OFFICE OF THE DISTRICT ATTORNEY

Clark County, Nevada

REX BELL
District Attorney

DONALD K. WADSWORTH
ASSISTANT DISTRICT ATTORNEY

WILLIAM T. KOOT
CHIEF CRIMINAL DEPUTY

JUL 13 1988

July 5, 1988

Mr. Gordon F. Proudfoot
BOYNE CLARK
Barristers and 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:

On June 17, 1988, Bill Curran, President of the State Bar of Nevada, forwarded your letter of June 10, 1988 addressed to him concerning the above matter to my attention. In said letter you inquired on behalf of the Canadian Bar Association whether or not the State of Nevada had any laws, guidelines or ethical codifications which require that exculpatory statements in criminal prosecutions be timely delivered up to defense counsel.

In that regard please find enclosed herein the following exhibits and related documentation:

1. Exhibit "A" which contains copies of Nevada Supreme Court Rules (of professional conduct) 179 and 173 entitled "Special Responsibilities of a Prosecutor" and "Fairness to Opposing Party and Counsel" respectively.

2. Exhibit "B" which sets forth a copy of Nevada Revised Statute 172.145 pertaining to a grand jury that is impaneled in the State of Nevada to hear criminal matters.

3. Exhibit "C" which sets forth copies of sections 174.235, 174.245 and 174.295 of the Nevada Revised Statutes, which sections pertain to the pre trial criminal discovery and inspection rights of an accused.

As reflected in the attached exhibit "A", subsection (4) of the Supreme Court Rule 179 places a special responsibility on a prosecutor in the State of Nevada to make a timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate or mitigate the guilt of the accused. Additionally, subsection (1) of Supreme Court Rule 173 directs that a lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.

Section 172.145 of the Nevada Revised Statutes which is set forth in Exhibit "B" likewise specifically requires that if the District Attorney (prosecutor) is aware of any evidence which will explain away the charge, he shall submit it to the Grand Jury.

The three criminal discovery and inspection statutes, i.e. NRS sections 174.235, 174.245 and 174.295 set forth in Exhibit "C", while not directly mentioning a duty to disclose exculpatory evidence, may in certain circumstances certainly have that effect. I would also mention with regard to said statutes that while the scope of the evidence which is legally discoverable thereunder is somewhat limited in that we exclude statements of state's witnesses, that in practice the actual discovery that is forwarded to an accused in this jurisdiction far exceeds those requirements. The Clark County District Attorney's Office has an "open file" policy of discovery, meaning that the defendant is entitled to copies of everything, i.e. reports, scientific examinations, witness statements, etc. that is contained in our file. The only exception to our "open file" policy is our office work product.

I sincerely hope that the enclosed documents will be helpful to you in your upcoming brief on the "Role of the Crown Prosecutor" which is being prepared for the Canadian Bar Association.

Very truly yours,

Donald K. Wadsworth
Assistant District Attorney

DKW/kab

Enclosures

cc: Bill Curran

E. Disability

F. Miscellaneous Provisions

G. Rules of Professional Conduct

EXHIBIT "A"

H. Continuing Legal Education for Active Members of the State Bar

I. Clients' Interest-Bearing Trust Accounts

J. Rules of Procedure for the Standing Committee on Ethics and Professional Responsibility

Rule 1

Rule
224. Functions
225. Opinic
226. Recom n
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227. Reports an
228. Immu
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CASE NOTES

Editor's note. — The following annotations were decided under former similar rules.

Public defender to be called as witness should be replaced. — Where public defender in murder trial had formerly represented defendant's co-defendant and thus he had the duty not to disclose statements made by former client and also to make a vigorous defense and deputy public defender was to be called as a witness such public defender and deputy had a conflict of duty and should have been replaced. Koza v. Eighth Judicial Dist. Court ex rel. County of Clark, 99 Nev. 535, 665 P.2d 244 (1983).

Rule 179.

Special responsibilities of a prosecutor.

The prosecutor in a criminal case shall:

1. Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

2. Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

3. Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

4. Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

5. Exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 177. (Added 1-27-86, eff. 3-28-86.)

Editor's note. — Former Rule 179 was repealed effective March 28, 1986.

CASE NOTES

A prosecutor's primary duty is not to convict, but to see that justice is done. Williams v. State, — Nev. —, 734 P.2d 700 (1987).

Rule 173.

Fairness to opposing party and counsel.

A lawyer shall not:

1. Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

2. Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

3. Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

4. In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

5. In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpablility of a civil litigant or the guilt or innocence of an accused; or

6. Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(a) the person is a relative or an employee or other agent of a client; and

(b) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information. (Added 1-27-86, eff. 3-28-86.)

Editor's note. — Former Rule 173 was repealed effective March 28, 1986.

Rule 174.

Impartiality and decorum of the tribunal.

A lawyer shall not:

1. Seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

2. Communicate ex parte with such a person except as permitted by law; or

3. Engage in conduct intended to disrupt a tribunal. (Added 1-27-86, eff. 3-28-86.)

Editor's note. — Former Rule 174 was repealed effective March 28, 1986.

1. Question an attorney or his employee regarding matters which he has learned during a legitimate investigation for his client.

2. Issue a subpena for the production of the private notes or other matters representing work done by the attorney or his employee regarding the legal services which the attorney provided for a client. (1985, p. 1028.)

172.145. Grand jury required to hear and district attorney required to submit known evidence which will explain away charge; invitations and issuance of process for witnesses.

1. The grand jury is not bound to hear evidence for the defendant. It is their duty, however, to weigh all evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they shall order that evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses.

2. If the district attorney is aware of any evidence which will explain away the charge, he shall submit it to the grand jury.

3. The grand jury may invite any person, without process, to appear before the grand jury to testify. (1967, p. 1409; 1985, p. 555.)

CASE NOTES

Cited in: United States ex rel. Morford v. Hocker, 268 F. Supp. 864 (D. Nev. 1967); Maiden v. State, 84 Nev. 443, 442 P.2d 902 (1968); Hyler v. Sheriff, Clark County, 93 Nev. 561, 571 P.2d 114 (1977); Seim v. State, 95 Nev. 89, 590 P.2d 1152 (1979); Biglieri v. Washoe County Grand Jury Report, 95 Nev. 696, 601 P.2d 703 (1979).

LEGAL PERIODICALS

Review of Selected Nevada Legislation, Criminal Procedure, 1985 Pac. L.J. Rev. Nev. Legis. 83.

172.155. Degree of evidence to warrant indictment; objection.

1. The grand jury ought to find an indictment when all the evidence before them, taken together, establishes probable cause to believe that an offense has been committed and that the defendant has committed it.

2. The defendant may object to the sufficiency of the evidence to sustain the indictment only by application for a writ of habeas corpus. (1967, p. 1409; 1979, p. 331.)

EXHIBIT "B"

Effective date. — This section became effective June 3, 1985.

174.229. Videotaped testimony.

If a prospective witness who is scheduled to testify before a grand jury or at a preliminary hearing is less than 14 years of age, the court shall, upon the motion of the district attorney, and may, upon its own motion, order the child's testimony to be videotaped at the time it is given. (1985, p. 1424.)

Effective date. — This section became effective June 3, 1985.

174.231. Effect of NRS 174.227 and 174.229.

The provisions of NRS 174.227 and 174.229 do not preclude:

1. The submission of videotaped depositions or testimony which are otherwise admissible as evidence in court.

2. A victim or prospective witness from testifying at a proceeding without the use of his videotaped deposition or testimony. (1985, p. 1424.)

Effective date. — This section became effective June 3, 1985.

Discovery and Inspection

174.235. Defendant's statements or confessions; reports of examinations and tests.

Upon motion of a defendant the court may order the district attorney to permit the defendant to inspect and copy or photograph any relevant:

1. Written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the district attorney; and

2. Results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the district attorney. (1967, p. 1419.)

CASE NOTES

Voluntary disclosure is not contemplated by the statutory provisions concerning criminal discovery. Thompson v. State, 93 Nev. 342, 565 P.2d 1011 (1977).

Cited in: Franklin v. Eighth Judicial Dist. Court ex rel. County of Clark, 85 Nev. 401, 455 P.2d 919 (1969); Donovan v. State, 94 Nev. 671, 584 P.2d 708 (1978); Riddle v. State, 96 Nev. 589, 613 P.2d 1031 (1980).

EXHIBIT "C"

OPINIONS OF ATTORNEY GENERAL

Breath samples. — There is no requirement in Nevada case law nor the statutes that breath samples be preserved as evidence in driving under the influence cases in which a breach test is conducted. AGO 83-11 (9-14-1983).

RESEARCH REFERENCES

Defendant's right to disclosure of presentence reports. 40 A.L.R.3d 681.

Right of defense in criminal prosecution to disclosure of prosecution information regarding prospective jurors. 86 A.L.R.3d 571.

Exclusion of evidence in state criminal actions for failure of prosecution to comply with discovery requirements as to statements made by defendants or other nonexpert witnesses — Modern cases. 33 A.L.R.4th 301.

174.245. Other books, papers, documents, tangible objects or places.

Upon motion of a defendant the court may order the district attorney to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subsection 2 of NRS 174.235 and NRS 174.087, this section does not authorize the discovery or inspection of reports, memoranda or other internal state documents made by state agents in connection with the investigation or prosecution of the case, or of statements made by state witnesses or prospective state witnesses (other than the defendant) to agents of the state. (1967, p. 1419; 1969, p. 350.)

CASE NOTES

Intransigent defiance, until a trial court ultimately loses patience and dismisses charges, is not an appropriate means by which to frame appellate issues concerning criminal discovery. State v. Stiglitz, 94 Nev. 158, 576 P.2d 746 (1978).

Cited in: Franklin v. Eighth Judicial Dist. Court ex rel. County of Clark, 85 Nev. 401, 455 P.2d 919 (1969); Riddle v. State, 96 Nev. 589, 613 P.2d 1031 (1980).

OPINIONS OF ATTORNEY GENERAL

Breath samples. — There is no requirement in Nevada case law nor the statutes that breath samples be preserved as evidence in driving under the influence cases in which a breach test is conducted. AGO 83-11 (9-14-1983).

RESEARCH REFERENCES

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirements as to physical or documentary evidence or the like — Modern cases. 27 A.L.R.4th 105.

Right of accused in state courts to have expert inspect, examine, or test physical evidence in possession of prosecution — Modern cases. 27 A.L.R.4th 1188.

174.285. Time of motions.

A motion under NRS 174.235 to 174.295, inclusive, may be made only within 10 days after arraignment or at such reasonable later time as the court may permit. The motion shall include all relief sought under such sections. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice. (1967, p. 1420.)

174.295. Continuing duty to disclose; failure to comply.

If, subsequent to compliance with an order issued pursuant to NRS 174.235 to 174.295, inclusive, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under such sections, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with such sections or with an order issued pursuant to such sections, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances. (1967, p. 1420.)

CASE NOTES

No relief for breaches of informal discovery agreements. — Although this statute provides relief for a prosecutor's failure to notify defense counsel of all discoverable material, that statute is only operative in situations where a previous defense motion has been made and a court order issued; it is not applicable to any informal arrangements that are made between counsel without benefit of court sanction. Donovan v. State, 94 Nev. 671, 584 P.2d 708 (1978).

Correction of inadvertent nondisclosure. — Where, on cross-examination, witness stated she had looked at mugbooks in attempt to identify perpetrator, but such books had not been made available to defendant under discovery order since it was apparent from the district attorney's statements at trial that he was unaware that witness had looked at the mugbooks, that the nondisclosure was inadvertent, and even were the court to assume the nondisclosure prejudiced defendant, the trial court alleviated this prejudice by allowing inspection of the mugbooks at a time during the trial when defendant could, if he so elected, cross-examine witnesses concerning the mugbooks, there was no abuse of discretion in order denying the motion for a mistrial. Langford v. State, 95 Nev. 631, 600 P.2d 231 (1979).

Cited in: Maginnis v. State, 93 Nev. 173, 561 P.2d 922 (1977).

RESEARCH REFERENCES

Sanctions against defense in criminal case for failure to comply with discovery requirements. 9 A.L.R.4th 837.

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirements as to physical or documentary evidence or the like — Modern cases. 27 A.L.R.4th 105.

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirements as to statements made by defendants or other nonexpert witnesses — Modern cases. 33 A.L.R.4th 301.

NEW HAMPSHIRE BAR ASSOCIATION

18 CENTRE STREET • CONCORD, NEW HAMPSHIRE 03301 • 603-224-6942

June 21, 1988

Mr. Gordon F. Proudfoot
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Dartmouth, Nova Scotia
B2Y 3Z5

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

Dear Brother Proudfoot:

In response to your inquiry dated June 10, 1988, I have enclosed a copy of Rule 3.8 of the New Hampshire Rules of Professional Conduct. These ethical rules were adopted by our Supreme Court in New Hampshire effective February 1, 1986, and in large measure were based upon the American Bar Association's recommendations for updated and codified rules.

You will note that Rule 3.8(d) would be applicable to your inquiry. If you are looking for more substantive information than this ethical rule, I suggest you contact the New Hampshire Bar Association in Concord, NH and inquire of the Criminal Justice section. The Bar's office address is:

New Hampshire Bar Association
18 Centre Street
Concord, NH 03301

and the phone number is (603) 224-6942.

I hope and trust that you find this information useful, and good luck on your project.

Yours very truly,

Stephen L. Tober

Stephen L. Tober

SLT/wlc

cc: Ms. Gail Kinney

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

ADOPTED JANUARY 16, 1986

EFFECTIVE FEBRUARY 1, 1986

PUBLISHED BY

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ORFORD, NEW HAMPSHIRE 03777

opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.

Committee Notes to Decisions

ECOP 82-4/4 **Representing Both Parties in Marital Mediation.** The Committee's opinion in regard to consulting attorneys for a non-profit mediation service was that both of the clients are those of the attorney and the mediation service is not the client. See Committee Notes, Rule 2.2.

ECOP 82-3/16 **Divorce Mediation.** Private divorce mediation creates an impermissible conflict of interest. See Committee Notes, Rule 2.2.

CPCOP 74-10/31 **Dual Representation.** Dual representation frequently creates impermissible conflicts of interest and should be avoided. See Committee Notes, Rule 1.7.

Rule 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

ABA Model Code Comments

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards relating to the administration of Criminal Justice, Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. See also Rule 3.3(d), governing

ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

New Hampshire Comments

This Rule does not address the problems raised by the authorization of police officers to act as prosecutors in New Hampshire. While police officers do have limited legal training, they are not lawyers, and may, or may not, recognize the special responsibilities that are inherent in the quasi-judicial office of prosecutor. When those responsibilities are ignored or abrogated, the rights of an accused are very likely to be jeopardized. The most frequent contact between the general public and the courts involves motor vehicle violations and in all likelihood police prosecutors. It is at this level that much of the public's perception about our system of justice is formed, and it is at this level that precautions against prosecutorial abuse are most needed.

While the Committee had very strong concerns about police prosecutors, it felt that the scope of these Rules did not extend the Committee's jurisdiction to police officers.

Committee Notes to Decisions

ECOP 82-3/3 **Use of Shared Space by Part Time County Attorney.** Sharing of office space by a part time county attorney and defense attorneys is improper. See Committee Notes, Rule 1.6.

Rule 3.9. Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

ABA Model Code Comments

In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure.

Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule, therefore, may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

This Rule does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency; representation in such a transaction is governed by Rules 4.1 through 4.4.

New Hampshire Comments

See also Rule 1.11A.

TRANSACTION

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JUN 27 1988

June 17, 1988

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Dartmouth, Nova Scotia B2Y 3Z5
Att: Gordon F. Proudfoot

Re: Exculpatory Evidence;
Royal Commission on the
Prosecution of Donald Marshall, Jr.

Dear Mr. Proudfoot:

This is in response to your May 25, 1988 letter to the Attorney General of the State of New York concerning the existence of rules or guidelines governing the disclosure of exculpatory evidence to defense counsel during a criminal prosecution.

In New York, Criminal Procedure Law (CPL) Sec. 240.20(h) requires the prosecution to disclose exculpatory evidence to the defendant and his attorney immediately or whenever he becomes aware of its existence.

A copy of that section, the practice commentary and the most recent amendments to that section are enclosed herein.

The rule of law that was codified in CPL Sec. 240.20(h) was enunciated by the United States Supreme Court in its decision of Brady v. Maryland, 373 U.S. 220, 83 S. Ct. 1194 (1963). The decision, which is applicable to all criminal prosecutions in New York, held that 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. A copy of the Brady decision is enclosed herein along with a copy of a United States Supreme Court decision called U.S. v. Agurs, 427 U.S. 97, 96 S. Ct. 2392 (1976) which further defines the rule of

Brady v. Maryland in the context of a prosecutor's duty to disclose exculpatory material absent a request from the defendant.

As can be seen, exculpatory evidence relating to a defendant's guilt or punishment must be disclosed to defense counsel by the prosecutor. This is true whether defense counsel requests it or not.

In New York, not only does a prosecutor have a duty to disclose exculpatory "Brady" material, he also has a duty to provide defense counsel with all pre-trial statements of prosecution witnesses. This is called "Rosario" material, and a breach of this "Rosario" duty can have severe consequences as can be seen by reading People v. Ranghelle, 69 N.Y.2d 56 (1986). A copy of the Ranghelle decision is enclosed herein.

Finally, the Code of Professional Responsibility, Disciplinary Rule #7-103 (B) requires a prosecutor in New York to disclose exculpatory evidence. A copy of that rule is enclosed herein for your guidance.

I have tried to supply you with the basic rules governing disclosure of exculpatory evidence in New York State. I hope these materials prove helpful to you in the preparation of your brief to the Royal Commission. If you have any questions about anything herein, please feel free to contact me.

Very truly yours,

Vincent J. O'Reilly

VINCENT J. O'REILLY
Assistant Attorney General
Criminal Prosecutions Bureau

VJO/mc

enc.

CF #1157

il court would, notwithstanding t disciplinary sanctions or other cedures may also be available to department. Id.

Counterclaims

n attorney may interpose a coun-laim in any suit which the attor- believes is neither frivolous nor arranted. N.Y.County 585 (1971).

Usurious mortgages

n attorney may not properly pre- usurious mortgage papers for a nt since a lawyer can not aid a nt in violating the law. N.Y. e 126 (1970).

Whereabouts of client

hen directed by client not to re- his location, the attorney is nd not to violate that confidence ss required by law or court order o so. N.Y.State 183 (1971).

Private placement adoptions

lawyer may handle private ement adoptions of children re the law regarding the validity ich adoptions is in apparent con- N.Y.State 68 (1968).

Estates

ere suspicion of impropriety of beneficiary of an estate or of ible laxity on the part of a wel- agency in pursuing its remedies not require a lawyer for the ex- or of the estate to affirmatively nunicate facts, on his own initia- to the welfare agency, that may upon the status of the welfare ient, unless the lawyer has rea- to believe that the beneficiary held information required to be shed by law, provided he gives beneficiary the opportunity to sh the information on his own. State 207 (1971).

here decedent's sons were still in sition to advise the Department cial Services about the existence Totten Trusts" savings book ac- s found after the decedent had the last several years of his iving at the public expense, no had as yet been perpetrated. County 616 (1973).

9. Collection agencies

It is not ethical for an attorney to permit employees of a collection agency client to represent that they are from his office in their efforts to collect alleged debts. N.Y.County 586 (1971).

10. Matrimonial actions

An attorney may not properly refer a New York resident to a Mexican attorney to obtain a unilateral Mexican divorce where the plaintiff will appear in person in the action, but the defendant will appear neither in person or by attorney. N.Y.State 125 (1970).

It would be improper for a lawyer to advise or assist in, or refer client to another lawyer for the purpose of, procuring a foreign state divorce where the foreign court would not be informed of the client's actual residence. N.Y.State 10 (1965).

Where husband who intends to institute a divorce proceeding asked his lawyer not to disclose to the court a prior divorce decree obtained by the wife and where the husband represented to the lawyer that the prior decree was obtained without notice to him until after it was entered and that it was based on wife's false and perjured testimony, the nature of the proceeding was such as to indicate that disclosure might be required. N.Y.County 622 (1973).

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 [1]

(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 [2] 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,[3] if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

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People v. Gradville Bailey, Sup.Ct., Kings Co., N.Y., N.Y.Law J., April 19, 1982, p. 16.

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Notes of Decisions

1. Purpose

Trial court in delinquency adjudication erred in failing to direct prosecution to turn over arresting officer's memo for purposes of cross-examination. Matter of Pernell M., 1983, 98 A.D.2d 776, 469 N.Y.S.2d 95.

4. Applicability of provisions

Provisions of Criminal Procedural Law do not empower a court to grant any preindictment discovery to a prospective target desiring to appear before a grand jury investigating commission of a crime. Application of Ajax Inc., 1985, 127 Misc.2d 534, 486 N.Y.S.2d 663.

RECENT AMENDMENTS

§ 240.20. Discovery; upon demand of defendant

1. Except to the extent protected by court order, upon a demand to produce by a defendant against whom an indictment, superior court information, prosecutor's information, information, or simplified information charging a misdemeanor is pending, the prosecutor shall disclose to the defendant and make available for inspection, photographing, copying or testing, the following property:

[See main volume for text of (a) to (d)]

(e) Any photograph, photocopy or other reproduction made by or at the direction of a police officer, peace officer or prosecutor of any property prior to its release pursuant to the provisions of section 450.10 of the penal law, irrespective of whether the people intend to introduce at trial the property or the photograph, photocopy or other reproduction.

(f) Any other property obtained from the defendant, or a codefendant to be tried jointly;

(g) Any tapes or other electronic recordings which the prosecutor intends to introduce at trial, irrespective of whether such recording was made during the course of the criminal transaction;

(h) Anything required to be disclosed, prior to trial, to the defendant by the prosecutor, pursuant to the constitution of this state or of the United States.

(i) The approximate date, time and place of the offense charged and of defendant's arrest.

(j) In any prosecution under penal law section 156.05 or 156.10, the time, place and manner of notice given pursuant to subdivision six of section 156.00 of such law.

[See main volume for text of 2]

(As amended L.1983, c. 817, § 1; L.1984, c. 795, § 3; L.1986, c. 514, § 8.)

1986 Amendment. Subd. 1, par. (j). L.1986, c. 514, § 8, eff. Nov. 1, 1986, added par. (j).

1984 Amendment. Subd. 1, par. (e). L.1984, c. 795, § 3, eff. Nov. 1, 1984, added par. (e) and redesignated former par. (e) as (f).

Subd. 1, par. (f). L.1984, c. 795, § 3, eff. Nov. 1, 1984, redesignated former par. (e) as (f) and former par. (f) as (g).

Subd. 1, par. (g). L.1984, c. 795, § 3, eff. Nov. 1, 1984, redesignated former par. (f) as (g) and former par. (g) as (h).

Subd. 1, par. (h). L.1984, c. 795, § 3, eff. Nov. 1, 1984, redesignated former par. (g) as (h) and former par. (h) as (i).

Subd. 1, par. (i). L.1984, c. 795, § 3, eff. Nov. 1, 1984, redesignated former par. (h) as (i).

1983 Amendment. Subd. 1, opening par. L.1983, c. 317, § 1, eff. 30 days after June 21, 1983 and applicable only to criminal actions commenced on or after such date, substituted "prosecutor's information," for "prosecutor's information or" and inserted ", or simplified information charging a misdemeanor".

Effective Date of 1984 Amendment; Applicability. Amendment by L.1984, c. 795, eff. Nov. 1, 1984, applicable to criminal actions commenced on or after such date, pursuant to section 4 of L.1984, c. 795, set out as a note under Penal Law § 450.10.

Effective Date of 1983 Amendment; Application. See section 4 of L.1983, c. 317, set out as a note under section 240.40.

Supplementary Practice Commentaries

by Peter Preiser

1986

The 1986 amendment to subdivision one of this section, adding paragraph (j), is one of several CPL provisions formulated to implement new crimes established in the Penal Law (see Art. 156) to attack the rapidly emerging modern problems created by unauthorized use, duplication of and tampering with computer data and programs (see also CPL 20.60[3], 250.30). The present provision relates to discovery in cases where the defendant is charged with Unauthorized Use of a Computer (Penal Law § 156.05) or Computer Trespass (Penal Law, § 156.10). Those crimes require that the use or trespass occur after prior notice of the restriction on authorized use has been given by one of several methods prescribed in Penal Law § 156.00[6]. The present provision permits defense discovery on demand of the time, place and manner of the transmittal of that notice.

by Joseph W. Bellacosa

1984

New paragraph (e) of subdivision one of this section was added in 1984 to conform to the new Penal Law provisions governing the return of stolen property. The Penal Law amendments loosen the existing restrictions upon the return of this property, and severely limit the sanctions which may be imposed under CPL 240.70 for failure to comply with the Penal Law requirements (see Penal Law 450.10 and Supplementary Practice Commentary to CPL 240.70).

By providing for the prompt photographing and return of the stolen property, the new provisions attempt to strike a balance between the legitimate interests of the victim and the due process and discovery rights of the defendant to the original best evidence. The new provision should help to clarify and simplify this procedure except that there is a danger lurking in the amendment that routine applications by defendants to retain or extend times could generate unnecessary and additional court business.

Interestingly, the Court of Appeals decided a recent case in this general area dealing with the sanctions available for unauthorized disposal of discoverable property (see People v. Kelly, 62 N.Y.2d 516, 478 N.Y.S.2d 834 and commented on in the pocket part at CPL 240.70).

1983

Discovery will now be available even upon the pendency of a simplified misdemeanor information. This change for conformatory reasons may also be found reflected in CPL 240.30 and 240.40.

