fairly be termed "favorable," whether that evidence either be completely exculpatory in nature or simply tends to reduce the degree of offense or punishment therefor, or whether that evidence might be termed "favorable" in the sense that it might be fairly used by the defendant to impeach the credibility of any witness the government intends to call in this matter. See generally, Williams v. Dutton, 400 F.2d 797 (5th Cir.1968), cert. denied 393 U.S. 1105, 89 S.Ct. 908, 21 L.Ed.2d 799 (1969). Specifically, the defendant seeks, but does not limit, his request to the following:

a. The nature and substance of any agreement, immunity promise or understanding between the government or any agent thereof, and any witness, relating to the witness' expected testimony, including but not limited to, understandings or agreements, relating to pending or potential prosecutions. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

b. The nature and substance of any preferential treatment given at any time by any Commonwealth agent, whether or not in connection with this case, to any potential witness, including, but not limited to, letters from Commonwealth's Attorneys or other law enforcement personnel to governmental agencies, state agencies, creditors, etc. setting out that witness' cooperation or status with the Commonwealth, and which letter or communication

11. Silverburg v. Commonwealth, 587 S.W.2d 241 (Ky.1979).

12. Pennsylvania v. Ritchie, ___ U.S. ___, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

13. California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), on remand 173 Cal.App.3d 1093, 219 Cal.Rptr. 637 (1985).

might fairly be said to have been an attempt to provide some benefit or help to the witness.

c. Any money or other remuneration paid to any witness by the Commonwealth, including but not limited to, rewards, subsistence payments, expenses or other payments made for specific information supplied to the Commonwealth.

d. Any and all information in the possession of the Commonwealth regarding the mental condition of the Commonwealth's witnesses which would reflect or bring into question the witnesses' credibility.

e. The original statement and any amendment thereto, of any individuals who have provided the government with a statement inculpating the defendant, who later retracted all or any portions of that statement where such retraction would raise a conflict in the evidence which the Commonwealth intends to introduce. See United States v. Enright, 579 F.2d 980 (6th Cir. 1978).

f. Any and all interview memoranda or reports which contain any information, whatever the sources, which might fairly be said to contradict or be inconsistent with any evidence which the Commonwealth intends to adduce in this matter. See United States v. Enright, supra.

g. The names and addresses of any witnesses whom the Commonwealth believes would give testimony favorable to the defendant in regard to the matters alleged in the indictment, even though the Commonwealth may not be in possession of a statement of this witness and regardless of whether the Commonwealth intends to call this witness. See United States v. Eley, 335 F.Supp. 353 (N.D.Ga.1972).

h. The results of any scientific test or analysis done on any person or object in connection with this case where the result of that test or analysis did not implicate, or was neutral to the defendant. See Barbee v. Warden of Maryland Penitentiary, 331 F.2d 842 (4th Cir.1964); Norris v. Slayton, 540 F.2d 1241 (4th Cir. 1976).

i. Any documentary evidence in the possession of the Commonwealth which contradicts or is inconsistent with any testimony the Commonwealth intends to introduce in this cause.

j. The statement of any individual who has given a description to any person of any individual involved in the perpetration of the charged offense, which person the Commonwealth alleges to be the defendant, where such description might fairly be said not to match the defendant in characteristics such as height, weight,

body build, color of hair, etc. See Jackson v. Wainwright, 390 F.2d 288 (5th Cir.1968).

k. The name and address of any individual who has been requested to make an identification of the defendant in connection with this case, and failed to make such identification. Grant v. Alldredge, 498 F.2d 376 (2d Cir.1974).

§ 21.38 Disclosure of Juror Information

Some Commonwealth's Attorneys compile information about prospective jurors in serious cases. There is some precedent in other jurisdictions that jury information should be disclosed to the opposing party.[1] Giving such information may avoid challenge to individual jurors after the verdict.

§ 21.39 Disclosure of Juror Information—Form

[12.] That the Commonwealth's Attorney disclose any information compiled as to any prospective juror, including but not limited to arrest or conviction records, or whether the prospective juror was ever a witness.

§ 21.40 Disclosure of Identification Procedure

Normally, disclosure of physical evidence will indicate from whom it was obtained so that an appropriate suppression motion can be filed. However, where there have been identification procedures, this fact may not be readily apparent. Consequently, discovery should seek notification of any identification procedures.[1]

§ 21.41 Disclosure of Identification Procedure—Form

[13.] That in the event the Commonwealth intends to offer any "eyewitness identification testimony," the defendant through his attorney, be informed as to whether any such witness has at any time been asked to make any pretrial, extrajudicial identification of the defendant, whether by means of a live lineup, a photographic spread, or other type of confrontation; in the event such an extrajudicial identification has taken place, the defendant further requests the date of such identifications, and the names of all persons at the identification. If such identification occurred as

§ 21.38

1. See 86 A.L.R.3d 571.

§ 21.40

1. United States v. Cranson, 453 F.2d 123, 126 n. 6 (4th Cir.1971), cert. denied 406 U.S. 909, 92 S.Ct. 1607, 31 L.Ed.2d 821 (1972). But see Silverburg v. Commonwealth, 587 S.W.2d 241 (1979).

MURRAY, BRADEN, GONZALEZ & RICHARDSON

ATTORNEYS AND COUNSELORS AT LAW

612 GRAVIER STREET

NEW ORLEANS, LOUISIANA 70130

TELEPHONE (504) 581-2000

JULIAN R. MURRAY, JR.•
HENRY E. BRADEN, IV •
ROMUALDO GONZALEZ •
LAMAR M. (CHIP) RICHARDSON, JR.

•A LAW CORPORATION

MANDEVILLE OFFICE
200 GREENLEAVES BLVD
MANDEVILLE, LA. 70448
TELEPHONE (504) 626-4414

August 3, 1988

AUG 16 1988

Mr. Gordon F. Proudfoot
BOYNE CLARKE
suite 700, Belmont House
33 Alderney Drive
P.O. Box 876
Dartmouth, Nova Scotia
B2Y 3Z5

Dear Mr. Proudfoot,

I am in receipt of your letter of June 10, 1988 directed to Mr. Wood Brown, III, as President of the Louisiana State Bar Association. You will note by letter of June 28, 1988, Mr. Thomas Collins, Executive Counsel for the Bar Association, forwarded your letter to me for reply. I am the President of the Louisiana Association of Criminal Defense Lawyers.

Your inquiry as to whether the State of Louisiana has any laws, guidelines, or ethical codifications requiring that exculpatory statements in criminal prosecutions be delivered to defense counsel "at the earliest moment". There is no statutory requirement in the State of Louisiana requiring a prosecutor to make available to defense counsel exculpatory information, but our prosecutors are bound by the United States Supreme Court decision in the case of Brady v. Maryland which held that under the United States Constitution prosecutors were required to supply such information if timely requested by the defense.

The timing as to when the prosecutor is required to give such information depends upon the circumstances of each case. There is certainly no requirement that the prosecutor make it available "at the earliest moment" but it does have to be given far enough in advance to allow the defense to develop the information so that it can be effectively used at trial. Generally speaking if the prosecutor is going to bring out the exculpatory evidence himself during the course of the trial that would satisfy his requirement under the Brady decision and its progeny.

I attach for your consideration a sample copy of a typical motion and memorandum which a defense attorney in this State would ordinarly file to assure that the prosecutor supplies him

with any exculpatory information which he might possess.

If any further information is desired do not hesitate to contact me. I remain with best wishes

Very truly yours,

MURRAY, BRADEN, GONZALEZ & RICHARDSON

J. R. Murray, Jr.

JULIAN R. MURRAY, JR.

JRMjr/db

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	*	CRIMINAL DOCKET NO. [redacted]
VERSUS	*	SECTION "F" 15
[redacted]	*	VIOLATIONS: [redacted]
	*	

MOTION FOR PRODUCTION OF EXCULPATORY EVIDENCE AND FOR DISCLOSURE OF IMPEACHING EVIDENCE

NOW INTO COURT, through undersigned counsel, comes defendant, [redacted] and pursuant to Rule 12 (b) of the Federal Code of Criminal Procedure, and the decisions of the United States Supreme Court in Brady v. Maryland, 373 U.S. 83(1963), Giglio v. U.S., 405 U.S. 150(1972), and United States v. Agurs, 427 U.S. 97(1976), moves for the disclosure and production by the Federal Government, in advance of trial, of all evidence in its possession favorable to the accused, either as direct or impeaching evidence, including but not limited to such evidence contained in:

A. Any documents in the possession of the government which would indicate that [redacted] is not guilty of the alleged offenses including, but not limited to:

1. any written statements, or memoranda and notes thereof, or notes of oral statements of interviews with any person questioned concerning any tests or examinations performed in conjunction with this case;

2. any and all results or reports, or portions thereof, concerning any tests or examinations performed in conjunction with this case;

B. Any report prepared by agents of any investigative or prosecutorial agency of the government, whether such report was prepared in connection with the investigation or prosecution of the instant case;

C. Statements of any witnesses or other persons interviewed which tend to demonstrate that defendant, [redacted] is not guilty of the charged offenses, regardless of whether the government intends to call them as witnesses at the trial;

D. The memoranda or summaries of any oral statement made to an agent of the government by any person in connection with the subject matter of this case, whether or not;

1. the statement, if in writing, has been signed, or approved by the witness, or;

2. the statement relates to the proposed subject matter of the direct testimony of the witness at trial.

E. The stenographic recording or transcription of any oral statement made by any person to an agent of the government, or in the hearing of such agent, in connection with the subject matter of this case, whether or not:

1. the stenographic recording or transcription is a substantially verbatim recital of the statement, or;

2. the statement was recorded contemporaneously with its making, or;

3. the statement relates to the proposed subject matter of the direct testimony of the witness at trial.

F. Statements of persons or memoranda or recordings or any oral statements of any person in possession of the government, whether or not made to an agent of the government;

G. Any memoranda, documents, or statements used by the government in the investigation of this case, whether or not it was prepared by the government;

H. All reports or memoranda prepared on behalf of the government in connection with the investigation of this case.

I. Any memoranda, reports or documents prepared in connection with the grant of immunity to any person interviewed in the course of the investigation in this case, and any document reflecting the grant of immunity to any such person;

J. Any and all personal or business records prepared by or belonging to the defendant or any other party, or copies thereof, in the custody of the government;

K. All records and information revealing prior felony convictions or guilty verdicts or juvenile adjudications attributed to each witness called by the government, including but not limited to relevant "rap sheets";

L. All records and information revealing prior misconduct or bad acts attributed to each witness;

M. Any and all consideration or promises of consideration given to or on behalf of the witness or expected or hoped

for by the witness. By consideration, defendant refers to absolutely anything, whether bargained for or not, which arguably could be of value or use to the witness or concern to the witness, including but not limited to, formal or informal, direct or indirect consideration; leniency, favorable treatment or recommendations or other assistance with respect to any pending or potential criminal, parole, probation, pardon, clemency, civil, tax court, court of claims, administrative or other disputes with the government, with any authority or any other parties; criminal, civil or tax immunity grants; relief from forfeiture, payments of money, rewards or fees, witness fees, and special witness fees, provisions of food, clothing, shelter, transportation, legal services, or any other benefits; placement in a "witness protection program" and former status of a witness; and anything else which arguably could reveal an interest, motive, or bias of the witness in favor of the government or against the defense, or act as an inducement to testify or to color testimony.

N. All threats, expressed or implied, direct or indirect, or other coercion made or directed against the witness; criminal prosecution, investigations, or potential prosecution pending but which could be brought against the witness; any probationary, parole, deferred prosecution or custodial status of the witness, in any civil, tax court, court of claims, administrative, or other pending

or potential legal disputes with the government or over which the government has real, apparent or perceived influence;

O. The existence and identification of each occasion in which any prospective witness has testified before any court, grand jury, tribunal or other hearing body with respect to the defendant, the subject of this investigation, the facts of this case or any related case;

P. The existence and identification of each occasion in which each witness who was or is an informer, accomplice, co-conspirator, or expert has testified before any court, grand jury, or other tribunal body. Please annex transcripts from all said appearances;

Q. All statements made by each witness who is an informer made to any government agent during the investigation culminating in the instant charge, including notes, memoranda, recordings, and other written or recorded results of interviews with said witnesses;

R. All financial records, or documents filed with a federal or state agency, filed by any witness or informer, wherein said documents contain exculpatory evidence, regardless of whether the state intends to use these documents at trial, or to call the informer as a witness at this trial;

S. All of the records and/or information which arguably could be helpful or useful to the defense in impeaching or

otherwise detracting from the probative force of the government's evidence or which arguably could lead to such records or information;

T. The same records and information requested in items K-S above with respect to each non-witness declarant whose statements are to be offered as evidence.

Respectfully submitted:

J. R. Murray, Jr.

JULIAN R. MURRAY, JR.
MURRAY, MURRAY, BRADEN & GONZALEZ
612 Gravier Street
New Orleans, Louisiana 70130
(504) 581-3141
Attorney for Defendant

NOTICE OF HEARING ON THE
MOTION FOR PRODUCTION OF EXCULPATORY EVIDENCE
AND FOR DISCLOSURE OF IMPEACHING EVIDENCE

PLEASE TAKE NOTICE, upon the indictment herein and upon all pleadings and proceedings had herein, the undersigned will move this court, on the 28th day of August, 1985, at 11 o'clock A.m., for an order directing disclosure of evidence, and for such other relief as the court may deem just and proper.

New Orleans, Louisiana, this _____ day of _____, 1985.

J. R. Murray, Jr.

JULIAN R. MURRAY, JR.

CERTIFICATE

I hereby certify that a copy of the [illegible] has been served on all [illegible] of record by the 28 day of August.

J. R. Murray, Jr.

MURRAY, MURRAY, BRADEN & GONZALEZ

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	*	CRIMINAL DOCKET NO. [redacted]
VERSUS	*	SECTION "F"
[redacted]	*	VIOLATIONS: 18 U.S.C. §1014 18 U.S.C. §1341 18 U.S.C. §2314
	*	

MEMORANDUM IN SUPPORT OF EXCULPATORY EVIDENCE AND FOR DISCLOSURE OF IMPEACHING EVIDENCE

MAY IT PLEASE THE COURT:

The United States Supreme Court cases of Brady v. Maryland, 83 S.Ct. 1194, 373 U.S. 83(1963) and United States v. Agurs, 962 S.Ct. 2392, 427 U.S. 97(1976) set forth the principle that the government has a duty to furnish the defendant with all exculpatory material. These decisions are grounded upon the due process requirements of the Fifth and Fourteenth Amendments of the United States Constitution.

It is of no moment that the exculpatory evidence would be inadmissible on the defendant's behalf at trial. Giles v. Maryland, S.Ct. 386 U.S. 66(1967). It is sufficient that the "favorable evidence" might be beneficial in obtaining further evidence. Giles v. Maryland, supra.

The evidence sought includes evidence which might impeach the testimony or credibility of a government witness or which might be used as direct evidence. Williams v. Dutton, 400 F.2nd. 797 (5th Cir., 968). See also: Giglio v. United States, 92 S.Ct. 763, 405 U.S. 150(1972).

Accordingly, the defendant respectfully represents that he is entitled to receive the production of any papers, documents, records, statements, photographs and objects in the possession of the government which are favorable to the defendant.

It is further represented that should any question arise as to the exculpatory nature of the requested materials, that this Honorable Court has the authority to make an in camera inspection and determine the issue. Jackson v. Denno, 84 S.Ct. 1774, 378 U.S. 368(1964); Williams v. Dutton, supra.

Respectfully submitted:

JULIAN R. MURRAY, JR.
MURRAY, MURRAY, BRADEN & GONZALEZ
612 Gravier Street
New Orleans, Louisiana 70130
(504) 581-3141
Attorney for Defendant

NOTICE OF 3.11 CONFERENCE

I HEREBY CERTIFY, that a 3.11 conference was held pursuant to the local rules of the United State District Court for the Eastern District of Louisiana and that counsel have met and conferred for purposes of amicably resolving the issues.

JULIAN R. MURRAY, JR.
MURRAY, MURRAY, BRADEN & GONZALES
612 Gravier
New Orleans, La. 70130

Attorney for defendant

202

STINSON, LUPTON & WEISS, P.A.
ATTORNEYS AND COUNSELORS AT LAW
280 FRONT STREET
BATH, MAINE 04530-2607

CARL W. STINSON
RONALD W. LUPTON
DAVID R. WEISS
GARY A. GABREE
ELIZABETH J. SCHEFFEE

PHONE
207 - 442-8781

JUN 27 1988

June 17, 1988

Gordon F. Proudfoot, Esq.
Boyne Clarke
Barristers & Solicitors
Suite 700, Belmont House
33 Alderney Drive
P. O. Box 876
Dartmouth, Nova Scotia B2Y 3Z5

Re: Canadian Bar Submission to the Royal Commission on the Prosecution of Donald Marshall, Jr.

Dear Mr. Proudfoot:

In response to your letter of June 10, 1988 regarding the above referenced Canadian Bar Submission of a Brief on the "Role of the Crown Prosecutor," I am happy to provide you with a copy of the applicable disclosure rule which we use in the State of Maine. I have copied Rule 16 of the Maine Rules of Criminal Procedure which discuss the duty of the State's attorney to reveal the existence of exculpatory statements. I hope this is of some assistance to you.

Sincerely,

STINSON, LUPTON & WEISS, P. A.

David R. Weiss

David R. Weiss
President-Elect
Maine State Bar Association

DRW/bw
Enclosure

MAINE RULES OF COURT 1988 Edition

MAINE RULES

FEDERAL RULES

FOR MARGIN INDEX, SEE BACK COVER

WEST PUBLISHING CO. St. Paul, Minn.

tion, shall produce him at the examination and shall keep him in the presence of the witness during the examination. A defendant not in custody shall be given notice and shall have the right to be present at the examination. The court shall order the county in which the case is pending to pay to the defendant's attorney and to a defendant not in custody expenses of travel and subsistence for attendance at the examination.

[Amended effective January 3, 1978.]

RULE 16. DISCOVERY BY THE DEFENDANT

(a) Automatic Discovery.

(1) *Duty of the Attorney for the State.* The attorney for the State shall furnish to the defendant within a reasonable time:

(A) A statement describing any testimony or other evidence intended to be used against the defendant which:

(i) Was obtained as a result of a search and seizure or the hearing or recording of a wire or oral communication;

(ii) Resulted from any confession, admission, or statement made by the defendant; or

(iii) Relates to a lineup, showup, picture, or voice identification of the defendant;

(B) Any written or recorded statements and the substance of any oral statements made by the defendant.

(C) A statement describing any matter or information known to the attorney for the State which may not be known to the defendant and which tends to create a reasonable doubt of the defendant's guilt as to the offense charged.

(D) A statement describing the contents of any disclosure order issued pursuant to Rule 6(h) which pertains to the case against the defendant.

(2) *Continuing Duty to Disclose.* The attorney for the State shall have a continuing duty to disclose the matters specified in this subdivision.

(b) Discovery Upon Request.

(1) *Duty of the Attorney for the State.* Upon the defendant's written request, the attorney for the State, except as provided in subdivision (3), shall allow access at any reasonable time to those matters specified in subdivision (2) which are within the attorney for the State's possession or control. The attorney for the State's obligation extends to matters within the possession or control of any member of his staff and of any official or employee of this State or any political subdivision thereof who regularly reports or with reference to the particular case has

reported to his office. In affording this access, the attorney for the State shall allow the defendant at any reasonable time and in any reasonable manner to inspect, photograph, copy, or have reasonable tests made.

(2) *Scope of Discovery.* The following matters are discoverable:

(A) Any books, papers, documents, photographs (including motion pictures and video tapes), tangible objects, buildings or places, or copies or portions thereof, which are material to the preparation of the defense or which the attorney for the State intends to use as evidence in any proceeding or which were obtained from or belong to the defendant;

(B) 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.

(C) Expert Witnesses. The names and addresses of the expert witnesses whom the state intends to call in any proceeding.

(3) *Exception: Work Product.* Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the mental impressions, conclusions, opinions, or legal theories of the attorney for the State or members of his legal staff.

(4) *Continuing Duty to Disclose.* If matter which would have been furnished to the defendant under this subdivision comes within the attorney for the State's possession or control after the defendant has had access to similar matter, the attorney for the State shall promptly so inform the defendant.

(c) Discovery Pursuant to Court Order.

(1) *Witnesses.* Upon timely motion of a defendant and upon a showing that the specific matter sought may be material to the preparation of his defense, that the informal discovery procedures of subdivisions (a) and (b) of this rule have been exhausted and that the request is reasonable, the court shall order the attorney for the State to permit the defendant access to any of the following matters:

(A) Names and addresses of witnesses;

(B) Written or recorded statements of witnesses and summaries of statements of witnesses contained in police reports or similar matter;

(C) Any record of prior criminal convictions of witnesses.

Access shall be according to the terms and conditions set forth in the court's order. A witness includes any person known to the State who has some knowledge of the circumstances of the alleged offense. The fact that a witness's name is on a list furnished under this subdivision and that he is not called shall not be commented upon at trial. The

attorney for the State shall have a continuing duty to disclose matters specified in this subdivision which come within his possession or control after the defendant has had access under this subdivision.

(2) *Bill of Particulars.* The court for cause may direct the filing of a bill of particulars if it is satisfied that counsel has exhausted his discovery remedies under this rule or it is satisfied that discovery would be ineffective to protect the rights of the defendant. The bill of particulars may be amended at any time subject to such conditions as justice requires.

(3) *Grand Jury Transcripts.* Discovery of transcripts of testimony of witnesses before a grand jury is governed by Rule 6.

(4) *Reports of Expert Witnesses.* If the expert witness whom the state intends to call in any proceeding has not prepared a report of examination or tests, the court may order that the expert prepare and the attorney for the state serve a report stating the subject matter on which the expert is expected to testify, the substance of the facts to which the expert is expected to testify and a summary of the expert's opinions and the grounds for each opinion.

(d) Sanctions for Noncompliance. If the attorney for the State fails to comply with this rule, the court on motion of the defendant or on its own motion may take appropriate action, which may include, but is not limited to, one or more of the following: requiring the attorney for the State to comply, granting the defendant additional time or a continuance, relieving the defendant from making a disclosure required by Rule 16A, prohibiting the attorney for the State from introducing specified evidence and dismissing charges with prejudice.

[Added effective January 3, 1978; Amended effective February 1, 1983; January 31, 1985; February 15, 1986; February 1, 1987; February 15, 1988.]

RULE 16A. DISCOVERY BY THE STATE

(a) The Person of the Defendant.

(1) Upon motion and notice the court may order a defendant to:

(A) Appear in a line-up;

(B) Speak for identification by witnesses to an offense;

(C) Be fingerprinted, palmprinted, or footprinted;

(D) Pose for photographs;

(E) Try on articles of clothing;

(F) Permit the taking of specimens of material under his fingernails;

(G) Permit the taking of samples of his blood, hair, and other material of his body which involve no unreasonable intrusion thereof;

(H) Provide specimens of his handwriting; and

(I) Submit to a reasonable physical or medical inspection of his body.

(2) Reasonable notice of the time and place of any personal appearance of the defendant required for the foregoing purposes shall be given by the attorney for the State to the defendant and his attorney. Provision may be made for appearances for such purposes in an order by the court admitting the defendant to bail or providing for his release.

(3) *Definition.* For purposes of this Rule, a defendant is a person against whom a criminal pleading has been filed.

(b) Notice of Alibi. No less than ten days before the date set for trial, the attorney for the State may serve upon the defendant or his attorney a demand that the defendant serve a notice of alibi if the defendant intends to rely on such defense at the trial. The demand shall state the time and place that the attorney for the State proposes to establish at the trial as the time and place where the defendant participated in or committed the crime. If such a demand has been served, and if the defendant intends to rely on the defense of alibi, not more than five days after service of such demand, he shall serve upon the attorney for the State and file a notice of alibi which states the place which the defendant claims to have been at the time stated in the demand and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi. Within five days thereafter, the attorney for the State shall file and serve upon the defendant or his attorney a written notice stating the names and addresses of the witnesses upon whom the State intends to rely to establish the defendant's presence at the time and place stated in the demand.

If the defendant fails to serve and file a notice of alibi after service of a demand, the court may take appropriate action. If the attorney for the State fails to serve and file a notice of witnesses, the court shall order compliance pursuant to Rule 16(c)(1). The fact that a witness's name is on a notice furnished under this subdivision and that he is not called shall not be commented upon at trial.

(c) Reports of Examinations and Tests. Upon motion of the attorney for the State, the court may order a defendant to permit the attorney for the State to inspect and copy or photograph any reports or results of physical or mental examinations or of scientific tests, experiments, or comparisons, or any other reports or statements of experts which are within the defendant's possession or control and which the defendant intends to introduce as evidence in any proceeding. In

ordering such discovery, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of defendant's attorney.

(d) Documents and Tangible Objects. Upon motion by the attorney for the State, the court may order a defendant to permit the attorney for the State to inspect and copy or photograph or have reasonable tests made upon any book, paper, document, photograph, or tangible object which is within the defendant's possession or control and which the defendant intends to introduce as evidence in any proceeding.

(e) Expert Witnesses. Upon motion of the attorney for the State, the court may order a defendant to supply the names and addresses of the expert witnesses whom the defendant intends to call in any proceeding. If the expert witness has not prepared a report of examination or tests, the court may order that the expert prepare and the defendant serve a report stating the subject matter on which the expert is expected to testify, the substance of the facts to which the expert is expected to testify, and a summary of the expert's opinions and the grounds for each opinion.

[Added effective January 3, 1978; amended effective February 1, 1983; February 15, 1986.]

RULE 17. SUBPOENA

(a) For Attendance of Witnesses; Form; Issuance. A subpoena shall be issued by the clerk under the seal of the court or by a member of the Maine Bar. It shall state the name of the court and the title, if any, of the proceeding and shall command each person to whom it is directed to attend and give testimony at the place and during the time period specified therein. The time period shall not exceed the period covered by the trial list scheduling the case. The attorney for the subpoenaing party shall make arrangements to minimize the burden on the subpoenaed person. The clerk shall issue a subpoena, signed and sealed but otherwise in blank, to a member of the bar requesting it, who shall fill in the blanks before it is served.

(b) Indigent Defendants. A defendant determined indigent by the court pursuant to Rule 44(b) is entitled to subpoena an in-state witness without payment of the witness fee, mileage and cost of service of the subpoena. Such fees and costs shall be paid out of Judicial Department funds. A request to the Sheriff for service shall be accompanied by a certificate of counsel that the defendant has been determined indigent.

A defendant who is financially unable to pay the fees and costs to subpoena an out-of-state witness may move ex parte for an order dispensing with payment of fees and costs. The court shall grant the

AUG 2 3 1988

Maryland State Bar Association, Inc.
THE MARYLAND BAR CENTER
520 WEST FAYETTE STREET
BALTIMORE, MARYLAND 21201
(301) 685-7878
(800) 492-1964

August 22, 1988

Gordon F. Proudfoot
Boyne Clarke
Barristers & Solicitors
Suite 700, Belmont House
33 Alderney Drive
P.O. Box 876
Dartmouth, Nova Scotia
B2y 3Z5

Re: Canadian Bar Submission to the Royal Commission on the Prosecution of Donald Marshall, Jr.

Dear Mr. Proudfoot:

Your letter of June 10, 1988, to President Titus of our Bar Association regarding the above matter, was forwarded to me for handling as Chairman of our Criminal Law Section Council.

As I understand your inquiry, I enclose herewith certain materials which should prove very interesting to you, specifically the decision of Brady v. Maryland which we now refer to as Brady Material, seems to be applicable to your particular question as well as the Jenoks Act Materials, which statute was precipitated after the famous Jenoks Decision and the materials that are included with this letter, spell out the various things that the goverment is required to do and when.

(210)

Further, our Court of Appeals has recently adopted rules which set forth various discovery required in criminal proceedings both in our District Court, and in our Circuit Court, which require certain disclosure by the State both without request and upon request; a copy of those rules and materials are attached hereto for your advisement.

I trust the enclosed documentation satisfies your inquiry and if you need anything further, please do not hesitate to contact me.

Very truly yours,

J. Harrison Phillips, III
Chairman

JHP,III/sds
Enclosures

cc: Roger W. Titus, Esquire
President, Maryland State Bar Association

William C. Brennan, Jr., Esquire
Secretary, Criminal Law Section Council

(i) JOINT DEFENDANTS

When persons are jointly tried, the court, for good cause shown, may refuse to permit the use at trial of a deposition taken at the instance of one defendant over the objection of any other defendant.

Source: This Rule is derived as follows:
Section (a) is new.
Section (b) is derived from former Rule 740 a and j.
Section (c) is derived from former Rule 740 c.
Section (d) is derived from former Rule 740 d.
Section (e) is derived from former Rule 740 e.
Section (f) is derived from former Rule 740 f.
Section (g) is derived from former Rule 740 g.
Section (h) is derived from former Rule 740 h.
Section (i) is derived from former Rule 740 i.

RULE 4-262. DISCOVERY IN DISTRICT COURT

(a) SCOPE

Discovery and inspection pursuant to this Rule is available in the District Court in actions for offenses that are punishable by imprisonment, and shall be as follows:

(1) The State's Attorney shall furnish to the defendant any material or information that tends to negate or mitigate the guilt or punishment of the defendant as to the offense charged.

(2) Upon request of the defendant and the State's Attorney shall permit the defendant to inspect and copy (A) any portion of a document containing a statement or containing the substance of a statement made by the defendant to a State agent that the State intends to use at a hearing, other than a preliminary hearing, or trial, and (B) each written report or statement made by an expert whom the State expects to call as a witness at a hearing, other than a preliminary hearing, or trial.

(3) Upon request of the State the defendant shall permit any discovery or inspection specified in subsection (d)(1) of Rule 4-263.

Committee note: This Rule is not intended to limit the constitutional requirement of disclosure by the State. See Brady v. State, *226 Md. 422, 174 A.2d 167 (1961), aff'd. 373 U.S. 83 (1963).*

(b) PROCEDURE

The discovery and inspection required or permitted by this Rule shall be completed before the hearing or trial. A request for discovery and inspection and response need not be in writing and need not be filed with the court. If a request was made before the date of the hearing or trial and the request was refused or denied, the court may grant a delay or continuance in the hearing or trial to permit the inspection or discovery.

(c) OBLIGATIONS OF THE STATE'S ATTORNEY

The obligations of the State's Attorney under this Rule extend to material and information in the possession or control of the State's Attorney and staff members and any others who have participated in the investigation or evaluation of the action and who either regularly report, or with reference to the particular action have reported, to the office of the State's Attorney.

Source: This Rule is new.

RULE 4-263. DISCOVERY IN CIRCUIT COURT

Discovery and inspection in circuit court shall be as follows:

(a) DISCLOSURE WITHOUT REQUEST

Without the necessity of a request, the State's Attorney shall furnish to the defendant:

(1) Any material or information tending to negate or mitigate the guilt or punishment of the defendant as to the offense charged;

(2) Any relevant material or information regarding: (A) specific searches and seizures, wire taps or eavesdropping, (B) the acquisition of statements made by the defendant to a State agent that the State intends to use at a hearing or trial, and (C) pretrial identification of the defendant by a witness for the State.

(b) DISCLOSURE UPON REQUEST

Upon request of the defendant, the State's Attorney shall:

(1) Witnesses

Disclose to the defendant the name and address of each person then known whom the State intends to call as a witness at the hearing or trial to prove its case in chief or to rebut alibi testimony;

(2) Statements of the Defendant

As to all statements made by the defendant to a State agent that the State intends to use at a hearing or trial, furnish to the defendant, but not file unless the court so orders: (A) a copy of each written or recorded statement, and (B) the substance of each oral statement and a copy of all reports of each oral statement;

(3) Statements of Codefendants

As to all statements made by a codefendant to a State agent which the State intends to use at a joint hearing or trial, furnish to the defendant, but not file unless the court so orders: (A) a copy of each written or recorded statement, and (B) the substance of each oral statement and a copy of all reports of each oral statement;

(4) Reports or Statements of Experts

Produce and permit the defendant to inspect and copy all written reports or statements made in connection with the action by each expert consulted by the State, including the results of any physical or mental examination, scientific test, experiment, or comparison, and furnish the defendant with the substance of any such oral report and conclusion;

(5) Evidence for Use at Trial

Produce and permit the defendant to inspect, copy, and photograph any documents, recordings, photographs, or other tangible things that the State intends to use at the hearing or trial;

(6) Property of the Defendant

Produce and permit the defendant to inspect, copy, and photograph any item obtained from or belonging to the defendant, whether or not the State intends to use the item at the hearing or trial.

