# UNIFORM RULES OF CRIMINAL PROCEDURE (1987) *

*Drafted by the*

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

*and by it*

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

*at its*

ANNUAL CONFERENCE
MEETING IN ITS NINETY-SIXTH YEAR
IN NEWPORT BEACH, CALIFORNIA
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With Prefatory Note and Comments

Approved by the American Bar Association at its Meeting in
Philadelphia, Pennsylvania, February 9, 1988,
as an Effective Tool for Implementing the
American Bar Association Standards for Criminal Justice,
Because Such Rules are in Substantial Accord with Those Standards

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* The Conference changed the designation of the Rules of Criminal Procedure (1987) from Uniform to Model as approved by the Executive Committee on January 18, 1998.

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# UNIFORM RULES OF CRIMINAL PROCEDURE (1987)

## PREFATORY NOTE

This redrafting of the Uniform Rules of Criminal Procedure makes the Rules an appropriate vehicle for implementing the 1980 Second Edition of the ABA Standards for Criminal Justice, as amended in 1984 and 1985. The redrafting proved to be much more extensive than originally anticipated, mostly because of the need for provisions responding to the 1984 addition to the ABA Standards of Chapter 7, the Criminal Justice Mental Health Standards.

### History of the Rules

The 1952 Rules. The Conference first adopted Uniform Rules of Criminal Procedure in 1952. These derived largely from the Federal Rules of Criminal Procedure and the ALI Model Code of Criminal Procedure (1931). Subsequent developments, including significant research and drafting in the area of criminal procedure supported by federal and state governments and by organizations including the American Bar Association, caused the Conference to conclude that the 1952 Uniform Rules had become largely outdated.

The 1970-74 Rules revision project. Consequently, in 1970 the Conference inaugurated an extensive project to revise the Uniform Rules. It received grants from the federal government's National Institute of Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration. These grants enabled the Conference to employ a Staff Director and three Reporters, Professors Jerold H. Israel, Yale Kamisar, and Wayne R. LaFave. The grants also allowed the Conference's Drafting Committee to conduct three of its 19 meetings together with members of an Advisory Committee, which included representation from several ABA sections and other organizations interested in criminal procedure.

After presentation at three annual meetings, the Conference adopted the Uniform Rules of Criminal Procedure (1974) to replace the 1952 Uniform Rules. Having been drafted in light of the ABA Standards, the 1974 Rules for the most part conformed to the Standards. However, as indicated in the 1974 Uniform Rules' Comments and in ABA Section of Criminal Justice, Uniform Rules of Criminal Procedure: Comparison and Analysis (1975), there were some differences.

In August 1975, the ABA House of Delegates approved the Uniform Rules of Criminal Procedure "as a valuable resource for those interested in achieving criminal procedural reform in their respective jurisdictions," albeit specifying that "nothing contained herein should be construed as an endorsement of each and every uniform rule except insofar as such rules are in accord with the American Bar Association Standards for Criminal Justice which represent the approved policy of this organization."

The 1976-80 Standards revision project. In 1976, the ABA undertook an updating project which yielded the 1980 Second Edition of the ABA Standards for Criminal Justice. The Second Edition refers to the related Uniform Rules provisions throughout and discusses many of them in the Commentaries to the Standards. During the revision process, a number of Standards were changed to bring them into closer harmony with the Uniform Rules.

The 1983-87 Rules revision project. After a preliminary consideration by two Study Committees, the first of which was headed by the late William B. Spann, the Conference in August 1983 authorized the Drafting Committee to undertake the task of bringing the Uniform Rules into conformity with the newly-revised ABA Standards. Discussions with Professor B. J. George, Jr., then chairperson of the ABA Standards Committee, engendered the belief that accomplishment of this task would induce the ABA to actively support the Uniform Rules as a means for states to implement the ABA Standards.

Accordingly, the ABA named Professor Norman Lefstein (1986-87 Chairperson of the ABA Criminal Justice Section) as the ABA's Advisor to the Uniform Rules project. Professor Lefstein attended each of the Drafting Committee's eight weekend meetings except three attended by his designee Mr. Richard P. Lynch (then Director of the ABA Standards Committee) or Dean Steven H. Goldberg (member of the Criminal Justice Section and the Standards Committee). At Professor Lefstein's request, Director Lynch also represented the ABA at the Conference's 1986 annual meeting and Dean Goldberg represented the ABA at the Conference's 1987 annual meeting.

The Drafting Committee met twice in 1984 to produce the draft which the Conference considered at its 1984 annual meeting. That draft included amendments to conform the Uniform Rules to the 1980 Second Edition of the ABA Standards.

In December 1984, the Drafting Committee determined it would be desirable and in line with its charge to draft new provisions based upon the Criminal Justice Mental Health Standards the ABA had just added to the ABA Standards. This determination received strong support from the then chairperson of the ABA Standards Committee, Chief Justice William H. Erickson. He wrote the Drafting Committee chairman that he could "think of no better implementation vehicle than the possible incorporation of some of these [Criminal Justice Mental Health] standards within the Uniform Rules." Accordingly, the Conference approved the Drafting Committee's including provisions based upon the new Criminal Justice Mental Health Standards.

For this new part of its work, the Drafting Committee further decided to seek an advisor from a national mental health professionals' organization. Thus, at its next three meetings, it had the helpful advice of Dr. Donald Paull, substituting for Dr. Bruce Bennett of the American Psychological Association.

At the Conference's 1986 annual meeting, it considered provisions drafted in response to the 1984 addition to the ABA Standards of Chapter 7, the Criminal Justice Mental Health Standards, and the 1985 amendments to ABA Standards Chapter 10, Pretrial Release.

Debate was particularly spirited on the 1986 annual meeting draft's provision on detention of persons charged with violent felonies. That provision defined "violent felony" and specified that after a hearing with certain safeguards the court could order a defendant charged with a violent felony detained if the court finds (1) that the evidence would reasonably permit a jury to find beyond a reasonable doubt that the defendant committed the violent felony charged, (2) by clear and convincing evidence that the defendant committed certain other dangerous conduct, and (3) by clear and convincing evidence that no conditions of release are reasonably sufficient to protect the safety of others or the administration of justice. The Conference's Committee of the Whole adopted a motion that it was the sense of the house to strike from the provision a sentence specifying, "The rules governing admissibility of evidence in criminal trials apply."

At its two meetings in 1987, in addition to its other work on the provisions herein, the Drafting Committee made several attempts to draft provisions consistent with the Conference's sense-of-the-house determination not to apply the rules of evidence at the detention hearing. It adopted a provision (similar to Fed. R. Civ. P. 56(c)) specifying "The rules of evidence apply, but an affidavit is admissible if it is made on personal knowledge, sets forth facts which would be admissible in evidence, and shows affirmatively that the affiant is competent to testify to the matters stated." Further, the Committee considered adding "The court may continue the hearing for the time necessary to summon an affiant for cross-examination or a witness to respond to matters in an affidavit."

But at the Drafting Committee's April 1987 meeting, ABA Advisor Lefstein indicated that in his opinion the ABA Criminal Justice Section would vigorously oppose the preventive detention provision because of its inconsistency with Standard 10-5.10(c)'s requirement that "[a]t any preventive detention hearing . . . the rules governing admissibility of evidence in criminal trials should apply." The Drafting Committee discussed the importance of securing ABA approval for the Rules. It also considered the view that at least some aspects of preventive detention are substantive rather than procedural, and may be more appropriately treated by statute than by court rule. Consequently, the Drafting Committee voted unanimously to recommend that the Conference defer consideration of provisions on preventive detention, and authorize separate future study of both procedural and substantive provisions on preventive detention. The Conference's Executive Committee accepted this recommendation at the 1987 annual meeting, and authorized appointment of a Pretrial Detention Act drafting committee.

The Conference voted final approval of these Uniform Rules of Criminal Procedure (1987) at its annual meeting in 1987. Thus, in addition to the extensive 1970-1974 Uniform Rules revision project and the exhaustive work reflected in the ABA Standards, the Rules here presented are the product of eight weekend Drafting Committee meetings over the last four years and three annual meeting submissions.

## SUMMARY OF CONTENTS

In response to the 1984 addition to the ABA Standards of Chapter 7, the Criminal Justice Mental Health Standards, this 1987 compilation revises Rules 411 (setting times) and 451(c) (matters to be raised by pretrial motion), substantially revises Rule 423 (disclosure by defendant), and adds the following new provisions: Rules 424 and 425 (examination of mental condition at time of crime), Rule 444(d) (incompetence to plead), Rules 463 through 469 (incompetence of defendant), Rule 523(d) (instruction on mental nonresponsibility), Rule 535(b) (verdict of not guilty by reason of mental nonresponsibility), Rule 613 (expenditures for mental-health professional regarding sentencing), Rule 615 (incompetence at time of sentencing), Rule 621 (judgment), and Rule 711(d) (incompetence to waive counsel). This compilation substantially revises Rule 442 (pretrial diversion) in response to the 1985 addition of Standards 10-6.1 through 10.6-2 in the chapter on pretrial release. Most of this compilation's other changes were occasioned by the original 1980 version of the Standard's Second Edition. Some of the more significant changes from the 1974 Uniform Rules of Criminal Procedure are listed below.

Procedures before appearance. Rule 211(b) allows arrest rather than a citation or summons whenever the crime is a felony, but Rule 211(c) bars warrantless arrest if the officer knows a summons or prosecutor's citation has been issued for the conduct in question. Rule 221(b) allows a magistrate, in extraordinary circumstances, to issue a warrant even though the prosecutor requested only a summons. Rule 311 generally requires the defendant's presentation before the magistrate within six hours, and prohibits delay for investigative purposes except for a prompt identification procedure involving a witness who is likely to die, or an immediate need to take from the defendant's body nontestimonial evidence which will be lost, altered or materially dissipated, before a court-ordered nontestimonial evidence procedure can be executed.

Release before and during trial. Rules 341 through 346, regarding release before and during trial, have been completely reorganized and generally made much more specific in light of the Standards' Chapter 10 on pretrial release. Rules 344 (hearing on conditions of release) and 345 (probable cause hearing) are substituted for original Rule 344 (detention hearing).

Discovery. Rule 423 (disclosure by defendant) is completely redrafted in light of the new Criminal Justice Mental Health Standards. The principal changes are the addition of subdivision (b), requiring notice of intent to rely upon a mental nonresponsibility defense, and subdivision (c), requiring notice within 48 hours after commencement of a defense-initiated examination of mental state at the time of the offense. The latter notice lets the prosecutor seek a prosecution-initiated examination under Rule 425, but the report of that examination is not revealed to the prosecution unless and until the defendant gives notice under Rule 423(d) of intent to call a mental-health professional at trial.

Examination regarding mental condition at time of crime. New Rule 424 specifies that upon a showing of a likely need for examination regarding a defendant's mental condition at the time of the crime, the court shall authorize reasonable expenditures from public funds for an indigent defendant to retain the services of one or more mental-health professionals. Under new

Rule 425, the court must order an examination regarding mental condition at the time of the crime on the prosecutor's motion after the defense has given notice of a defense-initiated examination or of intent to call a mental-health professional at trial. The Rule specifies what must, may be, and may not be done at the prosecution-initiated examination, what the report must contain, the report's distribution, the consequences of the defendant's deliberate refusal to cooperate in the examination, and admissibility of evidence resulting from the examination.

Nontestimonial evidence procedures. Rule 434(c) authorizes the court to order a defendant to participate in specified nontestimonial evidence procedures or other procedures which do not involve an unreasonable intrusion of the body or an unreasonable affront to the dignity of the individual. Provisions authorizing an order to take an individual into custody upon a showing of probable cause that the individual will flee upon service of a nontestimonial evidence order or that the evidence will be altered, dissipated, or lost if not promptly obtained are omitted from Rule 436 (investigatory nontestimonial evidence order) and Rule 437 (obtaining nontestimonial evidence from third person upon defendant's motion).

Pretrial diversion. Rule 442 (pretrial diversion) is substantially revised in light of new provisions in the pretrial release Standards. The principal changes are the addition of a court-approval requirement for diversion agreements under subdivision (a)(2), an arrest provision in subdivision (f), a release provision in subdivision (g), and a provision for termination and dismissal upon showing of rehabilitation in subdivision (j).

Pleas. New Rule 443(b)(1) authorizes the court to conduct a plea agreement conference upon the parties' request when they are unable to reach a plea agreement. New Rule 444(d) governs incompetence to plead. Under Rule 444(g)(2)(v), a defendant may not withdraw a plea merely because the sentence exceeds that designated in a plea agreement except in specified circumstances.

Competence. New Rules 463 through 469 provide with considerable detail the procedure when good faith doubt is raised about the defendant's competence to proceed. They require the prosecutor, defense counsel, or court to raise the issue when there is good faith doubt of the defendant's competence, authorize the court to order the defendant to appear for examination and to appoint a professional to conduct the examination, provide for release or confinement pending examination, specify the form and contents of the examination report, describe the competency hearing and the dispositions that may flow from it, provide for periodic redetermination of incompetence, allow certain proceedings while the defendant remains incompetent, provide for a hearing on unlikelihood of attaining competence and the dispositions that may flow from that hearing, provide for disposition of a defendant confined for the maximum or presumptive time of sentence for the crime charged, restrict admissibility of evidence obtained from the defendant, and provide for trial of a defendant on medication.

Severance, bifurcation, and dismissal. Rule 472 requires severance of crimes and defendants only in specified situations, rather than requiring it unless the court makes a specified determination. Bracketed new Rule 474 authorizes bifurcation of mental nonresponsibility issues

upon defense motion. In Rule 481, the pretrial judgment of acquittal is changed to pretrial dismissal, and the court is permitted to make the dismissal with or without prejudice.

Trial by jury. New Rule 523(d) requires instructing the jury that it may consider a not guilty by reason of mental nonresponsibility verdict only after finding beyond a reasonable doubt that the defendant committed the crime charged. Rule 531(c) and (d) give the court discretion, when the jury retires for deliberation, on whether to submit exhibits and, with the parties' consent, all or part of a deposition received in evidence or a prepared transcript or recording of testimony. Under Rule 532, deliberating jurors are sequestered only if the court so orders. New Rule 535(b) provides a not guilty by reason of mental nonresponsibility verdict.

Sentencing. Rule 612(b) and (c) permit the court to excise from the parties' copies of the presentence investigation report portions likely to result in specified kinds of harm and to order counsel not to disclose to the defendant diagnostic opinions where disclosure would seriously interfere with a treatment program. New Rule 613 specifies that upon a showing of a likely need for a mental-health professional's services regarding issues relevant to sentencing, the court shall authorize public funds for an indigent defendant to retain those services. Rule 614 requires the sentencing court to accord due consideration to the views of a victim or close relative of a deceased or incapacitated victim. New Rule 615 allows provisional sentencing of a defendant who is incompetent at the time of sentencing, but otherwise provides the kind of procedure specified in Rules 464 and 466 for incompetence to proceed. Rule 621 requires credit for any confinement because of inability to secure release or because of procedures regarding competence. Rule 641(e) requires (in brackets) clear and convincing evidence of a probation violation.

Waiver of counsel. Under Rule 711(b), a lawyer must consult with the defendant before the defendant can waive counsel in a felony case, and the court may not sentence the defendant to any term of incarceration unless a lawyer consulted with the defendant before the defendant waived counsel. New Rule 711(d) governs incompetence to waive counsel.

Open courtroom. Rule 714(b) allows temporary deferral of public access to pretrial proceedings or trial proceedings outside the jury's presence upon a party's or the court's own motion if the court finds the deferral is necessary for a compelling reason which cannot be adequately protected by reasonable alternative means.

The overall organization of the Rules is shown by the table of contents, which shows the major divisions--the articles and parts--as well as the Rules and the separately captioned paragraphs and subparagraphs thereof. With the exception of Article VII, which contains general provisions applicable throughout the entire prosecution, the organization is designed to be chronological for the typical case. Accordingly, the typical case would proceed under these Rules as follows:

(1) The defendant is detained following an alleged crime for the purpose of determining whether to cite, release, or arrest under Rule 211.

(2) The officer issues a citation under Rule 221(a)(1).

(3) The prosecutor issues an information under Rule 231.

(4) The defendant appears by the defendant's lawyer filing a statement under Rule 312 that the lawyer represents the defendant and that the defendant agrees to the conditions of release specified in Rule 341(a)(1) through (4).

(5) The trial court sets the times for discovery and other pretrial procedures under Rule 411.

(6) Discovery proceeds under Rules 421 through 438.

(7) The parties discuss disposition of the case under Rule 441.

(8) The case is disposed of by pretrial diversion under Rule 442, a plea under Rule 444, or trial under Article V and, if there is a conviction, sentencing or other disposition under Article VI.

In the Comments to these Rules, unless otherwise noted, references to a "Standard" are to the ABA Standards for Criminal Justice (2d ed. 1980), as amended,* and references to "ALI" are to the ALI Model Code of Pre-Arraignment Procedure (1975).

The provisions in these Rules, in addition to being consistent with the ABA Standards, are desirable on their merits and improve the Uniform Rules of Criminal Procedure. With the modifications which have been incorporated in these Rules, the Uniform Rules can serve as an effective vehicle to implement the ABA Standards for Criminal Justice.

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* In 1991 the Uniform Rules of Criminal Procedure drafting committee's chairperson and reporter modified some of the Rules' Comments to refer to the 1991 third edition of chapters 4, 5, and 8 of the ABA Standards.

# UNIFORM RULES OF CRIMINAL PROCEDURE (1987)

## ARTICLE I

## SCOPE

RULE 111. SCOPE. These Rules govern the practice and procedure in all criminal proceedings in this State [except .....].

RELATED STANDARD: 11-1.2

### COMMENT

These Rules are designed to apply to the prosecution of all felonies and all misdemeanors punishable by incarceration. It is recognized, however, that a state may desire specifically to exclude prosecution for traffic offenses (see Model Rules Governing Traffic Court Procedure), and extradition proceedings (see Uniform Criminal Extradition Act; Uniform Rendition of Accused Persons Act). To avoid possible confusion as to the scope of the term "criminal proceedings," a state may also desire to specify that proceedings sometimes viewed as "quasi-criminal" are not encompassed--e.g., proceedings under the Uniform Juvenile Court Act, proceedings for forfeiture of property used in the commission of a crime, proceedings for issuance of peace bonds, etc. See, e.g., N.D.R. Crim. P. 54(b). A state may also find that some provisions of these rules are not appropriate for the prosecution of minor misdemeanors, particularly where a trial de novo is available following a misdemeanor conviction. Compare ABA Standard 11-1.2 (discovery Standards "should be applied in all serious criminal cases").

ARTICLE II

PROCEDURES BEFORE APPEARANCE

PART 1

DETENTION FOR CRIME WITHOUT ARREST WARRANT

RULE 211. DETENTION TO DETERMINE WHETHER TO CITE, RELEASE, OR ARREST.

(a) Detention authorized. Under circumstances in which a [law enforcement officer] is authorized by law to arrest an individual without a warrant for the commission of a crime, the [officer] may detain the individual to determine whether the individual should be issued a citation under Rule 221(a)(1), released without a citation under Rule 244, or arrested under subdivision (b).

RELATED STANDARD: 10-1.1

COMMENT

Rules 211 through 221 generally

It is anticipated that most prosecutions will be initiated by an officer's citation and that arrest, either with or without a warrant, will not ordinarily be resorted to under these Rules. Rules 211 through 221, like Rule 341, below (release before and during trial), are designed to minimize unnecessary pretrial detention. As stated in ABA Standard 10-1.1, "The law favors the release of defendants pending determination of guilt or innocence."

Subdivision (a)

The power to detain hereunder (and hence to issue a citation under Rule 221(a)(1), below) is limited to situations where the officer is authorized by law to arrest the person without a warrant. Thus, if state law does not permit warrantless arrest for a misdemeanor committed outside the officer's presence, the officer may not cite for an out-of-presence misdemeanor. In

that event, the proper procedure would be either a prosecuting attorney's citation under Rule 221(a)(2), a summons under Rule 221(b), or an arrest warrant under Rule 221(c).

Length of detention is governed by Rule 311 below.

(b) When arrest permitted in lieu of release with or without citation. An individual detained under subdivision (a) may be arrested rather than released with or without a citation only if the [law enforcement officer] making the determination reasonably believes that:

(1) the individual has committed a felony;

(2) the individual, after receiving a citation, has deliberately committed a crime in the [officer's] presence;

(3) arrest is necessary to prevent imminent bodily harm to the individual or to another; or

(4) there is substantial likelihood that the individual will not respond to a citation because the individual:

(i) failed to provide satisfactory identification after being afforded reasonable opportunity to do so;

(ii) refused to sign the citation after the [officer] explained that the citation was not an admission of guilt and represented only the individual's promise to appear;

(iii) lacks sufficient family, employment, residential, or other ties to ensure the individual's appearance; or

(iv) previously failed to appear in response to a citation, summons, or other legal process for a crime.

RELATED STANDARD: 10-2.2

COMMENT

This subdivision is based upon ABA Standard 10-2.2.

Clause (1) reflects Standard 10-2.2(a)'s provision that except in the specified circumstances, an officer with grounds to arrest for a misdemeanor should cite rather than arrest.

In clause (2), the word "deliberately" is intended to limit the scope of this clause to situations where the perpetrator willfully refuses to desist and is actively defying the officer.

Clause (3) is based upon Standard 10-2.2(c)(iii). As stated in Standard 10-2.5, "Notwithstanding that a citation is issued, a law enforcement officer should be authorized to take a cited person to an appropriate medical facility if the person appears mentally or physically unable to care for himself or herself."

Clause (4)'s subclauses are based upon Standard 10-2.2(c)(i), (ii), (iv), and (v).

The officer referred to in this subdivision may be the one who made the initial detention or one into whose custody the initial officer placed the detained person. It is left to the law enforcement departments to allocate authority over the matters specified.

It should be emphasized that this subdivision merely permits, and does not require, arrest. The officer has discretion to issue a citation in a case of a felony or when the person, e.g., refuses to sign the citation. See Rule 221(a)(1) below.

(c) Summons or prosecuting attorney's citation. If a [law enforcement officer] knows that a summons or prosecuting attorney's citation has been issued to an individual, the [officer] may not arrest the individual for a crime arising out of the same conduct without an arrest warrant.

RELATED STANDARD: 10-3.1

COMMENT

This subdivision is based upon Standard 10-3.1's last sentence, but refers to a prosecutor's citation as well as a summons. The History of Standard explains that it prevents a police officer "from 'overruling' a judicial officer by effecting a warrantless arrest after the police officer's application for a warrant has been denied."

(d) Previous determination not to issue information, summons, or warrant. If the [law enforcement officer] knows that a prosecuting attorney has determined not to issue an information or that a [magistrate] has determined not to issue a summons or arrest warrant against an individual for a crime, the [officer] may not detain, cite, or arrest the individual for a crime arising out of the same conduct unless doing so is supported by newly discovered evidence.

COMMENT

Like the previous subdivision, this prevents a law enforcement officer from "overruling" prosecutorial or judicial determinations.

(e) Effect of detention. If a detained or arrested individual is released with a citation, or released without a citation under Rule 244, the detention must not be recorded as an arrest.

RELATED STANDARD: 10-2.4

COMMENT

Rule 244 below covers both mandatory and permissive release.

A custodial arrest is necessary for a valid search incident to arrest. See United States v. Robinson, 414 U.S. 218, 235 (1973); Gustafson v. Florida, 414 U.S. 260, 265 (1973). But, as stated in Standard 10-2.4, "When an officer makes a lawful arrest, the defendant's subsequent release on citation should not affect the lawfulness of any search incident to the arrest."

RULE 212. PROCEDURE UPON DETENTION.

(a) Informing detainee. If an individual is detained under Rule 211(a), a [law enforcement officer] as promptly as reasonable under the circumstances shall:

(1) provide identification as a [law enforcement officer], unless the [officer's] identity is apparent; and

(2) inform the individual generally of the crime believed to have been committed, unless it is apparent.

COMMENT

This is very similar to ALI Model Code of Pre-Arraignment Procedure § 120.8(1)(a), (c) (1975).

Normally it will be the officer who initially detains the person who will comply with this subdivision, but in some situations, e.g., where a number of persons are detained at the same time, another officer may do so.

(b) Warnings upon removal from scene. A [law enforcement officer], as promptly as reasonable under the circumstances, shall inform a detained or arrested individual who is to be removed from the scene:

(1) where the individual will be taken;

(2) of the right to remain silent and that anything the individual says, orally or in writing, will be used against the individual;

(3) that there will be no questioning unless the individual wishes, and that the individual has the right to consult with a lawyer before being questioned or saying anything and to have a lawyer present during any questioning;

(4) that if the individual desires to consult with a lawyer, but is unable to obtain one, the individual will not be questioned without a lawyer and that if the individual is unable to pay for the services of a lawyer, one will be provided; and

(5) that if at any time during any questioning the individual expresses a desire to consult with a lawyer or for questioning to stop, questioning will stop.

COMMENT

This derives from Miranda v. Arizona, 384 U.S. 436 (1966), and ALI §§ 120.8(1)(d), 140.8(2)(c), 310.1(4)(a).

The warnings specified here must be given upon removal from the scene even if it has not been determined to arrest rather than cite or release the person, and even if questioning is not attempted. If questioning is undertaken, additional requirements are imposed by Rule 243 below.

(c) Warnings upon determination to take to place of detention. A [law enforcement officer], as promptly as reasonable under the circumstances, shall inform a detained or arrested individual who is to be taken to a place of detention where the individual will be taken and that the individual will be permitted upon arrival to communicate with a lawyer and relatives or friends.

COMMENT

This is very similar to ALI § 120.8(1)(d)(ii). Regarding the concluding words, "relatives or friends," see the Comment to Rule 321(c)(2)(i) below. The same language is used in Rules 241, 242(a), and 242(c) below.

(d) Informing of arrest. A [law enforcement officer] who has determined to arrest an individual rather than to release the individual with or without a citation shall promptly inform the individual that an arrest is being made.

COMMENT

This is very similar to ALI § 120.8(1)(b).

RULE 213. DETENTION OF INDIVIDUAL ARRESTED BY PRIVATE CITIZEN.

A [law enforcement officer] who pursuant to law takes custody of an individual arrested by a private citizen shall proceed in accordance with Rules 211 and 212 as if the [officer] had detained the individual under Rule 211(a).

COMMENT

This Rule makes it clear that the procedure established by Rules 211 and 212 must be employed when an officer obtains custody of a citizen's arrestee, even where the officer could not have arrested the arrestee because, e.g., the arrestee's crime was a misdemeanor committed outside the officer's presence.

## PART 2

## CITATION, SUMMONS, AND ARREST WARRANT

### RULE 221. ISSUANCE OF CITATION, SUMMONS, OR ARREST WARRANT.

(a) Citation.

(1) By [law enforcement officer]. A [law enforcement officer] may issue a citation to an individual who has been detained under Rule 211(a).

RELATED STANDARD: 10-2.3(a)

COMMENT

As provided in ABA Standard 10-2.3(a), an officer may issue a citation in any case where the officer is authorized by law to arrest. See National Advisory Comm'n on Criminal Justice Standards and Goals, Corrections Standard 4.3(2) (1973). Further, this subdivision authorizes an officer at the station (subject to the law enforcement department's distribution of decision making authority) to "reevaluate a decision to arrest and . . . issue a citation at the police station in lieu of detention." Id. 4.3(3). See ALI Model Code of Pre-Arraignment Procedure § 120.2 (1975).

(2) By prosecuting attorney. Upon signing an information the prosecuting attorney may issue a citation, request the issuance of summons under subdivision (b), or request the issuance of an arrest warrant, if authorized by subdivision (c). The prosecuting attorney need not issue a citation for an individual who has been issued a [law enforcement officer's] citation, or who has been brought before a [magistrate] under Rule 311 after arrest without a warrant.

RELATED STANDARD: 10-3.3(b)

COMMENT

The "information" is governed by Rule 231 below.

In providing for issuance directly by the prosecuting attorney, without the need for any magistrate involvement, this paragraph accords with Wis. Stat. Ann. § 968.04(2)(a) (1985) and is similar to ABA Standard 10-3.3(b) ("The judicial officer should ordinarily issue a summons in lieu of an arrest warrant when the prosecuting attorney so requests").

As noted in the Comment to Rule 211(a) above, the prosecutor's citation may be used for misdemeanors not committed in a law enforcement officer's presence, even if state law does not permit law enforcement officers to arrest for out-of-presence misdemeanors.

The second sentence makes it clear that if the individual has already been issued a law enforcement officer's citation or brought before a magistrate, no further process is necessary.

(b) Summons. A [magistrate] may issue a summons to a defendant whenever an information has been filed and affidavit or testimony shows probable cause to believe that a crime has been committed and that the defendant committed it. The [magistrate] shall issue a summons rather than an arrest warrant if a warrant is not permitted under subdivision (c) or, absent extraordinary circumstances, if the prosecuting attorney requests the issuance of a summons.

RELATED STANDARDS: 10-3.1, 10-3.3(b)

COMMENT

These Rules retain the reference "[magistrate]" where states without unitary court systems may specify the appropriate court of limited jurisdiction. States with unitary systems would specify "court."

This first sentence allows the magistrate to issue a summons in any case in which the magistrate is authorized to issue a warrant. Accord, Standard 10-3.1. Thus the magistrate is permitted to override the prosecutor's determination that a warrant should issue.

But the magistrate ordinarily is not allowed to override the prosecutor's determination that a warrant should not issue. Accord, Standard 10-3.3(b). As explained in the History of Standard:

> In most instances, there will be no reason for the judicial officer to issue a warrant when the prosecutor is satisfied with a summons. But it was deemed unwise to deprive the judicial officer of the power to make an independent assessment of the facts in all cases. Especially in cases where a judicial officer authorizes the arrest of a defendant because of disobedience to the officer's own order, the judicial officer should be permitted to issue a warrant despite the prosecutor's failure to request one.

Finally, the magistrate must issue a summons whenever affidavit or testimony establishes probable cause to believe that an offense was committed and that the defendant committed it, but does not show any of the grounds specified in subdivision (c)(2) below.

This subdivision does not provide, as does the immediately following subdivision on issuance of warrants, for issuance without an information where the prosecutor is not available. There would never be enough urgency in the need for a summons to justify bypassing the prosecutor.

(c) Arrest warrant--prerequisites. A [magistrate] may issue a warrant for the arrest of a defendant if affidavit or testimony shows:

(1) probable cause to believe that a crime has been committed and that the defendant committed it; and

(2) at least one of the following grounds:

(i) the crime was a felony;

(ii) arrest is necessary to prevent imminent bodily harm to the defendant or to another;

(iii) the defendant's whereabouts are unknown and issuance of an arrest warrant is necessary to subject the defendant to the court's jurisdiction; or

(iv) there is substantial likelihood that the defendant will not respond to a summons because the defendant:

(A) previously has failed to appear in response to a citation, summons, or other legal process for a crime; or

(B) lacks sufficient family, employment, residential, or other ties to assure appearance.

RELATED STANDARD: 10-3.2

COMMENT

This subdivision makes issuance of an arrest warrant permissible in the situations specified. Even though the conditions of this subdivision are satisfied, the magistrate may, under subdivision (b) above, issue a summons instead of an arrest warrant.

Clause (2) is based upon Standard 10-3.2.

(d) Arrest warrant--procedure. An information must be filed before the issuance of an arrest warrant unless the [magistrate] finds that a prosecuting attorney is not available and an affidavit states the essential facts constituting the crime charged and the official or customary designation of any statute, ordinance, rule, regulation, or other provision of law that the defendant is alleged to have violated. If a warrant is issued before the filing of an information, an information must promptly be made and filed and a copy furnished to the defendant. Before ruling on a request for an arrest warrant, the [magistrate] may require any individual, other than the defendant, who appears likely to have knowledge relevant to the crime charged to appear

personally and give testimony relative to the crime charged. A [magistrate] who issues a warrant shall state in writing or on the record the reasons for not issuing a summons.