The Advisory Committee on Criminal Law and Procedure urged this technical expansion because there was no discernible basis or rationale for excluding this category from the otherwise plenary list of accusatory instruments with respect to which discovery was available. Further, it was felt unfair to limit a defendant's discovery rights, dependent

perhaps arbitrarily or haphazardly, on the police officer's mere choice of form of the accusatory instrument in a misdemeanor situation.

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Practice Commentaries Cited

People v. Bennett, 1981, 80 A.D.2d 68, 438 N.Y.S.2d 389.
People v. Delgado, 1981, 110 Misc.2d 492, 442 N.Y.S.2d 748.

Notes of Decisions

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1. Constitutional requirements respecting disclosure

Suppression of exculpatory evidence in the face of a specific and relevant defense request will seldom, if ever, be excusable but, where the defense makes only a general request or none at all, failure to turn over obviously exculpatory material violates due process only if omitted evidence creates a reasonable doubt which did not otherwise exist. People v. Smith, 1984, 63 N.Y.2d 41, 479 N.Y.S.2d 706, 468 N.E.2d 879, certiorari denied 105 S.Ct. 1226, 469 U.S. 1227, 84 L.Ed.2d 364, rehearing denied 105 S.Ct. 2042, 471 U.S. 1049, 85 L.Ed.2d 340.

Failure to disclose to defendant fact that complainant had initially stated that sexual attack took place at tavern rather than defendant's home did not deprive defendant of his due process rights or a fair trial. People v. McMullen, 1983, 92 A.D.2d 1059, 461 N.Y.S.2d 565.

Violation of *"Brady"* rule which requires disclosure of certain preexisting, favorable information or evidence within knowledge of prosecution does not automatically result in violation of defendant's constitutional right to due process, but depends upon materiality thereof, and materiality depends upon nature of what was withheld or circumstances accompanying pretrial demand for discovery. People v. Rich, 1983, 118 Misc.2d 1057, 462 N.Y.S.2d 163.

2. Defendant, rights of

People v. Smoot, 1981, 112 Misc.2d 877, 447 N.Y.S.2d 575 [main volume] affirmed 86 A.D.2d 880, 450 N.Y.S.2d 397.

Prosecution was not required to provide defendant with free transcripts of all proceedings involving man who had previously pled guilty to attempted rape of same victim; man's crime occurred over different period of time than defendant's crime, and man and defendant were not codefendants. People v. Morrow, 1987, ___ A.D.2d ___, 513 N.Y.S.2d 891.

In determining whether defendant charged with rape is entitled to discover statements made by victim to and records kept by rape crisis counselors, court must balance defendant's Sixth Amendment right of confrontation and cross-examination of adverse witnesses, his right to exculpatory evidence and evidence material to issue of guilt or innocence, and his right to statements made by prosecution witness with right of complainant to seek counseling to aid her in dealing with trauma of rape and her reasonable expectation that such counseling will not be made public. People v. Pena, 1985, 127 Misc.2d 1057, 487 N.Y.S.2d 935.

Criminal defendants' rights guaranteed by the Constitution, statutes and case law do not include the right to gain access to police records containing personal information about crime victims and witnesses by use of court-ordered subpoenas duces tecum issued ex parte. People v. Bolivar, 1983, 121 Misc.2d 229, 467 N.Y.S.2d 525.

Proper procedure for effectuating defendants' right to discover evidence against them so that they can intelligently prepare trial and negotiate plea agreements is specified in statute governing subpoenas duces tecum, and if there is dissatisfaction with this statutory procedure, relief should be sought

produce the same. People v. Caban, 1984, 123 Misc.2d 943, 475 N.Y.S.2d 330.

Duty of the prosecution to disclose material evidence to an accused exists when there is a general request or even no request. People v. McCann, 1982, 115 Misc.2d 1025, 455 N.Y.S.2d 212.

5. Demand

Prosecutor had right to make his request that defendant exhibit his knee, for identification purposes, in presence of jury, thereby allowing inference to be drawn that defendant's knee was as described by witness, but it would have been better practice if prosecutor had moved for pretrial discovery pursuant to article. People v. Rumph, 1985, 128 Misc.2d 438, 488 N.Y.S.2d 998.

6a. —— Bank reports

In criminal proceeding, bank was required to produce any relevant report submitted by it to the Federal Reserve Board which was prepared by its agents or employees, but was not required to produce any report prepared by the Board, its agents or employees. People v. Calandra, 1983, 120 Misc.2d 1059, 467 N.Y.S.2d 141.

6b. —— Body

Victim's body in homicide case is not discoverable item prosecution must produce upon demand by defendant. People v. Rose, 1986, 122 A.D.2d 484, 505 N.Y.S.2d 244.

7. —— Defendant statements, etc.

State was not required to disclose to defense counsel prior to trial that defendant might have told arresting officer that he had taken some valium on date of burglary, where prosecutor used defendant's use of drugs to impeach defendant's credibility and prosecutor had no reason to believe that statement regarding valium consumption was of exculpatory nature. People v. [illegible], 121 A.D.2d 748, 504 N.Y.S.2d [illegible].

Corporate defendant was not entitled to discovery of statements made by non-defendant employees to law enforcement authorities before grand jury investigating corporation's possible violation of tax laws where corporation did not specifically designate such employees to testify on its behalf. People v. Christie, 1986, 133 Misc.2d 468, 505 N.Y.S.2d 310.

Memorandum from assistant district attorney to district attorney concerning status and progress of investigation that culminated in defendant's indictment was required to be disclosed to defendant to extent that oral statements made by defendant in presence of the assistant district attorney were reported where assistant district attorney was expected to be called to testify about those statements. People v. Essner, 1984, 125 Misc.2d 905, 480 N.Y.S.2d 857.

Informant, who was a prospective trial witness, became a subagent of law enforcement officials as of November 24, 1982, the date on which detective knew that informant was assisting another in obtaining, or attempting to obtain, information from defendant, and thus State was precluded, on its direct case, from introducing any statement allegedly made by defendant to informant on or after that date, and prosecutor would be required to disclose those statements allegedly made subsequent to that date. People v. Odierno, 1983, 121 Misc.2d 33[illegible], 467 N.Y.S.2d 968.

7a. —— Diary of victim

Murder defendant was not entitled to discover personal diary of murder victim to determine whether diary contained any information useful to his defense, even though defendant's name appeared in diary; diary was not in district attorney's possession, and defendant failed to demonstrate that it was reasonably likely that diary contained evidence or potential evidence. People v. Chambers, 1987, 134 Misc.2d 688, 512 N.Y.S.2d 631.

8. —— Exculpatory materials

Absent a connection to three counts of first-degree robbery with which defendant was charged, evidence of one victim's drug-related activity or such activity at victim's place of business was collateral and was not the kind of material the People were required to supply to defendant for use to impeach a witness. People v. Battee, 1986, 122 A.D.2d 527, 505 N.Y.S.2d 10.

Under principles of retroactivity, *Brady* requirement that prosecution disclose evidence that is exculpatory and material to issue of guilt or punishment would be applied to defendant's motion to vacate 1951 conviction of murder in second degree based upon guilty plea. People v. Armer, 1986, 119 A.D.2d 930, 501 N.Y.S.2d 203.

It was *Brady* violation for prosecution to fail to provide burglary defendant with evidence that key witness against him may also have believed that defendant was responsible for a prior robbery of witness' wife, and thus had an overriding animosity against defendant, as jury was entitled to hear any evidence which would assist them in their valid assessment of the credibility of the witness. People v. Velez, 1986, 118 A.D.2d 116, 504 N.Y.S.2d 404.

Though police have duty to disclose exculpatory material in their control, failure to so disclose will constitute reversible error if such evidence is material to defense and likely to have changed jury's verdict. People v. Russo, 1985, 109 A.D.2d 855, 486 N.Y.S.2d 769.

United States Supreme Court's *Brady* decision regarding State's disclosure of exculpatory material was not violated, where photographs in dispute were of nonexculpatory nature, and photographs would not have affected judgment of jury in view of overwhelming evidence of defendant's guilt in committing first-degree robbery and first-degree attempted robbery. People v. Russo, 1985, 109 A.D.2d 855, 486 N.Y.S.2d 769.

On defense motion to produce victim of rape with which defendant had not been charged, who had assisted police in making composite sketch, evidence that defendant might not have committed the rape, with which he was not charged, was irrelevant and inadmissible and was not exculpatory as to charged robbery, and thus *Brady* application was properly denied. People v. Reynolds, 1984, 104 A.D.2d 611, 479 N.Y.S.2d 736.

Police had no duty to record monitored transaction between undercover police agent and defendant simply because of speculative assumption that, if recorded, tapes might have contained potentially exculpatory information. People v. De Zimm, 1984, 102 A.D.2d 633, 479 N.Y.S.2d 859.

Material contained in police report which was not disclosed to defendant was not exculpatory and would not have affected verdict of jury where description of defendant in report substantially conformed to defendant's actual description except as to age reference, which was immaterial, defendant's photograph was not among photographs which witness saw before lineup, and thus fact that he failed to identify anyone, if anything, tended to strengthen his lineup identification of defendant, and failure of witness to identify defendant from composite drawing was of no significance since it was not shown that composite looked like defendant. People v. LaBombard, 1984, 99 A.D.2d 851, 472 N.Y.S.2d 764.

Record established that defendant was provided with Brady and Rosario material in sufficient time to use it effectively in his defense to charge of murder in the second degree. People v. McAfee, 1983, 95 A.D.2d 898, 463 N.Y.S.2d 916.

Prosecutor had an obligation to disclose true identity of voice on tape recording of conversation between defendant and individual requesting defendant's help to prevent latter's incarceration because defendant's accomplice in alleged scheme to receive kickbacks in exchange for awarding municipal contracts was going to testify against him as, on its face, the tape could have served to create false impression as to exculpatory impact, in that the other party was an undercover officer, but any prejudice was ameliorated by curative instruction. People v. Tempera, 1983, 94 A.D.2d 748, 462 N.Y.S.2d 512.

Prosecutor has an affirmative duty to view a videotape taken of a defendant following his arrest for driving while intoxicated and, if it is exculpatory, make it available to the defendant, even absent a request therefor. People v. Karns, 1985, 130 Misc.2d 247, 495 N.Y.S.2d 890.

Jury may draw inference against defendant who fails to produce evidence which, if favorable, would naturally have been produced. People v. Rumph, 1985, 128 Misc.2d 438, 488 N.Y.S.2d 998.

Duty to disclose exculpatory material arises from the prosecutor's interest, overriding the particular and immediate interest of his client in the prosecution, that justice be done; justice cannot be done if the prosecutor in withholding evidence, even for a brief period, casts himself in the role of an architect of a proceeding that does not comport with minimal standards of justice; prosecution must bend every effort to avoid prejudice to defendant in all future proceedings. People v. Hunter, 1984, 126 Misc.2d 13, 480 N.Y.S.2d 1006.

Witness' statement that defendant was not the thief but, rather, the captor, was one that obviously tended to exculpate the defendant and establish his innocence of third-degree grand larceny, and therefore the statement was one that the prosecutor could not knowingly suppress or conceal from defendant upon request for evidence of that specific character; given its obviously exculpatory nature, it was a statement which the prosecutor was obliged to disclose to the defense even in the absence of such request. People v. Hunter, 1984, 126 Misc.2d 13, 480 N.Y.S.2d 1006.

Since suppression is a prohibited evil, prosecutor satisfies disclosure obligation and *Brady* requirement by revealing favorable material in time for defense to present it effectively for jury's consideration during trial. People v. Jones, 1984, 125 Misc.2d 798, 479 N.Y.S.2d 966.

Preferred practice is pretrial disclosure of *Brady* material, since delayed disclosure, during trial, may be so unfair as to occasion a mistrial, with a resulting double jeopardy dismissal or later reversal. People v. Jones, 1984, 125 Misc.2d 798, 479 N.Y.S.2d 966.

In prosecution for assault in third degree, obstructing governmental administration and resisting arrest, the People's timely pretrial disclosure that exculpatory material existed and their efforts to acquire it amply satisfied their *Brady* obligation, despite fact that production of full details of the material was delayed, since defendants could and did obtain postponements to prepare adequately for trial. People v. Jones, 1984, 125 Misc.2d 798, 479 N.Y.S.2d 966.

It is incumbent on the state to employ regular procedures to preserve evidence which the state's agent could reasonably foresee might be favorable to the accused. People v. Molina, 1983, 121 Misc.2d 483, 468 N.Y.S.2d 551.

Government has a duty to preserve material evidence favorable to an accused. People v. McCann, 1982, 115 Misc.2d 1025, 455 N.Y.S.2d 212.

9. —— Exploration of case of prosecutor

Where exculpatory evidence was disclosed prior to close of People's direct case and defense had sufficient time to utilize material and there was no indication that earlier disclosure would have substantially affected nature of evidence or altered defendants' trial strategy, alleged late disclosure of exculpatory materials did not deprive defendants of fair trial. People v. Clark, 1982, 89 A.D.2d 820, 453 N.Y.S.2d 525.

10. —— Grand jury records and minutes

Grand jury synopsis sheet, which was not abbreviated summary of interview with any of People's witnesses, did not constitute "*Rosario* material" and was not subject to disclosure to defendant. People v. Williams, 1987, ___ A.D.2d ___, 513 N.Y.S.2d 840.

Accused who had already pled guilty to and been sentenced for crime arising out of activities investigated by grand jury and who waited four and one-half years after council of hospital of which accused was copartner was notified of attempt to obtain grand jury materials before initiating proceedings to vacate release order was not entitled to vacatur of release order on basis that he was not informed of attempts to procure grand jury materials. Matter of Deputy Attorney-General for Medicaid Fraud Control, 1986, 120 A.D.2d 586, 502 N.Y.S.2d 493.

Defense counsel was not entitled to transcript of defendant's sealed grand jury testimony in unrelated case due to People's motion to unseal minutes, where defendant did not make cross motion within three days before principal motion was heard, and People's motion was denied. People v. Lester, 1987, ___ Misc.2d 205, 514 N.Y.S.2d 861.

Release of expert's grand jury testimony under statute governing release of grand jury minutes of witness' testimony is limited to instance whereby court has determined that assistance of defense counsel is required in order to decide motion to dismiss indictment upon ground that evidence presented to grand jury is legally insufficient to support a charge. People v. Delaney, 1984, 125 Misc.2d 928, 480 N.Y.S.2d 229.

11. —— Identity of informant

In light of the marginal nature of the information provided by informant, who observed defendant walking with kidnap victim and gave police defendant's name and address, defendant was not entitled to disclosure of informant's identity absent an extremely strong showing of relevance. People v. Rios, 1983, 60 N.Y.2d 764, 469 N.Y.S.2d ___, 457 N.E.2d 776.

Even assuming that defendant's pro se demand for production or disclosure of informant encompassed request for in camera inquiry, People's inability to produce her at hearing directed by Appellate Division did not mandate suppression of items seized at time of defendant's arrest where record supported both findings that informant existed and that People made diligent effort to comply with direction to find her; nor was it an abuse of discretion to deny hearing. People v. Fulton, 1983, 58 N.Y.2d 979, 460 N.Y.S.2d 508, 447 N.E.2d 56.

Defendant was not entitled to production of informant who had purchased

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The North Carolina State Bar

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JUN 2 7 1988

June 20, 1988

Gordon F. Proudfoot, Esq.
Boyne Clarke
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Dear Mr. Proudfoot:

This is in response to your letter of June 10 on behalf of The Canadian Bar Association regarding laws, government guidelines and professional ethical codifications requiring exculpatory statements in criminal prosecutions to be provided to the defense.

As I am sure you are aware, in the United States each of the 50 states has its own separate court system which administers the laws of that state under procedures enacted or approved by the legislature or Supreme Court of that state. In addition, there is a completely separate federal court system, which administers laws enacted by the U.S. Congress in accordance with procedures in the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. The information contained below should be read in that context, inasmuch as the information relates solely to the State of North Carolina.

The North Carolina Legislature enacted Chapter 15A of the General Statutes, known as the Criminal Procedure Act. A copy of Subchapter IX, Article 48, G.S. § 15A-901, et. seq., is enclosed. Your particular attention is directed to G.S. § 15A-903(a)(2) which requires the Court, upon motion of a defendant, to order the prosecutor to divulge the substance of any statement relevant to the case made by the defendant which is within the possession of the State, the existence of which is known to the prosecutor or becomes known to him before or during the course of trial, except that disclosure is not required if the statement was made to an informant whose identity is a secret and who will not testify for the prosecution and if the statement is not

exculpatory. I also call your attention to the provisions of G.S. § 15A-907, regarding a continuing duty of disclosure. I should point out that this type of formal discovery is available only in cases within the original jurisdiction of our Superior Court, which is to say those cases involving felony crimes.

As regards ethical codifications relevant to your question, Rule 7.3 of the North Carolina Rules of Professional Conduct is entitled "Special Responsibilities of a Prosecutor". Rule 7.3(D) reads as follows:

> The prosecutor in a criminal or quasi criminal case shall make timely disclosure to the defense of all evidence or information known to him that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to him, except when he is relieved of this responsibility by a protective order of the tribunal;

I trust that this information will be of some assistance to you in the preparation of your brief.

Sincerely,

Robert G. Baynes

RGB/gh

Enclosure

cc: James Y. Preston, Esq.
Emil F. Kratt, Esq.
B. E. James, Esq.

offender was placed in custody is a Class G or more serious felony.

(12) Is notified if the offender escapes from custody or is released from custody, if the crime for which the offender was placed in custody is a Class G or more serious felony.

(13) Has family members of a homicide victim offered all the guarantees in this section, except those in subdivision (1). (1985 (Reg. Sess., 1986), c. 998, s. 1.)

§ 15A-826. Victim and witness assistants.

Victim and witness assistants are responsible for coordinating efforts within the law-enforcement and judicial systems to assure that each victim and witness is treated in accordance with this Article. (1985 (Reg. Sess., 1986), c. 998, s. 1.)

§ 15A-827. Scope.

This Article does not create any civil or criminal liability on the part of the State of North Carolina or any criminal justice agency, employee, or volunteer. (1985 (Reg. Sess., 1986), c. 998, s. 1.)

§§ 15A-828 to 15A-849: Reserved for future codification purposes.

ARTICLE 46.

§§ 15A-850 to 15A-875: Reserved for future codification purposes.

ARTICLE 47.

§§ 15A-876 to 15A-900: Reserved for future codification purposes.

SUBCHAPTER IX. PRETRIAL PROCEDURE.

ARTICLE 48.

Discovery in the Superior Court.

§ 15A-901. Application of Article.

This Article applies to cases within the original jurisdiction of the superior court. (1973, c. 1286, s. 1.)

§ 15A-902. Discovery procedure.

(a) A party seeking discovery under this Article must, before filing any motion before a judge, request in writing that the other party comply voluntarily with the discovery request. Upon receiving a negative or unsatisfactory response, or upon the passage of seven days following the receipt of the request without response, the party requesting discovery may file a motion for discovery under the provisions of this Article concerning any matter as to which voluntary discovery was not made pursuant to request.

(b) To the extent that discovery authorized in this Article is voluntarily made in response to a request, the discovery is deemed to have been made under an order of the court for the purposes of this Article.

(c) A motion for discovery under this Article must be heard before a superior court judge.

(d) If a defendant is represented by counsel, he may as a matter of right request voluntary discovery from the State under subsection (a) above not later than the tenth working day after either the probable-cause hearing or the date he waives the hearing. If a defendant is not represented by counsel, or is indicted or consents to the filing of a bill of information before he has been afforded or waived a probable-cause hearing, he may as a matter of right request voluntary discovery from the State under subsection (a) above not later than the tenth working day after

(1) The defendant's consent to be tried upon a bill of information, or the service of notice upon him that a true bill of indictment has been found by the grand jury, or

(2) The appointment of counsel — whichever is later.

For the purposes of this subsection a defendant is represented by counsel only if counsel was retained by or appointed for him prior to or during a probable-cause hearing or prior to execution by him of a waiver of a probable-cause hearing.

(e) The State may as a matter of right request voluntary discovery from the defendant, when authorized under this Article, at any time not later than the tenth working day after disclosure by the State with respect to the category of discovery in question.

(f) A motion for discovery made at any time prior to trial may be entertained if the parties so stipulate or if the judge for good cause shown determines that the motion should be allowed in whole or in part. (1973, c. 1286, s. 1.)

§ 15A-903. Disclosure of evidence by the State — information subject to disclosure.

(a) Statement of Defendant. — Upon motion of a defendant, the court must order the prosecutor:

(1) To 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 State the existence of which is known or by the exercise of due diligence may become known to the prosecutor; and

(2) To divulge, in written or recorded form, the substance of any oral statement relevant to the subject matter of the case made by the defendant, regardless of to whom the statement was made, within the possession, custody or control of the State, the existence of which is known to the prosecutor or becomes known to him prior to or during the course of trial; except that disclosure of such a statement is not required if it was made to an informant whose identity is a prosecution secret and who will not testify for the prosecution, and if the statement is not exculpatory. If the statement was made to a person other than a law-enforcement officer and if the statement is then known to the State, the State must divulge the substance of the statement no later than 12 o'clock noon, on Wednesday prior to the beginning of the week during which the case is calendared for trial. If disclosure of the substance of defendant's oral statement to an informant whose identity is or was a prosecution secret is withheld, the informant must not testify for the prosecution at trial.

(b) Statement of a Codefendant. — Upon motion of a defendant, the court must order the prosecutor:

(1) To permit the defendant to inspect and copy or photograph any written or recorded statement of a codefendant which the State intends to offer in evidence at their joint trial; and

(2) To divulge, in written or recorded form, the substance of any oral statement made by a codefendant which the State intends to offer in evidence at their joint trial.

(c) Defendant's Prior Record. — Upon motion of the defendant, the court must order the State to furnish to the defendant a copy of his prior criminal record, if any, as is available to the prosecutor.

(d) Documents and Tangible Objects. — Upon motion of the defendant, the court must order the prosecutor to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, buildings and places, or any other crime scene, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the State and which are material to the preparation of his defense, are intended for use by the State as evidence at the trial, or were obtained from or belong to the defendant.

(e) Reports of Examinations and Tests. — Upon motion of a defendant, the court must order the prosecutor to provide a copy of or to permit the defendant to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor. In addition, upon motion of a defendant, the court must order the prosecutor to permit the defendant to inspect, examine, and test, subject to appropriate safeguards, any physical evidence, or a sample of it, available to the prosecutor if the State intends to offer the evidence, or tests or experiments made in connection with the evidence, as an exhibit or evidence in the case.

(f) Statements of State's Witnesses.

(1) In any criminal prosecution brought by the State, no statement or report in the possession of the State that was made by a State witness or prospective State witness, other than the defendant, shall be the subject of subpoena, discovery, or inspection until that witness has testified on direct examination in the trial of the case.

(2) After a witness called by the State has testified on direct examination, the court shall, on motion of the defendant, order the State to produce any statement of the witness in the possession of the State

that relates to the subject matter as to which the witness has testified. If the entire contents of that statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(3) If the State claims that any statement ordered to be produced under this section contains matter that does not relate to the subject matter of the testimony of the witness, the court shall order the State to deliver that statement for the inspection of the court in camera. Upon delivery the court shall excise the portions of the statement that do not relate to the subject matter of the testimony of the witness. With that material excised, the court shall then direct delivery of the statement to the defendant for his use. If, pursuant to this procedure, any portion of the statement is withheld from the defendant and the defendant objects to the withholding, and if the trial results in the conviction of the defendant, the entire text of the statement shall be preserved by the State and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this subsection, the court, upon application of the defendant, may recess proceedings in the trial for a period of time that it determines is reasonably required for the examination of the statement by the defendant and his preparation for its use in the trial.

(4) If the State elects not to comply with an order of the court under subdivision (2) or (3) to deliver a statement to the defendant, the court shall strike from the record the testimony of the witness, and direct the jury to disregard the testimony, and the trial shall proceed unless the court determines that the interests of justice require that a mistrial be declared.

(5) The term "statement," as used in subdivision (2), (3), and (4) in relation to any witness called by the State means

a. A written statement made by the witness and signed or otherwise adopted or approved by him;

b. A stenographic, mechanical, electrical, or other recording, or a transcription thereof, that is a substantially verbatim recital or an oral statement made by the witness and recorded contemporaneously with the making of the oral statements. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1983, c. 759, ss. 1-3; 1983, Ex. Sess., c. 6, s. 1.)

§ 15A-904. Disclosure of evidence by the State — certain reports not subject to disclosure.

(a) Except as provided in G.S. 15A-903(a), (b), (c) and (e), this Article does not require the production of reports, memoranda, or other internal documents made by the prosecutor, law-enforcement officers, or other persons acting on behalf of the State in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State.

(b) Nothing in this section prohibits a prosecutor from making voluntary disclosures in the interest of justice. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

§ 15A-905. Disclosure of evidence by the defendant — information subject to disclosure.

(a) Documents and Tangible Objects. — If the court grants any relief sought by the defendant under G.S. 15A-903(d), the court must, upon motion of the State, order the defendant to permit the State to inspect and copy or photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, 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 in evidence at the trial.

(b) Reports of Examinations and Tests. — If the court grants any relief sought by the defendant under G.S. 15A-903(e), the court must, upon motion of the State, order the defendant to permit the State to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments

made in connection with the case, or copies thereof, within the possession and control of the defendant which the defendant intends to introduce in evidence 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 his testimony. In addition, upon motion of a prosecutor, the court must order the defendant to permit the prosecutor to inspect, examine, and test, subject to appropriate safeguards, any physical evidence or a sample of it available to the defendant if the defendant intends to offer such evidence, or tests or experiments made in connection with such evidence, as an exhibit or evidence in the case. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)

§ 15A-906. Disclosure of evidence by the defendant — certain evidence not subject to disclosure.

