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Criminal Discovery: Experience Under the American Bar Association Standards

*JERRY E. NORTON

INTRODUCTION: THE DEVELOPMENT OF CRIMINAL DISCOVERY IN THE 1970's

Before 1970, no generally accepted foundation existed for comprehensive rules for criminal discovery. Although the scope of civil discovery had grown at an accelerating pace since the adoption of the Federal Rules of Civil Procedure in 1938, there had been an apparent inability to translate the philosophy of open disclosure into language suitable for penal prosecutions. This inability was attributable to both philosophical and practical differences between civil and criminal proceedings.

The civil proceeding operates upon the notion that two equally adverse presentations will uncover the "truth." The philosophy of full disclosure through discovery thus complements the philosophy of the civil proceeding; broad discovery facilitates the truth-finding process. In contrast, the criminal proceeding is marked by the "sporting theory of justice": certain safeguards are afforded the defendant at the expense of the truth. The full disclosure philosophy

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1. A civil case may be viewed as a dispute between two equal parties having the same legal rights and duties. The judge and jury act as arbitrators in the dispute. The function of the triers of fact and law is to uncover the truth. The task of the litigant is to persuade the triers that his is the true version. The rule that the plaintiff has the burden of proof by a preponderance of the evidence merely serves to break the deadlock which would otherwise exist where the trier of fact finds the evidence of both parties equally persuasive.

2. For example, the jury in a criminal case is instructed that it must return a verdict of not guilty if it has any reasonable doubt as to guilt, even though it is persuaded by a preponderance of the evidence that the defendant is guilty. The Fourth Amendment may be justified as a measure designed to protect the public generally, not exclusively to protect persons accused or about to be accused of crimes. See, e.g., Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 367 (1974). Nevertheless, the Fourth Amendment may operate as a "handicap." It should also be noted that this characterization does not rely upon the exclusionary rule. When government agents honor the Fourth Amendment prohibition against unreasonable searches, they are "barred" from presenting evidence of the truthfulness of the charges just as surely as when illegally obtained evidence is excluded.
of discovery is not always compatible with the sporting theory of criminal justice. It is not surprising that resistance to the adoption of criminal discovery practices was based to some extent on the impact which discovery might have on the balance of advantages awarded.\(^3\)

Related to the fear that discovery in criminal proceedings would upset the theoretical balance of advantages was the practical concern that discovery in criminal cases could not be made reciprocal. Prosecutors were not inclined to support the notion of criminal discovery when they believed that discovery practice would require them to open their files, while the Fifth Amendment would bar prosecutors from compelling similar disclosure by the defense. Justifiably, prosecutors were unenthusiastic about a plan that would unveil only their side of the truth before trial.

Until the 1960's these barriers to the adoption of criminal discovery practices appeared insurmountable. A new approach was needed to both reciprocity and the theory of sporting advantage. One important step was the suggestion that reciprocity of discovery could exist without requiring identical disclosures by both sides. Reciprocity could be effected by conferring on the defense discovery powers complementary, yet not identical, to those enjoyed by the prosecution.\(^4\) Although this broader view of reciprocity in criminal discovery seemed to allay the theoretical problems from the defendant's perspective, reciprocity problems remained from the prosecution's perspective due to the defendant's Fifth Amendment right. Furthermore, it had been recognized that criminal discovery encompassed other than the typical civil discovery from trial.

3. Perhaps this is what Judge Learned Hand had in mind when, after listing advantages given to the defendant, he said:

   Under our criminal procedure the accused has every advantage . . . Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.


4. Louisell, Criminal Discovery: Dilemma Real or Apparent? 49 Calif. L. Rev. 56 (1961) [hereinafter cited as Louisell]. Thus, for example, the defense need not have the power to seize evidence, but it could be given the power to demand access to evidence seized by the government.
tools of depositions and interrogatories. Many of the government's investigative powers were, in effect, discovery devices. This broader definition of criminal discovery provided no new benefits to the prosecutor, however, and to the contrary raised the spectre of more information which could be made available, while the defendant continued to be shielded by his right to remain silent. Clearly, no new theory for criminal discovery would be accepted by a substantial segment of the bench, bar, or public unless some new advantages were awarded to the prosecution.

During the 1960's two routes out of this apparent impasse began to open. One of these can be traced to the 1966 Amendments to the Federal Rules of Criminal Procedure. The United States Supreme Court amended Rule 16 of the Federal Rules of Criminal Procedure by adding a new section (c) which embodied a *quid pro quo* approach to criminal discovery. Certain disclosures by the government to the defense could be conditioned upon a willingness of the defense to make similar disclosures to the government. While not completely free of constitutional uncertainties, this approach at least avoided the Fifth Amendment proscription against *compelling* a defendant to be a witness against himself; instead, the defendant was free to choose whether or not to disclose information. Nevertheless, this *quid pro quo* approach only partly balanced the scale of discovery advantages in criminal practices. The

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5. Goldstein, *supra* note 3. The government powers to search for and seize evidence, to compel persons to appear in line-ups, and to compel the giving of handwriting exemplars are actually discovery powers which belong exclusively to the government.

6. Rule 16(c) stated:

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


8. Following amendments to the rules in 1975, the provision for disclosure by the defense is now located in Federal Rule of Criminal Procedure 16(b). A proposed amendment to the rule which would have discarded the *quid pro quo* approach in favor of the “advance notice” theory as utilized in the ABA Standards was passed by the Senate but defeated in the House. The House-Senate Conference adopted the House version, which retained the *quid pro quo* approach taken in the 1966 amendments. 8 *Moore's Federal Practice* ¶ 16.01(4) (1980).
amendment gave no right of discovery to the government; instead, it afforded the government only the right to request a court order conditioning its disclosures upon disclosure by the defense. In effect, reciprocal discovery continued to remain under the control of the defense.

The second development in the 1960's reflected a more fundamental change in the concept of reciprocity. This conceptual shift may be traced to the California Supreme Court's decision in Jones v. Superior Court, which articulated and applied a theory that had been debated by criminal justice scholars. In Jones, the prosecutor obtained a trial court order directing the defendant to make available the names and addresses of all physicians who had treated or who were to testify on behalf of the defendant, together with their reports and x-rays. In an opinion by Justice Traynor, the court held that the trial court's order was overbroad because it included the disclosure of defense witnesses and evidence which would not be used at trial. The court stated, however, that the Fifth Amendment stood as no bar to discovery of defense witnesses and evidence intended to be presented at trial. Justice Traynor compared the procedure to notice-of-alibi statutes adopted by a number of states, and reasoned that such discovery merely compels the defendant to give information which inevitably he will give voluntarily at trial. Therefore, the court held, such discovery does not violate the Fifth Amendment.

The "advance notice" theory of Jones permitted truly reciprocal discovery to become possible for the first time. Most remaining

11. The identity of the defense witnesses and the existence of any reports or x-rays the defense offers in evidence will necessarily be revealed at the trial. The witnesses will be subject to cross examination, and the reports and x-rays subject to study and challenge. Learning identity of the defense witnesses and of such reports and x-rays in advance merely enables the prosecution to perform its function at the trial more effectively. Thus, the alibi statutes do not infringe on the privilege against self-incrimination. Rather, they set up a wholly reasonable rule of pleading which in no manner compels a defendant to give any evidence other than that which he will voluntarily and without compulsion give at trial. Such statutes do not violate the right of a defendant to be forever silent. Rather they say to the accused: If you don't intend to remain silent, if you expect to offer an alibi defense, then advance notice and whereabouts must be forthcoming; but if you personally and your potential witnesses elect to remain silent throughout the trial, we have no desire to break that silence by any requirement of this statute.

58 Cal. 2d 56, 372 P.2d 919, 922 (quoting Dean, supra note 10, at 440).
constitutioinal uncertainties about the theory were removed in 1970 by the United States Supreme Court's decision in Williams v. Florida. There, the Court upheld a notice-of-alibi statute against a Fifth Amendment challenge.

The American Bar Association (ABA) adopted the "advance notice" theory in 1970 in promulgating standards of criminal discovery. The quid pro quo approach of the 1966 Federal Rule of Criminal Procedure 16 (c) was largely rejected in these standards. In 1978, the ABA revised the standards as part of a comprehensive recodification of its criminal justice standards. The 1978 ABA Standards retained the "advance notice" approach, but experience and reflection up on the earlier standards led to several important changes.

13. Id. at 85. The Court stated:
At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information which the petitioner from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself.
14. During the 1960's, as a part of its Project on Minimum Standards for Criminal Justice, the ABA appointed an Advisory Committee on Pretrial Proceedings under the chairmanship of Judge Alfred P. Murrah. In May of 1969 the committee issued its report, entitled Discovery and Procedure Before Trial, in which it recommended a series of standards for reciprocal discovery as well as for omnibus hearings and other pretrial procedures. The latter proposals will not be considered in this article. For a discussion of omnibus hearings, see R. Nimmer, Prosecution Disclosure and Judicial Reform: The Omnibus Hearing in Two Courts (1975).

With some significant amendments, the ABA House of Delegates approved the proposed standards in August of 1970. American Bar Association Project on Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970). These standards will be referred to throughout this article as "1970 ABA Standards."
15. See note 7 supra and accompanying text.
16. "[T]he Advisory Committee, in formulating this standard as to the policy for discovery, has rejected the notion of conditional discovery embodied in the federal rule. . . . If disclosures to the accused promote finality, orderliness, and efficiency in prosecutions generally, these gains should not depend upon the possibly capricious willingness of the accused to make reciprocal disclosures." 1970 ABA STANDARD 1.2 COMMENTARY.
17. The standards concerning discovery and procedure before trial became Chapter 11 of the work. See American Bar Association Standards Relating to the Administration of Criminal Justice, Chapter 11, Discovery and Procedure Before Trial (Approved Draft, 1978). Throughout this article, these standards will be referred to as "1978 ABA Standards." As in the 1970 Standards, the 1978 Standards also contain proposals for pretrial hearing procedures which will not be considered in this article. For a discussion of these hearing procedures, see R. Nimmer, Prosecutor Disclosure and Judicial Reform: The Omnibus Hearing in Two Courts (1975).
At the same time, in the years since 1970, a number of states adopted procedures for criminal discovery, most often by supreme court rule. In a few instances, most notably in New York, these procedures were modeled after the federal quid pro quo approach. California, perhaps typically, chose to take its own route. Most commonly, however, state supreme courts drew from the model in the 1970 ABA Standards.

The implementation of the advance notice theory in the ABA Standards and state rules is the focus of the following discussion. Four general topics will be covered, reflecting the subdivisions of the ABA Standards: general principles, disclosure to the accused, disclosure to the prosecution and regulation of discovery. The 1970 and 1978 ABA Standards will be compared throughout, and further comparison will be made to a sampling of state discovery rules, with special emphasis on Illinois. Illinois was one of the first states to adopt rules based on the 1970 ABA Standards, and thus a body of decisional law has developed involving the application of the discovery rules. The discovery rules in seven other states also will be considered: Arkansas, Arizona, Colorado, Florida, Minnesota, Missouri, and Vermont.

**GENERAL PRINCIPLES**

*purposes*

Both the 1970 and the 1978 ABA Standards set forth general purposes for criminal discovery. The overall goal of affording discovery in criminal cases is to "permit thorough preparation for trial and [to] minimize surprise at trial." Implicit in this goal is

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20. The relevant rule number and date of adoption in these states are as follows:

<table>
<thead>
<tr>
<th>State</th>
<th>Rule Number</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arkansas</td>
<td>17.1</td>
<td>1976</td>
</tr>
<tr>
<td>Arizona</td>
<td>15.1</td>
<td>1975</td>
</tr>
<tr>
<td>Colorado</td>
<td>16F</td>
<td>1974</td>
</tr>
<tr>
<td>Florida</td>
<td>3.220</td>
<td>1973</td>
</tr>
<tr>
<td>Illinois</td>
<td>411-415</td>
<td>1971</td>
</tr>
<tr>
<td>Minnesota</td>
<td>9.01</td>
<td>1975</td>
</tr>
<tr>
<td>Missouri</td>
<td>25.03</td>
<td>1974</td>
</tr>
<tr>
<td>Vermont</td>
<td>16</td>
<td>1974</td>
</tr>
</tbody>
</table>
the notion that, to be effective, discovery must take place substantially prior to trial; disclosure just before, or at the time of, trial may be useless.\textsuperscript{22} One practical result of timely discovery is to promote effective plea bargaining. As in civil litigation, when the parties in a criminal prosecution know the evidence, they are more likely to reach an agreement on disposition. Moreover, in criminal cases, the finality of the agreed disposition may also depend on discovery.\textsuperscript{28}

Discovery also ensures equality in pre-trial disclosure to all similarly situated defendants.\textsuperscript{24} In the absence of rules which define disclosure rights, procedural and substantive inequities could result. The elimination of substantial variances in discovery practices seems to have been an important consideration leading the Supreme Court of Illinois to adopt criminal discovery rules.\textsuperscript{25}

Finally, full and timely disclosure encourages efficiency at trial by minimizing potential interruptions and complications.\textsuperscript{26} The existence of constitutional and collateral issues, for example, may become apparent through discovery at the pre-trial stage.\textsuperscript{27} These issues can then be addressed in pre-trial motions, rather than being raised for the first time at trial.

\textit{Applicability}

Both the 1970 and the 1978 ABA Standards provide that discovery "should be applied in all serious criminal cases."\textsuperscript{28} The ambiguity is intentional, leaving to each jurisdiction the task of identifying the point at which an offense warrants application of the

\textsuperscript{22} "[E]leventh hour delivery of . . . thrice requested discovery items" defeats the purpose and violates the spirit of discovery. People v. McCabe, 75 Ill. App. 3d 162, 167, 383 N.E.2d 1199 (1979).

\textsuperscript{23} A defendant who is ill-informed about the circumstances of the case may make judgments that are costly to the individual as well as to the system. An overly optimistic view of the circumstances may lead to a wasteful trial, while an unduly pessimistic view of the circumstances may lead to a premature plea which is subsequently challenged. The finality of guilty pleas is particularly important when a substantial majority of all cases are resolved by plea.

\textsuperscript{24} 1978 ABA Standard 11-1.1 Commentary.

\textsuperscript{25} 1978 ABA Standard 11-1.1(a)(v).

\textsuperscript{26} People v. Schmidt, 56 Ill. 2d 572, 575, 309 N.E.2d 557 (1974).

\textsuperscript{27} 1978 ABA Standard 11-1.1(a)(iv); 1970 ABA Standard 1.1(a)(v).

\textsuperscript{28} For example, if the prosecution is bound to disclose the use of electronic surveillance, (see 1978 ABA Standard 11-2.1(b)(ii); 1970 ABA Standard 2.1(b)(ii)), the defense may be required to raise any challenge to the constitutionality of the surveillance before trial.
Illinois Supreme Court Rule 411 limits discovery to cases for which the accused might be "imprisoned in the penitentiary." The result is to exclude both misdemeanor and juvenile cases. The Illinois Supreme Court has stated that this distinction is premised on the desire for expeditious disposition of the substantial volume of less serious cases. The court also has refused to extend the right of criminal discovery to probation revocation hearings.

Of the other seven sample jurisdictions, only Minnesota and Missouri seem to specifically define the level of offense in which discovery is available. In Minnesota, discovery is available in felony and gross misdemeanor cases. In Missouri, discovery is available in all criminal cases.

**Timing**

The 1970 and 1978 ABA Standards do not explicitly describe which stage in a criminal proceeding triggers the beginning of discovery. A general reading of the drafters' comments suggests that discovery is to occur after the filing of formal charges. The comments suggest that discovery is to be used in the trial preparation stage and not in the preliminary hearing stage. The Illinois rule explicitly states that discovery powers are triggered by indictment.

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29. While the standard should apply in all felonies and in serious misdemeanors, each jurisdiction should identify for itself the point at which offenses are serious enough to warrant application of the standard. Less serious offenses should be subject to simple open file discovery and to simple pretrial procedures.