(c) MATTERS NOT SUBJECT TO DISCOVERY BY THE DEFENDANT

This Rule does not require the State to disclose:

(1) Any documents to the extent that they contain the opinions, theories, conclusions, or other work product of the State's Attorney, or

(2) The identity of a confidential informant, so long as the failure to disclose the informant's identity does not infringe a constitutional right of the defendant and the State's Attorney does not intend to call the informant as a witness, or

(3) Any other matter if the court finds that its disclosure would entail a substantial risk of harm to any person outweighing the interest in disclosure.

(d) DISCOVERY BY THE STATE

Upon the Request of the State, the defendant shall:

(1) As to the Person of the Defendant

Appear in a lineup for identification; speak for identification; be fingerprinted; pose for photographs not involving reenactment of a scene; try on articles of clothing; permit the taking of specimens of material under fingernails; permit the taking of samples of blood, hair, and other material involving no unreasonable intrusion upon the defendant's person; provide handwriting specimens; and submit to reasonable physical or mental examination;

(2) Reports of Experts

Produce and permit the State to inspect and copy all written reports made in connection with the action by each expert whom the defendant expects to call as a witness at the hearing or trial, including the results of any physical or mental examination, scientific test, experiment, or comparison, and furnish the State with the substance of any such oral report and conclusion;

(3) Alibi Witnesses

Upon designation by the State of the time, place, and date of the alleged occurrence, furnish the name and address of each person other than the defendant whom the defendant intends to call as a witness to show that the defendant was not present at the time, place, and date designated by the State in its request.

(e) TIME FOR DISCOVERY

The State's Attorney shall make disclosure pursuant to section (a) of this Rule within 25 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213. Any request by the defendant for discovery pursuant to section (b) of this Rule, and any request by the State for discovery pursuant to section (d) of this Rule shall be made within 15 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213. The party served with the request shall furnish the discovery within ten days after service.

(f) MOTION TO COMPEL DISCOVERY

If discovery is not furnished as requested, a motion to compel discovery may be filed within ten days after receipt of inadequate discovery or after discovery should have been received, whichever is earlier. The motion shall specifically describe the requested matters that have not been furnished. A response to the motion may be filed within five days after service of the motion. The court need not consider any motion to compel discovery unless the moving party has filed a certificate describing good faith attempts to discuss with the opposing party the resolution of the dispute and certifying that they are unable to reach agreement on the disputed issues. The certificate shall include the date, time, and circumstances of each discussion or attempted discussion.

(g) OBLIGATIONS OF STATE'S ATTORNEY

The obligations of the State's Attorney under this Rule extend to material and information in the possession or control of the State's Attorney and staff members and any others who have participated in the investigation or evaluation of the action and who either regularly report, or with reference to the particular action have reported, to the office of the State's Attorney.

(h) CONTINUING DUTY TO DISCLOSE

A party who has responded to a request or order for discovery and who obtains further material information shall supplement the response promptly.

216

(i) PROTECTIVE ORDERS

On motion and for good cause shown, the court may order that specified disclosures be restricted. If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 741 a 1 and 2.
Section (b) is derived from former Rule 741 b.
Section (c) is derived from former Rule 741 c.
Section (d) is derived from former Rule 741 d.
Section (e) is derived from former Rule 741 e 1.
Section (f) is derived from former Rule 741 e 2.
Section (g) is derived from former Rule 741 a 3.
Section (h) is derived from former Rule 741 f.
Section (i) is derived from former Rule 741 g.

RULE 4-264. SUBPOENA FOR TANGIBLE EVIDENCE BEFORE TRIAL IN CIRCUIT COURT

On motion of a party, the circuit court may order the issuance of a subpoena commanding a person to produce for inspection and copying at a specified time and place before trial designated documents, recordings, photographs, or other tangible things, not privileged, which may constitute or contain evidence relevant to the action. Any response to the motion shall be filed within five days.

Source: This Rule is derived from former Rule 742 a.

MBA

20 WEST STREET
BOSTON, MASSACHUSETTS 02111
(617) 542-3602

Committee on Professional Ethics

217

July 13, 1988 JUL 15 1988

Gordon F. Proudfoot
Boyne Clarke
Barristers and Solicitors
Suite 700
Belmont House
33 Alderney Drive
P.O. Box 876
Dartmouth, Nova Scotia
B2Y 3Z5

Dear Mr. Proudfoot:

As Staff Liaison to the Committee on Professional Ethics, I have been asked to respond to your letter of June 10, 1988 to Mr. Thomas E. Maffei. I apologize for the delay in responding. I hope that in sending this via Federal Express you will receive the imformation in time.

The ethics rules used in Massachusetts are referred to as Rule 3:07 or 3:08 (the latter pertains to prosecutorial functions) of the Supreme Judical Court. I've enclosed a copy of these rules. Kindly refer to Disciplinary Rule (DR) 7-103(B) on page 241. This rule appears directly on point. However there are other related, though less direct, rules such as DR 1-102 A(1) and (2); DR 1-103 (B); DR 7-101(A)(2); DR 7-102(A)(3) and (4) and (5) and (6).

The Massachusetts Bar Association is a voluntary association and does not have governmental authority to interpret or enforce these rules. This is a function of the Board of Bar Overseers. You may wish to speak to a member of its legal staff to see what if any related reported cases may be of assistance to you. The address and phone number is:

Board of Bar Overseers
11 Beacon Street
Boston, MA 02108
(617) 720-0700

I have researched the advisory opinions of the MBA's Committee on Professional Ethics. There are no opinions which are related to your inquiry. You may wish to research the rules and opinions of other jurisdictions in the United States. A helpful resource for this is the ABA/BNA's three volume set, "Lawyers Manual on Professional Conduct". The American Bar Association's (ABA) phone number is (312) 988-5000.

I hope this is helpful. Please contact me if I may be of further assistance.

Sincerely,

Dorothea M. Boniello, Esquire
Staff Liaison
Committee on Professional Ethics

DMB:eao

cc: Thomas Maffei, President- Elect
Kay Paine, Executive Director

rule, shall be personally responsible for such act or omission and shall be subject to discipline therefor.

(7) Nothing in this rule shall be deemed to modify, abrogate, or reduce the attorney-client privilege or any comparable privilege or relationship, whether statutory or deriving from the common law.

Amended, effective Jan. 29, 1987.

RULE 3:07. CANONS OF ETHICS AND DISCIPLINARY RULES REGULATING THE PRACTICE OF LAW

(1) The practice of law by members of the Massachusetts Bar shall be regulated by the Canons of Ethics and Disciplinary Rules attached hereto and incorporated by reference herein.

(2) The Ethical Considerations as appearing in the American Bar Association "Code of Professional Responsibility and Canons of Judicial Ethics" (1970) are not adopted as a rule of this court, but those Ethical Considerations form a body of principles upon which the Canons of Ethics and Disciplinary Rules, as herein adopted, are to be interpreted.*

(3) This rule shall take effect on October 2, 1972, and shall apply only to matters which occur on or after said date.

* The within canons and rules are based on but are not identical to the American Bar Association "Code of Professional Responsibility and Canons of Judicial Ethics" (1970).

CANON 1

A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession

DISCIPLINARY RULES

DR 1-101. Maintaining Integrity and Competence of the Legal Profession

(A) A lawyer is subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his application for admission to the bar.

(B) A lawyer shall not further the application for admission to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute.

DR 1-102. Misconduct

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Reserved for future use.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 1-103. Disclosure of Information to Authorities

(A) Reserved for future use.

(B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

CANON 2

A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available

DISCIPLINARY RULES

DR 2-101. Publicity and Advertising

(A) A lawyer shall not, on behalf of himself, his partner or associate, or any other lawyer affiliated with him or his firm, knowingly use or participate in the use of any form of public communication containing a deceptive statement or claim.

(B) Any public communication for the purpose of publicity or advertising shall contain the name of the lawyer, law firm, law partnership, professional corporation, or group of lawyers responsible for the communication.

Amended March 24, 1983, effective July 1, 1983.

ANNOUNCEMENT CONCERNING 1983 AMENDMENT OF SUPREME JUDICIAL COURT RULE 3:07, DR 2-101 ON LAWYER ADVERTISING

On June 21, 1982, the Massachusetts Bar Association filed a petition to amend Supreme Judicial Court Rule 3:07, Disciplinary Rule 2-101 concerning lawyer advertising. In the August 2, 1982 issue of Lawyers Weekly, the Court invited comments, before October 1, 1982, by interested parties.

The Court received briefs and comments from various parties and organizations concerning the proposed amendments. The Justices express their appreciation for the efforts of the Massachusetts Bar Association Lawyer Advertising Task Force and to the various parties who have submitted their comments and briefs. The Justices have given careful consideration to the views expressed.

The Massachusetts Bar Association petition proposes adding new subsections (B), (C), (D), (E),

(1) Accept compensation for his legal services from one other than his client.

(2) Accept from one other than his client anything of value related to his representation of or his employment by his client.

(B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

(C) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) A non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) A non-lawyer is a corporate director or officer thereof; or

(3) A non-lawyer has the right to direct or control the professional judgment of a lawyer.

CANON 6

A Lawyer Should Represent a Client Competently

DISCIPLINARY RULES

DR 6-101. Failing to Act Competently

(A) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.

DR 6-102. Limiting Liability to Client

(A) A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

CANON 7

A Lawyer Should Represent a Client Zealously Within the Bounds of the Law

DISCIPLINARY RULES

DR 7-101. Representing a Client Zealously

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102 and DR 5-105.

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B).

(B) In his representation of a client, a lawyer may:

(1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.

(2) Refuse to aid or participate in conduct that he believes to be unlawful even though there is some support for an argument that the conduct is legal.

DR 7-102. Representing a Client Within the Bounds of the Law

(A) In his representation of a client, a lawyer shall not:

(1) File suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation of preservation of evidence when he knows or it is obvious that the evidence is false.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

(8) Knowingly engage in other illegal conduct contrary to a Disciplinary Rule.

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

DR 7-103. Performing the Duty of Public Prosecutor or Other Government Lawyer

(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

DR 7-104. Communicating with One of Adverse Interest

(A) During the course of his representation of a client, a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

DR 7-105. Threatening Criminal Prosecution

(A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

DR 7-106. Trial Conduct

(A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

(B) In presenting a matter to a tribunal, a lawyer shall disclose:

(1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.

(2) Unless privileged or irrelevant, the identities of the clients he represents and of the persons who employed him.

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

(1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

(2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.

(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

(5) Fail to comply with known local customs of courtesy or practice of the bar on a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

(7) Intentionally or habitually violate any established rule of procedure or of evidence.

DR 7-107. Trial Publicity

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

(1) Information contained in a public record.

(2) That the investigation is in progress.

(3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.

(4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.

(5) A warning to the public of any dangers.

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall

MASSACHUSETTS PRACTICE

Volume 30A

Criminal Practice and Procedure

SECOND EDITION

1987 Pocket Part

By

KENT B. SMITH

Associate Justice, Massachusetts Appeals Court

Sections 1371 to End

TABLES–INDEX

Replacing prior Pocket Part in back of Volume

ST. PAUL, MINN.
WEST PUBLISHING CO.
1987

C. DISCOVERY OF EXCULPATORY EVIDENCE

1. INTRODUCTION

§ 1382. Introduction

1. United States v. Ingraldi, 793 F.2d 408 (1st Cir.1986); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir. 1986); California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), on remand 173 Cal.App.3d 1093, 219 Cal. Rptr. 637 (1985); Com. v. Wilder, 18 Mass. App.Ct. 782, 471 N.E.2d 118 (1984); Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984); Com. v. Cinelli, 389 Mass. 197, 449 N.E.2d 1207 (1983), certiorari denied 464 U.S. 860, 104 S.Ct. 186, 78 L.Ed.2d 165 (1983).

2. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986); California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), on remand 173 Cal.App.3d 1093, 219 Cal.Rptr. 637 (1985).

4. Com. v. Light, 394 Mass. 112, 474 N.E.2d 1074 (1985).

§ 1383. Definition of Exculpatory Evidence

1. Com. v. Champagne, 399 Mass. 80, 503 N.E.2d 7 (1987); Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987).

2. Com. v. Walker, 392 Mass. 152, 466 N.E.2d 71 (1984). *Walker* points out that such evidence must be admissible. Also see Com. v. Cinelli, 389 Mass. 197, 449 N.E.2d 1207 (1983), certiorari denied 464 U.S. 860, 104 S.Ct. 186, 78 L.Ed.2d 165 (1983). In *Cinelli*, the Court held that an "anonymous tip" file is not admissible. Also see United States v. Drougas, 748 F.2d 8 (1st Cir.1984).

3. California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), on remand 173 Cal.App.3d 1093, 219 Cal.Rptr. 637 (1985). Com. v. Bryant, 390 Mass. 729, 459 N.E.2d 792 (1984).

4. California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), on remand 173 Cal.App.3d 1093, 219 Cal.Rptr. 637 (1985).

§ 1384. Definition of Exculpatory Evidence—Nondisclosure of Impeaching Evidence

1. United States v. Ingraldi, 793 F.2d 408 (1st Cir.1986); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir. 1986).

§ 1385. The Prosecutor's Duty to Disclose

1. Com. v. Donahue, 396 Mass. 590, 487 N.E.2d 1351 (1986); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986); Com. v. Monteiro, 396 Mass. 123, 484 N.E.2d 999 (1985).

4. Com. v. Themelis, 22 Mass.App.Ct. 754, 498 N.E.2d 136 (1986), review denied 398 Mass. 1106, 503 N.E.2d 35 (1986).

5. Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984).

§ 1386. The Prosecutor's Duty to Disclose—The Importance of a Specific Request

1. Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.

1986); Com. v. Leavitt, 21 Mass.App.Ct. 84, 484 N.E.2d 1032 (1985), review denied 396 Mass. 1105, 487 N.E.2d 855 (1986); Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984); United States v. Hemmer, 729 F.2d 10 (1st Cir.1984), certiorari denied 467 U.S. 1218, 104 S.Ct. 2666, 81 L.Ed.2d 371 (1984).

2. Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); Com. v. Donahue, 396 Mass. 590, 487 N.E.2d 1351 (1986); United States v. Ingraldi, 793 F.2d 408 (1st Cir. 1986); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986); Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984); United States v. Hemmer, 729 F.2d 10 (1st Cir.1984), certiorari denied 467 U.S. 1218, 104 S.Ct. 2666, 81 L.Ed.2d 371 (1984); King v. Ponte, 717 F.2d 635 (1st Cir.1983).

3. Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir. 1986); Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984); United States v. Hemmer, 729 F.2d 10 (1st Cir.1984), certiorari denied 467 U.S. 1218, 104 S.Ct. 2666, 81 L.Ed.2d 371 (1984); King v. Ponte, 717 F.2d 635 (1st Cir.1983).

4. Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); United States v. Ingraldi, 793 F.2d 408 (1st Cir.1986); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986); Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984); Com. v. Soucy, 17 Mass.App.Ct. 471, 459 N.E.2d 827 (1984).

5. Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir. 1986); Com. v. Leavitt, 21 Mass.App.Ct. 84, 484 N.E.2d 1032 (1985), review denied 396 Mass. 1105, 487 N.E.2d 855 (1986); Com. v. Monteiro, 396 Mass. 123, 484 N.E.2d 999 (1985); Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984); Com. v. Soucy, 17 Mass.App.Ct. 471, 459 N.E.2d 827 (1984); Com. v. Scalley, 17 Mass.App.Ct. 224, 457 N.E.2d 298 (1983), review denied 391 Mass. 1102, 459 N.E.2d 825 (1984). United States v. Hemmer, 729 F.2d 10 (1st Cir.1984), certiorari denied 467 U.S. 1218, 104 S.Ct. 2666, 81 L.Ed.2d 371 (1984).

6. Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); United States v. Hemmer, 729 F.2d 10 (1st Cir.1984), certiorari denied 467 U.S. 1218, 104 S.Ct. 2666, 81 L.Ed.2d 371 (1984).

2. THE RULE AND EXCULPATORY EVIDENCE

§ 1388. Evidence Must Be in Possession, Custody, or Control of Prosecutor

If the material is in the hands of the Federal authorities, the prosecutor may have the burden of securing Federal cooperation in order to have the defendant secure the material.[3.5]

Factors that are important in determining whether the prosecutor is obligated to seek requested exculpatory evidence from the Federal authorities include: the potential unfairness to the defendant, the defendant's lack of access to the evidence, the burden on the prosecutor of obtaining the evidence, and the degree of cooperation between the State and Federal authorities, both in general and in the particular case.[3.10]

Due process does not require the police to preserve breath samples of suspected drunk drivers in order for the results of the breath-analysis tests to be admissible in criminal prosecutions.[6]

1. Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); Com. v. Donahue, 396 Mass. 590, 487 N.E.2d 1351 (1986); Com. v. Light, 394 Mass. 112, 474 N.E.2d 1074 (1985); Com. v. Wilder, 18 Mass.App.Ct. 782, 471 N.E.2d 118 (1984).

2. Com. v. Donahue, 396 Mass. 590, 487 N.E.2d 1351 (1986); Com. v. Monteiro, 396 Mass. 123, 484 N.E.2d 999 (1985).

3. Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); Com. v. Monteiro, 396 Mass. 123, 484 N.E.2d 999 (1985); Com. v. Light, 394 Mass. 112, 474 N.E.2d 1074 (1985); Com. v. Wilder, 18 Mass.App.Ct. 782, 471 N.E.2d 118 (1984).

3.5 Com. v. Donahue, 396 Mass. 590, 487 N.E.2d 1351 (1986); Com. v. Liebman, 379 Mass. 671, 400 N.E.2d 842 (1980), appeal after remand 388 Mass. 483, 446 N.E.2d 714 (1983).

3.10 Com. v. Donahue, 396 Mass. 590, 487 N.E.2d 1351 (1986).

4. Com v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); Com. v. Monteiro, 396 Mass. 123, 484 N.E.2d 999 (1985); Com. v. Light, 394 Mass. 112, 474 N.E.2d 1074 (1985).

6. California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), on remand 173 Cal.App.3d 1093, 219 Cal.Rptr. 637 (1985); Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984). Also see Com. v. Wilder, 18 Mass.App.Ct. 782, 471 N.E.2d 118 (1984); Com. v. Nicholson, 20 Mass.App.Ct. 9, 477 N.E.2d 1038 (1985), review denied 481 N.E.2d 197 (1985).

3. *BRADY* SITUATIONS

§ 1389. Introduction

1. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986); California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), on remand 173 Cal.App.3d 1093, 219 Cal.Rptr. 637 (1985).

§ 1390. Loss or Destruction of Evidence is Not a *Brady* Situation

However, it has been held that the denial of the defendant's suppression motion was error where the Commonwealth's testing of the defendant's boots destroyed them so that the defendant's experts could not test them, and the defendant showed that he was prejudiced.[5]

1. Com. v. Fidler, 23 Mass.App.Ct. 506, 503 N.E.2d 1302 (1987); Com. v. Charles, 397 Mass. 1, 489 N.E.2d 679 (1986).

2. Com. v. Fidler, 23 Mass.App.Ct. 506, 503 N.E.2d 1302 (1987); Com. v. Charles, 397 Mass. 1, 489 N.E.2d 679 (1986).

3. Com. v. Fidler, 23 Mass.App.Ct. 506, 503 N.E.2d 1302 (1987); Com. v. Charles, 397 Mass. 1, 489 N.E.2d 679 (1986); United States v. Kincaid, 712 F.2d 1 (1st Cir.1983).

4. Com. v. Fidler, 23 Mass.App.Ct. 506, 503 N.E.2d 1302 (1987); Com. v. Charles, 397 Mass. 1, 489 N.E.2d 679 (1986); United States v. Kincaid, 712 F.2d 1 (1st Cir.1983); In Com. v. Gabbidon, 17 Mass.App.Ct. 525, 459 N.E.2d 1263 (1984), review denied 391 Mass. 1104, 462 N.E.2d 1374 (1984) the defendant failed to show that the Commonwealth was responsible for the loss.

5. Com. v. Gliniewicz, 398 Mass. 744, 500 N.E.2d 1324 (1986).

§ 1391. Knowingly Use of False Testimony

1. Com. v. Monteiro, 396 Mass. 123, 484 N.E.2d 999 (1985); Com. v. Johnson, 21 Mass.App.Ct. 28, 483 N.E.2d 838 (1985); Com. v. McLeod, 394 Mass. 727, 477 N.E.2d 972 (1985), certiorari denied — U.S. —, 106 S.Ct. 248, 88 L.Ed.2d 256 (1985). In *McLeod* the Court stated that simply because a witness alters some portion of his testimony at the time of trial is not a sufficient reason to conclude that the new testimony is false, or that the Commonwealth knew or had reason to know that it was false.

4. Com. v. Monteiro, 396 Mass. 123, 484 N.E.2d 999 (1985); Com. v. Johnson, 21 Mass.App.Ct. 28, 483 N.E.2d 838 (1985); Com. v. McLeod, 394 Mass. 727, 477 N.E.2d 972 (1985), certiorari denied — U.S. —, 106 S.Ct. 248, 88 L.Ed.2d 256 (1985).

§ 1392. Prosecution Must Reveal Any Agreements With Key Witness

1. Com. v. Johnson, 21 Mass.App.Ct. 28, 483 N.E.2d 838 (1985); Com. v. Fuller, 394 Mass. 251, 475 N.E.2d 381 (1985). United States v. Drougas, 748 F.2d 8 (1st Cir.1984). In *Fuller*, the Court stated that evidence that money had been given to the defendant's mother by the Commonwealth to permit her to testify, and that other witnesses who feared retribution, were given money by the Commonwealth to fly to Florida after the trial, did not constitute exculpatory evidence.

2. Com. v. Johnson, 21 Mass.App.Ct. 28, 483 N.E.2d 838 (1985).

§ 1393. Standards of Materiality When Perjurious Testimony Is Used

1. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986). In *Bagley* the court stated that a "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

4. DELAYED DISCLOSURE DURING TRIAL

§ 1394. Delayed Disclosure of Exculpatory Evidence

1. Com. v. Burke, 20 Mass.App.Ct. 489, 481 N.E.2d 494 (1985), review denied 396 Mass. 1101, 484 N.E.2d 102 (1985); Com. v. Costello, 392 Mass. 393, 467 N.E.2d 811 (1984); Com. v. Lam Hue To, 391 Mass. 301, 461 N.E.2d 776 (1984); Com. v. Scalley, 17 Mass.App.Ct. 224, 457 N.E.2d 298 (1983), review denied 391 Mass. 1102, 459 N.E.2d 825 (1984).

2. Com. v. Themelis, 22 Mass.App.Ct. 754, 498 N.E.2d 136 (1986), review denied 398 Mass. 1106, 503 N.E.2d 35 (1986); Com. v. Donovan, 395 Mass. 20, 478 N.E.2d 727 (1985); Com. v. McLeod, 394 Mass. 727, 477 N.E.2d 972 (1985), certiorari denied — U.S. —, 106 S.Ct. 248, 88 L.Ed.2d 256 (1985); Com. v. Lam Hue To, 391 Mass. 301, 461 N.E.2d 776 (1984).

3. Com. v. Themelis, 22 Mass.App.Ct. 754, 498 N.E.2d 136 (1986), review denied 398 Mass. 1106, 503 N.E.2d 35 (1986); Com. v. Lam Hue To, 391 Mass. 301, 461 N.E.2d 776 (1984).

4. Com. v. Themelis, 22 Mass.App.Ct. 754, 498 N.E.2d 136 (1986), review denied 398 Mass. 1106, 503 N.E.2d 35 (1986); Com. v. Cannavo, 16 Mass.App.Ct. 977, 452 N.E.2d 1175 (1983).

5. Com. v. Themelis, 22 Mass.App.Ct. 754, 498 N.E.2d 136 (1986), review denied 398 Mass. 1106, 503 N.E.2d 35 (1986); Com. v. Burke, 20 Mass.App.Ct. 489, 481 N.E.2d 494 (1985), review denied 396 Mass. 1101, 484 N.E.2d 102 (1985); Com. v. Donovan, 395 Mass. 20, 478 N.E.2d 727 (1985).

6. Com. v. Burke, 20 Mass.App.Ct. 489, 481 N.E.2d 494 (1985), review denied 396 Mass. 1101, 484 N.E.2d 102 (1985); Com. v. Scalley, 17 Mass.App.Ct. 224, 457 N.E.2d 298 (1983), review denied 391 Mass. 1102, 459 N.E.2d 825 (1984); Com. v. Cannavo, 16 Mass.App.Ct. 977, 452 N.E.2d 1175 (1983).

7. Com. v. Themelis, 22 Mass.App.Ct. 754, 498 N.E.2d 136 (1986), review denied 398 Mass. 1106, 503 N.E.2d 35 (1986); United States v. Ingraldi, 793 F.2d 408 (1st Cir.1986); Com. v. Donovan, 395 Mass. 20, 478 N.E.2d 727 (1985); Com. v. McLeod, 394 Mass. 727, 477 N.E.2d 972 (1985), certiorari denied — U.S. —, 106 S.Ct. 248, 88 L.Ed.2d 256 (1985); Com. v. Lam Hue To, 391 Mass. 301, 461 N.E.2d 776 (1984); Com. v. Scalley, 17 Mass.App.Ct. 224, 457 N.E.2d 298 (1983), review denied 391 Mass. 1102, 459 N.E.2d 825 (1984). Also see United States v. Drougas, 748 F.2d 8 (1st Cir.1984).

8. Com. v. Themelis, 22 Mass.App.Ct. 754, 498 N.E.2d 136 (1986), review denied 398 Mass. 1106, 503 N.E.2d 35 (1986); United States v. Ingraldi, 793 F.2d 408 (1st Cir.1986); Com. v. Donovan, 395 Mass. 20, 478 N.E.2d 727 (1985); Com. v. McLeod, 394 Mass. 727, 477 N.E.2d 972 (1985), certiorari denied — U.S. —, 106 S.Ct. 248, 88

L.Ed.2d 256 (1985); Com. v. Key, 19 Mass. App.Ct. 224, 457 N.E.2d 298 (1983); United States v. Drougas, 748 F.2d 8 (1st Cir.1984); United States v. Ayres, 725 F.2d 806 (1st Cir.1984), certiorari denied 469 U.S. 817, 105 S.Ct. 84, 83 L.Ed.2d 31 (1984).

5. VIOLATIONS OF *BRADY* AND THE REVIEWING COURT

§ 1395. Basic Criteria for a *Brady* Violation

On a motion for a new trial in regard to exculpatory evidence, it is inappropriate for a Judge to assume the role of counsel and to determine whether and to what use particular evidence should have been introduced.[4.5]

4. United States v. Drougas, 748 F.2d 8 (1st Cir.1984).

4.5 Com. v. Donahue, 396 Mass. 590, 487 N.E.2d 1351 (1986).

§ 1396. Defendant Must Show That Evidence Was Suppressed or Prosecution Failed to Disclose It

1. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986); Com. v. Leavitt, 21 Mass.App.Ct. 84, 484 N.E.2d 1032 (1985), review denied 396 Mass. 1105, 487 N.E.2d 855 (1986); Com. v. Monteiro, 396 Mass. 123, 484 N.E.2d 999 (1985).

2. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986); Com. v. Leavitt, 21 Mass.App.Ct. 84, 484 N.E.2d 1032 (1985), review denied 396 Mass. 1105, 487 N.E.2d 855 (1986); Com. v. Monteiro, 396 Mass. 123, 484 N.E.2d 999 (1985).

§ 1397. Defendant Must Show Suppressed Evidence Was Exculpatory and Material

1. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986); Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); Com. v. Leavitt, 21 Mass.App.Ct. 84, 484 N.E.2d 1032 (1985), review denied 396 Mass. 1105, 487 N.E.2d 855 (1986); Com. v. Doherty, 394 Mass. 341, 476 N.E.2d 169 (1985); Com. v. Gabbidon, 17 Mass.App.Ct. 525, 459 N.E.2d 1263 (1984), review denied 391 Mass. 1104, 462 N.E.2d 1374 (1984); Com. v. Soucy, 17 Mass.App.Ct. 471, 459 N.E.2d 827 (1984); United States v. Drougas, 748 F.2d 8 (1st Cir.1984); United States v. Ranney, 719 F.2d 1183 (1st Cir.1983).

2. Com. v. Donahue, 396 Mass. 590, 487 N.E.2d 1351 (1986); United States v. Ranney, 719 F.2d 1183 (1st Cir.1983).

3. Com. v. Fuller, 394 Mass. 251, 475 N.E.2d 381 (1985); King v. Ponte, 717 F.2d 635 (1st Cir.1983).

4. United States v. Ranney, 719 F.2d 1183 (1st Cir.1983).

§ 1398. The Different Levels of Materiality

1. Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984).

4. Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984); King v. Ponte, 717 F.2d 635 (1st Cir.1983).

5. Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984); Com. v. Scalley, 17 Mass.App.Ct. 224, 457 N.E.2d 298 (1983), review denied 391 Mass. 1102, 459 N.E.2d 825 (1984); King v. Ponte, 717 F.2d 635 (1st Cir.1983).

6. Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984); King v. Ponte, 717 F.2d 635 (1st Cir.1983). Also see Com. v. Scalley, 17 Mass.App.Ct. 224, 457 N.E.2d 298 (1983), review denied 391 Mass. 1102, 459 N.E.2d 825 (1984).

8. Com. v. Gallarelli, 399 Mass. 17, 502 N.E.2d 516 (1987); Com. v. Leavitt, 21 Mass.App.Ct. 84, 484 N.E.2d 1032 (1985), review denied 396 Mass. 1105, 487 N.E.2d 855 (1986); Com. v. Monteiro, 396 Mass. 123, 484 N.E.2d 999 (1985); Com. v. Neal, 392 Mass. 1, 464 N.E.2d 1356 (1984); Com. v. Soucy, 17 Mass.App.Ct. 471, 459 N.E.2d 827 (1984); United States v. Hemmer, 729 F.2d 10 (1st Cir.1984), certiorari denied 467 U.S. 1218, 104 S.Ct. 2666, 81 L.Ed.2d 371 (1984).

9. Com. v. Doherty, 394 Mass. 341, 476 N.E.2d 169 (1985); Com. v. Soucy, 17 Mass.App.Ct. 471, 459 N.E.2d 827 (1984); Com. v. Scalley, 17 Mass.App.Ct. 224, 457 N.E.2d 298 (1983), review denied 391 Mass. 1102, 459 N.E.2d 825 (1984).

D. DISCRETIONARY DISCOVERY

§ 1399. Introduction

1. Com. v. Cronk, 396 Mass. 194, 484 N.E.2d 1330 (1985).

§ 1400. Photographs

1. See Com. v. Farnkoff, 16 Mass.App.Ct. 433, 452 N.E.2d 249 (1983), review denied 393 Mass. 1103, 454 N.E.2d 1276 (1983) where the Court stated that the words "inventory of physical evidence" does not mean identification materials.

§ 1401. Photographs Used for Identification

1. Com. v. Purvis, 18 Mass.App.Ct. 933, 465 N.E.2d 1232 (1984), review denied 393 Mass. 1101, 469 N.E.2d 830 (1984).

§ 1402. Names and Addresses of Prospective Witnesses

1. Com. v. Chappee, 397 Mass. 508, 492 N.E.2d 719 (1986).

2. Com. v. Chappee, 397 Mass. 508, 492 N.E.2d 719 (1986).

4. Com. v. Gonsalves, 23 Mass.App.Ct. 184, 499 N.E.2d 1229 (1986); Com. v. Chappee, 397 Mass. 508, 492 N.E.2d 719 (1986); Com. v. Pope, 19 Mass.App.Ct. 627, 476 N.E.2d 969 (1985), review denied 480 N.E.2d 24 (1985).