RELATED STANDARDS: 10-3.3(c), 3-3.4(a), (b)

COMMENT

This subdivision requires that an "information" be filed before an arrest warrant may issue or, if the magistrate finds that a prosecuting attorney is not available, promptly after the warrant's issuance. The information, which under these Rules serves the charging function of the traditional "complaint," can be issued only by a prosecuting attorney. Thus, a prosecuting attorney's approval is necessary either before or promptly after issuance of the warrant. See Standard 3-3.4(a), (b). Conduct of a criminal prosecution should be controlled by the prosecuting attorney and a prosecuting attorney should be brought into the process as soon as practicable. See Commentary to ABA Standards 3-2.1, 3-3.4. Allowing the magistrate to issue a warrant in the face of the prosecutor's refusal to issue an information would improperly give the magistrate a prosecutorial function, whereas (except in cases of the necessity presented by the prosecutor's unavailability) the magistrate should be limited to a judicial function. If a local prosecutor improperly refuses to file an information, the proper remedy is resort to the attorney general or to a "special prosecutor" appointed by the attorney general or the governor.

The penultimate sentence allows the magistrate to assure himself or herself when faced with a showing which establishes probable cause but nevertheless leaves question in the magistrate's mind. It also provides aid when a witness will not appear without subpoena. It is intended only to aid the performance of the magistrate's judicial function; it is not intended to give the magistrate any prosecutorial function. The prosecutor may prevent the magistrate from calling a witness by withdrawing the application for an arrest warrant.

The last sentence is based upon Standard 10-3.3(c).

(e) Arrest warrant after citation or summons. The fact that a citation or summons has been issued or served does not preclude the issuance of an arrest warrant under subdivision (c).

COMMENT

This subdivision must be read in light of the stringency of subdivision (c)'s requirements for arrest warrants.

(f) Failure to respond.

(1) Upon citation. If a defendant fails to respond to a citation that has been served, an information has been filed, and affidavit or testimony shows probable cause to believe that a crime has been committed and that the defendant committed it, the [magistrate] may issue a summons or, if permitted under subdivision (c), an arrest warrant.

RELATED STANDARDS: 10-3.1, 10-3.2(a)

COMMENT

This is consistent with Standards 10-3.1 and 10-3.2(a).

(2) Upon summons. If a defendant fails to respond to a summons, the [magistrate] may issue an arrest warrant.

RELATED STANDARD: 10-3.2(a)

COMMENT

This is consistent with Standard 10-3.2(a).

RULE 222. FORM OF CITATION, SUMMONS, OR ARREST WARRANT.

(a) Citation and summons generally. A citation or summons must be in writing and signed by the individual issuing it with the title of the issuer's office. It must state the date of issuance and the municipality or county where issued, specify the defendant's name and designate a time for appearance not more than [ten] days after issuance. [It must inform the defendant that intentional failure to appear in response to the citation or summons without just cause is punishable .....] It must inform the defendant of the right to be represented by a lawyer. If the defendant is charged with a crime punishable by incarceration, the citation or summons must

specify that a defendant who for any reason is unable to obtain a lawyer is entitled to the services of [a court-appointed lawyer] [a public defender] [a legal-aid lawyer], and how to proceed to obtain those services.

RELATED STANDARD: 10-5.7

COMMENT

Regarding the bracketed third sentence, see Standard 10-5.7 ("Intentional failure to appear in court without just cause after pretrial release should be made a criminal offense").

As to the last two sentences' providing for inclusion of information as to the right to counsel, including appointed counsel, see Uniform Juvenile Court Act § 22(d). As to the standards for entitlement to appointed counsel, see Comment to Rule 321(b) below.

(b) Citation by [law enforcement officer]. A citation issued by a [law enforcement officer] must contain the matters specified in subdivision (a), describe the crime charged against the defendant, set forth for the defendant's signature a promise to appear that is specified not to constitute an admission of guilt, and state that if the defendant does not appear at a stated time and place before a [magistrate] an application may be made for the issuance of a summons or arrest warrant. It must inform the defendant that the [officer] will request that an information be filed with the [magistrate] before the end of the [second] business day preceding the date specified for appearance, and that if an information is not so filed the defendant will be relieved from the obligation to appear and will be so notified by the prosecuting attorney.

RELATED STANDARDS: 10-1.2(a), 10-2.2(c)(ii)

COMMENT

This derives from ALI Model Code of Pre-Arraignment Procedure § 130.3(a) (1975). The provision for a signed promise to appear that is specified not to constitute an admission of guilt derives from Standards 10-1.2(a) and 10-2.2(c)(ii).

The prosecutor's duty to either file an information prior to the end of the second business day preceding the date for appearance or to notify the defendant that the defendant need not appear is specified in Rule 231(f)(2) below.

(c) Citation by prosecuting attorney. A citation issued by a prosecuting attorney must contain the matter specified in subdivision (a), have attached a copy of the information, state the date upon or after which the prosecuting attorney intends to file the information, and state that if the defendant does not appear at a stated time and place before a [magistrate] an application may be made for the issuance of a summons or arrest warrant.

COMMENT

The prosecutor's citation specifies when the prosecutor intends to file the information to allow the defendant or the defendant's lawyer to discuss and possibly clear up the matter with the prosecutor before the information is filed.

(d) Summons. A summons must contain the matters specified in subdivision (a), be in the name of the [State] [Commonwealth] [People], have attached a copy of the information, summon the defendant to appear before a [magistrate] at a stated time and place, and state that if the defendant does not so appear an application may be made for the issuance of an arrest warrant.

RELATED STANDARD: 10-1.2(b)

COMMENT

This subdivision is consistent with Standard 10-1.2(b). Like subdivisions (c) and (e), it requires attachment of an "information." See Rule 231 below.

(e) Arrest warrant. An arrest warrant must be in writing and in the name of the [State] [Commonwealth] [People], be directed to all [law enforcement officers] in the State, and

be signed by the [magistrate] with the title and location of the [magistrate's] office and the date of issuance. It must specify the defendant's name or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It must have attached a copy of the information, if filed, or if not filed, a copy of an affidavit supporting its issuance. It may specify the manner in which it is to be executed, conditions of release, and requirements for appearance. It must command that the defendant be arrested and that unless the defendant sooner complies with the specified conditions of release, if any, the defendant be brought before a [magistrate] without unnecessary delay. It must have printed upon it the information specified in Rule 212(b) and (c).

RELATED STANDARD: 10-4.1

COMMENT

The warrant must be directed to all law enforcement officers in the state, but if the magistrate wants it served by a particular officer, the magistrate can deliver the warrant to that officer for service and if the magistrate wants it served by a certain type of law enforcement officer, the magistrate can so specify under this subdivision's authorization to "specify the manner in which it is to be executed."

Although there is no general requirement to attach a copy of any affidavit upon which the warrant was issued, an affidavit must be attached if no information is filed. This is because otherwise there would be no document accompanying the warrant which specifies the crime charged or designates the provision of law allegedly violated. (Rule 221(d) above requires an affidavit to contain these matters when, because of prosecutor unavailability, a warrant is sought before filing of an information.)

The provision that the warrant "may specify the manner in which it is to be executed" takes no position on the substantive questions whether there should be limits as to such things as time of day, announcement of purpose or use of force upon the execution of arrest warrants. Compare ALI Model Code of Pre-Arraignment Procedure §§ 120.6, 120.7 (1975). It merely authorizes the magistrate, acting either because of compulsion of law or because the magistrate deems it advisable, to specify limits as to these or other matters.

This subdivision also says the warrant may specify conditions of release. Although conditions of release should normally be specified, in some situations the magistrate

may feel it is necessary to have the defendant appear so that the magistrate may obtain more information on what the conditions of release should be.

The authorization to specify "requirements for appearance" allows the magistrate to specify the time and place of appearance if the defendant meets the conditions of release.

Regarding the duty to bring the defendant before a magistrate without unnecessary delay, see ABA Standard 10-4.1 and Rule 311 below. This subdivision does not have the warrant specify before what magistrate the defendant must be produced. Usually the officer will prefer to bring the defendant before a magistrate of the court which issued the warrant, and this is permissible if it can be done "without unnecessary delay."

Under the final sentence, the oral warnings specified elsewhere in these Rules are supplemented by written ones to a defendant arrested with a warrant.

## RULE 223. SERVICE OR EXECUTION OF CITATION, SUMMONS, OR ARREST WARRANT.

(a) Service of citation or summons. The citation or summons may be served by a [law enforcement officer] delivering a copy of the citation or summons and of the information, if one has been issued, to the defendant personally or mailing a copy thereof to the defendant by certified mail. If the defendant is a corporation, the citation or summons may be served in any manner provided for service of a summons upon a corporation in a civil action.

RELATED STANDARD: 10-3.4

### COMMENT

In line with Standard 10-3.4, a summons as well as a citation may be served by certified mail.

This subdivision applies to the law enforcement officer's as well as the prosecutor's citation and the summons. (Hence the reference "information, if one has been issued.") Since Rule 221(a)(1) authorizes law enforcement officer's citations to issue only where a warrantless arrest would otherwise be lawful, hand delivery will almost always be used for them. But an officer, busy at an accident scene, who does not have time to fill out a citation, may release a person with the understanding that the officer will mail out a citation the next morning. And an officer who after issuing a citation realizes it is filled out incorrectly may mail out a new

one. It might be preferable for the prosecutor to issue a citation whenever the officer does not issue a citation on the spot, but requiring this might sometimes discourage the officer from proceeding by citation as opposed to arrest.

(b) Execution of arrest warrant. The arrest warrant must be executed by arrest of the defendant as directed in the warrant. The [law enforcement officer] shall provide identification as a [law enforcement officer] unless the [officer's] identity is apparent, and inform the defendant that the defendant is under arrest. The [officer] need not have the warrant in possession at the time of arrest, but in that case the [officer] shall inform the defendant of the crime charged and of the fact that a warrant has been issued. The [officer] shall inform the defendant of the matters specified in Rule 212(b) and (c). The defendant must be furnished without unnecessary delay a copy of the warrant and of the information, if filed, or if not filed, a copy of an affidavit supporting its issuance.

COMMENT

This is based upon ALI Model Code of Pre-Arraignment Procedure §§ 120.3(2), 120.8(1) (1975).

RULE 224. RETURN OF CITATION, SUMMONS, OR ARREST WARRANT.

(a) Citation. If a citation is served and the prosecuting attorney files an information, the prosecuting attorney shall file the original of the citation and proof of the service.

COMMENT

The reference, "[i]f . . . the prosecuting attorney files an information" refers to the possibility that the prosecutor may decide not to go forward with the prosecution and hence not file an information. See Rule 222(c) and Comment above. Only if the prosecutor determines to file an information must the prosecutor file the citation and proof of its service.

(b) Summons. On or before the return day, the officer to whom a summons was delivered for service shall make return thereof to the [magistrate] before whom the summons is returnable.

COMMENT

This derives from Fed. R. Crim. P. 4(d)(4).

(c) Arrest warrant. The officer executing an arrest warrant shall make prompt return of it to the [magistrate] who issued it.

COMMENT

This derives from N.J. Rules of Court 3:3-3(e).

RULE 225. CANCELLATION OF SUMMONS OR ARREST WARRANT.

At the request of the prosecuting attorney, an unserved summons or unexecuted warrant must be returned to the [magistrate] by whom it was issued, who shall cancel it.

COMMENT

This is similar to Fed. R. Crim. P. 4(d)(4).

[RULE 226. SUMMONS OR ARREST WARRANT UPON INDICTMENT.

(a) Issuance.

(1) Summons. After an indictment is returned, the clerk, upon the prosecuting attorney's request, shall issue a summons.

RELATED STANDARD: 10-3.3(b)

COMMENT

Rule 226 generally

Rule 226 in its entirety is set forth in brackets so that it may be omitted by a state whose constitution does not require any use of the indictment.

Subdivision (a)(1)

Paragraph (1) is based upon ABA Standard 10-3.3(b). The prosecutor need not request a summons for a defendant who has already been issued a citation or summons or arrested for the crime charged. See Rule 221(a)(2) above.

(2) Arrest warrant. The court may issue a warrant for the arrest of a defendant against whom an indictment has been returned if the indictment, affidavit, or testimony shows one of the grounds specified in Rule 221(c)(2) for issuance of a warrant. The court may refuse to issue an arrest warrant in any case in which it concludes that a summons should be issued instead of an arrest warrant.

RELATED STANDARDS: 10-3.1, 10-3.2

COMMENT

See Rule 221(c) and Comment above.

(3) Arrest warrant after summons. The fact that a summons has been issued or served does not preclude the issuance of an arrest warrant under paragraph (2).

COMMENT

This corresponds exactly to Rule 221(e) above (arrest warrant after citation or summons upon information).

(4) Failure to respond. If a defendant fails to respond to a summons, the court may issue an arrest warrant.

RELATED STANDARD: 10-3.2(a)

COMMENT

This is based upon Standard 10-3.2(a) and corresponds to Rule 221(f)(2) above (failure to respond to summons upon information).

(b) Form. The form of the summons or arrest warrant must be as provided in Rule 222 but:

(1) it must have attached a copy of the indictment;

(2) the summons must refer to appearance before the court; and

(3) the arrest warrant must be signed by a judge of the court and command that unless the defendant sooner complies with the specified conditions of release, if any, the defendant be brought before the court or before a [magistrate] without unnecessary delay.

RELATED STANDARDS: 10-1.2(b), 10-4.1

COMMENT

Under this subdivision, Rule 222(a), (d), and (e) apply except that, as to Rule 222(d) and (e) the required attachment would be the indictment rather than the information, as to rule 222(d) the summoning would be to appear before "the court" rather than a magistrate, and as to Rule 222(e) the signing would be by a judge of the court rather than by a magistrate and the directed production would be "Before the court or before a magistrate without unnecessary delay." By its reference to Rule 222, this subdivision is consistent with Standards 10-1.2(b) and 10-4.1.

(c) Service or execution. The summons must be served or the warrant executed as provided in Rule 223.

RELATED STANDARD: 10-3.4

COMMENT

In line with Standard 10-3.4, the summons may be served by certified mail.

(d) Return.

(1) Summons. On or before the return day, the officer to whom a summons was delivered for service shall make return of the summons to the court before which the summons is returnable.

COMMENT

Except for specifying "court before which" rather than "[magistrate] before whom," this is identical to Rule 224(b) above (return of summons upon information).

(2) Arrest warrant. The officer executing an arrest warrant shall make prompt return of the warrant to the court that issued it.

COMMENT

Except for specifying "court that" rather "[magistrate] who," this is identical to Rule 224(c) above (return of warrants upon information of affidavit).

(e) Cancellation. At the request of the prosecuting attorney, any unserved summons or unexecuted warrant must be returned and cancelled by the clerk.

COMMENT

This is identical to Rule 225 (cancellation of summons or arrest warrant upon information) except that the latter concludes, "returned to the [magistrate] by whom it was issued, who shall cancel it."

(f) Appearance. Appearance before the court in response to a summons or arrest warrant upon an indictment must conform to Rules 312 and 321.]

COMMENT

This is to make it clear that Rule 312 (when appearance by defendant not in custody required) and Rule 321 (appearance in person, including informing of rights and providing for lawyer) apply to appearances in response to a summons or arrest warrant upon an indictment as well as to appearances in response to a citation, summons, or arrest warrant upon an information.

PART 3

INFORMATION [AND INDICTMENT]

RULE 231. INFORMATION.

(a) Use. All crimes must be prosecuted by information [or, to the extent required by the Constitution of this State, by indictment].

RELATED STANDARD: 3-2.10

COMMENT

Use of a grand jury is unnecessary under these Rules. The grand jury today is generally recognized as performing two major functions in the criminal justice system. First, it serves as a basic "screening agency," reviewing the evidence of the prosecution to insure that no person is charged with an offense in the absence of probable cause (or, in some states, a higher standard of probability). Second, it serves as an investigatory agency through the use of its subpoena power. These Rules are designed to provide better alternatives for performing both of these functions.

With respect to investigations, Rule 432 below provides an investigatory deposition that may be used in much the same fashion as the grand jury subpoena is currently used, but avoids the complexities resulting from the grand jury's combined investigatory and screening function.

Over half of the states currently do not require that the grand jury review the prosecutor's decision to prosecute with respect to most serious felonies. In those states primary reliance for screening is placed upon the preliminary hearing. The Rule 481 motion for pretrial dismissal provides a more effective and efficient means of screening than either grand jury review or the preliminary hearing. See also Rule 345 below (probable cause hearing for defendant who remains in custody because of inability or failure to meet conditions of release).

Aside from its basic screening and investigatory function, the grand jury may perform certain related roles under current practice. In cases of significant political impact, the grand jury's decision to prosecute may serve as a "buffer" between the prosecutor and the public. It seems, however, that the prosecutor should directly bear the responsibility for such decisions. Similarly, insofar as the grand jury might be viewed as a body that could leaven the law's rigidity by refusing to indict, despite adequate evidence, "where prosecution without mercy would result

in a miscarriage of justice," Fletcher, Charge to a Grand Jury, 18 F.R.D. 211, 214 (1955), that responsibility also should be borne by the prosecutor directly.

The grand jury also may be viewed as an agency capable of independent investigatory action--i.e., an agency that may initiate its own investigation into areas in which law enforcement has been lax. That rarely exercised capacity is not sufficient, however, to justify retention of the grand jury. Other, more effective alternatives for investigation of such matters are available, and should be adopted by any states which do not presently provide them. In many states, a prosecutor may be replaced for the purpose of a particular investigation by the attorney general or a special prosecutor appointed by the governor. See, e.g., Standard 3-2.10; Model Department of Criminal Justice Act § 7. The replacement prosecutor would have available the investigatory subpoena provided in Rule 432. It should be noted further that some states have investigatory commissions with independent subpoena power that also play an effective role in this area. See Model Crime Investigating Commission Act.

Some states' constitutions require use of the grand jury in some cases. To accommodate these states, reference is made throughout these Rules to prosecution by indictment. These references are in brackets, to be omitted in states with constitutions not requiring any prosecution by indictment. No specific provisions are included relating to the internal operations of the grand jury since it is anticipated (1) that the Rule 481 motion for pretrial dismissal will be available to review the grand jury's charging decision, (2) the grand jury proceedings will be recorded and subject to discovery under Rule 421, and (3) the grand jury will not be utilized for investigatory purposes in light of the availability of Rule 432.

Indictment aside, the only accusatory instrument provided is the "information," and there is no provision for a "complaint."

The word "information" is utilized rather than some new term like "accusation" or "charge", for two reasons. First, the instrument envisaged is like the traditional "information" except that:

(1) it is to be used for misdemeanor and ordinance as well as felony prosecutions,

(2) it issues at the outset of felony prosecutions rather than normally issuing only after preliminary examination or waiver thereof,

(3) it of itself justifies the issuance of a "prosecutor's citation," is a prerequisite to issuance of a summons, and unless a prosecuting attorney is unavailable, is a prerequisite to issuance of a warrant, and

(4) it is easier to amend.

The second reason for using the term "information" is that some states have constitutional provisions, and many states have statutory provisions, on "informations" which should be permitted to refer to this instrument.

(b) Issuance. The information must be signed by the prosecuting attorney.

RELATED STANDARD: 3-3.4(a)

COMMENT

The reasons for requiring prosecutor involvement at the earliest practicable stage of a prosecution, and reference to the possibility of defining "prosecuting attorney" to include the attorney general and "special prosecutors" are included in the first paragraph of the Comment to Rule 221(d) above. See ABA Standard 3-3.4(a).

This subdivision covers only those situations in which the prosecutor has determined that there should be a criminal prosecution. Prosecutors may dispose of matters referred to them by law enforcement officers and citizens to this stage through investigation and consultation, including consultation with the potential defendant. In pursuing the latter course, the prosecutor should use great care to avoid action inconsistent with the potential defendant's privilege against self-incrimination, restrictions upon compounding crimes, and ethical limitations imposed upon a prosecutor in dealing with an unrepresented potential defendant. See Standards 3-3.1, 3-3.2.

This subdivision does not require that the information be under oath because, unlike the traditional "complaint" which appears to serve two functions, setting forth the charge and providing at least part of the basis for a finding of probable cause for issuance of an arrest warrant, the information under these Rules serves only the charging function.

(c) Form. The information must be a written statement of the essential facts constituting the crime charged. It must state for each count the official or customary designation of any relevant statute, ordinance, rule, regulation, or other provision of law that the defendant is alleged to have violated, the maximum penalty that may be imposed upon conviction, and, as particularly as possible, the time and place of the defendant's alleged commission of the crime. Allegations of fact may be in the alternative. Unnecessary allegations may be disregarded as

surplusage and on motion of either party or on the court's own motion may be stricken from the information by the court.

COMMENT

This derives from Fed. R. Crim. P. 7(c)(1) and (d), with the following exceptions. The second sentence's reference to maximum possible penalty derives from Wis. Stat. Ann. § 970.02(1)(a) (West 1985). The second sentence's reference to the time and place of the defendant's alleged commission of the crime derives from Fla. R. Crim. P. 3.140(d)(3), Mont. Code Ann. § 46-11-40(c)(iv) (1985), and Tex. Code Crim. P. art. 15.05(3) (Vernon 1977), and is desirable in light of notice of alibi, double jeopardy, statute of limitations, and venue considerations. The penultimate sentence's reach is similar to that of Fla. R. Crim. P. 3.140(k)(5) and ALI Code of Criminal Procedure § 176 (1930), which allow "disjunctive or alternative" allegation regarding "acts, means, intents, or results." The last sentence follows Fla. R. Crim. P. 3.140(i) except for substituting "on motion of either party or on the court's own motion" for "on motion of the defendant."

Although not specified herein, any state constitutional requirement of a formal conclusion such as "against the peace and dignity of the state" would, of course, control.

Nothing herein disapproves of incorporation by reference in one count of allegations made in another count, as specifically authorized in Fed. R. Crim. P. 7(c)(1).

(d) Joinder of crimes. Two or more crimes may be charged in the same information in a separate count for each crime.

RELATED STANDARD: 13-2.1(a)

COMMENT

This accords with Standard 13-2.1(a). Unrelated crimes will remain joined only with the defendant's acquiescence, because Rule 472(a) below requires severance of unrelated crimes upon either party's motion.

Even without employing the phrase "whether felonies or misdemeanors or both," see Fed. R. Crim. P. 8(a), there should be no doubt that felonies and misdemeanors may be joined together for trial.

(e) Joinder of defendants. Two or more defendants may be charged in the same information if:

(1) all are charged with accountability for each crime included; or

(2) although all are not charged with accountability for each crime it is alleged that the several crimes charged are based upon:

(i) the same conduct;

(ii) a single criminal episode; or

(iii) a common plan.

RELATED STANDARDS: 13-1.2, 13-2.2(a)

COMMENT

This is based upon Standards 13-1.2 and 13-2.2(a).

Regarding "accountability," the Commentary to Standard 13-2.2(a)(i) explains that "all participants in an offense can be prosecuted together even though the inclusion of some may depend upon accessorial, vicarious, or other principles of criminal liability."

(f) Filing. If the prosecuting attorney determines to go forward with the prosecution, the information must be filed with a [magistrate] in the [county] where the crime was allegedly committed:

(1) before the prosecuting attorney applies for a summons or arrest warrant;

(2) if a citation has issued, before the end of the [second] business day preceding the date for appearance specified therein; if it is not so filed, the defendant need not appear and the prosecuting attorney shall give notice to the defendant so stating; or

(3) if the defendant was arrested without a warrant and not released upon issuance of a citation, by the time of the defendant's appearance before a [magistrate] or promptly

thereafter; failure so to file is ground for release on personal recognizance under Rule 341(a)(1) through (4) upon application of the defendant or on the [magistrate's] own motion.

COMMENT

The opening "if" clause recognizes the prosecutor's discretion not to go forward with the prosecution.

Clause (1) refers to the prosecutor's applying. For the procedure when the prosecutor is unavailable and someone else requests issuance of a warrant, see Rule 221(d) above.

Clause (2) ensures that if an information is not filed the defendant will be notified in time to avoid an unnecessary trip to the court house. See ALI Model Code of Pre-Arraignment Procedure § 130.3(2) (1975).

Clause (3) allows filing of the information "promptly thereafter" as well as "by the time of the defendant's appearance before a [magistrate]," because a prosecutor may not be available by the time of appearance. In that event, Rule requires a writing stating the essential facts constituting the crime charged and designating the provision of law allegedly violated. Compare ALI § 310.1(2) (1975).

(g) Amendment.

(1) Before trial. If trial has not commenced, the prosecuting attorney may amend the information to allege, or to change the allegations regarding, any crime arising out of the same alleged conduct of the defendant that gave rise to any crime alleged or attempted to be alleged in the original information.

COMMENT

Because the information under these Rules is prepared earlier and when the prosecutor has fewer facts than is generally true with the traditional information, pretrial amendment is freely permitted. This provision is similar in concept to Cal. Penal Code § 1009 (West 1985) and Wis. Stat. Ann. § 971.29(1) (West 1985).

(2) After commencement of trial. After commencement of trial, the court may permit the prosecuting attorney to amend the information at any time before verdict or finding if no additional or different crime is charged and substantial rights of the defendant are not thereby prejudiced. An amendment may charge an additional or different crime with the express consent of the defendant.

COMMENT

The first sentence is similar in effect to Colo. R. Crim. P. 7(e) and Mont. Code Ann. § 46-11-403(2) (1985).

The last sentence covers situations where the defendant wishes to stand trial on a different offense (even though it is not a "lesser included offense") as well as where he wishes to plead guilty to a different offense. The latter situation is addressed in La. Code Crim. P. art. 487(B) (West Supp. 1987).

(3) Continuance. The defendant must be granted any extension of time, adjournment, or continuance reasonably necessitated by an amendment.

COMMENT

This is comparable to Cal. Penal Code § 1009 (West 1985), La. Code Crim. P. art. 489 (West 1967), N.J. Rules of Court 3:7-4, N.Y. Crim. P. Law § 100.45(3) (McKinney 1981), and Pa. R. Crim. P. 220.

(h) Dismissal by prosecuting attorney. The prosecuting attorney may dismiss the information or any count thereof by filing a notice of the dismissal. The notice must state the reasons for the dismissal. The dismissal is with prejudice only if jeopardy has attached or the court has approved a stipulation for dismissal with prejudice. While a motion for pretrial dismissal under Rule 481 is pending, the prosecuting attorney may dismiss the information only with consent of the defendant.

RELATED STANDARD: 3-4.3

COMMENT

The first sentence is to the same effect as provision in Alaska R. Crim. P. 43(a) and La. Code Crim. P. art. 691 (West 1981). As stated in 3A C. Wright, Federal Practice & Procedure § 812 (1982):

> It is difficult indeed to see any real or substantial change or benefit achieved by [requiring court approval]. The court is powerless to compel a prosecutor to proceed in a case which he believes does not warrant prosecution. If the court refuses consent to dismiss, the prosecutor in his opening statement to the jury and in his presentation of evidence can indicate to the jury the considerations that should work an acquittal.

The second sentence derives from ABA Standard 3-4.3 and is designed to assure the visibility of the dismissal decision.

Under the third sentence, dismissal with prejudice can occur only at a time of high visibility--after jeopardy has attached or if the court approves. Jeopardy attaches in a jury case when the jury is empaneled and sworn and in a nonjury case when the court begins to hear evidence. Serfass v. United States, 420 U.S. 377, 388 (1975) and cases cited. See Commentary to ABA Standard 15-2.5.

The court approval feature accords with Nev. Rev. Stat. §§ 178.554, 178.562(1) (1985).

The last sentence prevents the motion for pretrial dismissal from being deterred by the prospect that after being educated as to the prosecution's shortcomings, the prosecutor could respond by merely dismissing without prejudice while remedying them. Since Rule 481(a)(2) below allows the motion for pretrial dismissal to be made only after the prosecutor has furnished the Rule 422 notice of the evidence and witnesses the prosecutor intends to use at trial, the prosecutor should not be able to frustrate the Rule 481 motion by dismissing without prejudice, unless the defendant consents.

[RULE 232. INDICTMENT.

(a) Use[; waiver]. Crimes must be prosecuted by indictment to the extent required by the Constitution of this State. [[If permitted by the Constitution of this State,] the defendant, after being informed by the court of the nature of the charge and of the defendant's

rights, may waive prosecution by indictment, whereupon prosecution must be by information. The waiver must be in writing signed by the defendant or made orally in open court.]

COMMENT

Rule 232 generally

Rule 232 in its entirety is set forth in brackets so that it may be omitted by a state whose constitution does not require any use of the indictment.

Subdivision (a)

This is consistent with ABA Standard 13-1.1 (accusatory instrument). The last two sentences, which derive from ALI Model Code of Pre-Arraignment Procedure § 340.1(2) (1975) and N.J. Rules of Court 3:7-2, may be omitted by a state whose constitution does not permit any waiver of indictment. A state adopting the second sentence may omit the first portion thereof if its constitution does not restrict waiver of indictment.

The second sentence's concluding words make it clear that the prosecutor is not justified in seeking an indictment if the defendant has waived prosecution thereby.

(b) Form; joinder; amendment; dismissal. The indictment must be in the same form as the information. It is subject to the same joinder, amendment, and dismissal rules as the information [, but an amendment may not charge an additional or different crime required by the Constitution of this State to be prosecuted by indictment [unless the defendant makes a waiver under subdivision (a)]].]

RELATED STANDARD: 13-1.1

COMMENT

See Rule 231(c), (d), (e), (g), and (h) above.

The bracketed language may be included by states with constitutions so requiring.

PART 4

## PROCEDURES AFTER DETENTION FOR CRIME

### RULE 241. WARNINGS TO BE GIVEN AT PLACE OF DETENTION.

As promptly as reasonable under the circumstances after the arrival of a detained or arrested individual at a place of detention, a [law enforcement officer] or designated person shall inform the individual:

(1) of the crime for which the individual is being held;

(2) that the individual is entitled to the services of a lawyer;

(3) that if for any reason the individual is unable to obtain the services of a lawyer, access to a lawyer's services will be arranged;

(4) that if the individual is unable to pay for the services of a lawyer, the services will be provided;

(5) of any conditions of pre-appearance release;

(6) that the individual will be brought before a [magistrate] without unnecessary delay if not sooner released; and

(7) of the right to communicate by telephone or otherwise with:

(i) relatives or friends; and

(ii) other persons reasonably needed to obtain the services of a lawyer and to meet any conditions of pre-appearance release.

RELATED STANDARD: 5-8.1(a)

#### COMMENT

This Rule applies in all cases, regardless of whether there is attempted any questioning (which would be subject to Rule 243 below).

The reference "or designated person" contemplates that in some localities some or all of the information specified could be given by someone from the public defender, legal aid or court services office. See ABA Standard 5-8.1(a) (3d ed. 1991).

Clauses (1), (5), (6), and (7) derive from ALI Model Code of Pre-Arraignment Procedure § 130.1(2) (1975). Regarding clause (7)(i)'s reference to "relatives or friends," see the Comment to Rule 321(c)(2)(i) below.

Clauses (2), (3), and (4) are in accord with ABA Standard 5-8.1(a) (3d ed. 1991).

RULE 242. OTHER DUTIES AT PLACE OF DETENTION.

(a) Assistance in communication. A [law enforcement officer] or designated person shall make reasonable effort to assist a detained or arrested individual at a place of detention in communicating with:

(1) relatives or friends; and

(2) other persons reasonably needed to obtain the services of a lawyer [including, if appropriate, the [public defender's office] [legal aid service] [lawyer referral service],] and in meeting any conditions of pre-appearance release.

RELATED STANDARDS: 4-2.1, 5-6.1, 5-8.1

COMMENT

This derives from ALI Model Code of Pre-Arraignment Procedure § 130.1(5) (1975) and is consistent with ABA Standards 4-2.1, 5-6.1, and 5-8.1 (3d ed. 1991). Regarding clause (1)'s reference to "relatives or friends," see the Comment to Rule 321(c)(2)(i) below.

(b) Informing others. If a detained or arrested individual at a place of detention appears to be incapable of communicating with a relative, friend, or lawyer, a [law enforcement officer] or designated person shall make reasonable effort to notify a relative or friend of the individual's detention or arrest and of the crime for which the individual is being held.

COMMENT

This is rather similar to Uniform Alcoholism and Intoxication Treatment Act 12(f).

(c) Allowing consultation. A detained or arrested individual at a place of detention must be afforded reasonable opportunity to consult in private with a lawyer and to consult with relatives or friends.

RELATED STANDARD: 4-3.1(b)

COMMENT

This derives from ALI Model Code of Pre-Arraignment Procedure § 140.7(2) (1975) and is in accord with ABA Standard 4-3.1(b) (3d ed. 1991). Regarding the reference to "relatives or friends," see the Comment to Rule 321(c)(2)(i) below.