Except as provided in G.S. 15A-905(b) this Article does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by prosecution or defense witnesses, or by prospective prosecution witnesses or defense witnesses, to the defendant, his agents, or attorneys. (1973, c. 1286, s. 1.)

§ 15A-907. Continuing duty to disclose.

If a party, subject to compliance with an order issued pursuant to this Article, discovers prior to or during trial additional evidence or decides to use additional evidence, and the evidence is or may be subject to discovery or inspection under this Article, he must promptly notify the attorney for the other party of the existence of the additional evidence. (1973, c. 1286, s. 1; 1975, c. 166, s. 16.)

§ 15A-908. Regulation of discovery — protective orders.

(a) Upon written motion of a party and a finding of good cause, which may include, but is not limited to a finding that there is a substantial risk to any person or physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment, the court may at any time order that discovery or inspection be denied, restricted, or deferred, or may make other appropriate orders.

(b) The court may permit a party seeking relief under subsection (a) to submit supporting affidavits or statements to the court for in camera inspection. If thereafter the court enters an order granting relief under subsection (a), the material submitted in camera must be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal. (1973, c. 1286, s. 1; 1983, Ex. Sess., c. 6, s. 2.)

§ 15A-909. Regulation of discovery — time, place, and manner of discovery and inspection.

An order of the court granting relief under this Article must specify the time, place, and manner of making the discovery and inspection permitted and may prescribe appropriate terms and conditions. (1973, c. 1286, s. 1.)

§ 15A-910. Regulation of discovery — failure to comply.

If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may

(1) Order the party to permit the discovery or inspection, or
(2) Grant a continuance or recess, or
(3) Prohibit the party from introducing evidence not disclosed, or
(3a) Declare a mistrial, or
(3b) Dismiss the charge, with or without prejudice, or
(4) Enter other appropriate orders. (1973, c. 1286, s. 1; 1975, c. 166, s. 17; 1983, Ex. Sess., c. 6, s. 3.)

§§ 15A-911 to 15A-920: Reserved for future codification purposes.

ARTICLE 49.

Pleadings and Joinder.

§ 15A-921. Pleadings in criminal cases.

Subject to the provisions of this Article, the following may serve as pleadings of the State in criminal cases:

(1) Citation.
(2) Criminal summons.
(3) Warrant for arrest.
(4) Magistrate's order pursuant to G.S. 15A-511 after arrest without warrant.

Svete & Wickline Co., L.P.A.
Attorneys at Law
100 Parker Court - Chardon, Ohio 44024
216/286-9571

Joseph T. Svete
Paul O. Wickline
David A. McGee
Charles F. Cichocki

Of Counsel:
R. L. Grubb
Norman J. Raasch

June 21st, 1988

JUN 2 7 1988

Gordon F. Proudfoot, Esq.
BOYNE CLARKE Barristers & Solicitors
Suite 700, Belmont House
33 Alderney Drive
Post Office Box #879
Dartmouth, Nova Scotia B2Y 3Z5

RE: CANADIAN BAR SUBMISSION TO THE ROYAL COMMISSION ON THE PROSECUTION OF DONALD MARSHALL JR.

Dear Mr. Proudfoot:

I am an associate with the lawfirm of SVETE & WICKLINE. One of my areas of expertise is Criminal Law. Accordingly, your letter of June 10th, 1988, to Attorney Joseph T. Svete, in his capacity as President-Elect of the Ohio State Bar Association, was forwarded to me for response.

Although our legal systems have the same roots, it is apparent that evolution has done much to our "common" law. With that in mind, I trust that you will not find my reply condescending.

With slight variations, the Ohio Criminal Code parallels the majority of other states. Once an individual has been charged with a crime, he has an opportunity, prior to trial, to obtain several categories of information from the State. Upon written request made, within twenty-one days after arraignment, or seven days before the date of trial, the defendant is entitled to be provided with the following information:

(a) The statement of the defendant or the co-defendant.

(b) Defendant's prior record.

(c) Documents and tangible objects within the possession of the State which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial.

(d) Reports of physical or mental examinations, and of scientific tests or experiements.

(e) Witnesses names and addresses and prior felony convictions of any such witnesses.

(f) Disclosure of evidence favorable to defendant.

Once the defendant requests and obtains discovery, the State's attorney may request to be provided the same information from the defendant. Both parties have a continuing duty to disclose subsequently obtained information.

Central to your inquiry would be the category of items above-designated as "evidence favorable to defendant". Pursuant to that item, upon motion by the defendant, before trial, the court shall order the prosecuting attorney to disclose to counsel for defendant all evidence, known or which may become known to the prosecuting attorney, favorable to the defendant and material to either guilt or punishment. Ohio Criminal Rule 16 reflects a procedural codification of the holding of the U.S. Supreme Court in Brady v. Maryland, 373 U.S. 83 (1963). There is a myriad of decisions on both the state and federal level construing the scope of this right, attachment and waiver. Without knowing the thoroughness of the response sought, I will allow this brief synopsis to suffice.

Should you desire additional elaboration or information, please do not hesitate in writing me, or contacting me by phone, at the number provided above.

Very truly yours,

SVETE & WICKLINE CO., L.P.A.

Charles F. Cichocki, Esquire.

CFC:pg

JOHN HENRY HINGSON III, P.C.
ATTORNEY AT LAW
222 PROMENADE BUILDING
421 HIGH STREET
OREGON CITY, OREGON 97045

TELEPHONE
(503) 656-0355

August 24, 1988 Ref. No. 21311028

Keith Burns, President
Oregon State Bar
109 Standard Plaza
1100 SW 6th Avenue
Portland, Oregon 97204

Dear President Burns:

I am in receipt of Mr. Proudfoot's letter of June 10, 1988. I offer the following in response to Mr. Proudfoot's inquiry.

In 1963 the United States Supreme Court announced the rule of law that the prosecution's withholding of evidence favorable to an accused on the issue of guilt or sentencing violates due process of law afforded all citizens of the United States by the Fourteenth Amendment to the United States Constitution. Brady v. Maryland, 373 US 83, 83 S Ct 1194, 10 L Ed2d 215 (1963). In 1985, the United States Supreme Court extended that rule of law to require the prosecution to disclose, upon request, evidence that impeaches government witnesses. United States v. Bagley, 473 US ___, 105 S Ct 3375, 87 L Ed2d 481 (1985).

The State of Oregon, by a disciplinary rule, DR 7-103 (enclosed) requires the performance by the prosecution of the same functions. The majority of states in this nation have similar disciplinary rules governing the performance of duties by public prosecutors.

The actual performance of this duty by public prosecutors is problematic. Due to the perception by many criminal defense lawyers in America that those functions are not properly performed, the National Association of Criminal Defense Lawyers- an organization of over 5000 public and private criminal defenders in America - has established a Prosecutorial Misconduct Committee.

Should Mr. Proudfoot desire to correspond directly with the National Association of Criminal Defense Lawyers - which I recommend that he do - they can be reached at the following address:

National Association of Criminal Defense Lawyers
1110 Vermont Avenue, N.W.
Suite 1150
Washington, D.C. 20005
202/872-8688

I am sending a copy of Mr. Proudfoot's letter, together with a copy of my response, to the National Association of Criminal Defense Lawyers in order that they may be informed should Mr. Proudfoot desire to contact them. I hope this is of assistance.

Very truly yours,

John Henry Hingson III

JHH/nb
Enclosure
cc: David Dorsey, NACDL

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

(7) Counsel or assist the lawyer's 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) The lawyer's client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the lawyer's client to rectify the same, and if the lawyer's client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal except when the information is a confidence as defined in DR 4-101(A).

(2) A person other than the lawyer's 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 the lawyer 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 the defendant has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the defendant, mitigate the degree of the offense or reduce the punishment.

DR 7-104 Communicating with a Person Represented by Counsel.

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

(1) Communicate or cause another to communicate on the subject of the representation, or on directly related subjects, with a person the lawyer knows to be represented by a lawyer on that subject, or on directly related subjects, unless the lawyer has the prior consent of the lawyer representing such other person or is authorized by law to do so. This prohibition includes a lawyer representing the lawyer's own interests.

(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 the lawyer's client.

DR 7-105 Threatening Criminal Prosecution.

(A) A lawyer shall not threaten to present criminal charges to obtain an advantage in a civil matter.

DR 7-106 Trial Conduct.

(A) A lawyer shall not disregard or advise the lawyer's client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding but the lawyer may take appropriate steps in good faith to test the

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

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

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

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

(1) State or allude to any matter that the lawyer 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 the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

(3) Assert the lawyer's personal knowledge of the facts in issue except when testifying as a witness.

(4) Assert the lawyer's 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 a criminal defendant but the lawyer may argue, on the lawyer's 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 or a particular tribunal without giving to opposing counsel timely notice of the lawyer's 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 shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer intended to affect the fact-finding process or the lawyer knows or reasonably should know the statements pose a serious and imminent threat to the fact-finding process in an adjudicative proceeding and acts with indifference to that effect.

(B) The foregoing provision of DR 7-107 does not preclude a lawyer from replying to charges of misconduct publicly made against the lawyer or from participating in the proceedings of legislative, administrative or other investigative bodies.

(C) A lawyer shall exercise reasonable care to prevent the lawyer's employees from making an extrajudicial statement that the lawyer would be prohibited from making under DR 7-107(A).

DR 7-108 Communication with or Investigation of Jurors.

(A) Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone the lawyer knows to be a member of the venire from which the jury will be selected for the trial of the case.

(B) During the trial of a case:

(1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.

(2) A lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(C) DR 7-108(A) and (B) do not prohibit a lawyer from communicating with veniremen or jurors in the course of official proceedings.

(D) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to

pennsylvania Bar association
100 South Street, Post Office Box 186 • Harrisburg, PA 17108 • Telephone (717) 238-6715

SEP 16 1988

September 13, 1988

Gordon F. Proudfoot, Esquire
Canada Bar Association
P. O. Box 876
Dartmouth, N.S.
B2Y 3Z5

Dear Mr. Proudfoot:

Your letter of August 5, 1988 to Carl W. Brueck, Jr., President of the Pennsylvania Bar Association has been forwarded to me for response.

I am enclosing a copy of Rule 305 (Pretrial Discovery and Inspection) of the Rules of Criminal Procedure and a copy of Rule 3.8 (Special Responsibilities of a Prosecutor) of the Rules of Professional Conduct.

Hopefully, the foregoing is responsive to your inquiry. If you have any further questions, please feel free to contact me.

Very truly yours,

Dona Porvaznik

Dona Porvaznik, Ethics Coordinator

DP:rep

CC: Carl W. Brueck, Jr., Esquire
James E. Tarman, Esquire
(w/o enclosures)

101(B) permits a lawyer to testify while representing a client: "(1) If the testimony will relate solely to an uncontested matter; (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client; (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."

The exception stated in (a)(1) consolidates provisions of DR 5-101(B)(1) and (2). Testimony relating to a formality, referred to in DR 5-101(B)(2), in effect defines the phrase "uncontested issue," and is redundant.

RULE 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

COMMENT:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

CODE COMPARISON:

DR 7-103(A) provides that "A public prosecutor . . . shall not institute . . . criminal charges when he knows or it is obvious that the charges are not supported by probable cause." DR 7-103(B) provides that "A public prosecutor . . . shall make timely disclosure . . . 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."

RULE 3.9 Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) and (b), and 3.5.

COMMENT:

In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure.

Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

This Rule does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency; representation in such a transaction is governed by Rules 4.1 thru 4.4.

CODE COMPARISON:

EC 7-15 states that "A lawyer appearing before an administrative agency, regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law." EC 7-16 states that "When a lawyer appears in connection with proposed legislation, he . . . should comply with applicable laws and legislative rules." EC 8-5 states that "Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a . . . legislative body . . . should never be participated in . . . by lawyers." DR 7-106(B)(1) provides that "In presenting a matter to a tribunal, a lawyer shall disclose . . . Unless privileged or irrelevant, the identities of the clients he represents and of the persons who employed him."

in this rule, are observed in some fashion in all court cases.

The main purposes of arraignment are: to assure that the defendant is advised of the charges against him; to have counsel enter an appearance, or, if the defendant has no counsel to consider defendant's right to counsel; and to commence the period of time within which to initiate pretrial discovery and to file other motions. With regard to the waiver of counsel, see Rule 318.

It is intended that, in addition to other instances of "cause shown" for delaying the arraignment, the arraignment may be delayed where the defendant was unavailable for arraignment within the ten day period after indictment or information.

Adopted June 30, 1964, effective Jan. 1, 1965. Amended, effective Nov. 22, 1971; amended Nov. 29, 1972, effective in 10 days; amended and effective Feb. 15, 1974; renumbered from Rule 317 and amended June 29, 1977, effective Jan. 1, 1978; amended Oct. 21, 1977, effective as to cases in which the indictment or information is filed on or after Jan. 1, 1978; amended Nov. 22, 1977; amended Jan. 28, 1983, effective July 1, 1983; Oct. 21, 1983, effective Jan. 1, 1984.

RULE 304. BILL OF PARTICULARS

(a) A request for a bill of particulars shall be served in writing by the defendant upon the attorney for the Commonwealth within seven (7) days following arraignment. The request shall promptly be filed as provided in Rule 9022 subsequent to service upon the attorney for the Commonwealth.

(b) The request shall set forth the specific particulars sought by the defendant, and the reasons why the particulars are requested.

(c) Upon failure or refusal of the attorney for the Commonwealth to furnish a bill of particulars after service of a request upon him, the defendant may make written motion for relief to the court within seven (7) days after such failure or refusal. If further particulars are desired after an original bill of particulars has been furnished, a motion therefor may be made to the court within five (5) days after the original bill is furnished.

(d) When a motion for relief is made, the court may make such order as it deems necessary in the interests of justice.

Note

Adopted June 29, 1977, effective January 1, 1978; amended October 21, 1983, effective January 1, 1984.

Comment

This rule replaces previous Rules 221 and 230 in their entirety. Prior to the 1977 revision of this Chapter, the rules dealing with Bills of Particulars appeared in Chapter 200, concerning indictments (Rule 221) and informations (Rule 230). The traditional function of a bill of particulars—namely, to clarify the pleadings and to limit the evidence which can be offered to support the indictment or information—has not been changed by the transfer of the provision to Chapter 300. The purpose of the transfer was to place the procedure in chronological context with other pretrial matters, including discovery and the omnibus pretrial motion.

Adopted June 29, 1977, effective as to cases in which the indictment or information is filed on or after Jan. 1, 1978. Amended Nov. 22, 1977; Oct. 21, 1983, effective Jan. 1, 1984.

RULE 305. PRETRIAL DISCOVERY AND INSPECTION

A. Informal. Before any disclosure or discovery can be sought under these rules by either party, counsel for the parties shall make a good faith effort to resolve all questions of discovery, and to provide information required or requested under these rules as to which there is no dispute. When there are items requested by one party which the other party has refused to disclose, the demanding party may make appropriate motion to the court. Such motion shall be made within fourteen (14) days after arraignment, unless the time for filing is extended by the court. In such motion the party must set forth the fact that a good faith effort to discuss the requested material has taken place and proved unsuccessful. Nothing in this provision shall delay the disclosure of any items agreed upon by the parties pending resolution of any motion for discovery.

B. Disclosure by the Commonwealth.

(1) *Mandatory.* In all court cases, on request by the defendant, and subject to any protective order which the Commonwealth might obtain under this rule, the Commonwealth shall disclose to the defendant's attorney all of the following requested items or information, provided they are material to the instant case. The Commonwealth shall, when applicable, permit the defendant's attorney to inspect and copy or photograph such items.

(a) Any evidence favorable to the accused which is material either to guilt or to punishment, and which is within the possession or control of the attorney for the Commonwealth;

(b) any written confession or inculpatory statement, or the substance of any oral confession or inculpatory statement, and the identity of the person to whom the confession or inculpatory statement was made, which is in the possession or control of the attorney for the Commonwealth;

(c) the defendant's prior criminal record;

(d) the circumstances and results of any identification of the defendant by voice, photograph, or in-person identification;

(e) results or reports of scientific tests, expert opinions, and written or recorded reports of polygraph examinations or other physical or mental examinations of the defendant, which are within

the possession or control of the attorney for the Commonwealth;

(f) any tangible objects, including documents, photographs, fingerprints, or other tangible evidence;

(g) the transcripts and recordings of any electronic surveillance, and the authority by which the said transcripts and recordings were obtained.

(2) *Discretionary with the Court.* In all court cases, except as otherwise provided in Rule 263 (Disclosure of Testimony Before Investigating Grand Jury), if the defendant files a motion for pretrial discovery, the court may order the Commonwealth to allow the defendant's attorney to inspect and copy or photograph any of the following requested items, upon a showing that they are material to the preparation of the defense, and that the request is reasonable:

(a) the names and addresses of eyewitnesses;

(b) all written or recorded statements, and substantially verbatim oral statements, of eyewitnesses the Commonwealth intends to call at trial;

(c) all written or recorded statements, and substantially verbatim oral statements, made by co-defendants, and by co-conspirators or accomplices, whether such individuals have been charged or not;

(d) any other evidence specifically identified by the defendant, provided the defendant can additionally establish that its disclosure would be in the interests of justice.

C. Disclosure by the Defendant.

(1) *Mandatory.*

(a) Notice of Alibi Defense. A defendant who intends to offer the defense of alibi at trial shall, at the time required for filing the omnibus pretrial motion under Rule 306, file of record notice signed by the defendant or the attorney for the defendant, with proof of service upon the attorney for the Commonwealth, specifying intention to claim such defense. Such notice shall contain specific information as to the place or places where the defendant claims to have been at the time of the alleged offense and the names and addresses of witnesses whom the defendant intends to call in support of such claim.

(b) Notice of Insanity or Mental Infirmity Defense. A defendant who intends to offer at trial the defense of insanity, or a claim of mental infirmity, shall, at the time required for filing an omnibus pretrial motion under Rule 306, file of record notice signed by the defendant or the attorney for the defendant, with proof of service upon the attorney for the Commonwealth, specifying intention to claim such defense. Such notice shall contain specific available information as to the nature and extent of the alleged insanity or claim of mental infirmity, the period of time which the defendant allegedly suffered from such insanity or mental infirmity, and the names and addresses of witnesses, expert or otherwise, whom the defendant intends to call at trial to establish such defense.

(c) Disclosure of Reciprocal Witnesses. Within seven (7) days after service of such notice of alibi defense or of insanity or claim of mental infirmity defense, or within such other time as allowed by the court upon cause shown, the attorney for the Commonwealth shall disclose to the defendant the names and addresses of all persons the Commonwealth intends to call as witnesses to disprove or discredit the defendant's claim of alibi or of insanity or mental infirmity.

(d) Failure to File Notice. If the defendant fails to file and serve notice of alibi defense or insanity or mental infirmity defense as required by this rule, or omits any witness from such notice, the court at trial may exclude the testimony of any omitted witness, or may exclude entirely any evidence offered by the defendant for the purpose of proving the defense, except testimony by the defendant, or may grant a continuance to enable the Commonwealth to investigate such evidence, or may make such other order as the interests of justice require.

(e) Failure to Supply Reciprocal Notice. If the attorney for the Commonwealth fails to file and serve a list of its witnesses as required by this rule, or omits any witness therefrom, the court at trial may exclude the testimony of any omitted witness, or may exclude any evidence offered by the Commonwealth for the purpose of disproving the alibi, insanity or mental infirmity defense, or may grant a continuance to enable the defense to investigate such evidence, or may make such other order as the interests of justice require.

(f) Failure to Call Witnesses. No adverse inference may be drawn against the defendant, nor may any comment be made concerning the defendant's failure to call available alibi, insanity or mental infirmity witnesses, when such witnesses have been prevented from testifying by reason of this rule unless the defendant or the defendant's attorney shall attempt to explain such failure to the jury.

(g) Impeachment. A defendant may testify concerning an alibi notwithstanding that the defendant has not filed notice, but if the defendant has filed notice and testifies concerning his presence at the time of the offense at a place or time different from that specified in the notice, the defendant may be cross-examined concerning such notice.

(2) *Discretionary With the Court.* In all court cases, if the Commonwealth files a motion for pre-

trial discovery, the court may order the defendant, subject to the defendant's rights against compulsory self-incrimination, to allow the attorney for the Commonwealth to inspect and copy or photograph any of the following requested items, upon a showing of materiality to the preparation of the Commonwealth's case and that the request is reasonable:

(a) 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, or which were prepared by a witness whom the defendant intends to call at the trial, when results or reports relate to the testimony of that witness, provided the defendant has requested and received discovery under paragraph B(1)(e);

(b) the names and addresses of eyewitnesses whom the defendant intends to call in its case in chief, provided that the defendant has previously requested and received discovery under paragraph B(2)(a).

D. Continuing Duty to Disclose. If, prior to or during trial, either party discovers additional evidence or material previously requested or ordered to be disclosed by it, which is subject to discovery or inspection under this rule, or the identity of an additional witness or witnesses, such party shall promptly notify the opposing party or the court of the additional evidence, material or witness.

E. Remedy. 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 discovery or inspection, may grant a continuance, or may prohibit such party from introducing evidence not disclosed, other than testimony of the defendant, or it may enter such other order as it deems just under the circumstances.

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

G. 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 attorney for the Commonwealth or the attorney for the defense, or members of their legal staffs.

Note

Replaces former Rule 310 in its entirety. Former Rule 310 was originally adopted June 30, 1964, effective January 1, 1965. Present Rule 305 adopted June 29, 1977, effective January 1, 1978; Comment revised April 24, 1981, effective June 1, 1981; amended October 22, 1981, effective January 1, 1982.

Comment

This rule is intended to apply only to court cases; the constitutional guarantees mandated in *Brady v. Maryland*, 83 S.Ct. 1194, 373 U.S. 83, 10 L.Ed.2d 215 (1963), and the refinements of the *Brady* standards embodied in subsequent judicial decisions, apply to all cases, including court cases and summary cases, and nothing to the contrary is intended. For definitions of "court case" and "summary case", see Rule 3.

In determining the extent to which pretrial discovery should be ordered under the "Discretionary with the Court" sections of this rule, judges may be guided by the following general principles of the ABA *Standards Relating to Discovery and Procedure Before Trial* (Approved Draft, 1970):

SEC. 1.1: PROCEDURAL NEEDS PRIOR TO TRIAL.

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

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

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

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

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

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

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

(b) These needs can be served by:

(i) fuller discovery;

(ii) simpler and more efficient procedures; and

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

SEC. 1.2: SCOPE OF DISCOVERY.

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

Whenever the rule makes reference to the term "identification," or "in-person identification," it is understood

that such terms are intended to refer to all forms of identifying a defendant by means of the defendant's person being in some way exhibited to a witness for the purpose of an identification: *e. g.*, line-up, stand-up, show-up, one-on-one confrontation, one-way mirror, etc. The purpose of this provision is to make possible the assertion of a rational basis for a claim of improper identification based upon *Stovall v. Denno*, 87 S.Ct. 1967, 388 U.S. 293, 18 L.Ed.2d 1199 (1967), and *United States v. Wade*, 87 S.Ct. 1926, 388 U.S. 218, 18 L.Ed.2d 1149 (1967).

This rule is not intended to affect the admissibility of evidence discoverable under this rule or the fruits thereof, nor the standing of the defendant to seek suppression of such evidence.

The notice-of-alibi provision of this rule contained in part C(1)(a) is intended to comply with the requirement of *Wardius v. Oregon*, 93 S.Ct. 2208, 412 U.S. 470, 37 L.Ed.2d 82 (1973), by the inclusion of reciprocal disclosure responsibilities placed upon the Commonwealth in paragraph C(1)(c). This rule thus replaces former Rule 312, which was rescinded on June 29, 1973, pursuant to *Wardius, supra. See also Commonwealth v. Contakos*, 455 Pa. 136, 314 A.2d 259 (1974). The provision requiring a notice of insanity defense, paragraph C(1)(b), has not previously been included in these rules, but the safeguards surrounding them have been made identical to those protecting the defendant under the notice-of-alibi provision.

The provision for a protective order, part F, does not confer upon the Commonwealth any right of appeal not presently afforded by statute.

Part G is derived in part from ABA *Standards Relating To Discovery And Procedure Before Trial* § 2.6(a). See *Commentary* contained therein. Part G, however, makes this provision applicable to the work product of the defense, while the ABA Standards refer only to the prosecution.

It should also be noted that as to material which is discretionary with the court, or which is not enumerated in the rule, if such information contains exculpatory evidence as would come under the *Brady* rule, it *must* be disclosed. Nothing in this rule is intended to limit in any way disclosure of evidence constitutionally required to be disclosed.

The limited suspension of Section 5720 of the Wiretapping and Electronic Surveillance Control Act, Act of October 4, 1978, P.L. 831, No. 164, 18 Pa. C.S. § 5720, (see Rule 340(g)), is intended to insure that the statutory provision and Rule 305B(1)(g) are read in harmony. A defendant may seek discovery under subparagraph B(1)(g) pursuant to the time frame of the rule, while the disclosure provisions of Section 5720 would operate within the time frame set forth in Section 5720 as to materials specified in Section 5720 and not previously discovered.

Adopted June 30, 1974, effective Jan. 1, 1965. Renumbered from Rule 310 and amended June 29, 1977, effective as to cases in which the indictment or information is filed on or after Jan. 1, 1978; amended Nov. 22, 1977; April 24, 1981, effective June 1, 1981; Oct. 22, 1981, effective Jan. 1, 1982.

RULE 306. OMNIBUS PRETRIAL MOTION FOR RELIEF

Unless otherwise required in the interests of justice, all pretrial requests for relief shall be included in one omnibus pretrial motion.

Note

Formerly Rule 304, adopted June 30, 1964, effective January 1, 1965; amended and renumbered 306, June 29, 1977, effective January 1, 1978; amended Oct. 21, 1983, effective January 1, 1984.