1978 ABA Standard 11-1.2 Commentary.


32. People v. Schmidt, 56 Ill. 2d 572, 574-75, 309 N.E.2d 557 (1974). The court stated: Among the factors motivating the decision to restrict application of the rules to cases in which a penitentiary sentence was possible was our awareness of the very substantial volume of less serious cases and the impact upon their expeditious disposition of the expanded discovery provided by the new rules. A second consideration in reaching our conclusion was our desire to eliminate, so far as feasible, substantial variances in the scope of discovery permitted in the courts of this State. To now hold, as defendant urges we do, that the trial judges have discretion to apply our criminal discovery rules to less serious offenses would renew in those cases the very problems we sought to eliminate in the more serious cases.

Id.


34. Minn. R. Crim. P. 9.01.

35. Mo. R. Crim. P. 25.32.
or information and that they shall not be used "prior to or in the course of any preliminary hearing." 

**DISCLOSURE TO THE ACCUSED**

*Constitutionally Required Disclosure: Evidence Favorable to the Defense*

Both the 1970 and 1978 ABA Standards and all of the sample states have rules requiring the prosecutor to disclose evidence favorable to the accused. These rules are intended to satisfy the due process requirements enunciated by the Supreme Court in *Brady v. Maryland* and extended in *United States v. Agurs*. In *Brady*, the Court held that the prosecutor must disclose all evidence favorable to the accused, provided that the evidence is material to guilt or to punishment. In *Agurs*, the Court specifically defined the State's disclosure duties and indicated that due process may require disclosure in some cases in spite of the defense's failure to make a discovery request. Because of the importance of the *Agurs* decision to any discussion of criminal discovery, it will be considered in some detail.

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37. 1970 ABA Standard 2.1(c); 1978 ABA Standard 11-2.1(c).


41. Brady v. Maryland, 373 U.S. at 87:

[T]he 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.

42. See note 50 infra.

43. The pertinent facts of the case are as follows. Linda Agurs and the victim, James Sewel, checked into a motel as wife and husband. At the time that they checked in, Sewel was carrying two knives. About 15 minutes later, motel employees heard Agurs scream for help. Entering the room, they found Agurs holding a knife which Sewel was trying to take from her. Sewel was dead on arrival at the hospital.

Government evidence showed that the victim had several hundred dollars on his person two hours before this episode. Its evidence also indicated that Sewel had left the motel room after having sexual intercourse with Agurs. When the police arrived at the motel, they found the contents of the victim's pockets in disarray on the dresser, but no sign of any money. The theory of the prosecution was that Sewel discovered Agurs in the act of taking his money when he returned to the motel room. Agurs then grabbed one of Sewel's knives and attacked him.

The defense offered no evidence, but argued that the victim had initiated the attack and
In *Agurs*, as in the earlier case of *Moore v. Illinois*, the Court resisted the argument that due process required the prosecutor to disclose any information that might affect a jury's verdict. The Court divided the prosecutor’s duty into three levels, according to relative materiality.

The lowest level of materiality included instances where the government introduces perjured testimony which it knows or should know is perjured. In such cases, the failure to disclose this information will require that the conviction be set aside “if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” Such a result is required, “not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process.”

The second level of materiality is triggered when the defense makes a specific request of the state for disclosure of favorable evidence. In such a case, the state must disclose all evidence which is material to guilt or punishment.

that the actions were in self-defense. Medical testimony presented by the government showed no bruises or knife wounds on Agurs. There were several deep stab wounds in Sewel’s chest, however, together with a number of slashes on his arms and hands which were characterized by the expert witnesses as “defensive wounds.” The jury found Agurs guilty of murder.

Three months after the jury verdict, the defense filed a motion for a new trial, alleging that the prosecution had failed to disclose records showing that the victim, Sewel, had two previous convictions, one for assault and carrying a deadly weapon, and another for carrying a deadly weapon. In opposing the motion for a new trial, the government pointed out that the defense had not demanded the victim’s criminal record before or during the trial. Had it done so, the prosecution argued, the information would have been disclosed. The district court denied the defense motion, but the court of appeals reversed. The Supreme Court reversed the court of appeals.

44. 408 U.S. 786 (1972).
45. United States v. Agurs, 427 U.S. 97, 109 (1976): “If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice.” Id. Receiving the assertion that due process requires blanket disclosure, the Court stated: “Whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much.” Id.

The Illinois Supreme Court also has rejected an argument that a general right to disclosure of all evidence is created by a court rule designed to provide for disclosure of evidence favorable to the accused. *People v. Chaney*, 63 Ill. 2d 216, 347 N.E.2d 138 (1976).

47. Id. at 104.
48. Brady v. Maryland, 373 U.S. 83 (1963). Speaking for the majority in *Agurs*, Mr. Justice Stevens explained the requirements of *Brady*:

In *Brady* the request was specific. It gave the prosecutor notice of exactly what the defense desired. Although there is, of course, no duty to provide defense coun-
The third level of materiality governs those instances not disposed of by the other two levels. Even where the defense fails to make a specific discovery request, the state nevertheless is required to disclose information that is highly material to the defense's case. The test for such materiality is whether, looking at the entire record, the omitted evidence creates a reasonable doubt of guilt. This reasonable doubt test is slightly less stringent than that under the federal rules for a new trial based on newly discovered evidence in the hands of third parties. In newly discovered evidence cases, there is a "severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal." Since the ABA Standards were designed to incorporate the due process requirement of Brady and Agurs, it would seem that decisions interpreting the standards would be co-extensive with Agurs.

49. Id. at 112-13.

50. Id. at 111. The difficulty in distinguishing between the last two materiality showings triggered the dissent of Justice Marshall, joined by Justice Brennan. Id. at 114 (Marshall, J., dissenting). Justice Marshall argued that actually there is no difference in the standard of the majority for failure to disclose unrequested information in the hands of the prosecutor and the standard for a new trial based on newly discovered evidence. The burden thus imposed on the defendant is at least as "severe" as, if not more "severe" than, the burden he generally faces on a Rule 33 motion. Surely if a judge is able to say that evidence actually creates a reasonable doubt as to guilt in his mind (the Court's standard), he would also conclude that the evidence "probably would have resulted in acquittal" (the general Rule 33 standard). In short, in spite of its own salutary precaution, the Court treats the case in which the prosecutor withholds evidence no differently from the case in which evidence is newly discovered from a neutral source. The "prosecutor's obligations to serve the cause of justice" is reduced to a status, to borrow the Court's words of "no special significance."

Id. at 115-16.

The hierarchy of materiality showings dictated by the Agurs decision might best be illustrated in table form:
and related due process cases. One Illinois Supreme Court decision suggests, however, that Illinois Supreme Court Rule 412 (c) may afford the defendant a greater right to disclosure than that required under the Fourteenth Amendment. The court suggested that all evidence favorable to the accused must be disclosed whether or not the defense makes a specific discovery request. The Illinois Supreme Court has interpreted the rule as co-extensive with that portion of Agurs which requires disclosure in nearly all instances when a specific request is made. The issue has arisen since Agurs, however, as to what constitutes a “specific” request.

<table>
<thead>
<tr>
<th>circumstance of prosecutor's action</th>
<th>required materiality for reversal on constitutional grounds</th>
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<tbody>
<tr>
<td>knowing use by prosecutor of perjured testimony</td>
<td>“any reasonable likelihood that the testimony could have affected the judgment of the jury.”</td>
</tr>
<tr>
<td>failure to disclose after a specific request</td>
<td>When it is favorable to the defense and is material either to guilt or to punishment (Brady v. Maryland)</td>
</tr>
<tr>
<td>failure to disclose after no specific request</td>
<td>“if the omitted evidence creates a reasonable doubt that did not otherwise exist. . . .”</td>
</tr>
<tr>
<td>newly discovered evidence not in the prosecutor's possession (Federal Rule of Criminal Procedure 33—the extent to which this may be constitutionally required was not discussed in Agurs)</td>
<td>“newly discovered evidence probably would have resulted in acquittal.”</td>
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</tbody>
</table>

51. While the Agurs decision was directly concerned with the Fifth Amendment in a federal prosecution, the majority left no doubt but that they would approach Fourteenth Amendment cases in the same manner. Speaking of the due process clause of the Fifth Amendment, Justice Stevens said, “Our construction of that Clause will apply equally to the comparable clause in the Fourteenth Amendment applicable to trials in state courts.” United States v. Agurs, 427 U.S. at 107.

52. People v. Newberry, 53 Ill. 2d 228, 290 N.E.2d 592 (1972):

The prosecution is required to disclose to an accused all evidence favorable to his case . . ., and since October 1, 1971, our rules concerning pretrial discovery have required the prosecution to disclose that information to the defendant, whether or not he has requested it . . . This case, however, was tried before the adoption of Rule 412.

53 Ill. 2d at 237, 290 N.E.2d at 597. But see People v. Howze, 7 Ill. App. 3d 60, 286 N.E.2d 512 (1972), where Supreme Court Rule 412(d), requiring a motion, was read as a limit on 412(c).
for purposes of applying the more favorable *Brady* material-to-guilt test. In a recent Illinois case, the defense filed a discovery motion asking for the names of the prosecution's witnesses and "memoranda containing substantially verbatim reports of their oral statements, and list of memoranda reporting or summarizing their oral statements, which the State has in its possession or control." The Supreme Court of Illinois held that this request was sufficiently specific to require the prosecution to disclose a police report which contained certain favorable information obtained from witnesses.

**Prosecutorial Duty and General Disclosure**

In suggesting guidelines as to what materials should be subject to discovery where it is not constitutionally required, the 1970 and 1978 ABA Standards differ markedly in the prosecutor's duty to disclose. The 1970 Standards limit disclosure in the usual case to

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53. Defense counsel "may make no request at all, or possibly ask for 'all *Brady* material,' or for 'anything exculpatory.' Such a request really gives the prosecutor no better notice than if no request is made." United States v. Agurs, 427 U.S. 97, 106-07 (1976).


55. *Id.*

[The police officer's] report can be considered to have set out a composite summary of oral statements by three persons whom the People called as witnesses. We consider that the request, under these facts, was given with sufficient specificity to warrant application of the *Brady* test, and that the prosecution's failure to provide the report was not harmless error.

56. Standard 11-2.1 of the 1978 ABA Standards on Discovery and Procedure Before Trial defines the prosecutor's duty to disclose to the defense as follows:

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

(i) the names and addresses of witnesses, together with their relevant written or recorded statements;

(ii) any written or recorded statements and the substance of any oral statements made by the accused or made by codefendant;

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

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

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

(vi) any record of prior criminal convictions of the defendant or of any codefendant.

(b) When the information is within the prosecutor's control, the prosecuting attorney shall inform the defense counsel:

(i) if relevant recorded grand jury testimony has not been transcribed;
the items listed in the standard. To obtain additional disclosures, the defense was required to obtain a specific court order upon a showing of materiality and reasonableness. The 1978 Standards, in contrast, require disclosure by the prosecutor of "all of the material and information within the prosecutor's possession or control including but not limited to" the listed items. The 1978 Standard, its drafters contend, promotes an "open file" policy in which the prosecutor will normally reveal all of the information in his possession.

Names and Addresses of Witnesses

The witness disclosure requirements of the 1970 and 1978 ABA Standards reflect the difference in disclosure philosophy. The guarded disclosure philosophy of the 1970 Standard requires that the prosecution disclose only the names and last known addresses of persons "whom the prosecution intends to call as witnesses." In contrast, the broader 1978 Standards require the prosecutor to disclose the names and addresses "of witnesses." No qualifying language limits this "open file" approach. The absence of any limitation suggests that the prosecutor is bound to reveal the names of all known witnesses.

Most states adopting discovery rules modeled on the ABA Standards have adopted the language of the 1970 Standards. An Illinois

(ii) if the defendant's conversations or premises have been subjected to electronic surveillance (including wiretapping);

(iii) if the prosecutor intends to conduct scientific tests, experiments, or comparisons which may consume or destroy the subject of the test, or intends to dispose of relevant physical objects; and

(iv) if the prosecutor intends to offer (as part of the proof that the defendant committed the offense charged) evidence of other offenses.

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

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

57. See note 90 infra.
58. 1970 ABA STANDARD 2.5(a).
59. 1978 ABA STANDARD 11-2.1(a) (emphasis added).
60. 1978 ABA STANDARD 11-2.1(a) COMMENTARY.
Supreme Court rule based on the 1970 Standard has been interpreted as requiring disclosure only of those witnesses whom the prosecution intends to call, thus excluding from disclosure other occurrence witnesses. One Illinois appellate court has held that the duty of the state to disclose the names of its witnesses is so important that the trial court's failure to exclude an undisclosed co-defendant witness is reversible error. On the other hand, the disclosure of a witness who the state intends to call does not require that the witness, in fact, be called at trial. Two states which otherwise closely followed the 1970 ABA Standards adopted a more open requirement with regard to witnesses, similar to the 1978 ABA Standards. A Florida Supreme Court rule requires the prosecutor to disclose "the names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto." Vermont appears to reach a similar result by requiring the prosecutor to disclose "the names and addresses of all witnesses then known to him."

Rebuttal Witnesses

The drafters of the 1970 ABA Standards believed that prosecutors should not be required to disclose rebuttal witnesses, with the caveat that the prosecutor "should not be tempted to use this mechanism to avoid disclosing their witnesses' testimony as actually and realistically part of his case-in-chief." The 1978 ABA Standards are not explicit as to whether rebuttal witnesses must be disclosed. In light of the "open file" philosophy behind the newer standards, however, "witnesses" should be construed to include rebuttal witnesses. Thus, the 1978 Standards should require the disclosure of all witnesses, regardless of the stage at which those witnesses are to appear. The rules in Florida and Vermont seem to suggest a similar outcome. Arizona, on the other hand,
followed the 1970 Standard, and adopted a rule which explicitly limits the prosecutor's disclosure duty to witnesses whom he intends to call in his case-in-chief.\textsuperscript{70}

The Illinois Supreme Court originally adopted a rule similar to the 1970 Standard, with the understanding that rebuttal witnesses need not be disclosed.\textsuperscript{71} This rule was amended in 1976, however, to require the prosecutor to disclose those witnesses who are to be called in rebuttal to certain defenses which the defendant has been required to disclose to the state under the defense disclosure sections of the rules.\textsuperscript{72} The 1976 amendment apparently seeks to incorporate the constitutional guarantees recognized by the Illinois Supreme Court in People ex rel Carey v. Strayhorn.\textsuperscript{73}

Carey involved a constitutional challenge to the Illinois alibi defense statute.\textsuperscript{74} Under the statute, the defendant was required to give notice of his intention to raise an alibi defense and to provide a list of witnesses whom he intended to call in support of the defense. The statute expressly excused the state from any similar duty to supply a list of those witnesses who were to be called to rebut the alibi defense. Relying upon the United States Supreme Court decision in Wardius v. Oregon,\textsuperscript{75} the Illinois Supreme Court held that the alibi defense statute lacked the element of reciprocity required by the due process clause of the fourteenth amendment.\textsuperscript{76} Although Carey specifically guaranteed the right to reciprocity related to alibi defenses, the 1976 amendment extends that protection to all required disclosures by defendant of a particular defense.\textsuperscript{77} Apart from these situations, however, the 1976 amend-
ment apparently leaves intact that portion of the rule which does not require the state to disclose the names and addresses of rebuttal witnesses.\textsuperscript{78}

**Statements of Witnesses**

Both the 1970 and the 1978 ABA Standards require that the prosecutor disclose relevant written or recorded statements of witnesses whose names and addresses have been revealed.\textsuperscript{79} This standard has been subject to considerable modification in states which have otherwise followed the ABA model. At least one state, Arkansas, does not provide for disclosure of witnesses’ statements at all.\textsuperscript{80} Florida takes pains to define what constitutes a statement for disclosure purposes.\textsuperscript{81}

Court rules in Minnesota and Missouri, on the other hand, appear to require disclosure of more than just prior written and recorded statements of witnesses. Minnesota requires the prosecutor to disclose “written summaries within his knowledge of the substance of relevant oral statements.”\textsuperscript{82} A similar rule is followed in Missouri, where the prosecutor is obliged to disclose “written or recorded statements, and existing memoranda reporting or summarizing part or all of their oral statements.”\textsuperscript{83}

Illinois appears to take a position somewhere between that of the ABA Standards and the Minnesota and Missouri rules. Illinois requires disclosure of more than just the written statements of witnesses, but does not require disclosure of general written summa-

\textsuperscript{78} People v. Knowles, 76 Ill. App. 3d 1004, 395 N.E.2d 706 (1979). The rule was held to apply even though the witness’ testimony could have been used in the state’s case-in-chief.