RULE 243. PROCEDURE FOR QUESTIONING.

(a) Informing; waiver. An individual who is in custody or otherwise deprived of freedom of action in any significant way may not be questioned regarding any crime unless before questioning:

(1) the individual is warned of each of the matters specified in Rule 212(b) and indicates an understanding of each of them; and

(2) having had reasonable opportunity to exercise the rights, the individual expressly, voluntarily, knowingly, and intelligently waives each of them and expresses a willingness to answer questions.

RELATED STANDARD: 5-8.1

COMMENT

This is based upon Miranda v. Arizona, 384 U.S. 436 (1966), and is consistent with ABA Standard 5-8.1 (3d ed. 1991). See ALI Model Code of Pre-Arraignment Procedure § 120.8(1)(d) (1975).

(b) Other matters. If the individual in any manner expresses a desire to consult with a lawyer or for questioning to stop, questioning must stop. The informing of rights, any waiver thereof, and any questioning must be recorded upon a sound recording device whenever feasible or if questioning occurs at a place of detention. Compliance with Rule 311 may not be delayed for the purpose of questioning.

RELATED STANDARD: 10-4.1

COMMENT

The first sentence derives from ALI Model Code of Pre-Arraignment Procedure §§ 120.8(2), 140.8(3) (1975). Regarding resumption of questioning initiated by the defendant, see Oregon v. Bradshaw, 462 U.S. 1039 (1983) and cases cited.

The second sentence is based upon ALI § 130.4(3). See Steffan v. State, 711 P.2d 1156 (Alaska 1985) (unexcused failure to record custodial interrogation at place of detention violates due process under state constitution).

The last sentence is based upon ABA Standard 10-4.1 and ALI § 130.2(1)(b).

RULE 244. RELEASE OF DETAINED OR ARRESTED INDIVIDUALS.

(a) Mandatory release. A [law enforcement officer] responsible for the custody of an individual detained or arrested without an arrest warrant shall promptly release the individual without bringing the individual before a [magistrate] or issuing a citation if it is determined that:

(1) no probable cause exists to believe that the individual committed a crime for which arrest is authorized by law; or

(2) the prosecuting attorney has determined not to issue an information against the individual.

COMMENT

This is based upon ALI Model Code of Pre-Arraignment Procedure §§ 120.9(2), 130.2(1)(a),(6) (1975).

Both this and the next subdivision leave it to the law enforcement department to determine what officers other than the one who initially detained the individual may make the decision to release.

Under clause (1), in many jurisdictions release would be necessary if the individual were arrested for a crime committed out of the officer's presence and it was later determined that the crime was only a misdemeanor.

(b) Permissive release. Unless the [law enforcement officer] responsible for the custody of an individual detained or arrested without a warrant sooner learns that the prosecuting attorney has determined to issue an information against the individual, the [officer] may release the individual in conformity with a departmental enforcement standard without bringing the individual before a [magistrate] or issuing a citation.

RELATED STANDARDS: 1-4.1, 1-4.2, 1-4.3

COMMENT

This is similar to Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Police Standard 4.3 (1973). Compare Cal. Penal Code § 849(b) (West 1985). Release after arrest is sufficiently similar to non-arrest (as to which police discretion is prevalent) to make this type of provision desirable. As stated in ABA Standard 1-4.1, "The nature of the responsibilities currently placed upon the police requires that the police exercise a great deal of discretion--a situation that has long existed, but is not always recognized." Absent this kind of provision, an officer may be hesitant to release under subdivision (a) above even though the officer believed release was desirable because of a fear it might be construed as admitting false arrest.

The requirement of "conformity with a departmental enforcement standard" tends to insure uniform and equal application, although it is recognized that a standard might specify

that officers have discretion in the case of certain types of crimes. See ABA Standards 1-4.2 and 1-4.3. A departmental standard may be based upon the fact that the prosecutor does not prosecute certain types of cases.

# ARTICLE III

# APPEARANCE

## PART 1

## OBTAINING APPEARANCE

### RULE 311. PRODUCTION BEFORE [MAGISTRATE].

(a) Production. A detained or arrested individual who is not sooner released must be brought before a [magistrate] without unnecessary delay. If an information has not then been filed with the [magistrate], the [law enforcement officer] shall file with the [magistrate] a writing charging the individual with commission of a designated crime, containing a statement of the essential facts constituting the crime, and specify the official or customary designation of any statute, ordinance, rule, regulation, or other provision of law the individual is alleged to have violated.

RELATED STANDARD: 10-4.1

COMMENT

The first sentence is based upon Standard 10-4.1.

The second sentence is designed to assure that production will not be delayed because a prosecutor cannot be found or because an information has been filed with a magistrate other than the one before whom the person is brought. It is expected that the officer making the "writing" in lieu of an information will often telephone the prosecutor (even if in another part of the state) to discuss what should be set forth therein. See ALI Model Code of Pre-Arraignment Procedure §§ 130.2(5), 310.1(2) (1975).

(b) Limitations upon delay. A detained or arrested individual must be brought before the [magistrate] within [six] hours after the individual's initial detention, excluding time between [6 p.m. and 7 a.m.], unless extraordinary circumstances make presentation within the time allowed impractical. Even if within [six] hours, presentation may not be delayed for:

(1) an information to be filed with the magistrate;

(2) the purpose of questioning under Rule 243; or

(3) investigative purposes, except as permitted under subdivision (c).

RELATED STANDARD: 10-4.1

COMMENT

This is based upon Standard 10-4.1. In a jurisdiction with magistrates available around the clock, the first appearance may be a rather informal proceeding, whereas in a jurisdiction with magistrates available only during daytime hours it may be a more formal courtroom proceeding. In the latter context, the important point is that the defendant be brought before the magistrate, not that the magistrate actually start dealing with the defendant's case within the six hours. Standard 10-4.1's Commentary states in part:

> [A]lthough the right to prompt presentment has long been recognized, enforcement of that right has been hampered by the inevitable ambiguity of phrases like "without unnecessary delay" contained in many codes. This standard attempts to give content to such phrases by setting an outside limit on permissible delay. In so doing, it follows the National Advisory Commission on Criminal Justice Standards and Goals, the American Law Institute, and the National Association of Pretrial Service Agencies, which have also sought to define the right in terms of a specified number of hours. Moreover, the specific standard--presentment within six hours of arrest except when this would require presentment during nighttime hours--is similar to the standards suggested by the National Advisory Commission, by the National Association of Pretrial Service Agencies, and by Congress itself. In some rural jurisdictions, it may not be possible to comply immediately with a six-hour rule. Nonetheless, jurisdictions should establish a six-hour standard as the goal ultimately to be achieved. Moreover, even if that goal cannot now be reached, every jurisdiction should set some absolute time limitation on the period of permissible delay.

(c) Permissible delay. Presentation may be delayed for:

(1) fingerprinting, photographing, and other booking procedures authorized by law which are promptly performed;

(2) an identification procedure which must be immediately performed involving a witness who is likely to die before the detained or arrested individual can be brought before a [magistrate] and an order under Rule 434(b) can be executed; or

(3) a procedure which must be immediately performed to take from the individual's body nontestimonial evidence which will be lost, altered, or materially dissipated before the individual can be brought before a [magistrate] and an order under Rule 434(b) can be executed.

RELATED STANDARD: 10-4.1

COMMENT

Clause (1) is based upon Standard 10-4.1's Commentary, which states, "The Standard anticipates that the defendant will first be transported to the police station where the defendant will be booked and held while routine administrative procedures are followed."

Clauses (2) and (3) allow delay for specific truly necessary investigative measures as minimal exceptions to the general principle recognized in subdivision (b)(3) above and stated in Standard 10-4.1, "[u]nder no circumstances should the accused's first appearance be delayed in order to conduct . . . in-custody investigation."

(d) Release. If a detained or arrested individual is not brought before a [magistrate] as promptly as this Rule requires [and the individual is eligible for release]:

(1) a [law enforcement officer] responsible for the individual's custody shall release the individual with a citation under Rule 221(a)(1); or

(2) the [magistrate] before whom the individual is brought shall release the individual on personal recognizance under Rule 341(a)(1) through (4).

RELATED STANDARD: 10-4.1

COMMENT

This is based upon Standard 10-4.1 and ALI Model Code of Pre-Arraignment Procedures § 310.1(1) (1975). The introductory portion's bracketed language is broad enough to exclude defendants charged with crimes that are nonbailable under state constitutional or statutory provisions (see Comment to Rule 321(c) below) and defendants who have been preventively detained under applicable law (see Standards 10-4.2(f), 10-5.4, and 10-5.10).

RULE 312. APPEARANCE BY DEFENDANT NOT IN CUSTODY.

A defendant not in custody shall appear in person at the time and place specified in the citation, summons, or conditions of release, but the defendant is deemed to have appeared if the defendant's lawyer, on or before that time, files a statement that the lawyer represents the defendant and that the defendant agrees to the conditions of release specified in Rule 341(a)(1) through (4).

COMMENT

Since the purposes of first appearance are to inform the defendant of certain matters and to provide for counsel and pretrial release, appearance is unnecessary if the defendant is not in custody and has a lawyer who can do the informing.

The specified filing is deemed an appearance for purposes of Rule 331 (questioning after appearance) and Rule 411 (setting times for discovery and other pretrial procedures).

RULE 313. PROCEDURE UPON DEFENDANT'S LAWYER FILING STATEMENT.

Upon receiving a statement filed under Rule 312, the [magistrate] shall furnish the defendant's lawyer a copy of any document filed with the [magistrate] in support of the charge. [If the next proceeding is to be before another court, the [magistrate] shall transmit to that court

all documents in the case, but transcripts of recorded proceedings must be made or transmitted only if requested by that court.]

COMMENT

The first sentence parallels provisions in Rule 321(a) below. The bracketed last sentence is identical to Rule 321(d) below, and would be omitted in a state with a unitary court system.

PART 2

APPEARANCE IN PERSON

RULE 321. APPEARANCE IN PERSON.

(a) Informing defendant. If a defendant appears in person, the [magistrate] shall furnish the defendant a copy of any document filed with the [magistrate] in support of the charge and inform the defendant:

(1) of the charge and the maximum possible penalty that may be imposed upon conviction;

(2) of the right to remain silent, that anything the defendant says, orally or in writing, will be used against the defendant, and that if the defendant has made a statement the defendant has the right not to say anything further;

(3) of the right to be assisted by a lawyer at every stage of the proceedings;

(4) that the defendant will not be questioned by any person regarding any crime unless the defendant consents and that the defendant has the right to consult with a lawyer before being questioned or saying anything and to have a lawyer present during any questioning;

(5) that if at any time during any questioning regarding any crime the defendant expresses a desire to consult with a lawyer or for questioning to stop, questioning will stop; and

(6) of the general nature of the further proceedings to be taken in the case.

RELATED STANDARD: 10-4.2(b), (c)

COMMENT

This is based upon ABA Standard 10-4.2(b), (c) and ALI Model Code of Pre-Arraignment Procedure § 310.1(3), (4) (1975).

(b) Providing for lawyer. If the defendant has no lawyer and is charged with a crime punishable by incarceration or a crime conviction of which may be used in a later proceeding as a basis for incarceration, the [magistrate] shall inform the defendant that if for any reason the defendant is unable to obtain the services of a lawyer, one will be appointed, and that if the defendant is unable to pay for the services of a lawyer, the services will be provided. If the [magistrate] so informs the defendant and does not accept a waiver of counsel under Rule 711, the [magistrate] shall:

(1) direct the defendant to retain a lawyer at the defendant's own expense and inform the defendant how to do so;

(2) if the defendant is financially unable to retain a lawyer, appoint or arrange for the prompt appointment of a lawyer; or

(3) if the defendant is otherwise unable to retain a lawyer, assist the defendant in obtaining a lawyer and, if other alternatives are unavailable, appoint or arrange for

the prompt appointment of a lawyer who is entitled to reasonable compensation from the defendant.

RELATED STANDARDS: 5-5.1, 10-4.2(b)(ii)

COMMENT

This is in accord with Standard 5-5.1 (3d ed. 1991) and Standard 10-4.2(b)(ii).

The inability to obtain a lawyer's services covered by this subdivision is not limited to financial inability. Although inability to obtain counsel is usually financial, sometimes it is for other reasons, the most notable of which is the unpopularity of the defendant or the defendant's cause.

If a nonindigent defendant does not make a competent waiver of counsel under Rule 711, it is not objectionable to direct the defendant to obtain a lawyer at the defendant's own expense, see United States v. Sampson, 161 F.Supp. 216, 217 (D.D.C. 1958), or to appoint a lawyer who shall be entitled to reasonable compensation from the defendant. See Kamisar & Choper, The Right to Counsel in Minnesota: Some Field Findings and Legal Policy Observations, 48 Minn. L. Rev. 1, 27 (1963); Note, The Right of an Accused to Proceed Without Counsel, 49 Minn. L. Rev. 1133, 1148 n.90 (1965).

Regarding appointments under clause (3), good practice would be to appoint from a revolving list, e.g., one provided by a bar association. If the defendant and the defendant's lawyer cannot agree on the fee, it should be fixed by the court.

(c) Conditions of release; informing defendant in custody. The [magistrate] shall:

(1) prescribe conditions of release under Rule 341 [if the defendant is eligible for release], but if the defendant is in custody under an arrest warrant from a court of another [county], appears without a lawyer, and does not make a waiver of counsel that is accepted under Rule 711, the [magistrate] may not set monetary conditions with which the defendant is unable to comply without first hearing from a lawyer provided under subdivision (b); the [magistrate] may provide that the lawyer need assist the defendant only for purposes of this appearance;

(2) if the defendant is not released from custody, inform the defendant of the right to communicate by telephone or otherwise with:

(i) relatives or friends; and

(ii) other persons reasonably needed to obtain the services of a lawyer and to meet any conditions of release;

(3) if the defendant is in custody under an arrest warrant of a court of another [county] and is not released from custody, order that if the defendant does not sooner meet the conditions of release the defendant must be transported promptly to the [sheriff] of the [county] of the court that issued the warrant; and

(4) if the defendant [is eligible for release and] is not released from custody, advise the defendant of the right to a hearing on conditions of release under Rule 344 and, if the hearing will be held, set the time for the hearing.

RELATED STANDARD: 10-4.2(b)(iii), (e)

COMMENT

This is based upon Standard 10-4.2(b)(iii), (e) and ALI Model Code of Pre-Arraignment Procedure § 310.1(4)(b), (7) (1975).

The bracketed words in clauses (1) and (4) would be adopted by a state in which a defendant may be ineligible for release because the defendant has been preventively detained, see, e.g., Ariz. Const. art. II, 22(3); Cal. Const. art. I, 12; Colo. Const. art. II, 19(b); Fla. Const. art. I, 14; Ill. Const. art. I, 9; Va. Code Ann. 19-2-120 (1983), or because, e.g., the defendant is charged with a capital crime and the proof is evident or the presumption great, see, e.g., Ariz. Const. art. II, 22(1); Colo. Const. art. II, 19(a); Ky. R. Crim. P. 4.02; Ohio R. Crim. P. 46(A); Utah Code Ann. 77-20-1 (1984); Wyo. R. Crim. P. 8(a). Compare Fla. Const. art. I, 14 (defendant charged with crime punishable by death or life imprisonment and proof is evident or presumption great). In clause (1), the purpose of the special provision for the defendant in custody under an arrest warrant from a court of another county is to minimize the burden upon the defendant and the state of transporting the defendant in custody away from the area of the arrest. Compare

Commentary to Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts Standard 4.5 (1973):

In clause (1), the purpose of the special provision for the defendant in custody under an arrest warrant from a court of another county is to minimize the burden upon the defendant and the state of transporting the defendant in custody away from the area of the arrest. Compare Commentary to Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts Standard 4.5 (1973):

> If the accused has an attorney who cannot appear at the hearing, if he needs time to employ counsel, of if he professes indigency and the question of entitlement to counsel on the basis of indigency cannot be resolved immediately, the court should appoint counsel for the limited purpose of representing the accused at this hearing.

Clause (2)(i)'s, reference to "relatives and friends" derives from Standard 10-4.2(b)(iii) (at the first appearance steps should be taken to ensure that the defendant is advised of the "right to communicate with counsel, family, and friends, and that, if necessary, reasonable means will be provided to enable defendant to do so"). The defendant is not entitled to communicate with an unreasonably large number of relatives and friends; Rule 242(a) above requires only "reasonable" effort to assist an arrestee's communication with relatives or friends.

(d) Transmittal of documents. If the next proceeding is to be before another court, the [magistrate] shall transmit to that court all documents in the case, but transcripts of recorded proceedings must be made or transmitted only if requested by that court.

COMMENT

In a state with a unitary court system, the only application of this subdivision would be where a defendant arrested with a warrant is brought before a court other than that which issued the warrant.

In many cases it will not be necessary to have prepared a written transcript of the first appearance proceedings or of the recorded testimony, if any, taken as a basis for issuing a summons or arrest warrant.

PART 3

QUESTIONING AFTER APPEARANCE

RULE 331. QUESTIONING AFTER APPEARANCE.

Unless the defendant's lawyer consents or is present at the questioning, or the defendant has waived counsel under Rule 711, no [law enforcement officer] or prosecuting attorney, or agent of either, may question a defendant after the defendant's appearance and during the pendency of the prosecution:

(1) regarding any crime if the defendant is in custody; or

(2) if the defendant is not in custody, regarding:

(i) the crime charged;

(ii) any related crime as defined under Rule 471(a); or

(iii) any crime of the same or similar character committed before the defendant appeared.

RELATED STANDARD: 3-4.1(b)

COMMENT

This is based upon Standard 3-4.1(b) (unprofessional for prosecutor to engage in plea discussions directly with represented defendant without counsel's approval), ABA Model Rules of Professional Conduct Rule 4.2 (lawyer shall not communicate about subject of representation with represented party unless other lawyer consents or authorized by law), ABA Model Code of Professional Responsibility DR 7-104(A)(1) (same), and Massiah v. United States, 377 U.S. 201, 206 (1964) (violates sixth amendment to use against defendant "incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel").

The effect of this Rule is not limited to situations where the defendant in fact already had counsel. Unless the magistrate accepts a waiver of counsel, the magistrate must provide for the defendant to receive the assistance of counsel (either by directing the defendant to

obtain counsel, assisting the defendant in obtaining counsel, or appointing or arranging for the appointment of counsel), and the mere accident of when counsel is in fact obtained should not bear upon police ability to obtain a statement.

## PART 4

## RELEASE BEFORE AND DURING TRIAL

### RULE 341. RELEASE BEFORE AND DURING TRIAL

(a) Release on personal recognizance defined. "Release on personal recognizance" means release of a defendant without monetary conditions under an order to:

(1) appear at all appropriate times;

(2) report any change of address to the [court];

(3) refrain from committing any crimes;

(4) refrain from intimidating or otherwise interfering with potential witnesses; and

(5) obey any additional conditions the [magistrate] may impose under subdivision (f).

RELATED STANDARD: 10-1.2(c)

#### COMMENT

Except for clause (2), this subdivision is based upon Standard 10-1.2(c). In clause (2), a jurisdiction might specify "release agency" rather than "court."

Clause (4) does not prohibit legitimate contacts with potential witnesses.

(b) Release without investigation. If a defendant is charged with a misdemeanor or appears in response to a citation or summons, the [magistrate] shall release the defendant on personal recognizance without a release investigation under subdivision (c) unless:

(1) the prosecuting attorney requests a release investigation; or

(2) a release investigation is ordered on the [magistrate's] own motion.

RELATED STANDARD: 10-4.3

COMMENT

This is based upon Standard 10-4.3's first sentence.

(c) Release investigation.

(1) When conducted. A release investigation must be conducted at or before the time of the first appearance of a defendant [eligible for release] if:

(i) requested or ordered under subdivision (b); or

(ii) the defendant is in custody and charged with a felony unless:

(A) the prosecuting attorney gives notice that the prosecuting attorney does not oppose release on personal recognizance; or

(B) the defendant, after consulting with or waiving counsel, waives the right to the investigation.

RELATED STANDARDS: 10-4.3, 10-4.4(a)

COMMENT

This is based upon Standard 10-4.3's second sentence and Standard 10-4.4(a). Regarding the introductory portion's bracketed reference to eligibility for release, see Comment to Rule 321(c) above.

(2) How conducted. The release investigation must be undertaken by the release agency established or designated under Rule 342. The defendant may not be questioned about pending charges.

RELATED STANDARD: 10-4.4(b), (c)

COMMENT

This is based upon Standard 10-4.4(b) and (c).

(3) Recommendations. The release agency shall report its findings and make recommendations to the [magistrate] concerning any conditions that should be imposed on the defendant's release. The report must be furnished to the parties and the [magistrate] as soon as possible.

RELATED STANDARD: 10-4.4(e)

COMMENT

This is based upon Standard 10-4.4(e)'s first and third sentences.

(d) Factors to be considered. In setting conditions of release [for a defendant eligible for release], the [magistrate] shall consider relevant factors including:

(1) the defendant's employment status and history;

(2) the nature and extent of the defendant's family ties and relationships;

(3) the length and character of the defendant's past and present residence;

(4) the defendant's reputation, character, and mental condition;

(5) the identity of individuals who would vouch for the defendant's reliability or who agree to assist the defendant in attending court at appropriate times;

(6) the defendant's previous criminal record, if any, and, if previously released pending trial, whether the defendant appeared as required;

(7) the nature of the current charge, the apparent probability of conviction, and the likely sentence, insofar as those factors are relevant to the risk of nonappearance;

(8) any other factors relevant to the defendant's ties to the community or the risk of the defendant's intentional failure to appear;

(9) the assets available to the defendant to meet any monetary conditions upon release; and

(10) any facts indicating the likelihood of violations of law if the defendant is released without restrictions.

RELATED STANDARDS: 10-4.4(d), 10-5.1(b), 10-5.3(e)

COMMENT

This new provision is based not just upon Standard 10-4.4(d)'s list of factors to be included in the pre-first-appearance (release) inquiry, but also upon Standard 10-5.1(b)'s list of factors for the judicial officer to consider in determining whether there is substantial risk of nonappearance and Standard 10-5.3(e)'s list of factors for the judicial officer to consider in setting monetary conditions.

Regarding the introductory portion's bracketed reference to eligibility for release, see Comment to Rule 321(c) above.

(e) Release on personal recognizance. [If the defendant is eligible for release,] the [magistrate] shall release the defendant on personal recognizance under subdivision (a)(1) through (4) unless the [magistrate] finds that there is a substantial risk of nonappearance or a need for additional conditions under subdivision (f). In determining whether there is a substantial risk of nonappearance, the [magistrate] shall consider the factors specified in

subdivision (d)(1) through (8). If the [magistrate] finds that release on personal recognizance is unwarranted, the [magistrate] shall state in the record the reasons for the finding and, if the defendant appeared pursuant to a citation or summons, any new or newly discovered information unavailable to the official issuing the citation or summons which justifies more stringent conditions of release.

RELATED STANDARDS: 10-4.3, 10-5.1

COMMENT

This is based upon Standard 10-5.1 and the last sentence of Standard 10-4.3. Regarding the first sentence's bracketed reference to eligibility for release, see the Comment to Rule 321(c) above.

(f) Additional nonmonetary conditions. If the [magistrate] determines from affidavit or testimony, or a [magistrate] [or grand jury] has determined, that there is probable cause to believe that the defendant has committed the crime charged, the [magistrate], upon finding that release on personal recognizance without conditions in addition to those specified in subdivision (a)(1) through (4) is unwarranted, shall impose the least onerous one or more of the following conditions necessary to ensure the defendant's appearance in court, protect the safety of the community, and prevent intimidation of witnesses and interference with the orderly administration of justice:

(1) release the defendant to the custody of the release agency established or designated under Rule 342;

(2) release the defendant into the care of some other qualified person or organization responsible for supervising the defendant and assisting the defendant in appearing in court, who shall maintain close contact with the defendant, assist the defendant in making

arrangements to appear in court, and, if appropriate, accompany the defendant to court, but may not be required to be financially responsible for the defendant or to forfeit money if the defendant fails to appear in court;

(3) impose reasonable restrictions on the defendant's activities, movements, associations, and residences, including prohibitions against the defendant approaching or communicating with particular persons or classes of persons and going to designated geographical areas or premises;

(4) prohibit the defendant from possessing any dangerous weapon or using intoxicating liquor or a controlled substance; or

(5) impose any other reasonable restriction that will ensure the defendant's appearance, protect the safety of the community, and prevent intimidation of witnesses and interference with the orderly administration of justice.

RELATED STANDARDS: 10-1.3(b), 10-5.2

COMMENT

Except for the provision regarding probable cause, this is based upon Standard 10-5.2. See also Standard 10-1.3(b), which specifies:

> Constitutionally permissible nonmonetary conditions should be employed to assure the defendant's appearance at court and to prevent the commission of criminal violations while the defendant is at liberty pending adjudication.

(g) Monetary conditions.

(1) Prerequisites. The [magistrate] may not set monetary conditions in addition to any nonmonetary conditions under Rule 341(f) unless:

(i) the [magistrate] determines from affidavit or testimony, or a [magistrate] [or grand jury] has determined, that there is probable cause to believe that the defendant committed the crime charged; and

(ii) the [magistrate] finds that no other conditions of release will reasonably ensure the defendant's appearance in court.

RELATED STANDARD: 10-5.3(a), (b), (c)

COMMENT

This is based upon Standard 10-5.3(a), (b), and (c).

(2) Kind of bond. Upon finding that monetary conditions should be set, the [magistrate] shall require the first of the following alternatives which, in conjunction with any nonmonetary conditions, the [magistrate] finds sufficient to provide reasonable assurance of the defendant's appearance:

(i) execution of an unsecured bond, either signed by other persons or not;

(ii) execution of an unsecured bond accompanied by the deposit of cash or securities equal to ten percent of the bond's face amount, which deposit must be returned at the conclusion of the proceedings if the defendant has not defaulted in the performance of the bond's conditions; or

(iii) execution of a bond secured by the deposit of the full amount in cash or other property or by the obligation of qualified, uncompensated sureties.

RELATED STANDARD: 10-5.3(d)

COMMENT

This is based upon Standard 10-5.3(d).

(3) Amount of bond. The [magistrate] shall set monetary conditions no higher than the amount reasonably required to ensure the defendant's appearance in light of the factors specified in subdivision (d)(1) through (9).

RELATED STANDARD: 10-5.3(e), (f)

COMMENT

This is based upon Standard 10-5.3(e). See also Standard 10-5.3(f), which specifies:

> Monetary conditions should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge but should be the result of an individualized decision, taking into account the special circumstances of each defendant.

(h) Informing released defendant. A [magistrate] authorizing the release of a defendant under this Rule shall inform the defendant:

(1) of the conditions imposed;

(2) of the consequences applicable to a violation of a condition of release; and

(3) that an arrest warrant may be issued immediately upon a violation of a condition of release.

RELATED STANDARD: 10-1.2(d)

COMMENT

This is based upon 18 U.S.C.A. § 3142(h) (West Supp. 1987), and is consistent with Standard 10-1.2(d).

(i) Change in conditions of release. On motion of the prosecuting attorney or defendant alleging facts bearing on the conditions of the release not known or considered when a defendant charged with a crime punishable by incarceration was issued a summons or citation or when the [magistrate] imposed the conditions of release, the [magistrate or the court in which the case is pending] shall hold a hearing to determine whether the conditions of release should be changed. If the motion is by the prosecuting attorney and affidavit or testimony shows probable cause to believe that the defendant would not otherwise appear at the hearing, the [magistrate or court] by order may direct a [law enforcement officer] to bring the defendant forthwith before the [magistrate or court]. If a defendant who testifies at the hearing does not testify at trial, the defendant's testimony at the hearing is not admissible at trial. If the defendant testifies at trial, the defendant's testimony at the hearing is admissible only to impeach the defendant.

RELATED STANDARDS: 10-5.6(a), 10-5.8(a), 10-5.10(c)

COMMENT

The first sentence is based upon Standard 10-5.6(a). The second sentence is similar to Standard 10-5.8(a). The last two sentences are similar to Standard 10-5.10(c) (admissible against defendant only in perjury prosecution).

Violation of conditions of release would justify changing the conditions of release under this subdivision. As explained in the Prefatory Note above, the Conference determined not to include preventive detention provisions in these Rules.

(j) Informing defendant in custody. If the [magistrate or court] sets conditions that result in the defendant being kept in custody, the [magistrate or court] shall inform the defendant of the right to a hearing on conditions of release under Rule 344 and, if the hearing is not waived by a defendant represented by counsel, set the time for the hearing.

COMMENT

This applies whether the conditions the defendant cannot meet were set initially or upon a change of conditions under subdivision (i) above.

(k) Information considered. Information offered in proceedings under this Rule need not conform to the rules of evidence.

COMMENT

This is based upon Unif. R. Evid. 1101(b)(3).

RULE 342. RELEASE AGENCY.

(a) Duties. Each [court], by local rule, shall establish, or designate a person or existing agency to serve as, a release agency to monitor and assist released defendants. The court may assign the agency appropriate duties, including to:

(1) conduct release investigations and formulate detailed guidelines to be utilized in making release recommendations under Rule 341(c);

(2) provide intensive supervision for defendants released into its custody;

(3) operate or contract for the operation of residential half-way houses, addict and alcoholic treatment centers, counseling services, and other appropriate facilities for the care or custody of released defendants;

(4) promptly inform the court of all apparent violations of conditions of release or arrests of defendants released into its custody and under its supervision and recommend appropriate modifications of conditions of release;

(5) supervise other agencies that serve as custodians for released defendants and advise the court as to the eligibility, availability, and capacity of those agencies;

(6) assist released defendants in securing any necessary employment and medical, legal, or social services; and

(7) remind released defendants of their court appearance dates and assist them in getting to court.

RELATED STANDARD: 10-1.4

COMMENT

This subdivision is based upon Standard 10-1.4.

(b) Disclosure of information. Information obtained from or concerning the defendant by a release agency must not be disclosed to any person other than the defendant's lawyer, except as necessary to advise the appropriate [magistrate or court] concerning conditions of release.

COMMENT

This is based upon Pa. R. Crim. P. 4008(b).

RULE 343. APPROVAL, FORFEITURE, AND SATISFACTION OF UNDERTAKING.

(a) Justification of sureties. Every surety on an undertaking shall justify under oath or affirmation and may be required to describe the property by which the surety proposes to justify and the incumbrances thereon, the number and amount of other undertakings entered into by the surety and remaining undischarged and all the surety's other liabilities. No undertaking may be approved unless the surety thereon appears to be qualified.

COMMENT

This is based upon Fed. R. Crim. P. 46(d).

(b) Forfeiture.

(1) Declaration. If there is a breach of a condition of an undertaking, the court may declare a forfeiture. The court shall cause notice of the forfeiture to be mailed forthwith to the defendant and the defendant's sureties, if any, at their last known address.

COMMENT

This is similar to Fed. R. Crim. P. 46(e)(1).

(2) Vacating forfeiture. The court may direct that a forfeiture be vacated in whole or in part, upon conditions the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

COMMENT

This is similar to Fed. R. Crim. P. 46(e)(2).

(3) Enforcement. If a forfeiture is not vacated within [one month] after declaration of the forfeiture, the court on motion shall direct the entry of a judgment by default. By entering into an undertaking an obligor submits to the court's jurisdiction and irrevocably appoints the [clerk of the court] as agent upon whom any papers affecting the obliger's liability may be served. The liability may be enforced on motion without an independent action. The motion and any notice of the motion the court prescribes may be served on the [clerk of court], who shall forthwith mail copies to each obligor at the obliger's last known address.

COMMENT

This is similar to Fed. R. Crim. P. 46(e)(3).

(4) Remission. After entry of judgment, the court may remit the forfeiture in whole or in part under the conditions for vacating a forfeiture under paragraph (2).

COMMENT

This is similar to Fed. R. Crim. P. 46(e)(4).

(c) Exoneration. If the conditions of an undertaking have been satisfied or a forfeiture has been vacated or remitted in whole, the court shall exonerate the obligors and release any property deposited. If a forfeiture has been vacated or remitted in part, the court shall correspondingly exonerate the obligors and release part of any property deposited. A surety on an undertaking may be exonerated and obtain a release of property deposited at any time by a deposit of cash in the amount of the undertaking or by a surrender of the defendant into custody.