§ 1405. Criminal Records of Prospective Witnesses

1. Com. v. Sullivan, 17 Mass.App.Ct. 981, 459 N.E.2d 117 (1984).

West's

Massachusetts Criminal Law and Procedure 1987

Constitutional Provisions
Statutes
Rules of Criminal Procedure

Combined Index

ST. PAUL, MINN.
WEST PUBLISHING CO.

RULE 13. PRETRIAL MOTIONS

(Applicable to District Court and Superior Court)

(a) In General

(1) *Requirement of Writing and Signature; Waiver.* A pretrial motion shall be in writing and signed by the party making the motion or the attorney for that party. Pretrial motions shall be filed within the time allowed by subdivision (d) of this rule. Notwithstanding the foregoing, the failure of the defendant to file pretrial motions in a District Court jury-waived session, or if filed, the denial thereof, shall not constitute a waiver of the right to file such motions upon an appeal to a District Court jury session.

(2) *Grounds and Affidavit.* A pretrial motion shall state the grounds on which it is based and shall include in separately numbered paragraphs all reasons, defenses, or objections then available, which shall be set forth with particularity. If there are multiple charges, a motion filed pursuant to this rule shall specify the particular charge to which it applies. Grounds not stated which reasonably could have been known at the time a motion is filed shall be deemed to have been waived, but a judge for cause shown may grant relief from such waiver. In addition, an affidavit detailing all facts relied upon in support of the motion and signed by a person with personal knowledge of the factual basis of the motion shall be attached.

(3) *Service and Notice.* A copy of any pretrial motion and supporting affidavits shall be served on all parties or their attorneys pursuant to Rule 32 at the time the originals are filed. Opposing affidavits shall be served not later than one day before the hearing. For cause shown the requirements of this subdivision (3) may be waived by the court.

(4) *Memoranda of Law.* The judge or special magistrate may require the filing of a memorandum of law, in such form and within such time as he may direct, as a condition precedent to a hearing on a motion or interlocutory matter. No motion to suppress evidence, other than evidence seized during a warrantless search, and no motion to dismiss may be filed unless accompanied by a memorandum of law, except when otherwise ordered by the judge or special magistrate.

(5) *Renewal.* Upon a showing that substantial justice requires, the judge or special magistrate may permit a pretrial motion which has been heard and denied to be renewed.

(b) Bill of Particulars

(1) *Motion.* Within the time provided for the filing of pretrial motions by this rule or within such other time as the judge may allow, a defendant may request or the judge upon his own motion may order that the prosecution file a statement of such particulars as may be necessary to give both the defendant and the court reasonable notice of the crime charged, including time, place, manner, or means.

(2) *Amendment.* If at trial there exists a material variance between the evidence and bill of particulars, the judge may order the bill of particulars amended or may grant such other relief as justice requires.

(c) Motion to Dismiss or to Grant Appropriate Relief

(1) All defenses available to a defendant by plea, other than not guilty, shall only be raised by a motion to dismiss or by a motion to grant appropriate relief.

(2) A defense or objection which is capable of determination without trial of the general issue shall be raised before trial by motion.

(d) Filing; Hearing on Motions

(1) *District Court*

(A) No Conference Ordered.

(i) Filing. A pretrial motion shall be filed and marked up for hearing not less than five days prior to trial or within such other time as the court may order. The judge for cause shown may entertain a pretrial motion at any time before trial.

(ii) Scheduling Hearings on Motions. If the parties have agreed to a mutually convenient time for the hearing of a pretrial motion, the moving party may request that the clerk mark up the motion for hearing at that time. If so requested, the clerk shall mark up the motion for hearing at that time unless the judge otherwise orders.

(B) Conference Ordered. Only pretrial motions the subject matter of which could not be agreed upon at the pretrial conference shall be filed with the court. A pretrial motion shall be filed and heard at the time set by the judge pursuant to Rule 11(b)(2) for the filing of the conference report or at such other time as the judge may allow.

(C) Notice. The moving party shall give reasonable notice to all interested persons of the time set for hearing a pretrial motion.

(2) *Superior Court; Jury Sessions in District Court*

(A) Filing; Hearing on Motions. Only pretrial motions the subject matter of which could not be agreed upon at the pretrial conference shall be filed with the court. A pretrial motion shall be filed within seven days after the date set for the filing of the pretrial conference report pursuant to Rule 11(a)(2) or at such other time as the judge or special magistrate may allow. Within seven days after a pretrial motion is filed, the clerk shall schedule a hearing thereon, but the judge or special magistrate for cause shown may entertain such motion at any time before trial.

(B) Notice. The moving party shall give reasonable notice to all interested persons of the time set for hearing a pretrial motion.

Reporter's Notes

This rule establishes the form of, and manner for the presentation of, pretrial motions. Not every motion that is made in a pretrial posture comes within the scope of the rule. For example, discovery motions by the prosecution are governed by other time limits under Mass.R.Crim.P. 14(e). Where, however, no other rules or statutes provide otherwise, pretrial motions should be made in conformity with the provisions of this rule.

The primary sources of this rule are Rule 3.190 of the Florida Rules of Criminal Procedure (1974) and the existing statutory law of the Commonwealth. The rule has an abbreviated counterpart in Rule 47 of the Federal Rules of Criminal Procedure.

Subdivision (a). This subdivision is derived in large part from the Florida Rule, but essentially restates existing practice and is supported in large part by Rule 9 of the Superior Court Rules (1974). The references to pretrial motions are to include pleadings in response to a motion where such exist.

Subdivision (a)(1) recognizes that, under G.L. c. 218, § 26A (St.1978, c. 478, § 188) and § 27A (St. 1978, c. 478, § 189), the appeal from a conviction in a District Court jury-waived session to a jury session is "an unfettered and unqualified right," Costarelli v. Commonwealth, [374 Mass. 677, 373 N.E.2d 1183] (1978) and that "on the exercise of that right, the [first] District Court judgment is vacated." *Costarelli v. Commonwealth, supra*; Enbinder v. Commonwealth, 368 Mass. 214, 217-18, [330 N.E.2d 846] cert. denied, [96 S.Ct. 467] 423 U.S. 1024 [46 L.Ed.2d 398] (1975). Former G.L. c. 277, § 47A (as amended, St.1978, c. 478, § 298) provided that any motion filed in a jury-waived session could be filed in the jury session within ten days after the entry of the appeal; this subdivision specifies no time limit.

Subdivision (a)(2) is taken from Rules 9 and 61 of the Superior Court Rules (1974). The requirement of an affidavit in support of factual assertions is supported additionally by former G.L. c. 277, § 74 (R.S. [1836] c. 136, § 31).

The reference in subdivision (a)(3) to opposing affidavits is to apply only if there are opposing affidavits. It is not intended to be read to require them.

Subdivision (a)(4) is taken from Rule 9 of the Superior Court Rules (1974).

Subdivision (a)(5) provides that although a motion has been once heard and denied, it may be renewed if "substantial justice requires" that action. This is appropriate where new or additional grounds are alleged which could not reasonably have been known when the motion was originally filed. See (a)(2), *supra*.

Subdivision (b). Former G.L. c. 277, § 40 (St. 1887, c. 436, § 2) permitted the court to require the prosecution to file particulars in order to more fully apprise the defendant or the court of the nature of the charges. This subdivision incorporates that practice into this rule.

The distinction which was drawn in the statute between particulars ordered by a court with jurisdiction over the offense charged and those ordered by a court without jurisdiction of the offense charged has not been retained in this rule. However, the judge may in his discretion order whatever particulars he deems necessary under the circumstances, and this would permit him to order a more complete statement of particulars where it is required in the interests of justice.

If the specifications supplied in conformity with the court's order are irrelevant or prejudicial, defense counsel must file a motion to strike those deemed improper. 30 MASS. PRACTICE SERIES (Smith) § 628 (1970).

Although the rule requires motions for bills of particulars to be made before trial, it is not intended to be construed so as to limit the inherent power of the court in an appropriate situation to order a bill at any time.

Subdivision (c). This is a restatement of former G.L. c. 277, § 47A (St.1965, c. 617, § 1). It should be noted that G.L. c. 277, § 47A abolished at least in name all the other pleas, demurrers, challenges, and motions to quash and effectively consolidated all of them under the general heading of a motion to dismiss or grant appropriate relief, in effect retaining the statutory and common law of the Commonwealth governing such pleas. Section 47A (as amended) now provides for relief from the waiver of defenses not timely raised, upon a showing of cause:

> In a criminal case, any defense or objection based upon defects in the institution of the prosecution or in the complaint or indictment, other than a failure to show jurisdiction in the court or to charge an offense, shall only be raised prior to trial and only by a motion in conformity with the requirements of the Massachusetts Rules of Criminal Procedure. The failure to raise any such defense or objection by motion prior to trial shall constitute a waiver thereof, but a judge or special magistrate may, for cause shown, grant relief from such waiver. A defense or objection based upon a failure to show jurisdiction in the court or to charge an offense may be raised by motion to dismiss prior to trial, but shall be noticed by the court at any time.

"Cause" should be read to include grounds of which the moving party was not previously aware.

Subdivision (d). The time limits provided in this rule for the filing of pretrial motions are intended to set the norm. Ample opportunity is left for the court to exercise its discretion in the interest of justice, however, by the inclusion of the "for cause shown" provision in subdivisions (d)(1)(A)(i) and (d)(2)(A). "Interested persons," as used in this subdivision, is to include the parties, co-defendants, if any, and witnesses whose depositions are to be taken. Mass.R.Crim.P. 2(b)(8).

Subdivisions (d)(1)(B) and (d)(2)(A) make explicit what is already implicit in Mass.R.Crim.P. 11, namely, that the only pretrial motions which may be filed are those as to the substance of which counsel were unable to agree at the pretrial conference. By requiring that the substance of any pretrial motions a party intends to file be discussed with the adverse party at the pretrial conference, these subdivisions institute a

rule of judicial economy. It is contemplated that having parties compare all the motions they intend to file before trial at the pretrial conference will make the conference more productive in terms of eliminating many of the "boiler plate" motions presently filed in criminal actions, and, therefore, lead to a more productive utilization of the court's time.

If a conflict between this subdivision and the general filing and service of papers provisions of Rule 32 should arise, this subdivision is controlling as to motions to which it is applicable.

Cross References

Controlled substances, prosecutions, bill of particulars, see M G L A c 277, § 38
Defenses or objections, defects in institution of prosecution or in indictment or complaint, see M G L A c 277, § 47A
Dismissal of indictment based upon secondary evidence, see Rule 4
Double jeopardy, see M G L A c 263, § 7
Immaterial defects in indictment, see M G L A c 277, § 34
Interlocutory appeals, dismissal of indictment or suppression of evidence, see M G L A c 278, § 28E
Special magistrates, see Rule 47
Sufficiency of indictment, see M G L A c 277, § 34

Library References

Criminal Law ⇐632
Indictment and Information ⇐121.1 to 121.5, 136 et seq
C J S Criminal Law § 929
C J S Indictments and Informations §§ 156, 195
30 Mass Prac Series (Smith) § 1271 et seq

RULE 14. PRETRIAL DISCOVERY

(Applicable to Trials in the District Court and Superior Court)

(a) Procedures for Discovery

(1) *Mandatory Discovery for the Defendant.* Upon motion of a defendant made pursuant to Rule 13, the judge shall issue an order of discovery when the requested information is relevant and consists of:

(A) any written or recorded statements made by the defendant within the possession, custody, or control of the prosecutor, or

(B) the written or recorded statements of a person who has testified before a grand jury; or

(C) any facts of an exculpatory nature within the possession, custody, or control of the prosecutor.

The discovery of any grand jury minutes ordered pursuant to this subdivision shall be limited to those which have been recorded and stenographically transcribed. The judge may in his discretion order grand jury minutes to be transcribed.

(2) *Discretionary Discovery.* Upon motion of a defendant made pursuant to Rule 13, the judge may issue an order of discovery requiring that the defendant be permitted to discover, inspect, and copy any material and relevant evidence, documents, statements of persons, or reports of physical or mental examinations of any person or of scientific tests or experiments, within the possession, custody, or control of the prosecutor or persons under his direction and control. The judge may also order the production by the Commonwealth of the names and addresses of its prospective witnesses and the production by the probation department of the record of prior convictions of any such witness.

(3) *Reciprocal Discovery*

(A) If the judge grants discovery or inspection to a defendant pursuant to subdivision (a)(2) of this rule, the judge may upon motion by the Commonwealth condition his order by requiring the defendant to permit the Commonwealth to discover, inspect, and copy any material and relevant evidence discoverable under subdivision (a)(2) which the defendant intends to use at trial, including the names, addresses, and statements of those persons whom the defendant intends to use as witnesses at trial.

(B) Notwithstanding the defendant's failure to file a motion for discretionary discovery under subdivision (a)(2) of this rule, the Commonwealth may within the time allowed by subdivision (e) of this rule file a motion for delivery of those materials discoverable pursuant to subdivision (a)(3)(A) of this rule. The judge shall condition his order by requiring that the Commonwealth make those materials discoverable under subdivision (a)(2) of this rule available for inspection and copying by the defendant.

(4) *Continuing Duty.* If either party subsequently learns of additional material which he would have been under a duty to disclose or produce pursuant to any provisions of this rule at the time of a previous discovery order, he shall promptly notify the other party of his acquisition of such additional material and shall disclose the material in the same manner as required for initial discovery under this rule.

(5) *Work Product.* This rule does not authorize discovery by a party of those portions of records, reports, correspondence, memoranda, or internal documents of the adverse party which are only the legal research, opinions, theories, or conclusions of the adverse party or his attorney and legal staff, or of statements of a defendant, signed or unsigned, made to the attorney for the defendant or his legal staff.

(6) *Protective Orders.* Upon a sufficient showing, the judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. The judge may alter the time requirements of this rule. The judge may, for cause shown, grant discovery to a defendant on the condition that the material to be discovered be available only to counsel for the defendant.

(7) *Amendment of Discovery Orders.* Upon motion of either party made subsequent to an order of the judge pursuant to this rule, the judge may alter or amend the previous order or orders as the interests of justice may require. The judge may, for cause shown, affirm a prior order granting discovery to a defendant upon the additional condition that the material to be discovered is to be available only to counsel for the defendant.

(b) Special Procedures

(1) *Notice of Alibi*

(A) Notice by Defendant. The judge may, upon written motion of the Commonwealth filed pursuant to subdivision (e) of this rule, stating the time, date, and place at which the alleged offense was committed, order that the defendant serve upon the prosecutor a written notice, signed by the defendant, of his intention to offer a defense of alibi. The notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish the alibi.

(B) Disclosure of Information and Witness. Within the time allowed by subdivision (e) of this rule, the Commonwealth shall serve upon the defendant or his attorney a written notice stating the names and addresses of witnesses upon whom the prosecutor intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(C) Continuing Duty to Disclose. If prior to or during trial a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (b)(1)(A) or (B), that party shall promptly notify the adverse party or his attorney of the existence and identity of the additional witness.

(D) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at the scene of the alleged offense. This rule shall not limit the right of the defendant to testify in his own behalf.

(E) Exceptions. For cause shown, the judge may grant an exception to any of the requirements of subdivisions (b)(1)(A) through (D) of this rule.

(F) Inadmissibility of Withdrawn Alibi. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with that intention, is not admissible in any civil or criminal proceeding against the person who gave notice of that intention.

(2) *Defense of Lack of Criminal Responsibility Because of Mental Disease or Defect*

(A) Notice. If a defendant intends to rely upon the defense of lack of criminal responsibility because of mental disease or defect at the time of the alleged crime, he shall, within the time provided for the filing of pretrial motions by Rule 13 or at such later time as the judge may allow, notify the prosecutor in writing of such intention. The notice shall state:

(i) whether the defendant intends to offer testimony of expert witnesses on the issue of lack of criminal responsibility because of mental disease or defect;

(ii) the names and addresses of expert witnesses whom the defendant expects to call; and

(iii) whether those expert witnesses intend to rely in whole or in part on statements of the defendant as to his mental condition at the time of the alleged crime or as to his criminal responsibility for the alleged crime.

The defendant shall file a copy of the notice with the clerk. The judge may for cause shown allow late filing of the notice, grant additional time to the parties to prepare for trial, or make such other order as may be appropriate.

(B) Examination. If the notice of the defendant or subsequent inquiry by the judge or developments in the case indicate that statements of the defendant as to his mental condition at the time of or as to his criminal responsibility for the alleged crime will be relied upon by expert witnesses of the defendant, the judge, upon his own motion or upon motion of the prosecutor, may order the defendant to submit to a psychiatric examination consistent with the provisions of the General Laws and subject to the following terms and conditions:

(i) The examination shall include such physical and psychological examinations and physiological and psychiatric tests as the examiner deems necessary to form an opinion as to the mental condition of the defendant at the time the alleged offense was committed. No examination based on statements of the defendant may be conducted unless the judge has found that (a) the defendant then intends to offer at trial psychiatric evidence based on his own statements or (b) there is a reasonable likelihood that the defendant will offer that evidence.

(ii) No statement, confession, or admission, or other evidence of or obtained from the defendant during the course of the examination, except evidence derived solely from physical or physiological observations or tests, may be revealed to the prosecutor or anyone acting on his behalf unless so ordered by the judge.

(iii) The examiner shall file with the court a written psychiatric report which shall contain his findings, including specific statements of the basis thereof, as to the mental condition of the defendant at the time the alleged offense was committed.

The report shall be sealed and shall not be made available to the parties unless (a) the judge determines that the report contains no matter, informa-

tion, or evidence which is based upon statements of the defendant as to his mental condition at the time of or his criminal responsibility for the alleged crime or which is otherwise within the scope of the privilege against self-incrimination; or (b) the defendant files a motion requesting that the report be made available to the parties; or (c) during trial the defendant raises the defense of lack of criminal responsibility and the judge is satisfied that (1) the defendant intends to testify in his own behalf or (2) the defendant intends to offer expert testimony based in whole or in part upon statements of the defendant as to his mental condition at the time of or as to his criminal responsibility for the alleged crime.

If a psychiatric report contains both privileged and nonprivileged matter, the judge may, if feasible at such time as he deems appropriate, make available to the parties the nonprivileged portions.

(iv) If a defendant refuses to submit to an examination ordered pursuant to and subject to the terms and conditions of this rule, the judge may prescribe such remedies as he deems warranted by the circumstances, which may include exclusion of the testimony of any expert witness offered by the defendant on the issue of his mental condition or the admission of evidence of the refusal of the defendant to submit to examination.

(3) *Notice of Other Defenses.* If a defendant intends to rely upon a defense based upon a license, claim of authority or ownership, or exemption, he shall, within the time provided for the filing of pretrial motions by Rule 13 or at such later time as the judge may direct, notify the prosecutor in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, a license, claim of authority or ownership, or exemption may not be relied upon as a defense. The judge may for cause shown allow a late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) Sanctions for Noncompliance

(1) *Relief for Nondisclosure.* For failure to comply with any discovery order issued pursuant to this rule, the judge may make a further order for discovery, grant a continuance, or enter such other order as he deems just under the circumstances.

(2) *Exclusion of Evidence.* The judge may in his discretion exclude evidence for noncompliance with a discovery order issued pursuant to this rule. Testimony of the defendant and evidence concerning the defense of lack of criminal responsibility which is otherwise admissible cannot be excluded except as provided by subdivision (b)(2) of this rule.

(d) Definition. The term "statement", as used in this ule, means:

(1) a writing made by a person having percipient knowledge of relevant facts and which contains such facts, signed or otherwise adopted or approved by such person; or

(2) a stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral declaration and which is recorded contemporaneously with the making of the oral declaration.

(e) Time Requirements

(1) *District Court*

(A) Discovery by the Prosecution. If a pretrial conference is ordered, the motion of the Commonwealth for discovery of material under subdivision (a)(3)(B) of this rule shall be filed and heard at a time set by the judge. If no pretrial conference is ordered, the motion of the Commonwealth shall be filed and marked up for hearing not less than five days before trial or within such later time as the judge may allow.

(B) Discovery of Alibi Defense. If a pretrial conference is ordered, the motion of the Commonwealth for discovery of material under subdivision (b)(1) of this rule shall be filed and heard at a time set by the judge, that time to be not less than five days before trial. If no pretrial conference is ordered, the motion of the Commonwealth shall be filed and marked up for hearing not less than five days before trial or within such later time as the judge may allow.

The notice filed by the defendant in response to the motion shall be served upon the Commonwealth not more than two days after motion or at such later time as the judge may allow.

(2) *Superior Court*

(A) Discovery by the Prosecution. The Commonwealth may, within seven days after the expiration of the time allowed for the filing of pretrial motions under Rule 13 or within such other time as the judge may allow, make a motion for discovery under subdivision (a)(3)(B) of this rule.

(B) Discovery of Alibi Defense. The motion of the Commonwealth for discovery of material under subdivision (b)(1) of this rule shall be made not less than twenty-one days prior to trial or within such other time as the judge may allow. The notice filed by the defendant in response shall be served upon the Commonwealth not more than seven days after filing of the motion or at such other time as the judge may allow. The notice by the Commonwealth in response to the defendant's notice shall be served upon the defendant within seven days after receipt of the defendant's notice or within such other time as the judge may allow.

Reporter's Notes

The substance of this rule is drawn from Fed.R.Crim.P. 12.1, 12.2 and 16; N.J.R.Crim.P. 3:13-3 (1972); and Fla.R.Crim.P. 3.220 (1975). See ABA *Standards Relating to Discovery and Procedure Before Trial* (Approved Draft, 1970); Rules of Criminal Procedure (U.L.A.) rules 421-23, 434-38 (1974); National Advisory Commission on Criminal Justice Standards & Goals, *Courts*, Standard 4.9 (1973); President's Commission on Law Enforcement & Administration of Justice, Task Force Report: *The Courts* 41-44 (1967).

This rule is based on the concept of reciprocity and has as its aim full pretrial disclosure of items normally within the range of discovery. With the exceptions of mandatory discovery and those cases where a protective order is appropriate, discovery by one side will open the door to full discovery by the other side. It is emphasized, however, that the formal provisions of this rule are brought into effect only when discovery is initiated through a motion filed under this rule for court-ordered disclosure. The promulgation of this rule is not intended to discourage those disclosures which may take place at a pretrial conference under Mass.R.Crim.P. 11 or whatever other informal discovery may be agreed upon by the parties.

Subdivision (a). This owes some allegiance to Federal Rule 16 but differs in that much of what is mandatory under 16(a) is discretionary under this rule. Subdivision (a)(1)(A) has a counterpart in both the federal rule and New Jersey Rule 3:13-3 (1972). Subdivision (a)(1)(B) creates a discovery classification not covered specifically by Fed.R.Crim.P. 16. Federal rule 16 provides only for a disclosure of the recorded testimony of the defendant before a grand jury, whereas (1)(B) provides that the court shall order the disclosure of the testimony of any witness before a grand jury, where such testimony is relevant.

Subdivisions (a)(1) and (a)(2) of this rule are concerned with the defendant's discovery rights. To a very large extent, the scope of disclosure called for by these subdivisions is a codification of prior Massachusetts practice. The defendant's discovery rights are considered under two categories: mandatory, (a)(1), and discretionary, (a)(2). Neither category grants the defendant an absolute right to the materials contained therein, but the former creates a presumption in favor of the discovery of certain information. The material specified in the mandatory category is, upon the defendant's motion, to be produced unless the prosecutor can persuade the court that disclosure is not in the interest of justice and that a protective order should be granted. Those items which, in the interests of fairness to the defendant, are usually disclosed in the normal course of the proceedings have been included in the category of mandatory discovery. All other discovery is within the discretion of the court.

The purpose in having these categories is twofold. First and most importantly, full pretrial discovery is encouraged. The defendant is given as of right only those materials that either the Constitution or fairness demands. In order for the defendant to secure other information or materials from the prosecution, he must be willing, under the principle of reciprocity established by subdivision (a)(3), to divulge information contained in his files. To expand the scope of mandatory discovery for the defense would be to remove the impetus for full reciprocal discovery. The intent is not to limit what is obtainable by the defendant, but to increase what will be discovered by both sides. Secondly, this rule promotes judicial efficiency since the need for hearings upon motions for mandatory discovery will be dispensed with except in unusual circumstances where a protective order is sought.

(a)(1)(A). This section expands to a limited degree the scope of discovery available to the defendant under prior Massachusetts law. While under former practice, statements made by a defendant were usually disclosed to that defendant by the prosecution, 30 MASS. PRACTICE SERIES (Smith) § 613 (1970, Supp.1978), this was not a required procedure. Commonwealth v. Chapin, 333 Mass. 610 [132 N.E.2d 404] (1956). However, the United States Supreme Court, in Cicenia v. LaGay, [78 S.Ct. 1297] 357 U.S. 504 [2 L.Ed.2d 1523] (1958), stated that granting the defendant discovery of his own statements was the better practice even though this could not be found to be a constitutional mandate. While the defendant has no absolute right to discover his own statements, this rule is in conformity with the general practice in Massachusetts, the federal system, and other states. Disclosure is generally compelled only as to those statements of a defendant which have been reduced to writing. *See* Commonwealth v. Nichols, 4 Mass.App. [606, 356 N.E.2d 464] (1976); Commonwealth v. Clark, 3 Mass.App. 481, 485 [334 N.E.2d 68] (1975); Commonwealth v. Colella, 2 Mass.App. 706, 709 [319 N.E.2d 923] (1975).

(a)(1)(B). The rule had developed in both the Massachusetts and federal courts that pretrial discovery of grand jury minutes was to be allowed when the defendant showed a "particularized need" that the release of a part or all of the minutes would serve. Dennis v. United States, [86 S.Ct. 1840] 384 U.S. 855 [16 L.Ed.2d 973] (1966); Commonwealth v. Cook, 351 Mass. 231 [218 N.E.2d 393] (1966), cert. denied, [87 S.Ct. 529] 385 U.S. 981 [17 L.Ed.2d 443]. The Supreme Judicial Court in Commonwealth v. Stewart, 365 Mass. 99 [309 N.E.2d 470] (1974), announced a new rule mandating that on the defendant's motion, the court will routinely order the Commonwealth to supply defense counsel . . . with the grand jury testimony of any person called as a Commonwealth witness which is related to the subject matter of his testimony at trial. The defense will not be required to show "particularized need."

Id. at 105-06. While the *Stewart* court spoke specifically to the issue of production of grand jury testimony for purposes of impeachment of witnesses at trial, see Mass.R.Crim.P. 23, the particularized need standard has since been eliminated as to other types of testimony and in other contexts. *E. g.*, Commonwealth v. Lewinsky, 367 Mass. 889, 901-03 [329 N.E.2d 738] (1975) (prior written statements of witnesses). *See* subdivision (a)(2), infra.

Superior Court Rule 63 (1974) mandates that stenographic notes of all testimony given before a grand jury shall be taken, but that transcripts thereof need

be furnished only as required by the prosecuting officer unless the court orders otherwise. It is within the judge's discretion under this subdivision to order the transcription of a stenographic record. *Compare* Commonwealth v. Pimental, 5 Mass.App. [463, 363 N.E.2d 1343] (1977) (no error in ordering trial to proceed despite Commonwealth's failure to comply with order to supply defendant with copy of grand jury minutes where minutes not transcribed).

Commonwealth v. Stewart, supra, required production of the grand jury testimony of "any person called as a Commonwealth witness." 365 Mass. 106. Thus the testimony of a grand jury witness who was not called as a witness at the trial was not subject to disclosure. Pursuant to this rule the court may compel production of the grand jury testimony of any person, whether or not the Commonwealth intends to call that person at trial. Further, delivery of the transcript of the grand jury witness' testimony—insofar as relevant—is to be in advance of trial within a time set by the judge, rather than "not later than the close of his direct testimony at trial" as required by *Stewart*. 365 Mass. at 106.

Although the relevant grand jury testimony should be routinely supplied by the Commonwealth when properly requested by the defendant, Commonwealth v. Shagoury, Mass.App.Adv.Sh. (1978) 927, 941 [6 Mass.App. 584, 380 N.E.2d 708] in order to obtain that testimony before trial the defendant must comply with the requirements of this rule. If he does not—or if the judge rules that the requested testimony is either not relevant or is to be the subject of a protective order—a motion for production under Mass.R. Crim.P. 23 must be made at the time the witness testifies on direct examination.

There is no requirement that the requested grand jury testimony have been given before the grand jury which returned the indictment against the defendant, Commonwealth v. Cavanaugh, 371 Mass. 46, 57-58 [353 N.E.2d 732] (1976), as long as that testimony is related to the witness' testimony (or prospective testimony) at trial. *See* Commonwealth v. Barnett, 371 Mass. 87, 94 [354 N.E.2d 879] (1976).

(a)(1)(C). This is an implementation of the constitutional requirement established in Brady v. Maryland, [83 S.Ct. 1194] 373 U.S. 83 [10 L.Ed.2d 215] (1963), that

> 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 punishment, irrespective of the good faith or bad faith of the prosecution.

Id. at 87 (emphasis supplied). *Accord* Moore v. Illinois, [98 S.Ct. 458] 408 U.S. 786, 794 [54 L.Ed.2d 424] (1972); Commonwealth v. Adrey, Mass.Adv.Sh. (1978) 3008, 3015 [376 Mass. 747, 383 N.E.2d 1110]; Commonwealth v. Ellison, Mass.Adv.Sh. (1978) 2072, 2094 [376 Mass. 1, 379 N.E.2d 560].

The term "exculpatory" within subdivision (a)(1)(C) is not intended to be technically construed as encompassing alibi or other complete proof of innocence, but as meaning evidence which tends to negate the guilt of the defendant or, stated affirmatively, supporting his innocence. Commonwealth v. Pisa, [372 Mass. 590, 363 N.E.2d 245] (1977) cert. denied, [98 S.Ct. 210] 434 U.S. 869 [54 L.Ed.2d 147] (1977). *Accord* Commonwealth v. Ellison, Mass.Adv.Sh. (1978) 2072, 2095 n. 9 [376 Mass. 1, 379 N.E.2d 560]. The term thus comprehends evidence which provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's version of facts, calls into question a material (although not indispensable) element of the Commonwealth's version, or challenges the credibility of a key Commonwealth witness. *Commonwealth v. Ellison, supra*, at 2095.

To establish a violation of the rule of *Brady v. Maryland, supra*, as incorporated herein, the defendant must demonstrate upon review that evidence actually existed, Commonwealth v. Adams, Mass.Adv.Sh. (1978) 795, 807 [374 Mass. 733, 374 N.E.2d 576], that that evidence would have tended to exculpate him, Commonwealth v. Pisa, [372 Mass. 590, 363 N.E.2d 245] (1977), cert. denied, [98 S.Ct. 210] 434 U.S. 869 [54 L.Ed.2d 147] (1977), and that the Commonwealth failed to disclose it upon proper request, Commonwealth v. Gilday, 367 Mass. 474, 487 [327 N.E.2d 851] (1975). *Accord* Commonwealth v. Adrey, Mass.Adv.Sh. (1978) 3008, 3015 [376 Mass. 747, 383 N.E.2d 1110].