\textsuperscript{79} 1970 ABA STANDARD 2.1(a)(i); 1978 ABA STANDARD 11-2.1(a)(i).

\textsuperscript{80} Ark. R. Crim. P. 171.

\textsuperscript{81} A statement is defined for purposes of the Florida rule as:

[A] written statement made by said person and signed or otherwise adopted or approved by him, or a stenographic, mechanical, electrical or other recording, or a transcript thereof, or which is a substantially verbatim recital of an oral statement made by said person to an officer or agent of the State and recorded contemporaneously with the asking of such oral statement, provided, however, if the court determines in in camera proceedings as provided in subsection (1) hereof that any police report contains irrelevant, sensitive information or information interrelated with other crimes or criminal activities and the disclosure of the contents of such police report may seriously impair law enforcement or jeopardize the investigation of such other crimes or activities, the court may prohibit or partially restrict such disclosure.

\textsuperscript{82} Fla. R. Crim. P. 3.220(a)(1)(ii).

\textsuperscript{83} Minn. R. Crim. P. 9.01(1)(a).

\textsuperscript{83} Mo. R. Crim. P. 25.03(A)(1).
ries of oral statements. Instead, only those “memoranda containing substantially verbatim reports of . . . [witnesses'] oral statements” must be disclosed.84 The prosecutor must also submit a “list of memoranda reporting or summarizing their oral statements.”85 Requiring such a list of memoranda provides defense counsel an opportunity to move for an in camera examination of the memoranda by the court. If the court finds on examination that the memoranda contain “substantially verbatim reports of oral statements,” the court can then order disclosure.86 While the Illinois rule thus appears to extend the ABA requirements only to the extent of requiring disclosure of substantially verbatim reports of oral statements, in at least one case the Illinois Supreme Court has interpreted this rule broadly.87 The result may not be unlike the rules in Minnesota and Missouri.

Some of the reluctance to adopt the limited language of the ABA Standards concerning disclosure of witnesses’ statements is a product of continuing uncertainty as to the impact of Jencks v. United States.88 The Supreme Court in Jencks held that it was error for a federal trial judge to fail to order the prosecution to turn over to

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84. ILL. REV. STAT. ch. 110A, § 412(a)(i) (1977) (ILL. SUP. CT. R. 412(a)(i)).
85. Id.
86. Id.
87. People v. Bassett, 56 Ill. 2d 285, 307 N.E.2d 359 (1974). During a murder investigation, at least 800 penitentiary inmates were questioned, with notes of these interviews made on yellow paper. After all of the interviews were completed, these notes were transcribed on white cards. Each of the resulting white cards was neither verbatim nor signed by the inmate. Nevertheless, the majority of the court held that the cards should have been delivered to the defense, subject to the deletion of work product. “These cards, by their very nature, had to be a reproduction in one form or another of what the witness said when interviewed earlier. As such, the portion of the material which can fairly be said to be the witness’s statement must be turned over to the defense so they may determine its worth as impeachment material.” 56 Ill. 2d at 292, 307 N.E.2d at 363.

In the later case of People v. Burns, 75 Ill. 2d 282, 388 N.E.2d 394 (1979), the Illinois Supreme Court held that the prosecution should have disclosed a police report which contained information supplied by witnesses. “Officer Van Note’s report can be considered to have set out a composite summary of oral statements by three persons whom the People called as witnesses. We consider that the request, under these facts, was given with sufficient specificity to warrant application of the Brady test, and that the prosecution’s failure to provide the report was not harmless error.” 75 Ill. 2d at 289, 388 N.E.2d at 397. The decision thus was based exclusively on due process standards announced in Brady v. Maryland, 373 U.S. 83 (1963), and not on the Illinois discovery rules. For Brady to apply, the information must be found to be favorable to the defendant; the Illinois court found the police report to be favorable. In People v. Mireles, 79 Ill. App. 3d 173, 398 N.E.2d 150 (1979), an Illinois Appellate Court held that the prosecutor is not obligated under Brady to disclose what the court characterized as “thumbnail” summaries of what an official was told.

the defense certain reports by witnesses for the prosecution. Congress reacted to the decision by passing legislation which closely followed the Court's decision. Although the Jencks decision was ostensibly based on the Supreme Court's supervisory powers, the suggestion has been made that it also has significant constitutional implications. Jencks and its progeny had a very direct impact on Florida, which drew on the Jencks Act for a definition of "statement." The impact of Jencks on the Illinois rule is also clear.

None of the state rules directly require the preparation of summaries for disclosure to the defense. One possible exception to this rule is suggested in an Illinois appellate court decision in which the court ruled that, where a statement is not reduced to writing in an effort to evade the discovery rules, disclosure of the statement may be ordered. Illinois also has codified one exception to the general rule that summaries need not be prepared. Pursuant to Rule 412 (a), which requires the disclosure of rebuttal evidence when the defendant has disclosed defenses as required by the discovery rules, the prosecutor must prepare summaries of the statements of rebuttal witnesses. The Illinois rule is limited, however, to certain rebuttal witnesses, and does not generally require the prosecutor to prepare summaries of the testimony of witnesses.

Statements Made by the Accused or by a Co-Defendant

Both the 1970 and the 1978 ABA Standards provide that the prosecution should be required to disclose any written or recorded statements and the substance of any oral statements made by the

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90. For a discussion of the history and meaning of the Jencks Act, see Palermo v. United States, 360 U.S. 343 (1959).
91. Justice Brennan, in his concurring opinion in Palermo v. United States, 360 U.S. 343, 362-63 (1959), stated: "It is true that our holding in Jencks was not put on constitutional grounds, for it did not have to be; but it would be idle to say that the commands of the Constitution were not close to the surface of the decision . . . ."
   In our view, neither the defense nor the prosecution should be allowed to avoid discovery rules by a studied practice of failing to reduce otherwise discoverable information to writing. When the trial court determines within its discretion that the reason for the failure to reduce such a statement to writing is to avoid discovery, it may properly order the statement be reduced to writing.
96. The rule requires in these limited situations that the prosecution disclose, among other things, "a specific statement as to the substance of the testimony such witnesses will give at the time of trial of the cause." Id.
The two standards differ only as to statements by co-defendants. The 1970 Standards require disclosure of statements of the co-defendant only if there is to be a joint trial. The drafters of the 1978 Standard omitted the limitation on the right to co-defendants' statements, citing in their commentary "the shift to open file disclosure." Of the eight state jurisdictions, only Colorado and Vermont appear to follow the 1970 Standards without substantial change. The rules adopted in Arkansas, Minnesota, and Illinois adopt the position of the 1978 Standards. The rules in Florida, Illinois, and Missouri go beyond both the 1970 and 1978 Standards. These jurisdictions require that the prosecution disclose a list of witnesses to the making or acknowledgment of such statements by defendants and co-defendants. The substance of oral statements of the accused and co-defendants must be disclosed. Failure of the state to provide such disclosure may be reversible error.

Grand Jury Testimony

Both the 1970 and the 1978 ABA Standards require the prosecu-

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98. The drafters of the 1970 Standard indicated in their commentary that they were only concerned with avoiding errors of the type condemned in Bruton v. United States, 391 U.S. 123 (1968). The drafters noted:

[T]he Supreme Court held [in Bruton] that it was constitutional error to try one defendant under conditions where a codefendant's statement implicating the first defendant was before the jury, even under careful instructions that the statement was only admissible against the codefendant. If an adequate motion for severance is to be made or if the question of whether the codefendant's statement can be altered to remove the prejudice is to be decided at the appropriate time, it is clear that defense counsel must be able to examine it before trial.

1970 ABA Standard 2.1 Commentary.

102. Arizona reaches the same result by requiring the prosecutor to disclose "all statements of the defendant and of any person who will be tried with him." Ariz. R. Crim. P. 15.1(a)(2).
104. Minn. R. Crim. P. 9.01(1)(2). The word "accomplices" is used rather than "co-defendants."
tion to disclose portions of grand jury minutes containing testimony of the accused and of prosecution witnesses. The 1970 Standard requires that the prosecutor disclose the grand jury testimony of only those persons whom he intends to call as witnesses at the trial. The 1978 Standard, on the other hand, requires that the prosecution disclose, in addition to the testimony of the accused, "relevant testimony of witnesses." 

Half of the states considered in this article have followed the 1970 ABA Standard: Colorado, Illinois, Minnesota, and Missouri. Arizona seems to have adopted no rule governing the discovery of grand jury testimony. Arkansas and Florida, on the other hand, allow discovery of the grand jury testimony of the defendant only. In not providing for discovery of witnesses' grand jury testimony, these two states appear to follow the more conservative practice exemplified in the Jencks Act.

The Vermont rule permits discovery of grand jury proceedings beyond that required in either the 1970 or the 1978 ABA Standards. That rule requires disclosure of "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." The drafters of this rule intended it 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."

**Reports of Experts**

The 1970 and 1978 ABA Standards are essentially identical in requiring the prosecution to disclose reports or statements of ex-

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110. While the ABA Standards require disclosure of transcribed grand jury testimony, neither the 1970 nor the 1978 Standards require either the recording of a grand jury proceeding or its transcription. See also People v. Lentz, 55 Ill. 2d 517, 304 N.E.2d 278 (1973).
111. 1970 ABA STAND 2.1(a)(iii).
112. 1978 ABA STAND 11-2.1(a)(iii).
114. ILL. REV. STAT. ch. 110A, § 412(a)(iii) (1977) (ILL. SUP. CT. R. 412(a)(iii)).
115. MINN. R. CRIM. P. 18.05(2)(2).
117. ARK. R. CRIM. P. 17.1(a)(iii). Rule 17.1(b)(i), however, requires the prosecutor to disclose "the substance of any relevant grand jury testimony."
120. VT. R. CRIM. P. 16(a)(2)(B).
121. Id. Comments.
The disclosure requirement extends to all reports or statements "made in connection with a particular case," and is intended by the drafters of these standards to be quite broad. 122

Seven of the eight jurisdictions under consideration have adopted the ABA Standard without significant limitation. 124 Arizona does modify the ABA Standards in two regards. First, it does not require disclosure of reports on mental examinations. Second, it requires disclosure only of the names and addresses of the experts who have examined the defendant or the evidence. 125

Documents and Tangible Objects

The 1970 and 1978 ABA Standards both require that the prosecution disclose any books, papers, documents, photographs, or tangible objects which the prosecutor intends to use or which were obtained from or belong to the defendant. 126 This category of items was intended to include "movies, weapons, bullets, footprint impressions obtained by use of plaster and the like, articles of clothing, materials found at the scene of the offense [such as narcotics, paint scrapings, hair, tools or other equipment], receipts, financial records, charts, diagrams, and other visual aids." 127 The 1978 Standard differs only in that the words "buildings or places" were added to the list of items to be disclosed. 128

Of the eight states, five appear to have drawn from the 1970 ABA Standard. 129 Minnesota and Vermont also have incorporated the addition contained in the 1978 Standard. The Minnesota rule requires the prosecutor to "permit defense counsel to inspect and photograph buildings or places concerning which the prosecuting

123. 1978 ABA Standard 11-2.1 Commentary:
If made in connection with the case, the reports must be disclosed whether or not the contents of the report are helpful to the prosecutor and whether or not the prosecutor intends to use the report at trial. Items discoverable pursuant to the standard would include autopsy reports, reports of medical examinations of victims, of any psychiatric examination of the accused, of chemical analyses, of blood tests, . . . and the like.
127. 1970 ABA Standard 2.1 Commentary.
attorney intends to offer evidence at the trials.\footnote{130}

**Record of Prior Convictions**

Both the 1970 and 1978 ABA Standards require disclosure of records of prior convictions, but they differ regarding the extent to which such disclosure is required. The 1970 Standard requires disclosure of records of prior criminal convictions “of persons whom the prosecuting attorney intends to call as witnesses” at a trial.\footnote{131} The 1978 Standard requires disclosure of records of prior convictions “of the defendant or of any co-defendant.”\footnote{132} The drafters of the 1978 Standard believe that the original requirement mandating disclosure of prior records of all testifying witnesses often would be unnecessary for many witnesses in many cases.\footnote{133} Accordingly, they felt that this information would more properly fall within the area of discretionary disclosures for which a specific court order could be requested.\footnote{134} On the other hand, the drafters reasoned that the defendant’s and co-defendant’s prior record of convictions could be of importance “on such issues as whether or not the defendant should plead guilty, should testify at trial, or should move to restrict the use of prior convictions for impeachment purposes. The prior record will also show whether or not defendant faces treatment under enhanced sentencing provisions.”\footnote{135}

Florida has no rule concerning disclosure of prior convictions. Arkansas, Colorado, Illinois, and Missouri have adopted the 1970 ABA Standard.\footnote{136} Minnesota has adopted rules which require some of the disclosures mandated under both the 1970 and the 1978 ABA Standards; prior convictions of both the prosecution witnesses and of the defendant are required.\footnote{137} Vermont has also

\begin{footnotes}
\item[130] Minn. R. Crim. P. 901(1)(3). See also Vt. R. Crim. P. 16(a)(2)(D).
\item[131] 1970 ABA Standard 2.1(a)(vi).
\item[133] Id. Commentary.
\item[134] 1978 ABA Standard 11-2.5.
\item[136] Ark. R. Crim. P. 17.1(a)(vi); Colo. R. Crim. P. 161(a)(1)(vi); Mo. R. Crim. P. 25.03 (A)(7). Ill. Sup. Ct. Rule 412(a)(vi) differs only in that it limits the records of prior convictions which the prosecution must disclose to those which may be used for impeachment purposes. The reasoning of the Illinois drafting committee was that since not all prior convictions may be used under Illinois law for impeachment purposes, only those which may be so used need be disclosed. Id. Commentary. Ariz. R. Crim. P. 15.1(a)(7) contains a similar limitation in restricting disclosure to prior felony convictions.
\item[137] Minn. R. Crim. P. 9.01(1)(1)(a), (1)(5). Disclosure under this rule is limited to prior convictions known to the prosecutor at the time, and the defense is entitled to such disclosure only after the defense reveals the record of the defendant’s prior convictions known to
added the disclosure requirement of prior convictions of the defendant to the 1970 Standard requirement for disclosure of prior convictions of witnesses. None of the states considered has adopted the portion of the 1978 ABA Standard which requires disclosure of prior records of co-defendants.

Arizona has also combined the 1970 ABA Standard requiring disclosure of prior convictions of witnesses with the provision of the 1978 Standard requiring disclosure of prior convictions of the defendant. The Arizona rule, however, requires broader disclosure in this regard than either the 1970 or the 1978 ABA Standards. In addition to prior criminal records, the prosecutor is bound to disclose "a list of all prior acts of the defendant which the prosecutor will use to prove motive, intent, or knowledge or otherwise use at trial."

An Illinois court had held that the state's duty to disclose is not limited to the criminal records of its witnesses in the possession of the prosecutor. The discovery rule "imposes an affirmative obligation upon the State to obtain the criminal histories of its potential witnesses." Thus, the record to be disclosed is of all prior convictions, state and federal.

Notice of Special Issues

In addition to outright disclosure, the 1970 and the 1978 ABA Standards require that the prosecutor give notice of the existence of certain collateral issues. This is not a disclosure requirement so much as a notice requirement. In the words of the commentary accompanying the 1970 Standard, "all that must be disclosed with regard to these particular matters are clues." The purpose for requiring the prosecutor to give such "clues" is to "permit the defendant to raise any issues involving the factors prior to trial and thus avoid mid-trial interruptions."

the defense.