COMMENT

This is similar to Fed. R. Crim. P. 46(f).

RULE 344. HEARING ON CONDITIONS OF RELEASE.

(a) When held. Unless waived by a defendant represented by counsel, the [magistrate] shall conduct a hearing on conditions of release not later than five days after the commencement of custody of a defendant who has not met conditions of release. The defendant must be released on personal recognizance under Rule 341(a)(1) through (4) if an order under subdivision (e) is not filed within five days after the custody has commenced unless:

(1) the defendant consents to a continuance; or

(2) the [magistrate] grants one or more continuances of not more than two days each because extraordinary circumstances exist and the delay is indispensable to the interests of justice.

RELATED STANDARD: 10-5.4(b)(ii)(B), (iv)

COMMENT

This is similar to Standard 10-5.4(b)(ii)(B), (iv). The defendant's lawyer may enter the waiver specified in the first sentence. Unless waived by the defendant, the hearing should be before a judicial officer of at least equal rank to the one who set the conditions of release.

(b) Procedures at hearing. Upon request of either party, process must be issued to summon witnesses. The prosecuting attorney shall offer evidence in support of conditions of release. The defendant may offer evidence.

RELATED STANDARD: 10-5.10(a)

COMMENT

This is similar to Standard 10-5.10(a).

(c) Evidence. The [magistrate] need not exclude evidence on the ground that it was acquired by unlawful means. Hearsay evidence may be received, if there is a substantial basis for believing that:

(1) the source of the evidence related by the witness is reliable; and

(2) there is a factual basis for the information furnished.

RELATED STANDARD: 10-5.10(c)

COMMENT

This subdivision is similar to W. Va. R. Crim. P. 46(h)(4). It does not conflict with Standard 10-5.10(c)'s provision, "At any preventive detention hearing . . . the rules governing admissibility of evidence in criminal trials should apply," because the Rule 344 hearing on conditions of release is not a detention hearing within the meaning of Standard 10-5.10. As explained in the Prefatory Note above, these Rules include no provision on preventive detention. The Rule 344 hearing cannot yield an order of detention (see Standard 10-5.10(f)(ii)), but only conditions of release (see subdivision (e) below). Rules of evidence commonly go beyond this subdivision's limited allowance of hearsay to specify inapplicability of the rules of evidence (except regarding privileges) to "proceedings with respect to release on bail or otherwise." See Unif. R. Evid. 1101(b)(3) and Colorado, Delaware, Guam, Iowa, Minnesota, Nebraska, New Hampshire, North Carolina, North Dakota, Oregon, Utah, Washington, Wisconsin, and Wyoming provisions described at 13A U.L.A. 861-65 (1986).

(d) Testimony by defendant. If a defendant who testifies at the hearing does not testify at the trial, the defendant's testimony at the hearing is not admissible at trial. If the defendant testifies at trial, the defendant's testimony at the hearing is admissible only to impeach the defendant.

RELATED STANDARD: 10-5.10(c)

COMMENT

This is similar to Standard 10-5.10(c), which specifies "The testimony of a defendant [at a preventive detention hearing], including evidence derived from that testimony, should not be admissible in any other judicial proceedings against the defendant other than a prosecution for perjury based upon that testimony." It is mandated under Simmons v. United States, 390 U.S. 377 (1968).

(e) Order. When the hearing is concluded, the [magistrate] shall order the least onerous conditions under Rule 341 necessary to ensure the defendant's appearance in court, protect the safety of the community, and prevent intimidation of witnesses and interference with the orderly administration of justice.

RELATED STANDARD: 10-5.10(e)(ii)

COMMENT

This is similar to Standard 10-5.10(e)(ii).

RULE 345. PROBABLE CAUSE HEARING.

(a) When held. On motion of a defendant who remains in custody because of inability or failure to meet conditions of release imposed after a hearing under Rule 344(e), the [magistrate] shall conduct a probable cause hearing unless the defendant sooner meets conditions of release. A defendant not sooner released must be released on personal recognizance under Rule 341(a)(1) through (4) if an order under subdivision (d) is not filed within five days after the motion unless:

(1) the defendant consents to a continuance; or

(2) the [magistrate] grants one or more continuances of not more than two days each because extraordinary circumstances exist and the delay is indispensable to the interests of justice.

RELATED STANDARD: 10-5.4(b)(ii)(B), (iv)

COMMENT

This is similar to Standard 10-5.4(b)(ii)(B), (iv).

Although the hearing under this Rule on probable cause is separate from that under Rule 344 on conditions of release, the parties and the magistrate could agree to conduct it immediately after, and at the same session, as the hearing on conditions of release.

(b) Procedures at hearing. Upon request of either party, process must be issued to summon witnesses. The prosecuting attorney shall offer evidence in support of probable cause. The defendant may offer evidence.

RELATED STANDARD: 10-5.10(a)

COMMENT

This is similar to Standard 10-5.10(a).

(c) Evidence. The [magistrate] need not exclude evidence on the ground that it was acquired by unlawful means. Hearsay evidence may be received, if there is a substantial basis for believing that:

(1) the source of the evidence related by the witness is reliable; and

(2) there is a factual basis for the information furnished.

RELATED STANDARD: 10-5.10(c)

COMMENT

This subdivision is identical to Rule 344(c) above. It does not conflict with Standard 10-5.10(c)'s provision, "At any preventive detention hearing . . . the rules governing admissibility of evidence in criminal trials should apply," because the Rule 345 probable cause hearing is not a detention hearing within the meaning of Standard 10-5.10. As explained in the Prefatory Note above, these Rules include no provision on preventive detention. The only issue in the Rule 345 hearing is that specified in subdivision (d) below, "whether there is probable cause to believe that a crime has been committed and that the defendant committed it." This is quite different from the issues regarding the defendant's dangerousness and likelihood of nonappearance covered by Standard 10-5.10(e) and (f). Allowance of hearsay, at least in some circumstances, is common in proceedings where the issue is probable cause. See, e.g., ALI Model Code of Pre-Arraignment Procedure § 330.4(4) (1975); Fed. R. Crim. P. 5.1(a); N.D. R. Crim. 5.1(a). Indeed, rules of evidence commonly specify their inapplicability (except regarding privileges) to such proceedings. See Unif. R. Evid. 1101(b)(3) and Colorado, Delaware, Guam, Iowa, Minnesota, Nebraska, New Hampshire, North Carolina, North Dakota, Oregon, Vermont, and Wyoming provisions described at 13A U.L.A. 861-65 (1986).

Moreover, the Rule 345 hearing cannot yield an order of detention like that under Standard 10-5.10(f)(ii); rather Rule 345(d) specifies, "If the [magistrate] finds probable cause, the [magistrate] shall continue the conditions of release under Rule 344(e)." A defendant who becomes able to meet those conditions of release is released.

(d) Finding and disposition. When the hearing is concluded, the [magistrate] shall determine whether there is probable cause to believe that a crime has been committed and

that the defendant committed it. If the [magistrate] finds probable cause, the [magistrate] shall continue the conditions of release ordered under Rule 344(e). If the [magistrate] does not find probable cause [and the prosecution is by information], the [magistrate] shall order the information dismissed without prejudice. [If the [magistrate] does not find probable cause and the prosecution is by indictment, the [magistrate] shall release the defendant on personal recognizance under Rule 341(a)(1) through (4).]

RELATED STANDARD: 10-5.10(e)(i)(A)

COMMENT

This is somewhat similar to Standard 10-5.10(e)(i)(A) (preventive detention hearing).

A state would include the bracketed language if it desired to allow a prosecution by indictment to proceed notwithstanding the magistrate's determination of no probable cause.

RULE 346. LIMITED RELEASE FROM DETENTION.

The court may order a detained defendant released in the custody of a [law enforcement officer] for limited periods and under appropriate conditions if the defendant shows that this is necessary for the preparation of the defendant's case or for another compelling reason. The court may hear the motion ex parte and in camera, and may issue an appropriate protective order.

RELATED STANDARD: 10-5.14

COMMENT

This is based upon Standard 10-5.14's first sentence, but "or for another compelling reason" is from 18 U.S.C.A. 3142(i) (Supp. 1987).

# ARTICLE IV

# PRETRIAL PROCEDURES

## PART 1

## GENERAL PROVISIONS

### RULE 411. SETTING TIMES.

After the defendant has appeared, the court [having jurisdiction to try the crime] shall promptly set the times:

(1) on or before which the prosecuting attorney must furnish the matters specified in Rule 422(a);

(2) after which the defendant may request the matters specified in Rule 422(b);

(3) on or before which the defendant must notify the prosecuting attorney under Rule 423(a), (b), (d), and (e), and furnish a report under Rule 423(f);

(4) after which the prosecuting attorney may request a report or statement under Rule 423(g) or access to matters specified in Rule 423(i);

(5) after which discovery depositions under Rule 431 may be taken only with leave of court;

(6) on or before which pretrial motions under Rule 451 may be made;

(7) on or before which a motion for pretrial dismissal under Rule 481 may be made;

(8) if there is to be a pretrial conference under Rule 491, when it will be held; and

(9) after which, if the case is not disposed of by plea or otherwise, the court will set it for trial.

COMMENT

In the introductory portion, the bracketed words "having jurisdiction to try the crime" would be omitted in a state with a unitary court system.

The court may set different times for clause (3)'s disclosures. Model Insanity Defense and Post-Trial Disposition Act 303, 502, and 504 require the notice of intent to call a mental health witness under Rule 423(d) to be within the time for making pretrial motions, the notice identifying mental health witness(es) under Rule 423(e) to be at least 20 days before trial, and the furnishing of a report under Rule 423(f) to be at least 15 days before trial.

This Rule leaves the times to the court's discretion because they should vary according to the nature and complexity of the case, whether the defendant is in custody, and local conditions and practices. The parties may make special requests to the court before it sets the times under the Rule, and may move the court for modifications of the times thereafter.

RULE 412. INVESTIGATIONS NOT TO BE IMPEDED.

Except as to matters to which the parties need not allow access under Rules 421(b) and 423(k) and except as to the defendant's lawyer advising the defendant, a party or an agent of a party may not discourage or obstruct communication between any person and a party or otherwise obstruct a party's investigation of the case.

RELATED STANDARDS: 3-3.1(c), 4-4.3(d), 11-4.1

COMMENT

This is in accord with Standard 4-4.3(d) (3d ed. 1991), and Standards 3-3.1(c) and 11-4.1.

## PART 2

## DISCLOSURE BY PARTIES

### RULE 421. PROSECUTING ATTORNEY TO ALLOW ACCESS.

(a) Duty of prosecuting attorney. Upon the defendant's written request, the prosecuting attorney, except as provided in subdivision (b), shall allow access at any reasonable time to all matters within the prosecuting attorney's possession or control which relate in any way to the case, including statements, [portions of grand jury minutes or transcripts,] [law enforcement officer] reports, expert reports, reports on prospective jurors, papers, photographs, objects, and places, and the identity of persons having information relating to the case. The prosecuting attorney's obligation extends to matters within the possession or control of any member of the prosecuting attorney's staff and of any official or employee of this State who has participated in the investigation or evaluation of the case and who either regularly reports or with reference to the particular case has reported to the prosecuting attorney's office. In affording this access, the prosecuting attorney shall allow the defendant at any reasonable time and in any reasonable manner to inspect, photograph, copy, or have reasonable tests made. If a scientific test or experiment of any matter may preclude or impair any further tests or experiments, the prosecuting attorney shall give the defendant and any person known or believed to have an interest in the matter reasonable notice and opportunity to be present and to have an expert observe or participate in the test or experiment.

RELATED STANDARDS: 11-2.1(a), (b)(iii), (d), 11-2.2(b)

COMMENT

The first, second, and third sentences are based upon Standards 11-2.1(a), 11-2.1(d), and 11-2.2(b) respectively. The last sentence is similar to Standard 11-2.1(b)(iii), which requires the prosecutor to inform defense counsel of the intent to conduct a test or experiment that may consume or destroy the subject matter.

The first sentence's reference "relate in any way to the case" is intended to denote a breadth similar to that created in the civil discovery area by Fed. R. Civ. P. 26(b)(1). The reference is broad enough to include matters relating not only to the crime charged, but to included crimes, punishment, and codefendants.

(b) Exceptions.

(1) Legal work product. The prosecuting attorney need not allow access to portions of records, correspondence, reports, recordings, or memoranda to the extent that they are:

(i) legal research; or

(ii) opinions, theories, or conclusions of the prosecuting attorney, a member of the prosecuting attorney's staff, or an agent of the prosecuting attorney not intended to be called as a witness.

RELATED STANDARD: 11-2.6(a)

COMMENT

This is based upon Standard 11-2.6(a).

(2) Pending motion for protective order. If the prosecuting attorney moves for a protective order, the prosecuting attorney, pending the court's ruling on the motion, may deny access to the extent the prosecuting attorney reasonably believes the protective order will permit.

COMMENT

This allows to prosecutor to maintain the status quo pending the consideration of a motion under paragraph (3) below.

(3) Protective order.

(i) Risk of harm, intimidation, or bribery; continuing investigation. The court may permit the prosecuting attorney to defer access for a specified time to the extent earlier access would create a substantial risk to any person of physical harm, intimidation, or bribery or to the extent justified by the need to protect the integrity of a continuing investigation. Deferral may not be permitted if it prejudices a right of the defendant or allows insufficient time before trial for the defendant to make beneficial use of the information sought, including any additional pretrial discovery thereby necessitated.

RELATED STANDARDS: 11-2.5(b), 11-2.6(b), 11-4.4

COMMENT

This provides for protective orders limited to deferring disclosure. As to the risk of harm, intimidation, or bribery, see ABA Standard 11-2.5(b). As to protecting the integrity of a continuing investigation, see Standard 11-2.6(b); Fla. R. Crim. P. 3.220(a)(1)(ii); N.J. Rules of Court 3:13-3(d)(1). The last sentence is similar to Standard 11-4.4.

(ii) Protecting evidentiary value. The court may impose reasonable conditions as to the manner of inspection, photographing, copying, or testing, to the extent necessary to protect the evidentiary value of any matter to which the defendant seeks access or the prosecuting attorney proposes to test.

RELATED STANDARD: 11-4.4

COMMENT

This is rather similar to Standard 11-4.4.

(4) Excision. If only part of a matter is within an exception prescribed by this subdivision, the prosecuting attorney shall allow access to a copy of the matter from which the part within the exception has been excised in a manner showing there has been excision.

RELATED STANDARD: 11-4.5

COMMENT

This is similar to Standard 11-4.5.

(c) Continuing duty. If any matter relating to the case, other than legal work product specified in subdivision (b)(1), comes within the prosecuting attorney's possession or control after the defendant has had access under this Rule, the prosecuting attorney shall promptly so inform the defendant.

RELATED STANDARD: 11-4.2

COMMENT

This is based upon Standard 11-4.2.

(d) Matters held by other governmental personnel. Upon written request of the defendant for access to specified matters relating to the case which are within the possession or control of an official or employee of any government but which are not within the control of the prosecuting attorney, the prosecuting attorney, except as provided in subdivision (b), shall use diligent good faith efforts to cause the official
or employee to allow the defendant access at any reasonable time and in any reasonable manner to inspect, photograph, copy, or have reasonable tests made.

RELATED STANDARD: 11-2.4

COMMENT

This is based upon Standard 11-2.4.

If the prosecutor's diligent good faith efforts to cause the official or employee to grant the defendant access are unsuccessful, the defendant has available the deposition and subpoena provisions of these Rules.

(e) Sanctions for noncompliance. If the prosecuting attorney fails to comply with this Rule, the court, on motion of the defendant or its own motion, shall require the prosecuting attorney to comply, grant the defendant additional time or a continuance, grant a mistrial, or grant other appropriate relief.

RELATED STANDARD: 11-4.7

COMMENT

This is based upon Standard 11-4.7. The reference to granting a mistrial is from Fla. R. Crim. P. 3.220(j)(1). Because of double jeopardy considerations, this sanction should not be used to rectify prosecutorial misconduct without the defendant's consent.

(f) In-camera proceedings. Upon hearing a motion under this Rule, the court may permit all or part of a showing of cause for denial or deferral of access to be made in-camera and out of the presence of the defendant and the defendant's counsel. In-camera proceedings must be recorded. If the court allows any access to be denied or deferred, the entire record of the in-camera proceedings must be sealed and preserved in the court's records, to be made available to any reviewing court.

RELATED STANDARD: 11-4.6

COMMENT

This is based upon Standard 11-4.6.

RULE 422. NOTICE BY PROSECUTING ATTORNEY.

(a) Matters furnished automatically. On or before the time set under Rule 411, the prosecuting attorney shall furnish to the defendant a statement:

(1) describing any testimony or other evidence intended to be used against the defendant that:

(i) was obtained as a result of a search and seizure, wiretapping, or any form of electronic or other eavesdropping;

(ii) consists of or resulted from any confession, admission, or statement made by the defendant; or

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

(2) informing the defendant that if the defendant contends that any of the above evidence is subject to suppression under Rule 461, the defendant must move the court, by a specified time set under Rule 411, to suppress the evidence;

(3) describing any confession, admission, or statement of a codefendant intended to be used at the trial;

(4) precisely describing any crime that the prosecuting attorney intends to show as part of the proof that the defendant committed the crime charged, if the defendant has not been prosecuted for the crime and the crime was allegedly committed at a time other than that of the crime charged; and

(5) describing any matter or information known to the prosecuting attorney which may not be known to the defendant and which tends to negate the defendant's guilt as to the crime charged or would tend to mitigate the penalty.

RELATED STANDARD: 11-2.1

COMMENT

This requires automatic disclosure of the matters specified in Standard 11-2.1(a)(ii), (v), (b)(ii), (iv), (c), as well as the matter specified in clauses (1)(iii) and (2).

(b) Matters furnished upon request. Upon the defendant's written request made after the time set under Rule 411, the prosecuting attorney shall furnish to the defendant and file with the court a statement:

(1) generally describing any book, paper, document, photograph, or tangible object intended to be used in evidence against the defendant and not described under subdivision (a);

(2) setting forth the name, address, and occupation of each individual intended to be called as a witness against the defendant and, so far as reasonably ascertainable by the prosecuting attorney, any record of criminal convictions of each individual; and

(3) setting forth, so far as reasonably ascertainable by the prosecuting attorney, any record of criminal convictions of the defendant.

RELATED STANDARD: 11-2.1(a)(i), (v), (vi)

COMMENT

This is based upon ABA Standard 11-2.1(a)(i), (v), and (vi).

(c) Continuing duty. If the prosecuting attorney discovers a matter specified in subdivision (a) or (b) after the time set under Rule 411:

(1) the prosecuting attorney shall promptly furnish it to the defendant; and

(2) the court, on motion of the defendant, may grant additional time, a continuance, or other appropriate relief.

RELATED STANDARD: 11-4.2

COMMENT

This is based upon Standard 11-4.2 and the Commentary thereto.

(d) Sanctions for noncompliance. If the prosecuting attorney fails to comply with this Rule, the court, on motion of the defendant or its own motion, shall require the prosecuting attorney to comply, grant the defendant additional time or a continuance, grant a mistrial, or grant other appropriate relief.

RELATED STANDARD: 11-4.7

COMMENT

This is identical to Rule 421(e) above. See the Comment to that provision.

RULE 423. DISCLOSURE BY DEFENDANT.

(a) Notice of alibi. If a defendant intends to call as a witness an individual other than the defendant to show that the defendant was not present at the time and place of the crime charged, the defendant, on or before the time set under Rule 411, shall notify the prosecuting attorney in writing of that fact and of the witness' name and address.

RELATED STANDARD: 11-3.3(a)(i)

COMMENT

This is based upon Standard 11-3.3(a)(i).

(b) Notice of defense of [mental nonresponsibility]. If the defendant intends to rely on the defense of [mental nonresponsibility], the defendant, on or before the time set under Rule 411, shall notify the prosecuting attorney in writing of that fact.

RELATED STANDARD: 7-6.3(a)

COMMENT

This new subdivision is based upon Standard 7-6.3(a) and Model Insanity Defense and Post-Trial Disposition Act § 302(a) and (b). As stated in Standard 7-6.3(b):

> Neither the court nor the prosecution should assert a defense based on abnormal mental condition over the objection of a defendant who is competent to make a decision about raising the defense.

(c) Notice of mental examination. If the defense initiates an examination by a mental-health professional regarding the defendant's mental condition at the time of the crime charged, the defendant, within [48 hours] after the examination begins, shall notify the prosecuting attorney in writing of that fact. If the defense learns that the mental-health professional has begun an examination regarding the defendant's mental condition at the time of the crime charged, the defendant shall immediately notify the prosecuting attorney in writing.

RELATED STANDARDS: 7-3.4(a), 7-3.10

COMMENT

This is based upon Standard 7-3.4(a)'s first sentence. Notice under this subdivision need be given only after commencement of the first examination.

Notice under this subdivision enables the prosecutor to seek a prosecution-initiated examination under Rule 425 below. The defendants' rights are protected by Rule

425(e), which provides that the report of the prosecution-initiated examination is not revealed to the prosecution unless and until the defendant gives notice under Rule 423(d) of intent to call a mental-health professional at trial and by Rule 425(g)'s limits on admissibility of evidence. Compare Kastigar v. United States, 406 U.S. 441 (1972) (witness may be compelled to testify before grand jury about crime if prosecution is barred from using testimony or evidence derived therefrom against witness).

Regarding who is a "mental-health professional," as stated in the Comment to Model Act § 301:

> The qualifications of a "mental-health professional" are not specified. Minimum educational and training requirements should be set by state or by local courts, taking into account the availability of such professionals within the jurisdiction. Standards should require appropriate basic education and training in the area of testimony, as well as forensic training and experience. A psychiatrist or a professional psychologist with a doctoral degree in psychology are examples of persons who would satisfy the basic educational and training criteria for certain testimony concerning mental condition at the time of the alleged crime, but other persons may also be found qualified.

"Mental-health professional" is intended to include a qualified professional in the area of mental retardation. See Standard 7-3.10; Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414 (1985).

(d) Notice of intent to call witness. If the defendant intends to call as a witness a mental-health professional for testimony relating to the defendant's mental condition at the time of the crime charged, the defendant, on or before the time set under Rule 411, shall notify the prosecuting attorney in writing of that fact.

RELATED STANDARD: 7-6.3(a)

COMMENT

This is based upon Standard 7-6.3(a) and Model Act 302 and 303.

(e) Identifying witness. If the defendant has given notice of intent to call a witness under subdivision (d), the defendant, on or before the time set under Rule 411, shall notify the prosecuting attorney in writing of the witness' name, address, and qualifications.

COMMENT

This is based upon Model Act 504.

As stated in Rule 411's Comment above, the court may set a different time for the disclosure under this subdivision from that under subdivision (d).

(f) Report regarding mental condition. If the defendant intends to call a mental-health professional as an expert witness regarding the defendant's mental condition at the time of the crime charged, the defendant, on or before the time set under Rule 411, shall direct the intended witness to prepare a written report in the form specified in Rule 425(b) and shall furnish the prosecuting attorney a copy of the report.

RELATED STANDARD: 7-3.8(b)(ii)

COMMENT

This is based upon Standard 7-3.8(b)(ii) and Model Act 502. Regarding public funding of the professional's services when the defendant is indigent, see Rule 424 below.

This subdivision's disclosure duty is subject to subdivision (k) below regarding excision of communications of the defendant and protective orders.

(g) Other expert witness report. [If the defendant has requested and received discovery under Rule 421 or Rule 422(b),] the defendant, upon the prosecuting attorney's written request after the time set under Rule 411, shall furnish the prosecuting attorney a copy of any report or statement regarding a medical examination or scientific test, experiment, or comparison if the report or statement:

(1) was made in connection with the particular case;

(2) was prepared by an expert whom the defendant intends to call as a witness at a hearing or trial; and

(3) relates to the witness' anticipated testimony.

RELATED STANDARD: 11-3.2(a)

COMMENT

This is based upon Standard 11-3.2(a).

(h) Report relied upon by witness. If the defendant has furnished an intended expert witness' report under subdivision (f) or (g), the defendant, upon the prosecuting attorney's written request, shall promptly furnish any other expert's report within the defendant's or intended witness' possession or control upon which the intended witness will rely in testifying.

RELATED STANDARD: 11-3.2(a)

COMMENT

This is based upon Standard 11-3.2(a), which requires disclosure of "any reports or statements (including results of . . . examinations and of scientific tests, experiments or comparisons) which were made by experts in connection with the particular case and which the defendant intends to use at a hearing or trial." See Model Act § 502.

(i) Documents and objects. [If the defendant has requested and received discovery under Rule 421 or Rule 422(b),] the defendant, upon the prosecuting attorney's written request after the time set under Rule 411, shall allow the prosecuting attorney access at any reasonable time and in any reasonable manner to inspect, photograph, copy, or have reasonable tests made upon any book, paper, document, recording, photograph, or other tangible object within the defendant's possession or control which the defendant intends to offer in evidence.

RELATED STANDARDS: 7-3.6(d), 11-3.2(a)

COMMENT

The bracketed opening words are based upon Standard 11-3.2(a). Except for the word "recording," the rest of the provision is based upon Fed. R. Crim. P. 16(b)(1)(A).

The reference to "recording" is based upon Standard 7-3.6(d)'s specifying that if the defense intends to use at trial the recording of an evaluation of the defendant's mental condition at the time of the offense, the court should provide the prosecutor a copy of the recording. It should be emphasized that this subdivision requires the defendant to offer access to a recording only if the defendant intends to offer the recording in evidence. See Commentary to Standard 7-3.6(d). It does not require giving access to the recording just because Rule 423(f) or (h) above requires the furnishing of a report. The judge at trial may require matters referred to in testimony to be turned over for purposes of possible impeachment on cross examination.

(j) Continuing duty. If the defendant discovers a matter specified in this Rule after the time set under Rule 411:

(1) the defendant shall promptly furnish it to the prosecuting attorney; and

(2) the court, on motion of the prosecuting attorney, may grant additional time, a continuance, or other appropriate relief.

RELATED STANDARD: 11-4.2

COMMENT

This is based upon Standard 11-4.2 and its Commentary, and clarifies the existence of a continuing duty under Rule 423(a), (e), (g), (h), and (i).

(k) Exceptions.

(1) Work product; communications of defendant. The defendant need not furnish any portion of a report, statement, or recording to the extent it is:

(i) legal research;

(ii) an opinion, theory, or conclusion of the defendant's lawyer, a member of the lawyer's staff, or an agent of the lawyer not intended to be called as a witness; or

(iii) a communication of the defendant.

RELATED STANDARD: 11-3.2(b)

COMMENT

This is based upon Standard 11-3.2(b). It is similar to Rule 421(b)(1) above regarding prosecution disclosure.

Communications about strategy by an agent of the lawyer who will testify may be subject to paragraphs (2) and (3) below regarding protective order issued for good cause.

Under paragraph (4) below, a matter within this paragraph's exceptions may be excised in a manner showing that there has been excision. If the prosecutor believes that the excision, e.g., of communications of the defendant from a report regarding mental condition, is excessive, the prosecutor may move for compliance under Rule 423(m) below.

(2) Pending motion for protective order. If the defendant moves for a protective order, the defendant, pending the court's ruling on the motion, may withhold the furnishing of a report, statement, document, recording, or object to the extent the defendant's lawyer reasonably believes the protective order will permit.

COMMENT

This parallels Rule 421(b)(2) above regarding prosecution disclosure. This paragraph allows withholding of matters in addition to those specified in paragraph (1) above.

(3) Protective order. Upon a showing of good cause, the court may order that the furnishing of a report, statement, document, recording, or object may be denied, restricted, or deferred for a specified time. The court may order the defendant to disclose promptly to the prosecuting attorney a list of the sources of information relied upon in any report the furnishing of which has been denied, restricted, or deferred.

RELATED STANDARD: 7-3.8(b)(ii)

COMMENT

This is based upon Standard 7-3.8(b)(ii). It parallels Rule 421(c)(3)(i) above regarding prosecution disclosure.

(4) Excision. If only part of a report, statement, document, recording, or object is within an exception prescribed by this subdivision, the defendant shall furnish the prosecuting attorney a copy from which the part has been excised in a manner showing there has been excision.

RELATED STANDARDS: 7-3.6(d), 11-4.5

COMMENT

This is based upon Standard 11-4.5 and parallels Rule 421(b)(4) above (excision from prosecution disclosure). See also Standard 7-3.6(d)'s last sentence, "Upon defense motion, the court may enter a protective order redacting portions of the recording before it is forwarded to the prosecution."

(l) Evidence. The fact that the defendant, under this Rule, has indicated an intention to offer specified evidence or to call a designated witness is not admissible in evidence at a hearing or trial. Evidence obtained as a result of disclosure under this Rule is not admissible at trial except to refute:

(1) the evidence disclosed if the defendant introduces it; or

(2) the testimony of a witness whose identity this Rule requires to be disclosed.

RELATED STANDARDS: 11-3.2(c), 11-3.3(b)

COMMENT

This is based upon Standards 11-3.2(c) and 11-3.3(b). See Model Insanity Defense and Post-Trial Disposition Act 503, 601(b), 602. This subdivision does not address the issue of inevitable discovery.

(m) Sanctions for noncompliance. If the defendant fails to comply with this Rule, the court, on motion of the prosecuting attorney or its own motion, shall require the defendant to comply, grant the prosecuting attorney additional time or a continuance, grant a mistrial, or grant other appropriate relief.

RELATED STANDARDS: 7-3.4(a), 7-6.3(a), 11-4.7(a)

COMMENT

This subdivision, which parallels Rule 421(e) above regarding prosecution disclosure, is based upon Standard 7-3.4(a)'s last sentence, Standard 7-6.3(a)'s last two sentences, and Standard 11-4.7(a).

Although this subdivision does not specifically rule out exclusion of evidence as a sanction, neither does it list it and it generally would be inappropriate. Standard 11-4.7's Commentary states:

> The general authority to enter an appropriate order is not intended to endorse sanctions . . . that exclude from evidence any discoverable, but nondisclosed items. . . .
>
> . . . The exclusion sanction is not recommended because its results are capricious. [E]xclusion of defense evidence may lead to an unfair conviction [which] would defeat the objectives of discovery. In addition, the exclusion of defense evidence raises significant constitutional issues. [Footnotes omitted.]

But see Braunskill v. Hilton, 629 F. Supp. 511, 522 (D.N.J. 1986) (witness preclusion as discovery sanction does not per se violate compulsory process clause); Taliaferro v. State, 295 Md. 376, 456 A.2d 29, 35-36 (listing provisions of 32 states and District of Columbia specifying exclusion of testimony as sanction for alibi notice violation and cases from 11 states and District of Columbia upholding this sanction), cert. denied, 461 U.S. 948 (1983) (White, J., joined by Brennan and Blackmun, JJ., dissenting on ground Court should examine issue).

It would even be questionable to specifically allow exclusion if the nondisclosure was deliberate and substantially prejudices the prosecution's ability to refute the evidence, because this may result in punishing the defendant by conviction of the substantive offense for what was really only counsel's default. Even if the defendant were responsible for the

nondisclosure, the defendant may not have anticipated this severe a sanction. But see State v. Lindsey, 284 N.W.2d 368, 376 (Minn. 1979) (concurring opinion) ("courts should exclude evidence only in the most unusual situations, such as . . . where defendant deliberately and intentionally refused to disclose the names of his alibi witnesses").

Compare Rule 425(f) below, which, in line with Standard 7-3.4(c), specifies that in very limited circumstances where the defendant deliberately refused to cooperate in a prosecution-initiated mental examination, the court may exclude the defendant's introduction at trial of expert testimony regarding mental state at the time of the offense.

Unspecified relief which would be appropriate in some circumstances includes a sanction against counsel. Standard 11-4.7(b) specifies that "the court may subject counsel to appropriate sanctions upon a finding that counsel willfully violated the [discovery] rule or order."

The reference to granting a mistrial accords with Fla. R. Crim. P. 3.220(j)(1). Because of double jeopardy considerations, this sanction should not be used without the defendant's consent if the matter may be remedied by a continuance. See United States v. Jorn, 400 U.S. 470 (1971).