Comment

Types of relief requested in the omnibus pretrial motions shall include, but shall not be limited to, the following:

(1) for continuance;

(2) for severance and joinder or consolidation;

(3) for suppression of evidence;

(4) for psychiatric examination;

(5) to quash an indictment or information;

(6) for change of venue or venire;

(7) to disqualify a judge;

(8) for appointment of investigator; and

(9) for pretrial conference.

This rule previously contained several paragraphs that provided requirements for the form and content of the omnibus pretrial motion. These paragraphs were deleted as unnecessary in 1983, when these requirements were incorporated into Rule 9020, a general rule applicable to all motions, including the omnibus pretrial motion.

Adopted June 30, 1964, effective Jan. 1, 1965. Renumbered from Rule 304 and amended June 29, 1977, effective as to cases in which the indictment or information is filed on or after Jan. 1, 1978; amended Nov. 22, 1977; Oct. 21, 1983, effective Jan. 1, 1984.

RULE 307. TIME FOR OMNIBUS PRETRIAL MOTION AND SERVICE

Except as otherwise provided in these rules, the omnibus pretrial motion for relief shall be filed and served within thirty (30) days after arraignment, unless opportunity therefor did not exist, or the defendant or defense attorney, or the attorney for the Commonwealth, was not aware of the grounds for the motion, or unless the time for filing has been extended by the court for cause shown.

Copies of all pretrial motions shall be served in accordance with Rule 9023.

Note

Formerly Rule 305, adopted June 30, 1964, effective January 1, 1965; renumbered 307 and amended June 29, 1977, effective January 1, 1978; amended Oct. 21, 1983, effective January 1, 1984.

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RHODE ISLAND BAR ASSOCIATION
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June 30, 1988

JUL 6 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 inquiry of June 10, the law of the State of Rhode Island is in the United States mainstream regarding prosecutorial duty to disclose exculpatory matter. Enclosed is a copy of Rule 16 of the Rhode Island Superior Court Rules of Criminal Procedure, which is based upon but not identical with Federal Rule 16. Also enclosed are copies of excerpts from Canon 7 of the Rhode Island Code of Professional Responsibility, specifically Disciplinary Rule 7-103 and Ethical Consideration 7-13. As I am sure you are aware, various American jurisdictions - including the State of Rhode Island - are in the process of adopting new rules of professional responsibility to replace the Code. The new rules, however, contain language substantially similar to the present Disciplinary Rule 7-103(b).

All United States jurisdictions are subject to the constitutional due process requirement enunciated by the United States Supreme Court in Brady v. Maryland, 373 U.S. 83 (1963), which requires the production of exculpatory information under the Fourteenth Amendment to the United States Constitution.

I trust that the enclosed information will assist your work.

Sincerely,

William F. McMahon
President

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Enclosures

16. Discovery and inspection. — (a) *Discovery by Defendant.* Upon written request by a defendant, the attorney for the State shall permit the defendant to inspect or listen to and copy or photograph any of the following items within the possession, custody, or control of the State, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the State:

(1) all relevant written or recorded statements or confessions, signed or unsigned, or written summaries of oral statements or confessions made by the defendant, or copies thereof;

(2) all relevant recorded testimony before a grand jury of the defendant, or in the case of a corporate defendant, of any present or former officer or employee of the defendant corporation concerning activities carried on, or knowledge acquired, within the scope of or reasonably relating to his employment;

(3) all written or recorded statements or confessions which were made by a co-defendant who is to be tried together with the moving defendant and which the State intends to offer in evidence at the trial, and written summaries of oral statements or confessions of such a co-defendant in the event the State intends at the trial to offer evidence of such oral statements or confessions;

(4) all books, papers, documents, photographs, sound recordings, or copies thereof, or tangible objects, buildings, or places which are intended for use by the State as evidence at the trial or were obtained from or belong to the defendant;

(5) all results or reports in writing, or copies thereof, of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case and, subject to an appropriate protective order under paragraph (f), any tangible objects still in existence that were the subject of such tests or experiments;

(6) a written list of the names and addresses of all persons whom the attorney for the State expects to call as witnesses at the trial in support of the State's direct case;

(7) as to those persons whom the State expects to call as witnesses at the trial, all relevant recorded testimony before a grand jury of such persons and all written or recorded verbatim statements, signed or unsigned, of such persons and, if no such testimony or statement of a witness is in the possession of the State, a summary of the testimony such person is expected to give at the trial;

(8) all reports or records of prior convictions of the defendant, or of persons whom the attorney for the State expects to call as witnesses at the trial, and within fifteen (15) days after receipt from the defendant of a list produced pursuant to paragraph (b) (3) of persons whom the defendant expects to call as witnesses all reports or records of prior convictions of such persons;

(9) all warrants which have been executed in connection with the particular case and the papers accompanying them, including affidavits, transcripts of oral testimony, returns and inventories.

(b) *Discovery by the State.* A defendant who seeks any discovery under subdivision (a) of this rule shall permit the State, upon receipt

of written request, to inspect or listen to and copy or photograph any of the following items within the possession, custody or control of the defendant or his attorney:

(1) all books, papers, documents, photographs, sound recordings or copies thereof, or tangible objects, buildings, or places which are intended for use by the defendant as evidence at the trial;

(2) all results or reports in writing, or copies thereof, of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case and prepared by a person whom the defendant intends to call as a witness at the trial and, subject to an appropriate protective order under paragraph (f), any tangible objects still in existence that were the subject of such tests or experiments;

(3) a written list of the names and addresses of all persons other than the defendant whom the defendant expects to call as witnesses at the trial in the event the State presents a prima facie case;

(4) as to those persons other than the defendant whom the defendant expects to call as witnesses at the trial, all written or recorded verbatim statements, signed or unsigned, of such persons and, if no such statement of a witness is in the possession of the defendant, a summary of the testimony such person is expected to give at the trial.

(c) *Notice of Alibi.* In the event a defendant seeks any discovery under subdivision (a) of this rule, then upon demand by the attorney for the State and delivery by him to the defendant of a written statement describing with specificity the date and time when and the place where the offense charged is alleged to have occurred, the defendant, within twenty-one (21) days after receipt of such demand and particulars, shall give written notification whether he intends to rely in any way on the defense of alibi. If the defendant does so intend, the notice shall state with specificity the place at which he claims to have been at the time of the alleged offense and the names and addresses of the witnesses he intends to call at the trial to establish such alibi. Within twenty-one (21) days after receipt of written notification of intent to rely on the defense of alibi, together with particulars thereof, the attorney for the State shall furnish to the defendant written notice of the names and addresses of the witnesses whom the State intends to call at the trial to establish defendant's presence at the place where and the time when the offense is alleged to have occurred.

(d) *Material Not Subject to Discovery.* Except as provided in subdivisions (a) and (b), this rule does not authorize discovery of internal reports, memoranda, or other documents made by a defendant, or his attorney or agent, or by the attorney for the State, or by officers or agents of the State, in connection with or in preparation for the prosecution or defense of a criminal proceeding.

(e) *Failure to Call a Witness.* The fact that a person was designated by a party pursuant to subdivision (a)(6) or subdivision (b)(3) as an intended witness but was not called to testify shall not be commented upon at the trial by any party.

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(f) *Protective Orders.* Upon motion and a sufficient showing the court may at any time order that the discovery or inspection sought pursuant to this rule be denied, restricted or deferred, or make such other order as is appropriate. In determining the motion, the court may consider, among other things, the following: protection of witnesses and others from physical harm, threats of harm, bribes, economic reprisals and other intimidation; maintenance of such secrecy regarding informants as is required for effective investigation of criminal activity; and protection of confidential relationships and privileges recognized by law; the need to safeguard from loss or to preserve the condition of tangible objects sought to be discovered under paragraphs (a)(4), (a)(5), (b)(1) and (b)(2). The court may permit a party to make a showing of good cause, in whole or in part, in the form of a written statement to be inspected by the court alone. If the court thereafter enters a protective order, the entire text of the party's statement shall be sealed and preserved in the records of the court, to be made available only to an appellate court in the event of an appeal. Upon application of a party who has, pursuant to subdivision (a) (6) or subdivision (b) (3), been requested to designate the names of persons who will be called as witnesses at the trial, the court may order that the testimony of one or more persons so designated be perpetuated by oral deposition pursuant to Rule 15 at a time and place and before an officer ordered by the court. Examination and cross-examination shall proceed as permitted at the trial. A record of the testimony of such a witness shall be made and shall be admissible at the trial as part of the case of the party who requested the taking of the deposition in the event the witness becomes unavailable without fault of such party or if the witness changes his testimony materially.

(g) *Procedure and Timing.*

(1) *Defendant's Request.* A request by a defendant for discovery and inspection shall be made within twenty-one (21) days after arraignment. The attorney for the state shall respond in writing within fifteen (15) days after service of the request stating with respect to each item or category either that discovery and inspection will be permitted or stating that the request will not or cannot be complied with and the reason why. The response shall also specify the place and time defendant may inspect the items being made available.

(2) *State's Request.* Within twenty-one (21) days after serving a response to a defendant's request for discovery and inspection, the attorney for the State may serve a defendant with a request for discovery and inspection. The defendant shall respond within fifteen (15) days after service of the request stating with respect to each item or category either that discovery and inspection will be permitted or stating that the request will not or cannot be complied with and the reason why. The response shall also specify the place and time the attorney for the State may inspect the items being made available.

(3) *Discovery or Inspection Withheld.* In the event a party refuse to comply with a request for discovery or inspection, the party wh served the request may move for an order to compel compliance wit his request.

(4) *Extensions of Time.* The court may on motion of a party an for good cause shown extend the time for serving requests or re sponses permitted or required under this rule.

(h) *Continuing Duty to Disclose.* If, subsequent to complian with a request for discovery or with an order issued pursuant to th rule, and prior to or during trial, a party discovers additional mate rial previously requested which is subject to discovery or inspectio under this rule, he shall promptly notify the other party of the exi tence thereof.

(i) *Failure to Comply.* If at any time during the course of th proceedings it is brought to the attention of the court that a part has failed to comply with this rule or with an order issued pursuan to this rule, it may order such party to provide the discovery o inspection, grant a continuance, or prohibit the party from introduc ing in evidence the material which or testimony of a witness whos identity or statement were not disclosed, or it may enter such othe order as it deems appropriate.

(j) *Applicability of Rule.* This rule applies only to criminal trial in the Superior Court.

Reporter's Notes to 1974 Amendment. This memorandum is intended to review the new version of Rule 16 of the Rules of Criminal Procedure of the Superior Court. The proposed rule was submitted to the Advisory Committee of the Superior Court this past November and has been subjected to extensive discussion, criticism and revision. On April 26th, the Committee gave final approval to the attached rule and recommended its adoption by the Justices of the Superior Court.

The purpose of the revision is to provide for the fullest, reciprocal discovery in criminal cases in the Superior Court that is practicable as well as consistent with the Constitutional rights of defendants. Until fairly recently, there existed serious and widespread doubt concerning the constitutionality of requiring a criminal defendant to give discovery, even if only as a condition to obtaining discovery from the State. See 1 Wright, Federal Practice & Procedure, 523-528 (1969); ABA, Standards Relating to Discovery and Procedure Before Trial 44-45 (Tent. Draft 1969) [hereinafter referred to as "ABA Standards,"]. In 1970, however, the Supreme Court in *Williams v Florida*, 399 US 78, resolved much of the doubt when it held that a defendant in a state proceeding could, consistent with the privilege against self-incrimination, be required on request to give pretrial notice of his intention to raise the d fense of alibi as well as to supply the nam of witnesses he intended to call in support the defense. Although the Florida rule i volved in the *Williams* case provided for ciprocal discovery, the Court did not ex pressly condition its approval of the rule on that ground. In June of 1973, the Court, in *Wardius v Oregon*, 412 US 470, squarely held that a state rule which compelled a defendant to provide discovery with respect to the de fense of alibi violates the Fourteenth Amend ment if reciprocal discovery rights are no available to the defendant. Although th Court was dealing with a rule limited only t discovery of alibi defense, its statement con cerning reciprocity would appear to be appli cable to other aspects of discovery: "... in th absence of a strong showing of state interes to the contrary, discovery must be a two-way street.... It is fundamentally unfair to re quire a defendant to divulge the details of h own case while at the same time subjectin him to the hazard of surprise concerning re utation of the very pieces of evidence which he disclosed to the State." 412 US 475-6.

Though the decision in *Wardius* require that discovery be a "two-way street" it doe not deal directly with the further question o whether a defendant who chooses not to seek discovery available to him can nonetheless be compelled to give discovery at the initiative

of the prosecution. (covery rules consi *Wardius* were not c dant first seeking di cally designed for th the process. Until qu all clear whether a trusive discovery of rials and informatio prosecution would f cause the defendant lent right to seek materials. Very sub tion problems were scheme. It was ass flected in [former] Rules of Criminal P dant initiates discov can be provided w rights. This approac waiver by the defe lege against self-inc erwise possess to res adoption of [former] the express doubts Justice Douglas, joi F.R.D. 276-78 (196 that the Court woul discovery by the p Rule 16 [formerly al that the discovery p defendant.

In early 1970 the the Federal Crimina liminary draft of a Rule 16 that provid of discovery for bot prosecution. The Co potential self-incri volved in permittin discovery in the abs demand by the defe upon decisions uph state of the defense constitutionality of 607-609 (1970). How uncertainty about th quiring the defend prior to trial," an also circulated und tion's right of discov a prior request by th of similar evidence f F.R.D. 596 (1970). the Supreme Court it promulgated Rule 1st, essentially in th the Committee, per covery by the prose that has perturbed laid to rest.

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NOTES TO DECISIONS

ANALYSIS

1. False statements.
2. Misrepresentations.

1. False Statements.

Where defendant was convicted in a federal court of conspiring to have false declarations under oath given to the court, the supreme court found that, under the circumstances of the case, defendant's integrity was not irreparably damaged, and therefore suspended him from the practice of law rather than disbar him. In re Bucci, 119 R.I. 904, 376 A.2d 723 (1977).

2. Misrepresentations.

An attorney who misrepresents to the court the assets of his client and the extent of the attorney's fee violated DR 1-102(A)(4) and (5) and subdivision (A)(3) of this Disciplinary Rule. Carter v. Kamaras, — R.I. —, 478 A.2d 991 (1984).

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.

NOTES TO DECISIONS

ANALYSIS

1. Purpose.
2. Intent irrelevant.

1. Purpose.

The purpose of the prohibition against an attorney in a controversy communicating directly or indirectly about the controversy with a party who is known to be represented by counsel is to prevent a person from being deprived of the advice of retained counsel by the bypassing of such counsel. Carter v. Kamaras, — R.I. —, 430 A.2d 1058 (1981).

2. Intent Irrelevant.

It is immaterial whether the direct contact prohibited by paragraph (1) of subsection (A) of this Disciplinary Rule is an intentional or negligent violation of this Rule. Carter v. Kamaras, — R.I. —, 430 A.2d 1058 (1981).

incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent.

EC 7-13. The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused.

EC 7-14. A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

EC 7-15. The nature and purpose of proceedings before administrative agencies vary widely. The proceedings may be legislative or

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June 28, 1988

JUL 7

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

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

Dear Mr. Proudfoot:

Your letter of June 10, 1988, to South Dakota State Bar Association President Charles B. Kornmann, inquiring as to any laws, guidelines, or professional ethical codifications requiring exculpatory statements in criminal prosecutions to be delivered up to defense counsel which may be enforced in South Dakota, has been forwarded to me for response as chairman of the Criminal Law Committee of the State Bar of South Dakota.

As respects exculpatory statements, South Dakota has no particular statutory provisions requiring prosecutorial disclosure of exculpatory evidence to the defense. South Dakota, however, does follow the rule laid down by the United States Supreme Court in Brady v. Maryland, 373 US 83, 83 S. Ct. 1194, 10 LEd 2d 215(1963) that withholding evidence favorable to an accused on the issue of guilt or sentencing is a denial of the right to due process under the Constitution of the United States. In State v. Wilde, 306 NW2d 645(S.D. 1981), the South Dakota Supreme Court adopted the Brady rule stating that the

> "(S)uppression by the prosecution of evidence favorable to an accused violates due process where the evidence has been requested by the accused and is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. Reaffirmed in Reutter v. Meierhenry, 405 NW2d 627(S.D. 1987)."

South Dakota statutory rules of criminal discovery are set out at South Dakota Codified Laws Title 23(A), Chapter 13. Generally, our statutory rules provide for mandatory disclosure of information by the prosecution upon a defendant's written request.

On June 20, 1987, the State Bar of South Dakota approved new model rules of professional conduct. These rules were enacted by the South Dakota Supreme Court on December 15, 1987, and will become effective on July 1 of this year. Model Rule 3.8(D), Special Responsibilities of a Prosecutor, provides that a prosecutor in all criminal cases shall "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to exculpate the guilt of the accused, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged exculpatory information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;".

Accordingly, in South Dakota, a prosecutor has both a legal and an ethical obligation to disclose to a defendant exculpatory information known to the prosecutor.

I certainly hope this response will be of assistance to you in providing your submission to the Royal Commission. If I may be of further help, please do not hesitate to let me know.

Sincerely,

FINCH, VIKEN, VIKEN and PECHOTA

Terry L. Pechota

TLP: kd
cc: Charles B. Kornmann, President
State Bar of South Dakota

AUG 2 4 1988

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August 18, 1988

TENNESSEE BAR ASSOCIATION
WILLIAM LANDIS TURNER
President

Mr. Gordon F. Proudfoot
CBA-NOVA SCOTIA BRANCH
2nd Floor, Bank of Canada
1583 Hollis Street
Halifax, Nova Scotia
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Dear Mr. Proudfoot:

In response to your request for our laws on disclosure of exculpatory information, I enclose the relevant sections from the latest edition of David Raybin's book on Tennessee Criminal Procedure, in which he summarizes the authorities on this subject.

If you need additional information, please let me know.

Sincerely,

Wm. Landis Turner

WLT/sgb

Enclosure

102 North Court Street □ Post Office Box 789 □ Hohenwald, Tennessee 38462 □ (615) 796-2264

§ 13.41 Disclosure of Exculpatory "Brady" Material

The state has a constitutional obligation to disclose evidence which is exculpatory in nature, either as to guilt or as to punishment.[1] The degree of relief for a failure to disclose information is highly dependent on whether there has been a request for exculpatory information and the degree of specificity of the request. If there is no request or only a general "boiler plate" request, a reversal for nondisclosure will only occur if the omitted evidence creates a reasonable doubt that did not otherwise exist.[2] A specific request, on the other hand, will be of value if nondisclosure *might* have affected the outcome of the trial.[3] Consequently, any request for "Brady" material should be as specific as possible.[4]

The failure to disclose relates to the failure to disclose *prior* to or *during* trial.[5] If there is disclosure during the trial, this

§ 13.41

1. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); Branch v. State, 4 Tenn.Cr.App. 164, 469 S.W.2d 533 (1970) (failure to disclose victim's knife in self defense case).

2. United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); Cason v. State, 503 S.W.2d 206 (Tenn.Cr.App.1973) (no request for photograph of victims in a rape case).

3. Id. State v. Smith, 656 S.W.2d 882 (Tenn.Cr.App.1983) (matters proffered to establish that state had withheld exculpatory evidence and that one of state's witnesses had tried to suppress unfavorable testimony, developed at hearing on motion for new trial, were either refuted or satisfactorily explained by prosecution; any matters that were not refuted or explained did not affect outcome of trial); State v. Wooden, 658 S.W.2d 553 (Tenn.Cr.App.1983) (Jane Doe complaint, charging a black man with raping a white woman, on which grand jury returned a no true bill, was not exculpatory evidence in prosecution against defendant on multiple charges connected with sexual assaults, and state was not required to reveal complaint in response to defendant's pretrial discovery motion); State v. Caldwell, 656 S.W.2d 894 (Tenn.Cr.App. 1983) (that state failed to provide defendant with various items of allegedly exculpatory evidence did not warrant reversal of murder conviction in view of questionable exculpatory value and in view of knowledge possessed by defendant).

4. See § 13.42.

5. Clariday v. State, 552 S.W.2d 759 (Tenn.Cr.App.1976) (alleged inconsistent statement of witness); State v. Venable, 606 S.W.2d 298 (Tenn.Cr. App.1980) (prior statements of witnesses); Hull v. State, 589 S.W.2d 948 (Tenn.Cr.App.1979) (destruction of victim's shirt without subjecting it to tests); Stewart v. State, 534 S.W.2d 875 (Tenn.Cr.App.1975) (statements of rape victim); Graves v. State, 489 S.W.2d 74 (Tenn.Cr.App.1972) (any agreement by state with a witness must be divulged); State v. Hammonds, 616 S.W.2d 890 (Tenn.Cr.App. 1981) (nothing exculpatory in alleged fingerprint of another person in a burglary case when the other person admitted to presence); State v. Teague, 645 S.W.2d 392 (Tenn.1983) (deal).

may involve a discovery violation but not necessarily a "Brady" violation.[6] The remedy for a total failure to disclose can be a new trial or a possible dismissal.[7]

§ 13.42 Disclosure of Exculpatory "Brady" Material—Form

[18.] Pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the defendant requests any and all evidence in possession of the state 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 the offense or punishment therefore, 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). 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 that 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), Graves v. State, 489 S.W.2d 74 (Tenn.Cr.App.1972).

b. The nature and substance of any preferential treatment given at any time by any state agent, whether or not in connection with this case, to any potential witness, including, but not limited to, letters from State Attorneys or other law enforcement personnel to governmental agencies, state agencies, creditors, etc., setting out that witness' cooperation or status with the state, and which letter or communication might fairly be said to have been an attempt to provide some benefit or help to the witness.

6. Hamilton v. State, 555 S.W.2d 724 (Tenn.Cr.App.1977) (disclosure of evidence during trial); State v. Hicks, 618 S.W.2d 510 (Tenn.Cr.App.1981) (failure to disclose pretrial statement of defendant); State v. Beal, 614 S.W.2d 77 (Tenn.Cr.App.1981) (inconsistency of description brought out at trial); Lackey v. State, 578 S.W.2d 101 (Tenn.Cr.App.1978) (statement of witness brought out at trial); State v. Goodman, 643 S.W.2d 375 (Tenn.Cr.App.1982) (defendant failed to call witness who had exculpatory information of which defense lawyer was aware).

7. State v. Cagle, 626 S.W.2d 719 (Tenn.Cr.App.1981).

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

d. Any and all information in the possession of the state regarding the mental condition of the state's witnesses which would reflect or bring into question the witnesses' credibility. State v. Brown, 552 S.W.2d 383 (Tenn.1977).

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 portion of that statement where such retraction would raise a conflict in the evidence which the state 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 government intends to adduce in this matter. See United States v. Enright, supra.

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

h. The results of any scientific tests 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 State which contradicts or is inconsistent with any testimony the State intends to introduce in this cause.

j. The statement of any individual who has given a description to any person of an individual involved in the perpetration of the charged offense, which person the State 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. Aldredge, 498 F.2d 376 (2nd Cir.1974).

§ 13.43 Disclosure of Juror Information

Some district 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.[2]

§ 13.44 Disclosure of Juror Information—Form

[19.] That the District Attorney disclose any information compiled by him as to any prospective juror, including but not limited to arrest or conviction records, or whether the prospective juror was ever a witness.

§ 13.45 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 request notification of any identification procedures.[1] Copies of any identification photographs should be disclosed.[2]

§ 13.46 Disclosure of Identification Procedure—Form

[20.] That in the event the State 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 photo-

§ 13.43

1. See Prosecution Information as to Jurors, 86 A.L.R.3rd 571. The clerk is required to disclose some juror information prior to trial, see Rule 24(g), Tenn.R.Crim.P.

2. See e.g. Clariday v. State, 552 S.W.2d 759 (Tenn.Cr.App.1976) (undisclosed fact of jury foreman being a student in a law class taught by district attorney).

§ 13.45

1. United States v. Cranson, 453 F.2d 123, 126 n. 6 (4th Cir.1971). See also § 20.2.

2. State v. Wilkens, Tenn.Cr.App at Jackson, filed Sept. 11, 1980 (unpublished) (trial court erred in declining to require the state to produce the photographs).

§ 13.41 Disclosure of Exculpatory "Brady" Material

In United States v. Bagley[8] the government failed to disclose that two witnesses had signed contracts for undercover work which would pay money to the witnesses commensurate with the information furnished. The Court's opinion was more concerned with the standard of a post-trial review of whether the withheld information was "material."[9] However, the Court did clarify the scope of the prosecutor's duty to disclose. The Court found that "impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule."[10] Impeachment evidence in Tennessee is very broad and should now be disclosed upon proper request.[11]

1. See LaFave & Israel, Criminal Procedure § 19.5 (1984).

3. State v. Hartman, 703 S.W.2d 106 (Tenn.1985), certiorari denied ___ U.S. ___, 106 S.Ct. 3308, 92 L.Ed.2d 721 (1986) (omitted evidence "does not create a reasonable doubt of guilt of defendant and would not have affected outcome of trial").

4. In 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) the Court seemed to alter the standard of a post-trial review of withheld evidence without regard to specific nature of the discovery request. The Court found that material evidence is proof which, had it been disclosed to the defense, would have created a reasonable probability that the result of the proceeding would have been different.

5. State v. Swanson, 680 S.W.2d 487 (Tenn.Cr.App.1984) (the absence of the defendant's fingerprints on a truck is not material where defendant admitted to having been inside the victim's truck prior to the occurrence of the offense); State v. Williams, 690 S.W.2d 517 (Tenn. 1985) (when the reliability of a witness may well be determinative of guilt or innocence, the non-disclosure of evidence affecting credibility may justify a new trial, regardless of the good or bad faith of the prosecutor).