138. VT. R. CRIM. P. 16(a)(2)(E) and (F).
139. ARIZ. R. CRIM. P. 15.1(a)(6) and (7). The prior convictions of the defendant which the prosecution must disclose are limited to those which the prosecutor will use at the trial.
140. ARIZ. R. CRIM. P. 15.1(a)(6).
142. 1970 ABA STANDARD 2.1(b); 1978 ABA STANDARD 11-2.1(b). See notes 145-158 infra and accompanying text.
143. 1970 ABA STANDARD 2.1 COMMENTARY.
144. 1978 ABA STANDARD 11-2.1 COMMENTARY.
Untranscribed Grand Jury Testimony

Both the 1970 and the 1978 ABA Standards provide that the prosecutor should inform defense counsel if relevant recorded grand jury testimony has not been transcribed.\(^{146}\) The drafters of the 1978 Standard believed that this provision would serve, among other things, to give the defense an opportunity to take steps to have the testimony transcribed if needed before trial or for impeachment purposes.\(^{148}\) Nothing in the standard itself requires either the recording or transcribing of grand jury testimony; the standard affords the defense counsel only an opportunity to seek an appropriate order.

The rule that the defendant be notified of certain untranscribed grand jury testimony does not appear to have been enthusiastically received in the states. Of the eight states under consideration, only Colorado and Vermont have included this requirement in their court rules.\(^{147}\)

Electronic Surveillance

The 1970 and 1978 ABA Standards are substantially identical in requiring the state to notify the defendant if his conversations or premises have been subject to electronic surveillance.\(^{148}\) This requirement is clearly intended to notify the defense of a potential suppression issue.\(^{149}\) This will then permit defendant to move for an in camera hearing as mandated by Alderman v. United States.\(^{150}\)

Of the eight states, only Minnesota lacks a discovery rule requiring notice of electronic surveillance. Arkansas, Arizona, Colorado, Illinois, and Vermont have basically mirrored the ABA Standard.\(^{151}\) Florida requires not only notice of electronic surveillance

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145. 1970 ABA STANDARD 2.1(b)(i); 1978 ABA STANDARD 11-2.1(b)(i).
146. 1978 ABA STANDARD 11-2.1(b)(i) COMMENTARY.
147. COLO. R. CRIM. P. 16(f)(2)(f) and VT. R. CRIM. P. 16(b)(1)(B). Vermont also requires that the prosecutor give notice of any untranscribed inquest proceedings.
149. 1970 ABA COMMENTARY. The drafters of the 1970 Standard explained:

   The purpose for requiring the prosecutor initially to give notice only of the possible issue, rather than a complete revelation of all relevant information in his possession, is to permit flexibility in control of any additional disclosures, perhaps by means of a protective order . . . , upon an in camera showing to the court . . . . Such flexibility is consistent with Alderman, and indeed may facilitate the determination of the threshold issue—whether any such surveillance was indeed illegal.
151. VT. R. CRIM. P. 16(6)(1)(C); ARIZ. R. CRIM. P. 15.1(b)(1); COLO. R. CRIM. P.
but also notice of any documents relating to that surveillance.¹⁶³ Missouri requires notice of both photographic and electronic surveillance.¹⁶³

**Destruction of Physical Objects**

The 1978 ABA Standards include two notice requirements not present in the 1970 Standards. The first requires that the prosecutor give notice if he “intends to conduct scientific tests, experiments, or comparisons which may consume or destroy the subject of the test, or intends to dispose of relevant physical objects.”¹⁶⁴ The drafters of this provision explain that it protects the interests of both the defendant and the state.¹⁶⁵ None of the eight states has a rule requiring such notice.

**Other Offenses**

The second notice requirement added by the 1978 Standards applies “if the prosecutor intends to offer [as part of the proof that the defendant committed the offense charged] evidence of other offenses.”¹⁶⁶ The drafters of this section believed that it would permit the defendant to contest the relevance of any offense cited in the notice and, if the offense had not previously been prosecuted, to move to join the offenses for trial.¹⁶⁷ Again, none of the eight jurisdictions has adopted a rule based on the 1978 ABA Standards, although Arizona’s rule requiring disclosure of prior convictions of the defendant is worded in such a way that it achieves much the same purpose as this section of the 1978 ABA Standards. The Arizona rule requires the prosecutor to disclose “a list of all prior acts of the defendant which the prosecutor will use to prove motive, intent, or knowledge or otherwise use

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¹⁶¹(a)(2)(II); Ill. Sup. Ct. R. 412(b); Ark. R. Crim. P. 17.1(b)(ii).
¹⁵⁴. 1978 ABA Standard 11.2.1(b)(iii).
¹⁵⁵. The drafters explain that this: permits the defense to take appropriate steps to insure that the defense is not prejudiced as a result of the intended action. For example, the defense might want to evaluate the test conditions, have its own expert observe or participate in the testing, or suggest alternate tests. The notice also serves to protect the prosecution case. If the defense has had notice of intended action and has participated in the action (or waived participation), the prosecution case will be less subject to attack. ... ¹⁹⁷⁸ ABA Standard 11.2.1(b)(iii) Commentary.
¹⁵⁷. Id. Commentary.
at trial."\textsuperscript{158}

\section*{Informants}

The committee which drafted the 1970 ABA Standards would have included a requirement that the prosecutor inform defense counsel “if he has any relevant material or information which has been provided by an informant.”\textsuperscript{159} The committee which proposed this requirement recognized that the identity of an informant normally need not be disclosed under \textit{McCray v. Illinois}.\textsuperscript{160} Nevertheless, it felt that a notice requirement could make the defense aware of possible issues such as entrapment, unlawful search and seizure, or material testimony on the issue of guilt or innocence.\textsuperscript{161} The ABA House of Delegates rejected this provision, however, and it did not become part of the 1970 Standards.

The original committee proposal was broadly circulated, nonetheless, and appears to have been influential in at least three of the eight states examined here. Florida and Vermont adopted the standards essentially as originally proposed.\textsuperscript{162} Arizona broadly requires, in addition, disclosure of the informant’s identity if it is not privileged.\textsuperscript{163}

\section*{State Performance of Obligation}

The 1970 ABA Standards require that the prosecutor make the listed disclosures as soon as practicable “following the filing of charges against the accused.”\textsuperscript{164} The 1970 Standard was predicated on the hope that criminal discovery would operate automatically, without the requirement of formal motions or requests.\textsuperscript{165} The 1978 ABA Standards provide that disclosure normally should be triggered by a “request.”\textsuperscript{166} The drafters of this standard explain that “[t]he request requirement is intended to ensure that the prosecutor has a clear idea of the information wanted by the defendant and to avoid wasteful collection of information not useful

\begin{itemize}
  \item \textsuperscript{158} ARIZ. R. CRIM. P. 15.1(a)(6).
  \item \textsuperscript{159} ABA Standards Relating to Discovery and Procedure Before Trial (Tentative Draft 1969) 2.1(b)(1).
  \item \textsuperscript{160} 386 U.S. 300 (1967).
  \item \textsuperscript{161} Commentary to 1969 Tent. Draft, at p. 72.
  \item \textsuperscript{162} FLA. R. CRIM. P. 3.220(a)(1)(vii); VT. R. CRIM. P. 16(b)(1)(A).
  \item \textsuperscript{163} ARIZ. R. CRIM. P. 15.1(b)(3).
  \item \textsuperscript{164} 1970 ABA STANDARD 2.2(a).
  \item \textsuperscript{165} Id. COMMENTARY.
  \item \textsuperscript{166} 1978 ABA STANDARD 11-2.2(a)(i) and 11-2.1(a).
\end{itemize}
They further explain, however, that the request may be informal, and need not amount to a formal motion. A similar approach seems to have been adopted in Florida, Colorado, and Missouri. They further explain, however, that the request may be informal, and need not amount to a formal motion. A similar approach seems to have been adopted in Florida, Colorado, and Missouri.

Most states require some type of informal or formal request. The Illinois rule provides that the state shall perform its discovery obligations as soon as practicable "following the filing of a motion by defense counsel." This rule operates on the assumption that normally a formal motion should be required to initiate the discovery process, although an order would not always be necessary.

Even where the standard or court rule requires a request, demand, or motion, there are important exceptions. One exception involves instances where due process requires disclosure to the defense regardless of a motion. Other exceptions are created by state rules which permit the state and the defense to establish other procedures for disclosure upon mutual agreement. Such a procedure is also authorized by the 1970 and 1978 ABA Standards.

A problem may arise as to the disclosure duty of the government when the pertinent evidence is in the hands of another governmental agency. In such a case a balance should be struck between realistically limiting the state's duty and avoiding rigid bureaucratic barriers to the defendant's right to disclosure. The 1970 and 1978 Standards accordingly provide that the prosecutor's duty extends to information in the hands of "members of the prosecutor's staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or, with reference to the particular case, have reported to the prosecutor's office."

167. 1978 ABA Standard 11-2.1 Commentary.
169. E.g., Ark. R. Crim. P. 17.2(a); Vt. R. Crim. P. 16(a)(1), (2).  
171. See notes 71-89 supra and accompanying text.
172. 1978 ABA Standard 11-2.2(b); 1970 ABA Standard 2.2(b); Ark. R. Crim. P. 17.2(b); Colo. R. Crim. P. 161(b)(2); Fla. R. Crim. P. 3.220(a)(3); Ill. Sup. Ct. R. 412(e); Mo. R. Crim. P. 25.07.
173. 1978 ABA Standard 11-2.1; 1970 ABA Standard 2.1(d). The commentary to the 1978 standard explains: The effect is to charge the prosecutor with responsibility for material and information known to people within the prosecutor's scope of authority while discharging the prosecutor from responsibility for material and information known to government employees "who have no connection with the prosecution and, for
Three states, Colorado, Minnesota, and Vermont substantially follow the ABA recommendation. In Arizona, however, the duty of the prosecutor is limited to matters in the control of members of his staff and other persons who have participated in the investigation "and who are under the prosecutor's control." The Arizona rule thus does not impose a duty on the prosecutor to disclose material held by an independent investigatory agency, even if that agency worked on the pending prosecution.

The ABA Standards also impose a related duty on the prosecutor to maintain a free flow of information between the prosecutor and other investigative personnel. Among the states considered, only Colorado and Illinois have adopted this standard. This provision was used by an Illinois appellate court to rule that the Cook County State's Attorney must assure a free flow of information from the Chicago Police Department Crime Laboratory to the prosecutor's office. Both the 1970 and 1978 Standards additionally require that the prosecutor affirmatively aid the defense in obtaining disclosures from other governmental agencies. The drafters of the 1978 ABA Standards explain that the purpose of this

practical purposes, may be regarded as third parties."

175. Minn. R. Crim. P. 9.01(1)(7).
176. Vt. R. Crim. P. 16(c).
177. Ariz. R. Crim. P. 15.1(d). See also Commentary at 88.
178. 1978 ABA Standard 11-2.2(c) provides:

The prosecutor would ensure that a flow of information is maintained between the various investigative personnel and the prosecutor's office sufficient to place within the prosecutor's possession or control all material and information relevant to the accused and the offense charged.

To the same effect, see 1970 ABA Standard 2.2(c).


182. 1978 ABA Standard 11-2.4 provides:

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

See also 1970 ABA Standard 2.4.
provision is to maintain the informal nature of criminal discovery; by requiring the defendant to apply to the prosecutor when other agencies possess pertinent information, court intercession becomes less necessary.\textsuperscript{183} Arkansas,\textsuperscript{184} Colorado,\textsuperscript{185} Illinois,\textsuperscript{186} and Missouri\textsuperscript{187} have similar procedures.

Discretionary Disclosures and Evidentiary Depositions

The 1970 and 1978 ABA Standards additionally require disclosure of matters affecting the admissibility of evidence at trial. The 1970 Standards mandated disclosure of material from, or information regarding, 1) searches and seizures, 2) statements made by the accused, and 3) the relationship of certain persons to the prosecuting authority.\textsuperscript{188} The 1978 Standards added to this list lineups, showups and other identifications of the accused.\textsuperscript{189} Arkansas\textsuperscript{190} and Colorado\textsuperscript{191} substantially follow the 1970 ABA Standard. Arizona additionally requires disclosure to the defense if a search warrant was executed and an informant was used. The name of the informant must also be disclosed if that information is not privileged.\textsuperscript{192} Florida requires disclosure only as to "whether there has been any search or seizure and any documents relating thereto."\textsuperscript{193}

The 1970 and 1978 ABA Standards also have a catch-all provision which is intended to give a court discretion to order disclosure

\textsuperscript{183} 1978 ABA STANDARD 11-2.4 COMMENTARY. The drafters explained that the provision does not provide that the prosecutor must canvass other departments for information relating to the case. However, when the defendant knows that other agencies or departments have discoverable information, the standard permits the defendant to request that information through the prosecutor. * * * The standard continues the pattern of encouraging informal discovery by requiring the defendant to apply directly to the prosecutor before enlisting the assistance of the court.

\textsuperscript{184} ARK. R. CRIM. P. 17.3(a)(b).
\textsuperscript{185} COLO. R. CRIM. P. 16I(d)(1)(2).
\textsuperscript{186} ILL. SUP. CT. R. 412(g).
\textsuperscript{187} Mo. R. CRIM. P. 25.32(c), 25.33(c).
\textsuperscript{188} 1970 ABA STANDARD 2.3 provides:

Upon the request of the defense counsel, the prosecuting attorney shall disclose and permit inspection, testing, copying and photographing of any relevant material and information regarding:

(i) searches and seizures specified by the defense;
(ii) the acquisition of specified statements from the accused;
(iii) the relationship, if any, of specified persons to the prosecuting attorney.

\textsuperscript{189} 1978 ABA STANDARD 11-2.3.
\textsuperscript{190} ARK. R. CRIM. P. 17.1(c).
\textsuperscript{191} COLO. R. CRIM. P. 16I(c).
\textsuperscript{192} ARIZ. R. CRIM. P. 15.1(b)(2).
\textsuperscript{193} FLA. R. CRIM. P. 3.220(a)(1)(ix).
of other information not otherwise required by the standards. The court should consider all of the circumstances surrounding the requested disclosure such as risks of physical harm, intimidation, bribery, and economic reprisals. Although the 1970 and 1978 Standards appear to be identical, the rationales underlying each are different. The drafters of the 1970 Standards believed that this section would allow the defense to seek disclosures from persons other than the prosecutor or other government personnel. The commentary to the 1978 Standards suggests different purposes which discretionary discovery would serve. In addition to allowing for discovery of such things as transcripts of prior proceedings and demographic information about prospective jurors, the provision could be invoked to require the prosecution to order the performance of certain tests or other procedures. Such orders could operate to neutralize the investigative inequality of the defendant; for example, a court might order a lineup under this provision.

The drafters of the 1970 Standards believed that one major discovery device included under discretionary disclosure would be a limited power to order third-party depositions. The committee

194. 1978 ABA Standard 11-2.5 provides:

   (a) Upon showing that items not covered in standards 11-2.1, 11-2.3, or 11-2.4 are material to the preparation of the defense, the court may order disclosure to defense counsel of the specified material or information.

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

195. See 1970 ABA Standard 2.5. The language of the 1978 ABA Standard is substantially the same as the corresponding section in the 1970 Standard except that the more recent standard does not contain the limitation, "[i]f the request is reasonable." Since the provision deals with discretionary—not mandatory—discovery, the change would appear to make little difference in practice.

196. Id. Commentary.

197. 1978 ABA Standard 11-2.5 Commentary.

198. 1970 ABA Standard 2.5 Commentary.