(n) In-camera proceedings. Upon hearing a motion under this Rule, the court may permit all or part of a showing of cause for denial, restriction, or deferral of disclosure to be made in camera and out of the presence of the prosecuting attorney. In-camera proceedings must be recorded. If the court allows any access to be denied or deferred, the entire record of the in-camera proceedings must be sealed and preserved in the court's records, and made available to any reviewing court.

RELATED STANDARD: 11-4.6

COMMENT

This is based upon Standard 11-4.6 and parallels Rule 421(f) above regarding prosecution disclosure.

## RULE 424. COURT AUTHORIZATION OF EXPENDITURES FOR DEFENSE-INITIATED EXAMINATION OF MENTAL CONDITION AT TIME OF CRIME.

A defendant who because of inability to pay is unable to obtain the services of a mental-health professional may apply to the court for assistance. Upon a showing of a likely need for examination regarding the defendant's mental condition at the time of the crime charged, the court shall authorize reasonable expenditures from public funds for the defendant's retention of the services of one or more mental-health professionals to examine the defendant and assist in evaluation, preparation, and presentation of the defense. Upon request by the defendant, the application and the proceedings on the application must be ex parte and in camera and the records regarding the application and proceedings must be sealed until after disposition of the case. Any order under this subdivision authorizing expenditures must be made part of the public record.

RELATED STANDARD: 7-3.3(a)

COMMENT

This is based upon Model Insanity Defense and Post-Trial Disposition Act § 301 and Standard 7-3.3(a).

The first sentence's "unable to obtain" language recognizes that, as stated in the Comment to Model Act
301, "[i]n some jurisdictions expert mental-health services are available to indigent defendants through standing collateral services of public agencies such as public defenders."

The second sentence's opening words, although broad, do not justify authorization in every case. The second sentence's concluding words, "to examine the defendant and assist in evaluation, preparation, and presentation of the defense," derive from the Court's statement of its holding in Ake v. Oklahoma, 470 U.S. 68, 83 (1985). The last part of the penultimate sentence accords with the last sentence of Rule 731(b) below (government payment of defense witness fees).

RULE 425. PROSECUTION-INITIATED EXAMINATION OF MENTAL CONDITION AT TIME OF CRIME.

(a) Order for examination. On motion of the prosecuting attorney made after the prosecuting attorney is notified under Rule 423(c) or (d), the court shall order the defendant to submit to an examination of the defendant's mental condition at the time of the crime charged to be performed by a mental-health professional acceptable to the prosecution. The order must include provisions as to the time, place, and other conditions of the examination.

RELATED STANDARDS: 7-3.4(a), 7-6.4(a), (c)

COMMENT

Rule 425 generally

Like Rule 424, Rule 425 is based upon provisions in the ABA's 1984 Criminal Justice Mental Health Standards.

Subdivision (a)

This subdivision is based upon Standard 7-3.4(a)'s third sentence, Standard 7-6.4(a)'s first sentence, and Model Insanity Defense and Post-Trial Disposition Act 304.

As stated in Standard 7-6.4(c), "The court should not on its own motion order a mental evaluation of the defendant to determine mental condition at the time of the offense."

(b) Requirements for examination. The order for examination, or, if the parties agree to a prosecution-initiated examination without a court order, the prosecuting attorney's directions to the mental-health professional, must specify that:

(1) the examination may consist of interviewing, clinical evaluation, and psychological testing as the mental-health professional considers appropriate, within the limits of nonexperimental, generally accepted psychiatric, psychological, or medical practices;

(2) at the beginning of the examination, the mental-health professional shall inform the defendant that:

(i) the examination is being made at the request of the prosecuting attorney;

(ii) the purpose of the examination is to obtain information about the defendant's mental condition at the time of the crime charged;

(iii) the defendant must respond to questions during the examination, but information obtained may not be used at trial to show that the defendant committed the conduct charged; it may be used only on the issue of the defendant's mental condition at the time of the crime if the defendant introduces expert testimony on that issue; and

(iv) if the defendant raises the issue of [mental nonresponsibility] and is found not guilty by reason of [mental nonresponsibility], information obtained from the examination may be used in subsequent proceedings concerning commitment or other disposition;

(3) the examination must be audio-recorded and, if the court directs, video-recorded, and within [seven days] after completion of the examination, the mental-health professional shall furnish a copy of the recording, under seal, to the court and a copy of the recording to the defendant but may not otherwise disclose the recording;

(4) the defendant's lawyer may be present at the examination only with the mental-health professional's previous approval and if present may actively participate only if requested to do so by the mental-health professional;

(5) the prosecuting attorney may not be present at the examination;

(6) the mental-health professional shall furnish copies of conclusions and full reports as specified in Rule 425(e), but may not otherwise furnish to the prosecuting attorney information from the examination; and

(7) if the mental-health professional concludes that the defendant may be mentally incompetent to stand trial, presents an imminent risk of serious danger to another individual, is imminently suicidal, or otherwise needs emergency intervention, the mental-health professional shall promptly notify the defendant's lawyer, the prosecuting attorney, and the court.

RELATED STANDARDS: 7-3.2(a)(ii), (b), 7-3.5(d)(i)-(iii), 7-3.6(b), (c), (d), 7-6.4(f)

COMMENT

The introductory portion of this subdivision is based upon Standard 7-3.6(b) and Model Act 304(b).

Clause (1) is based upon Model Act § 402.

Clause (2) is based upon Standards 7-3.5(d)(i)-(iii) and 7-3.6(d)(i)-(ii) and Model Act § 401. Clause (2)(iii) also derives from Standards 7-3.2(a)(ii) and 7-6.4(f). Clause (2)(iv) is from Model Act § 401.

Clause (3) is based upon Standard 7-3.6(d)'s first sentence and Model Act 403. The provision for furnishing the recording to the court (under seal) as well as the defendant is from Model Act § 403(b). As stated in Model Act § 403's Comment:

> This provision reflects . . . the difficulty of cross-examination of an expert witness without knowledge as to what took place at an examination. In addition, recording affords protection against possible over-reaching by a prosecution-retained mental-health professional and thereby permits vindication of a defendant's Fifth Amendment rights.

The court may use the recording under Rule 425(f) below in determining an issue regarding the defendant's refusal to cooperate in a prosecution-initiated examination. As stated in Standard 7-3.6(d)'s second sentence, "The defense may use the recording for any evidentiary purpose permitted by the jurisdiction." As indicated in Model Act 602, the most common purpose would be to impeach the prosecution's mental health professional. Under Rule 423(i) above, the defense must allow the prosecution access to the recording only if the defendant intends to offer it in evidence. The court may require it to be made available to the prosecution at trial if the defense uses it to impeach the prosecution's mental health professional.

Clauses (4) and (5) are based upon Standard 7-3.6(c)(ii) and (iii).

Clause (6) is based upon Standard 7-3.5(d)(iii).

Clause (7) is based upon Standard 7-3.2(b).

Under Standard 7-3.5(b), the prosecutor should submit any record or information to the mental health professional that the latter regards as necessary for conducting a thorough evaluation.

(c) Objection to examination procedure. The defendant shall assert any objection to any defect in the examination procedure within [seven days] after receiving the recording of the examination under subdivision (b)(3).

COMMENT

This allows remedial action if there was a defect in the examination.

(d) Form of report. The report of the examination must specify:

(1) the specific issues addressed;

(2) the identity of individuals interviewed and records or other information used;

(3) the procedures, tests, and techniques used;

(4) the date and time of examination of the defendant, the explanation given to the defendant concerning the examination, and the identity of each individual present during the examination;

(5) the relevant information obtained and findings made, including any statements or information that serve as necessary factual predicates for the findings or opinions even if the statements or information are of a personal or potentially incriminating nature;

(6) matters concerning which the mental-health professional was unable to obtain relevant information and the reasons therefor; and

(7) the conclusions and the reasoning on which the conclusions were based.

RELATED STANDARD: 7-3.7(b)

COMMENT

This is based upon Standard 7-3.7(b) and Model Act § 501. Clause (4) is taken from Model Act § 501(4). The last part of clause (5) is taken from Standard 7-3.7(b)(ii).

(e) Distribution of report.

(1) If defendant has notified under Rule 423(d). If the defendant has notified the prosecuting attorney under Rule 423(d) of intent to call a mental-health professional as a witness for testimony relating to the defendant's mental condition at the time of the crime charged, the mental-health professional shall furnish a copy of the report to the prosecuting attorney and the defendant.

RELATED STANDARD: 7-3.4(b)

COMMENT

This is based upon Standard 7-3.4(b) although it has the mental-health professional rather than the court provide the copies.

(2) If defendant has not notified under Rule 423(d). If the defendant has not notified the prosecuting attorney under Rule 423(d), the mental-health professional shall furnish the report to the court under seal and a copy to the defendant and at the same time furnish to the prosecuting attorney and the defendant the mental-health professional's conclusions

without reference to statements made by the defendant or anyone else, the sources of information, or the factual basis for the conclusions. If the defendant later notifies the prosecuting attorney under Rule 423(d), the court shall promptly unseal the full report and furnish the prosecuting attorney a copy.

RELATED STANDARD: 7-3.4(b)

COMMENT

This is based upon Standard 7-3.4(b) although it has the mental-health professional rather than the court provide the copy of the full report to the defendant.

(f) Defendant's refusal to cooperate. If, on motion of the prosecuting attorney, the court finds that an adequate examination under this Rule has been precluded because the defendant without just cause deliberately refused to participate or to respond to questions in the examination, and that the refusal was not a result of mental illness or defect, the court shall grant appropriate relief. In ruling upon the motion, the court may consider all relevant information, including the recording of the examination, but proceedings concerning the recording must be in camera and out of the presence of counsel and records of proceedings concerning the recording must be sealed until after disposition of the case. The court at trial may exclude the defendant's introduction of testimony by a mental-health professional relating to the defendant's mental condition at the time of the crime charged only upon determining that less drastic measures are inadequate. The court may not exclude other evidence because of the refusal to cooperate.

RELATED STANDARD: 7-3.4(c)

COMMENT

This is based upon Standard 7-3.4(c)'s first two sentences and Model Act 404. The references to the defendant acting "without just cause deliberately," to granting appropriate

relief, and to considering the recording of the examination are from the Model Act. The references to an adequate examination being precluded, to the refusal not being a result of the defendant's mental illness, and to excluding testimony are from the Standard. The limitation upon excluding the defendant's expert's testimony is from Model Act 404's Comment, which states:

> The determination concerning possible sanctions depends on a number of factors, e.g., the degree of willfulness and the extent of nonresponsiveness, the availability of comparable evidence from other sources, and the type of testimony proffered by the defendant concerning mental condition at the time of the alleged crime. The objective is to protect the prosecution from the unfairness of being denied examination of the defendant by the prosecution's mental-health professional when the defendant may have been examined by a defense expert. While one possible sanction is to bar any testimony by the defense expert, a court should first consider less drastic measures. Exclusion of evidence favorable to a defendant inevitably gives rise to constitutional and criminal justice concerns. After a finding that a defendant has deliberately failed to participate or to respond to questions, reiteration of the court order may result in the defendant's submission to examination. Alternatively, a court should consider whether permitting the prosecutor to introduce at trial evidence of the defendant's obduracy would be sufficient to offset any unfairness. This evaluation must be made on a case by case basis. In no event should a court completely bar the defense of absence of responsibility as a sanction under this section.

Compare Rule 423(m) above (sanctions for noncompliance with discovery requirements).

> Standard 7-3.4(c)'s Commentary states:
>
> Courts have responded to a defendant's noncooperation by imposing various sanctions. A defendant could be precluded from presenting any evidence--whether from a mental health or mental retardation professional or others--to support the defendant's mental disability claim. Most courts and commentators have rejected such a sanction as unjustifiably harsh. A second sanction is adverse comment to the jury. The court through a jury instruction, or the prosecutor in final argument, could be allowed to inform the jury that the defendant has refused to cooperate with the court-ordered mental health or mental retardation professional evaluator. The adverse comment implies that defendant's evidence, including expert opinion offered by defendant, is not credible. The "adverse comment" sanction has been criticized as being unfair both to the prosecution and the defense. The defendant is permitted to present expert testimony that cannot be effectively challenged by the prosecution, and the prosecution (or the court) is permitted to transform the silence of the defendant into evidence against him or her.
>
> The sanction embodied in [this provision] permits the noncooperating defendant to assert a claim based on the defendant's mental condition at the time of the alleged crime, but allows the court to exclude any mental health or mental retardation

> professional testimony offered by the defendant to support the defense claim. This rule of "reciprocity" balances the evidence available to the prosecution and defense. The defendant's own testimony, the testimony of lay witnesses, and other relevant nonexpert evidence remains available to establish or refute the defense claim. Most appellate courts that have considered the issue of sanction have endorsed the "reciprocity" approach. The position has also been accepted in the Federal Rules of Criminal Procedure and in some state statutes.
>
> For a court to impose [this] sanction . . . the defendant's noncooperation must be of such importance that it precludes an adequate evaluation by the court-ordered mental health or mental retardation professional evaluator. The prosecution should be required to show . . . that the prosecution's ability to respond to the defendant's claim has been unfairly compromised by the defendant's refusal to cooperate. [Footnotes omitted.]

(g) Admissibility of evidence. Evidence obtained as a result of an examination under this Rule, other than the recording of the examination, is admissible over the defendant's objection at trial only if:

(1) the defendant introduces testimony of a mental-health professional regarding the defendant's mental condition at the time of the crime charged; and

(2) the evidence is offered:

(i) to rebut evidence introduced by the defendant obtained from an examination of the defendant by a mental-health professional; or

(ii) to impeach the defendant on the defendant's testimony as to mental condition at the time of the crime charged.

RELATED STANDARD: 7-3.2(a)(ii)

COMMENT

The introductory portion and clause (2) are based upon Model Act 601(a). Clause (1) is based upon Standard 7-3.2(a)(ii).

As indicated in Rule 425(b)(2)(iv) above, if the defendant is found not guilty by reason of mental nonresponsibility, information from an examination under this Rule is

admissible in subsequent proceedings concerning commitment or other disposition. See Model Act 907(c).

(h) Admissibility of recording. If the defendant has referred to or otherwise used the recording of the examination to impeach the testimony of the mental-health professional who conducted the examination, the recording may be used to the extent permitted by the rules of evidence on re-direct examination of that witness or to impeach the testimony of the defendant in any criminal, civil, or administrative proceeding. The defendant shall make the recording available to the prosecuting attorney before using it to impeach the testimony of the mental-health professional who conducted the examination.

COMMENT

This is based upon Model Act 602. As stated in the second sentence of Rule 425(f) above, the recording of the examination also may be used in a proceeding regarding the defendant's refusal to cooperate in an examination.

## PART 3

## OTHER DISCOVERY

### RULE 431. DEPOSITIONS.

(a) When taken. At any time after the defendant has appeared, a party may take the testimony of any individual by deposition, except:

(1) the defendant may not be deposed unless the defendant consents and the defendant's lawyer, if any, is present or the lawyer's presence is waived;

(2) a discovery deposition may be taken after the time set under Rule 411 only with leave of court;

(3) a deposition to perpetuate testimony may be taken only with leave of court, which must be granted on motion of any party if it appears that the deponent may be able to give material testimony but may be unable to attend a trial or hearing; and

(4) on motion of a party or of the deponent and upon a showing that the taking of the deposition does or will unreasonably annoy, embarrass, or oppress the deponent or a party, the court in which the prosecution is pending, or the court of the [district] in which the deposition is being taken, may order that the deposition not be taken or continued or may limit the scope and manner of its taking. Upon demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to make the motion.

COMMENT

In permitting either party to take discovery depositions without court approval, this accords with Fed. R. Civ. P. 30(a) and Vt. R. Crim. P. 15(a). Several states allow the defense to do so. See e.g., Fla. R. Crim. P. 3.220(d); Mo. Ann. Stat. § 545.400 (Vernon 1987); Mo. R. Crim. P. 25.11; N.H. Rev. Stat. Ann. § 517:13 (Supp. 1986).

Rather than require court approval, this subdivision allows discovery depositions subject to the right of a party or deponent to move under clause (4) hereof to have the court order that the deposition not be taken or continued.

A survey of all prosecutors, judges of all criminal courts, and many defense lawyers in Vermont, where the opportunity to take depositions in criminal cases has been generally available since 1961, found "no indication that these procedures were used for blind fishing expeditions," that they are probably resorted to in less than 8% of criminal cases, that the great majority of respondents stated that decreased the likelihood of trial and "not a single prosecutor, judge or defense attorney indicated that the likelihood was increased," and that there was not a single mention of an instance of abuse or call for a return of the old law. Langrock, Vermont's Experiment in Criminal Discovery, 53 A.B.A. J. 732, 733-34 (1967). The author stated:

> The parade of "horribles" escaping from Pandora's box as proposed by the opponents of change in this are numerous. They include possible intimidation of witnesses, better opportunity to prepare perjured testimony, harassment of prosecutors and police officers, extra burden on the prosecution officer, increased costs of the administration of criminal law, etc. The interesting thing shown by Vermont's experience is that all of these "horribles" are imaginary.

Id. at 734.

Making depositions generally available is especially justifiable in light of these Rules' eliminating probable cause hearings where the defendant is not in custody. Depositions provide greater flexibility in scheduling than do probable cause hearings, and cost less because they do not require the presence of a judicial officer or the use of a courtroom. Further, since they will normally occur at a later point in the proceedings than would the probable cause hearing, the parties will more likely dispense with them if they find that they can obtain sufficient information by interviewing the witnesses or examining their statements. The parties are unlikely to resort to depositions unless they think it is necessary, and clause (4) is available to prevent abuse. The greater availability of information made possible by depositions will increase the likelihood of disposition short of trial.

In requiring a defendant's consent before being deposed, clause (1) accords with Fed. R. Crim. P. 15 (d) (1) and Vt. R. Crim. P. 15 (d) (1).

Under clause (2), the court will set a time after which discovery depositions cannot be taken without leave of court. See Vt. R. Crim. P. 15(a).

Clause (3) is similar to Colo. R. Crim. P. 15(a), Nev. Rev. Stat. § 174.175(1) (1985), and Wis. Stat. Ann. § 967.04 (1) (1985).

It is important to distinguish depositions to perpetuate testimony from discovery depositions. See Fla. R. Crim. P. 3.190 (j), 3.220(d). The parties should be put on notice that a deposition is to perpetuate testimony, because they will likely examine differently than if it were a discovery deposition. Further, the defendant generally must be present at a perpetuation deposition. See subdivision (g) below. This may produce additional expense, see subdivision (h) below, and if the defendant is in custody it will require a custodian and, as to a deposition outside the state, will often be infeasible, see subdivision (f) below.

If upon taking a discovery deposition a party becomes aware of the advisability of perpetuating the deponent's testimony, the party may seek leave to take a perpetuation deposition under clause (3). Or the party might be able to accomplish this purpose under subdivision (l) below, which specifies, "Nothing in this Rule precludes the taking of a deposition . . . or the use of a deposition, by agreement of the parties."

Clause (4) is very similar to F.R. Civ. P. 30(d) except in providing for relief before as well as during the deposition. It allows the court to intervene in the event of abuses of the deposition procedure.

(b) Subpoenas. Attendance of witnesses and production of documentary evidence and objects may be compelled by subpoena under Rule 731.

COMMENT

This derives from Fed. R. Civ. P. 30(a) and Alaska R. Crim. P. 15(a).

(c) Witness who would not respond to subpoena. If a party is granted leave to take a deposition to perpetuate testimony, the court, on motion of the party and upon a showing of probable cause to believe that the deponent would not respond to a subpoena, by order shall direct a [law enforcement officer] to take the deponent into custody, hold the deponent until the taking of the deposition begins but not more than [six] hours, and keep the deponent in custody during the taking of the deposition. If the motion is by the prosecuting attorney, the court, upon further motion by the prosecuting attorney and a showing of probable cause to believe that the defendant would not otherwise attend the taking of the deposition, may make the same order as to the defendant.

COMMENT

The first sentence similar to Colo. R. Crim. P. 15(b). See Alaska R. Crim. P. 15(a); Mont. Code Ann. § 46-15-201(2) (1985); Wis. Stat. Ann. § 967.04(1) (1985).

The second sentence ensures confrontation so that the prosecution will be able to use the deposition at trial. See subdivision (i) below.

(d) Notice of taking. A party at whose instance the deposition is to be taken shall give all parties reasonable written notice of the name and address of each person to be examined,

the time and place for the deposition, and the manner of recording. On motion of a party or of the deponent the court may change the time, place, or manner of recording.

COMMENT

Except for referring to manner of recording and allowing the deponent as well as a party to move to change the time, place, or manner of recording, this derives from Fed. R. Crim. P. 15(b).

Regarding manner of recording, see subdivision (e)(2) below and the Comment thereto.

(e) How taken. A deposition must be taken in the manner provided in civil actions, except:

(1) if the deposition is taken at a place over which this State lacks jurisdiction, it may be taken instead in the manner provided by the law of that place;

(2) it must be recorded by the means specified in the notice; and

(3) On motion of a party and upon a showing that a party or the deponent is engaging in serious misconduct at the taking of a deposition, the court by order may direct that the deposition's taking be continued in the presence of a [judge], in which case the [judge] may preside over the remainder of the deposition's taking.

COMMENT

The introductory portion derives from Fed. R. Crim. P. 15(d).

Clause (1) covers depositions on Indian reservations and enclaves over which the state lacks jurisdiction as well as depositions outside the state's physical boundaries. In providing that such depositions may be taken per the place of taking's law instead of per the prosecuting state's civil procedure, clause (1) is similar to that part of Fed. R. Civ. R. 28(b) which provides, "In a foreign country, depositions may be taken . . . before a person authorized to administer oaths in the place where the examination is held, either by the law thereof or by the law of the United States." As to bringing out-of-state witnesses to the prosecuting state, see Uniform Act to

Secure the Attendance of Witnesses From Without the State in Criminal Cases, which has been adopted by every state.

In allowing depositions to be recorded by other than stenographic means, clause (2) accords with Fed. R. Civ. P. 30(b) (4), except that the latter allows this only upon stipulation or court order. This provides a means by which the cost of deposition may be minimized. See Rule 754(b) below regarding the term "recorded."

As to clause (3), it should be noted that some states authorize depositions or "conditional examinations" to be conducted before judges or magistrates. See Cal. Penal Code § 1339 (West 1982); Colo. R. Crim. P. 15(d); N.Y. Crim. P. Law § 660.50(2) (McKinney 1984); Tex. Code Crim. P. art. 39.03 (1979).

(f) Place of taking. A deposition must be taken in a building where the trial may be held, at a place agreed upon by the parties, or at a place designated by special or general order of the court. If the defendant is in custody or subject to conditions of release that prohibit leaving the state and does not appear before the court and understandingly and voluntarily waive the right to be present, a deposition to perpetuate testimony may not be taken at a place requiring transporting the defendant within a jurisdiction that does not confer upon [law enforcement officers] of this state the right to transport prisoners within it.

COMMENT

The first sentence is taken from Fla. R. Crim. P. 3.220(d)(1). Because of the need for the prosecutor and, sometimes, an incarcerated defendant to be present, the courthouse will usually be the most convenient place for the deposition.

The last sentence corresponds to Wis. Stat. Ann. § 967.04(4)(b) (West 1985).

(g) Presence of defendant.

(1) At discovery deposition. The defendant may be present at the taking of a discovery deposition, but if in custody the defendant may be present only with leave of court.

COMMENT

Normally the defendant's interest in being on hand to assist his or her lawyer at the deposition should impel the court to grant the detained defendant's request to be present. As to the effect of the defendant's presence upon the state's ability to use a discovery deposition as substantive evidence at trial, see subdivision (i) below.

(2) At deposition to perpetuate testimony. The defendant must be present at the taking of a deposition to perpetuate testimony, but if the defendant's lawyer is present at the taking:

(i) the court may excuse the defendant from being present if the defendant appears before the court and understandingly and voluntarily waives the right to be present;

(ii) the taking of the deposition may continue if the defendant, present when it commenced, thereafter voluntarily absents therefrom; or

(iii) if the deposition's taking is presided over by a [judge], the [judge] may direct that the deposition's taking or part thereof be conducted in the defendant's absence if the [judge] has justifiably excluded the defendant because of disruptive conduct.

COMMENT

This is an adaptation of Rule 713(b) below. However, clause (ii) hereof is patterned after Fed. R. Crim. P. 43(b)(1) rather than Rule 713(b)(2) below because the court will not have informed the defendant as Rule 713(b)(2) requires. See Comment to Rule 713.

(3) Unexcused absence. If the defendant is not present at the commencement of the taking of a deposition to perpetuate testimony and the defendant's absence has not been excused:

(i) the deposition's taking may proceed, in which case the deposition may be used only as a discovery deposition; or

(ii) if the deposition is taken at the instance of the state, the prosecuting attorney may direct that the taking be postponed until the defendant's attendance can be obtained, and the court, upon application of the prosecuting attorney, by order may direct a [law enforcement officer] to take and keep the defendant in custody during the taking of the deposition.

COMMENT

Under clause (i), either the defense or the prosecution may proceed with its perpetuation deposition in the defendant's unexcused absence, but the deposition may then be used only as a discovery deposition, with restricted admissibility. See subdivision (i) below. But clause (ii), which is patterned after Rule 713(c) below, gives the prosecutor the option of having the defendant brought in so that the deposition will have the greater admissibility of a perpetuation deposition.

(h) Payment of expenses. If the deposition is taken at the instance of the state, the court may, and in all cases in which the defendant is unable to bear the expense shall, direct the state to pay the expense of taking the deposition, including the reasonable expenses of travel and subsistence of the defendant's lawyer and, if the deposition is to perpetuate testimony or the court permits as to a discovery deposition, of the defendant in attending the deposition.

COMMENT

This is similar to Fed. R. Crim. P. 15(c) and Vt. R. Crim. P. 15(c).

(i) Substantive use on grounds of unavailability. So far as otherwise admissible under the rules of evidence, a deposition to perpetuate testimony may be used as substantive evidence at the trial or upon any hearing if the deponent is unavailable [as defined in Rule 804(a) of the Uniform Rules of Evidence]. A discovery deposition may be so used if the court determines that the use is fair in light of the nature of an extent of the total examination at the

taking thereof, but it may be offered by the state only if the defendant was present at its taking. [Unless the exemption, refusal, claim of lack of memory, inability, or absence is due to the procuring or wrongdoing of the proponent of the statement for the purpose of preventing the deponent from attending or testifying, the deponent is unavailable for purposes of this subdivision if the deponent:

(1) is exempted by ruling of the court on the grounds of privilege from testifying concerning the subject matter of a statement;

(2) persists in refusing to testify concerning the subject matter of a statement despite an order of the court to do so;

(3) testifies to a lack of memory of the subject matter of a statement;

(4) is unable to be present or to testify at the trial or hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the trial or hearing and the proponent of the statement has been unable to procure the deponent's attendance by process or other reasonable means.]

COMMENT

This subdivision treats only substantive use on grounds of unavailability because only as to that matter do depositions call for special rules.

A state may either incorporate a definition of "unavailable" by a cross-reference like the bracketed language at the end of the first sentence or set forth a definition as in the bracketed third sentence. That sentence is based upon Unif. R. Evid. 804(a).

(j) Offer of part of deposition. If only a part of a deposition is offered in evidence by a party, an adverse party may require the party to offer or may personally offer all of it which is relevant to the part offered.

COMMENT

This derives from Fed. R. Crim. P. 15(e).

(k) Objection to admissibility. Objections to receiving in evidence a deposition or part thereof may be made as provided in a civil action.

COMMENT

This is from Alaska R. Crim. P. 15(f), Mont. Code Ann. § 46-15-204(4) (1985), Nev. Rev. Stat. § 174.225 (1985), and Vt. R. Crim. P. 15(f).

(l) Deposition by agreement not precluded. This Rule does not preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties.

COMMENT

This is based upon Vt. R. Crim. P. 15(i).

RULE 432. INVESTIGATORY DEPOSITION.

(a) Authority. The prosecuting attorney may take by deposition the testimony of an individual believed to possess information concerning the possible commission of a crime within the prosecuting attorney's jurisdiction.

COMMENT

RULE 432 GENERALLY

There is general recognition of the need for prosecutorial investigative authority to obtain relevant information from persons who will not volunatarily furnish it. Most jurisdictions use the grand jury for that purpose. These Rules encourage states to discard the grand jury as a screening agency in light of available alternative procedures. See Comment to Rule 231(a) above. Similarly, granting direct authority to the prosecutor to obtain investigatory depositions is viewed as preferable to using the grand jury for investigatory purposes. Reliance upon the

investigatory deposition avoids many of the complexities that arise in the grand jury setting because of the combination of the grand jury's investigatory and screening functions. Thus such issues as secrecy, presence of counsel, and scope of examination may be viewed differently when the concern is the interests of the prosecutor and witness apart from the grand jury function of determining probable cause. A preference for a separate prosecutor investigative authority is also reflected in Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts Standard 12.8 (1973). As stated in the Commentary thereto:

> One important tool necessary to the proper investigation of criminal cases is suggested by this standard: the prosecutor should have the authority to issue subpoenas requiring those with knowledge of possible criminal activity to appear for questioning. At present, the prosecution must either rely upon voluntary cooperation (which in a significant number of cases is not forthcoming) or utilize the cumbersome device of the grand jury to obtain information concerning criminal activity. This standard proposes the more straightforward approach of a subpoena issued directly by the prosecutor.

Several states authorize investigatory deposition procedures on the initiative of the prosecutor. See e.g., Ark. Stat. Ann. § 43-801 (1977); Fla. Stat. Ann. § 27.04 (West 1974); Kan. Stat. Ann. § 22.3101 (1981); La. Code Crim. P. art. 66 (West Supp. 1987). The Model Crime Investigation Commission Act recommends that similar authority be granted to commissions. See, e.g., N.Y. Unconsol. Laws § 7501-7507 (McKinney 1979 & Supp. 1987).

Subdivision (a)

This subdivision grants authority to the prosecutor to take an investigatory deposition. The standard for determining who may be deposed is derived from N.Y. Crim. P. Law § 190.50(2) (McKinney 1982) ("The people may call as a witness in a grand jury proceeding any person believed by the district attorney to possess relevant information or knowledge"). The limitation of investigation to possible commission of a crime within the prosecutor's jurisdiction (ordinarily the district from which the prosecutor is elected) is common to grand jury investigations. See, e.g., Fla. Stat. Ann. § 905.16 (West 1985); N.Y. Crim. P. Law § 190.55 (McKinney 1982). See also Okla. Stat. Ann. tit. 22, § 258 (West 1969) (prosecutor authority to subpoena witnesses for examination before prosecutor limited to felony cases triable in county).

Current investigatory deposition provisions are divided as to whether application must be made to the court to utilize that procedure. Compare La. Code Crim. P. art. 66 (West Supp. 1987) (court may issue subpoena upon written application of prosecutor) with Ark. Stat. Ann. § 43-801 (1977) (prosecutor "shall have authority to issue subpoenas in all criminal matters"). This Rule adopts the latter approach, which is also utilized in most grand jury provisions. See, e.g., Cal. Penal Code § 939.2 (West 1985); Tex. Crim. P. Code Ann. art. 20.10 (Vernon 1977). If the prosecutor misuses this authority, the witness may object under subdivisions (c) and (k) below.

(b) Attendance. Attendance of the deponent and production of documentary evidence and objects may be compelled by subpoena under Rule 731. A written notification of the matters specified in subdivision (g) must be served along with the subpoena.

COMMENT

Issuance of the subpoena is governed by Rule 731, which gives the prosecutor automatic access to the subpoena authority of the court. To assure the witness an adequate opportunity to make an informed determination regarding the rights specified in subdivision (g) below, a written notification of those rights must be served along with the subpoena.

(c) When taken. A deposition may not be taken under this Rule after an individual is arrested for, or a citation, summons, arrest warrant, [indictment,] or information is issued for, commission of a crime that is a subject of the deposition or any related crime as defined under Rule 471(a). On motion of a defendant or deponent and a showing that a scheduled deposition is prohibited by this subdivision, the court shall order that the deposition not be taken except in conformity with Rule 431.

COMMENT

Once prosecution has been initiated as to the subject matter of an investigation there is a defendant whose counsel is entitled to participate in the deposition procedure. Accordingly, once any individual is arrested, or any citation, summons, warrant, indictment, or information is issued, the deposition procedure of Rule 431 above rather than the investigatory deposition procedure of this Rule applies. This extends to initiation of prosecution against anyone for a related crime as defined in Rule 471(a).