6. State v. Shelton, 684 S.W.2d 661 (Tenn.Cr.App.1984) (officers actually testified at trial).

8. 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir.1986).

9. See discussion in note 4 supra.

10. 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) (failure "to assist the defense by disclosing information that might have been helpful in conducting the cross-examination").

11. See § 27.180 et seq.

§ 13.43 Disclosure of Juror Information

2. State v. Pender, 687 S.W.2d 714 (Tenn.Cr.App.1984) (no authority which would have required state to disclose that juror was a reserve police officer).

C. STATE DISCOVERY REQUEST

§ 13.60 Right to Discovery

2. See LaFave & Israel, Criminal Procedure § 19.4 (1984).

STATE BAR OF TEXAS

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JUL 18 1988

Office of the General Counsel

July 6, 1988

Gordon R. Proudfoot
Boyne Clarke
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Dear Mr. Proudfoot:

Your letter of June 10, 1988, addressed to Mr. James B. Sales, President of the State Bar of Texas, has been referred to me for response. I have enclosed for your information a copy of Texas Disciplinary Rule 7-103. Please note the (B) provision of that particular Disciplinary Rule. Timely disclosure is required of exculpatory evidence.

Further, the case law in the United States follows Brady v. Maryland, 373 U.S. 83 (1963), which requires production of evidence favorable to an accused upon request. The good faith or bad faith of the prosecutor in suppressing such evidence is not material.

I hope this information is of some assistance to you. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Steven D. Peterson
General Counsel

SDP/db

cc: James B. Sales, 1301 McKinney, Gulf Tower, Houston, Texas 77010

lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

EC 7-36. Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings. While maintaining his independence, a lawyer should be respectful, courteous, and above-board in his relations with a judge or hearing officer before whom he appears. He should avoid undue solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special consideration.

EC 7-37. In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude, and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

EC 7-38. A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, setting, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client. He should follow local customs of courtesy or practice, unless he gives timely notice to opposing counsel of his intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.

EC 7-39. In the final analysis, proper functioning of the adversary system depends upon cooperation between lawyers and tribunals in utilizing procedures which will preserve the impartiality of the tribunal and make their decisional processes prompt and just, without impinging upon the obligation of the lawyer to represent his client zealously within the framework 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 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.
  (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.

Office of Bar Counsel

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Telephone: (801) 531-9077

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AUG 1 0 1988

July 20, 1988

Gordon F. Proudfoot
BOYNE CLARK
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P.O. Box 876
Dartmouth, Nova Scotia
B2Y 3Z5

Dear Mr. Proudfoot:

In response to your letter to Mr. Kent Kasting of June 10, 1988, I have enclosed a copy of our rule which governs the disclosure of exculpatory statements in criminal prosecutions. I appreciated the opportunity to be of assistance to you in this matter.

Sincerely,

Christine A. Burdick
Acting Bar Counsel

CAB/jw

Enclosure

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

THE PROSECUTOR IN A CRIMINAL CASE SHALL:

(a) REFRAIN FROM PROSECUTING A CHARGE THAT THE PROSECUTOR KNOWS IS NOT SUPPORTED BY PROBABLE CAUSE;

(b) MAKE REASONABLE EFFORTS TO ASSURE THAT THE ACCUSED HAS BEEN ADVISED OF THE RIGHT TO, AND THE PROCEDURE FOR OBTAINING, COUNSEL AND HAS BEEN GIVEN REASONABLE OPPORTUNITY TO OBTAIN COUNSEL;

(c) NOT SEEK TO OBTAIN FROM AN UNREPRESENTED ACCUSED A WAIVER OF IMPORTANT PRETRIAL RIGHTS, SUCH AS THE RIGHT TO A PRELIMINARY HEARING;

(d) MAKE TIMELY DISCLOSURE TO THE DEFENSE OF ALL EVIDENCE OR INFORMATION KNOWN TO THE PROSECUTOR THAT TENDS TO NEGATE THE GUILT OF THE ACCUSED OR MITIGATES THE OFFENSE, AND, IN CONNECTION WITH SENTENCING, DISCLOSE TO THE DEFENSE ALL UNPRIVILEGED MITIGATING INFORMATION KNOWN TO THE PROSECUTOR, EXCEPT WHEN THE PROSECUTOR IS RELIEVED OF THIS RESPONSIBILITY BY A PROTECTIVE ORDER OF THE TRIBUNAL; AND

(e) EXERCISE REASONABLE CARE TO PREVENT INVESTIGATORS, LAW ENFORCEMENT PERSONNEL, EMPLOYEES OR OTHER PERSONS ASSISTING OR ASSOCIATED WITH THE PROSECUTOR IN A CRIMINAL CASE FROM MAKING AN EXTRAJUDICIAL STATEMENT THAT THE PROSECUTOR WOULD BE PROHIBITED FROM MAKING UNDER RULE 3.6.

COMMENT:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. See Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

CODE COMPARISON

DR 7-103(A) provided that a "public prosecutor ... shall not institute ... criminal charges when he knows or it is obvious that the charges are not supported by probable cause." DR 7-103(B) provided that "[a] public prosecutor ... shall make timely disclosure ... 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."

RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A LAWYER REPRESENTING A CLIENT BEFORE A LEGISLATIVE OR ADMINISTRATIVE TRIBUNAL IN A NONADJUDICATIVE PROCEEDING SHALL DISCLOSE THAT THE APPEARANCE IS IN A REPRESENTATIVE CAPACITY AND SHALL CONFORM TO THE PROVISIONS OF RULES 3.3(a) THROUGH (c), 3.4(a) THROUGH (c), and 3.5.

COMMENT:

In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure.

Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

This Rule does not apply to representation of a client in negotiation or other bilateral transaction with a governmental agency; representation in such a transaction is governed by Rules 4.1 through 4.4.

CODE COMPARISON

EC 7-15 stated that a lawyer "appearing before an administrative agency, regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law." EC 7-16 stated that "[w]hen a lawyer appears in connection with proposed legislation, he ... should comply with applicable laws and legislative rules." EC 8-5 stated that "fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a ... legislative body ... should never be participated in ... by lawyers." DR 7-106(B)(1) provided that "[i]n presenting a matter to a tribunal, a lawyer shall disclose ... [u]nless privileged or irrelevant, the identity of the clients he represents and of the persons who employed him."

SUPREME COURT OF VERMONT
111 STATE STREET
MONTPELIER, VERMONT
05602

AUG 26 1988

CHAMBERS OF
JOHN A. DOOLEY
ASSOCIATE JUSTICE

August 19, 1988

Gordon F. Proudfoot
P.O. Box 876
Dartmouth, N.S.
B2Y 3Z5

Dear Mr. Proudfoot:

In response to your inquiry, enclosed please find a copy of Rule 16(b) of the Vermont Rules of Criminal Procedure, with Reporter's Notes, that addresses the issue with which you are concerned.

Sincerely,

John A. Dooley
Associate Justice

JD:ab

reversal since depositions remain sealed until filed with the court and the court could not abrogate the rules of criminal procedure based on oversight or fiscal choice. Id.

3. Unavailable witnesses. Where purpose of bringing in testimony of a witness was to impeach testimony of another witness and the examiner had the witness on the stand and later available for recall, was fully aware of the inconsistent statement and of his own intention to bring it forth from the witness, who was only available for a limited time, and had full opportunity to comply with the requirement that a preliminary foundation for impeachment be laid by calling the statement to the attention of the testifier and failed to do so, later attempt to introduce deposition of witness, who had since moved out of state, in place of his testimony on the ground that he was then an absent witness was properly denied. State v. Young (1981) 139 Vt. 535, 433 A.2d 254.

RULE 16. DISCOVERY BY DEFENDANT

(a) Prosecutor's Obligations. Except as provided in subdivision (d) of this rule for matters not subject to disclosure and in Rule 16.2(d) for protective orders, upon a plea of not guilty the prosecuting attorney shall upon request of the defendant made in writing or in open court at his appearance under Rule 5 or at any time thereafter

(1) Disclose to defendant's attorney as soon as possible the names and addresses of all witnesses then known to him, and permit defendant's attorney to inspect and copy or photograph their relevant written or recorded statements, within the prosecuting attorney's possession or control.

(2) Disclose to defendant's attorney and permit him to inspect and copy or photograph within a reasonable time the following material or information within the prosecuting attorney's possession, custody, or control:

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

(B) the transcript of any grand jury proceedings pertaining to the indictment of the defendant or of any inquest proceedings pertaining to the investigation of the defendant;

(C) 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;

(D) any books, papers, documents, photographs (including motion pictures and video tapes), or tangible objects, buildings or places or copies or portions thereof, which are material to the preparation of the defense or which the prosecuting attorney

intends to use in the hearing or trial or which were obtained from or belong to the defendant;

(E) the names and addresses of all witnesses whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any record of prior criminal convictions of any such witness;

(F) any record of prior criminal convictions of the defendant; and

(G) any other material or information not protected from disclosure under subdivision (d) of this rule that is necessary to the preparation of the defense.

The fact that a witness' name is on a list furnished under subparagraph (2)(E) of this subdivision and that he is not called shall not be commented upon at trial.

If no request is made, the prosecuting attorney shall, at or before the status conference, disclose in writing the foregoing items or state in writing that they do not exist.

(b) Same: Collateral or Exculpatory Matter. The prosecuting attorney shall, as soon as possible, after a plea of not guilty,

(1) Inform defendant's attorney,

(A) if he has any relevant material or information which has been provided by an informant;

(B) if there are any grand jury or inquest proceedings which have not been transcribed; and

(C) if there has been any electronic surveillance (including wiretapping) of conversations to which the defendant was a party or of his premises.

(2) Disclose to defendant's attorney any material or information within his possession or control which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce his punishment therefor.

(c) Same: Scope. The prosecuting attorney's obligations under subdivisions (a) and (b) of this rule extend to material and information in the possession, custody, or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his office.

(d) Matters Not 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 mental impressions, conclusions, opinions, or legal theories of the prosecuting attorney, members of his legal staff, or other agents of the prosecution, including investigators and police officers.

(2) *Informants.* Disclosure of an informant's identity shall not be required except as provided in Rule 509(c) of the Vermont Rules of Evidence.—Amended Dec. 19, 1973, eff. Jan. 1, 1974; March 17, 1977, eff. May 1, 1977; Dec. 8, 1981, eff. March 1, 1982; Dec. 28, 1982, eff. April 1, 1983.

Cross references. Identity of informant, privilege, see Rule 509, Vermont Rules of Evidence.

Lawyer-client privilege, generally, see Rule 502, Vermont Rules of Evidence.

Writings or objects used to refresh memory of witness, penalty for failure to produce, see Rule 612(c), Vermont Rules of Evidence.

Reporter's Notes—1983 Amendment

Rule 16(d)(2) is amended for conformity with Evidence Rule 509 which creates an informant's privilege. The privilege, like the present rule, applies only to matters that are prosecution secrets and does not apply to informants who are to be called as witnesses by the state. The most important exception to the privilege, however, is somewhat broader in scope than the rule, extending under Rule 509(c)(2) to "any issue" in a criminal case. Rule 16(d)(2) was limited to issues where disclosure was compelled by the Constitution—i.e., those essential to the determination of guilt or innocence—or where the informant's identity was itself in issue—e.g., entrapment. See Reporter's Notes to Evidence Rule 509, Criminal Rule 16(d)(2).

Reporter's Notes—1982 Amendment

Rule 16(a) is amended as part of the change from the omnibus hearing to the status conference. See Reporter's Notes—1982 Amendments to Rule 12. The rule formerly required the prosecutor to make certain disclosures at the omnibus hearing unless a request is made earlier. It now requires the disclosures to be in writing and to be made at or before the status conference. Oral disclosures formerly were made in response to the omnibus checklist, a practice that has been eliminated with the shift to the status conference.

Reporter's Notes—1977 Amendment

This amendment is intended to make clear that the list of items which the defendant may discover under Rule 16(a) is not exclusive. For example, defendant should be able to inquire as to any arrangements between the prosecution and its witnesses or any information about the background of prospective jurors which prosecution investigators may have uncovered. The amendment does

not specify the matters that are discoverable, but requires that they be outside the protections for work product and informants contained in Rule 16(d) and that they be "necessary to the defense." If the prosecution wishes to resist disclosure of a particular item under this provision, it should move for a protective order under Rule 16.2(d). On that motion the court will decide the question of necessity. Conversely, the defendant can compel compliance with a request under this provision either by a motion for sanctions under Rule 16.2(g) or by successfully resisting a motion for a protective order. Since the amendment applies to either "material or information," it is in effect similar to the interrogatory procedure of Civil Rule 33, without the formality and detail of that rule.

Reporter's Notes

This rule must be read with Rules 16.1 and 16.2, which form with it a system of reciprocal discovery. The three rules are in general similar to the ABA Minimum Standards (Discovery and Procedure before Trial) §§ 2.1–4.7 and to the currently proposed amendments to Federal Rule 16, first presented in January 1970, 48 F.R.D. 553, 587 (1970), and transmitted to the Supreme Court with important revisions in November 1972 Proposed Amendments to the Federal Rules of Criminal Procedure (Mimeograph, Admin. Ofc. U.S. Courts, 1972). The rules go further than either source in the breadth of discovery accorded the defendant, however, and extend considerably the defendant's rights under former 13 V.S.A § 6727, repealed by Act No. 118 of 1973, § 25. The rules also alter Vermont practice significantly by allowing discovery by the prosecution. See Rule 16.1.

Rule 16(a) is based on ABA Minimum Standards § 2.1(a). It provides for disclosure to the defendant of stated matters upon request, which may be made in writing or orally in open court at any time. Under the last sentence of the subdivision, if no request is made, the prosecutor must in any event disclose the items, or state that they do not exist, at the omnibus hearing. The request procedure, adapted from the proposed Federal Rule, is designed to avoid loss of time in needless motions. At the same time the prosecutor is relieved of the burden of automatic disclosure, unnecessary in many routine cases, that ABA Minimum Standards § 2.2 requires. If the prosecution wishes to oppose or limit disclosure, its remedy is a motion for a protective order under Rule 16.2(d). This self-operating feature of discovery practice under the rules, like the deposition procedure under Rule 15(a), is similar to civil practice, where it has worked effectively. See Reporter's Notes to Rule 15(a). Cf. ABA Minimum Standards § 2.2, Commentary.

Rule 16(a)(1), requiring disclosure of all witnesses known to the prosecution and access to their statements, whether the witnesses are to be used at trial or not, is broader than either ABA Minimum Standards § 2.1 or the proposed Federal Rule. The Vermont rule in effect makes available to the defendant the prosecution's full investigative resources on the theory that justice is best served and

speedy disposition of cases is encouraged if both sides have equal access to sources of potential evidence. Because knowledge of the existence of witnesses is essential in the preparation of defendant's case this disclosure must be made "as soon as possible" after request, rather than "within a reasonable time," as is provided for disclosures under Rule 16(a)(2). The breadth of disclosure required under this rule is, of course, subject to the limitations as to work product and informants provided by Rule 16(d). The prosecution may resist disclosure on such grounds by motion for protective order under Rule 16.2(d). Although disclosure under Rule 16(a)(1) is required only upon request, the obligation of the prosecution to reveal the existence of informant's evidence and to disclose exculpatory evidence without request under Rule 16(b) will, where applicable, supersede the procedure of Rule 16(a)(1).

The items enumerated in Rule 16(a)(2) are essentially those as to which disclosure is required under ABA Minimum Standards § 2.1(a). See Commentary to that section. The provision of subparagraph (A) for inspection of codefendants' statements goes beyond the discovery allowed under former 13 V.S.A. § 6727, supra. See State v. Anair, 123 Vt. 80, 181 A.2d 61 (1962). Such disclosure is desirable to give defendant advance notice of possible grounds for severance in a joint trial situation under Rule 14(b)(2)(B). See Reporter's Notes to that rule and ABA Minimum Standards § 2.1(a)(ii), Commentary.

Subparagraph (B) goes beyond ABA Minimum Standards § 2.1(a)(iii), which requires disclosure only of the defendant's own grand jury testimony and relevant testimony of witnesses to be called at trial. Proposed Federal Rules 16(a)(1)(A), (3), apply only to testimony of the defendant and officers of a corporate defendant, except as further disclosure may be permitted under Federal Rule 6(e). Cf. Reporter's Notes to Rule 6. The Vermont rule is also a significant departure from prior Vermont practice under which disclosure of grand jury and inquest testimony was allowed in the court's discretion only upon a showing of genuine need. See State v. Alexander, 130 Vt. 54, 286 A.2d 262 (1971); State v. Oakes, 129 Vt. 241, 276 A.2d 18, cert. denied 404 U.S. 965 (1971); State v. Miner, 128 Vt. 55, 258 A.2d 815 (1969). The complete disclosure required under the rule is intended to equalize the investigative advantage which the grand jury and inquest procedures give the prosecution and to eliminate time-consuming disputes over questions of relevance and need. The prosecution must seek a protective order if disclosure will imperil the secrecy of the grand jury or inquest.

Subparagraphs (C)-(F) require disclosure that would presumably have been permissible under former 13 V.S.A § 6727, supra. See State v. Miner, supra, 128 Vt. at 71-73. Those provisions all are consistent with the general goal of equalizing investigative advantages and eliminating surprise at trial, and all are of course subject to the prosecution's right to a protective order. See ABA Minimum Standards § 2.1(a)(i), (iv)-(vi), Commentary. Proposed Federal Rule 16(a)(1)(B)-(E) provides for similar disclosure. The requirement of subparagraph (E) that witnesses to be used at trial

be disclosed must be complied with even after a general disclosure of witnesses is made under Rule 16(a)(1). Disclosure of trial witnesses is an aid in planning trial strategy. The broader disclosure is for investigative purposes. Statements of trial witnesses are not specifically referred to in subparagraph (E), but such statements either will have been made available under Rule 16(a)(1) or must be disclosed under the continuing duty to implement that rule imposed by Rule 16.2(b). The provision prohibiting comment on the prosecution's failure to call a listed witness is intended to protect the prosecution from an unfair implication that might be drawn from a tactical step. The prohibition is only against commenting upon the fact that the witness was previously listed; it does not bar comment generally upon the prosecution's failure to call the witness. See Federal Advisory Committee's Note, 48 F.R.D. 553, 606.

Rule 16(b) is taken from ABA Minimum Standards § 2.1(b), (c). It imposes an absolute obligation upon the prosecution to disclose matters pertaining to certain collateral procedural and constitutional issues susceptible of preliminary determination, as well as exculpatory matters. The provision as to informants in subparagraph (A) was eliminated in an amendment to ABA Minimum Standards § 2.1(b) (Supp. 1970) on the theory that the point was adequately covered by the provision for exculpatory matter and by other procedural devices. The informant clause has been retained in the rule, however, because of issues, such as search and seizure, to which such matter may pertain, that are not strictly speaking within the exculpatory clause, and because of the desirability of giving the defendant prompt access to matter pertaining to preliminary issues. Subparagraph (B) implements Rule 16(a)(2)(B) by making routine transcription of grand jury and inquest proceedings unnecessary. If fully apprised of the contents of such proceedings, defendant presumably will not request transcripts of no value to him. Rule 16(b)(2) is intended to implement the constitutional requirement of disclosure of exculpatory material imposed by Brady v. Maryland, 373 U.S. 83 (1963). See ABA Minimum Standards § 2.1(c), Commentary.

Rule 16(c), taken from ABA Minimum Standards § 2.1(d), makes clear that the prosecution's obligations extend not only to material in the hands of the prosecutor's immediate staff but to that possessed or controlled by others, such as police officers, involved in the investigation of the case under the prosecutor's direction. Excluded from the obligations of Rule 16 are employees or officers of other governmental agencies who may be involved with the matter in question but have no working connection with the prosecution. Although the rules do not require it, as a matter of good practice prosecutors should follow the guidelines of ABA Minimum Standards § 2.4 in seeking to make available upon defendant's request material that is under the control of other agencies of the State. If the prosecution fails in such efforts, the defendant has available the subpoena duces tecum under Rule 17(c) to compel production of such material. See Reporter's Notes to Rule 17(c).

The standard of "possession, custody or control" found in Rule 16(a) is further defined by Rule 16(c). The same language in Federal Rule 16 and Civil Rule 34 may be looked to for interpretive guidance. "Control" should be so construed that the prosecution will not be able to avoid discovery by declining possession or custody of material which normally should be in its files. Moreover, although the rule does not contain the language of Federal Rule 16(a), which applies to matter "the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government," such a due diligence requirement should be read into the rule, consistent with the continuing duty to disclose imposed by Rule 16.2(b). The better practice is that delineated in ABA Minimum Standards § 2.2(c): "The prosecuting Attorney should ensure that a flow of information is maintained between the various investigative personnel and his office sufficient to place within his possession or control all material and information relevant to the accused and the offense charged." See id., Commentary.

Rule 16(d) is taken from ABA Minimum Standards § 2.6(a), (b). Objections to disclosure based upon it should be made by motion for protective order under Rule 16.2(d). Rule 16(d)(1) is similar in language and effect to Civil Rule 26(b)(3). The limitation in the rule to work product provides a narrower protection than that accorded government agents under Federal Rule 16(a). The Vermont rule is more protective than ABA Minimum Standards § 2.6(a), however. That section only covers members of the prosecutor's "legal staff." In view of the broad protection accorded by the rule, the courts should interpret "mental impressions, conclusions, opinions, or legal theories" narrowly to achieve the basic purpose of the rule to protect the adversary process from intrusion. See ABA Minimum Standards § 2.6(a), Commentary. Such a narrow interpretation is particularly called for where reports of nonlawyers are involved, if the general purpose of Rule 16 to give the defendant access to the basic information concerning the case in the prosecution's hands is not to be defeated. Of course, even the work product exception may give way where there is a constitutional duty to disclose, as in the case of exculpatory matter. See discussion of Rule 16(b)(2) above. Where a work product objection is legitimately made, its impact upon the defendant's right of access may be limited by the excision of the challenged matter under Rule 16.2(e).

Rule 16(d)(2) bars disclosure of an informer's identity over prosecution objection unless constitutionally compelled, unless shown by the defendant to be a fact essential to a defense such as entrapment, or unless the informer's identity will in any event be revealed by his testifying at trial. The essential-fact exception may also express a constitutional compulsion. See Roviaro v. United States, 353 U.S. 53 (1957). Revelation may also be constitutionally compelled when the basis of an arrest or search is challenged on Fourth Amendment grounds and there is doubt as to the credibility of the affiant or the informant. See McCray v. Illinois, 386 U.S. 300 (1967); People v. Verrecchio, 23 N.Y.2d 489, 245 N.E.2d 222 (1969).

V.R.Cr.P. 16 RULES OF CRIMINAL PROCEDURE

ANNOTATIONS

1. Duty of prosecutor. The prosecutor has a duty of disclosure under this rule, which duty is part of his professional responsibility, and a failure to fulfill it that does not amount to reversible error may still prompt submission and review of the matter as an ethical violation. State v. Durling (1981) 140 Vt. 491, 442 A.2d 455.

2. Applicability. Provision of this rule making discovery of grand jury minutes available would not be applied to allow such discovery in case in which conviction was had prior to the rule's effective date. Berard v. Moeykens (1974) 132 Vt. 597, 326 A.2d 166.

Provision of this rule requiring prosecutor to disclose to defense reports made in connection with the particular case did not apply to reports completed long before the crime involved in the case was committed. State v. Kasper (1979) 137 Vt. 184, 404 A.2d 85.

3. Rebuttal witnesses. Rebuttal witnesses may not be subject to pretrial disclosure in cases in which they are not known to the prosecution at that time; however, there is no right to withhold, but rather a duty to disclose witnesses, and, such a duty being a continuing one, as soon as a previously unknown witness becomes known, his or her existence must be declared to the defense. State v. Durling (1981) 140 Vt. 491, 442 A.2d 455.

4. Failure to disclose witnesses. Where state never informed defendant before trial that a certain witness whose testimony was central to the state's case was on the list of witnesses the state intended to call, and the witness was allowed to testify at the trial which resulted in conviction, requirement of this rule, that defendant be supplied, on request therefore, with a list of the witnesses the state intends to call, was not complied with, defendant was prejudiced and reversal was required. State v. Evans (1976) 134 Vt. 189, 353 A.2d 363.

Prosecutor's duty to disclose certain things to a defendant is a continuing one, and where prosecutor knew of eyewitness for weeks before trial and did not disclose him to defendant until second day of trial, there was sufficient prejudice to require reversal, absent cure of the error. State v. Connarn (1980) 138 Vt. 270, 413 A.2d 812.

Otherwise reversible error occurring when prosecutor knew for weeks before trial of eyewitness against defendant and did not disclose him until second day of trial was cured where defendant was given opportunity to depose witness and did so, was offered a continuance several times and refused, defendant called him as a witness, his testimony was largely cumulative, and defendant did not show prejudicial error. Id.

Where defendant was charged and convicted by jury of operating a vehicle under the influence of intoxicating liquor and two medical witnesses were allowed to testify even though their names were not included on the list of prospective witnesses required by this rule to be furnished when known to the prosecuting attorney, state failed to comply with this rule, and court's failure to grant defendant's motion to suppress, or, alternatively, to grant a continuance adequate for unhurried deposition was error; however, based on the record, including court's justifiable taking of

judicial notice, without objection, that names of witnesses were revealed during voir dire, defendant did not meet burden of affirmatively demonstrating prejudicial error. State v. Cheney (1977) 135 Vt. 513, 380 A.2d 93.