Any movement toward the use of discovery depositions in criminal cases remains minimal. Federal Rule of Criminal Procedure 15 has long provided for the taking of depositions, but the wording of the rule makes it clear that it is intended purely for the purpose of preserving testimony, not for discovery. Federal courts have continued to resist efforts to use Rule 15 for discovery purposes. See, e.g., United States v. Adcock, 558 F.2d 397 (8th Cir.), cert. denied, 434 U.S. 921 (1977). When the state Supreme Court adopted criminal discovery rules for Illinois, one of the rules dealt with evidence depositions. Both the text of the rule and the drafting committee commentary make clear, however, that it was modeled after Federal Rule of Criminal Procedure 15, and was not intended to provide for discovery depo-
had rejected a provision giving the defendant the right to take discovery depositions. There were several reasons given for the rejection: (1) there would be no inherent cost limitation, although many defendants are indigent; (2) the failure to take depositions might discourage witnesses from coming forward in criminal cases; and (3) depositions are unnecessary in most criminal cases. The drafters of the 1978 ABA Standards chose to make the discretionary authority of the trial court to order depositions and other third-party disclosures more specific in the standards themselves. Further, they expressed a more positive attitude toward discovery depositions than did the drafters of the 1970 Standards. Yet, even the 1978 drafters were unwilling to recommend that discovery depositions be allowed as a matter of right. Although the drafting committee found that "discovery depositions are not widely authorized," of the eight jurisdictions considered here, three authorize discovery depositions by court rule. At least one other authorizes depositions by statute. Perhaps the experience with third-party discovery in these jurisdictions will demonstrate that the problems involved are not insurmountable.

Illinois has a catch-all discretionary disclosure provision like the 1978 ABA Standard, and experience under that rule provides other possible alternative uses of the court's discretionary judgment. In one case, an Illinois appellate court held that a trial court could require the prosecutor to reduce to writing the statements of a wit-

sitions. "The Committee chose not to include depositions for discovery purposes, but did decide to follow the unmistakable trend and provide for depositions to preserve testimony." Ill. Sup. Ct. R. 414, Committee Comments.

199. 1970 ABA STANDARD 2.5 COMMENTARY.

200. 1978 ABA STANDARD 11-4.8 provides:

(a) Upon the request of the prosecuting attorney or the defense counsel, the court may order third parties to:

(i) participate in the taking of depositions;

(ii) submit to scientific and identification experiments and tests; or

(iii) permit the requesting party to review and copy specified records and documents.

(b) The court may deny, delay, or otherwise condition disclosure authorized by this standard if it finds that there is a substantial risk to any person of physical harm, bribery, or intimidation resulting from such disclosure, which outweighs any usefulness of the disclosure to the defense counsel of the prosecuting attorney.

201. Id. COMMENTARY.

202. Id.

203. Ariz. R. Crim. P. 15.3; Fla. R. Crim. P. 3.220(d); and Mo. R. Crim. P. 25.41-25.44.


ness so that they might be available to the defense. The appellate court acknowledged that the prosecutor generally has no duty to reduce to writing the statements of all witnesses, but where the state seeks to defeat discovery, the provision for discretionary disclosure may provide a remedy. In another decision, an Illinois appellate court held that a trial court erred in not ordering disclosure of the names of occurrence witnesses under the facts of the particular case. The court acknowledged that the discovery rules generally do not require the disclosure of the names of all occurrence witnesses, and that the information was being sought under the discretionary disclosure rule. The court held, nevertheless, that the refusal to order the disclosure was an abuse of the trial court's discretion.

The commentary to the 1978 Standards also suggests that the discretionary disclosure section could be used to request information previously included under mandatory disclosure. For example, the 1970 Standards required the prosecutor to disclose the prior criminal records of prosecution witnesses. The 1978 drafters dropped this requirement on the ground that this information often could be used to intimidate prospective witnesses. By permitting such discovery under discretionary disclosure, however, a court could guard against such dangers by including the issuance of a protective order.

Court rules in Arkansas and Colorado closely follow the ABA Standards. Arizona limits discretionary disclosure to instances where the defense shows "substantial need in the preparation of his case." The defense must further show that it is "unable without undue hardship to obtain the substantial equivalent by

207. 19 Ill. App. 3d at 370, 311 N.E.2d at 597.
In our view, neither the defense nor the prosecution should be allowed to avoid discovery rules by a studied practice of failing to reduce otherwise discoverable information to writing. When the trial court determines within its discretion that the reason for the failure to reduce such a statement to writing is to avoid discovery it may properly order that the statement be reduced to writing.
209. 1978 ABA STANDARD 11-2.5 COMMENTARY.
210. 1978 ABA STANDARD 11-2.5(b); 1970 ABA STANDARD 2.5(b); 1978 ABA STANDARD 11-4.4; 1970 ABA STANDARD 4.4.
211. Ark. R. Crim. P. 17.4.
212. Colo. R. Crim. P. 16I(e).
other means." The court may also "upon the request of any person
affected by the order" vacate or modify the order "if compliance
would be unreasonable or oppressive."\textsuperscript{213}

Florida has a rule similar to the ABA Standard in that discre-
tionary disclosure may be allowed "as justice may require."\textsuperscript{214} Flor-
da differs from the standard, however, in that the power to deny
disclosures because of threatened harm or harassment extends to
all disclosures by the prosecution, not just discretionary disclo-
sure.\textsuperscript{215} Illinois similarly grants the court broad power to deny
mandatory as well as discretionary disclosures.\textsuperscript{216}

Minnesota has discretionary disclosure provisions similar to
those recommended by the ABA, but does not have a provision
allowing the court to wholly deny such disclosures.\textsuperscript{217} Perhaps the
drafters of the Minnesota rules believed that such a power was im-
PLICIT in the fact that such discovery is discretionary. Missouri sim-
ilarly has no provision for the denial of discretionary disclosure,
but this may be because the Missouri rule dealing with additional
disclosures is not truly discretionary.\textsuperscript{218} If the court finds that the
material requested by the defendant should reasonably be dis-
closed, the court is obligated to order disclosure.

Matters Not Subject to Disclosure

The ABA Standards exempt from discovery materials subject to
the work product doctrine, information concerning an informant's
identity, and material involving national security.\textsuperscript{219} The work

\begin{itemize}
\item \textsuperscript{213} Ariz. R. Crim. P. 15.1(e).
\item \textsuperscript{214} Fla. R. Crim. P. 3.220(a)(5).
\item \textsuperscript{215} Fla. R. Crim. P. 3.220(a)(4).
\item \textsuperscript{216} Ill. Sup. Ct. R. 412(h), (i).
\item \textsuperscript{217} Minn. R. Crim. P. 9.01(2).
\item \textsuperscript{218} Mo. R. Crim. P. 25.04.
\item \textsuperscript{219} Standard 11-2.6 of the 1978 ABA STANDARDS adopts, substantially verbatim, standard 2.6 of the 1970 proposal. The 1978 Standard reads as follows:
\begin{itemize}
\item (a) Work product. Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting attorney or members of the prosecutor's legal staff.
\item (b) Informants. Disclosure of an informant's identity shall not be required where such identity is a prosecution secret and where a failure to disclose will not infringe the constitutional rights of the accused. Disclosure shall not be denied of the identity of witnesses to be produced at a hearing or trial.
\item (c) National security. Disclosure shall not be required where it involves a substantial risk of grave prejudice to national security and where a failure to disclose will not infringe the constitutional rights of the accused. Disclosure shall not be denied regarding witnesses or material to be produced at a hearing or trial.
\end{itemize}
product and informant identity exclusions are the most important and common types of protected information.

The work product exclusion, according to comments on the 1978 Standards, is limited by a two-fold test. First, work product includes only material prepared by the prosecutor and his legal staff. "Papers or documents prepared by other prosecutorial or investigative personnel are not exempt." Several of the states which have adopted discovery rules, however, have extended the work product exclusion to include police and investigative personnel.

The second test for the application of the exclusion is that "the contents of the paper must be judgmental rather than factual." Where the document represents the prosecutor’s theories, judgments, or strategic planning, it is not subject to discovery. The problem in deciding whether the material is "judgmental" or "factual" may often be difficult in cases where the document pertains to anticipated testimony by witnesses. While the prosecutor’s evaluation of the effectiveness of a witness may be viewed as "judgmental," any specific recitation of a witness’s statements may be viewed as "factual," and therefore outside the exclusion. An in camera examination by the court may be required to delete the appropriate material from that to be disclosed.

The work product exclusion in both the 1970 and the 1978 ABA Standards specifically applies only to the prosecution, not to the defense. It appears that this limitation is not premised on any notion that defense counsel should be less protected in his work product. Rather it recognizes that the disclosures which the defense may be required to make are much more limited and are unlikely to raise work product issues. The drafters of the 1978 Standards recognized, however, that a work product issue could arise over requests for defense disclosure of medical and scientific reports. Therefore, when defining the duty of the defense to disclose such reports, the drafters also provided that disclosure shall not be required "... of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions,

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220. 1978 ABA STANDARD 11-2.6 COMMENTARY.
221. Ark. R. Crim. P. 17.5(a) (state agents); Ariz. R. Crim. P. 15.4(b)(i) (law enforcement officers); Ill. Sup. Ct. R. 412(j) (the state or members of its legal or investigative staffs); Minn. R. Crim. P. 9.01(3)(1)(a) (official agencies participating in the prosecution); Vt. R. Crim. P. 16(d)(1) (police officers).
222. 1978 ABA STANDARD 11-2.6 COMMENTARY.
223. Id.
theories, or conclusions of the defense attorney or members of the defense legal staff." While work product issues are less likely to arise in the context of defense disclosures, there appears to be no reason why the general work product exclusion should not include defense attorneys as well as prosecutors. The rules in Arizona, Florida, Illinois, and Missouri have recognized this and have extended the work product exclusion to all parties.

Informant identity is a second type of information which need not be disclosed under the ABA Standards. The need for prosecutors to encourage informers to come forward and to protect such informers thereafter led the Supreme Court to hold in McCray v. Illinois that disclosure of informants' identities is not constitutionally required. The same concerns are reflected in the ABA Standards. The informant's privilege is subject to important limitations. If the state intends to produce the informant at a trial or hearing, it cannot refuse to disclose the informant's identity. The state may, however, apply for a protective order.

Additional limitations on the informant exclusion are designed to incorporate the reasoning of the United States Supreme Court in Roviaro v. United States. In Roviaro the Court held that in some instances fairness to the defendant may require that the informant's identity be disclosed. While the Court did not ground

225. 1978 ABA Standard 11-3.2(b)(i). The comments acknowledge that this is purely a work product exclusion.
227. 386 U.S. 300 (1967).
229. What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.

A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.
its decision on the Constitution, the due process overtones in *Roviaro* have not been ignored.\(^{230}\)

The Illinois Supreme Court has held that, based on *Roviaro* and its own discovery rules, the prosecution cannot normally refuse to disclose the identity of an informant who is also the only participant in the charged criminal episode aside from the defendant and a police officer.\(^{231}\) Since the informant is the only person who can amplify or contradict the testimony of the police officer, the defendant must be given an opportunity to interview him and to decide whether he should be called as a witness.

Whether the informant’s identity should be disclosed may depend on whether the informant exceeds the limited role of informant. If he has only supplied investigative leads to the police, who have in turn gathered evidence without his participation, it would appear that the identity need not be disclosed. If, however, the informant has gone beyond supplying leads and has become a participant or key witness to the criminal activity with which the defendant is charged, he is no longer merely an informant. In such an instance, identity may be subject to disclosure.\(^{232}\)

**Disclosure to the Prosecution**

*The Person of the Accused*

The 1970 ABA Standards advanced the concept of reciprocity in discovery by including a requirement that the defense submit to investigative discovery by the state.\(^{233}\) The standard provides that, even after formal charging, the defendant can be required to appear in a line-up, speak for identification, be finger-printed, pose for photographs, try on articles of clothing, permit the taking of specimens from under his fingernails, permit the taking of blood samples and other body materials, provide handwriting samples, and submit to body inspection.\(^{234}\) Thus, the standard promotes

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\(^{231}\) See, e.g., People v. Castro, 10 Ill. App. 3d 1078, 1082, 295 N.E.2d 538, 541 (1973).

\[^{232}\] Since the court devoted considerable attention to the matter of ‘fundamental requirements of fairness’, it is obvious that what would here be a Fourteenth Amendment issue of due process was not altogether irrelevant to that decision."

\(^{233}\) People v. Lewis, 57 Ill. 2d 232, 311 N.E.2d 685 (1974).

\(^{234}\) While the defendant may be entitled to disclosure of the identity of the informant in appropriate cases, the prosecutor is not necessarily bound to maintain control over the whereabouts of the informant or to produce him for the defendant. People v. Contursi, 73 Ill. App. 3d 458, 392 N.E.2d 331 (1979).

reciprocity in criminal discovery by treating as discovery certain actions of the State.\textsuperscript{235}

The drafters of the standards indicated that conceptual advantages warranted the classification of these state investigative procedures as "discovery." The drafters acknowledged that most of these procedures ordinarily would be completed before filing of formal charges and therefore before formal discovery procedures become available.\textsuperscript{236} Nevertheless, an occasional need could arise for the use of these procedures after the filing of formal charges. Classification of such procedures as discovery tools, in such an instance, is conceptually consistent with the rationale of discovery. The drafters of the 1978 Standards noted additional advantages in including these investigative procedures under the rubric of discovery. Knowledge that such procedures remain available after formal charging may encourage the police to use alternatives to custodial arrest, such as a notice to appear. Moreover, even where a full custodial arrest occurs, the availability of later investigative procedures may encourage the police to permit an early release.\textsuperscript{237}

Although the enumerated discovery techniques involving the person of the accused are essentially identical in the 1970 and 1978 ABA Standards,\textsuperscript{238} the procedures for obtaining the defense disclo-

\textsuperscript{235} \textit{Id.} \textbf{COMMENTARY:}

Although this standard deals with matters customarily regarded as investigative procedures, rather than pretrial discovery, both conceptually and practically there is no reason why they should be viewed in such limited fashion. In the same sense that the procedure involves the acquisition of material and information before trial other than exchange between opposing counsel, it is no different from the taking of depositions, which has long been the heart of pretrial discovery in civil cases.

\textsuperscript{236} \textit{Id.}

\textsuperscript{237} 1978 ABA \textsc{Standard} 11-3.1 \textbf{COMMENTARY.} It appears that the drafters of the 1970 Standards hoped to promote the latter purpose by the language which they inserted in standard 3.1(b): "Provision may be made for appearances for such purposes in an order admitting the accused to bail or providing for his release."

\textsuperscript{238} 1978 ABA \textsc{Standard} 11-3.1 provides:

\begin{itemize}
  \item The person of the accused
    \begin{itemize}
      \item (a) After the initiation of judicial proceedings, the defendant must, upon the prosecutor's request, appear (within five business days, or within such other time as is mutually convenient) for the purpose of permitting the prosecution to obtain fingerprints, photographs, handwriting exemplars, or voice exemplars from the accused. Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given by the prosecuting attorney to the accused and the accused's counsel. Provision may be made for appearances for such purposes in an order admitting the accused to bail or providing for the accused's release.
      \item (b) Notwithstanding the initiation of judicial proceedings and after appropriate
The 1970 Standards require that a judicial order be obtained to compel the defendant’s appearance and participation. Enforcement of the order then could be assured by traditional contempt powers. The 1978 Standards, in contrast, reflect the notion that many of these procedures are so standard that the requirement of an order would tend to limit the secondary benefits which the standard is designed to promote. Therefore, the 1978 Standards require that the defendant appear within a reasonable time “upon the prosecutor’s request” for fingerprints, photographs, handwriting exemplars, and voice exemplars. However, where the prosecutor requests that the defendant participate in a line-up, try on clothing, permit the extraction of blood or other body tissue samples, submit to physical or medical inspection, or participate in other procedures, a judicial order must be obtained. The drafters of the 1978 Standards believed that these latter procedures could involve close Fourth Amendment questions best left to judicial re-

notice to the defendant, a judicial officer may order the accused to participate in a procedure enumerated in paragraph (c) for the purpose of disclosing nontestimonial evidence, if the judicial officer finds:

(i) that there is good cause to believe that the evidence sought may be relevant and material to the determination of whether the defendant committed an offense charged in the accusatory instrument;

(ii) that the procedure is reasonable and will be conducted in a manner which does not involve an unreasonable intrusion of the body or an unreasonable affront to the dignity of the individual; and

(iii) that the request is reasonable.