Admittedly, courts may have some difficulty in determining the relationship between the subject matter of the prosecutor's examination and the crime for which an arrest has been made or a citation, summons, warrant, indictment, or information issued. But the issue is no more difficult than that currently faced in the context of an objection to a grand jury investigation on the ground that the grand jury subpoena power is being utilized for the purpose of preparing an already pending indictment for trial. See United States v. Doe, 455 F.2d 1270 (1st Cir. 1972). Indeed the standard provided in this subdivision offers more direction to the court (and more protection against misuse of the investigatory deposition process) than the approach of the federal courts in ruling on those objections. See id. at 1273 (applying a

"predominant purpose" test). The reference to Rule 471(a) makes clear that the subject matter of the investigation must be defined in terms of the transaction and not just in terms of the individual about whom questions are asked.

(d) How taken. The deposition must be taken in the manner provided in a civil action, except:

(1) it must be recorded by the means the prosecuting attorney designates; and

(2) on motion of the deponent and upon a showing that the taking of the deposition will unreasonably annoy, embarrass, or oppress the deponent, the court may order that the deposition not be taken or may limit the scope and manner of its taking.

COMMENT

This is based upon related provisions of Rule 431 above. Clause (1) derives from Rule 431(e)(2). As the party seeking the deposition, the prosecutor may designate the recording method.

Clause (2) derives from Rule 431(a)(4) above. It obviously will be difficult for the prospective witness to make the requisite showing in advance of the deposition, but certain situations may be anticipated that are likely to require court action under clause (2), e.g., the witness claims to be too ill to be deposed or that repetitive depositions have been scheduled so as to harass the witness.

(e) Individuals present. No individual may be present during the taking of the deposition except:

(1) the prosecuting attorney;

(2) a stenographer or operator of a recording device;

(3) an interpreter, when needed;

(4) the deponent;

(5) the deponent's lawyer;

(6) a public officer holding the deponent in custody;

(7) a parent or guardian of a deponent who is a minor, unless excluded by order of the court; and

(8) with the court's approval, an individual whose presence is considered appropriate to protect the physical or mental health of another individual present.

COMMENT

This subdivision follows the common pattern of grand jury statutes in limiting the individuals who may be present. In part, this limitation is designed to protect the secrecy of the proceeding, but it is also designed to keep the deposition from taking on the appearance of a public hearing. The prosecutor may not conduct the investigatory deposition in the publicity-oriented fashion in which legislative hearings are sometimes conducted.

The list of individuals allowed to be present is similar to that specified for grand jury proceedings in N.Y. Crim. P. Law § 190.25(3) (McKinney 1982 & Supp. 1987), but the latter allows the witness' lawyer only if the witness has waived immunity and instead of clauses (7) and (8) allows a professional providing emotional support to a sex crime witness 12 years old or younger. In the grand jury situation, there may be concern that individuals present will influence the grand jury in its determination of probable cause. That concern does not exist in this setting. Neither is there as great concern that the presence of such individuals will improperly influence the witness' testimony, since the witness may have the assistance of counsel. Compare United States v. Carper, 116 F. Supp. 817 (D.D.C. 1953) (rejecting indictment because the presence of the deputy marshal holding the witness in custody could have intimidated the witness). However, such concern is not completely eliminated with respect to the individuals specified in clauses (7) and (8), and their presence is therefore specifically made subject to court control. Cf. United States v. Borys, 169 F. Supp. 366 (D. Alaska 1959) (indictment dismissed where parent present during child's testimony on alleged sex offense).

Clause (8) is stated broadly, rather than by specific reference to professionals, since there may be situations where other individuals may be appropriate to protect the mental or physical health of the witness or another person present (e.g., a relative of an extremely nervous witness or a police officer assigned to protect a prosecutor who has been threatened by the witness). Because of the breadth of this category, and therefore its potential for abuse, court approval is required.

Admittedly, as the number of individuals present increases, there may be somewhat greater difficulty in preserving secrecy. But the number authorized by this subdivision

should not be so substantial as to cause difficulties in this regard, and if the number is so great as to be oppressive to the witness, relief is available under subdivision (j)(6) below.

(f) Secrecy.

(1) Imposition of requirement. Upon the prosecuting attorney's determination that secrecy is needed to obtain relevant information or to protect the interests of a deponent or other person, or upon the deponent's request, the prosecuting attorney shall direct all individuals present during a deposition not to disclose the nature or purpose of the deposition or anything that transpires during the examination, except as permitted under paragraph (2). Neither the prosecuting attorney nor an agent of the prosecuting attorney may disclose, without the deponent's consent, that a subpoena has issued, except as necessary to its issuance or service.

COMMENT

Subdivision (f) carries over to the investigatory deposition some aspects of the secrecy requirement traditionally applied to the grand jury. In the grand jury setting, secrecy is thought to be necessary for several reasons: (1) to protect the internal operations of the grand jury, (2) to prevent disclosure of a grand jury investigation to a person being investigated, who might then decide to flee, (3) to prevent disclosure to a person being investigated who might tamper with prospective witness, (4) to encourage full and open testimony by the witness, and (5) to protect the reputation of an innocent person who is the subject of an investigation and may never be charged with an offense. Only the first ground is purely a product of the grand jury setting; grounds (2)-(5) may be equally applicable to the investigatory deposition under the circumstances of a particular case.

Under paragraph (1), the determination whether such circumstances exist is left to the prosecutor and witness. The witness may determine (1) whether possible public disclosure by a prosecutor would be injurious to the witness, or (2) even if the prosecutor clearly does not intend to make a public disclosure, whether the imposition of a legal requirement of secrecy will be helpful to the witness in avoiding pressure to disclose. Similarly, the prosecutor may determine that a secrecy requirement is necessary to keep the subject of the investigation from learning of its scope, to encourage witnesses to speak freely, or to restrict possible pre-prosecution publicity that may create difficulties in providing a fair trial on any subsequent charges. The determination by either the prosecutor or the witness that secrecy is needed is binding on the other.

In some jurisdictions, no secrecy requirement is currently imposed upon the grand jury witness. See, e.g., Fed. R. Crim. P. 6(e). In others the secrecy requirement is imposed upon all individuals present. See, e.g., La. Code Crim. P. art. 434(A) (West Supp. 1987). This subdivision follows the latter approach. When there is a need for secrecy--whether to protect the reputation of the potentially innocent subject of the investigation, or to facilitate the acquisition of further evidence without interference by the subject of the investigation--that need is undermined by disclosures by witnesses as well as other persons.

It should be noted, however, that the witness can only be precluded from discussing the deposition examination itself; the witness is free to discuss the subject matter discussed at the examination without referring to the examination. Moreover, each party may seek court approved disclosure under paragraph (2)(v) below.

The second sentence protects the witness against the misuse of the subpoena power to achieve publicity. See United States v. Dionisio, 410 U.S. 1, 43-44 (1973) (Marshall, J., dissenting). Similar provisions are found in various states. See, e.g., Mich. Comp. Laws Ann. § 767.4 (West 1982).

(2) Scope. Upon the prosecuting attorney's notification under paragraph (1), an individual present during a deposition may not disclose the nature or purpose of the deposition or anything that transpired during the examination, before an arrest for, or the issuance of a citation, summons, arrest warrant, [indictment,] or information for, the commission of a crime that was a subject of the examination or any related crime as defined under Rule 471(a), except disclosure may be made:

(i) to the lawyer for the deponent not present during the examination, and to the staff of the deponent's lawyer;

(ii) to a prosecuting attorney not present during the examination or a [law enforcement officer], for use in the performance of the official duties thereof;

(iii) to the court in connection with a challenge to the deposition as provided in this Rule;

(iv) in connection with a judicial proceeding on a criminal charge that the witness committed perjury in testimony taken under this Rule or other testimony relating to the same subject matter; and

(v) as directed by the court in the interest of justice.

RELATED STANDARD: 11-2.1(a)(iii)

COMMENT

The grounds for secrecy noted in the previous Comment are primarily applicable before the initiation of prosecution. Moreover, after charges are initiated, there is a defendant who needs to examine all depositions relating to the case, which are discoverable under Rule 421(a) above. See ABA Standard 11-2.1(a)(iii) (providing discovery of "those portions of the grand jury minutes containing testimony of the accused and relevant testimony of witnesses"). Accordingly, the duty of secrecy terminates with the initiation of prosecution of a crime that is a subject of the investigation.

This paragraph recognizes five exceptions even with respect to disclosure before the initiation of prosecution on the subject of the investigation. These exceptions are analogous to those presented in the grand jury setting, although broader in some respects.

Clause (i) is similar to La. Code Crim. P. art. 434(A) (West Supp. 1987).

Clause (ii) is similar to Fed. R. Crim. P. 6(e)(3)(A).

Clauses (iii) and (iv) are similar to Fed. R. Crim. P. 6(e)(3)(C)(i) (disclosure "when so directed by a court preliminarily to or in connection with a judicial proceeding").

Clause (v) is similar to provision in N.Y. Crim. P. Law § 190.25(4)(a) (McKinney Supp. 1987) (disclosure "upon written order of the court"). It gives the court authority to prevent unnecessary imposition of secrecy by the prosecutor or witness, and to grant appropriate relief where special justifications for disclosure outweigh the justification for secrecy.

(3) Further disclosure. An individual to whom disclosure is made under paragraph (2)(i) or (ii) may not make a further disclosure beyond that which an individual present during the deposition could make under paragraph (2).

COMMENT

This is similar to Fed. R. Crim. P. 6(e)(3)(B).

(g) Notification of rights. Before examining a deponent, the prosecuting attorney shall inform the deponent:

(1) of the right to refuse to answer on the ground that testimony may tend to incriminate the deponent;

(2) of the right to secrecy under subdivision (f); and

(3) of the right to the assistance of a lawyer during the examination;

(4) that upon request the court will provide a lawyer without cost; and

(5) that upon request the court will delay the examination to afford the deponent reasonable opportunity to obtain and consult with a lawyer.

COMMENT

There is a division of authority concerning the need to notify a grand jury witness of the right against self-incrimination, at least where the witness is a prospective defendant. Compare United States v. Scully, 225 F.2d 113 (2d Cir.), cert. denied, 350 U.S. 897 (1955), with State v. Fary, 19 N.J. 431, 117 A.2d 499 (1955). See also State ex rel. Lowe v. Nelson, 202 So. 2d 232 (Fla. Dist. Ct. App.), opinion adopted, 210 So. 2d 197 (Fla. 1967) (dividing over impact of Miranda). This subdivision requires notification in all cases. No attempt is made to distinguish between witnesses in terms of the likelihood that they may become defendants. Any such line of distinction involves considerable difficulty in application. See Birzon & Gerard, The Prospective Defendant Rule and the Privilege Against Self-Incrimination in New York, 15 Buff. L. Rev. 595 (1966). Moreover, any witness may suddenly be placed in a position where answers may be incriminatory. Any question as to whether the witness' response reflects a knowing waiver of the privilege should be avoided by requiring notification in each case. Cf. N.Y. Crim. P. Law § 190.40(2) (McKinney Supp. 1987) (granting immunity to all grand jury witnesses unless they execute written waivers).

A similar rationale supports the witness' right to assistance of counsel. While counsel is not available before the grand jury, that restriction is based upon concerns (e.g., possible attempts by counsel to influence the grand jury) that are not present in the deposition context. Indeed, most jurisdictions recognize the grand jury witness' need for the assistance of counsel by permitting the witness to leave the grand jury room when the witness desires to consult with counsel on legal matters. Compare ALI Model Code of Pre-Arraignment Procedure

§ 340.3(1) (1975) (allowing counsel in the grand jury room). Moreover, the witness before the prosecutor on an investigatory deposition lacks the "protective shield" of grand jurors that has been stressed as one of the factors justifying exclusion of counsel before the grand jury. See In re Groban, 352 U.S. 330, 341 (1957) (Black, J., dissenting). See also Gill v. State ex rel. Mobley, 242 Ark. 797, 416 S.W.2d 269 (1967) (holding right to counsel applicable to examination before prosecutor).

Since counsel can provide critical assistance to the witness in the exercise of the witness' legal rights, appointed counsel is provided. This may be required constitutionally when an indigent individual is a target of the investigation. Subdivision (g) goes beyond that situation both because of the difficulties involved in applying the target standard and the possible need for assistance even when the witness is not the target. Where the witness is willing to give the prosecutor a voluntary statement, there often will be no need to utilize this Rule, and the issue of appointment of counsel will not arise. If, on the other hand, the witness refuses to discuss the case except pursuant to a subpoena, the witness' very posture evidences a possible need for counsel, even though the witness may not be the target of the investigation.

In light of the fact that this procedure occurs at the investigatory stage, when the deponent is not charged and there may be no probable cause as to the deponent, the state should bear the cost of counsel just as it bears the cost of other professionals utilized at the investigatory stage, unless the deponent opts to retain a lawyer at the deponent's own expense.

(h) Recording. The notification of rights under subdivision (g) must be recorded as part of the deposition. If the deponent proceeds without a lawyer, the deponent's express waiver of the assistance of counsel also must be recorded.

COMMENT

This is in line with the policy of Rule 754(a) below that all significant proceedings be recorded.

(i) Immunity. A deponent called to testify under this Rule may be granted immunity under Rule 732.

COMMENT

Where the grand jury is used as an investigatory device, it is frequently utilized along with the grant of immunity. The same is true of the prosecutor's investigatory subpoena. See, e.g., La. Code Crim. P. art. 439.1 (West Supp. 1987).

(j) Refusal to testify. A deponent may refuse to answer a question if:

(1) the deponent has a privilege not to testify;

(2) the deponent has not had an adequate opportunity to consult with a lawyer;

(3) the question is based upon information derived from a violation of a constitutional right of the deponent or any other right requiring exclusion of evidence obtained from the violation thereof;

(4) the question is not relevant to the investigation of a possible commission of any crime within the jurisdiction of the prosecuting attorney;

(5) the question relates to a matter that is not a proper subject of investigation under subdivision (c); or

(6) the taking of the deposition unreasonably annoys, embarrasses, or oppresses the deponent.

COMMENT

This specifies grounds upon which a witness may refuse to answer a question. In the area of grand jury examination, there is considerable division as to the permissible grounds for objection.

The first ground--objection based upon a testimonial privilege (e.g., self incrimination, marital communications)--is well recognized. Whether the privilege is applicable would depend upon state law (or federal constitutional law where the privilege against self-incrimination is involved).

The second ground is a by-product of the right to counsel.

The third ground is an extension of the position taken by Congress with respect to illegal wiretaps. See Gelbard v. United States, 408 U.S. 41 (1972). Clause (3) also applies to examinations based upon information obtained via other violations requiring application of the exclusionary rule. Support for this position is found in the application of the "fruit of the poison

tree" doctrine to other aspects of the criminal process. See Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). In United States v. Calandra, 414 U.S. 338, (1974) a divided Court refused to extend Silverthorne to permit a grand jury witness to object to examination based on information obtained from an unconstitutional search. Calandra was based in part upon the "potential injury to the historic role and functions of the grand jury." Id. at 350. The Court was particularly concerned that recognition of objections of the type raised by the witness there would result in "'protracted interruptions of grand jury proceedings' . . ., effectively transforming them into preliminary trials on the merits." Id. While this concern applies to the prosecutor's investigatory deposition, it is not as significant in this setting. The prosecutor's investigatory deposition is not limited by a specific term or other cumbersome aspect of the grand jury investigative process. Also, as noted below in the discussion of clauses (4) and (5), the prosecutor acting alone is not granted quite the same, almost unlimited, scope of investigation as was recognized in Calandra as traditional for the grand jury.

The fourth ground of objection--relevancy--is not recognized with respect to grand jury proceedings in most jurisdictions. See, e.g., Blair v. United States, 250 U.S. 273 (1919); United States v. Girgenti, 197 F. 2d 218 (3d Cir. 1952). On the other hand, several states recognize relevancy objections, although there is a presumption of regularity that the witness must overcome. See, e.g., People v. Polk, 21 Ill. 2d 594, 174 N.E.2d 393 (1961). The refusal to recognize a relevancy objection in the grand jury setting has rested, in part, upon the view that the grand jury, because of its composition, will serve to bar prosecutorial misuse of its investigatory authority. That protection is not available in the investigatory deposition procedure. Rejection of a relevancy objection has also been justified on the ground that the determination of relevancy places too great a burden on the grand jury--i.e., that it cannot be expected to know at the outset the eventual outcome of its investigation. But the relevancy objection recognized in clause (4) imposes no such burden. The objecting witness must, in effect, show that the subject of investigation could not relate to any possible crime. There is no requirement that the prosecution establish probable cause that a particular crime was committed. A similar approach taken in the grand jury context apparently has not caused any great difficulties in those states that recognize relevancy objections.

Clause (5) is based upon subdivision (c) above and bars questions concerning pending prosecutions. The prosecutor may obtain such information by utilizing the deposition procedure of Rule 431 above.

Clause (6) restates the objection recognized in subdivision (d)(2) as an appropriate ground for challenging the entire deposition process. The objection will largely overlap the relevancy objection of clause (4), but there may be instances where a potentially relevant examination should be restricted. Thus, in Branzburg v. Hayes, 408 U.S. 665, 707-08 (1972), the Supreme Court, while upholding the grand jury's authority to question a reporter concerning alleged offenses, stated:

> [N]ews gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly

different issues for resolution . . . . Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash.

(k) Judicial order. If a deponent refuses to answer upon a ground provided in subdivision (j), the court, on motion of the prosecuting attorney and hearing, shall determine whether the refusal is justified under subdivision (j). To preserve the secrecy of the examination, the court may exclude the public from the hearing. If the court finds that subdivision (j) is inapplicable, the court shall require the deponent to answer. A deponent may not be held in contempt for refusal to answer a question in reliance upon subdivision (j) unless first directed by the court to answer. If the court finds that the refusal to answer was justified under subdivision (j), it may limit the future scope and manner of the taking of the deposition, or if the refusal was justified under subdivision (j)(4), (5), or (6), order that the deposition be terminated.

COMMENT

Rulings on objections recognized by subdivision (j) above will be made by the court under this subdivision.

The second sentence is similar to Fed. R. Crim. P. 6(e)(6), which specifies, "Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury."

The third and fourth sentences recognize that if a witness is mistaken as to the legal validity of an objection, the witness should not be held in contempt without first being given the opportunity to respond to the question. See Commentary to Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts Standard 12.8 (1973).

If the court sustains a witness' objection, its authority under the last sentence is sufficiently broad that it may prohibit future questions along the same line or even terminate the deposition when the entire examination relates to an improper subject.

RULE 433. PHYSICAL OR MENTAL EXAMINATION OF PROSPECTIVE WITNESS.

(a) Authority. On motion of a party, notice to an individual sought to be examined, and opportunity for the individual to be heard, the court may order an individual other than the defendant to submit to a physical or mental examination by a physician or mental-health professional if it appears:

(1) a party other than the movant intends to call the individual as a witness;

(2) the individual's testimony will be essential to the case of the party intending to call the individual as a witness; and

(3) there is probable cause to believe that the examination would show the individual's testimony would not be credible.

COMMENT

This is similar to Fed. R. Civ. P. 35(a) except that the latter lets the court order a party to produce for examination "a person in the custody or under the legal control of a party" when the proposed examinee's "mental or physical condition (including blood group) . . . is in controversy . . . for good cause shown," and does not specify the proposed examinee's opportunity to be heard.

In some situations a party should have a right to examination of another party's prospective witness regarding matters like eyesight, hearing, or mental condition, and the right should be directly enforceable against the prospective witness. Commenting on a witness' refusal to be examined often will be an inadequate substitute for an examination. Excluding all or part of the witness' testimony is also unsatisfactory, because a party's right to have a person testify should not be defeasible by the person's refusal to be examined.

The conditions in clauses (2) and (3) insure that the prospective witness' privacy will be invaded only where the examination appears necessary for a fair trial. It is not justifiable to compel examination if the person's testimony will be cumulative or if the movant fails to establish probable cause to believe the examination will show the testimony would not be credible.

(b) Contents of order. The order must specify the time, place, manner, conditions, and scope of the examination and by whom it may be made.

COMMENT

This is from Fed. R. Civ. P. 35(a).

(c) Report. If requested by a party or the individual examined, the party causing the examination to be made shall deliver to the individual examined a copy of any written report of the examining physician or mental-health professional setting out the findings, including results of all tests made, diagnoses, and conclusions.

COMMENT

This derives from Fed. R. Civ. P. 35(b)(1). Nothing herein precludes discovery of a report of an examining expert or the taking of the expert's deposition.

RULE 434. OBTAINING NONTESTIMONIAL EVIDENCE FROM DEFENDANT UPON PROSECUTION MOTION.

(a) Authority. On motion of the prosecuting attorney, the court by order may direct a defendant to participate in a procedure to obtain nontestimonial evidence under this Rule, if the court finds that:

(1) there is good cause to believe that the evidence sought may be relevant and material in determining whether the defendant committed a crime charged;

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

(3) the request is reasonable; and

(4) there is, or a [magistrate] [or grand jury] has determined there is, probable cause to believe that the crime was committed and the defendant committed it.

RELATED STANDARD: 11-3.1(b)

COMMENT

This is based upon Standard 11-3.1(b).

(b) Emergency procedure. Upon application of the prosecuting attorney, the court by order may direct a [law enforcement officer] to bring the defendant forthwith before the court for an immediate hearing on a motion made under this Rule, if affidavit or testimony shows probable cause to believe that the evidence sought will be altered, dissipated, or lost if not promptly obtained. Upon presentation of the defendant, the court shall inform the defendant of the defendant's rights under this Rule and afford the defendant reasonable opportunity to consult with a lawyer before hearing the motion.

COMMENT

This is based upon ALI Model Code of Pre-Arraignment Procedure § 170.7(2) (1975).

If the defendant cannot obtain the presence of counsel on short notice, special counsel may be appointed.

(c) Scope. The order may direct the defendant to:

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

(2) try on clothing and other articles;

(3) provide handwriting and voice exemplars;

(4) permit the taking of photographs;

(5) permit the taking of fingerprints, palm prints, footprints, and other body impressions;

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

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

(8) submit to body measurements and other reasonable body surface examinations;

(9) submit to reasonable physical and medical inspection, including x-rays, of the body; and

(10) participate in other procedures that comply with the requirements of subdivision (a).

RELATED STANDARD: 11-3.1(c)

COMMENT

This is based upon Standard 11-3.1(c) and ALI § 170.1(2).

The matters specified in clauses (3), (4), (5), and (8), while not specified in Standard 11-3.1(c), fall within Standard 11-3.1(c)(vi), which is identical to clause (10).

Regarding when a procedure would be permissible under clause (10), see Winston v. Lee, 470 U.S. 753 (1985). The Winston Court, holding that in the circumstances before it surgery to recover a bullet would violate the fourth amendment, said, "The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure." Id. at 760. In striking this balance, the Court considered the following factors: (1) whether there was probable cause to believe that the surgery would produce evidence of guilt, (2) "the extent to which the procedure may threaten the safety or health of the individual" (including the extent to which this is in dispute--"the very uncertainty militates against the finding the operation to be 'reasonable'"), (3) "the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity" (including whether the operation

requires general anesthetic, which "involves a virtually total divestment of . . . ordinary control"), and (4) the state's need for the evidence (in light of other available evidence against the defendant). Id. at 760-66.

(d) Contents of order. The order shall specify with particularity the authorized procedure, the scope of the defendant's participation, the time, duration, place, and other conditions of the procedure, and who may conduct it. It may also direct the defendant not to alter substantially any identifying physical characteristics to be examined or destroy any evidence sought. It shall specify that the defendant:

(1) may not be subjected to investigative interrogation while participating in or present for the procedure; and

(2) may be held in contempt of court if the defendant fails to appear and participate in the procedure as directed.

RELATED STANDARD: 11-3.1(d)

COMMENT

The first sentence is based upon Standard 11-3.1(d); the balance derives from ALI § 170.3(2)(f), (j), (n).

The court may find it desirable to impose certain conditions on the conduct of the procedure (e.g., that the lineup be photographed or statements made by witnesses be recorded.) Similarly, the court either may designate a particular person to conduct the procedure or may simply refer to an eligible group of persons by reference to their position (e.g., "any employee of the state crime laboratory").

(e) Service. The order must be served by delivering a copy of the order to the defendant personally.

COMMENT

This is from ALI § 170.5(1). Personal service is required to assure the availability of the contempt sanction if the defendant inexcusably fails to comply.

(f) Implementation of order.

(1) Individuals present. While participating in or present for an authorized procedure, the defendant may be accompanied by a lawyer and by an observer of the defendant's choice. The presence of other individuals at the procedure may be limited as the court considers appropriate under the circumstances.

RELATED STANDARD: 5-6.1

COMMENT

Regarding presence of a lawyer, this derives from ALI § 160.3. See Standard 5-6.1 (3d ed. 1991) (counsel should be provided on request to person not charged or in custody but who is in need of legal representation arising from criminal proceedings); Kirby v. Illinois, 406 U.S. 682 (1972) (accused entitled to counsel at lineup). Although Gilbert v. California, 388 U.S. 263 (1967) establishes that counsel need not be appointed for a handwriting exemplar procedure, it is not clear that police could refuse access to counsel who desired to be present.

An observer is allowed because counsel may desire to have an expert present, or the defendant may desire to have a relative present. The presence of one additional person should not interfere with the procedure's implementation. However, the court may prohibit the presence of other persons where appropriate.

(2) Promptness. The procedure must be conducted with dispatch.

COMMENT

This is similar to ALI § 170.7(3) (person may not be detained longer than reasonably necessary to conduct the procedure and in no case longer than three hours).

(3) Supervision. If the procedure involves an intrusion of the body, medical or other qualified supervision must be provided. Upon timely request of the defendant

and approval by the court, a procedure involving intrusion of the body must be supervised by a qualified health-care professional designated by the defendant.

COMMENT

The first sentence is similar to ALI § 160.2(6). The cost of the supervision will be borne by the prosecution just as it bears the cost of other experts it uses in the discovery process.

To avoid concerns about the nature of the medical supervision or the defendant's particular medical problems, the second sentence lets the defendant designate the expert. The requirement of court approval insures that the defendant will not be able to unduly delay the procedure by selecting an expert who is not readily available.

(4) Interrogation. The defendant must not be subjected to investigative interrogation while participating in or present for the procedure. No statement of the defendant is admissible against the defendant if made in the absence of the defendant's lawyer and while participating in or present for the procedure.

COMMENT

The first sentence derives from ALI § 170.7(4).

Because it is not always clear what constitutes interrogation, see, e.g., Combs v. Commonwealth, 438 S.W.2d 82 (Ky. 1969) (reading of ballistics report to defendant did not constitute interrogation), all statements made in absence of counsel are subject to suppression. This prohibition, of course, only extends to use of the substance of statement. It does not exclude use of the voiceprint against the defendant.

(g) Use of evidence. Any evidence obtained from the defendant may be used only with respect to the crime specified in the motion under subdivision (a) or a related crime as defined in Rule 471(a).

COMMENT

This bars the use of nontestimonial evidence obtained in connection with one crime in investigating other crimes as to which probable cause does not exist. This prohibition

applies only to the evidence furnished by the defendant. If a witness at a lineup happens to recognize the defendant as a person who robbed the witness on a previous occasion, that identification would not be excluded, assuming the lineup had not been purposefully arranged to obtain identification relating to the earlier robbery.

RULE 435. OBTAINING NONTESTIMONIAL EVIDENCE FROM DEFENDANT ON DEFENDANT'S MOTION.

(a) Authority. On motion of a defendant who has been arrested, cited, or charged in an information [or indictment], the court by order may direct the prosecuting attorney to provide one or more of the procedures specified in Rule 434(c) for participation therein by the defendant, if the court finds that the evidence sought could contribute to an adequate defense.

COMMENT

Rule 435 generally

This rule is based upon ALI Model Code of Pre-Arraignment Procedure § 170.2(8) (1975). It applies to defendants who themselves desire to participate in a nontestimonial evidence procedure conducted by the prosecution. The defendant who is convinced that nontestimonial evidence would "clear" him or her may desire to proceed under this Rule, although most nontestimonial evidence procedures could be conducted by the defendant without using this Rule. Thus, a defendant who desires to match the defendants blood with that found at the scene may exercise the right under Rule 421(a) above to make reasonable tests upon evidence within the prosecutor's possession. Similarly, if the defendant desires to test a witness' testimony on the issue of identification by asking the witness to make an identification from a group of photographs, this can be done by deposition. Indeed, the deposition procedure might even be used to present a lineup provided other persons were willing to participate. There may be situations, however, in which the defendant, to avoid any controversy as to the method used in obtaining the evidence, prefers that it be done at the prosecutor's direction. There may also be situations in which the evidence must be obtained promptly after arrest and before the deposition procedure is available.

Subdivision (a)

Subdivision (a) of this Rule largely parallels that of Rule 434 above. Reference is made to the defendant being arrested or cited because there may be need to obtain nontestimonial evidence before the information is filed.

The standard for issuing the order differs from that utilized in Rule 434(a). The order must be issued if the court finds that the evidence sought could contribute to an adequate defense. See Rule 731(b) below (witness fees). This standard requires a less detailed factual showing than Rule 434(a), and therefore minimizes the possibility that the defendant will be required to offer potentially incriminating evidence in order to utilize this Rule.

(b) Contents of order. The order shall specify with particularity the authorized procedure, the scope of the defendant's permitted participation, the time, duration, place, and other conditions of the procedure, and who may conduct the procedure.

COMMENT

This varies somewhat from Rule 434(d) above since the order is issued upon the defendant's motion.

(c) Implementation of order. Rule 434(f) applies to procedures ordered under subdivision (a).

COMMENT

See Rule 434(f) and Comment above. Since the defendant initiates the procedure, there is no reason to impose the limitation of Rule 434(g) above which is designed to preclude prosecutorial misuse of the Rule 434 procedure.

## RULE 436. INVESTIGATORY NONTESTIMONIAL EVIDENCE ORDER.

(a) Authority. Upon application of the prosecuting attorney, the court by order may direct any individual to participate in one or more of the procedures specified in Rule 434(c)(1) through (8), if affidavit or testimony shows probable cause to believe that:

(1) a crime has been committed by one or more of several individuals comprising a narrow focal group that includes the individual;

(2) the evidence sought may be of material aid in identifying who committed the crime; and

(3) the evidence sought cannot practicably be obtained from other sources.

COMMENT

Rule 436 generally

This Rule permits the issuance of an order directing an individual to participate in a nontestimonial evidence procedure on a showing of less than probable cause. Thus, in a situation in which the police have probable cause to believe that the crime was committed by a person of a particular description, and based upon access to the scene of the crime, etc., only several individuals meeting that description could have committed the crime, an order may be obtained directing those individuals to appear in a lineup or furnish other nontestimonial evidence which will assist in determining which of them actually committed the crime. Similar provisions are included in ALI Model Code of Pre-Arraignment Procedure § 170.2 (1975), and have been adopted in some jurisdictions. See, e.g., Ariz. Rev. Stat. Ann. § 13-3905 (1978); Idaho Code § 19-625 (1979); Utah Code Ann. § 77-8-1 (1982) (limited to lineups).

Support for the constitutionality of this Rule is found in United States v. Dionisio, 410 U.S. 1 (1973); Davis v. Mississippi, 394 U.S. 721 (1969); Camara v. Municipal Court, 387 U.S. 523 (1967); and Terry v. Ohio, 392 U.S. 1 (1968).

In Davis, the Court ruled inadmissible finger and palm prints obtained from the defendant following an arrest and significant detention not supported by probable cause. The Court noted, however, that it was "arguable . . . that because of the unique nature of the fingerprinting process, . . . detentions [for the limited purpose of obtaining prints] might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense." 394 U.S. at 727. The Court noted that "fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions." Id. It also noted that the "limited detention" for fingerprinting "need not come unexpectedly or at an inconvenient time." Id. For the "same reason," however, "the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context." Id. at 728.