In prosecution for unlawful trespass, admission of testimony by an oil company deliveryman, as a rebuttal witness for the prosecution, without notice to defense counsel, was not grounds for reversal where there was no prejudice to the defendant since the testimony of the deliveryman merely corroborated facts and since there was no surprise to the defendant, who had ample notice of the line of argument supported by the testimony from a proposed exhibit in the case. State v. Durling (1981) 140 Vt. 491, 442 A.2d 455.

5. Failure to call witness. In prosecution for driving while intoxicated, where state gave defendant a list of its witnesses as required by rule, state did not put a certain doctor who had administered a blood alcohol test on the stand, though the doctor was on the witness list, and court would not allow a continuance to obtain the doctor's testimony, defendant was not unfairly deprived of the right to present the doctor as a witness or to cross-examine him, since, if defendant wanted to insure the doctor's presence, he could have done so by subpoena, and not having done so, the risk of the doctor's absence from court fell on defendant. State v. Stevens (1980) 139 Vt. 184, 423 A.2d 853.

6. Reports. Where this rule required that prosecutor disclose to defense reports material to the preparation of the defense and supreme court found undisclosed reports not to be material to the defense, there was no error in lower court's failure to grant motion for disclosure. State v. Kasper (1979) 137 Vt. 184, 404 A.2d 85.

7. Exculpatory matter. In murder prosecution defended against on ground alleged victim murdered a look-alike so that he could disappear and avoid an upcoming robbery prosecution, where evidence not given to defense by prosecutor, as required by this rule, that person had seen someone who appeared to be the alleged victim, was relevant to an element of state's case that was subject to doubt, and where prosecutor, in his argument to jury, stressed the nonexistence of any evidence supporting defendant's theory of defense, defendant's constitutional right to fair trial was denied, and new trial would be granted. State v. Goshea (1979) 137 Vt. 69, 398 A.2d 289.

8. Waiver. Where letter written by the accused urging a prospective witness to lie was admitted to impeach the testimony of accused's psychiatrist but had not been disclosed to the defense prior to trial as required by this rule, failure of the accused to object in a timely fashion or to move to strike constituted a waiver of the claimed error. State v. Mecier (1980) 138 Vt. 149, 412 A.2d 29.

9. Cited. Cited in State v. Moran (1982) 141 Vt. 10, 444 A.2d 879; State v. Olds (1982) 141 Vt. 21, 443 A.2d 443.

RULE 16.1. DISCLOSURE TO THE PROSECUTION

(a) The Person of the Defendant.

(1) Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, upon motion and notice a judicial officer may require the defendant to:

(A) appear in a line-up;

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July 22, 1988

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CANADA
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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 Jay McAllister, III, was referred to me as Chairman of Criminal Law Committee of the Virginia Bar Association for a response. Since our Committee has no plans to meet until the end of August, I am taking the liberty of responding to your letter without Committee endorsement because of your request for a speedy reply in view of the need to file your brief in this matter in September 1988. This reply is therefore not an official one on behalf of the Committee and reflects only my throughts on this matter in an effort to assist you in answering the questions which you have raised.

You have inquired as to whether there are any laws or guidelines issued by the government, or professional ethical codifications, requiring exculpatory statements to be disclosed by the prosecution in criminal cases.

The United States Supreme Court has held 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." Brady v. Maryland, 373 U.S. 83, 87 (1963).

In the federal system, the disclosure of evidence by the prosecution is governed generally by Rule 16 of the Federal Rules of Criminal Procedure, a copy of which I am enclosing for your

information. Upon request by the defendant, the prosecution must turn over any statements of the defendant, the defendant's prior record, certain documents and tangible objects, and certain reports of examinations and tests. Statements of government witnesses are not required to be turned over except pursuant to the Jencks Act, 18 U.S.C. § 3500, which provides that witness statements must be turned over after the witness testifies in open court for purposes of cross-examination by the defendant. I am also enclosing a copy of the Jencks Act for your information.

In United States v. Agurs, 427 U.S. 97 (1976), the Supreme Court further refined the requirements of Brady v. Maryland to disclose exculpatory evidence. It stated that the due process clause would be violated (1) where the prosecution knowingly uses perjured testimony, and there is a reasonably likelihood it could have affected the jury verdict; (2) where the prosecutor fails to disclose exculpatory evidence after a specific request, and the undisclosed information might have affected the outcome of the trial; and (3) where, after a general request or no request by the defense, the prosecutor fails to disclose information suffiently material as to raise a reasonable doubt about the guilt of the defendant.

The Code of Professional Responsibility in Virginia includes a Disciplinary Rule dealing with "special responsibilities of a prosecutor or government lawyer". Under Canon 8 these special responsibilities are set forth in DR 8-102. In addition, certain ethical considerations are set forth in EC 8-10. Among the ethical considerations is: "The prosecutor should make timely disclosure to the defense of all information required by law. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused." I am enclosing a copy of these Disciplinary Rules and Ethical Considerations for your information.

Several years ago, I had occasion to publish an article on "Professional Responsibilities of the Federal Prosecutor". 17 U. Rich L. Rev. 511 (1983). To the extent that it might provide some general information on the subject or give you leads for further research, I am enclosing a copy for your information. A brief discussion of the duty to disclose exculpatory information is set forth at page 529.

I hope the foregoing and enclosures will be of some assistance to you as you prepare your brief. Should you have any questions or if I can provide you with any further information, please do not hesitate to contact me.

Because I have an interest in the subject matter of your brief, I would appreciate receiving a copy of it after it has been prepared.

I look forward to hearing from you.

Sincerely,

John S. Edwards

JSE/clr

Enclosures

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FILE NO. 99997.1911

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

Dear Mr. Proudfoot:

The president of the Virginia State Bar, Jay Corson, referred your letter of June 10, 1988 to me. I am chairman of the Virginia State Bar Standing Committee on Lawyer Discipline. Our committee is responsible for supervising the disciplinary system in Virginia. Our duties include considering proposed changes in the Code of Professional Responsibility. This Code is a Rule of the Virginia Supreme Court which governs lawyers' professional conduct in Virginia.

You have inquired as to whether we have any laws or guidelines requiring a prosecutor to disclose exculpatory statements in criminal prosecutions to defense counsel. The answer is yes. The current rule is found in the Code of Professional Responsibility at DR 8-102(A)(4). A copy is enclosed. A copy of the ethical consideration relating to this rule, which is deemed to be aspirational in nature rather than a mandatory requirement, is also enclosed. It is EC 8-10.

A little over a year ago, the Virginia Supreme Court had occasion to interpret DR 8-102(A)(4) in the case of Read v. Virginia State Bar, 357 S.E.2d 544. A copy of that decision, dated June 12, 1987 is enclosed. In response to that decision, the Virginia State Bar Counsel, Michael L. Rigsby, by letter of July 10, 1987 asked that our committee consider recommending a change in the rule.

After some study and seeking input from both the Virginia Association of Commonwealth's Attorneys as well as several defense attorneys' organizations, our committee presented a proposed change in the rule to the Virginia State Bar Council. A copy is enclosed.

The Council approved the committee's recommendation on June 16, 1988. This proposal will now go to the Virginia Supreme Court for its consideration and hopefully approval.

Also enclosed are copies of reports and correspondence from my file relating to our study of this proposed rule change and also a couple of articles commenting on the Read case. I hope these will be of assistance to you. If I can be of any further help, please do not hesitate to let me know.

Yours sincerely,

Virginia H. Hackney

89/657

Enclosures

cc: J. Jay Corson, IV, Esquire

VIRGINIA STATE BAR
PROFESSIONAL HANDBOOK

1987
SUPPLEMENT

Comprising rules and opinions added, amended, or deleted since publication of the 1986 Edition, through December 1, 1987

THE MICHIE COMPANY
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Canon 8.

A Lawyer Should Assist in Improving the Legal System.

DISCIPLINARY RULES.

DR 8-102. Special Responsibilities of a Prosecutor or Government Lawyer.

(A) The prosecutor in a criminal case or a government lawyer shall:

(1) Refrain from prosecuting a charge that the prosecutor or government lawyer knows is not supported by probable cause.

(2) Not induce an unrepresented defendant to surrender important procedural rights.

(3) Not discourage a person from giving relevant information to the defendants.

(4) Disclose to a defendant all information required by law.

(5) Not subpoena an attorney in any criminal case or proceeding, including any proceeding before any grand jury, without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is or was represented by the attorney/witness.

PROPOSED CHANGE TO PART 6 OF

THE RULES OF COURT, SECTION IV: DR 8-102(A)(4)

DR 8-102. Special Responsibilities of a Prosecutor or Government Lawyer.

(A) The prosecutor in a criminal case or a government lawyer shall:

(1) Refrain from prosecuting a charge that the prosecutor or government lawyer knows is not supported by probable cause.

(2) Not induce an unrepresented defendant to surrender important procedural rights.

(3) Not discourage a person from giving relevant information to the defendants.

(4) ~~Disclose to a defendant all information required by law.~~ 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.

(5) Not subpoena an attorney in any criminal case or proceeding, including any proceeding before any grand jury, without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is or was represented by the attorney/witness.

Adopted by Virginia State Bar Council
June 16, 1988

VIRGINIA STATE BAR
PROFESSIONAL HANDBOOK

1986
EDITION

(2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client.

(3) Accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official.

DR 8-102. Special Responsibilities of a Prosecutor or Government Lawyer. — (A) The prosecutor in a criminal case or a government lawyer shall:

(1) Refrain from prosecuting a charge that the prosecutor or government lawyer knows is not supported by probable cause.

(2) Not induce an unrepresented defendant to surrender important procedural rights.

(3) Not discourage a person from giving relevant information to the defendants.

(4) Disclose to a defendant all information required by law.

ETHICAL CONSIDERATIONS.

EC 8-1. — Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system. This system should function in a manner that commands public respect and fosters the use of legal remedies to achieve redress of grievances. By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus they should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients or former clients.

EC 8-2. — Rules of law are deficient if they are not just, understandable, and responsive to the needs of society. If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he should endeavor by lawful means to obtain appropriate changes in the law. He should encourage the simplification of laws and the repeal or amendment of laws that are outmoded. Likewise, legal procedures should be improved whenever experience indicates a change is needed.

EC 8-3. — The fair administration of justice requires the availability of competent lawyers. Members of the public should be educated to recognize the existence of legal problems and the resultant need for legal services, and should be provided methods for intelligent selection of counsel. Those persons unable to pay for legal services should be provided needed services. Clients and lawyers should not be penalized by undue geographical restraints upon representation in legal matters, and the bar should address itself to improvements in licensing, reciprocity, and admission procedures consistent with the needs of modern commerce.

EC 8-4. — Whenever a lawyer seeks legislative or administrative changes he should identify the capacity in which he appears, whether on behalf of himself, a client, or the public. A lawyer may advocate such changes on behalf of a client even though he does not agree with them. But when a lawyer purports to act on behalf of the public, he should espouse only those changes which he conscientiously believes to be in the public interest.

EC 8-5. — Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal or legislative body is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers. Unless constrained by his obligation to preserve the confidences and secrets of his client, a lawyer should reveal to appropriate authorities any knowledge he may have of such improper conduct.

EC 8-6. — Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

EC 8-7. — Since lawyers are a vital part of the legal system, they should be persons of integrity, of professional skill, and of dedication to the improvement of the system. Thus a lawyer should aid in establishing, as well as enforcing, standards of conduct adequate to protect the public by insuring that those who practice law are qualified to do so.

EC 8-8. — Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.

EC 8-9. — The advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly changes; therefore, lawyers should encourage, and should aid in making, needed changes and improvements.

EC 8-10. — The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) The prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. The prosecutor should make timely disclosure to the defense of all information required by law. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused.

EC 8-11. — A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he

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340-1322

July 15, 1988

JUL 21 1988

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

Dear Mr. Proudfoot:

Tom Potter has requested that I respond to your letter of June 10, 1988, in which you requested information on West Virginia law in connection with the disclosure of a exculpatory evidence in criminal prosecutions.

Because we are not familiar with the facts concerning the prosecution of Donald Marshall, Jr., it is difficult to respond to your inquiry with any degree of specificity. However, there are several general principles of law recognized in West Virginia which may be of some interest. Specifically, it is generally recognized that the prosecuting attorney has a duty to disclose exculpatory evidence regardless of whether that information has been requested by defense counsel. E.g., State v. Meadows, 304 S.E.2d 831 (W. Va. 1983); State v. Brewster, 261 S.E.2d 77 (W. Va. 1979); State v. Wilder, 352 S.E.2d 723 (W. Va. 1986); State v. Cowan, 197 S.E.2d 641

(W. Va. 1973); State v. Jacobs, 298 S.E.2d 836 (W. Va. 1982). Further, failure to produce exculpatory evidence after it is requested is reversible error. Hall v. McCoy, 329 S.E.2d 860 (W. Va. 1985). However, there are certain circumstances in which our court has refused to reverse where exculpatory evidence was not requested. State v. Hamrick, 151 S.E.2d 252 (W. Va. 1966).

Copies of the cases cited above are enclosed. Hopefully, they will be of some value to you in preparing your brief.

Sincerely,

Thad S Huffman

THAD S. HUFFMAN

TSH/tfh

Enclosures

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STATE BAR OF WISCONSIN

Office of the President

John Walsh
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June 30, 1988

JUL 6 1988

Mr. Gordon F. Proudfoot
BOYNE CLARK
P. O. Box 876
Dartmouth, Nova Scotia B2Y 3Z5
CANADA

Dear Mr. Proudfoot:

I am in receipt of your request for information regarding the duty to disclose exculpatory statements to the defense counsel in a criminal prosecution. On behalf of the State Bar of Wisconsin, I am pleased to respond.

The short answer to your question is that public prosecutors in Wisconsin are under an ethical duty to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense. This requirement has been acepted and codified by the Wisconsin Supreme Court into the Supreme Court Rules; SCR Chapter 20, Rule 3.8(d).

On January 1 of this year, SCR Chapter 20 was amended. Previously, it had consisted of the Code of Professional Responsibility. The Supreme Court repealed that Code and replaced it with Wisconsin's own version of the Model Rules of Professional Conduct, adopted by the American Bar Association in August, 1983. Other states in the U.S. are also now using the Model Rules or studying them.

Under both the old and new codes, public prosecutors have special duties. When the Code of Professional Responsibility governed attorney conduct, SR 20.37, "Performing the duty of public prosecutor or other government lawyer," provided:

> (2) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if the defendant 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.

Under the new Model Code, SCR 20:3.8, "Special responsibilities of a prosecutor," provides that the prosecutor in a criminal case shall:

> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal...

In addition to rule 3.8, there are several other rules in the Model Code that impose a similar duty on all attorneys and a breach of Rule 3.8 may sometimes go hand-in-hand with a breach of the other rules. For example, SCR 20:3.3, "Candor toward the tribunal," provides in (a)(4) that an attorney shall not knowingly offer evidence that the lawyer knows to be false. Furthermore, SCR 20.3.4, "Fairness to opposing party and counsel," prohibits a lawyer from unlawfully obstructing another party's access to evidence, falsifying evidence, requesting a person other than a client to refrain from voluntarily giving relevant information to another party under certain conditions, etc.

I have enclosed a photocopy of each of the rules mentioned above. I hope this information is helpful to you, and please contact me if I can be of any further assistance. Good luck in presenting your brief to the Royal Commission in September.

Very truly yours,

John Walsh, President

JW/nem
Enclosures

situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

* * *

ADVOCATE

SCR 20:3.1 Meritorious claims and contentions

(a) In representing a client, a lawyer shall not:

(1) knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law;

(2) knowingly advance a factual position unless there is a basis for doing so that is not frivolous; or

(3) file a suit, assert a position, conduct a defense, delay a trial or take other action on behalf of the client when the lawyer knows or when it is obvious that such an action would serve merely to harass or maliciously injure another.

(b) A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in deprivation of liberty, may nevertheless so defend the proceeding as to require that every element of the case be established.

COMMENT

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

Committee comment: Paragraphs (a)(1) and (a)(3) are now embodied in Supreme Court Rule 20.36(1)(a) and (b). Paragraph (a)(2) is new. One of the weaknesses of the ABA Model Rule is that it appears to establish an objective standard. In the committee's view, the subjective test for an ethical violation under this rule should be retained in Wisconsin. Matter of Lauer, 108 Wis. 2d 746, 324 N.W.2d 432 (1982). If the objective test were adopted, the standards of Wis. Stat. sec. 814.025 could be applied to disciplinary proceedings. The conduct rising to an ethical violation should be more egregious than conduct resulting in the imposition of costs and fees under sec. 814.025. CF. Sommer v. Carr, 99 Wis. 2d 789, 299 N.W.2d 856 (1981); Radlein v. Industrial Fire & Cas. Co., 117 Wis. 2d 605, 345 N.W.2d 874 (1984).

* * *

SCR 20:3.2 Expediting litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

COMMENT

Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

* * *

SCR 20:3.3 Candor toward the tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

COMMENT

The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a lawyer

An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation pre-

scribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Misleading legal argument

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

False evidence

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a criminal defendant

Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).

Remedial measures

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

Constitutional requirements

The general rule — that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client — applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Refusing to offer proof believed to be false

Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

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Ex parte proceedings

Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision: the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Committee comment: The committee does not limit the rule under paragraph (a)(1) and (2) to instances involving "material" facts. Under paragraph (b), the duties under this rule do not terminate at the conclusion of the proceeding.

* * *

SCR 20:3.4 Fairness to opposing party and counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

COMMENT

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

* * *

SCR 20:3.5 Impartiality and decorum of the tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person except as permitted by law; or

(c) engage in conduct intended to disrupt a tribunal.

COMMENT

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

* * *

SCR 20:3.6 Trial publicity

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in deprivation of liberty, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in deprivation of liberty, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results

between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.

* * *

SCR 20:3.8 Special responsibilities of a prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

COMMENT

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

* * *

SCR 20:3.9 Advocate in nonadjudicative proceedings

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

COMMENT

In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure.

Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

This Rule does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency; representation in such a transaction is governed by Rules 4.1 through 4.4.

* * *

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

SCR 20:4.1 Truthfulness in statements to others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

COMMENT

Misrepresentation

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

Statements of fact

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Fraud by client

Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.

* * *

SCR 20:4.2 Communication with person represented by counsel

the client to rectify the same and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal.

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

SCR 20.37. Performing the duty of public prosecutor or other government lawyer

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

(2) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if the defendant 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.

SCR 20.38. Communicating with one of adverse interest

During the course of representing a client a lawyer may not:

(1) Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing the 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 the person are or have a reasonable possibility of being in conflict with the interests of the client.

SCR 20.39. Threatening criminal prosecution

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

SCR 20.40. Trial conduct

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

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

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

(b) Unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

Attorneys at Law

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June 20, 1988

Gordon F. Proudfoot
BOYNE CLARK
Barristers & Solicitors
P. O. Box 876
Dartmouth, Nova Scotia B2Y 3Z5

JUN 2 8 1988

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

Dear Mr. Proudfoot:

There are ethical guidelines in the model Rules and Professional Conduct fairness to opposing counsel for the party that state that a lawyer shall not obstruct another party's access to evidence or unlawfully alter the story or conceal a document or other potential material having evidenciary value. This is set forth in Rule 3.4. The code comparison was Rule 3.4(a) DR 7-109(a) which provides that a lawyer shall not suppress any evidence that he and his client have a legal obligation to reveal.

It would seem to me from the fact situation which you have set forth in the prosecution of Donald Marshall, Jr. that the prosecutor would fall within that Rule and subsequently could be disbared or perhaps even sued for malpractice by Donald Marshall, Jr., if in fact the prosecution did fail to disclose exculpatory statements.

I have not at this point devoted a great deal of time to your problem. If you wish to discuss this matter further, please advise me.

Sincerely yours,

John M. Daly

JMD/bl

Federal Rules of Criminal Procedure

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 his 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 he was involved.

(B) DEFENDANT'S PRIOR RECORD. Upon request of the defendant, the government shall furnish to the defendant such copy of his 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 his 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.

(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 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 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 his 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 his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by

prospective government or defense witnesses, to the defendant, his agents or attorneys.

(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, he shall promptly notify the other party or his 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.

[16–1] Comment and History of Rule.

Rule 16 stood as originally promulgated until 1966, when it was completely rewritten. The amended Rule greatly expanded the scope of discovery available to a defendant, and also granted for the first time a lim-

1987 EDITION

FEDERAL CRIMINAL CODE and RULES

as amended to May 1, 1987

ST. PAUL, MINN.
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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*, 34 N.J. 172, 175 A.2d 622 (1961); *State* v. *Moffa*, 36 N.J. 215, 176 A.2d 1 (1961). The rule has been revised to expand

the scope of pretrial discovery. At the same time provisions are made to guard against possible abuses.

Subdivision (a).—The court is authorized to order the attorney for the government to permit the defendant to inspect and copy or photograph three different types of material:

(1) Relevant written or recorded statements or confessions made by the defendant, or copies thereof. The defendant is not required to designate because he may not always be aware that his statements or confessions are being recorded. The government's obligation is limited to production of such statements as 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. Discovery of statements and confessions is in line with what the Supreme Court has described as the "better practice" (*Ciccnia* v. *LaGay*, 357 U.S. 504, 511 (1958)), and with the law in a number of states. See e.g., Del. Rules Crim. Proc., Rule 16; Ill.Stat. Ch. 38, § 729, Md. Rules Proc., Rule 728; *State* v. *McGee*, 91 Ariz. 101, 370 P.2d 261 (1962); *Cash* v. *Superior Court*, 53 Cal.2d 72, 346 P.2d 407 (1959); *State* v. *Beckham*, 239 La. 1094, 121 So.2d 207, cert. den. 364 U.S. 874 (1960); *People* v. *Johnson*, 356 Mich. 619, 97 N.W.2d 739 (1959); *State* v. *Johnson*, supra; *People* v. *Stokes*, 24 Miss.2d 755, 204 N.Y.Supp.2d 827 (Ct. Gen. Sess. 1960). The amendment also makes it clear that discovery extends to recorded as well as written statements. For state cases upholding the discovery of recordings, see, e.g., *People* v. *Cartier*, 51 Cal.2d 590, 335 P.2d 114 (1959); *State* v. *Minor*, 177 A.2d 215 (Del. Super. Ct. 1962).

(2) Relevant results or reports of physical or mental examinations, and of scientific tests or experiments (including fingerprint and handwriting comparisons) made in connection with the particular case, or copies thereof. Again the defendant is not required to designate but the government's obligation is limited to production of items 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. With respect to results or reports of scientific tests or experiments the range of materials which must be produced by the government is further limited to those made in connection with the particular case. Cf. Fla. Stats. § 909.18; *State* v. *Superior Court*, 90 Ariz. 133, 367 P.2d 6 (1961); *People* v. *Cooper*, 53 Cal.2d 755, 770, 3 Cal.Rptr. 148, 157, 349 P.2d 1964, 973 (1960); *People* v. *Stokes*, supra, at 762, 204 N.Y.Supp.2d at 835.

(3) Relevant recorded testimony of a defendant before a grand jury. The policy which favors pretrial disclosure to a defendant of his statements to government agents also supports, pretrial disclosure of his testimony before a grand jury. Courts, however, have tended to require a showing of special circumstances before ordering such disclosure. See, e.g., *United States* v. *Johnson*, 215 F.Supp. 300 (D. Md. 1963). Disclosure is required only where the statement has been recorded and hence can be transcribed.

Subdivision (b).—This subdivision authorizes the court to order the attorney for the government to permit the defendant to inspect the copy or photograph all other books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government. Because of the necessarily broad and general terms in which the items to be discovered are described, several limitations are imposed:

(1) While specific designation is not required of the defendant, the burden is placed on him to make a showing of materiality to the preparation of his defense and that his request is reasonable. The requirement of reasonableness will permit the court to define and limit the scope of the government's obligation to search its files while meeting the legitimate needs of the defendant. The court is also authorized to limit discovery to portions of items sought.

(2) Reports, memoranda, and other internal government documents made by government agents in connection with the investigation or prosecution of the case are exempt from discovery. Cf. *Palermo* v. *United States*, 360 U.S. 343 (1959); *Ogden* v. *United States*, 303 F.2d 724 (9th Cir. 1962).

(3) Except as provided for reports of examinations and tests in subdivision (a)(2), statements made by government witnesses or prospective government witnesses to agents of the government are also exempt from discovery except as provided by 18 U.S.C. § 3500.

Subdivision (c).—This subdivision permits the court to condition a discovery order under subdivision (a)(2) and subdivision (b) by requiring the defendant to permit the government to discover similar items which the defendant intends to produce at the trial and which are within his possession, custody or control under restrictions similar to those placed in subdivision (b) upon discovery by the defendant. While the government normally has resources adequate to secure the information necessary for trial, there are some situations in which mutual disclosure would appear necessary to prevent the defendant from obtaining an unfair advantage. For example, in cases where both prosecution and defense have employed experts to make psychiatric examinations, it seems as important for the government to study the opinions of the experts to be called by the defendant in order to prepare for trial as it does for the defendant to study those of the government's witnesses. Or in cases (such as antitrust cases) in which the defendant is well represented and well financed, mutual disclosure so far as consistent with the privilege against self-incrimination would seem as appropriate as in civil cases. State cases have indicated that a requirement that the defendant disclose in advance of trial materials which he intends to use on his own behalf at the trial is not a violation of the privilege against self-incrimination. See *Jones* v. *Superior Court*, 58 Cal.2d 56, 22 Cal.Rptr. 879, 372 P.2d 919 (1962); *People* v. *Lopez*, 60 Cal.2d 223, 32 Cal.Rptr. 424, 384 P.2d 16 (1963); Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L.Rev. 228, 246 (1964); Comment, The Self-Incrimination Privilege: Barrier to Criminal Discovery, 51 Calif.L.Rev. 135 (1963); Note, 76 Harv.Rev. 828 (1963).