(c) An order issued pursuant to paragraph (b) may direct the accused to:

(i) appear, move, or speak for identification in a lineup, but if a lineup is not practicable, then in some other reasonable procedure;

(ii) try on clothing or other articles;

(iii) permit the taking of specimens of blood, urine, saliva, breath, hair, nails, and material under the nails;

(iv) permit the taking of samples of other materials of the body;

(v) submit to a reasonable physical or medical inspection, including x-rays, of the body; or

(vi) participate in other procedures which comply with the requirements of paragraph (b).

(d) The request or order shall specify the following information where appropriate: the authorized procedure, the scope of the defendant’s participation, the name or job title of the person who is to conduct the procedure, and the time, duration, place and other conditions under which the procedure is to be conducted.

239. 1970 ABA Standard 3.1 Commentary.
240. 1978 ABA Standard 11-3.1 Commentary.
241. Id. 11-3.1(a).
242. Id. 11-3.1(b), (c).
view. Accordingly, the new standard requires a three-part determination by the court, designed to assure probable cause and the reasonableness of both the request and the procedure to be followed.

The court rules in Arkansas, Florida, Illinois, and Vermont follow the model of the 1970 ABA Standards without noteworthy change. The rules in Colorado operate in the same fashion, although they are differently organized. The rules in Minnesota and Missouri reflect a concern, as in the 1978 Standards, to define Fourth Amendment limits on certain discovery techniques. The Arizona rule is far broader than the 1978 Standards: all discovery from the person of the accused may be obtained by the prosecutor upon written request and without a court order.

Medical and Scientific Reports

The extent of a defendant's obligations to disclose reports of defense experts has been the subject of broad disagreement. The disagreement centers on whether the defense must disclose all defense experts' reports, or only those which the defendant intends to use at trial. The Advisory Committee on Pretrial Proceedings in its 1969 draft recommended that the defense only disclose experts' reports which it intended to use at trial. The ABA House of Dele-
gates in 1970 deleted the limitation. The change arguably rendered the standard broad enough to allow a trial court to order the defense to make disclosure of the reports of all experts hired by the defense. The concern expressed by the original drafting committee with the constitutionality of such a broad disclosure rule was disposed of in the commentary to the House of Delegates' amendments: "[t]he limitation in the language deleted, . . . is covered by the existing limitation, 'subject to constitutional limitations.' "

The Illinois Supreme Court adopted a rule which paralleled the 1970 Standard. The result of the Illinois change was that, subject to constitutional limitations, the defense could be compelled to disclose reports even though it intended neither to use the reports nor call as a witness the expert who made the reports.

The Illinois rule became the subject of an original writ of mandamus proceeding before the Illinois Supreme Court in People ex rel. Bowman v. Woodward. In Bowman, the trial court entered an order as requested by the prosecution directing the defense counsel to disclose whether or not expert examinations were conducted and to permit an examination of the reports made by the defense experts. The trial court limited its disclosure to expert reports in the possession of defense counsel which the defense intended to use at trial. The state's attorney contended that this limitation was in violation of the Supreme Court rule and that the trial court should be ordered to direct disclosure without limitation.

Subject to constitutional limitations, the trial court may require that the prosecuting attorney be informed of and permitted to inspect and copy or photograph any report or results, or testimony relative thereto, of physical or mental examinations or of scientific tests, experiments, or comparisons, or any other reports or statements of experts which the defense counsel intends to use at a hearing or trial. (emphasis added).

254. In August of 1970, when the ABA House of Delegates considered the tentative draft submitted to them by the Advisory Committee on Pretrial Proceedings, the House of Delegates voted to amend standard 3.2 by striking the italicized language, see note 253 supra, and replacing it with the following: "statements of experts, made in connection with the particular case, including results of physical or mental examination and of scientific tests, experiments or comparisons." 1970 ABA STAND. 3.2 (Approved Draft).

255. Id. COMMENTARY (Supp.).
256. ILL. SUP. CT. R. 413 (c).
257. 63 Ill. 2d 382, 349 N.E.2d 57 (1976).
258. "[O]nly where defense counsel intends to call such expert, at a hearing or trial; and the defendant shall not be compelled to provide the aforesaid discovery to the State where the defendant does not intend to call the expert, or use said reports or material at a hearing or trial." 63 Ill. 2d at 384-85, 349 N.E.2d at 58-59.
A unanimous court denied the petition for writ of *mandamus*. The court found that the broad disclosures sought by the state under the discovery rule were unconstitutional in two regards. First, to compel the defendant to disclose the existence of tests of which the prosecution otherwise would be unaware, would violate the defendant's right against self-incrimination under both the federal and state constitutions. Second, to compel the disclosure by the defense of experts not intended to be witnesses, or reports not intended to be used at trial, also would violate the defendant's right against self-incrimination.

While the *Bownean* decision seriously limits Illinois Supreme Court Rule 413(c), that rule was not held unconstitutional nor was it altered by the court in its rule-making capacity. "Our Rule 413(c) . . . is, as the rule expressly states, subject to constitutional limitations. The order entered by the trial court was properly respectful of these limitations in accord with the rule's requirement." By pointing to the vague words "subject to constitutional limitations," the court was able to avoid the embarrassment of finding its own rule to be constitutionally inadequate. By leaving the rule itself unchanged, however, the wording of the rule is misleading, if not constitutionally inadequate.

The 1978 ABA Standards provide for narrow disclosure of defense experts and reports. The new standards limit disclosure of expert reports to those "which the defense intends to use at a

259. 63 Ill. 2d at 386, 349 N.E.2d at 59. "Judge Woodward [the trial judge] correctly decided that the defendant could be required to disclose information sought in the prosecution's motion only if the defendant intended to call the expert concerned as a witness or to use the requested reports or materials at a hearing or trial." *Id.*

260. 63 Ill. 2d at 387, 349 N.E.2d at 60, quoting *McCormick, Evidence* 282 (2d ed. 1972):

If the prosecution seeks not only the production of specifically described material of which it is aware but by a broader demand seeks also to use the knowledge of the defendant to determine the existence of material it suspects might exist, the accused is being compelled to respond in terms of disclosing whether the requested material exists. This involves a significantly greater testimonial aspect than the implied representation inherent in mere production.

261. The court noted that the order proposed by the prosecution in this case was very similar to that found overly broad by the Supreme Court of California in the seminal discovery decision of *Jones v. Superior Court*, 58 Cal. 2d 56, 372 P.2d 919 (1962). See also *Traynor, Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. Rev. 228 (1964). The Illinois court agreed with the conclusion reached by the California court, "that to compel the defendant to produce information that he did not intend to introduce at trial would violate his privilege against self-incrimination." 63 Ill. 2d at 388-89, 349 N.E.2d at 61.

262. 63 Ill. 2d at 389-90, 340 N.E.2d at 61.
hearing or trial." The comments justify this limitation on both policy and constitutional grounds.

**Defenses**

Perhaps the most critical issue involving disclosure by the accused is the extent to which defenses must be revealed. For a number of years, state statutes have required the defense to disclose certain defenses, especially an alibi defense. Until recently, these statutes were not viewed as discovery requirements. Since *Williams v. Florida*, however, such rules and statutes must be recognized as prosecution discovery standards and judged accordingly. In *Williams*, a Florida notice-of-alibi statute was upheld by the Supreme Court against a challenge based on the fifth and fourteenth amendments. Once the constitutional uncertainty surrounding the notice-of-alibi statutes was removed, speculation understandably turned to other defenses which the defendant might be forced to disclose to the prosecution.

At the time that *Williams* was pending, the ABA Advisory Committee was preparing its recommendations. No standard was in-

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263. Thus, the 1978 ABA Standards have retreated from the very open defense disclosure position taken by the House of Delegates in 1970, to one similar to that of the *Bowman* decision in Illinois, the *Jones* decision in California, and the original committee proposal for the 1970 ABA Standards. *See* 1978 ABA STANDARDS 11-3.2(a), which provides:

(a) Any defendant who has requested and received discovery pursuant to standards 11-3.1, 11-2.3, 11-2.4 or 11-2.5 shall, upon the request of the prosecutor, disclose to the prosecutor, and permit the prosecutor to inspect and copy or photograph, any reports or statements (including results of physical or mental examinations and of scientific tests, experiments, or comparisons) which were made by experts in connection with the particular case and which the defense intends to use at a hearing or trial.

(b) Disclosure shall not be required:

(i) of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the defense attorney or members of the defense legal staff; or

(ii) of any communications of the defendant.

(c) The fact that the defendant has indicated an intention to offer specified evidence or to call a specified witness is not admissible in evidence at a hearing or trial. Information obtained as a result of disclosure pursuant to this standard is not admissible in evidence at trial except to refute the matter disclosed.

264. *Id.* COMMENTARY. "This limitation, . . . has been added to the standard in order to make sure that the defendant is not required to disclose information that would lighten the prosecutor's burden of establishing guilt beyond a reasonable doubt or that would undercut the presumption of the defendant's innocence."

265. *See* Dean, note 10 *supra*.

266. 399 U.S. 78 (1970).
cluded regarding disclosure of defenses.\textsuperscript{267} By the time the ABA House of Delegates was considering the Committee's proposals, the Court had upheld the constitutionality of the Florida statute. The House of Delegates then promulgated a standard requiring the defendant to disclose "any defense which defense counsel intends to use at trial" and a list of persons intended to be witnesses in support of the defense.\textsuperscript{268} Hence, the standard broadly requires that the prosecutor be informed of all defenses, not only specific defenses such as alibi and insanity.\textsuperscript{269} The House of Delegates indicated in proposing such a broad standard that it failed to see a distinction between the alibi defense and other defenses for disclosure purposes.\textsuperscript{270}

Illinois Supreme Court Rule 413(d) incorporates the broad approach propounded by the House of Delegates in the 1970 Standards. Under this rule, defense counsel must inform the state "of any defenses which he intends to make at a hearing or trial."\textsuperscript{271} The promulgation of this rule prompted sharp criticism by the criminal defense bar:

With one swipe of a legislative scalpel, the \textit{ad hoc} Rules Committee has emasculated defense counsel and reduced him to a conduit whose sole function is to betray his client. The Committee closed its mind to the abuses of The Spanish Inquisition, the Star Chamber courts, and National Socialism, all of which were instituted in the name of virtue but left millions of victims in their wake.

* * *

The \textit{ad hoc} Rules Committee ignored over four thousand years

\textsuperscript{267} Perhaps the absence of any such standard reflects, in part, the Committee's uncertainty regarding the constitutionality of such a requirement. For a discussion of the constitutional uncertainty surrounding such a requirement before the Supreme Court decision in \textit{Williams}, see Norton, \textit{supra} note 7, at 17-19.

\textsuperscript{268} 1970 ABA \textsc{Standard} 3.3 provides:

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

\textsuperscript{269} See Norton, \textit{supra} note 7.

\textsuperscript{270} 1970 ABA \textsc{Standards Commentary} (Supp.). "[I]f such requirements are indeed valid, there is no apparent reason why a general requirement of disclosing the nature of any defense ought not be equally valid."

\textsuperscript{271} ILL. \textsc{Ann. Stat.} ch. 110A, § 413, Committee Comments (Smith-Hurd 1979). The committee that drafted the rule made it clear in its commentary that the rule was intended to operate broadly: "The notice of defenses includes both affirmative defenses, \textit{i.e.}, insanity, and nonaffirmative defenses, \textit{i.e.}, consent to intercourse in rape cases."
of history, and handed us Rule 413(d).\textsuperscript{272} Arkansas and Colorado also have essentially followed the 1970 ABA Standards.\textsuperscript{273} Arizona has a similar rule requiring disclosure of defenses, "including but not limited to, alibi, insanity, self-defense, entrapment, impotency, marriage, insufficiency of a prior conviction, mistaken identity, and good character."\textsuperscript{274} Minnesota also attempts a partial list of the defenses to be disclosed, by providing that notice to the prosecution shall include, but not be limited to, "the defense of self-defense, entrapment, mental illness or deficiency, duress, alibi, double jeopardy, statute of limitation, collateral estoppel . . . or intoxication."\textsuperscript{275} Other states have limited the defenses which must be disclosed to the prosecution before trial. Florida has limited such disclosures to alibi defenses.\textsuperscript{276} Missouri and Vermont rules require the disclosure of only alibi and insanity defenses.\textsuperscript{277}

By 1978, the arguments asserted against broad disclosure were given more consideration.\textsuperscript{278} The 1978 ABA Standards reflect a

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\item 273. ARK. R. CRIM. P. 18.3; COLO. R. CRIM. P. 16II(c). The Colorado rule also has a provision requiring the prosecutor to disclose rebuttal witnesses.
\item 274. ARIZ. R. CRIM. P. 15.2(b).
\item 275. MINN. R. CRIM. P. 9.02(1)(3)(a).
\item 276. FLA. R. CRIM. P. 3.200.
\item 277. MO. R. CRIM. P. 25.05 (A)(4), (5); VT. R. CRIM. P. 12.1.
\item 278. In adopting 1970 Standard 3.3, the ABA House of Delegates acknowledged that the Advisory Committee had advanced strong policy reasons for not adopting a rule requiring such broad disclosure of defenses. These reasons were summarized as follows:
\begin{enumerate}
\item Experienced defense counsel frequently do not make firm decisions regarding evidence to be produced by them at trial until the close of the prosecution's case. Whereas the prosecution necessarily sets forth a formal "battle plan" to be followed, the defense frequently seeks to achieve maximum flexibility, having certain arguments and evidence in readiness, the use of which are contingent upon its evaluation of the prosecution's presentation and the exigencies of the courtroom situation.
\item The first concern, above, makes the matter of sanctions peculiarly sensitive: the Advisory Committee was reluctant to propose standards which seemed unenforceable. \textit{See generally} Original Report, § 4.7 and Commentary thereto, pp. 106-8; Commentary to § 3.1 at p. 96. The contempt sanction (see section 4.7(b)) seems especially inadvisable in a situation where counsel has reason to be concerned about such fundamentals as the privilege against self-incrimination and the attorney-client privilege. Exclusion of available, relevant exculpatory evidence, excluded solely because of counsel's failure to conform to procedural requirements of advance disclosures, is also an undesirable sanction. The clearly acceptable "sanction" of permitting a continuance to the prosecution is a remedy which is available regardless of the disclosure requirements. In Williams v. Florida, 399 U.S. 78 (1970), the court expressly noted that the question of sanctions was not
\end{enumerate}
\end{itemize}
more limited rule, only requiring the defense to disclose the names of witnesses whom it intends to call to establish an alibi defense or an insanity-related defense. The comments indicate that the purpose of the revision is to limit disclosure to those defenses "that require special preparation or that are likely to generate mid-trial delays in the absence of pretrial disclosure."  

**Right to Counsel**

To a large extent, the right to have counsel present at post-charge investigatory-discovery procedures is mandated by the sixth amendment. Whether this right invariably attaches to all

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before it and had not been decided. *Id.* at 83 n.14.

(3) The distinction between the more specific defenses which the standard is designed to expose, *e.g.*, alibi, and the general denial defense is difficult to articulate in definitive terms. For example, when the defendant is shown to have been "somewhere else" at the critical time, the thrust of such proof is to defeat proof that the defendant perpetrated the crime or at least raise doubts in that regard.

(4) The disclosure requirement may be realistically conceived as discriminating against defendants who are represented by counsel. As was suggested by Chief Justice Traynor, the defendant himself cannot be required to speak. If his counsel feels constrained to comply with disclosure orders, the represented defendant may suppose himself disadvantaged. While it may be said that there is no prejudice where the choice is the defendant's, any procedure which operates as an inducement to refrain from using counsel can only bring discredit to the system as a whole, and perhaps also increased inefficiency.