Camara and Terry, though dealing with other procedures presenting fourth amendment issues (administrative searches and on-the-street frisks), recognized that where the invasion of privacy was not as great as that involved in the traditional search, a lesser standard of probability than the traditional probable cause standard would be satisfactory. Relying on Terry and Davis, the Court of Appeals for the District of Columbia has recognized judicial authority to order a suspect to participate in a "court-ordered line-up predicated on reasonable grounds short

of a basis for final arrest." See Wise v. Murphy, 275 A.2d 205 (D.C. 1971). See also United States v. Greene, 429 F.2d 193 (D.C. Cir. 1970).

Dionisio may provide even more extensive authority for nontestimonial evidence orders based upon a standard of less than probable cause. In that case, the Court upheld a grand jury subpoena directing approximately 20 persons to provide voice exemplar for comparison with recorded conversations that had been received in evidence by the grand jury. The Court of Appeals had held that the fourth amendment required that the subpoenas be supported by a preliminary showing of "reasonableness," which was described as something less than probable cause. While the three dissenting justices apparently shared that view, the majority held that there was no need for a preliminary showing either of a reasonable basis for issuance of the subpoena or of the traditional probable cause. The majority noted initially that "a subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense." "The compulsion exerted by a grand jury subpoena differs from the seizure effected by an arrest or even an investigative 'stop' . . . [in that] 'the latter is abrupt, is effected with force or the threat of it . . . and, in the case of an arrest, results in a record involving social stigma.'" Id. at 9, 10. The Court also rejected the contention that the taking of the voice exemplars, aside from the detention pursuant to a subpoena, itself constituted a violation of the fourth amendment. It noted that, under the standard of Katz v. United States, 389 U.S. 347 (1967), the individual had no reasonable expectation of privacy with respect to the sound of his voice, since his voice was a characteristic that he "knowingly exposes to the public." Id. at 14.

Various aspects of this Rule reflect a design to stay well within the perimeters suggested by Davis and Dionisio. First, there is no abrupt taking of the person into custody. The individual receives an order to appear at some future time. The order may be challenged or modified and assistance of counsel is provided for that purpose. The issuance of the order may not be publicized except with the subject's approval.

Second, the procedures included under this Rule relate either to evidence of characteristics that are open to the public or evidence, like fingerprints, that is easily obtained with a minimum of inconvenience.

Finally, the standard for issuing the order easily meets the "reasonable suspicion" standard of Terry which is used in other provisions of this type. See ALI § 170.2(6)(b) ("reasonable grounds to suspect that the person . . . may have committed the offense and it is reasonable in view of the seriousness of the offense to subject him to the specific identification procedures"); Idaho Code § 19-625(1)(B) ("reasonable grounds exist, which may or may not amount to probable cause"); Utah Code Ann. § 77-8-1(1) ("probable cause to believe that a crime has been committed and reason to believe that the suspect committed it"). While the standard of subdivision (a) is stated in a somewhat different fashion, it clearly does not fall short of a "reasonable suspicion" standard and presumably might be viewed as requiring a higher probability than some interpretations of "reasonable suspicion." It requires probable cause that a crime has been committed and that one or more of a limited group of persons committed the crime. It is only with regard to the size of the group that it departs from the traditional probable

cause standard. The group must be limited, but it may contain several individuals. The maximum size is not specified. Indeed, the permissible size may vary with the nature of the procedure requested, depending upon the degree of imposition involved in administering the procedure. It is not necessary, of course, that the exact size of the group be specified in the application, but the court should be assured that only a limited number of individuals possess the crucial characteristics, so the probability as to the individual is not so remote as to make the imposition "unreasonable."

Subdivision (a)

Unlike Rules 434 and 435 above, subdivision (a) authorizes the court to issue a nontestimonial evidence order upon ex parte consideration of the prosecutor's application, rather than after a hearing on a motion. The subject of the Rule 436 order, unlike the subject of a Rule 434 or 435 order, is not already a defendant in a criminal proceeding. The individual should not be required to even appear before the court to contest the prosecutor's request until the court has determined, on the basis of the prosecutor's evidence, that there is a factual basis for issuing the order. Moreover, the prosecutor should not be required to inform an individual that he or she is a suspect until the court finds a sufficient basis for issuing the order. The issuance of nontestimonial evidence orders upon ex parte consideration is common to the ALI and state provisions cited above. It should be emphasized that after the order is issued, the individual is entitled to a hearing upon a motion to have the order vacated or modified under subdivision (d) below. To insure that the individual has ample opportunity to utilize that motion, the Rule provides in subdivision (b) below for the automatic appointment of counsel upon request without cost to the individual. With these safeguards, it does not seem necessary to require an adversary hearing before execution of the order in every case. In many instances, the individual may not desire to contest the order.

The order may require participation in a procedure specified in clauses (1) through (8) of Rule 434(c), but not in a procedure under clause (9) or (10) of that Rule.

The standard for issuing the order is discussed in the introductory portion of this Comment above.

(b) Contents of order. The order shall specify with particularity the authorized procedure, the scope of the individual's participation, the time, duration, place, and other conditions of the procedure, who may conduct the procedure, and the time within which the order must be served. The order may also direct the individual not to alter substantially any identifying

physical characteristic to be examined or destroy any evidence sought. It must inform the individual:

(1) of the grounds upon which the order was issued;

(2) that the individual may not be subjected to investigative interrogation while participating in or present for the procedure;

(3) that the individual may be accompanied by a lawyer during the procedure and that upon request a lawyer will be provided without cost;

(4) that the individual may request that the court make a reasonable modification of the order with respect to time, place, or manner of conducting the procedure, including, if practicable, a modification to have the procedure conducted at the individual's place of residence;

(5) that the individual may challenge the order as provided in subdivision (d);

(6) of the manner in which the individual may request the assistance of a lawyer, request modification of the order, or challenge the order; and

(7) that the individual may be held in contempt of court if the individual fails to appear and participate in the procedure as directed.

COMMENT

The contents of a Rule 436 order are similar to those of a Rule 434 order, except that the individual is given additional information. The individual is informed of the grounds upon which the order was issued to assist in determining whether to challenge the order. See ALI § 170.3(2). Notification concerning the right to the assistance of counsel, to request modification of the order, to challenge the order, and the procedure to be utilized in exercising these rights is also included. Notification of these matters is necessary since it cannot be assumed that the individual will have available the assistance of counsel when the individual receives the order.

The notification of the right to counsel must clearly indicate that counsel will be provided without cost to the individual. In light of the nature of the procedures involved and the absence of a probable cause showing as to the individual, the prosecution should bear the cost of counsel just as it bears the cost of other experts utilized in obtaining and comparing nontestimonial evidence. See Idaho Code § 19-625(2)(H) (1979) and Utah Code Ann. § 77-8-2 (1982), providing for the appointment of counsel to assist the indigent.

(c) Service. The order must be served by delivering a copy of the order personally to the individual within the time period specified in the order. Unless the court fixes a shorter time upon a showing of cause, the order must be served at least [two business days] before the date of the individual's required participation.

COMMENT

Service is made in the same manner as under Rule 434. A time limit is placed upon service to avoid such delay as could permit the showing of probable cause to become stale. See ALI §§ 170.5, 170.7(2); Ariz. Rev. Stat. Ann. § 13-3905(B)(8) (1978); Idaho Code § 19-625(2)(J) (1979). This subdivision does not set any specific time limitation, but leaves the time limit to be specified by the court as appropriate under the circumstances.

Absent a showing of cause, this subdivision assures the individual at least two business days during which to arrange for counsel and possibly challenge the order. See ALI § 170.7(2).

(d) Modification and challenge. Upon a showing that compliance with the order will unreasonably embarrass or inconvenience the individual, the court shall change the time, place, or manner of conducting the procedure or vacate the order. Upon a showing that the order was improperly issued or that there are no longer sufficient grounds for issuance of the order, the court shall vacate it.

COMMENT

The first sentence is similar to ALI § 170.4, but refers to vacating as well as modifying the order and uses a standard like that specified in Rules 431(a)(4) and 432(d)(2) for restricting or terminating depositions.

The second sentence is similar to ALI § 170.6, but makes clear that the challenge is not limited to information available to the court when it issued the order. The individual may assert evidence contradicting that which the prosecutor offered under subdivision (a) or assert changed circumstances which show the order no longer is justified.

(e) Implementation of order. An individual participating in a procedure under this Rule has the same rights as a defendant under Rule 434(f).

COMMENT

See Rule 434(f)(1)-(4) and Comments above.

(f) Use of evidence. Any evidence obtained from an individual participating in a procedure under this Rule may be used against the individual only with respect to the crime specified in establishing probable cause under subdivision (a)(1) or a related crime as defined in Rule 471(a).

COMMENT

This tracks Rule 434(g). See the Comment to that Rule.

(g) Secrecy. Before completion of the procedure, neither the prosecuting attorney nor an agent of the prosecuting attorney may disclose, without the consent of the individual, that an order has been issued, except as is necessary to its issuance or service. Upon application of the individual, the court may restrict disclosure of the results of any testing or comparison utilizing evidence obtained in the authorized procedure before the introduction of the results in a judicial proceeding, but disclosure may be made:

(1) to a prosecuting attorney or a [law enforcement officer] for use in the performance of official duties; and

(2) in connection with a judicial proceeding.

COMMENT

This derives from ALI § 170.2(7) and from Rule 432(f) above regarding investigatory depositions. It protects the potentially innocent individual from the harm that may flow from publicizing the individual's status as a suspect.

(h) Reports. An individual participating in a procedure under this Rule must be furnished a written report of the result of any testing or comparison utilizing evidence obtained in the authorized procedure. If the evidence is subjected to any scientific test or comparison, a copy of any report prepared by the person conducting the test must be available, upon request, to the individual. Disclosure of the result and report must be made promptly after they become available unless the court directs that disclosure be delayed.

COMMENT

The innocent individual subjected to participation in a nontestimonial evidence procedure should be informed of the outcome of that procedure promptly after the result of any testing or comparison becomes available. Similarly, any scientific reports should be made available upon request. Where the result points to the individual's guilt, the reporting requirement merely advances discovery that will eventually be given to the individual as a defendant. It the result and report are available before prosecution is commenced, the court may direct that disclosure be delayed if there is cause to believe that the individual is likely to flee upon learning of the results.

In light of the reporting requirements, the Rule does not contain a provision requiring that a return be filed setting forth the type of evidence taken under the order. Compare Idaho Code § 19-625(3) (1979), (requiring that copy of return be given to individual). See also ALI §§ 130.4(4), 160.4(6), 170.8(2) (specifying that a record sufficient to disclose any matter relevant to accuracy be kept and reasonable access thereto be allowed to suspect or counsel).

(i) Disposition of evidence. Unless the court authorizes further retention, nontestimonial evidence obtained from an individual under this Rule and all copies thereof must be promptly destroyed or, upon request, returned to the individual, if an information [or

indictment] charging the individual with a crime relating to that evidence is not filed within [45 days] after the evidence was obtained. On motion of the prosecuting attorney, the court may authorize further retention of nontestimonial evidence as reasonably necessary to facilitate a continuing investigation or prosecution.

COMMENT

This derives from ALI § 170.8(4). See Wise v. Murphy, 275 A.2d 205 (D.C. 1971) (noting the significance of such protection in sustaining investigatory nontestimonial order).

The destruction provision insures that the Rule 436 procedure will not be misused to collect nontestimonial evidence for future use. In this regard, it supplements subdivision (f) above. If the individual desires to retain the evidence in the event that circumstances should change and an information is filed or another Rule 436 order is issued, the individual may obtain the evidence upon request.

RULE 437. OBTAINING NONTESTIMONIAL EVIDENCE FROM THIRD PERSON ON DEFENDANT'S MOTION.

(a) Authority. On motion of a defendant who has been arrested, cited, or charged in an information [or indictment], and after notice to the individual and opportunity for the individual to be heard, the court by order may direct any individual to participate in one or more of the procedures specified in Rule 434(c)(1) through (8), if it finds probable cause to believe that:

(1) the crime for which the defendant was arrested, cited, or charged was committed by one or more of several individuals comprising a narrow focal group that includes the subject individual;

(2) the evidence sought could contribute to an adequate defense of the defendant; and

(3) the evidence sought cannot practicably be obtained from other sources.

COMMENT

Rule 437 generally

Rule 437 provides the defendant with a counterpart to the prosecution's Rule 436 authority to obtain a nontestimonial evidence order on less than traditional probable cause. See ALI Model Code of Pre-Arraignment Procedure § 170.2(b) (1975). This Rule will be used when the defendant believes he or she can establish that another individual either committed the crime in question or is at least as likely a suspect as the defendant. It might be useful particularly where several individuals were present at the time of the crime, and the defendant claims that the victim erroneously identified the defendant rather than another individual present. In most such situations, the prosecutor may be willing to include the other individuals in any identification procedure to be certain of having charged the correct individual. But the defendant's right to establish his or her innocence cannot depend upon the prosecutor's discretion. Just as the defendant may use depositions to obtain testimony that shifts the suspicion to other individuals, the defendant should also be able to obtain nontestimonial evidence for that purpose. Here, however, because of the nature of the participation required of the individual, a showing of probability that the evidence will be helpful must first be made.

Subdivision (a)

A motion under this Rule, like a Rule 435 motion, is available to a defendant who has received a citation or has been arrested without a warrant, even though an information has not yet been filed. The procedure under this Rule must be available at this point to cover situations in which prompt action is necessary to avoid loss of nontestimonial evidence. Since the procedure is requested by motion, the prosecutor must be served and given an opportunity to be heard. Rule 752(a) below on service of papers requires service at least two days before a hearing "unless the court otherwise directs." Dispensing with the two-day requirement would often be appropriate for motions under Rule 437.

Both the procedures permitted to be ordered and the standards for issuing the order follow Rule 436(a) above and are discussed in the Comment to that Rule. The manner in which the requisite showing must be made does depart, however, from Rule 436(a) in one important aspect. While the Rule 436 order may be issued upon an ex parte application of the prosecutor, the instant subdivision requires an initial hearing on the defendant's motion. The ex parte procedure is not necessary under this Rule because there is no special need to avoid disclosure to the individual of his or her possible suspect status (as viewed by the defendant) before issuing the order. Also there may be less concern under this Rule of forcing the potential subject to defend against a frivolous motion since the prosecutor, who already is a party to the criminal proceeding, may reflect the individual's interests by opposing the motion.

The defendant may request that the procedure ordered under this Rule be provided by the prosecutor to avoid dispute concerning the administration of the procedure. However, there may be situations in which it would be appropriate to have another governmental agency, or even the defendant's own experts, conduct the procedure. Accordingly the court is granted discretion to direct that any person provide the procedure.

(b) Notice to individual. The notice shall specify that the individual may be represented by a lawyer at the hearing and that upon request the court may provide a lawyer without cost. Unless the court fixes a shorter time upon a showing of cause, the order must be served at least [two business days] before the date of the individual's required participation.

COMMENT

The individual may be represented by counsel at the hearing, but the appointment of counsel to assist the indigent at this stage is discretionary. As with Rule 436 above, the underlying premise of this Rule is that an individual who is to be required to participate in a nontestimonial evidence procedure should have the assistance of counsel to challenge the order. In the proceeding under this Rule, however, unlike the Rule 436 proceeding, the individual may not stand alone in objecting, to the requested order. The prosecutor is a party to the proceeding and his or her opposition to the defendant's motion may adequately represent the interest of the prospective subject. Accordingly, appointment of counsel is not automatically required under this Rule. Of course, if the order is issued, the individual is then automatically entitled to the assistance of counsel. Appointment of counsel, as under Rule 436, is made without cost to the individual.

(c) Contents of order. The order shall specify with particularity the authorized procedure, the scope of the individual's participation, the time, duration, place, and other conditions of the procedure, and who may conduct the procedure. The order may direct any person, including the prosecuting attorney, to provide the procedure. The order also may direct the individual not to alter substantially any identifying physical characteristic to be examined or destroy any evidence sought. It must specify that the individual:

(1) may not be subjected to investigative interrogation while participating in or present for the procedure;

(2) may be accompanied by a lawyer during the procedure and that upon request a lawyer will be provided without cost; and

(3) may be held in contempt of court if the individual fails to appear and participate in the procedure as directed.

COMMENT

This is patterned after Rule 436(b) above.

(d) Service. The order must be served by delivering a copy of the order personally to the individual.

COMMENT

This follows the service provisions of Rules 434(e) and 436(c) above.

(e) Implementation of order. An individual participating in a procedure under this Rule has the same rights as a defendant under Rule 434(f)(1) through (3). The defendant may be present, but if in custody the defendant may be present only with leave of court. The prosecuting attorney, an expert of the prosecuting attorney's choice, the defendant's lawyer, and an expert of the defendant's choice also may be present. The individual may not be subjected to investigative interrogation while participating in or present for the procedure. A statement of the individual made while participating in or present for the procedure is inadmissible against the individual if the statement was made:

(1) in the absence of the individual's lawyer; and

(2) in response to investigative interrogation by the prosecuting attorney or an agent thereof.

COMMENT

See Rule 434(f)(1) through (3) and Comments.

The limited right of the defendant in custody to be present parallels Rule 431(g)(1), above governing the defendant's presence at discovery depositions. The authority of the prosecutor and defense counsel to have other persons attend is limited to experts. Unlike the subject individual, the defendant and prosecutor have no need for the reassurance provided by a general observer. See Comment to Rule 434(f)(1) above.

The fourth sentence follows Rule 434(f)(4) in prohibiting investigative interrogation while the individual is participating in or present for the procedure.

The last sentence differs from Rule 434(f)(4) in not excluding all statements of the individual made in the absence of counsel. The prosecutor's use of evidence should not be subject to the actions of defense counsel who may seek to obtain admissions from the individual at the proceeding. The individual should realize that any self-incriminatory statement made in an effort to remove suspicion from the defendant may be used against the subject individual. The prosecutor is only barred from use of statements made by the individual in the absence of counsel and in response to interrogation by the prosecutor or the prosecutor's agent. If the prosecutor desires to interrogate the individual, the prosecutor must use the deposition procedure.

(f) Use of evidence. Evidence obtained from an individual participating in a procedure under this Rule may be used against the individual only with respect to the crime specified in establishing probable cause under subdivision (a)(1) or a related crime as defined in Rule 471(a).

COMMENT

This follows Rules 434(g) and 436(f) above.

(g) Secrecy. Before completion of the procedure, neither the prosecuting attorney, the defendant, nor their agents may disclose, without the consent of the individual, that a motion has been made or an order issued under this Rule, except as necessary to the presentation of the motion or the issuance or service of the order. Upon application of the

individual, the court may restrict disclosure of the results of any testing or comparison utilizing evidence obtained in the authorized procedure before the introduction of the results in a judicial proceeding, but disclosure may be made:

(1) to the defendant, the defendant's lawyer, and the lawyer's staff;

(2) to a prosecuting attorney or a [law enforcement officer] for use in the performance of official duties; and

(3) in connection with a judicial proceeding.

COMMENT

This parallels Rule 436(g) above.

(h) Reports. An individual participating in a procedure under this Rule must be furnished a written report of the result of any testing or comparison utilizing evidence obtained in the authorized procedure. If the evidence is subjected to any scientific test or comparison, a copy of any report prepared by the person conducting the test must be available, upon request, to the individual, the prosecuting attorney, and the defendant. Disclosure of the result and report to the individual must be made promptly after they become available unless the court directs that the disclosure be delayed.

COMMENT

This provision parallels Rule 436(g) above. See Comment to that Rule. Since the procedure may be provided by the defendant's experts or another agency (see Comment to subdivision (a) of this Rule, above) provision is made for furnishing any reports to the prosecutor as well as to the subject individual and the defendant. As with the deposition procedure, where the authority of the court is used by the defendant to obtain discovery from a third person, the evidence obtained from that person is made available to the prosecutor even though similar evidence would not be discoverable under Rule 423 above.

(i) Disposition of evidence. Unless the court authorizes further retention, nontestimonial evidence obtained under this Rule and all copies thereof must be promptly destroyed, or, upon request, returned to the individual, if an information [or indictment] charging the individual with crime relating to that evidence is not filed within [45 days] after the evidence was obtained. On motion of a party, the court may authorize further retention of nontestimonial evidence as reasonably necessary to facilitate a continuing investigation, prosecution, or defense.

COMMENT

This parallels Rule 436(i) above. See the Comment to that Rule.

RULE 438. COMPARING NONTESTIMONIAL EVIDENCE.

(a) Authority. On motion of the defendant, the court by order may direct a prosecuting attorney to have a scientific comparison made between a specified sample or specimen of nontestimonial evidence in the prosecuting attorney's possession or control and other nontestimonial evidence of a similar character in the prosecuting attorney's possession or control, if the court finds that the result of the comparison could contribute to an adequate defense.

COMMENT

This supplements Rules 435 and 436, but extends to evidence beyond that obtained under those Rules. Where the prosecutor is aware that a comparison of evidence may produce exculpatory results, the prosecutor presumably has an obligation to conduct such a comparison under Brady v. Maryland, 373 U.S. 83 (1963). The prosecutor may not always agree with defendant, however, as to the likelihood that the results could be exculpatory. In such a situation, the defense could always have its own expert conduct tests under Rule 421 above. However, to avoid controversy as to, the method of comparison, the defendant may appropriately prefer that the comparison be provided by the prosecutor. Cf. Rule 435 above. The standard for issuing the comparison order is similar to that of Rule 435. The order may extend to any evidence within the prosecutor's control. It does not extend to evidence in the defendant's possession unless that evidence had been given to (and accepted by) the prosecutor. The defendant can insure that evidence obtained under Rule 437 above is within the prosecutor's

control (and therefore subject to a comparison order) by requesting that the Rule 437 procedure be provided by the prosecutor.

(b) Contents of order. The order shall specify the comparison authorized, who may make it, and appropriate conditions under which it is to be made.

COMMENT

This is patterned after Rules 434(d) and 435(b) above. The defendant has access to the results of the comparison under Rule 421 above.

## PART 4

## DISPOSITION WITHOUT TRIAL

### RULE 441. DISCUSSION REGARDING DISPOSITION OF CASE.

(a) Meeting. The parties may meet to discuss the possibility of pretrial diversion under Rule 442 or of a plea agreement under Rule 443. The court may not participate in the discussions.

RELATED STANDARDS: 3-3.8(a), 4-6.1(a), 14-3.1(a), 14-3.3(f)

COMMENT

The first sentence is in accord with ABA Standard 4-6.1(a) (3d ed. 1991), ABA Standards 3-3.8(a) and 14-3.1(a), and ALI Model Code of Pre-Arraignment Procedure §§ 320.1(2), 350.3(1) (1975).

The second sentence is in line with Standard 14-3.3(f)'s last sentence, which specifies, "Except as otherwise provided in this standard, the judge should never through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered."

(b) Deferring proceedings. Upon stipulation of the parties, the court shall defer for a reasonable time any pending proceedings in the prosecution so that the procedures under this Rule may be pursued.

RELATED STANDARD: 14-3.3(e)

COMMENT

This derives from Standard 14-3.3(e) and ALI § 330.2(2).

(c) Aid of court in developing facts. Upon stipulation of the parties, the court by order may:

(1) direct the [probation service] to conduct an investigation of the defendant's background; or

(2) appoint a health-care professional to examine the defendant.

RELATED STANDARD: 18-5.2(b)

COMMENT

This derives from ALI § 320.4(1). Clause (1) is consistent with ABA Standard 18-5.2(b).

(d) Contents of order. An order under subdivision (c) shall specify the purpose and scope of the procedure and the matters to be covered, and shall direct that the results of any investigation or examination be embodied in a written report, copies of which must be made available to the parties.

RELATED STANDARD: 18-5.2(b)

COMMENT

This derives from Standard 18-5.2(b) and ALI § 320.4.

(e) Inadmissibility of discussions, statements, and agreements. Discussion between the parties under this Rule, a statement by the defendant or the defendant's lawyer under this Rule, and an agreement under Rule 442 or 443, are not admissible against the defendant in any criminal, civil, or administrative proceeding except a proceeding:

(1) to secure approval, modification, or termination of an agreement under Rule 442;

(2) to secure concurrence in a plea agreement under Rule 443(b);

(3) to secure acceptance of a plea under Rule 444(c);

(4) to secure withdrawal of a plea under Rule 444(f) or (g); or

(5) to cause a judgment based upon a plea to be reversed or held invalid.

RELATED STANDARD: 14-3.4

COMMENT

This is based upon Standard 14-3.4 and ALI §§ 320.3(3), 350.7.

RULE 442. PRETRIAL DIVERSION.

(a) Agreements permitted.

(1) Generally. The prosecuting attorney, after due consideration of the victim's views, and the defendant may agree that the prosecution will be suspended for a specified period after which it will be dismissed under subdivision (g) on condition that the defendant not commit a [crime] during the period. The agreement must be in writing and signed by the parties. It must state that the defendant waives the right to a speedy trial. It may include stipulations concerning the existence of specified facts or the admissibility into evidence of

specified testimony, evidence, or depositions if the suspension of prosecution is terminated and there is a trial on the charge.

RELATED STANDARDS: 10-6.1, 14-3.1(d)

COMMENT

Rule 442 generally

Rule 442 is based upon Standards 10-6.1 through 10-6.3 and ALI Model Code of Pre-Arraignment Procedure 320.5-.9 (1975).

Some jurisdictions utilize informal pre-charge diversion procedures which would not be governed by this Rule. This Rule covers only post-charge diversion.

Rule 442(a)(1)

Rule 442(a)(1) is based upon Standards 10-6.1 and 14-3.1(d) and ALI § 320.5.

The prosecutor may ascertain the victim's views in any reasonable manner. Since only "due" consideration is required, the prosecutor would not be barred from proceeding if the victim were not available. Compare Ky. Rev. Stat. Ann. 421.500(6) (Michie/Bobbs-Merrill Supp. 1986) (victim shall be consulted by prosecutor on disposition, including dismissal, release pending judicial proceedings, negotiated plea, and pretrial diversion). See Rule 614 and Comment below.

"Crime" is bracketed so that a state could, if it desired, use a term which would not include very minor matters like traffic violations.

(2) Approval required for additional conditions. With the court's approval after due consideration of the victim's views and upon a showing of substantial likelihood that a conviction could be obtained and that the benefits to society from rehabilitation outweigh any harm to society from suspending criminal prosecution, the agreement may specify one or more of the following additional conditions to be observed by the defendant during the period:

(i) that the defendant not engage in specified activities, conduct, and associations bearing a relationship to the conduct upon which the charge against the defendant is based;

(ii) that the defendant participate in a supervised rehabilitation program, which may include treatment, counseling, training, and education;

(iii) that the defendant make restitution in a specified manner for harm or loss caused by the crime charged; and

(iv) that the defendant perform specified community service.

RELATED STANDARD: 10-6.1(a), (b)

COMMENT

Except for the references to victim's views, restitution and community service, this is based upon Standard 10-6.1(a) and (b) and ALI §§ 320.5(1), 320.7(1).

Clause (iii), regarding restitution, is based upon Pa. R. Crim. P. 182(a).

(b) Limitations on agreements. The agreement may not specify a period longer or any condition other than could be imposed upon probation after conviction of the crime charged.

COMMENT

This derives from ALI § 320.6(1).

(c) Filing of agreement; release. Promptly after the agreement is made or, if required under subdivision (a)(2), approved by the court, the prosecuting attorney shall file the agreement together with a statement that pursuant to the agreement the prosecution is suspended for a period specified in the statement. Upon this filing, the defendant must be released from any custody under Rule 341.

COMMENT

This is based upon ALI §§ 320.5(4), 320.7(4).

(d) Modification of agreement. Subject to subdivisions (a), (b), and (c) and with the court's approval if required under subdivision (a)(2), the parties by mutual consent may modify the terms of the agreement at any time before its termination.

COMMENT

This is based upon ALI § 320.8(1).

(e) Termination of agreement; resumption of prosecution.

(1) Upon defendant's notice. The agreement is terminated and the prosecution may resume as if there had been no agreement if the defendant files a notice that the agreement is terminated.

COMMENT

This is based upon ALI § 320.8(3).

(2) Upon order of court. The court may order the agreement terminated and the prosecution resumed if, upon motion of the prosecuting attorney stating facts supporting the motion and upon hearing, the court finds that:

(i) the defendant or the defendant's lawyer misrepresented material facts affecting the agreement, if the motion is made within [six months] after the date of the agreement; or

(ii) the defendant has committed a material violation of the agreement, if the motion is made not later than [one month] after expiration of the period of suspension specified in the agreement.

RELATED STANDARD: 10-6.3(a)

COMMENT

This is based upon Standard 10-6.3(a) and ALI § 320.8(2).

As ALI § 320.8(2) states, the parties may seek, as an alternative to this procedure, a subdivision (d) modification of the agreement reasonably related to the defendant's violation or to newly ascertained facts.

(f) Emergency order. The court by order may direct a [law enforcement officer] to bring the defendant forthwith before the court for the hearing of the motion, if the court finds from affidavit or testimony that:

(1) there is probable cause to believe the defendant committed a material violation of the agreement; and

(2) there is substantial likelihood that the defendant otherwise will not attend the hearing.

RELATED STANDARD: 10-6.3(c)

COMMENT

This is based upon Standard 10-6.3(c).

Clause (2)'s substantial likelihood of nonappearance language derives from the provision on issuance of arrest warrant in Rule 221(c)(2)(iv) above.

(g) Release status upon resumption of prosecution. If prosecution resumes under subdivision (e), the defendant shall return to the release status in effect before prosecution was suspended unless the court imposes additional or different conditions of release.

RELATED STANDARD: 10-6.3(b)

COMMENT

This is based upon Standard 10-6.3(b).

(h) Termination of agreement; automatic dismissal. If no motion by the prosecuting attorney to terminate the agreement is pending, the agreement is terminated and the information [or indictment] is automatically dismissed with prejudice [one month] after expiration of the period of suspension specified in the agreement. If that motion is then pending, the agreement is terminated and the information [or indictment] is automatically dismissed with prejudice upon entry of a final order denying the motion.

RELATED STANDARD: 10-6.2(a)

COMMENT

This is based upon Standard 10-6.2(a) and ALI 320.8(6).

As stated in Standard 10-6.2(b), "A 'dismissal with prejudice' . . . means that the prosecuting attorney should not be allowed to recharge the offense or offenses contained in the dismissed accusatory instrument or to charge related offenses."

(i) Order of dismissal. If the prosecution is dismissed with prejudice under subdivision (h), the prosecuting attorney shall file a notice of the dismissal.

COMMENT

Under Rule 231(h) above, dismissal is accomplished by the prosecutor filing a notice of dismissal.

(j) Termination and dismissal upon showing of rehabilitation. The court may order the agreement terminated and the prosecution dismissed with prejudice if, upon motion of a party stating facts supporting the motion and opportunity to be heard, it finds that the defendant has committed no later [crime] and appears to be rehabilitated.

RELATED STANDARD: 10-6.2(a)

COMMENT

This is based upon Standard 10-6.2(a).

As in subdivision (a)(1) above, "crime" is bracketed. A state could, if desired, use a term which would not include very minor matters like traffic violations.

(k) Modification or termination and dismissal upon defendant's motion. If, upon motion of the defendant and hearing, the court finds that the prosecuting attorney obtained the defendant's consent to the agreement as a result of a material misrepresentation by a person covered by the prosecuting attorney's obligation under Rule 421(a), the court may:

(1) order appropriate modification of the terms resulting from the misrepresentation; or

(2) if the court determines that the interests of justice require, order the agreement terminated and the prosecution dismissed with prejudice.

COMMENT

This is similar to ALI 320.8(5).

RULE 443. PLEA AGREEMENTS

(a) Agreements permitted. The parties may agree that the defendant will plead on one or more of the following conditions:

(1) that the prosecuting attorney will amend the information [or indictment] to charge a specified crime;

(2) that the prosecuting attorney will dismiss or not bring certain charges against the defendant;

(3) that the prosecuting attorney will make, or will not oppose, specified recommendations as to the sentence or other disposition that should be imposed; and

(4) that the defendant will not seek appellate review, as permitted under Rule 444(f), of an order denying a pretrial motion.

RELATED STANDARDS: 14-3.1(b), 21-1.3(c)

COMMENT

Rule 443 generally

Rule 443 is based upon Standards 14-3.1 and 14-3.3.

Subdivision (a)

Subdivision (a) is based upon Standard 14-3.1(b). Regarding clause (4), see Standard 21-1.3(c).

(b) Court involvement.