It is preferred that a motion for disclosure under this subdivision be more than a general request for exculpatory evidence as the magnitude of the error in non-disclosure, is, in part, a function of the specificity of the motion. *Compare* Commonwealth v. Ellison, Mass.Adv.Sh. (1978) 2072, 2096-97 [376 Mass. 1, 379 N.E.2d 560] with Commonwealth v. Preston, 359 Mass. 368, 370-71 [268 N.E.2d 922] (1971) ("fishing expedition"); Commonwealth v. Meggs, 4 Mass.App. [773, 341 N.E.2d 699] (1976) (no pretrial motion); Commonwealth v. Clark, 3 Mass.App. 481, 485 [334 N.E.2d 68] (1975) ("general motion"); Commonwealth v. Colella, 2 Mass.App. 706, 708 [319 N.E.2d 923] (1974) ("very general motion"). In addition to preserving the issue of compliance with a disclosure order for appeal, specificity can operate to avoid appeals by directing the attention of the prosecutor to those particular materials which the defendant believes would be helpful. A prosecutor cannot be expected to appreciate the significance of every item of evidence in his possession to any possible defense which the defendant may assert. Commonwealth v. Pisa, [372 Mass. 590, 363 N.E.2d 245] (1977) cert. denied, [98 S.Ct. 210] 434 U.S. 869 [54 L.Ed.2d 147] (1977). Assembly and disclosure of those materials—and thus the entire pretrial phase of the proceedings—is expedited by specific motions.

It should be noted that the Commonwealth should furnish the defendant with exculpatory evidence even absent a request if that evidence is highly material, in the sense that the evidence would raise a substantial probability that the result of the trial would be altered. *E.g.*, Commonwealth v. Stone, 366 Mass. 506, 510-11 [320 N.E.2d 888] (1974) and cases cited.

Subdivision (a)(2). This subdivision broadly parallels N.J.R. Crim.P. 3:13-3(a) (1972).

All discovery by the defendant not ordered pursuant to subdivision (a)(1) is discretionary with the trial court in accordance with former Massachusetts practice. *E.g.*, Commonwealth v. Gibson, 357 Mass. 45, [255 N.E.2d 742] cert. denied, [91 S.Ct. 75] 400 U.S. 837 [27 L.Ed.2d 70] (1970) (no abuse of discretion in denying discovery of photographs used for identification procedures because defendant's request would have created an undue burden on the prosecution); Commonwealth v. Meggs, 4 Mass.App. [773, 341 N.E.2d 699] (1976); Commonwealth v. Clark, 3 Mass.App. 481, 484-85 [334 N.E.2d 68] (no record of preliminary view of photographs; no requirement to produce entire identification file). The difference from prior practice is that if the defendant's motion pursuant to this subdivision is granted, the prosecution will normally receive full discovery from the defendant. Subdivision (a)(3), *infra*.

There is no right to disclosure of a list of prospective Commonwealth witnesses except as to those who testified before a grand jury which returned an indictment charging a capital crime. Commonwealth v. Salerno, 356 Mass. 642, 648 [255 N.E.2d 318] (1970) and cases cited; Commonwealth v. Ventura, 294 Mass. 113, 119-20 [1 N.E.2d 30] (1936). Under this rule, the disclosure of witnesses' identities remains discretionary with the court, in consonance with prior Massachusetts practice. As along as the prosecution does not avail itself of discovery opportunities and does not bring into effect the reciprocal discovery provision of subdivision (a)(3), disclosure of witness' identities should be ordered only when the interests of justice are served. If a defendant has any connections with organized crime, or if for any other reason the court feels the defendant threatens a witness, disclosure should not be compelled. *See e.g.*, Commonwealth v. French, 357 Mass. 356, 399 [259 N.E.2d 195, 45 A.L.R.3d 1106] (1970). Similarly, if after a witness' identity has been disclosed, the court is advised that his safety is endangered, there is provision in Mass.R.Crim.P. 35 for the perpetuation of testimony. Once a witness' testimony is recorded, little reason remains for the defendant to attempt to intimidate him. Finally, subdivisions (a)(6) and (a)(7) provide specifically that the court can order information (including witnesses' names) to be disclosed only to defendant's counsel and not to the defendant himself. If, after an order or agreement to disclose the identity of witnesses has been entered or reached and the Commonwealth has complied therewith, it is determined that additional witnesses will be called, the defendant may, in the discretion of the court, be granted time within which to investigate and interview that witness. *See generally* Commonwealth v. Mains, [374 Mass. 733, 374 N.E.2d 576] (1978); Commonwealth v. Belmonte, 4 Mass.App. [506, 351 N.E.2d 559] (1976).

If a witness list is to be delivered to the defendant, the court may further order that the Commonwealth produce the records of prior convictions of those witnesses, under the direction of the court. Commonwealth v. Adams, [374 Mass. 722, 375 N.E.2d 681] (1978); Commonwealth v. Clark, 363 Mass. 467, 474 [295 N.E.2d 163] (1973). There is, however, no general pretrial entitlement to such records nor does the Commonwealth have an affirmative duty to collect and assemble them. Commonwealth v. Adams, *supra*; Commonwealth v. Clark, *supra*. *Accord* Commonwealth v. Pimental, 5 Mass.App. [463, 363 N.E.2d 1343] (1977); Commonwealth v. Colella, 2 Mass.App. 706, 708-09 [319 N.E.2d 923] (1974). Prior practice normally consisted of the Commonwealth's requesting copies of the witnesses' records of prior convictions from the State Department of Probation; under this rule, the judge may order the production of such records by that department. This may reveal with assurance only Massachusetts convictions; where known facts suggest that a witness has a record elsewhere, an inquiry as to out-of-state convictions may be a reasonable practice. Commonwealth v. Corradino, 368 Mass. 411, 422 [332 N.E.2d 907] (1975).

Although the Supreme Judicial Court intimates in Commonwealth v. Hall, 369 Mass. 715, 723-25, 728 [343 N.E.2d 388] (1976), that police reports are properly the object of pretrial disclosure, this rule intends that they are not generally discoverable in advance of trial, except to the extent that they contain "statements" of witnesses as defined in subdivision (d), *infra*. They are, of course, subject to disclosure under Mass.R.Crim.P. 23 if a police witness testifies therefrom. As to police reports in general, *see* Bougas v. Chief of Police of Lexington, 371 Mass. 59 [354 N.E.2d 872] (1976); Commonwealth v. Sheeran, 370 Mass. 82, 86 [345 N.E.2d 362] (1976) and cases cited; Commonwealth v. French, 357 Mass. 356, 399 [259 N.E.2d 195, 46 A.L.R.3d 1106] (1970) and cases cited.

Subdivision (a)(3). This subdivision derives from recent holdings of the Supreme Court relative to the rights of the prosecution to discover the defendant's case.

> The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either *by the prosecution* or by the defense.

United States v. Nixon, [94 S.Ct. 3090] 418 U.S. 683, 709 [41 L.Ed.2d 1039] (1973) (emphasis supplied). To this end, the prosecution can, in a proper case, call upon the power of the court to compel production of evidence which will facilitate full disclosure of all the relevant facts. United States v. Nobles, [95 S.Ct. 2160] 422 U.S. 225 [45 L.Ed.2d 141] (1975). *See* Commonwealth v. Hanger, Mass.Adv.Sh. (1979) 647 [377 Mass. 503, 386 N.E.2d 1262]; Blaisdell v. Commonwealth, Mass.Adv.Sh. (1977) 1307 [372 Mass. 753, 364 N.E.2d 191]; Commonwealth v. Edgerly, Mass.Adv.Sh. (1977) 707 [372 Mass. 337, 361 N.E.2d 1289]; Commonwealth v. Lewinski, 367 Mass. 889, 903 n.10 [329 N.E.2d 738] (1975).

Subdivision (A) establishes the principle of reciprocity. If the defendant is granted discovery other than mandatory discovery, the court will usually require the defendant to make available from his files all constitutionally discoverable material. The primary constitutional restraint upon prosecutorial discovery is the fifth amendment which limits discovery from the defendant to evidence which he intends to introduce

at trial. Intention in this context is, of course, fluid as investigation and discovery progress and the defendant is subject to the continuing duty imposed by subdivision (a)(4), *infra*.

Subdivision (B) grants the prosecution the right to seek discovery without having to wait for the defendant first to move for discovery. The *Commonwealth's* motion is to be filed within such time as the court may allow in the District Court ([c][1][A], *infra*) and within 14 days after the conference report is filed in Superior Court ([c][2][A], *infra*), although the court may allow a later filing. *See generally* Commonwealth v. Hanger, Mass.Adv.Sh. (1979) 647, 654-55 [377 Mass. 503, 386 N.E.2d 1262]. The last sentence gives effect to the constitutional mandate expressed in Wardius v. Oregon, [93 S.Ct. 2208] 412 U.S. 470 [37 L.Ed.2d 82] (1973), that the defendant is to be given reciprocal discovery rights. This guarantees a defendant the right to full discovery (except in cases where a protective order is appropriate) whenever the Commonwealth is granted any discovery.

(a)(4). This is taken from Rule 3.220(f) of the Florida Rules of Criminal Procedure and has a counterpart in the Federal Rule, the New Jersey Rule and the ABA *Standards Relating to Discovery and Procedure Before Trial* (Approved Draft, 1970).

(a)(5). Work product is protected under the federal rule and the ABA *Standards*, *supra*. The sanctity of a party's "work product" is a well recognized principle that was specifically approved by the Supreme Court relating to its application to discovery under the Federal Rules of Civil Procedure, Hickman v. Taylor, [67 S.Ct. 385] 329 U.S. 495 [91 L.Ed. 451] (1947). The principle has equal applicability to criminal discovery.

The definition of "work product" is drawn in part from Rules of Criminal Procedure (U.L.A.) rule 421(b)(1) (1974).

Subdivision (a)(6)-(7). All discovery under this rule is to some extent discretionary. If danger or abuse can be shown, discovery need not be granted. In some cases a court may require a defendant who wishes to avail himself of discovery to offer convincing proof that the discovery process will not be abused.

The power of the court to restrict the scope of otherwise permissible discovery is recognized in the Federal Rule, the New Jersey Rule, the Florida Rule, and the ABA *Standards*, *supra*.

Protective orders are designed for the unusual case in which the granting of discovery will work to the injury of the person whose material is to be discovered or to the injury of some third person. The party or person opposing discovery has the burden of showing why the discovery of requested materials must be denied or granted subject to restriction. With respect to discretionary discovery, a protective order may be sought only to restrict (and not prevent completely) the scope of discovery, because if reasons exist to wholly deny discovery *ab initio*, it is within the discretion of the court to deny the discovery motion, without requiring the opponent to the motion to seek a protective order. As to both mandatory and discretionary discovery, if what is sought is the modification of the existing discovery order, rather than the denial or restriction of an initial discovery order, the following subdivision, (a)(7), provides the appropriate remedy.

The provisions of these subdivisions that the court may, in certain situations, grant discovery to a defendant on condition that the material to be discovered be available only to counsel for the defendant, does not appear in either Fed.R.Crim.P. 16(d) or ABA *Standards* § 4.4, *supra*. However, this is merely a corollary to that sentence of subdivision (a)(6) which gives the court the power, upon a sufficient showing, to deny, restrict, or defer discovery or inspection. Fed.R.Crim.P. 16(d) and ABA *Standards* § 4.4 give the judge this same power. The commentary accompanying the ABA standard indicates that this restriction on disclosure means "such adjustment of the time, place, *recipient*, and use of disclosures as may commend themselves in the particular case." ABA *Standards*, *supra*, comment at 102 (emphasis supplied).

Since it is not constitutionally impermissible to limit pretrial discovery in criminal cases, United States v. Randolph, 456 F.2d 132 (3rd Cir.1972), there should be no objection to the Commonwealth's giving material only to defendant's counsel in certain situations, which is preferable to denying discovery altogether.

It is contemplated that this provision of Rule 14 will sometimes be used to prevent a defendant from seeing his own psychiatric report. In some instances, the mental well-being of the defendant could be adversely affected if he has access to such a report. United States v. Moody, 490 F.2d 866 (5th Cir. 1974). Although the defendant in *Moody* had been convicted, the same rationale is applicable to the defendant awaiting trial.

Subdivision (b). The philosophy and provisions of this subdivision are drawn from Commonwealth v. Edgerly, Mass.Adv.Sh. (1977) 707 [372 Mass. 337, 361 N.E.2d 1289]; Blaisdell v. Commonwealth, Mass. Adv.Sh. (1977) 1307 [372 Mass. 753, 364 N.E.2d 191]; and a number of other sources. *See* Commonwealth v. Hanger, Mass.Adv.Sh. (1979) 647 [377 Mass. 503, 386 N.E.2d 1262]; Commonwealth v. Lewinsky, 367 Mass. 889, 902-03 and n.10 [329 N.E.2d 738] (1975); Fed.R.Crim.P. 12.1, 12.2; Fla.R. Crim.P. 3.200; Rules of Criminal Procedure (U.L.A.) rule 425(a)(1)-(2) (1974); National Advisory Commission on Criminal Justice Standards and Goals, *Courts*, standard 4.9 (1973).

The Supreme Court in Williams v. Florida, [90 S.Ct. 1893] 399 U.S. 78 [26 L.Ed.2d 446] (1970), held that a prosecutor could obtain discovery from a defendant by requesting information pertaining to evidence which the defendant intended to offer at trial without violating the fifth amendment privilege against self-incrimination. Although the defendant is compelled to make an accelerated determination of the evidence he is to introduce at trial, the nature of this compulsion is such that it is not unconstitutional. While the holding of the Supreme Court related only to the discovery of a defendant's prospective alibi defense, the decision indicates that the rule announced

is applicable to other forms of prosecutorial discovery as well. *See* Commonwealth v. Lewinsky, 367 Mass. 889, 903 n.10 [329 N.E.2d 738] (1975). The types of disclosures mandated by subdivision (b)(1) (3) occur in those situations where in fairness the Commonwealth is entitled at least to notification.

(b)(1). Notice-of-alibi rules have been in existence at least since 1927 and as of 1978 at least half the states had such rules. See Williams v. Florida, [90 S.Ct. 1893] 399 U.S. 78, 81-82 [26 L.Ed.2d 446] (1970). The substance of this subdivision is taken from Commonwealth v. Edgerly, Mass.Adv.Sh. (1977) 707, 714-16 [372 Mass. 337, 361 N.E.2d 1289].

In Gilday v. Commonwealth, 360 Mass. 170 [274 N.E.2d 589] 1971), the Supreme Judicial Court, mindful of the implications of the Supreme Court's decision in Williams v. Florida, [90 S.Ct. 1893] 399 U.S. 78 [26 L.Ed.2d 446] (1970), held that discovery by the prosecution of the defendant's intent to interpose an alibi defense and of the names of any prospective witnesses in support of the alibi violated due process because in Massachusetts a defendant did not have an equal right to discovery from the prosecution. Nearly all a defendant's rights to discovery have been subject to judicial discretion under Massachusetts law. The Supreme Court in Wardius v. Oregon, [93 S.Ct. 2208] 412 U.S. 470 [37 L.Ed.2d 82] (1973), specifically held that reciprocity in discovery rights was a constitutional prerequisite to the validity of prosecutorial discovery.

> [A] judge may constitutionally require disclosure to the prosecution of an alibi defense and the identity of alibi witnesses only so long as his order, taken in its entirety, is not fundamentally unfair to the defendant. . . . In all instances the discovery order 'must' be accompanied by a reciprocal order directing the prosecution to notify the defendant of the names and addresses of witnesses on whom it intends to rely to dispute the defendant's alibi.

Commonwealth v. Hanger, Mass.Adv.Sh. (1979) 647, 653 [377 Mass. 503, 386 N.E.2d 1262] *citing* Commonwealth v. Edgerly, Mass.Adv.Sh. (1977) 712, 715 [372 Mass. 337, 361 N.E.2d 1289]. That requirement is supplied by subdivisions (b)(1)(B)-(C).

The purpose of such a rule is two-fold. First, alibi defenses are the most frequently and easily fabricated defenses. See, for example, Commonwealth v. Harris, 364 Mass. 236, 238 [303 N.E.2d 115] (1973). By requiring the defendant to give the Commonwealth pretrial notice of his intent to interpose such a defense and a list of witnesses to be used in support of the alibi, the defendant is prevented from using an eleventh hour defense, and the Commonwealth is given to tools necessary to uncover fabrication. Fairness to the defendant is insured by granting him discovery of the identities of rebuttal witnesses. Secondly, the need to grant continuances on the basis of surprise at trial will no longer exist.

As the *Edgerly* court observes, if, in the judge's discretion, no other order is appropriate to serve the purposes of this rule, he may exclude the testimony of any undisclosed witness offered by either party as to the defendant's absence from, or presence at, the scene of the alleged offense. Mass.Adv.Sh. (1977) at 716 [372 Mass. 337]. *See* Commonwealth v. Blodgett, Mass.Adv.Sh. (1979) 636, 645 n.9 [377 Mass. 494, 386 N.E.2d 1042]. If a defendant against whom a sanction is imposed is convicted, he may, of course, preserve for argument on appeal the issue of whether imposition of that sanction amounted to an abuse of discretion or the denial of any constitutional right. *Commonwealth v. Edgerly*, *supra*. *See generally* Commonwealth v. Hanger, Mass.App.Adv.Sh. (1978) 633 [6 Mass.App. 407, 376 N.E.2d 877]. In *Hanger* the procedure authorized by this subdivision was substantially approved in the absence of any rule, even though the Commonwealth's motion was not presented until the second day of trial. On further appellate review, the Supreme Judicial Court ruled that the allowance of the belated motion was error, but harmless in that case. Commonwealth v. Hanger, Mass. Adv.Sh. (1979) 647 [377 Mass. 503, 386 N.E.2d 1262]. As the court emphasized:

> It is . . . critical . . . that discovery of this nature take place reasonably in advance of trial to permit investigation by the defendant of the witnesses the prosecution expects to call in rebuttal . . . .
>
> . . . It is manifest in this case, where the discovery motion was not made until after the trial had started, that the motion came too late . . . to permit the kind of investigation contemplated by . . . [Mass.R.Crim.P. 14].

Mass.Adv.Sh. (1979) at 654-55 and n. 5 [377 Mass. 503].

(b)(2). The subject matter of this subdivision was treated by the Supreme Judicial Court in Blaisdell v. Commonwealth, Mass.Adv.Sh. (1977) 1307 [372 Mass. 753, 364 N.E.2d 191], and the procedures contained herein substantially restate those dictated by the court in that opinion.

Provisions requiring notice of an intent to rely upon a defense of lack of criminal responsibility have a different purpose than notice-of-alibi provisions. The latter, as noted above, are directed at preventing "eleventh-hour" or fabricated alibis. On the other hand, because rebuttal of an insanity defense requires a degree of expertise on the part of a cross-examiner that can only be gained through pretrial research, this subdivision is intended to meet the need of a prosecutor to familiarize himself with the complex nature of this type of defense.

The Supreme Judicial Court in Gilday v. Commonwealth, 360 Mass. 170 [274 N.E.2d 589] (1971), upheld an order to the defendant to disclose his intent with regard to the interposition of a defense of not guilty by reason of insanity despite the fact that the system of discovery then in effect was non-reciprocal. Implicit in the court's opinion is the fact that due process did not require reciprocation by the Commonwealth because only notice of intent to interpose the defense, and not the identity of the defendant's witnesses nor the evidence which he proposed to offer in support of that defense, was required. In short, the only response by the Commonwealth would be that opposition to that defense would be presented, which does not reasonably require notice.

As the court recognizes in *Blaisdell v. Commonwealth*, the privilege against self-incrimination is not

implicated by a mere notice requirement. Mass. Adv.Sh. (1978) at 1324 [372 Mass. 753]. Nor is there anything in that privilege which precludes

> an order requiring a defendant to reveal on motion of the prosecution the information of (a) whether a defendant pursuant to such defense intends to offer expert testimony thereon; (b) the names and addresses of such expert witnesses as the defense intends to call; (c) whether a defendant's experts intend to rely in whole or in part on statements of the defendant pertaining to his mental state at or about the time of the commission of the alleged crime or as it may be otherwise relevant to the issue of his mental responsibility therefor.

Id. That information is required by subdivisions (b)(2)(A)(i)-(iii) of this rule. If the defendant files the notice of intent, the Commonwealth is subject to the reciprocity requirements of this rule and as imposed by Commonwealth v. Edgerly, Mass.Adv.Sh. (1977) 707, 715 [372 Mass. 337, 361 N.E.2d 1289]; Blaisdell v. Commonwealth, Mass.Adv.Sh. (1977) 1307, 1324 [372 Mass. 753, 364 N.E.2d 191].

If in answer to subdivision (b)(2)(A)(iii) the defendant responds that his expert witnesses intend to rely upon statements of the defendant as a foundation for their testimony, or if that fact becomes apparent from inquiry by the judge or developments in the case, the judge may order that the defendant submit to a psychiatric examination. (b)(2)(B).

> If . . . a defendant voluntarily submits to psychiatric interrogation as to his inner thoughts, the alleged crime and other relevant factors bearing on his mental responsibility and, on advice of counsel, voluntarily proffers such evidence to the jury, we feel that the offer of such expert testimony based in whole or in part on a defendant's testimonial statements constitutes a waiver of the privilege [against self-incrimination] for such purposes. . . . In short, by adopting this approach, a defendant who seeks to put in issue his statements as the basis of psychiatric expert opinion in his behalf opens to the State the opportunity to rebut such testimonial evidence in essentially the same way as if he himself has testified. . . . Under such a view there would be no violation of his privilege should the court then order him under c. 123, § 15, to submit to psychiatric examination so that the jury may have the benefit of countervailing expert views, based on similar testimonial statements of a defendant in discharging its responsibility of making a true and valid determination of the issues thus opened by a defendant.

Blaisdell v. Commonwealth, Mass.Adv.Sh. (1977) 1307, 1322–23 [372 Mass. 753, 364 N.E.2d 191] (citations omitted). The privilege against self-incrimination does not bar the Commonwealth's use of evidence which incriminates the defendant, but rather the compelled production of such evidence by the defendant; yet it is clear that an examination pursuant to this subdivision constitutes compelled production. *Blaisdell v. Commonwealth, supra*, Mass. Adv.Sh. (1977) at 1313 [372 Mass. 753]. Therefore, if the psychiatric report contains evidence of a testimonial character, it is not to be made available to either party unless the defendant is to testify on his own behalf or is to offer expert testimony based on his statements ([b][2][B][iii][c]) or unless the defendant, by motion, requests that it be made available. ([b][2][B][iii][b]). Ordering the examination to be conducted prior to a defendant's formal waiver of the privilege against self-incrimination is justified on the basis that:

> To require the Commonwealth to wait may . . . well cause it to be disadvantaged in meeting the issues raised by a defendant's evidence by virtue of the fact that its expert witnesses will lack adequate time to examine properly a defendant and his evidence in order to prepare for trial. Alternatively, a continuance of the trial may cause needless expense to the Commonwealth, unnecessary inconvenience to the court and to the jurors, and disruption of the progress of the trial which may cause harm to either the prosecution or the defense. To require the Commonwealth to wait until such a waiver occurs at trial seems not only inexpedient and unwise but also unnecessary.

Blaisdell v. Commonwealth, supra, Mass.Adv.Sh. (1977) at 1323–24 [372 Mass. 753].

(b)(3). This subdivision is new to Massachusetts practice in its scope, if not its philosophy. See G.L. c. 278, § 7. It requires the defendant to furnish the prosecution with notice of his intent to rely upon a defense based upon a license, claim of authority or ownership, or exemption.

A "license" is defined as a right granted by the Commonwealth or other competent authority to do a particular act or carry on a particular business which, without such license, would be unlawful. A "claim of authority" is an assertion that the claimant has received an express or implied right to do an act from one lawfully empowered to grant such right. A "claim of ownership" is an assertion that the claimant has a right of possession enforceable in a court. An "exemption" is a release from a duty or obligation to which others are subject.

The requirement of disclosure in this subdivision is reasonable when considered in light of

> the proposition that the end of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduce surprise at trial.

Wardius v. Oregon, [93 S.Ct. 2208] 412 U.S. 470, 473 [37 L.Ed.2d 82] (1973).

The concept of mandating notice of criminal defenses other than alibi and insanity, subdivisions (b)(1)–(2) *supra*, was advocated by the American Bar Association in the ABA *Standards Relating to Discovery and Procedure Before Trial* (Approved Draft, 1970)

> 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 . . . .

Id., § 3.3 (emphasis supplied).

Considerations of reciprocity, dealt with by the United States Supreme Court in connection with notice-of-alibi statutes in Wardius v. Oregon, [93 S.Ct. 2208] 412 U.S. 470 [37 L.Ed.2d 82] (1973) and Williams v. Florida, [90 S.Ct. 1893] 399 U.S. 78 [26 L.Ed.2d 446] (1970), and by the Supreme Judicial Court in Gilday v. Commonwealth, 360 Mass. 170 [274 N.E.2d 589] (1971), are inapposite to subdivision (b)(3). The *Williams-Wardius* cases hold that state statutes requiring notice to be given the prosecution that an alibi defense is to be raised at trial, with the names of witnesses to be called in support of the alibi, are constitutionally valid only if the defendant is allowed reciprocal rights to receive the names of governmental rebuttal witnesses. The statutes in those decisions, unlike Rule 14(b)(3), involved the furnishing of prosecutors with both notice of, *and information pertaining to*, the intended defense. See subdivisions (b)(1) and (b)(2), *supra*. It was to this information gathering aspect of the Oregon and Florida statutes that the Supreme Court addressed itself.

> It is fundamentally unfair to require the defendant to divulge *the details* of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.

Wardius, supra at 476 (emphasis added).

Subdivision (b)(3) involves the giving only of notice. The defendant is not required to divulge the details of his intended defense. Mere notification of intent to raise a defense without more does not trigger considerations of reciprocity. *See* Gilday v. Commonwealth, 360 Mass. 170 [274 N.E.2d 589] (1971); Blaisdell v. Commonwealth, Mass.Adv.Sh. (1977) 1307, 1324 [372 Mass. 753, 364 N.E.2d 191].

The sanction for failure to comply with the requirement of subsection (b)(3) is drawn from Fed.R. Crim.P. 12.1 and 12.2. See also ABA *Standards, supra*, § 4.7. The court may "for cause shown" ease or lift the requirements of this subdivision.

It is anticipated that utilization of this subdivision will be infrequent in those cases in which a pretrial conference is held. One of the recommended subjects for consideration at conference is the nature of defenses upon which the defendant intends to rely at trial. Mass.R.Crim.P. 11(a)(1)(C), (b)(1)(C).

Subdivision (c). The general sanction provision of subdivision (c)(1) is paralleled by Fed.R.Crim.P. 16(d)(2) and New Jersey R.Crim.P. 3:13-3(f). The power to exclude alibi evidence other than the defendant's testimony is recognized in Commonwealth v. Edgerly, Mass.Adv.Sh. (1977) 707, 716 [372 Mass. 337, 361 N.E.2d 1289], and Commonwealth v. Blodgett, Mass.Adv.Sh. (1979), 636, 645 n.9 [377 Mass. 494, 386 N.E.2d 1042], and is expressed in subdivision (b)(1)(D), supra. See Federal Rule 12.1. See ABA *Standards Relating to Discovery and Procedure Before Trial* § 4.7(a) (Approved Draft, 1970). Subdivision (b)(2)(B)(iv), *supra*, provides the sanction for failure of the defendant to comply with a court-ordered psychiatric examination.

"Rights and duties are ephemeral indeed without remedies." ABA *Standards, supra*, comment at 107. Subdivision (c)(1) is intended to provide the general rule and is based on the assumption that the trial court is in the best situation to consider the opposing arguments concerning a failure to comply with a discovery order and to fashion an appropriate remedy. There is, it should be noted, statutory limitation on the court's power to grant a continuance without the defendant's consent. General Laws c. 276, § 35 provides a 10-day limit in such instances.

Although the court may exercise its general sanction power under subdivision (c)(1) to exclude other than alibi evidence, it is generally better to grant each party the freedom to present all relevant evidence at trial. However, in regard to alibi evidence, there is sufficient likelihood of abuse to require specifically empowering the court to exclude extrinsic alibi evidence. A court should only employ this sanction, however, when convinced that a failure to comply with an order was deliberate and prejudicial to the Commonwealth.

Subdivision (d). The definition of the term "statement" is drawn from 18 U.S.C. § 3500(e)(1)-(2) (1969, Supp.1976) and Commonwealth v. Lewinski, 367 Mass. 889 [329 N.E.2d 738] (1975).

Subdivision (e). The time limits established for the discovery of material under this rule are not intended to be inflexible, particularly in the District Court, even though such limits are to apply when the court specifies no other date for the completion of discovery. It is intended that courts will in many cases exercise the power expressly granted to modify the established time limits. In District Court proceedings, a lesser time than provided by the rule will frequently be ordered for the completion of discovery so that those proceedings retain their expeditious character.

Cross References

Criminal responsibility, examination, report, see M.G.L.A. c. 123, § 15.
Grand jury, see Rule 5.
Mental condition of defendant, transmittal of report, see Rule 3.
Post-conviction relief, discovery, see Rule 30.
Production of exculpatory evidence, constitutional guarantee, see Const. Pt. 1, Art. 12.
Witnesses,
  Inspection of statements, see Rule 23.
  Prior criminal record, credibility of witnesses, see M.G.L.A. c. 233, § 21.

Library References

Criminal Law ⇐624, 627.5, 627.10, 629.
C.J.S. Criminal Law §§ 940(7), 949 et seq., 955(1) et seq.
30A Mass.Prac. Series (Smith) § 1371 et seq.

RULE 15. INTERLOCUTORY APPEAL

(Applicable to District Court and Superior Court)

(a) District Court.

(1) *Right of Appeal Where Pretrial Motion to Dismiss Granted.* The Commonwealth shall have the right to appeal to the Appeals Court a decision by a judge granting a motion to dismiss a complaint or indictment made pursuant to the provisions of subdivision (c) of Rule 13.

(2) *Right of Appeal Where Motion to Suppress Evidence Granted.* The Commonwealth shall have the

State Bar of Michigan

306 Townsend Street
Lansing, Michigan 48933-2083
Telephone (517) 372-9030

July 12, 1988

Mr. Gordon F. Proudfoot
c/o Boyne Clarke
Barristers & Solicitors
Suite 700, Belmont House
33 Alderney Drive
P. O. Box 876
Dartmouth, Nova Scotia
B2Y 3Z5

Dear Mr. Proudfoot:

Thank you for your recent inquiry concerning exculpatory statements in criminal prosecutions. Please be advised that although state practice may vary, most US jurisdictions (state courts) do require that statements made by the accused (whether inculpatory or exculpatory) be delivered up to defense counsel upon request. Discovery, however, of statements made by third persons which might bear upon the innocence or guilt of the defendant is not quite so easily addressed. Normally, the response to the belated discovery (after conviction) of information which might have proven beneficial to the defense, has been by the granting of a new trial--and is not necessarily governed by code, rule or other standard, except as judicially announced.

However, for approximately the past five years, a committee of our Michigan Supreme Court has been working upon the development of new rules of criminal procedure. These rules have been before our Michigan Supreme Court since October of 1985, and although no action has been taken by our Supreme Court in adopting these rules, it is my understanding they remain under active consideration. So that you can obtain some scope of the rules, I enclose herewith copies of Rule 6.202 through 6.212, all dealing with the issue of discovery. Again, I note that I do not specifically find a direct reference to a prosecutor's obligation to provide exculpatory statements, except as to how the provisions of Rule 6.202(3) (p 69) may be interpreted.

Finally, please note that the American Bar Association has a standing committee on criminal justice standards whose chairman is Mr. Albert J. Datz of the Jacksonville, Florida Bar. Although I am not familiar with whether or not that committee has prepared standards of discovery impacting upon your subject matter, I am sure that a communication directed to Mr. Datz would assist you in obtaining information. You may wish to call the ABA Information Service number (Chicago--312/988-5158, ABA No. 132).

I hope this communication has been of some assistance to you. Please feel free to call me if I can be of any further assistance.

Sincerely yours,

Donald L. Reisig,
President-Elect

DLR:cls

Enclosures

cc: Michael Franck (w/o enc)

disclosure on both parties. MCR 6.210 exempts certain information from discovery, while MCR 6.211 defines certain limits that may be imposed. MCR 6.212 details the sanctions that may be imposed on the parties for violating the requirements of these rules. MCR 6.213 contains a limited deposition requirement. MCR 6.214 governs the use of subpoenas by the parties for witnesses and documents. MCR 6.215 establishes a new judicial procedure, the omnibus hearing, to expedite the disposition of criminal cases. Finally, MCR 6.216 concerns mental competency hearings. The rules are both comprehensive in scope and obviously interrelated.