In spite of this, the House of Delegates adopted 1970 ABA Standard 3.3 Commentary (Supp.).

279. 1978 ABA Standard 11-3.3 provides:

(a) Upon the request of the prosecutor, the defendant should disclose to the prosecutor the names and addresses of persons whom defense intends to call as witnesses for testimony:

(i) tending to show that the defendant was not present at the time and place specified in the accusatory instrument; or

(ii) relating to any mental disease, mental defect, or other condition bearing upon the defendant's mental state at the time the offense was committed.

(b) Information disclosed pursuant to paragraph (a) is not admissible in evidence at a hearing or trial. Information obtained as a result of disclosures made pursuant to paragraph (a) is not admissible of a witness whose identity is required to be disclosed pursuant to paragraph (a).

280. *Id.* Commentary. The comments explain the change by stating:

[S]ince the purpose of the disclosure is to permit adequate pretrial preparation, to prevent surprise at trial, and to avoid the necessity of delays during trial, pretrial disclosures about contemplated defenses should be limited to defenses that require special preparation or that are likely to generate mid-trial delays in the absence of pretrial disclosure. The defenses generally considered to have these characteristics are alibi and insanity.

procedures and in all instances is questionable in light of United States v. Ash. In Ash the Supreme Court held that a post-indictment photographic display at which neither the defendant nor his counsel were present was not in violation of the Sixth Amendment. While the facts of Ash narrow the holding of the case, some of the language in the majority opinion limiting the right to counsel to "a trial-like confrontation" may suggest limits to the broad sweep of Massiah v. United States.

A right to counsel may be conferred, on the other hand, by the discovery rules themselves. An example may be drawn from the Illinois Supreme Court decision in People v. Nichols. One evening, during the course of jury selection, the defendants were taken from their cells and photographed without any notice being given to their attorneys. The court ruled that this procedure would violate Illinois discovery rules. The court's summary of the facts does not indicate that there was any "confrontation" other than simply the taking of photographs. Even if this were not viewed as a violation of the sixth amendment under Ash, the right to counsel would be protected by the discovery rule. The value of the Illinois decision in other states may be limited, however, by the fact that the Illinois rule specifically confers a right to have an attorney present, while neither the 1970 nor the 1978 ABA Standards do so.

Another troublesome question is whether the defendant must have his attorney present at a mental examination conducted by prosecution or court-appointed experts. The Illinois Supreme Court has ruled that neither the discovery rules nor the sixth amendment afford the defendant the right to have an attorney present in this situation. Two justices in dissent argued, however, that the Illinois discovery rules mandate an opportunity for

283. Id. at 314.
286. 63 Ill. 2d at 449, 349 N.E.2d at 44. The Illinois court also found that the taking of the photographs violated the defendants' right to counsel. The rule noted in the case was Ill. Sup. Ct. R. 413(b) which, while not applicable at the time that the case was tried, was cited by the court. The rule provides, "Whenever the personal appearance of the accused is required . . . reasonable notice . . . shall be given by the State to the accused and his counsel, who shall have the right to be present."
287. The ABA Standards do require that notice of the time and place of such procedures be given to the defendant and his counsel.
defense counsel to be present. The dissenters also believed that the sixth amendment requires the presence of counsel at this critical stage. Courts in other jurisdictions are split on this issue.

SANCTIONS AND REGULATION OF DISCOVERY

Sanctions

As with any other procedural requirement, discovery rules require a means of enforcement, i.e., a range of sanctions appropriate to induce compliance without exacting an unnecessarily high cost. The most controversial sanction used to enforce discovery rules is the preclusion of evidence which the offending party has failed to disclose to the opposition. Enforcement may also be achieved by the use of other measures, including declaration of mistrial, dismissal, reversal, or sanctions against an offending attorney.

Preclusion of Evidence

Rule 16 of the Federal Rules of Criminal Procedure provides that if a party fails to comply with disclosure requirements, “the court may prohibit the party from introducing evidence not disclosed.” Neither the 1970 nor the 1978 ABA Standards contains a similar provision. The drafters of the 1970 Standards were ambivalent toward the federal preclusion sanction. Although they recognized the device as useful in some situations, they also acknowledged “difficulties” in applying it against defendants, and “unfairness” if only the prosecution is precluded. The drafters of the 1978 ABA Standards did not make any substantive changes in the standard, but their comments indicate a more emphatic rejection of the preclusion sanction. The drafters concluded that pre-

289. 74 Ill. 2d at 357, 385 N.E.2d at 684. The dissent, written by Justice Clark, was joined by Chief Justice Goldenhersh. Justice Kluczynski took no part in the consideration or decision of the case.

290. The majority and dissenting opinions in Larsen contain extensive discussions of decisions in other jurisdictions dealing with the sixth amendment issue. They also address the practical problem of whether the presence of counsel would impair or inhibit an effective mental examination.

291. 1970 ABA STANDARD 4.7 COMMENTARY states:

Without rejecting this device as a useful sanction in some situations, some members of the Committee thought there would be difficulties in applying it against accused persons, and unfairness if the sanction was applied only against the prosecution. The Committee's general view, moreover, was that the court should seek to apply sanctions which affect the evidence at trial and the merits of the case as little as possible, since these standards are designed to implement, not to impede, fair and speedy determinations of cases.
clusion yields capricious results, either a windfall to the defense or an unfair conviction. Furthermore, they noted that preclusion raises serious constitutional issues.292

Most of the states under consideration here have not shared the reluctance of the drafters of the ABA Standards toward use of the preclusion sanction. They have expressly adopted sanctions modeled on Federal Rule of Criminal Procedure 16.293 Minnesota and Vermont, however, apparently have followed the ABA position, since neither state's rules contains the preclusion sanction.294

Although the preclusion sanction may be effective in inducing compliance with discovery rules, serious unresolved constitutional problems remain if the sanction is used against the defense. Baldly stated, the constitutional issue is whether the interest of the state in formulating effective discovery rules permits the state, consistent with due process and the sixth amendment right of compulsory process, to exclude evidence tending to show that the defendant is innocent. In its two major decisions dealing with notice-of-alibi statutes, the United States Supreme Court specifically reserved ruling on the constitutionality of the preclusion sanction contained in the statute.295 The constitutional infirmity of such sanctions, however, is suggested in the Supreme Court's decision in Washington v. Texas.296 That case involved a Texas statute that barred co-participants in a charged crime from testifying for one another, while permitting them to testify for the state. The Court held the Texas statute unconstitutional:

[T]he petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that

292. 1978 ABA Standard 11-4.7 Commentary states: The exclusion sanction is not recommended, because its results are capricious. Thus, exclusion of prosecution evidence may produce a disproportionate windfall for the defense, while exclusion of defense evidence may lead to an unfair conviction. Either result would defeat the objectives of discovery. In addition, the exclusion of defense evidence raises significant constitutional issues.

293. Ark. R. Crim. P. 19.7; Ariz. R. Crim. P. 15.7(b)(4); Colo. R. Crim. P. 16 III (g); Fla. R. Crim. P. 3.220(f); Ill. Sup. Ct. R. 415(g)(4); Mo. R. Crim. P. 25.16.

294. Minn. R. Crim. P. 9.03(f), and Vt. R. Crim. P. 16.2(g). Although the preclusion sanction is not listed in the Vermont rule, the commentary indicates that it may be available in very limited circumstances: "Only where such (other) sanctions would be ineffective to give the prosecution a fair trial should the court resort to the exclusion of evidence."


he had personally observed and whose testimony would have been relevant and material to the defense.\textsuperscript{297}

This language and other decisions of the Supreme Court have led some commentators to suggest that the preclusion sanction would normally be unconstitutional as a sanction to enforce notice-of-alibi or other discovery measures.\textsuperscript{298}

This may not be a foregone conclusion, however, in light of the Court's later decision in \textit{United States v. Nobles}.\textsuperscript{299} In Nobles, the defense attempted to impeach prosecution witnesses on the basis of prior inconsistent statements made to a defense investigator. During the trial, the judge directed the defense to deliver to the prosecution a copy of the investigator's report, which had been inspected and edited \textit{in camera}. When defense counsel repeatedly refused to do this, the trial court ruled that the investigator would not be allowed to testify concerning his interviews with the prosecution witnesses. The Supreme Court upheld the trial court's decision, rejecting the argument that the defendant's sixth amendment rights of compulsory process and cross-examination were denied. The Court reasoned that sixth amendment rights are subject to legitimate demands of the adversarial system. Thus, it held that a court should have the power to assure that a jury hears full testimony and not a partial, truncated version.\textsuperscript{300}

The \textit{Nobles} decision contains some broad language, but several aspects of the case suggest limitations on the applicability of the

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\item \textsuperscript{297} \textit{Id.} at 23.
\item \textsuperscript{298} \textit{See}, e.g., Clinton, \textit{The Right to Present a Defense}, 9 \textit{Ind. L. Rev.} 711, 830-41 (1976) [hereinafter cited as Clinton].
\item \textsuperscript{299} \textit{422 U.S. 225} (1975).
\item \textsuperscript{300} The Court stated:

\begin{quote}
The court's preclusion sanction was an entirely proper method of assuring compliance with its order. Respondent's argument that this ruling deprived him of the Sixth Amendment rights to compulsory process and cross-examination misconceives the issue. The District Court did not bar the investigator's testimony. Cf. \textit{Washington v. Texas}, \textit{388 U.S. 14}, 19 (1967). It merely prevented respondent from presenting to the jury a partial view of the credibility issue by adducing the investigator's testimony and thereafter refusing to disclose the contemporaneous report that might offer further critical insights. The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth. Deciding, as we do, that it was within the court's discretion to assure that the jury would hear full testimony of the investigator rather than a truncated portion favorable to respondent we think it would be artificial indeed to deprive the court of the power to effectuate that judgment.
\end{quote}

\textit{Id.} at 241.
case to preclusion sanctions. First, the failure to make disclosure in *Nobles* was due to deliberate refusal. Further, the prosecution wanted the particular defense investigator’s report; no alternative procedures were available to serve the needs of the prosecution.\(^{301}\) Finally, and perhaps most important, the testimony excluded was not directly relevant to the guilt or innocence of the defendant or to any defense to which he would be entitled by law; rather, it only was relevant to the credibility of the government’s witnesses. Arguably, on a credibility issue the defense should be required to follow procedural conditions, while this might not apply to evidence on substantive issues.

The preclusion sanction has been used in Illinois, but with considerable reluctance. The due process and sixth amendment right of compulsory process issues are noted by the courts in the use of the sanction against the defendant, and even where preclusion is considered against the state, it similarly appears to be viewed as a drastic sanction, available only for flagrant violations.\(^{302}\) The most frequently cited Illinois case dealing with the sanction is the appellate court decision in *People v. Rayford*,\(^{303}\) where the court noted the general principle that “the exclusion of evidence is a drastic measure; and the rule in civil cases limits its application to flagrant violations where the uncooperative party demonstrates a ‘deliberate . . . or unwarranted disregard of the court’s authority.’”\(^{304}\) In *Rayford*, although defense counsel did not inform the state of a witness that it intended to call until after the trial had begun, counsel did disclose the name of the witness as soon as his identity and the relevance of his testimony became known. Under these facts, the court held that the trial judge should have granted the state a short continuance, and that it was error to exclude the witness. “The conduct of the defendant . . . falls far short of the flagrant violation which might justify the use of such a drastic measure as exclusion.”\(^{305}\)

Other Illinois courts similarly have ruled that preclusion of evidence is an abuse of discretion where there is no indication of deliberate non-compliance by the defense, and where other remedies,

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301. See Clinton, *supra* note 298.
304. Id. at 286, 356 N.E.2d at 1277.
305. Id. at 287, 356 N.E.2d at 1277, 1278.
particularly the granting of a short continuance to the state, would redress any disadvantage.\textsuperscript{306} Thus, use of the preclusion sanction has been held to be an abuse of the trial court's discretion where the defense has failed to correct the name of a female witness whose name was changed by marriage,\textsuperscript{307} or where the defense failed to provide the names of prison inmate witnesses where those names could readily be determined by the state.\textsuperscript{308} Evidence otherwise improperly excluded will not constitute prejudicial error, however, if the evidence is neither relevant nor probative of material issues in the case.\textsuperscript{309}

The Illinois courts have, nonetheless, upheld the use of the preclusion sanction to enforce discovery rules. Perhaps the most useful case is \textit{People v. Douthit},\textsuperscript{310} decided by the same panel that handed down the \textit{Rayford} decision. In \textit{Douthit}, the defense did not disclose its intention to call two additional witnesses until the second day of trial. Defense counsel claimed that the failure to disclose the names of the witnesses was unintentional and that the prosecution’s discovery motion was never received. The trial court made a detailed finding in the record that the defense attorney was experienced in local criminal procedures, which led the judge to conclude the omission was not in good faith. The court found that contempt would be inadequate and a continuance was not feasible, and therefore excluded the testimony of the two witnesses.\textsuperscript{311}

The preclusion sanction was upheld by the appellate court, which found that the standards suggested in the \textit{Rayford} decision had been met.\textsuperscript{312} A dissent argued that the appropriate sanction was a contempt citation for the attorney, because punishing the client for the transgressions of his attorney by excluding his witnesses violated the client’s sixth amendment right to present witnesses in his behalf.\textsuperscript{313}

\textsuperscript{306} See \textit{People v. Milton}, 72 Ill. App. 3d 1042, 1052, 390 N.E.2d 1306, 1313 (1979). “The rule does give the trial judge discretion to exclude the evidence involved, but this is a harsh sanction which, if used indiscriminately, may prejudice the rights of a defendant and constitute reversible error.”


\textsuperscript{309} \textit{People v. Dixon}, 78 Ill. App. 3d 73, 397 N.E.2d 45 (1979).


\textsuperscript{311} \textit{Id}.

\textsuperscript{312} \textit{Id}.

\textsuperscript{313} \textit{Id} at 756, 366 N.E.2d at 954 (Moran, J., dissenting).
Most court rules have general language similar to the 1978 ABA Standards, authorizing the court to “enter such other order as it deems just under the circumstances.” When this rule is applied against the prosecution, such other orders might extend to dismissing the charges or granting a mistrial. There is some suggestion in at least one Illinois appellate court decision that courts have inherent power to dismiss charges for the failure of the state to make required disclosures. Such action seems to be viewed as extremely harsh, however, to be applied in very rare circumstances. Illinois courts similarly have been reluctant to reverse convictions for failure of the prosecution to make disclosures. In People v. Greer, the Supreme Court of Illinois suggested the factors which must be taken into account in determining whether a new trial is required; these include prejudice to the defendant and whether the evidence is exculpatory or contradicts the defendant’s testimony.

A slightly more favored sanction against the prosecution is the granting of a mistrial. Where any lesser sanction is possible, nonetheless, especially the granting of a continuance, the trial court need not grant the defense motion for a mistrial. The granting of a mistrial against the defense for failure to make required disclosures may be possible in extreme cases. The double jeopardy language of the fifth amendment makes the issue a sen-
sitive one. The United States Supreme Court ruled in *Illinois v. Sommerville* that a mistrial granted over the defendant's objections would not bar a new trial if the mistrial was required by "manifest necessity."\(^{319}\) *Arizona v. Washington*\(^{320}\) demonstrates, however, that the manifest necessity test is not as stringent as it might appear to be. In *Arizona v. Washington*, a mistrial was declared following an improper opening statement by defense counsel. The Court acknowledged that "in a strict, literal sense, the mistrial was not ‘necessary’", because the jury could have been given a cautionary instruction.\(^{321}\) Nevertheless, the Court believed that considerable deference must be given to trial judges in protecting the integrity of a trial.\(^{322}\) The Court stated the standard in these terms: "Indeed, it is manifest that the key word ‘necessity’ cannot be interpreted literally; instead, contrary to the teaching of Webster, we assume that there are degrees of necessity and we require a ‘high degree’ before concluding that a mistrial is appropriate.”\(^{323}\)

Although *Arizona v. Washington* might support use of mistrial as a broad sanction to prevent professional misconduct, the facts of the case dealt more narrowly with misconduct tending to prejudice the jury. Nevertheless, *Arizona v. Washington* opens the possibility that, at least in very limited cases, the sanction of mistrial may be used to correct surprise caused by the failure of the defense to make required disclosures. It may prove to be an attractive alternative to total preclusion of the defendant's evidence.