Subdivision (d).—This subdivision is substantially the same as the last sentence of the existing rule.

Subdivision (e).—This subdivision gives the court authority to deny, restrict or defer discovery upon a sufficient showing. Control of the abuses of discovery is

necessary if it is to be expanded in the fashion proposed in subdivisions (a) and (b). Among the considerations to be taken into account by the court will be the safety of witnesses and others, a particular danger of perjury or witness intimidation, the protection of information vital to the national security, and the protection of business enterprises from economic reprisals.

For an example of a use of a protective order in state practice, see *People* v. *Lopez*, 60 Cal.2d 223, 32 Cal.Rptr. 424, 384 P.2d 16 (1963). See also Brennan, Remarks on Discovery, 33 F.R.D. 56, 65 (1963); Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L.Rev. 228, 244, 250.

In some cases it would defeat the purpose of the protective order if the government were required to make its showing in open court. The problem arises in its most extreme form where matters of national security are involved. Hence a procedure is set out where upon motion by the government the court may permit the government to make its showing, in whole or in part, in a written statement to be inspected by the court in camera. If the court grants relief based on such showing, the government's statement is to 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, Cf. 18 U.S.C. § 3500.

Subdivision (f).—This subdivision is designed to encourage promptness in making discovery motions and to give the court sufficient control to prevent unnecessary delay and court time consequent upon a multiplication of discovery motions. Normally one motion should encompass all relief sought and a subsequent motion permitted only upon a showing of cause. Where pretrial hearings are used pursuant to Rule 17.1, discovery issues may be resolved at such hearings.

Subdivision (g).—The first sentence establishes a continuing obligation on a party subject to a discovery order with respect to material discovered after initial compliance. The duty provided is to notify the other party, his attorney or the court of the existence of the material. A motion can then be made by the other party for additional discovery and, where the existence of the material is disclosed shortly before or during the trial, for any necessary continuance.

The second sentence gives wide discretion to the court in dealing with the failure of either party to comply with a discovery order. Such discretion will permit the court to consider the reasons why disclosure was not made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances.

1974 AMENDMENT

Rule 16 is revised to give greater discovery to both the prosecution and the defense. Subdivision (a) deals with disclosure of evidence by the government. Subdivision (b) deals with disclosure of evidence by the defendant. The majority of the Advisory Committee is of the view that the two—prosecution and defense discovery—are related and that the giving of a broader right of discovery to the defense is dependent upon giving also a broader right of discovery to the prosecution.

The draft provides for a right of prosecution discovery independent of any prior request for discovery by the defendant. The Advisory Committee is of the view that this is the most desirable approach to prosecution discovery. See American Bar Association, Standards Relating to Discovery and Procedure Before Trial, pp. 7, 43–46 (Approved Draft, 1970).

The language of the rule is recast from "the court may order" or "the court shall order" to "the government shall permit" or "the defendant shall permit." This is to make clear that discovery should be accomplished by the parties themselves, without the necessity of a court order unless there is dispute as to whether the matter is discoverable or a request for a protective order under subdivision (d)(1). The court, however, has the inherent right to enter an order under this rule.

The rule is intended to prescribe the minimum amount of discovery to which the parties are entitled. It is not intended to limit the judge's discretion to order broader discovery in appropriate cases. For example, subdivision (a)(3) is not intended to deny a judge's discretion to order disclosure of grand jury minutes where circumstances make it appropriate to do so.

Subdivision (a)(1)(A) amends the old rule to provide, upon request of the defendant, the government shall permit discovery if the conditions specified in subdivision (a)(1)(A) exist. Some courts have construed the current language as giving the court discretion as to whether to grant discovery of defendant's statements. See *United States* v. *Kaminsky*, 275 F.Supp. 365 (S.D.N.Y. 1967), denying discovery because the defendant did not demonstrate that his request for discovery was warranted; *United States* v. *Diliberto*, 264 F.Supp. 181 (S.D.N.Y. 1967), holding that there must be a showing of actual need before discovery would be granted; *United States* v. *Louis Carreau, Inc.*, 42 F.R.D. 408 (S.D.N.Y. 1967), holding that in the absence of a showing of good cause the government cannot be required to disclose defendant's prior statements in advance of trial. In *United States* v. *Louis Carreau, Inc.*, at p. 412, the court stated that if rule 16 meant that production of the statements was mandatory, the word "shall" would have been used instead of "may." See also *United States* v. *Wallace*, 272 F.Supp. 838 (S.D.N.Y. 1967); *United States* v. *Wood*, 270 F.Supp. 963 (S.D.N.Y. 1967); *United States* v. *Leighton*, 265 F.Supp. 27 (S.D.N.Y. 1967); *United States* v. *Longarzo*, 43 F.R.D. 395 (S.D.N.Y. 1967); *Loux* v. *United States*, 389 F.2d 911 (9th Cir. 1968); and the discussion of discovery in Discovery in Criminal Cases, 44 F.R.D. 481 (1968). Other courts have held that even though the current rules make discovery discretionary, the defendant need not show cause when he seeks to discover his own statements. See *United States* v. *Aadal*, 280 F.Supp. 859 (S.D.N.Y. 1967); *United States* v. *Federmann*, 41 F.R.D. 339 (S.D.N.Y. 1967); and *United States* v. *Projansky*, 44 F.R.D. 550 (S.D.N.Y. 1968).

The amendment making disclosure mandatory under the circumstances prescribed in subdivision (a)(1)(A) resolves such ambiguity as may currently exist, in the direction of more liberal discovery. See C. Wright, Federal Practice and Procedure: Criminal § 253 (1969, Supp. 1971), Rezneck, The New Federal Rules of Criminal Procedure, 54 Geo.L.J. 1276 (1966); Fla.Stat.Ann. § 925.05

(Supp. 1971–1972); N.J.Crim.Prac. Rule 35–11(a) (1967). This is done in the view that broad discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at the trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence. This is the ground upon which the American Bar Association Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) has unanimously recommended broader discovery. The United States Supreme Court has said that the pretrial disclosure of a defendant's statements "may be the 'better practice.'" *Cicenia* v. *La Gay*, 357 U.S. 504, 511, 78 S.Ct. 1297, 2 L.Ed.2d 1523 (1958). See also *Leland* v. *Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952); *State* v. *Johnson*, 28 N.J. 133, 145 A.2d 313 (1958).

The requirement that the statement be disclosed prior to trial, rather than waiting until the trial, also contributes to efficiency of administration. It is during the pretrial stage that the defendant usually decides whether to plead guilty. See *United States* v. *Projansky*, supra. The pretrial stage is also the time during which many objections to the admissibility of types of evidence ought to be made. Pretrial disclosure ought, therefore, to contribute both to an informed guilty plea practice and to a pretrial resolution of admissibility questions. See ABA, Standards Relating to Discovery and Procedure Before Trial § 1.2 and Commentary pp. 40–43 (Approved Draft, 1970).

The American Bar Association Standards mandate the prosecutor to make the required disclosure even though not requested to do so by the defendant. The proposed draft requires the defendant to request discovery, although obviously the attorney for the government may disclose without waiting for a request, and there are situations in which due process will require the prosecution, on its own, to disclose evidence "helpful" to the defense. *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Giles* v. *Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967).

The requirement in subdivision (a)(1)(A) is that the government produce "statements" without further discussion of what "statement" includes. There has been some recent controversy over what "statements" are subject to discovery under the current rule. See Discovery in Criminal Cases, 44 F.R.D. 481 (1968); C. Wright, Federal Practice and Procedure: Criminal § 253, pp. 505–506 (1969, Supp. 1971). The kinds of "statements" which have been held to be within the rule include "substantially verbatim and contemporaneous" statements, *United States* v. *Elife*, 43 F.R.D. 23 (S.D.N.Y. 1967); statements which reproduce the defendant's "exact words," *United States* v. *Armantrout*, 278 F.Supp. 517 (S.D.N.Y. 1968); a memorandum which was not verbatim but included the substance of the defendant's testimony, *United States* v. *Scharf*, 267 F.Supp. 19 (S.D.N.Y. 1967); Summaries of the defendant's statements, *United States* v. *Morrison*, 43 F.R.D. 516 (N.D.Ill.1967); and statements discovered by means of electronic surveillance, *United States* v. *Black*, 282 F.Supp. 35 (D.D.C. 1968). The court in *United States* v. *Iovinelli*, 276 F.Supp. 629, 631 (N.D.Ill.1967), declared that "statements" as used in old rule 16 is not restricted to the "substantially verbatim recital of an oral statement" or to statements which are a "recital of past occurrences."

The Jencks Act, 18 U.S.C. § 3500, defines "statements" of government witnesses discoverable for purposes of cross-examination as: (1) a "written statement" signed or otherwise approved by a witness, (2) "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the government and recorded contemporaneously with the making of such oral statement." 18 U.S.C. § 3500(e). The language of the Jencks Act has most often led to a restrictive definition of "statements," confining "statements" to the defendant's "own words." See *Hanks* v. *United States*, 388 F.2d 171 (10th Cir. 1968), and *Augenblick* v. *United States*, 377 F.2d 586, 180 Ct.Cl. 131 (1967).

The American Bar Association's Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) do not attempt to define "statements" because of a disagreement among members of the committee as to what the definition should be. The majority rejected the restrictive definition of "statements" contained in the Jencks Act, 18 U.S.C. § 3500(e), in the view that the defendant ought to be able to see his statement in whatever form it may have been preserved in fairness to the defendant and to discourage the practice, where it exists, of destroying original notes, after transforming them into secondary transcriptions, in order to avoid cross-examination based upon the original notes. See *Campbell* v. *United States*, 373 U.S. 487, 83 S.Ct. 1356, 10 L.Ed.2d 501 (1963). The minority favored a restrictive definition of "statements" in the view that the use of other than "verbatim" statements would subject witnesses to unfair cross-examination. See American Bar Association's Standards Relating to Discovery and Procedure Before Trial pp. 61–64 (Approved Draft, 1970). The draft of subdivision (a)(1)(A) leaves the matter of the meaning of the term unresolved and thus left for development on a case-by-case basis.

Subdivision (a)(1)(A) also provides for mandatory disclosure of a summary of any oral statement made by defendant to a government agent which the attorney for the government intends to use in evidence. The reasons for permitting the defendant to discover his own statements seem obviously to apply to the substance of any oral statement which the government intends to use in evidence at the trial. See American Bar Association Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(ii) (Approved Draft, 1970). Certainly disclosure will facilitate the raising of objections to admissibility prior to trial. There have been several conflicting decisions under the current rules as to whether the government must disclose the substance of oral statements of the defendant which it has in its possession. Cf. *United States* v. *Baker*, 262 F.Supp. 657 (D.C.D.C.1966); *United States* v. *Curry*, 278 F.Supp. 508 (N.D.Ill.1967); *United States* v. *Morrison*, 43 F.R.D. 516 (N.D.Ill.1967); *United States* v. *Reid*, 43 F.R.D. 520 (N.D.Ill.1967); *United States* v. *Armantrout*, 278 F.Supp. 517 (S.D.N.Y. 1968); and *United States* v. *Elife*, 43 F.R.D. 23 (S.D.N.Y. 1967). There is, however, considerable support for the policy of

disclosing the substance of the defendant's oral statement. Many courts have indicated that this is a "better practice" than denying such disclosure. E.g., *United States* v. *Curry*, supra; *Loux* v. *United States*, 389 F.2d 911 (9th Cir. 1968); and *United States* v. *Baker*, supra.

Subdivision (a)(1)(A) also provides for mandatory disclosure of any "recorded testimony" which defendant gives before a grand jury if the testimony "relates to the offense charged." The present rule is discretionary and is applicable only to those of defendant's statements which are "relevant."

The traditional rationale behind grand jury secrecy—protection of witnesses—does not apply when the accused seeks discovery of his own testimony. Cf. *Dennis* v. *United States*, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966); and *Allen* v. *United States*, 129 U.S.App.D.C. 61, 390 F.2d 476 (1968). In interpreting the rule many judges have granted defendant discovery without a showing of need or relevance. *United States* v. *Gleason*, 259 F.Supp. 282 (S.D.N.Y. 1966); *United States* v. *Longarzo*, 43 F.R.D. 395 (S.D.N.Y. 1967); and *United States* v. *United Concrete Pipe Corp.*, 41 F.R.D. 538 (N.D.Tex. 1966). Making disclosure mandatory without a showing of relevance conforms to the recommendation of the American Bar Association Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(iii) and Commentary pp. 64–66 (Approved Draft, 1970). Also see Note, Discovery by a Criminal Defendant of His Own Grand-Jury Testimony, 68 Columbia L.Rev. 311 (1968).

In a situation involving a corporate defendant, statements made by present and former officers and employees relating to their employment have been held discoverable as statements of the defendant. *United States* v. *Hughes*, 413 F.2d 1244 (5th Cir. 1969). The rule makes clear that such statements are discoverable if the officer or employee was "able legally to bind the defendant in respect to the activities involved in the charges."

Subdivision (a)(1)(B) allows discovery of the defendant's prior criminal record. A defendant may be uncertain of the precise nature of his prior record and it seems therefore in the interest of efficient and fair administration to make it possible to resolve prior to trial any disputes as to the correctness of the relevant criminal record of the defendant.

Subdivision (a)(1)(C) gives a right of discovery of certain tangible objects under the specified circumstances. Courts have construed the old rule as making disclosure discretionary with the judge. Cf. *United States* v. *Kaminsky*, 275 F.Supp. 365 (S.D.N.Y. 1967); *Gevinson* v. *United States*, 358 F.2d 761 (5th Cir. 1966), cert. denied, 385 U.S. 823, 87 S.Ct. 51, 17 L.Ed.2d 60 (1966); and *United States* v. *Tanner*, 279 F.Supp. 457 (N.D.Ill. 1967). The old rule requires a "showing of materiality to the preparation of his defense and that the request is reasonable." The new rule requires disclosure if any one of three situations exists: (a) the defendant shows that disclosure of the document or tangible object is material to the defense, (b) the government intends to use the document or tangible object in its presentation of its case in chief, or (c) the document or tangible object was obtained from or belongs to the defendant.

Disclosure of documents and tangible objects which are "material" to the preparation of the defense may be required under the rule of *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), without an additional showing that the request is "reasonable." In *Brady* the court held that "due process" requires that the prosecution disclose evidence favorable to the accused. Although the Advisory Committee decided not to codify the Brady Rule, the requirement that the government disclose documents and tangible objects "material to the preparation of his defense" underscores the importance of disclosure of evidence favorable to the defendant.

Limiting the rule to situations in which the defendant can show that the evidence is material seems unwise. It may be difficult for a defendant to make this showing if he does not know what the evidence is. For this reason subdivision (a)(1)(C) also contains language to compel disclosure if the government intends to use the property as evidence at the trial or if the property was obtained from or belongs to the defendant. See ABA Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(v) and Commentary pp. 68–69 (Approved Draft, 1970). This is probably the result under old rule 16 since the fact that the government intends to use the physical evidence at the trial is probably sufficient proof of "materiality." C. Wright, Federal Practice and Procedure: Criminal § 254 especially n. 70 at p. 513 (1969, Supp. 1971). But it seems desirable to make this explicit in the rule itself.

Requiring disclosure of documents and tangible objects which "were obtained from or belong to the defendant" probably is also making explicit in the rule what would otherwise be the interpretation of "materiality." See C. Wright, Federal Practice and Procedure: Criminal § 254 at p. 510 especially n. 58 (1969, Supp. 1971).

Subdivision (a)(1)(C) is also amended to add the word "photographs" to the objects previously listed. See ABA Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(v) (Approved Draft, 1970).

Subdivision (a)(1)(D) makes disclosure of the reports of examinations and tests mandatory. This is the recommendation of the ABA Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(iv) and Commentary pp. 66–68 (Approved Draft, 1970). The obligation of disclosure applies only to scientific tests or experiments "made in connection with the particular case." So limited, mandatory disclosure seems justified because: (1) it is difficult to test expert testimony at trial without advance notice and preparation; (2) it is not likely that such evidence will be distorted or misused if disclosed prior to trial; and (3) to the extent that a test may be favorable to the defense, its disclosure is mandated under the rule of *Brady* v. *Maryland*, supra.

Subdivision (a)(1)(E) is new. It provides for discovery of the names of witnesses to be called by the government and of the prior criminal record of these witnesses. Many states have statutes or rules which require that the accused be notified prior to trial of the witnesses to be called against him. See, e.g., Alaska R.Crim.Proc. 7(c); Ariz.R.Crim.Proc. 153, 17 A.R.S. (1956); Ark.Stat.Ann. § 43-1001 (1947); Cal.Pen.Code § 995n (West 1957); Colo. Rev.Stat.Ann. §§ 39-3-6, 39-4-2 (1963); Fla.Stat.Ann. § 906.29 (1944); Idaho Code Ann. § 19-1404 (1948); Ill. Rev.Stat. ch. 38, § 114-9 (1970); Ind.Ann.Stat. § 9-903 (1956), IC 1971, 35-1-16-3; Iowa Code Ann. § 772.3

(1950); Kan.Stat.Ann. § 62-931 (1964); Ky.R.Crim. Proc. 6.08 (1962); Mich.Stat.Ann. § 28.980, M.C.L.A. § 767.40 (Supp. 1971); Minn.Stat.Ann. § 628.08 (1947); Mo.Ann. Stat. § 545.070 (1953); Mont.Rev. Codes Ann. § 95-1503 (Supp. 1969); Neb.Rev.Stat. § 29-1602 (1964); Nev.Rev. Stat. § 173.045 (1967); Okl.Stat. tit. 22, § 384 (1951); Ore.Rev.Stat. § 132.580 (1969); Tenn. Code Ann. § 40-1708 (1955); Utah Code Ann. § 77-20-3 (1953). For examples of the ways in which these requirements are implemented, see *State* v. *Mitchell*, 181 Kan. 193, 310 P.2d 1063 (1957); *State* v. *Parr*, 129 Mont. 175, 283 P.2d 1086 (1955); *Phillips* v. *State*, 157 Neb. 419, 59 N.W. 598 (1953).

Witnesses' prior statements must be made available to defense counsel after the witness testifies on direct examination for possible impeachment purposes during trial: 18 U.S.C. § 3500.

The American Bar Association's Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(i) (Approved Draft, 1970) require disclosure of both the names and the statements of prosecution witnesses. Subdivision (a)(1)(E) requires only disclosure, prior to trial, of names, addresses, and prior criminal record. It does not require disclosure of the witnesses' statements although the rule does not preclude the parties from agreeing to disclose statements prior to trial. This is done, for example, in courts using the so-called "omnibus hearing."

Disclosure of the prior criminal record of witnesses places the defense in the same position as the government, which normally has knowledge of the defendant's record and the record of anticipated defense witnesses. In addition, the defendant often lacks means of procuring this information on his own. See American Bar Association Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(vi) (Approved Draft, 1970).

A principal argument against disclosure of the identity of witnesses prior to trial has been the danger to the witness, his being subjected either to physical harm or to threats designed to make the witness unavailable or to influence him to change his testimony. Discovery in Criminal cases, 44 F.R.D. 481, 499-500 (1968); Ratnoff, The New Criminal Deposition Statute in Ohio—Help or Hindrance to Justice?, 19 Case Western Reserve L.Rev. 279, 284 (1968). See, e.g., *United States* v. *Estep*, 151 F.Supp. 668, 672-673 (N.D. Tex. 1957):

> Ninety percent of the convictions had in the trial court for sale and dissemination of narcotic drugs are linked to the work and the evidence obtained by an informer. If that informer is not to have his life protected there won't be many informers hereafter.

See also the dissenting opinion of Mr. Justice Clark in *Roviaro* v. *United States*, 353 U.S. 53, 66-67, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). Threats of market retaliation against witnesses in criminal antitrust cases are another illustration. *Bergen Drug Co.* v. *Parke, Davis & Company*, 307 F.2d 725 (3d Cir. 1962); and *House of Materials, Inc.* v. *Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962). The government has two alternatives when it believes disclosure will create an undue risk of harm to the witness: It can ask for a protective order under subdivision (d)(1). See ABA Standards Relating to Discovery and Procedure Before Trial § 2.5(b) (Approved Draft, 1970). It can also move the court to allow the perpetuation of a particular witness's testimony for use at trial if the witness is unavailable or later changes his testimony. The purpose of the latter alternative is to make pretrial disclosure possible and at the same time to minimize any inducement to use improper means to force the witness either to not show up or to change his testimony before a jury. See rule 15.

Subdivision (a)(2) is substantially unchanged. It limits the discovery otherwise allowed by providing that the government need not disclose "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 "statements made by government witnesses or prospective government witnesses." The only proposed change is that the "reports, memoranda, or other internal government documents made by the attorney for the government" are included to make clear that the work product of the government attorney is protected. See C. Wright, Federal Practice and Procedure: Criminal § 254 n. 92 (1969, Supp. 1971); *United States* v. *Rothman*, 179 F.Supp. 935 (W.D.Pa. 1959); Note, "Work Product" in Criminal Discovery, 1966 Wash. U.L.Q. 321; American Bar Association, Standards Relating to Discovery and Procedure Before Trial § 2.6(a) (Approved Draft, 1970); cf. *Hickman* v. *Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), requires the disclosure of evidence favorable to the defendant. This is, of course, not changed by this rule.

Subdivision (a)(3) is included to make clear that recorded proceedings of a grand jury are explicitly dealt with in rule 6 and subdivision (a)(1)(A) of rule 16 and thus are not covered by other provisions such as subdivision (a)(1)(C) which deals generally with discovery of documents in the possession, custody, or control of the government.

Subdivision (a)(4) is designed to insure that the government will not be penalized if it makes a full disclosure of all potential witnesses and then decides not to call one or more of the witnesses listed. This is not, however, intended to abrogate the defendant's right to comment generally upon the government's failure to call witnesses in an appropriate case.

Subdivision (b) deals with the government's right to discovery of defense evidence or, put in other terms, with the extent to which a defendant is required to disclose its evidence to the prosecution prior to trial. Subdivision (b) replaces old subdivision (c).

Subdivision (b) enlarges the right of government discovery in several ways: (1) it gives the government the right to discovery of lists of defense witnesses as well as physical evidence and the results of examinations and tests; (2) it requires disclosure if the defendant has the evidence under his control and intends to use it at trial in his case in chief, without the additional burden, required by the old rule, of having to show, in behalf of the government, that the evidence is material and the request reasonable; and (3) it gives the government the right to discovery without conditioning that right upon the existence of a prior request for discovery by the defendant.

Although the government normally has resources adequate to secure much of the evidence for trial, there are situations in which pretrial disclosure of evidence to the

government is in the interest of effective and fair criminal justice administration. For example, the experimental "omnibus hearing" procedure (see discussion in Advisory Committee Note to rule 12) is based upon an assumption that the defendant, as well as the government, will be willing to disclose evidence prior to trial.

Having reached the conclusion that it is desirable to require broader disclosure by the defendant under certain circumstances, the Advisory Committee has taken the view that it is preferable to give the right of discovery to the government independently of a prior request for discovery by the defendant. This is the recommendation of the American Bar Association Standards Relating to Discovery and Procedure Before Trial, Commentary, pp. 43–46 (Approved Draft, 1970). It is sometimes asserted that making the government's right to discovery conditional will minimize the risk that government discovery will be viewed as an infringement of the defendant's constitutional rights. See discussion in C. Wright, Federal Practice and Procedure: Criminal § 256 (1969, Supp. 1971); Moore, Criminal Discovery, 19 Hastings L.J. 865 (1968); Wilder, Prosecution Discovery and the Privilege Against Self-Incrimination, 6 Am.Cr.L.Q. 3 (1967). There are assertions that prosecution discovery, even if conditioned upon the defendants being granted discovery, is a violation of the privilege. See statements of Mr. Justice Black and Mr. Justice Douglas, 39 F.R.D. 69, 272, 277–278 (1966); C. Wright, Federal Practice and Procedure: Criminal § 256 (1969, Supp. 1971). Several states require defense disclosure of an intended defense of alibi and, in some cases, a list of witnesses in support of an alibi defense, without making the requirement conditional upon prior discovery being given to the defense. E.g., Ariz.R.Crim.P. 162(B), 17 A.R.S. (1956); Ind.Ann.Stat. § 9–1631 to 9–1633 (1956), IC 1971, 35–5–1–1 to 35–5–1–3; Mich.Comp.Laws Ann. §§ 768.20, 768.21 (1968); N.Y. CPL § 250.20 (McKinney's Consol.Laws, c. 11–A, 1971); and Ohio Rev.Code Ann. § 2945.58 (1954). State courts have refused to hold these statutes violative of the privilege against self-incrimination. See *State* v. *Thayer*, 124 Ohio St. 1, 176 N.E. 656 (1931), and *People* v. *Rakiec*, 260 App.Div. 452, 23 N.Y.S.2d 607, aff'd, 289 N.Y. 306, 45 N.E.2d 812 (1942). See also rule 12.1 and Advisory Committee Note thereto.

Some state courts have held that a defendant may be required to disclose, in advance of trial, evidence which he intends to use on his own behalf at trial without violating the privilege against self-incrimination. See *Jones* v. *Superior Court of Nevada County*, 58 Cal.2d 56, 22 Cal.Rptr. 879, 372 P.2d 919 (1962); *People* v. *Lopez*, 60 Cal.2d 223, 32 Cal.Rptr. 424, 384 P.2d 16 (1963); Comment, The Self-Incrimination Privilege: Barrier to Criminal Discovery?, 51 Calif.L.Rev. 135 (1963); Note, 76 Harv. L.Rev. 838 (1963). The courts in *Jones* v. *Superior Court of Nevada County*, supra, suggests that if mandatory disclosure applies only to those items which the accused intends to introduce in evidence at trial, neither the incriminatory nor the involuntary aspects of the privilege against self-incrimination are present.