Rule 6.201 Informal Discovery

Before seeking a discovery order from the court, the parties shall attempt informally to resolve all discovery disputes and shall consider in good faith all discovery requests even when disclosure is not mandated by these rules. A court shall not grant a discovery order unless the party seeking the order alleges that an informal request for discovery has been refused by the other party.

Note

Efficiency in the system will not be promoted if trial and appellate courts frequently have to resolve discovery disputes. If such litigation is to be avoided, discovery must become a way of life in criminal cases. Subsequent rules attempt to promote this way of life by mandating broad discovery for both sides. MCR 6.201 attempts to promote this way of life by requiring the parties to resolve discovery disputes between themselves and by encouraging them to provide discovery even when these rules do not require it. MCR 6.201, therefore, sets a tone for this entire chapter, one favoring the broadest possible disclosure. It informs the parties to view these rules not as establishing limits on what must be disclosed but instead as defining minimum requirements.

By itself, of course, no rule can change the attitudes of litigants. To some extent, therefore, MCR 6.201 is hortatory. Nevertheless, the last sentence of the rule imposes a sanction on the failure to pursue informal discovery. A court is not permitted to grant a discovery order unless the party seeking the order first has attempted informally to obtain the desired information from the other party.

Rule 6.202 Mandatory Disclosure by the Prosecutor

Except as provided in MCR 6.210 and 6.211, the

prosecutor, upon request, shall disclose to the defendant's lawyer the following material and information within the prosecutor's possession or control (MCR 6.204[A]):

(1) Any written or recorded statements and the substance of any oral statements made by the defendant, a codefendant, or an accomplice together with the names and addresses of the witnesses to such statements;

(2) The names, addresses, reports, and statements of experts who examined the defendant or who conducted examinations, tests, experiments, or comparisons in connection with or relevant to the case;

(3) The names and last known addresses of all persons who have information that may be relevant to the offense charged, including a specification of those witnesses the prosecutor intends to call at trial, together with the written or recorded statements of all such persons and memoranda summarizing their oral statements;

(4) Any criminal record that the prosecutor intends to use at trial;

(5) Any reports or memoranda made by a police officer or investigator in connection with the investigation or prosecution of the case, but not including information about continuing or other police investigations;

(6) Any books, papers, documents, photographs, tangible objects, buildings, or places that the prosecutor intends to offer in evidence or to offer evidence about, or that were obtained from or belong to the defendant;

(7) The existence of any search, seizure, or electronic surveillance conducted in connection with the case, together with any affidavits, warrants, and returns pertaining to such activities; and

(8) Any plea agreements or grants of immunity made with or given to witnesses in connection with the defendant's case.

Note

In general. The first significant feature of MCR 6.202, which provides discovery to the defense, is that the rule is mandatory. The defendant, upon request, has a right to each of the enumerated items as long as they are within the prosecutor's possession or control as defined in MCR 6.204. The only exceptions are those provided in MCR

6.210 and 6.211. Second, the rule is intended to function without judicial involvement. The defendant does not have to file a discovery motion in court, but merely has to request the enumerated items from the prosecutor. Of course, if the prosecutor does not disclose enumerated information, the defendant may seek a discovery order from the court. (Under MCR 6.201, the defendant may not seek a discovery order until a request for disclosure has been made to the prosecutor.) Besides granting such an order, the court may impose sanctions on the prosecutor for wilful violations of this rule. See MCR 6.212.

MCR 6.202 does not address the manner in which the prosecutor must make disclosure. This is treated in MCR 6.204. Obviously, for example, objects such as buildings cannot be delivered to the defendant; such objects, however, may be made available for inspection and possibly for photographing. If the parties cannot agree on the prosecutor's manner of compliance, the court will have to resolve their disagreement under MCR 6.204.

The items enumerated in MCR 6.202 are typical of those found in discovery rules, see, *e.g.*, ABA Standards for Criminal Justice (2d ed), Discovery and Procedure Before Trial, § 11-2.1, although the number of included items makes MCR 6.202 more comprehensive than the corresponding rule in most jurisdictions. Indeed, the rule comes very close to mandating open file discovery. As discussed in the succeeding commentary, however, the rule is not intended to impose unnecessary burdens on the prosecutor. Thus, for example, if a police report contains a written statement from a witness summarizing a defendant's oral statement to that witness, the prosecutor would satisfy MCR 6.201(1), (3), and (5) simply by disclosing that portion of the police report. The rule does not require the prosecutor to make repetitive disclosures. Whether the prosecutor would satisfy MCR 6.202 merely by permitting inspection of the report or instead would have to permit duplication as well is governed by MCR 6.204.

1. Statements of defendants and codefendants. Not much controversy exists over the proposition that the defendant should have discovery of his own extrajudicial statements and some discovery of codefendants' statements. Jurisdictions vary, however, in defining the scope of such discovery. For example, FR Crim P 16(a)(1)(A) provides disclosure of the defendant's oral statements only if the prosecutor intends to offer them in evidence and only if they were made in response to interrogation by a government agent whom the defendant knew to be a government agent at the time the statement was made. The federal rules, however, make no provision at all for disclosure of codefendants' statements. Some states provide for discovery of codefendants' statements only if the codefendants and defendant are to be joined for trial. Fla R Crim P 3.220(a)(1)(iv). The rationale is that the defendant needs such statements in a joint trial to make timely severance motions when the codefendants' statements implicate the defendant in the crime. See *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968). The original ABA standards imposed this limitation, but the new standards have removed it. ABA Standards for Criminal Justice (2d ed), § 11-2.1(a)(ii). The reason for removing the limitation was that "the contents of the codefendant's statement

may affect defense preparation of issues unrelated to severance. . . ." *Id.*, Commentary 11.21. A number of states take this more liberal approach. See, *e.g.*, Mo Sup Ct R 25.03(A)(2).

Consistent with the philosophy reflected throughout these rules, MCR 6.202 takes the most liberal approach. The defendant is entitled to his own written and oral statements and those of any codefendant or accomplice. No limitations, other than the general ones provided in MCR 6.210 and 6.211 are imposed.

The rule also entitles the defendant to the names and addresses of witnesses to such statements. If a police officer is a witness to such a statement, the officer's work address will suffice. Although the practice is not uniform, the requirement for providing names and addresses of witnesses can be found in a number of states. See, *e.g.*, the Missouri rule, *supra*.

2. Experts names and reports. This provision is fairly typical, although again some variation in scope exists. FR Crim P 16(a)(1)(D) covers tests that are "material" to defense preparation or that the government intends to offer in its case-in-chief. ABA Standard for Criminal Justice (2d ed), 11-2.1(a)(iv) covers reports of tests made "in connection with the particular case. . . ." (The ABA standards now provide for open file discovery. The enumeration of items in the standards is meant for illustrative purposes.) MCR 6.202 covers tests that are either relevant to the case or made in connection with it. Again, the preference was for a broad rather than a narrow rule.

Discovery in this area provokes little controversy because the standard fears of perjury and witness intimidation rarely are applicable.

3. Witness names and statements. Discovery in this area perhaps is most controversial. When the United States Supreme Court proposed an amendment to the federal rules that would have provided for disclosure of the names of witnesses, Congress rejected the amendment. See Conference Committee, Federal Rules of Criminal Procedure Act of 1975, H.R. Rep. No. 94-414, 94th Congress, 1st Sess. 11-12 (1975). At the opposite end of the spectrum, the ABA standards provide for the broad disclosure set forth in MCR 6.202(3). The states are divided. Some, like the federal rules, do not make any provision for disclosure of witnesses. A larger number require the prosecutor to disclose only the names of witnesses who will be called at trial. See, *e.g.*, Md R Crim P 728(a)(3). Only a few states go as far as the ABA standards. See, *e.g.*, Me R Crim P 16(c) (names and addresses of witnesses "material" to the preparation of the defense). See, also, Fla R Crim P 3.220(a)(1)(i) (witnesses with relevant information).

In Michigan, MCL 767.40; MSA 28.980 has required the prosecutor to endorse the names of known witnesses on the information. This requirement, which judicially has been interpreted as applying to res gestae witnesses, was abrogated in MCR 6.108(D). As indicated in the commentary to that rule, however, this requirement was deleted only because disclosure of the names of witnesses is a subject more properly relating to discovery than to the nature and contents of the information. Accordingly, MCR 6.202 provides for the disclosure that the information formerly provided. In fact, however, MCR 6.202 goes further, for the provision requires disclosure not only of res gestae

witnesses but of all witnesses who have information that may be relevant to the offense charged. In addition, the rule requires the prosecutor to specify those witnesses he or she intends to call at trial. MCR 6.202 thus adds Michigan to the distinct minority of states that have followed the ABA standards in providing for such liberal discovery in this area.

The major concern of those who oppose such broad disclosure is that of witness intimidation. This concern is addressed in MCR 6.211, which deals with protective orders. Once the names of witnesses are disclosed, however, little reason exists for not also disclosing the statements of such witnesses. Again, however, jurisdictions vary. A number of states follow the federal Jencks Act, which precludes disclosure of statements until the witness has testified at trial. See 18 USC 3500. A number provide for disclosure limited to those witnesses the prosecutor intends to call. A few (Florida, Maine, and New Jersey, for example), require disclosure of the statements of all witnesses. MCR 6.202 follows the lead of these few states and the ABA standards. Written statements and any memoranda summarizing the oral statements must be disclosed for all witnesses who have information relevant to the offense. Arguably, Michigan law already has moved in the direction of liberal discovery in this area. See *People v Peete*, 113 Mich App 510, 515; 317 NW2d 666 (1982); *People v Hayward*, 98 Mich App 332, 335-336; 296 NW2d 250 (1980); *People v Walton*, 71 Mich App 478; 247 NW2d 378 (1976).

Michigan law now provides for pretrial disclosure to the defendant of the testimony of grand jury witnesses. GCR 1963, 787. MCR 6.202 requires disclosure of the names and statements of all witnesses who have information that may be relevant to the offense. This obviously applies to grand jury witnesses. Because it would have been redundant, no rule specifically referring to grand jury witnesses is included in MCR 6.202.

Disclosure under this rule need not be duplicative. For example, both the names and statements of witnesses may be contained in police reports which the prosecutor has made available to the defense. See MCR 6.202(5). When this is so, the prosecutor need not make a separate list of witnesses nor separately duplicate their statements. MCR 6.202 enumerates the information that the prosecutor must make available, but it does not designate any particular manner of making it available, and it certainly does not require that information provided under one heading must again be provided if it also falls under another. Substance not form is required. It warrants emphasis, however, that complete disclosure must be provided. For example, disclosing a summary of a witness's oral statement is no substitute for disclosing a written statement also in the prosecutor's possession or control. In such a case, both statements must be disclosed.

On occasion, the prosecutor may know of a witness with relevant information but not know the witness's name. Under MCR 6.202, the defense must be told about this witness, and any statements from the witness must be disclosed.

4. Criminal records. Rules pertaining to the discovery of the criminal records of the defendant and of witnesses vary considerably. Under

FR Crim P 16(a)(1)(B), the defendant is entitled to a copy of his own prior record to the extent it "is within the possession, custody, or control of the government" and if its existence "is known, or by the exercise of due diligence may become known, to the attorney for the government." ABA standard § 11-2.1(a)(vi) provides the defendant a right to disclosure of his own criminal record and that of any codefendant. The Standard arguably goes further, however, because its enumeration of items that must be disclosed is only illustrative of the open file disclosure the prosecutor must make. Illinois gives the defendant a right to "any record of prior convictions, which may be used for impeachment, of persons whom the State intends to call as witnesses. . . ." Ill S Ct R 412(a)(vi). Washington gives the defendant a right to "any record of prior criminal convictions known to the prosecuting attorney of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial." Wash R 4.7(a)(1)(vi). Minnesota entitles the defendant to his own prior record to the extent it is "known" to the prosecutor, but only if the defendant "informs the prosecuting attorney of any such records known to the defendant." Minn R Crim P 9.01 Subd. 1(5). A number of states do not deal with the matter at all.

The requirement in some states that the record be "known" to the prosecutor reflects a concern about the scope of the prosecutor's obligation. Without such a limitation, the question arises whether the prosecutor is responsible for knowledge of convictions obtained in the county, throughout the state, in other states, in the federal courts, or in some combination of these. Moreover, even if the scope of the prosecutor's obligation is narrow, the problem of assuring accuracy even in this computer age has not been overcome. Indeed, both prosecutors and defense lawyers agree that the computers currently employed are notoriously inaccurate in producing criminal records of suspects and witnesses. The committee felt that any rule imposing an obligation on the prosecutor to discover criminal records would be unduly burdensome, ultimately unworkable, and a cause of litigation over inaccuracies.

The committee also felt, however, that the prosecutor should not be permitted to surprise the defendant at trial. Accordingly, the prosecutor is required to disclose any criminal record, pertaining to the defendant or a witness, that the prosecutor intends to use at trial. This does not rule out broader discovery, however. The defendant always can seek informally more than MCR 6.202 requires. See MCR 6.201 encouraging the parties to provide more discovery than these rules mandate. Second, the defendant always can seek an order for broader discovery under the discretionary provisions in MCR 6.203. Finally, the constitution in some instances may require broader discovery. See, *e.g.*, *People v Torrez*, 90 Mich App 120; 282 NW2d 252 (1979).

5. Police reports. Discovery of police reports is not treated by rule in most jurisdictions. But, see, Idaho Crim R 16(b)(7) ("Upon written request of the defendant the prosecuting attorney shall furnish to the defendant reports and memoranda in his possession which were made by a police officer or investigator in connection with the investigation or prosecution of the case."); NJ R 3:13-3(a)(9) (police reports in

prosecutor's control). Contra Minn R Crim P 9.01 Subd. 3(1)(b) (specifically exempting from discovery reports and memoranda made by "prosecution agents in connection with the investigation or prosecution of the case. . ."); Kan Code Crim P § 22-3212(2) (specifically exempting "reports, memoranda, or other internal government documents made by officers in connection with the investigation or prosecution of the case . . .").

Reflecting its commitment to broad discovery, the committee decided to follow the lead of states like Idaho and New Jersey in specifically making discovery of police reports available. See also *Bay County Prosecutor v Bay County Dist Judge*, 109 Mich App 476; 311 NW2d 399 (1981) (indicating that a policy of refusing to disclose police reports obstructs the pursuit of justice).

The word "memoranda" in this rule is meant to include an officer's field notes. *Cf. People v Florinchi*, 84 Mich App 128; 269 NW2d 500 (1978) ("police reports" should be viewed as including police "tip sheets"). Again, the philosophy underlying MCR 6.202 is one of broad disclosure. The rule, however, does not itself impose any obligation on the police to preserve field notes. Of course, if the prosecutor intends to offer a police report into evidence, the field notes or "fragmentary notes" used to prepare the report must be preserved. *People v Rosborough*, 387 Mich 183; 195 NW2d 255 (1972).

Under MCR 6.204, the prosecutor is responsible for disclosure of police reports that are in the possession of the police. This, of course, requires prosecutors to establish a procedure assuring full and open communication between the police and prosecutor's office. The committee considered and rejected objections that police departments sometimes are defiant of the prosecutor's requests. For purposes of a criminal prosecution, the police and the prosecutor's office must both be considered as representatives of the state.

MCR 6.202(5) does exempt from disclosure information in the police report that relates to continuing or other police investigations. This exemption and the provisions in MCR 6.210(B) and (C) and 6.211(A) and (B) adequately should protect legitimate law enforcement interests.

6. Tangible objects. This provision is fairly typical. See FR Crim P 16(a)(1)(C); ABA Standard for Criminal Justice (2d ed), 11-2.1(a)(v). The wording is taken from the latter. The manner of providing disclosure is governed by MCR 6.204. Protective orders, MCR 6.211(B), are available to minimize concerns about the security of evidence.

7. Searches and affidavits. For purposes of filing appropriate suppression motions, the defendant should be aware of the existence of any search, seizure, or electronic surveillance conducted in connection with his case. To some extent, this information would be made available by compliance with MCR 6.202(6), for that section requires disclosure of any items that were obtained from or belong to the defendant. This subrule makes clear, however, that the defendant should be informed of searches even when they are not productive. Moreover, the subrule makes clear that the defendant should be informed of any electronic surveillance conducted in connection with his case. See, *e.g.*, ABA Standard for Criminal Justice (2d ed), 11-2.1(b)(ii); Fla R Crim P 3.220(a)(1)(viii) and (ix).

The defendant also should receive discovery of any documents relating to these activities. Accordingly, the rule states that the defendant has a right to "any affidavits, warrants, and returns" pertaining to them. Once again, however, it requires emphasis that the manner of providing disclosure is governed by MCR 6.204. For example, the prosecutor under MCR 6.204 could satisfy the mandate of MCR 6.202(7) by directing the defendant's lawyer to the court file containing the papers that must be disclosed.

8. Plea agreements and grants of immunity. Arguably the constitution requires disclosure of the information included in this subrule. See, *e.g.*, *Giglio v United States*, 405 US 150; 92 S Ct 763; 31 L Ed 2d 104 (1972). Whatever the scope of the constitutional rule, however, no reason exists for not informing the defendant of plea agreements or grants of immunity that witnesses have received.

Rule 6.203 Other Discovery

(A) Information in the Prosecutor's Control. Except as otherwise provided in MCR 6.210 and 6.211, the court, in its discretion, and on a showing of materiality to the preparation of the defense, may require the prosecutor to disclose information or evidence not covered by MCR 6.202.

(B) Orders to Conduct Tests. Except as provided in MCR 6.211, the court, on a showing of materiality to the preparation of the defense, may require tests, examinations, or other procedures to be performed.

(C) Physical and Mental Examinations of Witnesses. Absent compelling circumstances, the court shall not order the physical or mental examination of any witness including the complainant.

Note

Subrule (A). While MCR 6.202 is very broad, it does not require the prosecution simply to open its entire file to the defendant. Because of this, a provision is needed to assure disclosure, when appropriate, of information not covered by MCR 6.202. MCR 6.203(A) gives the court discretion to order further disclosure on a showing of materiality to the preparation of the defense. Of course, before seeking a court order, the defendant should informally seek the desired disclosure from the prosecutor. See MCR 6.201.

This subrule does not attempt to define the term "materiality." The meaning of this term must be provided in the context of specific fact situations. Because the governing standard, however, is materiality to the preparation of the defense, information may be disclosed under this subrule even if it is not admissible in evidence.

For similar provisions in other jurisdictions, see Fla R Crim P 3.220(a)(5) ("Upon a showing of materiality to the preparation of the defense, the court may require such other discovery to defense coun-

sel as justice may require"); Minn R Crim P 9.01, Subd. 2 ("Upon motion of the defendant with notice to the prosecuting attorney, the trial court . . . may, in its discretion, require the prosecuting attorney to disclose to defense counsel and to permit the inspection, reproduction or testing of any relevant material and information not subject to disclosure without order of court under Rule 9.01, subd. 1, provided, however, a showing is made that the information may relate to the guilt or innocence of the defendant or negate the guilt or reduce the culpability of the defendant as to the offense charged"). See also ABA Standard for Criminal Justice (2d ed), 11-2.5 ("Upon a showing that items not covered in standards 11-2.1, 11-2.3, or 11-2.4 are material to the preparation of the defense, the court may order disclosure to defense counsel of the specified material or information").

Subrule (B). MCR 6.202 and 6.203(A) are concerned with the disclosure to the defense of existing information. In some instances, however, the defendant may have a need for information that can be obtained only if certain tests or procedures are conducted. For example, a defendant may want a handkerchief tested for traces of blood or sperm. *Cf. People v Jordan*, 23 Mich App 375; 178 NW2d 659 (1970)(defendant charged with statutory rape, defendant's stained handkerchief introduced into evidence, state had not identified stains through scientific analysis). Similarly, a defendant may desire a line-up before trial to test the ability of eyewitnesses to identify him. In these situations, the defendant is requesting the prosecution to obtain information that it does not then possess.

No simple black-letter principle can cover the myriad situations that may arise. The need for a scientific test in a case like *Jordan, supra*, arguably is much greater than the need for pretrial line-ups in many cases. With respect to the latter, the general view is that the decision whether to order a pretrial line-up is left to the trial judge's discretion. See, *e.g., United States v Ravich*, 421 F2d 1196 (CA 2, 1970). On the other hand, the defendant's argument for a line-up before witnesses observe him in court is stronger when eyewitness identification evidence is crucial and contested. See *United States v Smith*, 154 US App DC 111; 473 F2d 1148 (1972); *Commonwealth v Sexton*, 246 Pa Super 30; 369 A2d 794 (1977). In some cases, procedures requested by the defense may be conducted easily and inexpensively; in others, the procedures may be burdensome. Obviously, the facts in each case must be considered and the legitimate interests of both sides balanced.

MCR 6.202(2) recognizes the judge's authority to order the prosecutor to conduct tests and procedures. The rule leaves the matter to the judge's discretion under a materiality standard. See ABA Standard for Criminal Justice (2d ed), 11-2.5(a), Commentary, p 11.37. The rule is subject to the limitation set forth in MCR 6.211. Requests for the examination of witnesses is governed by MCR 6.203(C).

Subrule (C). Requests for the physical or mental examinations of witnesses obviously involve more than the typical discovery concerns of possible perjury or witness intimidation. Such requests implicate the privacy and dignity interests of the affected individual. Accordingly, MCR 6.202(3) states that the trial judge shall not order such tests except in compelling circumstances. See, *e.g., People v Freeman*

(After Remand), 406 Mich 514; 280 NW2d 446 (1979) (absent showing of need, defendant charged with criminal sexual conduct has no right to have complaining witness examined by psychiatrist; in showing need, defendant must do more than make "amorphous contentions" about lack of corroboration for criminal charge or need to attack witness's credibility.) See also *People v Gerald Wells*, 102 Mich App 558, 563; 302 NW2d 232 (1980).

Rule 6.204 Performance and Scope of Prosecutor's Obligations

(A) Prosecutor's Possession or Control. Material and information is within the prosecutor's possession or control for purposes of MCR 6.202 if it is within the possession or control of the prosecutor, of members of the prosecutor's staff, or 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 the prosecutor's office.

(B) Time of Disclosure. Except as provided in MCR 6.206, or unless a court order otherwise specifies, the prosecutor shall make disclosure as soon as practicable following the receipt of a discovery request or court order.

(C) Manner of Performance. Except as provided in MCR 6.206, or unless a court order otherwise specifies, the prosecutor shall make disclosure in any manner mutually agreeable to the parties or by

(1) Notifying the defendant's lawyer that the requested information or material may be inspected, obtained, tested, or reproduced during specified reasonable times, and

(2) Making available to the defendant's lawyer at the time specified suitable facilities or other arrangements for inspecting, testing, and upon defense request, reproducing at actual cost such material and information.

Note

Subrule (A). The prosecutor's responsibility under MCR 6.202 is for enumerated information within his or her "possession or control." This subrule defines "possession or control." The prosecutor's responsibility clearly must extend beyond the office file on the defendant's case. Otherwise, information would be immunized from disclosure simply by being kept in a police file. On the other hand, some limit must be placed on the scope of the prosecutor's responsibility. Certainly, the prosecutor cannot be expected to disclose information that

is unknown even to those who have investigated or evaluated the defendant's case. Subrule (A) makes the prosecutor responsible for information within the possession or control of the prosecutor's office and within the possession or control of any agency that participated in the investigation of the case if (a) that agency, like the police department, regularly reports to the prosecutor's office, or (b) that agency has reported to the prosecutor's office with respect to the defendant's case.

Subrule (A) is taken almost verbatim from ABA Standard for Criminal Justice (2d ed), 11-2.1(d). See also Colo R Crim P 16(a)(4); Idaho Crim R 16(a); Minn R Crim P 9.01, Subd. 1(7). Obviously, this rule places a burden upon the prosecutor to assure that the police department or other investigative agency involved in the case makes full disclosure to the prosecutor's office. Some rules make this specific. See, *e.g.*, ABA Standard for Criminal Justice (2d ed), 11-2.2(c) ("The prosecutor shall ensure that a flow of information is maintained between the various investigative personnel and the prosecutor's office sufficient to place within the prosecutor's possession or control all material and information relevant to the accused and the offense charged"); Ill Sup Ct R 412(f) (same). While the committee felt that such a provision should not be included, the scope of subrule (A) is sufficiently broad to place such a burden upon the prosecutor.

Subrule (B). This subrule is taken from ABA Standard for Criminal Justice (2d ed), 11-2.2. Both to promote plea discussions and to assure the defendant adequate time to prepare for pretrial hearings and for trial, the prosecutor should provide discovery as soon as possible following a defense request. MCR 6.208(B) subjects the defendant to the same time requirements. Of course, a court order for disclosure may specify whatever time limitations the judge thinks appropriate.

If the defendant believes the prosecutor is unreasonably delaying disclosure, the defendant can seek a court order and possibly even sanctions. MCR 6.212. If the prosecutor believes that early disclosure will jeopardize legitimate law enforcement interests or create an undue risk of harm to witnesses, the prosecutor can move for an order permitting delay in disclosure. MCR 6.211(B). In most cases, however, discovery should proceed expeditiously without court involvement.

Subrule (B) goes considerably further than the rules in many other jurisdictions. See, *e.g.*, Fla R Crim P 3.220(a)(1) (requiring disclosure "[a]fter the filing of the indictment or information, within fifteen days after written demand by the defendant, . . ."); Mo Sup Ct R 25.02 (permitting discovery to commence "whenever an indictment is found, or an information filed"). But see Ill Sup Ct R 412(d) (following the ABA approach).

Subrule (C). This subrule specifies that the manner of providing discovery is to be governed by mutual agreement of the parties. This is consistent with the underlying philosophy of these rules stressing informal discovery between the parties. In any event, unless a court order provides otherwise, the prosecutor can satisfy the obligations of MCR 6.202 and 6.203 by notifying defense counsel (or the defendant if he is proceeding pro se) and making suitable facilities available at a reasonable time for disclosure. For similar provisions, see ABA Standard for Criminal Justice (2d ed), 11-2.2(b); Ill Sup Ct R 412(e); Mo Sup Ct R 25.07.

The method of providing disclosure obviously will vary depending upon the type of information requested. A defendant may want to inspect a building or other physical facility. Sometimes he may want to photograph parts of the building. With respect to certain documents, reading and inspection may be adequate. The subrule requires the parties to work out the appropriate method of disclosure, but the court is available to resolve disputes when necessary. The subrule does specify, however, that the defendant is entitled to duplicate any material that can be duplicated, provided he pays the actual costs. The rule does not address those circumstances in which the constitution may require that duplication be provided free of charge for indigent defendants.

Rule 6.205 Mandatory Disclosure by the Defense

Except as provided in MCR 6.210 and 6.211, the defendant's lawyer, upon request, shall disclose to the prosecutor the following material and information within the lawyer's possession or control:

(1) The nature of any defense as to which the defendant intends to offer evidence at trial;

(2) The names and last known addresses of all witnesses other than the defendant whom the defendant intends to offer at trial together with their written or recorded statements and memoranda summarizing their oral statements;

(3) Any reports or statements by experts concerning mental or physical examinations, or tests, experiments, or comparisons

(a) that the defendant intends to offer in evidence, or

(b) that were prepared by a witness whom the defendant intends to call as a witness, provided that the report or statement relates to the testimony to be offered.

(4) Any books, papers, documents, photographs, or tangible objects that the defendant intends to offer in evidence or that relate to the testimony of a witness whom the defendant intends to call.

Note

In general. The first consideration that must be addressed in making discovery a two-way street is whether and to what extent the constitution, specifically the fifth amendment protection against compulsory self-incrimination, permits discovery from the defendant. In

recent years, it has become evident that the fifth amendment is not much of an impediment to such discovery.

Williams v Florida, 399 US 78; 90 S Ct 1893; 26 L Ed 2d 446 (1970) was the first significant case in this area. *Williams* upheld a Florida statute that requires the defendant to advise the prosecutor before trial of his intention to present an alibi defense and that also requires that he inform the prosecutor where he claims to have been and the witnesses who will support this defense at trial. See also MCL 768.20; MSA 28.1043. The reasoning in *Williams*, however, was more significant than the holding. Rejecting the defendant's fifth amendment argument, the Court said,

> Nothing in such a rule requires the defendant to rely on an alibi or prevents him from abandoning the defense; these matters are left to his unfettered choice. That choice must be made, but the pressures that bear on his pretrial decision are of the same nature as those that would induce him to call alibi witnesses at the trial: the force of historical fact beyond both his and the State's control and the strength of the State's case built on these facts. Response to that kind of pressure by offering evidence or testimony is not compelled self-incrimination transgressing the Fifth and Fourteenth Amendments.
>
> In the case before us, the notice-of-alibi rule by itself in no way affected petitioner's crucial decision to call alibi witnesses or added to the legitimate pressures leading to that course of action. *At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information which the petitioner from the beginning planned to divulge at trial.* [399 US at 84-85 (emphasis added).]

The scope of this reasoning was not missed by dissenting Justice BLACK. As he stated, the Court's reasoning "goes at least so far as to permit the State to obtain under threat of sanction complete disclosure by the defendant in advance of trial of all evidence, testimony, and tactics he plans to use at that trial." *Id.*, 114 (BLACK and DOUGLAS, JJ., *dissenting*).

While *Williams* makes clear that the defendant can be required to disclose before trial information he intends to use at trial, other cases make clear that not all information in the defendant's possession is protected by the fifth amendment in any event. In *Schmerber v California*, 384 US 757; 86 S Ct 1826; 16 L Ed 2d 908 (1966), the Supreme Court held that physical evidence, unlike testimonial or communicative evidence, simply is outside the scope of the fifth amendment's protection. *Schmerber* upheld the taking of blood from the defendant to test for intoxication. See also *Gilbert v California*, 388 US 263; 87 S Ct 1951; 18 L Ed 2d 1178 (1967) (defendant can be required to give a writing sample); *United States v Dionisio*, 410 US 1; 93 S Ct 764; 35 L Ed 2d 67 (1973) (defendant can be subpoenaed by grand jury to provide a voice sample). The Court relied on these cases in *United States v Nobles*, 422 US 225; 95 S Ct 2160; 45 L Ed 2d 141 (1975), when it upheld a trial court order requiring a defense investigator to disclose statements he had obtained from witnesses.

In *Nobles*, the defense investigator interviewed two key prosecution witnesses before trial. At trial, the defense lawyer used this report to cross-examine the witnesses. When the defense called the investigator to impeach these witnesses further, the trial judge ordered the investigator to disclose to the prosecutor the full statements he had taken from the witnesses. When the defense refused to make disclosure, the trial judge refused to permit the investigator to testify. The Supreme Court upheld the trial court's actions. Although the disclosure was ordered at trial rather than before trial, nothing in the Court's fifth amendment discussion turned on this:

> The Court of Appeals concluded that the Fifth Amendment renders criminal discovery "basically a one-way street." Like many generalizations in constitutional law, this one is too broad.
>
> * * *
>
> In this instance disclosure of the relevant portions of the defense investigator's report would not

impinge on the fundamental values protected by the Fifth Amendment. The court's order was limited to statements allegedly made by third parties who were available as witnesses to both the prosecution and the defense. Respondent did not prepare the report, and there is no suggestion that the portions subject to the disclosure order reflected any information that he conveyed to the investigator. *The fact that these statements of third parties were elicited by a defense investigator on respondent's behalf does not convert them into respondent's personal communications. Requiring their production from the investigator therefore would not in any sense compel respondent to be a witness against himself or extort communications from him.*

We thus conclude that the Fifth Amendment privilege against compulsory self-incrimination, being personal to the defendant, does not extend to the testimony or statements of third parties called as witnesses at trial. [422 US at 233-234 (emphasis added).]