### Contempt and Other Sanctions Against the Attorney

An attorney is ethically bound to make disclosures required under appropriate statutes or court rules.\(^{324}\) Failure to do so may subject him to disciplinary action.\(^{325}\) The most immediate sanction against the attorney is the court's contempt power. An important limitation on this sanction is proposed by the ABA, which would

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321. Id. at 511.
322. Id. at 513.
323. Id. at 506.
325. See, e.g., ILL. CODE OF PROFESSIONAL RESPONSIBILITY Rule 7-102 (a)(3)(1980), which provides: “In his representation of a client, a lawyer shall not . . . (3) conceal or knowingly fail to disclose that which he is required by law to reveal. . . .”
permit punishment only for willful violations.\textsuperscript{326} The sanction would not be available, therefore, to redress problems caused by inadvertent concealment, or where the client has failed or refused to supply material or information.

In addition to its use as a means for punishing attorneys for failure to disclose, the contempt sanction may also be a means for testing a discovery order on appeal. In one Illinois case, for example, the trial court entered an order requiring disclosure by the prosecutor. When the prosecutor failed to comply, the court held him in contempt and imposed a fine of ten cents. The appellate court was not only undisturbed by the transparent effort to obtain collateral review; it actually endorsed the procedure.\textsuperscript{327}

\textit{Regulation of Discovery}

\textbf{Cooperation}

Both the 1970 and the 1978 ABA Standards provide that neither counsel nor other prosecution or defense personnel shall advise persons other than the accused to refrain from discussing the case with opposing counsel, “nor shall they otherwise impede opposing counsel’s investigation of the case.”\textsuperscript{328} Of the sample jurisdictions, all but Arizona and Missouri have adopted similar rules.\textsuperscript{329}

The Illinois Supreme Court has adopted a rule modeled on the ABA Standard, but in so doing, the court merely reaffirmed earlier Illinois decisional law. In \textit{People v. Glover},\textsuperscript{330} defense counsel talked with police officers concerning the facts of a pending prosecution. This discussion was interrupted by the chief of police, however, who announced that it was the policy of the department that officers would not be permitted to discuss pending cases with defense counsel before trial. The Illinois Supreme Court held that the chief’s actions were improper, because “a police officer, as well as a State’s Attorney, has a duty to protect the innocent, and should within reasonable limits with respect of time and place be available for interview by defense counsel, and the trial court should have so ordered.”\textsuperscript{331}

\textsuperscript{326} 1978 ABA \textsc{Standard} 11-4.7 provides in part: “(b) the court may subject counsel to appropriate sanctions upon a finding that counsel willfully violated the rule or order.”


\textsuperscript{328} 1978 ABA \textsc{Standard} 11-4.1. See also 1970 ABA \textsc{Standard} 4.1.

\textsuperscript{329} ARK. R. CRIM. P. 19.1; COLO. R. CRIM. P. 16II(a); FLA. R. CRIM. P. 3.220(e); ILL. R. CRIM. P. 415(a); MINN. R. CRIM. P. 9.03(1); VT. R. CRIM. P. 16.2(a).

\textsuperscript{330} 49 Ill. 2d 78, 273 N.E.2d 367 (1971).

\textsuperscript{331} Id. at 83, 273 N.E.2d at 370.
A broad reading of this language from the *Glover* decision suggests that every officer has a duty to talk with defense counsel. In a later case, however, the court indicated that the *Glover* decision should be read only to prohibit the prosecutor or a police officer's superiors from ordering him to refrain from talking to defense counsel. "The principle announced in *Glover* and in Rule 415(a) does not abrogate the general proposition that a prosecution witness need not grant an interview to defense counsel unless he chooses to do so,"333 This leaves the individual police officer free to choose whether or not to grant an interview to defense counsel.

Although it is improper, even unprofessional,333 to advise witnesses not to talk to opposing counsel, it is less clear whether it is improper to inform the witness of his legal right to refuse to talk to opposing counsel. In many instances, such an instruction may be understood by the witness as a direction to refuse an interview. Furthermore, even if that type of instruction is permissible, it at least may be viewed as likely to "otherwise impede opposing counsel's investigation of the case."334

Continuing Duty to Disclose

Both the 1970 and 1978 ABA Standards impose a continuing duty to disclose matters subject to discovery.335 The 1978 Standards, in addition, require disclosure of newly discovered materials even after the trial has ended. The drafters explained the post-trial extension by commenting: "[E]ven after trial, the discovery of exculpatory material may require the reevaluation of the fairness either of the conviction or of the sentence, while the discovery of incriminating evidence may affect the defendant's decision to challenge the conviction or sentence by appeal or by collateral attack."336

All of the states considered here have adopted rules similar to

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333. See ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function 3.1(c) and The Defense Function 4.3(c) (1971).
335. 1978 ABA Standard 11-4.2 provides:
   If, subsequent to compliance with these standards or orders, pursuant thereto, a party which is subject to disclosure, the other party shall promptly be notified of the existence of such additional material. If the additional material or information is discovered during or after trial, the court should also be notified.
See also 1970 ABA Standard 4.2.
336. 1978 ABA Standard 11-4.2 Commentary.
the 1970 ABA Standard. Illinois courts have recognized the continuing duty as a broad one. For example, material subject to disclosure must be turned over even though it is discovered just prior to trial. In addition, a party has the duty to correct errors in previously disclosed documents.

Custody of Materials

The 1970 and 1978 ABA Standards are virtually identical in directing the attorney to whom disclosure is made to keep the materials in his exclusive custody. Further, the material is to be used only for purposes of conducting the attorney’s case. In effect, this standard imposes an ethical duty on the attorney. One consequence of this standard should be particularly noted: an attorney may not supply copies of disclosed materials to his client. In addition, the requirement that the material be used “only for the purposes of conducting that attorney’s case” may limit use of the disclosures in contacts with the press. A court may impose additional terms dealing with custody. Presumably a court could permit an attorney to examine disclosed materials without either copying or obtaining custody of them.

Among the jurisdictions considered, Arkansas, Colorado, Illinois, Minnesota, and Vermont have closely followed the ABA proposals. The Missouri rule, on the other hand, does not specify that the attorney must keep the material in exclusive custody. Arizona and Florida have no rule on the subject.

Protective Orders

The provisions in the 1970 and 1978 ABA Standards allowing the court to enter protective orders restricting, conditioning, or de-
ferring discovery serve as a precautionary measure. A court may act to limit or prevent any danger or abuse threatened in connection with discovery. This standard is also partly designed to meet fears expressed by early opponents of criminal discovery that discovery rules would be used by one of the parties to intimidate witnesses or construct false evidence. The protective order may not be used, however, to totally deny discovery which the party would otherwise be entitled to under the rules. Under the ABA Standard, total denial of discovery could only apply to discretionary disclosures.

All of the sample jurisdictions, with the exception of Arizona, have adopted rules based on the ABA model. The drafters of the Illinois discovery rules apparently did not believe that the ABA Standard went far enough in providing protection against abuses of discovery. Illinois therefore modified the language in the ABA Standard, so that any disclosure may be denied if the harm outweighs the usefulness of disclosure. In spite of the broad language in the Illinois rule, it is unlikely that it could be used to deny disclosures required under Brady, or other due process decisions.

348. 1978 ABA Standard 11-4.4 provides: "[P]rovided that all material and information to which a party is entitled is disclosed in time to . . . make beneficial use of the disclosure." See also 1970 ABA Standard 4.4.
351. Ill. Sup. Ct. R. 412(i) provides: "(i) Denial of disclosure. The court may deny disclosure authorized by this rule [Rule 412, dealing with prosecution disclosures] and Rule 413 [dealing with defense disclosures] if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from such disclosure which outweighs any usefulness of the disclosure to counsel."
352. Id. Ill. Ann. Stat. ch. 110A, § 412, Committee Comments (Smith-Hurd 1979) provides: "Paragraph (i) is intended not only to be used by the court in conjunction with the discretionary disclosures provided for in paragraph 412(h), but is also to be applied whenever the risks of disclosure outweigh the advantages of such disclosure to the defense or State."
Excision and In Camera Proceedings

These two topics are considered together because issues of excision are often resolved through *in camera* proceedings. Both the 1970 and the 1978 ABA Standards provide that where parts of material or information are discoverable, but other parts are not, the nondiscoverable parts may be withheld. The excisions may be made by the disclosing party or by judicial order, but the 1978 Standard specifically provides that “the disclosing party must give notice that nondiscoverable parts have been withheld and the nondiscoverable parts shall be sealed, preserved in the records of the court, and made available to the appellate court in the event of appeal.”

An *in camera* proceeding may be used to decide questions concerning excision. Either the disclosing party may ask the court to decide what should be deleted, or the party to whom disclosure is made may seek judicial review of the excisions made by the disclosing party. An example of the way in which an *in camera* proceeding can be used to resolve issues of excision is provided by the Illinois case of *People v. Jenkins*. The prosecutor in that case, uncertain whether certain police reports contained substantially verbatim statements of witnesses and thus would be subject to disclosure, delivered the material to the trial judge. The judge decided that one page should be disclosed and ordered the remainder sealed and made part of the court record. On appeal, defense counsel argued that he should have been present at the *in camera* proceeding and even suggested that he should have been allowed to see the material under review. The appellate court held the actions of the trial court to be proper, although it reversed on other grounds.

All of the jurisdictions under consideration have substantially followed the 1970 ABA Standard on excision, with the exception of Florida, which has no rule. Most of the states have also followed

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355. 1970 ABA STANDARD 4.5; 1978 ABA STANDARD 11-4.5.
356. 1978 ABA STANDARD 11-4.5.
357. 1978 ABA STANDARD 11-4.6 COMMENTARY. Of course, the *in camera* proceeding may be important in resolving issues other than excision. It may be used to make a record dealing with the need to deny or regulate discovery or for purposes of protective orders. A record is to be made of the *in camera* proceedings, which is to be sealed and available for appeal. See also 1970 ABA STANDARD 4.6.
359. Id.
360. Ark. R. Crim. P. 19.5; Ariz. R. Crim. P. 15.5(b), (d); Colo. R. Crim. P. 16III(e); Ill.
the ABA Standards governing *in camera* proceedings.361 Illinois adopted the 1970 ABA Standard in substance,362 but the drafters of the Illinois rule also felt it was advisable to include a separate provision for an *in camera* proceeding to consider whether or not memoranda summarizing oral statements by prosecution witnesses are discoverable.363

**CONCLUSION**

This article has attempted to review the 1970 and 1978 ABA Standards on discovery and their adoption in sample states, with particular emphasis on judicial experience in Illinois. Any effort to assess the value of these rules in reaching the goal of open pretrial disclosure is a more difficult task. The fact that the ABA discovery standards have been used as a model in many states may itself be important. The courts of many states obviously believe that the approach of the standards serves to promote the goals of full trial preparation and minimization of surprise. How well discovery works in any given jurisdiction, however, depends upon more than the mere adoption of rules. It also depends upon the way the trial court exercises its considerable discretion in enforcing the rules. Only if the trial courts show a strong commitment to discovery, both by regularly ordering disclosure and by firmly enforcing the obligation to disclose, will the rules serve their purpose. It is difficult to assess this commitment by trial court judges either by reading the discovery rules or by examining appellate court decisions interpreting the rules.

In assessing the impact of discovery rules drawn from the ABA model, it may also be important to recognize that all of what may functionally be viewed as discovery is not found in the rules. In many cases, the parties find that the most useful discovery devices arise out of procedures nominally designed for other purposes. For the prosecutor, a discovery device which is likely to yield more use-

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361. *Ark. R. Crim. P.* 19.5; *Colo. R. Crim. P.* 16III(8); *Fla. R. Crim. P.* 3.2220(i); *Minn. R. Crim. P.* 9.03(6); *Mo. R. Crim. P.* 25.40(c); *Vt. R. Crim. P.* 16.2(8). *Ariz. R. Crim. P.* 15.5(c) and (d) differ only slightly from 1970 ABA Standard 4.6.
363. *Ill. Sup. Ct. R.* 412(a)(i) provides: "Upon written motion of defense counsel memoranda reporting or summarizing oral statements shall be examined by the court *in camera* and if found to be substantially verbatim reports of oral statements shall be disclosed to defense counsel." See *People v. Jenkins*, 30 Ill. App. 3d 1034, 333 N.E.2d 497 (1975) for a comparison of this rule and Rule 415(f).
ful information than anything he can expect to get from the defendant under the discovery rules is the grand jury investigation. Effectively, the prosecutor can take a discovery deposition from a witness subpoenaed to appear before the grand jury. Similarly, a grand jury subpoena duces tecum can require the production of documents or physical evidence which the prosecutor could not otherwise obtain.\footnote{364}{See, \textit{e.g.}, \textit{People v. Allen}, 410 Ill. 508, 103 N.E.2d 92 (1951).} While the defense is entitled under the discovery rules to disclosure of the transcripts of the testimony of some grand jury witnesses,\footnote{365}{See, \textit{e.g.}, 1978 ABA STANDARD 11-2.1(a)(iii).} this will not be of equal value, since the defense has no power to initiate this form of discovery, nor to cross-examine the witnesses at the time.

For the defense, the most important discovery device is likely to be the preliminary hearing. At this stage, defense counsel can observe and cross-examine government witnesses. Although the scope of the deposition-like discovery may be limited in many jurisdictions by the fact that the function of the preliminary hearing is limited to determining probable cause, it may still be a valuable discovery tool.\footnote{366}{The discovery benefit was one of the factors listed by the California Supreme Court in concluding that the equal protection clause of the state constitution was violated by a procedure which denied the defendant a preliminary hearing in instances where he had already been indicted by a grand jury. \textit{Hawkins v. Superior Court}, 150 Cal. Rptr. 435, 586 P.2d 916 (1978).} Of equal value to the defense may be the right to call witnesses at the preliminary hearing. Such a right effectively establishes the power to order a witness to appear for a deposition. However, the benefit to the defense may be tempered by the fact that the prosecution can use the transcript of the preliminary hearing testimony at trial if it can show that it is unable to produce the witness at trial.\footnote{367}{\textit{Ohio v. Roberts}, -- U.S. --, 48 U.S.L.W. 4874 (June 25, 1980).}

The Supreme Court of Illinois recently authorized the use of the preliminary hearing for yet another discovery purpose. In \textit{People ex rel. Fisher v. Carey},\footnote{368}{77 Ill. 2d 259, 396 N.E.2d 17 (1979).} the court addressed the question whether the Cook County Public Defender could use a subpoena duces tecum to obtain police reports before the preliminary hearing. The court acknowledged that the discovery rules in Illinois apply only after the preliminary hearing. Nevertheless, the court found that the power to subpoena is not determined by discovery rules, but by statutes and the constitution. The only limitation which the court
imposed on this discovery device was that it could not be used before the filing of a formal complaint.

This consideration of the grand jury and the preliminary hearing as discovery devices is presented only to demonstrate that discovery in criminal cases can only be assessed by examining the procedural system as a whole. Despite the potential for discovery provided by the grand jury and the preliminary hearing, these vehicles are no substitute for the discovery rules. As discovery devices, these procedures may be effective, but they are also haphazard; they do not permit continuing discovery and they may be limited by the formal, nondiscovery functions which they were designed to serve. By requiring the parties to disclose information to each other, the discovery rules serve an important complementary function. The rules, at a minimum, prevent unfair surprise even if they do not provide the best opportunity to the parties to prepare their cases. The accomplishment of this function alone renders the rules indispensable to any criminal proceeding.

369. For example, the scope of the examination or cross-examination in a preliminary hearing may be restricted by the magistrate to the narrow issue of probable cause.