On balance the Advisory Committee is of the view that an independent right of discovery for both the defendant and the government is likely to contribute to both effective and fair administration. See Louisell, Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma, 53 Calif.L.Rev. 89 (1965), for an analysis of the difficulty of weighing the value of broad discovery against the value which inheres in not requiring the defendant to disclose anything which might work to his disadvantage.

Subdivision (b)(1)(A) provides that the defendant shall disclose any documents and tangible objects which he has in his possession, custody, or control and which he intends to introduce in evidence in his case in chief.

Subdivision (b)(1)(B) provides that the defendant shall disclose the results of physical or mental examinations and scientific tests or experiments if (a) they were made in connection with a particular case; (b) the defendant has them under his control; and (c) he intends to offer them in evidence in his case in chief or which were prepared by a defense witness and the results or reports relate to the witness's testimony. In cases where both prosecution and defense have employed experts to conduct tests such as psychiatric examinations, it seems as important for the government to be able to study the results reached by defense experts which are to be called by the defendant as it does for the defendant to study those of government experts. See Schultz, Criminal Discovery by the Prosecution: Frontier Developments and Some Proposals for the Future, 22 N.Y.U.Intra.L.Rev. 268 (1967); American Bar Association, Standards Relating to Discovery and Procedure Before Trial § 3.2 (Supp., Approved Draft, 1970).

Subdivision (b)(1)(C) provides for discovery of a list of witnesses the defendant intends to call in his case in chief. State cases have indicated that disclosure of a list of defense witnesses does not violate the defendant's privilege against self-incrimination. See *Jones* v. *Superior Court of Nevada County*, supra, and *People* v. *Lopez*, supra. The defendant has the same option as does the government if it is believed that disclosure of the identity of a witness may subject that witness to harm or a threat of harm. The defendant can ask for a protective order under subdivision (d)(1) or can take a deposition in accordance with the terms of rule 15.

Subdivision (b)(2) is unchanged, appearing as the last sentence of subdivision (c) of old rule 16.

Subdivision (b)(3) provides that the defendant's failure to introduce evidence or call witnesses shall not be admissible in evidence against him. In states which require pretrial disclosure of witnesses' identity, the prosecution is not allowed to comment upon the defendant's failure to call a listed witness. See *O'Connor* v. *State*, 31 Wis.2d 684, 143 N.W.2d 489 (1966); *People* v. *Mancini*, 6 N.Y.2d 853, 188 N.Y.S.2d 559, 160 N.E.2d 91 (1959); and *State* v. *Cocco*, 73 Ohio App. 182, 55 N.E.2d 430 (1943). This is not, however, intended to abrogate the government's right to comment generally upon the defendant's failure to call witnesses in an appropriate case, other than the defendant's failure to testify.

Subdivision (c) is a restatement of part of old rule 16(g).

Subdivision (d)(1) deals with the protective order. Although the rule does not attempt to indicate when a protective order should be entered, it is obvious that one would be appropriate where there is reason to believe that a witness would be subject to physical or economic harm if his identity is revealed. See *Will* v. *United States*, 389 U.S. 90, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967).

The language "by the judge alone" is not meant to be inconsistent with *Alderman* v. *United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969). In *Alderman* the court points out that there may be appropriate occasions for the trial judge to decide questions relating to pretrial disclosure. See *Alderman* v. *United States*, 394 U.S. at 182 n. 14, 89 S.Ct. 961.

Subdivision (d)(2) is a restatement of part of old rule 16(g) and (d).

Old subdivision (f) of rule 16 dealing with time of motions is dropped because rule 12(c) provides the judge with authority to set the time for the making of pretrial motions including requests for discovery. Rule 12 also prescribes the consequences which follow from a failure to make a pretrial motion at the time fixed by the court. See rule 12(f).

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94-247

A. Amendments Proposed by the Supreme Court. Rule 16 of the Federal Rules of Criminal Procedure regulates discovery by the defendant of evidence in possession of the prosecution, and discovery by the prosecution of evidence in possession of the defendant. The present rule permits the defendant to move the court to discover certain material. The prosecutor's discovery is limited and is reciprocal—that is, if the defendant is granted discovery of certain items, then the prosecution may move for discovery of similar items under the defendant's control.

As proposed to be amended, the rule provides that the parties themselves will accomplish discovery—no motion need be filed and no court order is necessary. The court will intervene only to resolve a dispute as to whether something is discoverable or to issue a protective order.

The proposed rule enlarges the scope of the defendant's discovery to include a copy of his prior criminal record and a list of the names and addresses, plus record of prior felony convictions, of all witnesses the prosecution intends to call during its case-in-chief. It also permits the defendant to discover the substance of any oral statement of his which the prosecution intends to offer at trial, if the statement was given in response to interrogation by any person known by defendant to be a government agent.

Proposed subdivision (a)(2) provides that Rule 16 does not authorize the defendant to discover "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. . . ."

The proposed rule also enlarges the scope of the government's discovery of materials in the custody of the defendant. The government is entitled to a list of the names and addresses of the witnesses the defendant intends to call during his case-in-chief. Proposed subdivision (b)(2) protects the defendant from having to disclose "reports, memoranda, or other internal defense documents . . . made in connection with the investigation or defense of the case. . . ."

Subdivision (d)(1) of the proposed rule permits the court to deny, restrict, or defer discovery by either party, or to make such other order as is appropriate. Upon request, a party may make a showing that such an order is necessary. This showing shall be made to the judge alone if the party so requests. If the court enters an order after such a showing, it must seal the record of the showing and preserve it in the event there is an appeal.

B. Committee Action. The Committee agrees that the parties should, to the maximum possible extent, accomplish discovery themselves. The court should become involved only when it is necessary to resolve a dispute or to issue an order pursuant to subdivision (d).

Perhaps the most controversial amendments to this rule were those dealing with witness lists. Under present law, the government must turn over a witness list *only* in capital cases. [Section 3432 of title 18 of the United States Code provides: A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness.] The defendant never needs to turn over a list of his witnesses. The proposed rule requires both the government and the defendant to turn over witness lists in every case, capital or noncapital. Moreover, the lists must be furnished to the adversary party upon that party's request.

The proposed rule was sharply criticized by both prosecutors and defenders. The prosecutors feared that pretrial disclosure of prosecution witnesses would result in harm to witnesses. The defenders argued that a defendant cannot constitutionally be compelled to disclose his witnesses.

The Committee believes that it is desirable to promote greater pretrial discovery. As stated in the Advisory Committee Note,

> broader discovery by both the defense and the prosecution will contribute to the fair and efficient administration of criminal justice by aiding in informed plea negotiations, by minimizing the undesirable effect of surprise at trial, and by otherwise contributing to an accurate determination of the issue of guilt or innocence. . . .

The Committee, therefore, endorses the principle that witness lists are discoverable. However, the Committee has attempted to strike a balance between the narrow provisions of existing law and the broad provisions of the proposed rule.

The Committee rule makes the procedures defendant-triggered. If the defendant asks for and receives a list of prosecution witnesses, then the prosecution may request a list of defense witnesses. The witness lists need not be turned over until 3 days before trial. The court can modify the terms of discovery upon a sufficient showing. Thus, the court can require disclosure of the witness lists earlier than 3 days before trial, or can permit a party not to disclose the identity of a witness before trial.

The Committee provision promotes broader discovery and its attendant values—informed disposition of cases without trial, minimizing the undesirable effect of surprise, and helping insure that the issue of guilt or inno-

cence is accurately determined. At the same time, it avoids the problems suggested by both the prosecutors and the defenders.

The major argument advanced by prosecutors is the risk of danger to their witnesses if their identities are disclosed prior to trial. The Committee recognizes that there may be a risk but believes that the risk is not as great as some fear that it is. Numerous states require the prosecutor to provide the defendant with a list of prosecution witnesses prior to trial. [These States include Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, Oklahoma, Oregon, Tennessee, and Utah. See Advisory Committee Note, House Document 93-292, at 60.] The evidence before the Committee indicates that these states have not experienced unusual problems of witness intimidation. [See the comments of the Standing Committee on Criminal Law and Procedure of the State Bar of California in Hearings II, at 302.]

Some federal jurisdictions have adopted an omnibus pretrial discovery procedure that calls upon the prosecutor to give the defendant its witness lists. One such jurisdiction is the Southern District of California. The evidence before the Committee indicates that there has been no unusual problems with witness intimidation in that district. Charles Sevilla, Chief Trial Attorney for the Federal Defenders of San Diego, Inc., which operates in the Southern District of California, testified as follows:

> The Government in one of its statements to this committee indicated that providing the defense with witness lists will cause coerced witness perjury. This does not happen. We receive Government witness lists as a matter of course in the Southern District, and it's a rare occasion when there is any overture by a defense witness or by a defendant to a Government witness. It simply doesn't happen except on the rarest of occasion. When the Government has that fear it can resort to the protective order. [Hearings II, at 42.]

Mr. Sevilla's observations are corroborated by the views of the U.S. Attorney for the Southern District of California:

> Concerning the modifications to Rule 16, we have followed these procedures informally in this district for a number of years. We were one of the districts selected for the pilot projects of the Omnibus Hearing in 1967 or 1968. We have found that the courts in our district will not require us to disclose names of proposed witnesses when in our judgment to do so would not be advisable. Otherwise we routinely provide defense counsel with full discovery, including names and addresses of witnesses. We have not had any untoward results by following this program, having in mind that the courts will, and have, excused us from discovery where the circumstances warrant. [Hearings I, at 109.]

Much of the prosecutorial criticism of requiring the prosecution to give a list of its witnesses to the defendant reflects an unwillingness to trust judges to exercise sound judgment in the public interest. Prosecutors have stated that they frequently will open their files to defendants in order to induce pleas. [See testimony of Richard L. Thornburgh, United States Attorney for the Western District of Pennsylvania, in Hearings I, at 150.]

Prosecutors are willing to determine on their own when they can do this without jeopardizing the safety of witnesses. There is no reason why a judicial officer cannot exercise the same discretion in the public interest.

The Committee is convinced that in the usual case there is no serious risk of danger to prosecution witnesses from pretrial disclosure of their identities. In exceptional instances, there may be a risk of danger. The Committee rule, however, is capable of dealing with those exceptional instances while still providing for disclosure of witnesses in the usual case.

The Committee recognizes the force of the constitutional arguments advanced by defenders. Requiring a defendant, upon request, to give to the prosecution material which may be incriminating, certainly raises very serious constitutional problems. The Committee deals with these problems by having the defendant trigger the discovery procedures. Since the defendant has no constitutional right to discover any of the prosecution's evidence (unless it is exculpatory within the meaning of *Brady* v. *Maryland*, 373 U.S. 83 (1963)), it is permissible to condition his access to nonexculpatory evidence upon his turning over a list of defense witnesses. Rule 16 currently operates in this manner.

The Committee also changed subdivisions (a)(2) and (b)(2), which set forth "work product" exceptions to the general discovery requirements. The subsections proposed by the Supreme Court are cast in terms of the type of document involved (e.g., report), rather than in terms of the content (e.g., legal theory). The Committee recast these provisions by adopting language from Rule 26(b)(3) of the Federal Rules of Civil Procedure.

The Committee notes that subdivision (a)(1)(C) permits the defendant to discover certain items that "were obtained from or belong to the defendant." The Committee believes that, as indicated in the Advisory Committee Note [House Document 93-292, at 59], items that "were obtained from or belong to the defendant" are items that are material to the preparation of his defense.

The Committee added language to subdivision (a)(1)(B) to conform it to provisions in subdivision (a)(1)(A). The rule as changed by the Committee requires the prosecutor to give the defendant such copy of the defendant's prior criminal record as is within the prosecutor's "possession, custody, or control, the existence of which is known, or by the exercise of due diligence may become known" to the prosecutor. The Committee also made a similar conforming change in subdivision (a)(1)(E), dealing with the criminal records of government witnesses. The prosecutor can ordinarily discharge his obligation under these two subdivisions, (a)(1)(B) and (E), by obtaining a copy of the F.B.I. "rap sheet."

The Committee made an additional change in subdivision (a)(1)(E). The proposed rule required the prosecutor to provide the defendant with a record of the felony convictions of government witnesses. The major purpose for letting the defendant discover information about the record of government witnesses, is to provide him with information concerning the credibility of those witnesses. Rule 609(a) of the Federal Rules of Evidence permits a party to attack the credibility of a witness with convic-

tions other than just felony convictions. The Committee, therefore, changed subdivision (a)(1)(E) to require the prosecutor to turn over a record of all criminal convictions, not just felony convictions.

The Committee changed subdivision (d)(1), which deals with protective orders. Proposed (d)(1) required the court to conduct an ex parte proceeding whenever a party so requested. The Committee changed the mandatory language to permissive language. A Court may, not must, conduct an ex parte proceeding if a party so requests. Thus, if a party requests a protective or modifying order and asks to make its showing ex parte, the court has two separate determinations to make. First, it must determine whether an ex parte proceeding is appropriate, bearing in mind that ex parte proceedings are disfavored and not to be encouraged. [An ex parte proceeding would seem to be appropriate if any adversary proceeding would defeat the purpose of the protective or modifying order. For example, the identity of a witness would be disclosed and the purpose of the protective order is to conceal that witness' identity.] Second, it must determine whether a protective or modifying order shall issue.

CONFERENCE COMMITTEE NOTES, HOUSE REPORT NO. 94-414

Rule 16 deals with pretrial discovery by the defendant and the government. The House and Senate versions of the bill differ on Rule 16 in several respects.

A. Reciprocal vs. Independent Discovery for the Government.—The House version of the bill provides that the government's discovery is reciprocal. If the defendant requires and receives certain items from the government, then the government is entitled to get similar items from the defendant. The Senate version of the bill gives the government an independent right to discover material in the possession of the defendant.

The Conference adopts the House provisions.

B. Rule 16(a)(1)(A).—The House version permits an organization to discover relevant recorded grand jury testimony of any witness who was, at the time of the acts charged or of the grand jury proceedings, so situated as an officer or employee as to have been able legally to bind it in respect to the activities involved in the charges. The Senate version limits discovery of this material to testimony of a witness who was, at the time of the grand jury proceeding, so situated as an officer or employee as to have been legally to bind the defendant in respect to the activities involved in the charges.

The Conferees share a concern that during investigations, ex-employees and ex-officers of potential corporate defendants are a critical source of information regarding activities of their former corporate employers. It is not unusual that, at the time of their testimony or interview, these persons may have interests which are substantially adverse to or divergent from the putative corporate defendant. It is also not unusual that such individuals, though no longer sharing a community of interest with the corporation, may nevertheless be subject to pressure from their former employers. Such pressure may derive from the fact that the ex-employees or ex-officers have remained in the same industry or related industry, are employed by competitors, suppliers, or customers of their former employers, or have pension or other deferred compensation arrangements with former employers.

The Conferees also recognize that considerations of fairness require that a defendant corporation or other legal entity be entitled to the grand jury testimony of a former officer or employee if that person was personally involved in the conduct constituting the offense and was able legally to bind the defendant in respect to the conduct in which he was involved.

The Conferees decided that, on balance, a defendant organization should not be entitled to the relevant grand jury testimony of a former officer or employee in every instance. However, a defendant organization should be entitled to it if the former officer or employee was personally involved in the alleged conduct constituting the offense and was so situated as to have been able legally to bind the defendant in respect to the alleged conduct. The Conferees note that, even in those situations where the rule provides for disclosure of the testimony, the Government may, upon a sufficient showing, obtain a protective or modifying order pursuant to Rule 16(d)(1).

The Conference adopts a provision that permits a defendant organization to discover relevant grand jury testimony of a witness who (1) was, at the time of his 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 he was involved.

C. Rules 16(a)(1)(E) and (b)(1)(C) (witness lists).—The House version of the bill provides that each party, the government and the defendant, may discover the names and addresses of the other party's witnesses 3 days before trial. The Senate version of the bill eliminates these provisions, thereby making the names and addresses of a party's witnesses nondiscoverable. The Senate version also makes a conforming change in Rule 16(d)(1). The Conference adopts the Senate version.

A majority of the Conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contact directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy.

D. Rules 16(a)(2) and (b)(2).—Rules 16(a)(2) and (b)(2) define certain types of materials ("work product") not to be discoverable. The House version defines work product to be "the mental impressions, conclusions, opinions, or legal theories of the attorney for the government or other government agents." This is parallel to the definition in the Federal Rules of Civil Procedure. The Senate version returns to the Supreme Court's language and defines work product to be "reports, memoranda, or other internal government documents." This is the language of the present rule.

The Conference adopts the Senate provision.

The Conferees note that a party may not avoid a legitimate discovery request merely because something is

labelled "report", "memorandum", or "internal document". For example if a document qualifies as a statement of the defendant within the meaning of the Rule 16(a)(1)(A), then the labelling of that document as "report", "memorandum", or "internal government document" will not shield that statement from discovery. Likewise, if the results of an experiment qualify as the results of a scientific test within the meaning of Rule 16(b)(1)(B), then the results of that experiment are not shielded from discovery even if they are labelled "report", "memorandum", or "internal defense document".

1983 AMENDMENT

Rule 16(a)(3)

The added language is made necessary by the addition of Rule 26.2 and new subdivision (i) of Rule 12, which contemplate the production of statements, including those made to a grand jury, under specified circumstances.

1987 AMENDMENT

The amendments are technical. No substantive change is intended.

EDITORIAL NOTES

1975 Amendments. Subd. (a)(1). Pub.L. 94-64 amended subpars. (A), (B), and (D) generally, and deleted subpar. (E).

Subd. (a)(4). Pub.L. 94-149 deleted par. (4) reading "Failure to Call Witness. The fact that a witness' name is on a list furnished under this rule shall not be grounds for comment upon a failure to call the witness."

Subd. (b)(1). Pub.L. 94-64 amended subpars. (A) and (B) generally, and deleted subpar. (C).

Subd. (b)(3). Pub.L. 94-149 deleted par. (3) reading "Failure to Call Witness. The fact that a witness' name is on a list furnished under this rule shall not be grounds for a comment upon a failure to call a witness."

Subd. (c). Pub.L. 94-64 amended subd. (c) generally.

Subd. (d)(1). Pub.L. 94-64 amended par. (1) generally.

Rule 17. Subpoena

(a) For Attendance of Witnesses; Form; Issuance. A subpoena shall be issued by the clerk under the seal of the court. 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 time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a United States magistrate in a proceeding before that magistrate, but it need not be under the seal of the court.

(b) Defendants Unable to Pay. The court shall order at any time that a subpoena be issued for service on a named witness upon an *ex parte* application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. If the court orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

(d) Service. A subpoena may be served by the marshal, by a deputy marshal or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to that person the fee for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof.

(e) Place of Service.

(1) In United States. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States.

(2) Abroad. A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C., § 1783.

(f) For Taking Deposition; Place of Examination.

(1) Issuance. An order to take a deposition authorizes the issuance by the clerk of the court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein.

(2) Place. The witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the trial court, taking into account the convenience of the witness and the parties.

(g) **Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate.

(h) **Information Not Subject to Subpoena.** Statements made by witnesses or prospective witnesses may not be subpoenaed from the government or the defendant under this rule, but shall be subject to production only in accordance with the provisions of Rule 26.2.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(29), 89 Stat. 375, Apr. 30, 1979, eff. Dec. 1, 1980; Mar. 9, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). This rule is substantially the same as Rule 45(a) of the Federal Rules of Civil Procedure, 28 U.S.C. Appendix.

Note to Subdivision (b). This rule preserves the existing right of an indigent defendant to secure attendance of witnesses at the expense of the Government, 28 U.S.C. former § 656 (Witnesses for indigent defendants). Under existing law, however, the right is limited to witnesses who are within the district in which the court is held or within one hundred miles of the place of trial. No procedure now exists whereby an indigent defendant can procure at Government expense the attendance of witnesses found in another district and more than 100 miles of the place of trial. This limitation is abrogated by the rule so that an indigent defendant will be able to secure the attendance of witnesses at the expense of the Government no matter where they are located. The showing required by the rule to justify such relief is the same as that now exacted by 28 U.S.C. former § 656.

Note to Subdivision (c). This rule is substantially the same as Rule 45(b) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

Note to Subdivision (d). This rule is substantially the same as Rule 45(c) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix. The provision permitting persons other than the marshal to serve the subpoena, and requiring the payment of witness fees in Government cases is new matter.

Note to Subdivision (e). (1) This rule continues existing law, 28 U.S.C. § 654 (Witnesses; subpoenas; may run into another district). The rule is different in civil cases in that in such cases, unless a statute otherwise provides, a subpoena may be served only within the district or within 100 miles of the place of trial, 28 U.S.C. former § 654; Rule 45(e)(1) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

(2) This rule is substantially the same as Rule 45(e)(2) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix. See *Blackmer* v. *United States*, 284 U.S. 421, upholding the validity of the statute referred to in the rule.

Note to Subdivision (f). This rule is substantially the same as Rule 45(d) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

Note to Subdivision (g). This rule is substantially the same as Rule 45(f) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

1948 AMENDMENT

The amendment is to substitute proper reference to Title 28 in place of the repealed act.

1966 AMENDMENT

Subdivision (b).—Criticism has been directed at the requirement that an indigent defendant disclose in advance the theory of his defense in order to obtain the issuance of a subpoena at government expense while the government and defendants able to pay may have subpoenas issued in blank without any disclosure. See Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice (1963) p. 27. The Attorney General's Committee also urged that the standard of financial inability to pay be substituted for that of indigency. Id. at 40–41. In one case it was held that the affidavit filed by an indigent defendant under this subdivision could be used by the government at his trial for purposes of impeachment. *Smith* v. *United States*, 312 F.2d 867 (D.C. Cir. 1962). There has also been doubt as to whether the defendant need make a showing beyond the face of his affidavit in order to secure issuance of a subpoena. *Greenwell* v. *United States*, 317 F.2d 108 (D.C. Cir. 1963).

The amendment makes several changes. The references to a judge are deleted since applications should be made to the court. An ex parte application followed by a satisfactory showing is substituted for the requirement of a request or motion supported by affidavit. The court is required to order the issuance of a subpoena upon finding that the defendant is unable to pay the witness fees and that the presence of the witness is necessary to an adequate defense.

Subdivision (d).—The subdivision is revised to bring it into conformity with 28 U.S.C. § 1825.

1972 AMENDMENT

Subdivisions (a) and (g) are amended to reflect the existence of the "United States magistrate," a phrase defined in rule 54.

1974 AMENDMENT

Subdivision (f)(2) is amended to provide that the court has discretion over the place at which the deposition is to be taken. Similar authority is conferred by Civil Rule 45(d)(2). See C. Wright, Federal Practice and Procedure: Criminal § 278 (1969).

Ordinarily the deposition should be taken at the place most convenient for the witness but, under certain circumstances, the parties may prefer to arrange for the presence of the witness at a place more convenient to counsel.

Model Rules of Professional Conduct and Code of Judicial Conduct

American Bar Association

As amended August, 1984

conformity with an ABA-recommended amendment to provide that the duty of disclosure does not apply when the "information is protected as a privileged communication." This qualification may be empty, for the rule of attorney-client privilege has been construed to exclude communications that further a crime, including the crime of perjury. On this interpretation of DR 7-102(B)(1), the lawyer had a duty to disclose the perjury.

Paragraph (c) confers discretion on the lawyer to refuse to offer evidence that the lawyer "reasonably believes" is false. This gives the lawyer more latitude than DR 7-102(A)(4), which prohibited the lawyer from offering evidence the lawyer "knows" is false.

There was no counterpart in the Model Code to paragraph (d).

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or

concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

Model Code Comparison

With regard to paragraph (a), DR 7-109(A) provided that a lawyer "shall not suppress any evidence that he or his client has a legal obligation to reveal." DR 7-109(B) provided that a lawyer "shall not advise or cause a person to secrete himself . . . for the purpose of making him unavailable as a witness. . . ." DR 7-106(C)(7) provided that a lawyer shall not "[i]ntentionally or habitually violate any established rule of procedure or of evidence."

With regard to paragraph (b), DR 7-102(A)(6) provided that a lawyer shall not participate "in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." DR 7-109(C) provided that a lawyer "shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee or acquiesce in the payment of: (1) Expenses reasonably incurred by a witness in attending or testifying; (2) Reasonable compensation to a witness for his loss of time in attending or testifying; [or] (3) A reasonable fee for the professional services of an expert witness." EC 7-28 stated that witnesses "should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise."

Paragraph (c) is substantially similar to DR 7-106(A), which provided that "A lawyer shall not 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."

Paragraph (d) has no counterpart in the Model Code.

Paragraph (e) substantially incorporates DR 7-106(C)(1), (2), (3) and (4). DR 7-106(C)(2) proscribed asking a question "intended to degrade a witness or other person," a matter dealt with in Rule 4.4. DR 7-106(C)(5), providing that a lawyer shall not "fail to comply with known local customs of courtesy or practice," was too vague to be a rule of conduct enforceable as law.

With regard to paragraph (f), DR 7-104(A)(2) provided that a lawyer shall not "give advice to a person who is not represented . . . 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."

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate *ex parte* with such a person except as permitted by law; or

(c) engage in conduct intended to disrupt a tribunal.

Comment

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Model Code Comparison

With regard to paragraphs (a) and (b), DR 7-108(A) provided that "[b]efore the trial of a case a lawyer . . . shall not communicate with . . . anyone he knows to be a member of the venire. . . ." DR 7-108(B) provided that during the trial of a case a lawyer "shall not communicate with . . . any member of the jury." DR 7-110(B) provided that a lawyer shall not "communicate . . . as to the merits of the cause with a judge or an official before whom the proceeding is pending, except . . . upon adequate notice to opposing counsel," or as "otherwise authorized by law."