Finally, *Fisher v United States*, 425 US 391; 96 S Ct 1569; 48 L Ed 2d 39 (1976), casts doubt even on whether the defendant's own written statements are protected by the Fifth Amendment. The Court first analogized written papers to physical objects that are not protected by the Fifth Amendment. *Id.*, at 409, citing *Schmerber, supra*. In a footnote, the Court added,

> The fact that the documents may have been written by the person asserting the privilege is insufficient to trigger the privilege. And, unless the Government has compelled the subpoenaed person to write the document, the fact that it was written by him is not controlling with respect to the Fifth Amendment issue. . . . In the case of a documentary subpoena the only thing compelled is the act of producing the document and the compelled act is the same as the one performed when a chattel or document not authored by the producer is demanded. [425 US at 410 n 11 (citations omitted).]

See also *United States v Doe*, —US —; 104 S Ct 1237; — L Ed 2d — (1984) (reaffirming *Fisher* and rejecting a narrow reading of that case).

Fisher's precise scope is not clear. First, the subpoenaed documents in that case were accountant's workpapers, not the defendant's private writings. Second, the Court suggested that turning over documents may implicitly convey information to the government, information that could be used to authenticate the documents at trial. To this extent, the Court suggested, the Fifth Amendment may provide a defense to disclosure. See, also, *United States v Doe, supra*, specifically holding that while the Fifth Amendment does not protect the contents of papers, it protects against self-incriminating testimonial acts of disclosure. Nevertheless, it should be seen that *Fisher's* potential reach is broad. In addition, when *Fisher* and *Williams* are read together, no doubt can exist that the defendant can be required to disclose papers *that he intends to use at trial.*

Once it is recognized that the constitution is not much of an obstacle to two-way discovery, the remaining consideration is whether policy reasons exist for not providing such discovery. The primary purpose of the criminal trial is the search for truth: the guilty should be convicted, the innocent acquitted. Because we consider it more serious to convict an innocent person than to acquit a guilty one, we have skewed our procedures to put the risk of error on the state. The high burden of proof in criminal cases is designed to protect the innocent even at the expense of acquitting some of the guilty. Nothing in discovery, of course, creates a risk to the innocent. Rather, the purpose of broad discovery is to facilitate the search for truth.

The criminal justice system has concerns other than the search for truth. To some extent, the criminal justice system must be concerned about control of official behavior. For example, uncontrolled, widespread wiretapping would ensnare the guilty without increas-

ing the risk of convicting the innocent, but we do not permit our criminal justice system to operate this way. Truth cannot be obtained at any cost, but only consistently with the values of privacy and liberty that a free society holds dear. To this extent, therefore, the criminal justice system must be concerned with controlling official misconduct. Discovery from the defense, however, does not involve this concern.

The only possible objection to discovery from the defendant is that somehow it is unfair. But unfair in what sense? Fairness requires that the defendant have every opportunity to present a full defense. This fairness concern lends support to broad discovery from the prosecutor. In addition, as noted above, fairness demands that the state not obtain a conviction, even if reliable, by engaging in serious misconduct. Beyond this, however, fairness does not impose obstacles in the path of accurate factfinding. It is not unfair to convict a guilty defendant, and certainly the criminal justice system should not have a goal of giving guilty defendants a sporting chance to escape conviction. Broad discovery from both sides facilitates the search for truth, and there is nothing unfair in truth being ascertained. In the committee's view, therefore, the argument is persuasive that discovery should be as broad as the constitution will permit.

In fact, however, the committee did not go as far as the constitution apparently permits. MCR 6.205 is drawn carefully to comply with *Williams*. It does not go beyond the *Williams* rationale, even though cases like *Nobles*, *Fisher*, and *Doe* would support broader discovery. Moreover, while it is arguable that the defendant could be required to provide "open file" discovery to the prosecutor as a condition for obtaining discovery, the committee elected not to go down this route. Thus, discovery under these rules remains slanted in the defendant's favor. Three considerations explain the committee's reluctance to draft a broader rule. First, the precise scope of constitutional allowance is not yet clearly defined. See *Doe*, *supra*. Second, broad discovery from the defendant is a new concept for Michigan, one that will require a period of adjustment. If the constitutional trend continues, and if discovery from the defendant works as well as the committee thinks it will, there will be time enough to go further. Third, broader discovery than that provided for in these rules would put Michigan ahead of other states in this area.

While broad discovery from the defendant is a new concept for Michigan, other states already have moved in this direction. Thus, by adopting such discovery rules, Michigan is following the lead of other states rather than charting new paths. See, *e.g.*, Ariz R Crim P 15.2(a)-(f) (requiring, among other things, defense disclosure of "all defenses as to which [the defendant] will introduce evidence at trial,. . ." witnesses who will be called, statements of such witnesses, and documents that will be introduced); Ark R Crim P 18.1-18.3 (similar); Colo R Crim P 16, Part II(c) (similar); Fla R Crim P 3.220(b)(4) (names and statements of witnesses to be called); Idaho Crim P 16(c) (names of witnesses to be called; documents the defense intends to offer); Ill Sup Ct R 413(d) (defense shall disclose "any defenses which he intends to make at a hearing or trial. . ."; witness names, addresses, and statements; documents intended to be used as evidence or for impeachment); Minn R Crim P 9.02 (same) (Minnesota also requires the defendant to disclose his known criminal record as a condition for obtaining his prior record from the prosecutor. *Id.*, 9.01); Mo Sup Ct R 25.05 (names and addresses of witnesses defense intends to call; statements of such witnesses; documents intended to be introduced, except portions containing the defendant's own statements). Some states, by contrast, still remain restrictive in this area. See, *e.g.*, *People v Collie*, 30 Cal 3d 43; 177 Cal Rptr 458; 634 P2d 534 (1981) (prohibiting trial courts from ordering discovery from defendant absent authorizing legislation; suggesting that such legislation might be unconstitutional under state constitution). See, also, ABA Standard for Criminal Justice (2d ed), 11-3.3 (taking a more restrictive approach to discovery from the defendant than that taken by the above cited states).

MCR 6.205 is a counterpart to MCR 6.202. Upon request, the defendant must comply with the requirements of this rule. If the prosecutor desires broader

disclosure, the discretionary provisions in MCR 6.207 are available.

1. Nature of defense. As the above commentary indicates, this requirement is consistent with *Williams* and with the rules adopted in a number of states. It goes further than present Michigan law, which requires notice only of alibi and mental illness defenses. MCL 768.20, 768.20(a); MSA 28.1043, 28.1043(1). This rule does not preclude the defendant from challenging at trial the prosecutor's proof as to the elements of the crime. The rule simply requires the defendant to advise the prosecutor, upon request, of any defenses as to which he will offer evidence at trial.

MCR 6.208 governs the manner of disclosure. Like the prosecutor, the defendant is required to make disclosure as soon as possible. In the early stages of the case, however, the defendant may not know the defense(s) he intends to make. It is obvious that disclosure cannot occur until such an intent is formed. The defendant and his lawyer are expected, however, to comply with this rule in good faith. A prosecutor who believes that the defense is procrastinating unduly can go to court for a discovery order and possibly even for sanctions. MCR 6.212. (It should be noted, however, that MCR 6.212 does not permit the judge to preclude the defendant from testifying in his own behalf. Nor does it rule out the possibility that the only sanction imposed will be a continuance.)

Throughout this rule, the term defendant's lawyer includes the defendant when he is representing himself.

2. Witness names and statements. The wording of this requirement parallels that in MCR 6.202(3), except that while the prosecutor is required to disclose all witnesses who have relevant information about the case, the defendant need only disclose those witnesses he intends to call at trial. See the introductory commentary to this rule.

3. Expert names and reports. This is not a controversial provision. It is common in most jurisdictions. *Cf.* FR Crim P 16(b)(1)(B). Again, this rule is fully consistent with the rationale in *Williams.* While a broader rule would be permissible under *Nobles,* the mandatory requirements of MCL 6.205 do not go as far as the constitution would permit.

4. Tangible objects. Cf. FR Crim P 16(b)(1)(A). While a broader rule would be constitutionally permissible, see, *e.g., Andresen v Maryland,* 427 US 463; 96 S Ct 2737; 49 L Ed 2d 627 (1976), broader disclosure than that provided in this section, which is mandatory, must be sought under the discretionary provisions in MCR 6.207.

Rule 6.206 Alibi and Mental Illness Defenses

Whether or not the prosecutor has made a request for disclosure, the defendant's lawyer shall inform the prosecutor of the defendant's intent to rely on an alibi, insanity, or mental illness defense.

(A) Alibi. If the defendant intends to rely on an alibi defense, the defendant's lawyer shall notify the prosecutor in writing of such intent not less than seven days before the date set for the omnibus hearing (MCR 6.215). Within fourteen days of the receipt of such notice or at the omnibus hearing, whichever is earlier, the prosecutor shall serve upon the defendant written notice of an intent to offer a rebuttal to the alibi defense.

(B) Insanity and Mental Illness Defenses. If the defendant intends to rely on an insanity defense, a defense of diminished capacity, or a defense of mental illness negating an element of the alleged offense, the defendant's lawyer shall notify both the court and the prosecutor in writing of such intent not less than seven days before the date set for the omnibus hearing (MCR 6.215).

(1) On receipt of such notice, or at the omnibus hearing, the court shall order the defendant to undergo an examination relating to his claim of insanity or

mental illness by personnel of the center for forensic psychiatry for a period not to exceed thirty days.

(2) Either party, on adequate notice to the other, may obtain an independent psychiatric evaluation of the defendant by a clinician of his or her choice. If the defendant is indigent, he shall obtain such an examination at the county's expense.

(3) Statements made by the defendant during an examination provided for in this rule are not admissible in evidence on any issue other than his mental illness or insanity at the time of the offense.

(4) Without request, each person who evaluates the defendant under this rule shall prepare a report and submit it to both parties.

(5) Within fourteen days after receipt of the report from the center for forensic psychiatry or within fourteen days after receipt of the report of an independent examiner secured by the prosecutor, whichever occurs later, but not later than fourteen days before trial, the prosecutor shall inform the defendant's lawyer of an intent to rebut a defense of insanity or mental illness.

(C) Time for Compliance. The court may modify the time periods set forth in this rule.

Note

Because MCR 6.205 entitles the prosecutor upon request to all defenses as to which the defendant intends to offer evidence at trial, the notice provisions of this rule arguably are unnecessary. They are included, however, for several reasons. First, the Legislature has singled out alibi and insanity defenses for special treatment concerning pretrial notice. MCL 768.20, 768.20a, 768.21; MSA 28.1043, 28.1043(1), 28.1044. Second, the Legislature provided that the defendant must provide notice of an intent to rely on these defenses without any request by the prosecutor. MCR 6.206 retains this requirement, while MCR 6.205 provides discovery to the prosecutor only upon request. Finally, the insanity defense requires special attention in any event because of the need to provide for psychiatric examination of the defendant.

Subrule (A). This subrule follows the statutory pattern except that the time periods for providing notice have been altered. The new time periods relate to the new omnibus hearing procedure established by these rules. See MCR 6.215. The intent of the omnibus hearing requirement is to provide a procedural mechanism for the resolution of all pretrial motions and issues on a date certain before trial. Under subrule (C), the court may modify the time periods established in this rule.

Because the disclosure of the names of witnesses is fully covered by MCR 6.202 and 6.205, that subject is not treated in this subrule. Under those rules, the defendant, upon request, must disclose the names of all witnesses he intends to call at trial, and the prosecutor, upon request, must disclose all witnesses with relevant information about the case. Those rules obviously encompass alibi and alibi rebuttal witnesses. Moreover, those rules also mandate disclosure of the statements of such witnesses.

Subrule (B). This subrule also follows the statutory pattern except that again the relevant time periods relate to the date set for the omnibus hearing.

Under MCL 768.20(a); MSA 28.1043(1), the defendant must provide notice of an intent "to offer in his or her defense testimony to establish his insanity. . . ." Nevertheless, the case law makes clear that "insanity" includes diminished capacity, or as it is sometimes called mental illness negating an element of the offense. See *People v Atkins*, 117 Mich App 430, 435-436; 324 NW2d 38 (1982); *People v Gilbert*, 101 Mich App 459, 470-471; 300 NW2d 604 (1980); *People v Mangiapane*, 85 Mich App 379; 271 NW2d 240 (1978). Of course, this subrule is intended neither to broaden nor to narrow the scope of permissible mental illness defenses. Thus, in using the terms "diminished capacity" and "mental illness negating an element of the alleged offense," terms which seem to be used interchangeably in the cases, the subrule intends only to assure that pretrial disclosure is made for any mental illness defense permitted by the substantive criminal law.

The provisions regarding the court ordered psychiatric examination of the defendant generally follow the present law. Again, time periods relate to the omnibus hearing procedure. The defendant may move for an independent psychiatric examination before the forensic center's examination is conducted.

Rule 6.207 Other Discovery

(A) Information in the Control of the Defendant's Lawyer. Except as provided in MCR 6.210 and 6.211, the court, in its discretion, and on a showing of materiality to the preparation of the prosecution, may require the defendant's lawyer to disclose information or evidence not covered by MCR 6.205 and MCR 6.206.

(B) Orders to Conduct Tests. Except as provided in MCR 6.211, the court, on a showing of materiality to the preparation of the prosecution, may require tests, examinations, or other procedures to be performed.

(C) Physical or Mental Examinations of Witnesses. Absent compelling circumstances, the court shall not order the physical or mental examination of any defense witness.

Note

This rule is a counterpart to MCR 6.203. Just as the defense may seek broader discovery than that provided in the mandatory sections of MCR 6.202, the prosecutor may seek broader discovery than that provided in the mandatory sections of MCR 6.205 and 6.206. Both 6.203 and 6.207 are discretionary. Both use the same materiality standard.

It should not require mention that the judge may not order any discovery under this rule that would violate the defendant's constitutional rights. Like all provisions in these rules, MCR 6.207 is subject to constitutional limitations.

Subrule (B) is meant to cover such things as an order to appear in a line-up, to speak for identification purposes, to submit to fingerprinting, to provide fingernail specimens, and to provide handwriting samples. These examples are merely illustrative. The reach of the subrule is as broad as the reach of MCR 6.203(B), subject of course to constitutional limitations.

Subrule (C) recognizes the same protection for the defendant's witnesses that MCR 6.203(C) recognizes for the prosecutor's witnesses.

Rule 6.208 Performance and Scope of Defense Obligations

(A) Defense Lawyer's Possession or Control. Material and information is within the possession or control of the defendant's lawyer for purposes of MCR 6.205 if it is within the possession or control of the lawyer, of members of the lawyer's staff, of the defendant, or of any other person who has participated in the investigation of the case on behalf of the defense.

(B) Time of Disclosure. Except as provided in MCR 6.206, or unless a court order otherwise specifies, the defendant's lawyer shall make disclosure as soon as practicable following the receipt of a discovery request or court order.

(C) Manner of Performance. Except as provided in MCR 6.206, or unless a court order otherwise specifies, the defendant's lawyer shall make disclosure in any manner mutually agreeable to the parties or by

(1) Notifying the prosecutor that the required information or material may be inspected, obtained, tested, or reproduced during specified reasonable times, and

(2) Making available to the prosecutor suitable facilities or other arrangements for inspecting, testing, and, upon the prosecutor's request, reproducing at actual cost, such material and information.

Note

This rule is intended to be identical in scope to MCR 6.204. For explanation of the provisions, see the commentary to that rule.

Rule 6.209 Continuing Duty to Disclose

If, prior to or during trial, a party discovers additional information or material subject to disclosure under these rules, the party, without further request, shall promptly notify the other party.

Note

The rationale for this rule is obvious. A party should not escape responsibility under these rules simply because the discoverable information is not in the party's possession or control when a discovery request is made or a court order is issued. Rather, the party should have a continuing duty to provide the discoverable information as it comes within the party's possession or control. MCR 6.204, 6.208. No further request or court order is necessary to trigger this continuing duty to disclose. For similar provisions, see ABA Standard for Criminal Justice (2d ed), § 11-4.2, Fla R Crim P 3.220(f).

Of course, a party has a duty to disclose only if the information falls within the mandatory disclosure provisions of these rules or is covered by a judicial disclosure order. Unless and until a judicial order issues, a party does not have a *duty* to disclose information that is subject only to discretionary disclosure under these rules. See MCR 6.203, 6.207.

Rule 6.210 Material Not Subject to Disclosure

(A) Work Product. A party need not disclose legal research or records, correspondence, reports, or memoranda to the extent such items contain the opinions, theories, or conclusions of the lawyers or their legal or investigative staffs.

(B) Informants. The prosecutor need not disclose the identity of a confidential informant unless the prosecutor intends to call the informant as a witness or unless failure to disclose would violate the constitutional rights of the defendant.

(C) National Security. The prosecutor need not disclose material or information that, if disclosed, would present a substantial risk to the national security unless failure to disclose would violate the constitutional rights of the defendant or the prosecutor intends to introduce such material or information at trial.

(D) Defendant's Statements. Except as provided in MCR 6.206, the defendant's lawyer need not disclose

statements made by the defendant to the lawyer or to the lawyer's legal staff.

Note

In all jurisdictions, certain information is shielded from disclosure. Although the scope of the limitations may vary somewhat, little disagreement exists about the basic kinds of information that should be protected. See, *e.g.*, ABA standards, § 11-2.6, upon which MCR 6.210 is based.

The information described in this rule is protected against disclosure even pursuant to the discretionary discovery sections in these rules. See MCR 6.203, 6.207.

Subrule (A). The work product exemption is well established. As the commentary to the original ABA standards observed, "competition in the evaluation of facts and law has much greater value in the American system of justice than competition in the secret accumulation of facts. . . . To preserve the value engendered by the difference in perspective of opposing advocates, serious attention must be given to the dangers of dulling this perspective if the competitive spirit is dampened by knowledge that all ideas and notions which occur to the advocate must be shared, on a continuing basis, with opposing counsel." ABA Standards Relating to Discovery and Procedure Before Trial, Commentary at 89 (1970). Moreover, work product, which comprises merely the opinions or conclusions of the lawyers or their staffs, has only marginal value in assisting the parties to prepare for trial. ABA Standards for Criminal Justice (2d ed), § 11-2.6, Commentary at 11.40.

Subrule (A) narrowly defines the work product exemption. The subrule protects only the thought processes—the opinions, theories, or conclusions—of the lawyers and their staffs. For example, a statement that a lawyer obtains from a witness is *not* work product under this subrule. If the lawyer or investigator writes comments on the statement about the witness's usefulness, such opinion comments would be protected, but the witness's statement itself would be discoverable under the terms of MCR 6.202 and MCR 6.205. In such a case, the lawyer's comments could be excised from the statement under MCR 6.211. For similar definitions of work product, see Fla R Crim P 3.220(c)(1); Minn R Crim P 9.01 Subd. 3(1); Mo Sup Ct R 25.10(A).

Subrule (B). This subrule is based on ABA Standard for Criminal Justice (2d ed), § 11-2.6(b). The need to protect the identity of confidential informants is widely recognized. See, *e.g.*, Colo R Crim P 16(2); Fla R Crim P 3.220(c)(2); Idaho Crim R 16 Part I(f)(2); Ill Sup Ct R 412(j)(ii); Mo Sup Ct R 25.10(B).

Subrule (B) provides two exceptions to the protection afforded the identities of confidential informants. First, the prosecutor cannot withhold an informant's identity if the prosecutor intends to call the informant as a witness at some stage of the prosecution. Second, the prosecutor cannot withhold an informant's identity when this would violate the constitutional rights of the defendant. *Cf. Roviaro v United States*, 353 US 53; 77 S Ct 623; 1 L Ed 2d 639 (1957) (not actually decided on constitutional grounds but with strong constitutional overtones). When required to disclose an informant's identity, the prosecutor, if the case so warrants, may apply under MCR 6.211(B) for a specific order to delay disclosure.

Subrule (C). This subrule is based on ABA Standard for Criminal Justice (2d ed), § 11-2.6(c). Like subrule (B), this provision does not apply if the prosecutor intends to introduce such information at trial or if failure to provide discovery would violate the constitutional rights of the defendant.

Subrule (D). With the exception of MCR 6.206, none of the foregoing rules authorizes discovery of the defendant's own statements. Nevertheless, to remove any doubt that may exist, subrule (D) specially exempts from discovery the defendant's statements to his lawyer or to his lawyer's legal staff.

Subrule (D), however, is not intended to diminish the scope of discovery otherwise available to the prosecutor. For example, a witness may have given the defendant's lawyer a statement that relates conversations with the defendant. If the defendant intends to call this witness at trial, the witness's complete statement must be disclosed to the prosecutor pursuant to MCR 6.205(2). Subrule (D) is intended to permit free discussion between the defendant and his lawyer. Its intended scope is no broader than its underlying rationale.

Rule 6.211 Limitations on Disclosure

(A) Excision. When some parts of material or information are discoverable and other parts are not discoverable, the party shall disclose the discoverable parts and may excise the remainder. The party must inform the other party that nondiscoverable information has been excised and withheld. On motion, the court shall conduct an in camera hearing to determine whether the reasons for excision are justifiable. If the court upholds the excision, it shall seal and preserve the record of the in camera hearing for review in the event of an appeal.

(B) Protective Orders. On a showing of good cause, the court may enter such protective order as it deems appropriate. In considering whether good cause exists, the court shall consider the parties' interests in a fair trial, the risk to any person of harm, undue annoyance, intimidation, or threats, the risk that evidence will be fabricated, and the need for secrecy regarding the identity of informants or other law enforcement matters. On application, with notice to the other party, the court may permit the showing of good cause for a protective order to be made in camera. If the court grants a protective order, it shall seal and preserve the record of the proceeding for review in the event of an appeal.

Note

Subrule (A). This subrule is intended to make clear that disclosure under these rules cannot be avoided because a part of otherwise discoverable information is protected against disclosure. Rather, the party must disclose the discoverable part and may excise the protected part. See ABA Standard for Criminal Justice (2d ed), 11-4.5; Minn R Crim P § 9.03, Subd. 7. Of course, a party always is free to disclose information that need not be disclosed under these rules. See MCR 6.201.

A party excising information must inform the other party of the excision. This is necessary to permit the other party to challenge the excision in court. If such a challenge is made, the court shall conduct an in camera hearing with the party who has excised information. While adversary hearings usually are superior to in camera proceedings, it is obvious that a challenge to a party's decision to excise certain information cannot be resolved through an adversary process, for this would reveal what the party may be entitled to conceal. If the court upholds the excision, it must seal and preserve the record of its hearing. Even on appeal, however, the challenging party cannot be given access to excised information, for this would defeat the right to excise in the first place.

Subrule (B). All jurisdictions recognize that courts sometimes must issue protective orders limiting a party's obligation to disclose information that otherwise is discoverable. Jurisdictions divide, however, on the permissible scope of such protective orders. For example, FR Crim P 16(d) permits the court to enter a protective order that completely denies a party's right to certain discovery. ABA Standard for Criminal Justice (2d ed), 11-4.4, on the other hand, permits a court to take any appropriate action, "provided that all material and information to which a party is entitled is disclosed in time to permit counsel to make beneficial use of the disclosure." Rather than decide this issue in the abstract, the committee decided to leave it for judicial resolution in the context of concrete factual situations.

The party seeking a protective order has the burden of showing good cause. While subrule (B) enumerates factors that are relevant to a good cause determination, it does not attempt to define these factors precisely or to indicate how they are to be weighted in a given case. Such matters can be resolved only in the context of concrete factual situations. For example, less cause may be required to justify an order that permits a limited delay in discovery than would be needed to justify an order that drastically curtails discovery rights. In some cases, the court may feel that an order requiring a witness's testimony to be perpetuated, *cf.* MCR 6.213, may be adequate to deter threats of harm to the witness. The showing of risk for such an order arguably need not be as great as that required for an order that would shield the identity of the witness from disclosure.

Subrule (B) does not define the kinds of protective orders that may be issued. An order that postpones discovery sometimes may be appropriate. Depending upon judicial resolution of the issue left open in this subrule, an order denying discovery may be appropriate in some cases. As the above paragraph suggests, an order to perpetuate testimony may be an adequate measure for some risks. In some cases,

an order to refrain from certain conduct, with the threat of contempt held out as a possible sanction, may be adequate. Sometimes physical evidence may require special treatment to assure its integrity. Subrule (B) permits the court to be flexible. The kind of order that will be best in a given case ultimately must depend on the facts and on the court's ingenuity.

Concern for the safety of witnesses and the integrity of the judicial process should be neither denigrated nor minimized. Nevertheless, as the introductory commentary to this subchapter indicates, the discovery rules are premised on a belief that these concerns are not sufficiently strong in most cases to deny discovery. Rather, these rules presume that in most cases broad discovery safely can be provided to both sides. The protective order is designed for those occasional cases in which this presumption would be unrealistic. "Thus, the protective order permits the discovery system to be designed for the average case while still accommodating the 'legitimate needs of exceptional cases.'" ABA Standards for Criminal Justice (2d ed), Commentary at 11.61.

While motions for protective orders often will not require secrecy, they sometimes will. Subrule (B) places on the party seeking a protective order the burden of obtaining an in camera determination of the motion. The other party must be notified that an in camera determination of good cause is being sought, and the need for such an in camera review can be contested in court. If the court grants a protective order, after either an adversary hearing or an in camera review of the protective order motion, it must seal and preserve the record of the proceeding. Accord ABA Standard for Criminal Justice (2d ed), § 11-4.6; Fla R Crim P 3.220(i).

Rule 6.212 Sanctions

(A) Failure to Provide Discovery. If at any time during the course of the proceedings the court finds that a party has failed to comply with these rules, the court may,

(1) order such party to comply,

(2) grant a continuance,

(3) subject to subrule (B), enter such other order as seems just, except that the court may not preclude the defendant from testifying.

(B) Exclusion of Evidence or Defenses. The court shall not prohibit a party from calling a nondisclosed witness, from introducing nondisclosed information, or from offering a nondisclosed defense unless the court finds (1) that the party's failure to disclose has caused the other party prejudice likely to result in a miscarriage of justice and (2) that such prejudice cannot be cured by a less drastic sanction. If the defendant fails to

submit to an examination pursuant to MCR 6.206, the court shall bar him from presenting expert testimony relating to insanity, diminished capacity, or mental illness negating an element of the offense. If a witness fails to submit to an examination under MCR 6.203(C) or 6.207(C), the court shall bar the party who calls the witness from presenting expert testimony relating to the witness's physical or mental condition.

(C) Personal Sanctions. The court may impose on any person, including a lawyer, fines, costs, or other appropriate sanctions for wilfully violating these rules.

Note

MCR 6.212 is not as strict with respect to sanctions as the rules in some other states. For example, Fla R Crim P 3.220(j) simply includes as one of the available options a refusal to permit the party to call a nondisclosed witness or to introduce nondisclosed evidence. Accord Mo Sup Ct R 25.16. Nevertheless, the sanction of excluding evidence or defenses must be viewed as drastic, for it can have a distorting effect on the outcome of the trial. These rules mandate broad discovery to both sides because of the view that the criminal trial primarily is a search for truth. Accordingly, sanctions that undermine this goal must be looked upon with disfavor. Under subrule (B), exclusion of nondisclosed witnesses, information, or defenses is permissible only when necessary to prevent the goal of determining the truth from being thwarted. Such a sanction is permitted only to prevent a miscarriage of justice that cannot be cured by a less drastic sanction. *Cf. People v Merritt*, 396 Mich 67; 238 NW2d 31 (1976)(alibi). This limitation is intended to apply to sanctions against both sides. Exclusion of the prosecutor's evidence distorts the outcome as much as exclusion of the defendant's evidence.

This is not to suggest that the parties blithely may ignore the stringent disclosure requirements of these rules. To permit this to occur would undermine the important goals these rules seek to achieve. Accordingly, the court is given leeway in devising sanctions. Moreover, all persons, including the lawyers involved in the case, are subject to personal sanctions, including fines, costs, and other measures, such as contempt of court, for wilfully violating these rules. It is anticipated that courts will not be hesitant to impose such sanctions against lawyers in appropriate cases. Accord Fla R Crim Pro 3.22(j)(2); Mo Sup Ct R 25.16.

If the defendant fails to submit to a mental examination as required by MCR 6.206, the court is required to bar him from presenting expert testimony relating to a mental illness defense. This sanction is included in current law. See MCL 768.20a(4); MSA 28.1043(1)(4). Accord *People v Hayes*, 421 Mich 271; 364 NW2d 635 (1984). An exclusion sanction in this circumstance is fully consistent with the rationale discussed above. Similarly, if a witness fails to submit to a physical or mental examination in the exceptional case in

which the court has ordered such an examination, see MCR 6.203(C) and 6.207(C), the court is required to bar the party who calls the witness from presenting expert testimony relating to the physical or mental condition that would have been examined under the order. Thus, for example, if the complainant in a criminal sexual conduct case refuses to comply with a court ordered physical examination, the prosecutor will be precluded from introducing expert testimony about the witness's condition that would have been the subject of the examination. The prosecutor would not be barred, however, from calling the complainant to testify, for the subrule authorizes exclusion only of expert testimony.

Rule 6.213 Depositions

(A) Availability. On motion of any party or a witness, the court in its discretion, and subject to the conditions of this rule, may order the examination of any person except the defendant upon oral deposition.

(1) If the movant is a party, the party must show that a substantial likelihood exists that the person will not be available at the time of trial and that the person's testimony is material and not privileged.

(2) If the movant is a witness, the witness must show that he is incarcerated for failure to give satisfactory security that he will appear to testify at trial.

(B) Motion for Taking Deposition. A motion for deposition must specify the time and place for taking the deposition and the name and address of each person to be examined, together with the designated papers, documents, photographs, or other tangible objects, not privileged, to be produced at the same time and place. The court's order may specify the terms and conditions governing the conduct of the proceeding.

(C) Manner of Taking. Except as otherwise provided by court order, a deposition is to be taken in the manner specified for civil actions. Any statement of the witness being deposed that is in the possession of any party must be made available to the other party for use at the deposition.

(D) Defendant's Presence. Absent a waiver, the defendant has the right to be present at a deposition. If the defendant is in custody, the officer having custody of the defendant, on proper notice, shall produce him at the deposition and remain with him during it. If, after adequate notice, a defendant not in custody fails to

appear at a deposition, such failure, absent good cause shown, constitutes a waiver under this rule.

(E) Use. Depositions may be used at trial only in accordance with the Rules of Evidence.

Note

This rule is consistent with FR Crim P 15 and the rules in several other states that permit depositions of witnesses in criminal cases only in exceptional circumstances. Contra Fla R Crim P 3.220(d), which simply permits the defendant to "take the deposition upon oral examination of any person who may have information relevant to the offense charged." Because the discovery provisions in these rules are extremely broad, depositions should not be needed except in those rare cases when a substantial likelihood exists that a witness with nonprivileged material evidence will not be available for trial. The function of the deposition in criminal cases should not be to provide discovery, but rather to prevent the loss of possibly material evidence. Any broader rule would impose an unacceptable and unnecessary burden on witnesses and victims of crime.

Subrule (A). A party moving for a deposition under this subrule must show both that the witness's testimony is material and that a substantial likelihood exists that the witness will not be available at the time of trial. Unavailability is meant to be defined in accordance with the rules of evidence. Under this subrule, a witness may not be required to give privileged testimony at a deposition.

A witness who is incarcerated to assure his appearance at trial is permitted to move for his own deposition under this subrule. The subrule takes no position on whether the witness should be entitled to release after such a deposition is taken.

Subrule (B). This subrule is largely self-explanatory. Because the defendant, who may be incarcerated, has a right to be present at all depositions under subrule (D), it is important that the court, rather than the parties, have final authority to select the place and conditions for taking a deposition. For example, despite the wishes of the moving party, the court may find it appropriate to order that a witness's deposition be taken at the place where the defendant is incarcerated. Under subrule (B), the party in the first instance must specify the time and place for taking a deposition, but the court has final authority over such matters.

Subrule (C). This subrule merely specifies that the deposition procedure is to be conducted in accordance with the rules governing depositions in civil cases, including MCR 2.315.

Subrule (D). This subrule is self-explanatory. No attempt is made to define the requirements of adequate notice. Of course, notice is inadequate if it fails to satisfy constitutional requirements.

Subrule (E). This subrule makes clear that MCR 6.213 is intended neither to enlarge nor to diminish the permissible use of depositions under the rules of evidence. Necessarily, the rule makes no attempt to permit the use of deposition evidence when this would violate the constitutional rights of the defendant.

250

Rule 6.214 Subpoenas

(A) Subpoena for Attendance of Witnesses. Any party may obtain and issue a subpoena commanding the person to whom it is directed to appear for the purpose of testifying at a specified time and place.

(B) Subpoena for Production of Documentary Evidence. A subpoena also may command the person to whom it is directed to produce books, papers, documents, or other specified objects. On motion of a party, the court may order that the books, papers, documents, or other objects be produced before trial or before the time when they are to be offered in evidence, and upon their production, the court may permit such items to be inspected and copied by the parties.

(C) Defendants Unable to Pay. Upon an ex parte application and a satisfactory showing (1) that the defendant is unable to pay the legally required fees, mileage, and costs of a named witness and (2) that the witness may be needed for an adequate defense, the court shall direct a subpoena to issue without the payment of such fees and costs. In such cases, the court shall direct the fees and costs to be paid as if the prosecutor had subpoenaed the witness. Upon the defendant's application, the court may also direct the manner in which service shall be made.

(D) Form, Issuance, and Service of Subpoena; Refusal to Comply. Except as otherwise provided in this rule, the provisions of MCR 2.506 govern the form, issuance, and service of a subpoena and the applicable penalties for failure to comply with a subpoena. If the defendant shows that he has been unable to serve a subpoena upon a known witness who may be needed for an adequate defense, the court may direct that the defendant receive reasonable assistance for such service.

(E) Relief from Subpoena. On motion, the court may quash or modify a subpoena if compliance would be unreasonable or oppressive. The provisions of MCR 2.506 govern the making and resolution of such motions.

Note

In general. Most of the rules in this subchapter concern the obligations of the parties to each other in the process of preparing for

KIRKSEY & ASSOCIATES

WILLIAM B. KIRKSEY

CERTIFIED AS A SPECIALIST IN
CRIMINAL TRIAL ADVOCACY BY
THE NATIONAL BOARD OF TRIAL ADVOCACY

ATTORNEYS AT LAW
SUITE 100-M HERITAGE BUILDING
401 EAST CAPITOL AT CONGRESS

REPLY TO:
P.O. BOX 33
JACKSON, MISSISSIPPI 39205

(601) 354-4662

SEP - 2 1988

August 22, 1988

Mr. Gordon F. Proudfoot
Boyne Clarke
Barristers and Solicitors
Suite 700, Belmont House
33 Alderney Drive
P.O. Box 876
Dartmouth, Nova Scotia
B2Y 3Z5

Dear Gordon:

I apologize for not answering your letter sooner; however, due to a trial in Washington, D.C. I have been out of town quite often.

Pat Scanlon has referred your letter of June 10, 1988 concerning your injury on exculpatory material to me. I will attempt to respond in a manner that I hope will be of service to you.

Under the Mississippi Rules of Criminal Procedure there are certain matters that a Defendant is entitled to receive from the prosecution under Rule 4.06, I enclose a copy of this motion under said rule.

Under the Federal practice you have Rule 16 of the Federal Criminal Rules which provide for discovery and also the Jenks Act which provides for discovery. The leading case that dictates that exculpatory material be provided is Brady v. Maryland and Giglio v. U.S., 405 U.S. 150.

Under both the State and Federal scheme, "trial by ambush" is now a thing of the past. With the discovery rules like they are, both sides eventually know what the other side has prior to trial on the merits.

252

I hope this information proves helpful, and if I can help further please let me know.

With kindest regards, we remain

Sincerely,

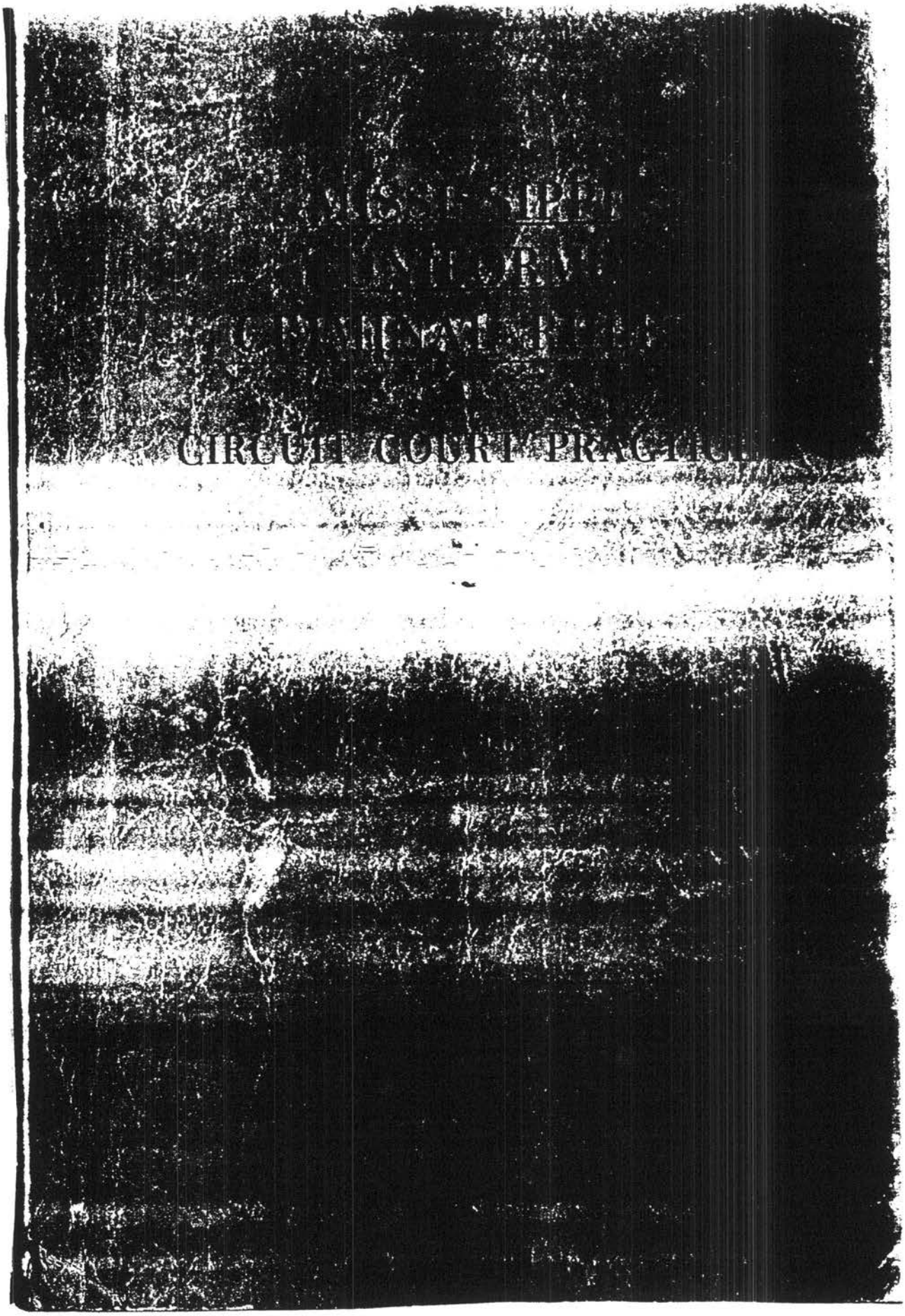
KIRKSEY & ASSOCIATES

William B. Kirksey

WBK/ehl

enclosure

Also enclosed is a copy of
the MS [illegible] [illegible] letter



Annotations

Section (1) of the rule is drawn from Fla.R.Crim.P. 3.-150(B) and ABA Standards, Joinder and Severance § 1.2 (1968). These two rules are virtually identical. The Florida rule, however, omits a section which would allow joinder of charges "so closely connected . . . that it would be difficult to separate proof of one charge from proof of the other." ABA Standards, supra § 1.2(C)(2). The rationale behind the omission is that in such a case the defendant would have a right to severance. Fla.R.Crim.P. 3.750, Committee Note at 229. Se ABA Standard, supra (comment at 17). cf. Thompson v. State, 231 Miss. 624, 97 So.2d 227 (1957), (right to separate trial does not give defendants a corresponding right to be tried jointly).

Section (2) of the rule is drawn from Fla.R.Crim.P. 3.-150(a) and ABA Standards, supra, § 1.1. These rules are almost identical in their wording. While the outer limits of permissible joinder of offenses is identified, the rule does not suggest that a joinder of offenses in such cases would always be desirable. ABA Standards, supra (commentary at 10). See, Ford v. State, 225 So.2d 287 (Miss.1969); Woods v. State, 200 Miss. 527, 27 So.2d 895 (1946); Johnson v. State, 196 Miss. 402, 17 So.2d 446 (1944). In Ford, supra, the defendant contended on appeal that the trial court erred in refusing to consolidate two indictments charging him with manslaughter. The court held that the granting or refusing of a motion for consolidation is left to the discretion of the trial court and absent an abuse of discretion its decision will stand. Id. at 381.

Note: The jury must be instructed to issue separate verdicts on each count.

Rule 4.06

DISCOVERY

The prosecution shall disclose to each defendant or his attorney, upon request and without further court order, the following:

(1) Names and addresses of all witnesses in chief proposed to be offered by the prosecution at trial;

(2) Copy of any written statement from the defendant;

(3) Copy of criminal record of the defendant, if proposed to be used to impeach;

(4) Copy of crime lab reports or report or any tests made;

(5) Exhibit any physical evidence and photos to be offered in evidence; and

(6) Copy of any exculpatory material concerning defendant.

Upon a showing of materiality to the preparation of the defense, the court may require such other discovery to defense counsel as justice may require.

The court may deny disclosure authorized by this section if it finds that there is a substantial risk to any person or 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.

The following shall not be subject to disclosure:

(1) 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 or defense attorney, or members of legal staff.

(2) Informants. Disclosure of an informant's identity shall not be required unless the confidential informant is to be produced at a hearing or trial, or a failure to disclose his identity will infringe the constitutional rights of the accused.

If the defendant requests discovery under this rule, the defendant shall, subject to constitutional limitations, disclose to the prosecutor and permit him to inspect, copy, test and photograph, the following information and material which corresponds to that which the defendant sought and which is in the possession or control of the defendant or his counsel:

(1) Names and addresses of all witnesses in chief proposed to be offered by the defendant at trial;

(2) Exhibit any physical evidence and photos to be offered in evidence; and

(3) Any reports or statements of experts, made in connection with the particular case.

Defense counsel shall make the foregoing disclosures simultaneously with the corresponding disclosure from the prosecutor.

Except as is otherwise provided or in cases where the witness would be forced to reveal self-incriminating evidence, 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.

If, subsequent to compliance with these rules 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.

The attorney receiving materials on discovery is responsible for those materials and shall not distribute them to third parties.

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.

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

Upon request of the defendant, the prosecution shall furnish to the court in camera, any prior written statements of witnesses. If these materials are found to be materially inconsistent with the witness's testimony, the statements shall be supplied to defense counsel prior to cross-examination.

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.

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.

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

Annotations

This rule is modeled from Add.R. 16th Cir.Ct. Dist. 6, and from ABA Standards, Discovery and Procedure Before Trial §§ 2.1 to 4.7 (1970). Portions of the proposed rules were drawn from Ariz.R.Crim.P. 3.220, which is similar to ABA Standards, supra. Other state court rules on discovery tend to be similar to the rule. See, e. g., Mo.R.Crim.P. 25.31–45; Minn.R.Crim.P. 9.

It has been suggested that prior notice and statements of witnesses may be required by due process and the sixth amendment. See Palermo v. U. S., 360 U.S. 343, 362–66 (1959). Mississippi cases present a much more restricted view of providing the defense with witnesses' statements before trial. See Bellow v. State, 238 Miss. 734, 106 So.2d 146 (1958); Armstrong v. State, 243 Miss. 402, 137 So.2d 930 (1962). See also, Grady v. State, 274 So.2d 141 (Miss.1973). In Armstrong, supra, the court noted that the trial judge has discretionary power to determine whether tangible evidence under the prosecution's control should be given to the defendant for inspection. However, it was further stated that the defendant should be able to inspect tangible evidence which may be used against him or which may be helpful in his defense and that the concepts of due process and fair trial should prevent concealment of evidence. In Grady, supra, defendant's motions to inspect were granted, and a written report was given to the defendant. However, testimony was given at

the trial which was at variance with the report. It was held that the trial court did not err in permitting the testimony of witness which varied from the report, when the defendant refused an offer for a continuance to further investigate the facts testified to.

The basis of providing a defendant with a copy of his own statements is threefold: (1) fundamental fairness and the absence of any compelling reason to withhold disclosure; (2) the requirement of the Miranda warnings and the right of the defendant to move for suppression; (3) the "better practice" language of Cicenia v. LaGay, 357 U.S. 504, 511 (1958). A requirement that the defense be allowed to inspect statements made by codefendants often rests upon Bruton v. U. S., 391 U.S. 123 (1968), which held that it was constitutional error to try one defendant before a jury which had statements of a co-defendant implicating the defendant. ABA Standards, supra § 2.1 (commentary, at 58–61).

Copies of crime lab reports or reports of tests made are required because of the near impossibility of testing or rebutting expert proof and testimony at trial. Jackson v. State, 243 So.2d 396 (Miss.1970) held, no error, when a defendant was denied a state test report when a portion of the tested substance was provided to the defendant. It was, however, error not to provide the defendant with a sample of the substance for test purposes.

It is to be noted that "relevant" is used as a limitation on the scope of some of the disclosures to be made by the prosecutor. This, of course, is to avoid the harassment of material being demanded which has no bearing on the case. For the problem of defining "relevant" see ABA Standards, supra § 2.1 (commentary at 54–56).

Section (6) is included, not only to deal with the moral aspect of withholding exculpatory evidence, but to deal with the constitutional requirement that the prosecution disclose evidence which tends to exculpate the accused or reduce the penalty. Brady v. Maryland, 373 U.S. 83 (1963). Although not required as a pretrial disclosure, the information must be disclosed at a time so that the defense can make use of it. Thus, pretrial would seem to be the most appropriate time for the disclosure. See ABA Standards, supra § 2.1 (commentary at 73–78); Ponder v. State, 335 So.2d 885 (Miss.1976).

The rule insures that information essential to a fair trial will not be refused because of no specific requirement to dis-

close it. The discretion of the court is utmost in importance to this section of the rule. This section seems to be well adapted to a large number of Mississippi cases concerning discovery. See e. g., Bright v. State, 293 So.2d 818 (Miss. 1974); Peterson v. State, 242 So.2d 420 (Miss.1970); ABA Standards, supra § 2.5 (commentary at 85–88).

The section on non-disclosure is largely self-explanatory. It is added to protect the thought processes of the prosecuting attorney. Opinions, theories and conclusions of the prosecutor or his staff are not subject to discovery. Therefore, the following would be protected by the rule: notes or outlines of trial strategy, of arguments to be made, of authorities to be cited and of questions to be asked witnesses; memoranda between personnel in the office on legal questions, evidence, prospective jurors or other aspects of the case, except medical, scientific and experts' reports; records of an attorney's travel with respect to a case; summaries and analysis of the case file; evaluations of anticipated witneses or their testimony; evaluations of the probability of obtaining certain evidence; and investigative sources and techniques. ABA Standards, supra § 2.6 (commentary at 91).

The rule also provides protection for the identity of the informant, one of the few privileges accorded to the prosecution. (See McCray v. Illinois, 386 U.S. 300 (1967); Roviard v. United States, 353 U.S. 53 (1957).

The rule requires the defendant to give substantially the same materials to the prosecution.

The rule also provides sufficient flexibility to meet the needs of exceptional cases. Without this flexibility, the needs of such cases will shape discovery policy to the extent that denial will result in all cases, as it does in most jurisdictions. 44 F.R.D. 481, 499 (1968). ABA Standards, supra § 4.4 (commentary at 101). It may be necessary in cases where there is a likelihood of intimidation of witnesses, harm to witnesses, or thwarting an on-going investigation. The court is allowed sufficient discretion to tailor its responses to the circumstances of the case, thus avoiding undue influence by exceptional cases on discovery policy, as well as providing for fair trials in such cases. See ABA Standards, supra §§ 4.4 to 4.6 (commentary at 101–06).

The rule contains remedies for the violation of rights and duties afforded by these rules. Explicit orders to disclose are provided for where persons affected have failed to understand

the more general provisions of a rule or statute. The court may impose sanctions where the breached duty was clear. Rather than provide specific sanctions for specific violations, the proposed rule leaves the sanctions to the discretion of trial courts under appellate court supervision. ABA Standards, supra § 4.7 (commentary at 106–07).

Rule 4.07

NOTICE OF ALIBI

Upon the written demand of the prosecuting attorney stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such other time as the court may direct, upon the prosecuting attorney a written notice of his intention to offer a defense of alibi, which notice shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon which he intends to rely to establish such alibi.

Within 10 days thereafter, but in no event less than 10 days before the trial, unless the court otherwise directs, the prosecuting attorney shall serve upon the defendant or his attorney a written notice stating the names and addresses of the witnesses upon whom the state intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

If prior to or during trial a party learns of an additional witness whose identity, if known, should have been included in the information previously furnished, the party shall promptly notify the other party or his attorney of the name and address of such additional witness.

Upon the failure of either to comply with the requirements of this rule, the court may use such sanctions as it deems proper, including:

(1) Granting a continuance;

(2) Limiting further discovery of the party failing to comply;

(3) Imposing criminal sanctions;

261

MICHAEL DONAHOE
ATTORNEY AT LAW
New York Block • 46 North Main #2E
P.O. Box 413 • Helena, Montana 59624
Phone 406 449-7539

September 2, 1988

Boyne Clarke
Barristers and Solicitors
Suite 700, Belmont House
33 Alderney Drive
P.O. Box 876
Dartmouth, Nova Scotia
B2Y 3Z5

Attention: Gordon F. Proudfoot

Re: The Royal Commission of Inquiry into the prosecution of Donald Marshall, Jr.

Dear Mr. Proudfoot:

I am writing in behalf of the State Bar of Montana in response to your letter dated August 5, 1988, to Max Hansen the President-Elect of the Montana State Bar Association. Your office has inquired as follows:

> Do you have any laws, guidelines issued by government, or professional ethical codifications requiring exculpatory statements in criminal prosecutions to be delivered up to defence counsel at the earliest moment?

I have been charged with answering your inquiry.

In the United States a person can be prosecuted criminally by a State or by the United States. Most individual states have laws in the form of statutes that provide for discovery in a criminal case. For example in Montana, as a matter of right, the Defendant is entitled to receive from the prosecution the following:

> A list of the names and addresses of all persons whom the prosecutor intends to call as witnesses in the case-in-chief, together with relevant written or recorded statements;
>
> All written or oral statements of the accused and of any person who will be tried with him;

The names and addresses of experts who have personally examined the accused or any evidence in the particular case, together with the results of physical examinations, scientific tests, experiments, or comparisons, including all written reports or statements made by them in connection with the particular case;

A list of or copies of all papers, documents, photographs, or tangible objects that the prosecutor will use at trial or that were obtained from or proportedly belonged to the accused; and

All material or information that tends to mitigate or negate the accused's guilt as to the offense charged or that would tend to reduce his punishment therefore.

Furthermore the prosecutor must inform the defense of any written or recorded material or information showing whether there has been any electronic surveillance of any conversations to which the accused was a party and whether a search warrant has been executed in connection with the case. Also the defense is entitled to know whether the case involves an informant, and if so his identity, in some circumstances. Thus as a matter of right in Montana the defense is entitled to a considerable amount of information in the way of discovery in a criminal prosecution.

In addition the defense can make a written request for additional material upon a showing that he has substantial need for such material in the preparation of his case and that without the information he would suffer undo hardship in the preparation of his defense. I have enclosed a copy of these Montana Statutes for your consideration.

In the Federal arena, which would be a prosecution conducted by the United States, the defendant is also entitled to information. However in some respects the rules in Federal Court are in a state of flux and not as clearly defined as the rules in the State system. In this connection I direct your attention to Rule 16 of the Federal Rules of Criminal Procedure (a copy is enclosed). As you can see there is significant information that must be revealed by the prosecution upon request from the defense. However there are other considerations beyond Rule 16 that must be considered in a federal prosecution. For example some cases decided by the United States Supreme Court suggest that the prosecution may have duties under the constitution to supply the defense with evidence.

Brady -vs- Maryland, 373 U.S. 83 is an illustration of this legal reasoning (a copy of the case is enclosed). Since Brady a number

of other decisions of the United States Supreme Court have discussed the defendant's right of access to evidence. In this regard I have enclosed for your consideration a brief that I recently prepared in a criminal appeal. Specifically I direct your attention to Issue No. 4 of the brief which is taken up beginning on page 15. As you can see the issue in the trial court was whether the indictment should have been dismissed or in the alternative the government's evidence suppressed due to pre-indictment delay. I reference this portion of the brief to show you that there is law in the United States which says that lack of access to evidence can constitute a tactical disadvantage and therefore result in a violation of due process.

Understand Mr. Proudfoot that these cases say that the defendant must show "substantial prejudice". This burden is not an easy one to meet. However as a criminal defense attorney my sense is that the defense bar is beginning to demand that the government make more thorough investigations with an eye toward being fair to the accused. For instance see the cases that I cited on page 22 of the brief that say that the prosecution owes the accused a duty to see that justice is done. Also see the case of California -vs-Trombetta, 475 U.S. 479 that I cited at page 20 of the brief. Trombetta says that the government can transgress constitutional limitations if in the exercise of its sovereign powers it hampers a criminal defendant's preparation for trial.

Frankly Mr. Proudfoot there is a lot of information that I could supply on this issue. However due to the time restraints associated with my busy practice I am prohibited from going into greater depth at this time. Certainly if you desire further information, and I have the time available, I would be happy to address further inquiries from your office.

I hope the enclosed material benefits the Commission. It is my fervent belief that the government owes a duty to the accused as well as the victim. Disinterested investigative practices should be the standard rather than the exception. The defense is entitled to a fair shake from the government and, moreover, the defense is entitled to know what the prosecution is holding in the way of exculpatory evidence. It is the only fair way to do it.

Thank you for your inquiry I am yours

Sincerely,

Michael Donahoe

MD/js

Enclosures

MONTANA CODE ANNOTATED

Adopted by Chapter 1, Laws of 1979

Gregory J. Petesch
Code Commissioner
&
Director Legal Services

Staff Attorneys

John MacMaster
H. David Cogley
Lee Heiman
Jim Lear
Valencia Lane
Mary Kelly McCue
Eddye McClure, Legal Reseacher
Doug Sternberg, Paralegal

Indexers

Nadine E. Wallace
Karen Caplis

Director Legislative Services
Henry C. Trenk

Support Services

Operations Bureau Chief
Marilynn Novak

Copy Editors
Mary Ellen Randall, Chief Editor
Carol Ann Jacobsen, Senior Editor

Proofreaders
Phyllis Cote, Senior Proofreader
Marie Fuhrmann, Senior Proofreader
Sally Bush-Arrigo, Proofreader
Ann Sigouin, Proofreader/Data Entry Operator

Senior Data Entry Operators/Programmers
Connie Dixon
Kevin Hayes

Distribution
Kathy Thompson

Systems and Programming
Tom Mulvaney
Gregg Wheeler
Leo La Salle, Typesetting

Published by
Montana Legislative Council
Room 138, State Capitol
Helena, Montana 59620
Telephone (406)444-3064
1987

46-15-203. Additional requirements when initiated by state or witness. The following additional requirements shall apply if the deposition is taken at the instance of the state or a witness:

(1) The officer having custody of a defendant shall be notified of the time and place set for examination and keep him in the presence of the witness during the examination.

(2) A defendant not in custody shall be given notice and shall have the right to be present at the examination.

(3) The state shall pay to the defendant's attorney and to a defendant not in custody expenses of travel and subsistence for attendance at the examination.

History: En. 95-1802 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1802(g).

46-15-204. Use of depositions at trial. (1) At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears that:

(a) the witness is dead;

(b) the witness is out of the state of Montana unless it appears that the absence of the witness was procured by the party offering the deposition;

(c) the witness is unable to attend or testify because of sickness or infirmity; or

(d) the party offering the deposition has been unable to procure the attendance of the witness by subpoena.

(2) Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(3) If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(4) Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

(5) For the purposes of this section, the word "deposition" shall in addition include any sworn testimony previously given by a witness which has been recorded and transcribed by a qualified stenographer and given in the presence of the defendant and cross-examined by him or his attorney on matters relevant to the trial or hearing where such deposition is sought to be used.

History: En. 95-1802 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1802(e), (f).

Cross-References

Objections to receiving deposition in evidence, Rules 30(c), 32, M.R.Civ.P. (see Title 25, ch. 20).

Part 3

Discovery — Immunity for Witnesses

46-15-301. Repealed. Sec. 11, Ch. 202, L. 1985.

History: En. 95-1803 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 26, Ch. 184, L. 1977; R.C.M. 1947, 95-1803(1), (3); amd. Sec. 14, Ch. 713, L. 1979; amd. Sec. 1, Ch. 557, L. 1981.

46-15-302. Repealed. Sec. 11, Ch. 202, L. 1985.

History: (1), (2)En. 95-1801 by Sec. 1, Ch. 196, L. 1967; Sec. 95-1801, R.C.M. 1947; (3)En. 95-1803 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 26, Ch. 184, L. 1977; Sec. 95-1803, R.C.M. 1947; R.C.M. 1947, 95-1801(d), 95-1803(2); amd. Sec. 1, Ch. 496, L. 1979.

46-15-303. Repealed. Sec. 11, Ch. 202, L. 1985.
History: En. 95-1804 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1804.

46-15-304 through 46-15-310 reserved.

46-15-311. Renumbered 46-15-331 by Code Commissioner, 1985.

46-15-312. Renumbered 46-15-332 by Code Commissioner, 1985.

46-15-313 through 46-15-320 reserved.

46-15-321. Definitions. As used in 46-15-321 through 46-15-329, unless the context requires otherwise, the following definitions apply:

(1) "Defendant" means the defense, including the accused, his counsel, and defense counsel's staff or investigators.

(2) "Make available for examination and reproduction" means to make material and information subject to disclosure available upon request at a designated place during specified reasonable times and provide suitable facilities or arrangements for reproducing it. The term does not mean that the disclosing party is required to make copies at its expense, to deliver the materials or information to the other party, or to supply the facilities or materials required to carry out tests on disclosed items. The parties may by mutual consent make any other or additional arrangements.

(3) "Statement" means:

(a) a writing signed or otherwise adopted or approved by a person;

(b) a mechanical, electrical, or other recording of a person's oral communications or a transcript thereof; and

(c) a writing containing a verbatim record as a summary of a person's oral communications.

(4) "Superseded notes" means handwritten notes, including field notes, that have been substantially incorporated into a statement. Such notes may no longer themselves be considered a statement.
History: En. Sec. 1, Ch. 202, L. 1985.

46-15-322. Disclosure by prosecution. (1) Upon arraignment in district court or at such later time as the court may for good cause permit, the prosecutor shall make available to the defendant for examination and reproduction the following material and information within his possession or control:

(a) a list of the names and addresses of all persons whom the prosecutor intends to call as witnesses in the case-in-chief, together with their relevant written or recorded statements;

(b) all written or oral statements of the accused and of any person who will be tried with him;

(c) the names and addresses of experts who have personally examined the accused or any evidence in the particular case, together with the results of physical examinations, scientific tests, experiments, or comparisons, including all written reports or statements made by them in connection with the particular case;

(d) a list or copies of all papers, documents, photographs, or tangible objects that the prosecutor will use at trial or that were obtained from or purportedly belong to the accused; and

(e) all material or information that tends to mitigate or negate the accused's guilt as to the offense charged or that would tend to reduce his punishment therefor.

(2) At the same time the prosecutor shall inform the defendant of and make available to the defendant for examination and reproduction any written or recorded material or information within his possession or control regarding:

(a) whether there has been any electronic surveillance of any conversations to which the accused was a party;

(b) whether a search warrant has been executed in connection with the case;

(c) whether the case has involved an informant, and, if so, his identity if the defendant is entitled to know either or both of these facts under Rule 502 of the Montana Rules of Evidence and 46-15-324(3).

(3) The prosecutor, upon written request, shall make available to the defendant for examination, testing, and reproduction any specified items contained in the list submitted under subsection (1)(d). The prosecutor may impose reasonable conditions, including an appropriate stipulation concerning chain of custody, to protect physical evidence produced under this section.

(4) The prosecutor's obligation of disclosure extends to material and information in the possession or control of members of his staff and of any other persons who have participated in the investigation or evaluation of the case.

(5) Upon motion of the defendant showing that he has substantial need in the preparation of his case for additional material or information not otherwise provided for and that he is unable without undue hardship to obtain the substantial equivalent by other means, the court in its discretion may order any person to make it available to him. The court may, upon the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

(6) The prosecutor shall furnish to the defendant no later than 5 days before trial or at such later time as the court may for good cause permit, together with their relevant written or recorded statements, a list of the names and addresses of all persons whom he intends to call as rebuttal witnesses to the defenses of alibi, compulsion, entrapment, justifiable use of force, mistaken identity, or good character or the defense that the accused did not have a particular state of mind that is an element of the offense charged.

History: En. Sec. 2, Ch. 202, L. 1985.

46-15-323. Disclosure by accused. (1) At any time after the filing in district court of an indictment or information, the accused, in connection with the particular crime with which he is charged, shall upon written request of the prosecutor and for good cause shown:

(a) appear in a line-up;

(b) speak for identification by witnesses;

(c) be fingerprinted, palm printed, footprinted, or voiceprinted;

(d) pose for photographs not involving reenactment of an event;

(e) try on clothing;

(f) permit the taking of samples of his hair, blood, saliva, urine, or other specified materials that involve no unreasonable intrusions of his body;

(g) provide specimens of his handwriting; or

(h) submit to a reasonable physical or medical inspection of his body; however, such inspection does not include psychiatric or psychological examination.

(2) The accused is entitled to the presence of counsel at the taking of any evidence pursuant to subsection (1). Subsection (1) supplements and does not limit any other procedures established by law.

(3) Within 30 days after arraignment in district court or at such later time as the court may for good cause permit, the defendant shall provide the prosecutor with a written notice of his intention to introduce evidence at trial of good character or the defenses of alibi, compulsion, entrapment, justifiable use of force, or mistaken identity or the defense that the accused did not have a particular state of mind that is an essential element of the offense charged. The notice must specify for each defense the names and addresses of the persons that will be called as witnesses at trial in support of the defense. Prior to trial the defendant shall, upon motion and showing of good cause, add to the list of witnesses the names of any additional witnesses. After the trial commences, no witnesses may be called by the defendant in support of these defenses unless the name of the witness is included on the list, except for good cause shown. Any evidence that reasonably becomes available after the initial 30 days shall be admitted if 46-15-327 is complied with.

(4) Simultaneously with the notice of defenses submitted under subsection (3), the defendant shall make available to the prosecutor for testing, examination, or reproduction:

(a) the names and addresses of all persons, other than the accused, whom he will call as witnesses at trial, together with all statements made by them in connection with the particular case;

(b) the names and addresses of experts whom he will call at trial, together with the results of their physical examinations, scientific tests, experiments, or comparisons, including all written reports and statements made by them in connection with the particular case; and

(c) a list of all papers, documents, photographs, and other tangible objects that he will use at trial.

(5) The defendant's obligation under this section extends to material and information within the possession or control of the defendant or his attorneys and agents.

(6) Upon motion of the prosecutor showing that he has substantial need in the preparation of his case for additional material or information not otherwise provided for, that he is unable without undue hardship to obtain the substantial equivalent by other means, and that disclosure thereof will not violate the accused's constitutional rights, the court in its discretion may order any person to make such material or information available to him. The court may, upon request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

History: **En. Sec. 3, Ch. 202, L. 1985.**

Cross-References

Self-incrimination and double jeopardy, Art. II, sec. 25, Mont. Const.

Notice of defense of mental disease or defect, 46-14-201.

46-15-324. Materials not subject to disclosure. (1) Except as provided in subsection (2), disclosure is not required for the work product of the prosecuting or defense attorney.

(2) If exculpatory information is contained in the work product, that information must be disclosed.

(3) Disclosure of the existence of an informant or of the identity of an informant who will not be called to testify is not required if:

(a) disclosure would result in substantial risk to the informant or to his operational effectiveness; and

(b) the failure to disclose will not infringe the constitutional rights of the accused.

History: En. Sec. 4, Ch. 202, L. 1985.

46-15-325. Failure to call a witness or raise a defense. The fact that a witness' name is on a list furnished pursuant to 46-15-321 through 46-15-329 or that a matter contained in a pretrial notice is not raised may not be commented upon at trial unless the court, on motion of a party, allows such comment after finding that the inclusion of the witness' name or the pretrial notice constituted an abuse of the applicable disclosure requirement or that other good cause is shown.

History: En. Sec. 5, Ch. 202, L. 1985.

46-15-326. Use of materials. Except as provided in 46-11-401, any materials, including witness lists, furnished to an attorney pursuant to 46-15-321 through 46-15-329 may not be disclosed to the public but may be disclosed to others only to the extent necessary for the proper conduct of the case.

History: En. Sec. 6, Ch. 202, L. 1985.

46-15-327. Continuing duty to disclose. If at any time after a disclosure has been made any party discovers additional information or material that would be subject to disclosure had it been known at the time of disclosure, such party shall promptly notify all other parties of the existence of the additional information or material and make an appropriate disclosure.

History: En. Sec. 7, Ch. 202, L. 1985.

46-15-328. Excision and protective orders. (1) Upon a motion of any party showing good cause, the court may at any time order that disclosure of the identity of any witness be deferred for any reasonable period of time, not to extend beyond 5 days prior to the date set for trial, or that any other disclosures required by 46-15-321 through 46-15-329 be denied, deferred, or regulated when it finds:

(a) that the disclosure would result in a risk or harm outweighing any usefulness of the disclosure to any party; and

(b) that the risk cannot be eliminated by a less substantial restriction of discovery rights.

(2) Whenever the court finds, on motion of any party, that only a portion of a document or other material is discoverable under 46-15-321 through 46-15-329, it may authorize the party disclosing it to excise that portion of the material which is nondiscoverable and disclose the remainder.

(3) On motion of the party seeking a protective or excision order or in submitting for the court's determination the discoverability of any material or

information, the court may permit him to present the material or information for the inspection of the judge alone. Counsel for all other parties are entitled to be present when such presentation is made.

(4) If the court enters an order that any material or any portion thereof is not discoverable under 46-15-321 through 46-15-329, the entire text of the material must be sealed and preserved in the record in the event of an appeal.

History: En. Sec. 8, Ch. 202, L. 1985.

46-15-329. Sanctions. If at any time during the course of the proceeding it is brought to the attention of the court that a party has failed to comply with any of the provisions of 46-15-321 through 46-15-329 or any order issued pursuant to 46-15-321 through 46-15-329, the court may impose any sanction that it finds just under the circumstances, including but not limited to:

(1) ordering disclosure of the information not previously disclosed;

(2) granting a continuance;

(3) holding a witness, party, or counsel in contempt;

(4) precluding a party from calling a witness, offering evidence, or raising a defense not disclosed; or

(5) declaring a mistrial when necessary to prevent a miscarriage of justice.

History: En. Sec. 9, Ch. 202, L. 1985.

46-15-330 reserved.

46-15-331. Compelling testimony or production of evidence — immunity. Before or during trial in any judicial proceeding, a justice of the supreme court or judge of the district court, upon request by the attorney prosecuting or counsel for the defense, may require a person to answer any question or produce any evidence that may incriminate him. If a person is required to give testimony or produce evidence in accordance with this section in any investigation or proceeding, no compelled testimony or evidence or any information directly or indirectly derived from such testimony or evidence may be used against the witness in any criminal prosecution. Nothing in this section prohibits a prosecutor from granting immunity from prosecution for or on account of any transaction, matter, or thing concerning which a witness is compelled to testify if the prosecutor determines, in his sole discretion, that the ends of justice would be served thereby. Immunity may not extend to prosecution or punishment for false statements given in any testimony required under this section.

History: En. 95-1807 by Sec. 7, Ch. 513, L. 1973; R.C.M. 1947, 95-1807; amd. Sec. 4, Ch. 577, L. 1983; Sec. 46-15-311, MCA 1983; redes. 46-15-331 by Code Commissioner, 1985.

46-15-332. Privileged matters. All matters which are privileged upon the trial are privileged against disclosure through any discovery procedure.

History: En. 95-1803 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 26, Ch. 184, L. 1977; R.C.M. 1947, 95-1803(4); Sec. 46-15-312, MCA 1983; redes. 46-15-332 by Code Commissioner, 1985.

Part 4

Evidence in Cases Involving Sexual Offenses

Part Cross-References

Provisions generally applicable to sexual crimes, 45-5-511.

46-15-401. When videotaped testimony admissible. For any prosecution commenced under 45-5-502(3), 45-5-503, 45-5-505, or 45-5-507, the testimony of the victim, at the request of such victim and with the concurrence of the prosecuting attorney, may be recorded by means of videotape for presentation at trial. The testimony so recorded may be presented at trial and shall be received into evidence. The victim need not be physically present in the courtroom when the videotape is admitted into evidence.

History: En. 95-1814 by Sec. 1, Ch. 384, L. 1977; R.C.M. 1947, 95-1814; amd. Sec. 1, Ch. 151, L. 1979; amd. Sec. 1, Ch. 8, L. 1983.

46-15-402. Procedure at videotaping. (1) The procedural and evidentiary rules of the state of Montana which are applicable to criminal trials within the state of Montana shall apply to the videotape proceedings authorized by this part.

(2) The district court judge, the prosecuting attorney, the victim, the defendant, the defendant's attorney, and such persons as are deemed necessary by the court to make the recordings authorized under this part shall be allowed to attend the videotape proceedings.

History: En. 95-1815 by Sec. 2, Ch. 384, L. 1977; R.C.M. 1947, 95-1815.

46-15-403. Court order to protect privacy of victim. Videotapes which are part of the court record are subject to a protective order of the court for the purpose of protecting the privacy of the victim.

History: En. 95-1816 by Sec. 3, Ch. 384, L. 1977; R.C.M. 1947, 95-1816.

Cross-References

Right of privacy, Art. II, sec. 10, Mont. Const.

46-15-404 through 46-15-410 reserved.

46-15-411. Payment for medical evidence. (1) The local law enforcement agency within whose jurisdiction an alleged incident of sexual intercourse without consent occurs shall pay for the medical examination of a victim of alleged sexual intercourse without consent when the examination is directed by such agency and when evidence obtained by the examination is used for the investigation or prosecution of an offense.

(2) This section does not require a law enforcement agency to pay any costs of treatment for injuries resulting from the alleged offense.

History: En. 95-1813 by Sec. 1, Ch. 128, L. 1977; R.C.M. 1947, 95-1813.

Cross-References

Sexual intercourse without consent, 45-5-503.

CHAPTER 16

TRIAL IN DISTRICT COURT

Part 1 — General Provisions

(272)

OFFICE OF THE PUBLIC DEFENDER

AUG 18 1988

COUNTY-CITY BUILDING
LINCOLN, NEBRASKA 68508
(402)471-7631

August 11, 1988

Mr. Gordon F. Proudfoot
Byne Clarke
Barristers & Solicitors
Suite 700, Belmont House
33 Alderney Drive
PO BOX 876
Dartmouth, Nova Scotia
B2Y 3Z5

RE: Canadian Bar Submission to Royal Commission on Prosecution of Donald Marshall, Jr.

Dear Mr. Proudfoot:

Your letter of June 10, 1988, to Mr. Robert T. Grimit, President Elect of the Nebraska Bar Association was forwarded to me for response. Enclosed please find a memorandum prepared by staff in my office concerning the statutory and case law guidelines along with professional ethical codifications concerning the prosecutions duty to deliver to the defense exculpatory evidence. I believe the memorandum enclosed along with the attached cases set forth the standards imposed upon prosecutors in the State of Nebraska to disclose exculpatory or mitigating evidence. If you have any additional questions after reviewing the memorandum and case law, please let me know and I'll be glad to try to answer them.

Very truly yours,

Scott P. Helvie
Chief Deputy

SPH:lm

Enc.

pc Mr. Robert Grimit
President-Elect
Nebraska State Bar Assoc.

Neb. Rev. Stat.

§ 29–1909. Witness From Another State; Not Subject to Arrest or Civil Process While in This State

If a person comes into this state in obedience to a summons directing him to attend and testify in this state, he shall not while in this state pursuant to such summons be subject to arrest for the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons. If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state or while returning therefrom, he shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

§ 29–1910. Act; How Construed

Sections 29–1906 to 29–1911 shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of the states which enact them. They shall be construed as supplemental to and cumulative with section 29–1904.

§ 29–1911. Act; How Cited

Sections 29–1906 to 29–1911 may be cited as the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings.

(c) DISCOVERY

§ 29–1912. Discovery; Defendant; Request to Inspect and Make Copies of Evidence; Granted; When

(1) When a defendant is charged with a felony or when a defendant is charged with a misdemeanor or a violation of a city or village ordinance for which imprisonment is a possible penalty, he or she may request the court where the case is to be tried, at any time after the filing of the indictment, information, or complaint to order the prosecuting attorney to permit the defendant to inspect and copy or photograph:

(a) The defendant's statement, if any. For purposes of this subdivision statement shall mean a written statement made by the defendant and signed or otherwise adopted or approved by him or her, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by the defendant to an agent of the prosecution, state, or political subdivision thereof, and recorded contemporaneously with the making of such oral statement;

(b) The defendant's prior criminal record, if any;

(c) The defendant's recorded testimony before a grand jury;

(d) The names and addresses of witnesses on whose evidence the charge is based;

(e) The results and reports of physical or mental examinations, and of scientific tests, or experiments made in connection with the particular case, or copies thereof; and

(f) Documents, papers, books, accounts, letters, photographs, objects or other tangible things of whatsoever kind or nature which could be used as evidence by the prosecuting authority.

(2) The court may issue such an order pursuant to the provisions of this section. In the exercise of its judicial discretion the court shall consider among other things whether:

(a) The request is material to the preparation of the defense;

(b) The request is not made primarily for the purpose of harassing the prosecution or its witnesses;

(c) The request, if granted, would not unreasonably delay the trial of the offense and an earlier request by the defendant could not have reasonably been made;

(d) There is no substantial likelihood that the request, if granted, would preclude a just determination of the issues at the trial of the offense; or

(e) The request, if granted, would not result in the possibility of bodily harm to, or coercion of, witnesses.

(3) Whenever the court refuses to grant an order pursuant to the provisions of this section, it shall render its findings in writing together with the facts upon which the findings are based.

(4) Whenever the prosecuting attorney believes that the granting of an order under the provisions of this section will result in the possibility of bodily harm to witnesses or that witnesses will be coerced, the court may permit him or her to make such a showing in the form of a written statement to be inspected by the court alone. The 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.

§ 29-1913. Discovery; Evidence of Prosecuting Authority; Test or Analysis by Defense; When Allowed; When Inadmissible

(1) When in any felony prosecution or any prosecution for a misdemeanor or a violation of a city or village ordinance for which imprisonment is a possible penalty, the evidence of the prosecuting authority consists of scientific tests or analyses of ballistics, firearms identification, fingerprints, blood, semen, or other stains, upon motion of the defendant the court where the case is to be tried may order the prosecuting attorney to make available to the defense such evidence

necessary to allow the defense to conduct like tests or analyses with its own experts. The order shall specify the time, place, and manner of making such tests or analyses by the defense. Such an order shall not be entered if the tests or analyses by the defense cannot be made because of the natural deterioration of the evidence.

(2) If the evidence necessary to conduct the tests or analyses by the defense is unavailable because of the neglect or intentional alteration by representatives of the prosecuting authority, other than alterations necessary to conduct the initial tests, the tests or analyses by the prosecuting authority shall not be admitted into evidence.

§ 29–1914. Discovery; Order; Limitation

Whenever an order is issued pursuant to the provisions of section 29–1912 or 29–1913, it shall be limited to items or information within the possession, custody, or control of the state or local subdivisions of government, the existence of which is known or by the exercise of due diligence may become known to the prosecution.

§ 29–1915. Discovery; Order; Specify Time, Place, and Manner of Inspections and Making Copies

An order issued pursuant to the provisions of sections 29–1912 to 29–1921 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.

§ 29–1916. Discovery; Order; Reciprocity to Prosecution; Waiver of Privilege of Self-Incrimination

(1) Whenever the court issues an order pursuant to the provisions of sections 29–1912 and 29–1913, the court may condition its order by requiring the defendant to grant the prosecution like access to comparable items or information included within the defendant's request which:

(a) Are in the possession, custody, or control of the defendant;

(b) The defendant intends to produce at the trial; and

(c) Are material to the preparation of the prosecution's case.

(2) Whenever a defendant is granted an order under the provisions of sections 29–1912 to 29–1921, he shall be deemed to have waived his privilege of self-incrimination for the purposes of the operation of the provisions of this section.

§ 29–1917. Discovery; Deposition of Witness; When; Procedure; Use of Deposition

(1) At any time after the filing of an indictment or information in a felony prosecution, the prosecuting attorney or the defendant may request the court to allow the taking of a deposition of any person other

than the defendant who may be a witness in the trial of the offense. The court may order the taking of the deposition when it finds the testimony of the witness:

(a) May be material or relevant to the issue to be determined at the trial of the offense; or

(b) May be of assistance to the parties in the preparation of their respective cases.

(2) An order granting the taking of a deposition shall include the time and place for taking such deposition and such other conditions as the court determines to be just.

(3) The proceedings in taking the deposition of a witness pursuant to the provisions of this section and returning it to the court shall be governed in all respects as the taking of depositions in civil cases.

(4) A deposition taken pursuant to the provisions of this section may be used at the trial by any party solely for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

§ 29–1918. Discovery of Additional Evidence; Notify Other Party

If, subsequent to compliance with an order for discovery under the provisions of sections 29–1912 to 29–1921, 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, he shall promptly notify the other party or his attorney and the court of the existence of the additional material.

§ 29–1919. Discovery; Failure to Comply; Effect

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 the provisions of sections 29–1912 to 29–1921 or an order issued pursuant to the provisions of sections 29–1912 to 29–1921, the court may:

(1) Order such party to permit the discovery or inspection of materials not previously disclosed;

(2) Grant a continuance;

(3) Prohibit the party from calling a witness not disclosed or introducing in evidence the material not disclosed; or

(4) Enter such other order as it deems just under the circumstances.

§ 29–1920. Discovery; Indigent Defendant; Costs; How Taxed

Whenever a defendant is adjudged indigent, the reasonable costs incurred in the operation of the provisions of sections 29–1912 to 29–1921 shall be taxed as costs against the prosecuting authority.

§ 29–1921. **Discovery; Attorney-Client Privilege Protected**

Nothing in sections 29–1912 to 29–1921 shall be construed to authorize any disclosure which would violate the attorney-client privilege.

§ 29–1922. **Discovery; Motion to Produce Statement of Defendant and Names of Eyewitnesses; Filing; Order**

Any defendant may file a motion to produce any statement made by the defendant, or furnish the name of every eyewitness who has identified the defendant at a lineup or showup. The motion shall be filed in the court where the case is to be tried and may be made at any time after the information, indictment, or complaint is filed, and must be filed at least ten days before trial or at the time of arraignment, whichever is the later, unless otherwise permitted by the court for good cause shown. Upon a showing that the items requested by the defendant may be material to the preparation of his or her defense and that the request is reasonable, the court shall entertain such motion and upon sufficient showing may at any time order that the discovery or the inspection be denied, restricted, or deferred or may specify the time, place, and manner of the making of the examination and the taking of copies of items requested and may prescribe such other terms and conditions as are just.

§ 29–1923. **Discovery; Additional Statement of Defendant or Name of Eyewitness; Order of Court**

If, subsequent to compliance with an order issued pursuant to section 29–1922, and prior to or during trial, the prosecuting authority discovers any additional statement made by the defendant or the name of any eyewitness who has identified the defendant at a lineup or showup previously requested or ordered which is subject to discovery or inspection under section 29–1922, he or she shall promptly notify the defendant or his or her attorney or the court of the existence of this additional material. If at any time during the course of the proceedings it is brought to the attention of the court that the prosecuting authority has failed to comply with this section or with an order issued pursuant to section 29–1922, the court may order the prosecuting authority to permit the discovery or inspection of materials or witnesses not previously disclosed, grant a continuance, or prohibit the prosecuting authority from introducing in evidence the material or the testimony of the witness or witnesses not disclosed, or it may enter such other order as it deems just under the circumstances.

§ 29–1924. **Statement, Defined**

The term statement as used in sections 29–1922 and 29–1923 shall mean (1) a written statement made by such defendant and signed or otherwise adopted or approved by him or her; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof,

EXCULPATORY STATEMENTS/EVIDENCE

For the past 25 years, the right of an accused to obtain favorable evidence from a prosecutor has been recognized by the U.S. Supreme Court. Since that time, the issue has been considered in several cases by that court as well as by state and appellate courts. These will be reviewed here, along with other codifications and statements on the issue.

CASE LAW

U.S. Supreme Court

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963)

The first recognition by the U.S. Supreme Court of the prosecutor's duty to provide exculpatory evidence to the defense came in this capital case. After Brady was tried, convicted and sentenced for murder, and the conviction was affirmed, a statement by a co-defendant admitting to the murder was discovered. The statement had been withheld by the prosecutor.

Brady appealed, claiming that his right to a fair trial was violated and the suppression violated the Due Process Clause of the Fourteenth Amendment. The U.S. Supreme Court agreed. "We now hold that 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 faith or bad faith of the prosecution." Brady at 87, 10 L.Ed.2d at 218. The Court affirmed the appellate court's reversal and remanded the case for retrial on the punishment issue only.

Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972).

Brady dealt with exculpatory statements. The Court also ruled in Giglio that other exculpatory evidence must be disclosed. The Court held that nondisclosure of the government's agreement with a co-conspirator affected the co-conspirator's credibility and the due process rights of the defendant were violated. Giglio was convicted of forgery and sentenced to five years' imprisonment. While awaiting appeal, the defense learned of evidence that the government had allegedly promised not to prosecute its key witness in exchange for his testimony. The Court said that a witness' reliability and credibility may help determine guilt or innocence and that nondisclosure of evidence about credibility comes under the general rule of Brady.

The evidence must be material, however, according to the Court, which held that any agreement about a future prosecution is relevant to the witness' credibility and the jury should be told of it. A new trial was ordered.

Moore v. Illinois, 408 U.S. 786, 92 S. Ct. 2562, 33 L.Ed.2d 706, reh'g denied, 409 U.S. 897, 93 S. Ct. 87, 34 L.Ed.2d 155 (1972).

The Court applied the Brady standards to a death penalty case in Moore, identifying three elements necessary to prove a due process violation. The evidence must have been suppressed by the prosecutor after a request by the defense; must be favorable to the defense; and must be material. The Court upheld the Brady principles, but found no violation of them in this case. In a

separate opinion, concurring in part and dissenting in part, Justice Marshall, joined by Justices Douglas, Stewart and Powell, stated that the defendant was denied a fair trial by the nondisclosure of certain evidence. "When the State possesses information that might well exonerate a defendant in a criminal case, it has an affirmative duty to disclose that information." Moore at 809, 33 L.Ed.2d at 721.

United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L.Ed.2d 342 (1976).

The issue of the request by the defense for exculpatory evidence was addressed by the Court in Agurs, in which the defendant's only defense for murder was self-defense. After her conviction for second-degree murder, defense counsel learned that the victim had a prior criminal record which would have demonstrated his tendencies to violent behavior. The prosecutor knew of his record, but did not disclose it. Even though the defense made no request for the information, the defendant appealed, seeking a new trial.

Three situations may arise where the Brady standards may apply, the Court held. The first involves perjured testimony of which the prosecutor had or should have had knowledge. The Court has held that such convictions are unfair and must be set aside if there is any possibility that the perjured testimony affected the jury's decision. That standard was not at stake in this case. The second situation is illustrated by Brady, where the prosecution receives a pretrial request for specific evidence, which must be material to the defense. The Court held that there

is no difference in cases where there has been a general request for exculpatory material or where there has been no request, which is the third situation. The Court said if there has been no request or a general request, the prosecutor should disclose clearly exculpatory material. "But if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made." Agurs at 107, 49 L.Ed.2d at 351. The Court ruled that the defendant was not deprived of a fair trial in this case, however, because the trial judge believed beyond a reasonable doubt that the defendant was guilty, and the evidence would have made no difference in the outcome.

California v. Trombetta, 467 U.S. 479, 104 S. Ct. 2528, 81 L.Ed.2d 413 (1984).

Trombetta raised the issue of the prosecutor's duty to preserve exculpatory evidence. Motorists who were convicted of driving while intoxicated appealed when they discovered that the police had not preserved the drivers' breath samples. They claimed that this failure deprived them of evidence which could impeach their breath tests. The Court held that law enforcement agencies are not required to preserve such samples in order to introduce the breath tests as evidence at trial. The Court said that in order to meet the Agurs materiality standard, "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other means." Trombetta at 489, 81 L.Ed.2d at 422. The evidence in

this case failed these tests, the Court held.

United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985).

The defendant was convicted of narcotics charges in Bagley, where a specific request was made by defense counsel for any deals the government had made in exchange for witnesses' testimony. The government did not disclose in its response any information about any such arrangements with witnesses. After filing requests for documents under the Freedom of Information Act several years later, the defendant found that two witnesses had contracted with the government to be paid for their testimony. The defendant moved for a vacation of his sentence, citing Brady. The Court held that the Brady rule covers both impeachment and exculpatory evidence, but retained the requirement of materiality. The standard of materiality was defined as evidence where there is a "reasonable probability" that the outcome of the trial would have differed if the evidence had been disclosed to the defense. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Bagley at 682, 87 L.Ed.2d at 494. The Court reversed and remanded the case to determine whether there was a reasonable probability that the trial's result would have differed if exculpatory evidence had been available.

U.S. Court of Appeals, Eighth Circuit

The Eighth Circuit has generally followed the Brady rules as standards, but has not often found violations of due process, either due to lack of materiality (792 F.2d 119, 831 F.2d 773);

failure to find suppression (791 F.2d 107); failure to find the evidence was exculpatory (801 F.2d 348, 834 F.2d 1431); or finding that the results would not have differed (823 F.2d 1241).

In a Nebraska case, Ogden v. Wolff, 522 F.2d 816 (8th Cir. 1975), the appeals court ruled that favorable evidence of a polygraph transcription had been suppressed, but found that the nondisclosure did not affect the fairness of the trial. The habeas corpus petitions were denied when the court determined that the requested report could have harmed as well as helped the defendant.

The appeals court in the same year reversed a conviction for filing a false claim and using a false document to receive urban renewal relocation payments. In U.S. v. Librach, 520 F.2d 550 (8th Cir. 1975), the court found an "egregious case of prosecutorial suppression of evidence that was both favorable and material to the defense" in the suppression of information that the government's chief witness was in protective custody and was being paid $10,000 for his testimony. Librach at 553.

A case which resulted in a conviction for cocaine distribution was remanded by the court in Anderson v. United States, 788 F.2d 517 (8th Cir. 1986). The state had refused to produce statements that were made by a co-conspirator during a polygraph exam, as well as tapes of conversations with him. The court held that whether those items were material should have been reviewed by the trial court.

In U.S. v. Risken, 788 F.2d 1361 (8th Cir. 1986), the court found error in a prosecutor's failure to disclose an agreement

between the government and a government witness, but held that it was not reversible error. The informal agreement called for the witness to be paid after the trial. The court said the "government's failure to disclose known evidence favorable to the accused is incompatible with Brady, even though nondisclosure in a particular case may not warrant reversal under" the standard of materiality of Bagley. Risken at 1375.

Nebraska Supreme Court

The Nebraska Supreme Court has also applied Brady standards, but has generally held that the failure to disclose is not material [See State v. Patterson, 213 Neb. 686 (1983)]; that no evidence was withheld [See State v. Fries, 214 Neb. 874 (1983)]; that the evidence was not exculpatory [See State v. Tweedy, 224 Neb. 715 (1987)]; or that a Brady violation was not proven [See State v. Meis, 217 Neb. 770 (1984), State v. Reyes, 218 Neb. 588 (1984)].

A murder conviction was affirmed when the court found no suppression of evidence in State v. Peery, 205 Neb. 271 (1980). The defendant's appeal was based on the prosecution's suppression of exculpatory evidence about a motorcyclist who was near the scene of the crime. Quoting Agurs, the court said the evidence must be favorable to the defense, material to either punishment or guilt, and exculpatory. The court found no connection between the motorcyclist and the murder and affirmed the trial court's finding that no exculpatory information was found in the police reports.

The court ordered a new trial in State v. Brown, 214 Neb. 665 (1983). After his arrest for robbery, the defendant filed motions asking for disclosure of examination and test reports. The state replied that it knew of no examinations or tests. The defendant also sought written statements of depositions. The defendant was found guilty and sought a new trial, based on the claim that information was suppressed about an attempted hypnotic session with the defendant. The court reviewed Brady, but said that case did not focus on pretrial preparation because it was not a rule of discovery. Discovery rules, codified in the Federal Rules of Criminal Procedure or state statutes, "can exact more than the constitutional minimum, so that courts must focus on information potentially useful to the defense." Brown at 675.

The court said the hypnotic session was not an examination or test and the failure to disclose was not prejudicial. However, a pathologist's opinion concerning the cause of his wounds did fall within state statute [Neb. Rev. Stat. 29-1912(1)(e)] and should have been disclosed. Without that information, the defendant did not receive a fair trial.

Again relying on Brady, the court affirmed a murder conviction, holding that the evidence was not specifically requested nor obviously exculpatory. State v. Rice, 214 Neb. 518 (1983). After several appeals were denied following a murder conviction, the defendant sought a new trial. His claim was based on the suppression of a tape of a 911 call, which allegedly lured a police officer to a home where he was killed by a bomb. The defendant also claimed that the state did not disclose

promises of leniency made to a government witness or a letter written by the government witness while he was in jail.

The court analyzed the three situations identified in Agurs in which the Brady rules apply. The court ruled out the existence of the perjury standard. It also found no specific request for the tape, eliminating that standard. In the third situation, a general request requires a response when the evidence is obviously exculpatory. The court said that standard is proper, but held that the tape was "not so obviously exculpatory as to create a reasonable doubt about the defendant's guilt which did not otherwise exist." 214 Neb. at 528. No relief was granted the defendant.

A defendant convicted of first degree assault claimed he was denied effective assistance of counsel because the counsel was allowed to see a state ombudsman's report, but the report was kept from the defendant. State v. Schaeffer, 217 Neb. 4 (1984). The court affirmed the conviction, finding that the result was based on overwhelming evidence, not on the withholding of information from a defendant. In a concurring opinion, Chief Justice Krivosha said he disagreed with the suggestion that a court may "instruct counsel to withhold documents or information from a client. If the client does not have the benefit of all of the information available to counsel, then the relationship between attorney and client cannot be fulfilled. . . . If the client should not see the information, and that may be the case, neither should his counsel." 217 Neb. at 7.

Federal Rules of Criminal Procedure (FRCP)

The Federal Rules of Criminal Procedure, which govern proceedings in criminal cases, address the disclosure of evidence by the prosecutor in Rule 16. Rule 16(a)(1)(A) requires that the government, upon request, permit the defendant "to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, . . .known, or by the exercise of due diligence may become known, to the attorney for the government . . . ." FRCP Rule 16. The prosecution is also required to provide, upon request, copies of the defendant's criminal record [Rule 16(a)(1)(B)], documents and tangible objtects material to the defense [Rule 16(a)(1)(C)], and reports of examinations or tests material to the defense [Rule 16(a)(1)(D)]. The rule does not provide for discovery of internal information or documents made by the prosecutor or statements of government witnesses [Rule 16(a)(2)]. The rules require that the duty to disclose continues during the trial if a party discovers additional evidence or material that was earlier requested [Rule 16(c)].

Nebraska Revised Statutes (1985)

Nebraska law addresses requests and suppressions in two chapters. Neb. Rev. Stat. § 29-115 requires that any person who is aggrieved by a statement which he or she has made that is not voluntary "may move for suppression of such statement for use as evidence against him or her."

In the discovery rules, a defendant is allowed to request that the court order the prosecutor to allow the defendant "to inspect and copy or photograph the defendant's statement." Neb.

Rev. Stat. § 29-1912(1)(a). The court may use its discretion and consider the materiality of the request; whether the request is made to harass the prosecution or witnesses; whether the request would delay the trial; whether the request would "preclude a just determination of the issues"; or whether the request would result in bodily harm. Neb. Rev. Stat. § 29-1912(2)(a-e).

The order is limited to items or information within the possession or control of the government and of which the prosecutor has knowledge. Neb. Rev. Stat. § 29-1914. If additional material is discovered during trial, and the party would have been under a duty to disclose earlier, the other party or attorney and the court should be notified. Neb. Rev. Stat. § 29-1918 and § 29-1923.

The law also allows any defendant to file a motion to produce a defendant's statement, and upon a showing that the request is reasonable and material to the defense, the motion may be granted by the court. Neb. Rev. Stat. § 29-1922.

Ethical Considerations

Attorneys are also guided by ethical standards promulgated by the American Bar Association. The ABA Model Code of Professional Responsibility, adopted in Nebraska and a majority of other states, requires that a public prosecutor make timely disclosure to the defendant's counsel, or to the defendant who has no counsel, of the existence of evidence "known to the prosecutor. . .that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." Disciplinary Rule 7-103(B). Exculpatory statements would

arguably fall within those standards.

The Model Rules of Professional Conduct were approved by the ABA in 1983 and have been adopted in many states. Rule 3.8 correlates with DR 7-103 in the Model Code and addresses the special responsibilities of a prosecutor. It requires that a prosecutor in a criminal case shall make timely disclosure to the defense of evidence known to the prosecutor "that tends to negate the guilt of the accused or mitigates the offense. . . ." [Rule 3.8(d)].

The ABA has also developed Standards of Criminal Justice Relating to the Prosecution Function, which expand on the Model Code and Model Rules and which have been adopted in some jurisdictions. Standard 3-3.11(1) states that it is "unprofessional conduct for a prosecutor intentionally to fail to make disclosure to the defense, at the earliest feasible opportunity, of the existence of evidence which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment of the accused." Unprofessional conduct is defined by the standards as activity for which an attorney may be disciplined. Prosecutors are also asked to comply in good faith with applicable discovery procedures [Standard 3-3.11(b)]. It is disciplinable conduct for a prosecutor to intentionally "avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused." [Standard 3-3.11(c)].

CONCLUSION

Case law supports the concept that prosecutors should disclose evidence, including statements, which are exculpatory, but it must be shown that the evidence is material to the defense, clearly exculpatory, and has a reasonable probability of altering the outcome of the trial.

Federal and state statutes require that prosecutors respond in good faith to requests from defendants for exculpatory materials, including defendant's statements, criminal records and other documents. The prosecutor's duty begins before the trial and continues through the proceedings, if new evidence is discovered.

The codes of professional responsibility which guide an attorney's ethical conduct suggest, and in some cases require, that a prosecutor make timely disclosure to the defense counsel of evidence which has a bearing on the defendant's guilt or punishment.

Failure to disclose evidence which has a material effect on a defendant's case may be held to be a violation of the defendant's right to a fair trial or to due process guaranteed by state and federal constitutions. However, courts appear to be most likely to consider the facts of each case before ruling that such violations exist and that a new trial is necessary.