[(1) Plea agreement conference. If the parties are unable to reach a plea agreement, upon request of both parties outlining the areas of remaining disagreement, the court may order a plea agreement conference. At the conference, the parties may make presentations concerning appropriate sentence limitations and the court may examine any [probation service]

report made under Rule 441(c). The court may require any individual, other than the defendant, to appear and testify at the conference, and may permit the defendant to do so. The court may specify what plea agreement would be acceptable or may state that it wishes to have a presentence investigation report under Rule 612 before so specifying. Thereupon, the parties may decide among themselves, outside the court's presence, whether to enter a plea agreement conforming to the court's suggested sentence limitations or to agree to the making and review by the court of a presentence investigation report.]

RELATED STANDARD: 14-3.3(c), (d)

COMMENT

This is based upon Standard 14-3.3(c) and (d).

As indicated in the third sentence, the court may have the alleged victim testify at the plea agreement conference.

If it is agreed that the court may order a presentence investigation report, the plea agreement conference may be continued after that report has been prepared and reviewed.

[(2) Concurrence.] If the parties agree that the defendant will plead on condition that the prosecuting attorney will make, or will not oppose, specified recommendations as to the sentence or other disposition they may submit the agreement in writing to the court, whereupon the court shall inform the parties whether it will consider the agreement in advance of a plea. If the court determines to consider the agreement, it may examine any [probation service] report made under Rule 441(c) and shall:

(i) concur in the agreement;

(ii) reject the agreement; or

(iii) notify the parties that it wishes to have a presentence investigation report under Rule 612, a plea agreement conference [under paragraph (1)], or both; if the parties consent, the court may order a presentence investigation report or a plea agreement conference.

RELATED STANDARD: 14-3.3(b)

COMMENT

This is based upon Standard 14-3.3(b). See ALI Model Code of Pre-Arraignment Procedure § 350.3(5) (1975).

The bracketed heading and bracketed language would be deleted in a jurisdiction which does not adopt bracketed Rule 443(b)(1).

[(3) General provisions.] Any conference under this subdivision must be held in open court and the record of the conference must be open to public inspection except to the extent the court finds that holding the conference in chambers or ordering the record sealed for a specified time or both is necessary for a compelling reason that cannot be adequately protected by reasonable alternative means. The court shall state its findings and conclusions in open court if it so orders. At the commencement of the conference, the court shall inform the defendant that if the case goes to trial, the judge may not be disqualified solely because the judge participated at the conference. The court may not communicate to the parties in any way, directly or indirectly, that a plea agreement should be accepted or that a plea should be entered. If [the parties agree to the court's suggested sentence limitations under paragraph (1) or] the court concurs in a plea agreement [under paragraph (2)], the parties shall proceed under Rule 444.

RELATED STANDARD: 14-3.3(e), (f)

COMMENT

This is based upon Standard 14-3.3(e) and (f).

The first sentence specifies "necessary for a compelling reason which cannot be adequately protected by reasonable alternative means" instead of referring to "good cause" (1) in recognition of the fact that a plea agreement conference may be subject to the U.S. Supreme Court's "open courtroom" line of cases and (2) because on policy grounds the "open courtroom" principle should apply to the plea agreement conference, even if the Constitution does not demand it. See Waller v. Georgia, 467 U.S. 39 (1984) (suppression hearing subject to "open courtroom" line of cases); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508-09 (1984) (voir dire subject to "open trial" principles).

Regarding the standard for overcoming the presumption of openness, see Rule 714(b) and Comment below.

Regarding the third sentence's provision for non-disqualification of the judge, see footnote 10 to Standard 14-3.3's Commentary, which points out:

> No provision is made in these standards for a defendant to have a different judge for trial if a proposed plea agreement is rejected and a preplea or presentence report concerning the defendant has been examined by the court. A judge is not normally held to be disqualified from presiding at a defendant's trial because information respecting the defendant's guilt has come to the judge's attention.

The bracketed heading and the bracketed language in the last sentence would be deleted in a jurisdiction which does not adopt bracketed Rule 443(b)(1) above.

RULE 444. PLEA OF GUILTY [OR NO CONTEST]

(a) Making. Upon reasonable notice to the prosecuting attorney, the defendant may appear before the court and, after the charge has been read, plead guilty [or[, if the court consents after due consideration of the views of the parties and of the victim or close relative of a deceased or incapacitated victim and of the public's interest in the effective administration of justice,] no contest].

RELATED STANDARD: 14-1.1

COMMENT

This is based upon Standard 14-1.1 and ALI Model Code of Pre-Arraignment Procedure § 350.1(1), (2) (1975).

In a state where the victim has the right to be heard, if the defendant will be sentenced immediately after pleading, the victim should be notified of the plea proceeding. See Rule 614 and Comment below. Compare Mo. Ann. Stat. 557.041(1) (Vernon Supp. 1987) (before accepting plea bargain, court shall allow victim or family member of victim deceased or incapacitated because of crime to submit written statement or appear to make statement).

(b) Counsel. If the defendant is represented by a lawyer, the court:

(1) shall inquire whether the defendant is satisfied with the lawyer's representation; and

(2) may not accept the plea if it appears that the defendant has not had the effective assistance of counsel.

RELATED STANDARD: 14-1.1(c)

COMMENT

This is based upon Standard 14-1.4(c).

(c) Acceptance.

(1) Understanding. The court may not accept the plea without first addressing the defendant personally in open court and determining that the defendant fully understands and has had reasonable time to consider:

(i) the nature and elements of the crime to which the plea is offered;

(ii) the maximum possible sentence on the charge, including, if there are several charges, that possible from consecutive sentences and including, if applicable,

that a different or additional punishment may be authorized by reason of a previous conviction or other factor, which may be established, in the present action, after the defendant's plea;

(iii) any mandatory minimum sentence on the charge and special circumstances affecting probation or release from incarceration;

(iv) that by the plea the defendant waives the right to a speedy and public trial and waives the rights the defendant would have at trial, including the right to be convicted only if the state, without using evidence obtained in violation of the defendant's constitutional rights, proves beyond a reasonable doubt that the defendant is guilty, the right[, if any,] to trial by jury, the right to be confronted by the witnesses against the defendant, the right to present evidence in the defendant's behalf and to have the court's aid in securing the presence of witnesses and evidence, and the right either to be or decline to be a witness in the defendant's own behalf; and

(v) that the defendant need not make the plea.

RELATED STANDARDS: 14-1.3(b), 14-1.4(a), (b)

COMMENT

This is based upon Standards 14-1.3(b) and 14-1.4(a) and ALI §§ 350.2(2), 350.4(1), (2).

Standard 14-1.4(b) provides guidance for carrying out subdivision (c)(1)'s requirements by stating:

> If the court is in doubt about whether the defendant comprehends his or her rights and the other matters of which notice is required to be supplied in accordance with this standard, the defendant should be asked to repeat to the court in his or her own words the information about such rights and the other matters, or the court should take such other steps as may be necessary to assure itself that the guilty plea is entered with complete understanding of the consequences.

(2) Voluntariness. The court may not accept the plea without first determining that it is voluntary. By inquiry of the prosecuting attorney, the defendant, and the defendant's lawyer, if any, the court shall determine whether the tendered plea is the result of plea discussions or of a plea agreement, and, if it is, what discussions were had and what agreement, if any, was reached. The court shall address the defendant personally and determine whether any other promise or any force or threat was used to obtain the plea. If the parties have agreed that the plea is tendered on the condition that the prosecuting attorney will make, or will not oppose, specified recommendations as to the sentence or other disposition, the court shall:

(i) inform the defendant that the condition is not binding on the court; and

(ii) inform the defendant whether, if the court imposes a sentence or other disposition exceeding that specified, the defendant will be entitled to withdraw the plea.

RELATED STANDARD: 14-1.5

COMMENT

This is based upon Standard 14-1.5.

(3) Factual basis. The court shall defer acceptance of the plea until it is satisfied that there is a factual basis for the plea.

RELATED STANDARD: 14-1.6(a)

COMMENT

This is based upon Standard 14-1.6(a).

(d) Incompetence to plead. A defendant is incompetent to plead if the defendant lacks sufficient present ability to consult with a reasonable degree of rational understanding with the defendant's lawyer or to understand the matters specified in subdivision (c)(1). Rules 464 through 469 apply to incompetence to plead. If the court has a reasonable doubt as to the defendant's competence to plead, the order under Rule 464(e) must require examination and determination of both competence to plead and competence to stand trial.

RELATED STANDARD: 7-5.1

COMMENT

This is based upon Standard 7-5.1.

By incorporating Rule 464(a), the penultimate sentence squares with Standard 7-5.1(c)'s requiring the prosecutor or defense counsel to advise the court of any good faith doubt of the defendant's competence to plead.

As stated in Standard 7-4.14(a), and under Rule 469(a) below, a defendant is not barred from entering a plea solely because the defendant is being provided medication to maintain competence.

(e) Plea to other crime. Upon acceptance of a plea or after a verdict or finding of guilty, the defendant may request permission to plead to any other crime the defendant has committed in the state the penalty for which does not exceed the jurisdictional power of the court. Upon written approval of the prosecuting attorney of the political subdivision in which the crime is or could be charged, the defendant may plead in conformity with this Rule. So pleading constitutes a waiver of venue as to any crime committed in another political subdivision of the state and waiver of formal charge as to a crime not yet charged.

RELATED STANDARD: 14-1.2

COMMENT

This is based upon Standard 14-1.2 and ALI § 350.1(3).

(f) Effect. The plea bars an appeal based upon any nonjurisdictional defect in the proceedings, but an order denying (i) a pretrial motion to suppress evidence, or (ii) any pretrial motion that, if granted, would be dispositive of the case, may be reviewed on appeal from an ensuing judgment of conviction.

RELATED STANDARD: 21-1.3(c)

COMMENT

This is based upon Standard 21-1.3(c). See Lefkowitz v. Newsome, 420 U.S. 283, 203 & n.11 (1975), where the Court, noting the similarity of the Uniform Rule, described a New York statute as evincing "commendable efforts to relieve the problem of congested criminal trial calendars in a manner that does not diminish the opportunity for the assertion of rights guaranteed by the Constitution."

A defendant who wishes to surrender this subdivision's appeal right in return for concessions in a plea agreement may do so under Rule 443(a)(4) above.

(g) Withdrawal as of right. The court shall allow the defendant to withdraw the plea:

(1) before sentencing for any fair and just reason unless the prosecution shows it has been substantially prejudiced by reliance upon the plea; or

(2) whenever a motion for withdrawal is timely made and withdrawal is necessary to correct a manifest injustice. A motion for withdrawal is timely if made with reasonable diligence, considering the nature of the allegations in the motion, and is not necessarily barred because made after judgment or sentence. Withdrawal is necessary to correct a manifest injustice if the defendant proves, among other grounds, that:

(i) the plea was accepted without substantial compliance with subdivision (c);

(ii) the plea was involuntary or was entered without knowledge of the nature and elements of the crime to which the plea was offered or that the sentence actually imposed could be imposed;

(iii) the plea resulted from the denial to the defendant of effective assistance of counsel guaranteed by constitution, statute, or rule;

(iv) the plea was not entered or ratified by the defendant, if the defendant is an individual, or was not ratified by a person authorized to so act in the defendant's behalf, if the defendant is a person other than an individual; or

(v) the sentence exceeds that specified in a plea agreement and:

(A) the prosecuting attorney failed to make or to refrain from opposing specified recommendations as promised in the plea agreement;

(B) the plea agreement was either tentatively or fully concurred in by the court, and the defendant did not affirm the plea after being informed that the court no longer concurred and after being called upon to affirm or withdraw the plea; or

(C) the plea was entered upon the express condition, approved by the court, that the plea could be withdrawn if the sentence exceeded that specified in the plea agreement.

RELATED STANDARDS: 14-1.4(a)(i), 14-2.1

COMMENT

This is based upon Standard 14-2.1.

Clause (2)(i) accords with McCarthy v. United States, 394 U.S. 459 (1969), where the Supreme Court concluded that failure to comply with Fed. R. Crim. P. 11 requires setting aside the plea. The words "without substantial compliance" are used because Rule 444(c) is considerably more specific than Fed. R. Crim. P. 11 was at the time McCarthy was decided.

Clause (2)(ii)'s reference to "the nature and elements" of the crime is from Standard 14-1.4(a)(i).

Regarding inadmissibility in evidence of pleas or statements made in connection with pleas, see Unif. R. Evid. 410 and Standard 14-2.2.

(h) Withdrawal by permission. In other cases, if the sentence exceeds that specified in a plea agreement, the court may permit withdrawal of the plea.

RELATED STANDARD: 14-3.3(g)

COMMENT

This is based upon Standard 14-3.3(g)'s last sentence.

(i) Claim of innocence unnecessary. The defendant may move to withdraw the plea without alleging innocence of the charges to which the plea was entered.

RELATED STANDARD: 14-2.1(b)(iii)

COMMENT

This is based upon Standard 14-2.1(b)(iii).

# PART 5

# PRETRIAL MOTIONS GENERALLY

## RULE 451. PRETRIAL MOTIONS.

(a) Use. Any defense, objection, or request capable of determination without trial of the general issue may be raised, and if raised before trial must be raised, by pretrial motion made in conformity with this Rule.

COMMENT

This derives from Fed. R. Crim. P. 12(a), (b).

(b) Time for motion. Except as to a motion for pretrial dismissal under Rule 481, unless otherwise permitted by the court in the interest of justice:

(1) all pretrial motions must be made by the time set under Rule 411; and

(2) a party making a pretrial motion shall make at the same time all other pretrial motions the party intends to make for which grounds are then available.

COMMENT

The "unless" clause derives from N.Y. Crim. P. Law §§ 170.30(3), 210.20(3) (McKinney 1982), clause (1) from Fed. R. Crim. P. 12(c), and clause (2) from Colo. R. Crim. P. 12(b)(2) and N.J. Rules of Court 3:10-5.

(c) Matters to be asserted by pretrial motion. Unless otherwise ordered by the court for cause shown, a party may assert the following only in a pretrial motion made in conformity with subdivision (b):

(1) a defense or objection based on a defect in the institution of the prosecution, other than the lack of jurisdiction of the court over the person or subject matter which can be raised at any time;

(2) a defense or objection based on a defect in information [or indictment];

(3) a request regarding discovery under Rules 411 through 438;

(4) a request that potential testimony or other evidence be suppressed under Rule 461;

(5) a request for transfer of prosecution under Rule 462;

(6) a request for joinder, dismissal, or severance under Rules 471 and 472; and

[(7) a request for bifurcation of mental nonresponsibility issues under Rule 474].

COMMENT

Except for clause (7), this is based upon Fed. R. Crim. P. 12(b), (f), 22.

Bracketed clause (7) adds the defendant's request for bifurcation under bracketed Rule 474 below to the list of matters which, unless the court otherwise orders for cause shown, must be asserted by pretrial motion.

The defense usually will be in a position by the time for the making of pretrial motions to decide whether to request bifurcation. In most of the reported decisions indicating when bifurcation was requested, it was requested before trial. See Contee v. United States, 410 F.2d 249, 250 (D.C. Cir. 1969); Montague v. State, 266 Ind. 51, 360 N.E.2d 181 (1977); People v. Meatte, 98 Mich. App. 74, 296 N.W.2d 190, 192 (1980); State v. Ward, 301 N.C. 469, 272 S.E.2d 84, 87-88 (1980); State ex rel. LaFollette v. Raskin, 34 Wis. 2d 607, 150 N.W.2d 318 (1967). See also State v. Daggett, 280 S.E.2d 545, 556 (W. Va. 1981) (first motion denied after pretrial hearing; second motion made after prosecution presented all its evidence). Several decisions state that the motion was made a substantial time before trial commenced. See Nielsen v. State, 623 P.2d 304, 307 (Alaska 1973) (five weeks); Houston v. State, 602 P.2d 784, 786 (Alaska 1979) (at same time as notice of intention to rely on insanity defense); State v. Armstrong, 344 A.2d 42, 52 (Me. 1975) (almost two months before motion denied). But see

Parham v. United States, 410 F.2d 559, 561 (D.C. Cir.) (motion made on day of trial and renewed at close of prosecution's case), cert. denied, 393 U.S. 858 (1968); State v. Boyd, 280 S.E.2d 669, 675 (W. Va. 1981) (motion made at beginning of trial).

If the defense is not in a position by the time set for making pretrial motions to decide whether to move for bifurcation, it may request permission under Rule 451(b) to make a later pretrial motion or under this subdivision to make the motion at trial.

(d) Hearing.

(1) Generally. Unless the court otherwise permits, all pretrial motions pending at the time set for hearing a pretrial motion must be heard at the same time.

COMMENT

This is rather similar to Fed. R. Crim. P. 12(c).

(2) Omnibus hearing. Upon notice to the parties, the court may conduct an omnibus hearing at which the court may raise matters on its own motion and permit the parties to raise matters by oral motion.

RELATED STANDARDS: 11-5.1(b), 11-5.3

COMMENT

This specifically permits the kind of hearing specified in Standard 11-5.3, which others have referred to as an omnibus hearing and which Standard 11-5.1(b) states may be "modified . . . or omitted to suit the circumstances of the particular case." See also Rule 491 below (pretrial conference).

(e) Determination. A pretrial motion must be determined before trial unless the court, with consent of all parties or upon a finding that it would be impractical to determine the motion before trial, orders the determination deferred until trial of the general issue or until after verdict.

COMMENT

This derives from Fed. R. Crim. P. 12(e).

(f) Effect of determination. If the court grants a motion based on a defect in the institution of the prosecution or in the information [or indictment], it may order that the defendant be held in custody or that the conditions of release be continued for a specified time pending the filing of a new information [or indictment]. This Rule does not affect the provisions of any statute relating to periods of limitation.

COMMENT

This is from Fed. R. Crim. P. 12(h).

## PART 6

## PARTICULAR PRETRIAL MOTIONS

### RULE 461. MOTION TO SUPPRESS.

(a) Generally. On motion of the defendant conforming to Rule 451, the court shall suppress potential testimony or other evidence if it finds that:

(1) suppression is required under the Constitution of the United States or the law of this state; or

(2) the evidence was derived from a violation of these Rules or the law of this state and the violation significantly affected the discovery of the evidence or the defendant's substantial rights.

RELATED STANDARD: 2-2.3(c)

COMMENT

This subdivision is consistent with ABA Standard 2-2.3(c) (electronic surveillance).

Clause (1) recognizes that there may be federal or state requirements that evidence obtained in a certain manner be suppressed. See, e.g., Mapp v. Ohio, 367 U.S. 643 (1961) (federal constitutional requirement); People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955) (state constitutional requirement); N.Y. Crim. P. Law § 710.20 (McKinney 1984) (statutory requirement).

Clause (2) extends the exclusionary remedy to evidence derived from a violation of these Rules and other state law regulating the criminal process. It should be noted, however, that where a violation also constitutes a constitutional violation, the evidence will be subject to suppression under clause (1), and the suppression motion will most likely be based upon that provision since constitutional standards for suppression may not require as substantial a relationship between the acquisition of the evidence and the violation as clause (2) requires. Thus, clause (1) will probably encompass most situations in which evidence was derived from violations of those Rules contained in Article II. Several provisions in that article are based upon federal constitutional standards. See, e.g. Rule 243 (procedure for questioning). Violations of other Rules, such as those limiting the authority to arrest (e.g., Rules 211 and 221), are most likely to produce evidence through a search conducted incident to the unlawful detention. Under the prevailing view of the fourth amendment, evidence obtained from a search incident to an unlawful arrest must be suppressed even though the illegality of the arrest itself stems from a violation of state law rather than the fourth amendment. See, e.g., United States v. DiRe, 332 U.S. 581 (1948); United States v. Mills, 472 F.2d 1231 (D.C. Cir. 1972).

There are certain Rule violations, however, that are likely to lead to the production of evidence that would not be subject to suppression under clause (1). Thus violations of certain non-constitutional aspects of Rules 432 and 436 may lead to acquisition of evidence from persons subjected to investigatory depositions or nontestimonial evidence procedures who are subsequently charged with criminal offenses.

Violations of state requirements not included in these Rules are less likely to lead to the production of evidence. However, there are some state provisions that relate to evidence-producing situations, and yet are not encompassed by these Rules. Thus, in a state that utilizes a grand jury, violation of safeguards relating to the witness may lead to witness disclosures that are incriminating.

Suppression of evidence obtained through violations of rules and other state requirements related to the production of evidence is supported by legislation and court decisions in several jurisdictions. The exclusionary rule has been applied in various instances to evidence obtained through violations of statutes or court rules that may not be constitutionally required, but are designed to supplement constitutional protected rights. See, e.g., Ker v. California, 374

U.S. 23 (1963) (recognizing potential exclusion of evidence obtained in violation of federal statute restricting no-knock entry even where the entry did not also violate fourth amendment); Mallory v. United States, 354 U.S. 449 (1967) (excluding confession obtained in violation of the prompt appearance requirement of Fed. R. Crim. P. 5(a)); 18 U.S.C.A. § 2515 (West Supp. 1987) (requiring suppression of evidence obtained in violation of federal law governing electronic surveillance, including violations of various provisions that probably are not constitutionally required).

The application of the exclusionary rule even as to constitutional violations has been a subject of considerable debate. It has been urged that other, more appropriate remedies could be devised. See, e.g., Bivens v. Six Unknown Agents, 403 U.S. 388, 411 (1973) (Burger, C.J., dissenting). But within the framework of rules governing only the area of criminal procedure, the exclusion of evidence remains the only effective means of deterring official disregard of significant safeguards. It also serves to preserve the "imperative of judicial integrity" by denying judicial sanction of substantial violations through the admission of evidence clearly obtained from such violations. See Elkins v. United States, 364 U.S. 206, 222 (1960).

Clause (2) does not require an inflexible application of the exclusionary rule to all evidence derived from a violation of a Rule or other state law no matter how tenuous the relationship of the evidence to the violation or how insignificant the violation. See Ill. Ann. Stat. ch. 38, para. 108-14 (Smith-Hurd 1980) (no suppression for technical irregularity in warrant not affecting defendant's substantial rights); Wis. Stat. Ann. § 968.22 (West 1985) (same); cf. Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded"). If the violation significantly affected the substantial rights of the defendant, then the evidence must be excluded if the evidence is "derived" from the violation, i.e., meets the standard of causal relationship traditionally applied to constitutional violations under the "fruit of the poisonous tree" doctrine. See, e.g., Harrison v. United States, 392 U.S. 219 (1968); Wong Sun v. United States, 371 U.S. 471 (1963). In determining whether a "substantial" right was "significantly affected," a court would look to the significance of the right as it serves to implement fundamental (i.e., primarily constitutional) safeguards and the extent of the violation. See Miller v. United States, 357 U.S. 301 (1958).

The standard of substantiality under clause (2) looks only to the significance of the right involved and the degree of infringement, not to whether the violation was "willful." Compare ALI Model Code of Pre-Arraignment Procedure §§ 150.3, 160.7, 290.2 (1975). A hearing on a pretrial motion is not an appropriate forum for determining whether either the government official involved or the entire agency acted in "good faith." Also, insofar as the defendant is concerned, the significance of the injury is not dependent upon the official's motives. While the deterrence function of the exclusionary rule is significant, the rule also serves as a remedy for the defendant whose rights have been violated.

If the violation does not significantly affect the defendant's substantial rights, exclusion still may be required if the violation significantly affected the discovery of the

evidence. This standard of causal connection between the discovery and the violation requires a more significant relationship than the standard application of the "fruit of the poisonous tree" doctrine. A finding that the violation was directly followed by the disclosure of the evidence by the defendant would not necessarily be sufficient. See People v. Pettis, 12 Ill. App. 3d 123, 298 N.E.2d 372 (1973). The violation must have been a significant fact that contributed to the defendant's disclosure. Ordinarily, only a violation that significantly affected a substantial right would have such an impact. There may, however, be exceptions depending upon the particular situation. For example, the failure to inform an arrestee that the arrestee will be taken to a specific detention facility might not be viewed generally as significantly affecting substantial rights where the arrestee has been given the other warnings required under Rule 212(b) above. In a particular case, however, the failure to provide such reassurance may be a significant factor that leads the arrestee to make certain disclosures that would not otherwise have made.

(b) Pre-charge motion. A person having reasonable grounds to believe that evidence subject to suppression may be used against the person in a criminal proceeding may move for its suppression under subdivision (a), even though an information [or indictment] charging the person has not yet been filed.

COMMENT

This derives from N.J. Rules of Court 3:5-7 and is similar to Colo. R. Crim. P. 41(e) and Maine R. Crim. P. 41(e).

The pre-charge motion is designed primarily to bar the "grievous, irreparable injury" to a person indicted on the basis of illegally seized evidence. See In re Fried, 161 F.2d 453, 458-59 (2d Cir. 1947).

The pre-charge motion is not limited to challenges based upon fourth amendment violations since the same "irreparable injury" may flow just as readily from issuance of an information on the basis of evidence subject to suppression on other grounds.

The impact of a ruling denying the pre-charge motion upon subsequent attempts to raise the suppression issue after prosecution is initiated ordinarily should be the same as the impact of the denial of a pretrial motion on subsequent objections. In some jurisdictions, the court is bound by the initial ruling, while in others, it may have considerable discretion to review that ruling. Compare Pa. R. Crim. P. 323(j) with Anderson v. United States, 352 F.2d 945 (D.C. Cir. 1965).

RULE 462. TRANSFER OF PROSECUTION.

(a) For prejudice in the [county]. On motion of the defendant [or the prosecuting attorney] conforming to Rule 451, [or on its own motion,] the court shall transfer the prosecution as to the defendant to another [county] if satisfied that there is a reasonable likelihood that a fair and impartial trial cannot be had in the [county] in which it is pending. The motion may be supported by qualified public opinion surveys or opinion testimony offered by individuals. A showing of actual prejudice is not required. It is not a ground for a denial of the motion that a transfer has already been granted.

RELATED STANDARD: 8-3.3

COMMENT

This is in accord with Standard 8-3.3 (3d ed. 1991).

Regarding the first sentence's optional provision for the motion to be by the prosecutor, see Standard 8-3.3(a) (3d ed. 1991), which specifies, "Except as federal or state constitutional or statutory provisions otherwise require, a change of venue or continuance may be granted on motion of either the prosecution or the defense."

The first sentence's optional provision for the court acting upon its own motion derives from Cal. Penal Code § 1033(b) (West 1985) and Tex. Crim. P. Code Ann. art. 31.01 (Vernon 1966). This would be omitted by states with constitutions giving the defendant an absolute right to trial in the county where the crime was committed.

(b) Transfer in other cases. For the convenience of parties or witnesses and in the interest of justice, the court on motion of the defendant may transfer the prosecution as to the defendant to another [county].

COMMENT

This is based upon Fed. R. Crim. P. 21(b).

(c) Disposition. A motion for transfer made before the jury is impaneled must be disposed of before impaneling, but the court may defer ruling until examination under Rule 512(b) has been completed. If a motion for transfer is permitted to be made, or if reconsideration or review of a previous denial is sought, after impaneling, the fact that the jury satisfies legal requirements is not controlling if it appears there is a reasonable likelihood that a fair and impartial trial cannot be had in the [county] in which the prosecution is pending.

RELATED STANDARD: 8-3.3(c)

COMMENT

This is in accord with Standard 8-3.3(c) (3d ed. 1991).

(d) Claim not precluded. A claim that a prosecution should have been transferred is not precluded by a waiver of the right to trial by jury or by a failure to exercise all available peremptory challenges.

RELATED STANDARD: 8-3.3(d)

COMMENT

This is in accord with the last sentence of Standard 8-3.3(d) (3d ed. 1991).

(e) Proceedings on transfer. If the prosecution is transferred, all documents in the case or certified copies thereof must be transmitted to the court to which it is transferred, but transcripts of recorded proceedings must be made or transmitted only if requested by that court.

COMMENT

Except for specifying "or certified copies thereof," this parallels Rule 321 (e) above (transmittal of documents after first appearance). See Fed. R. Crim. P. 21(c).

RULE 463. INCOMPETENCE TO STAND TRIAL.

(a) Incompetent defendant not to be tried. A defendant may not be tried while incompetent to stand trial.

RELATED STANDARD: 7-4.1(a)

COMMENT

Rules 463 through 469 generally. Like Rules 424 and 425, Rules 463 through 469 are based upon provisions in the ABA's 1984 Criminal Justice Mental Health Standards.

Rule 463(a). Rule 463(a) is based upon Standard 7-4.1(a).

(b) Incompetence to stand trial defined. A defendant is incompetent to stand trial if the defendant lacks:

(1) sufficient present ability to consult with a reasonable degree of rational understanding with the defendant's lawyer;

(2) sufficient present ability otherwise to assist in the defense; or

(3) a rational as well as factual understanding of the proceedings.

RELATED STANDARD: 7-4.1(b), (c)

COMMENT

This is based upon Standard 7-4.1(b). As stated in Standard 7-4.1(c)'s last sentence:

> A finding of mental incompetence to stand trial may arise from mental illness, physical illness or disability, mental retardation or other developmental disability, or other etiology so long as it results in a defendant's inability to consult with defense counsel or to understand the proceedings.

(c) Procedures. Rules 464 through 469 apply to incompetence to stand trial.

COMMENT

This subdivision obviates the need to reiterate the words "to stand trial" throughout Rules 464 through 469 and facilitates Rules 444(d), 615(c), and 711(d) specifying that Rules 464 through (466 or) 469 apply to incompetence to plead, be sentenced, or waive counsel.

RULE 464. COMPETENCY EXAMINATION.

(a) Raising issue.

(1) Defendant. The defendant may move for a competency examination.

COMMENT

This reflects the norm that a party may request court action by motion, and does not address whether it is proper for defense counsel to move for an examination absent a good-faith doubt as to the defendant's competence. Rule 3.1 of the ABA Model Rules of Professional Conduct prohibits asserting an issue unless there is a non-frivolous basis for doing so. Rule 1.2 of those Rules does not specify asserting incompetence as an issue where the criminal defense lawyer must abide by the client's decision. However, it arguably should be considered as such an issue because of its similarity to the issues Rule 1.2 lists--the plea to be entered, whether to waive jury trial, and whether the client will testify.

(2) Defense counsel. If the defendant's lawyer has a good faith doubt as to the defendant's competence and the defendant objects to the lawyer moving for a competency examination, the lawyer shall either:

(i) move for the examination notwithstanding the objection; or

(ii) notify the court of the facts known to the lawyer which raise the good faith doubt, other than communications protected by the attorney-client privilege.

RELATED STANDARD: 7-4.2(c), (e), (f)

COMMENT

This is based upon Standard 7-4.2(c) and (f).

The defendant's lawyer may have the defendant examined by a defense-selected expert if one is available, but doing so does not remove or suspend the duty to move or notify the

court. As stated in the Comment to Rule 466(b) below, if after the court orders a competency examination an indigent defendant applies to the court for public funds for a mental health professional, whether to grant the application is within the court's discretion in light of the circumstances of the particular case and the fact that the court has appointed an expert who may be called and examined by either party as a court witness.

The defendant's lawyer need not move for an examination or notify the court of mere temporary incompetence, e.g., caused by drugs, if other appropriate action could avert the defendant's proceeding at trial while incompetent.

As stated in Standard 7-4.2(e), neither party should invoke this procedure absent good faith doubt that the defendant is competent to stand trial, for purposes unrelated to incompetence to stand trial, or for delay.

(3) Prosecuting attorney. The prosecuting attorney shall:

(i) notify the defendant's lawyer and the court of any information that comes to the prosecution's attention relative to the defendant's incompetence; and

(ii) move for a competency examination whenever the prosecuting attorney has a good faith doubt as to the defendant's competence.

RELATED STANDARD: 7-4.2(b)

COMMENT

This is based upon Standard 7-4.2(b).

(4) Court. The court has a continuing obligation, separate and apart from that of counsel, to raise the issue of competence at any time the court has a good faith doubt as to that issue. The court may raise the issue at any stage of the proceedings on its own motion.

RELATED STANDARD: 7-4.2(a)

COMMENT

This is based upon Standard 7-4.2(a).

(b) Motion for examination. A motion for examination must set forth the facts that form the basis for the motion, but the defendant's lawyer may not divulge communications in violation of the attorney-client privilege.

RELATED STANDARD: 7-4.2(d), (f)

COMMENT

This is based upon Standard 7-4.2(d) and (f).

(c) Issuance of order for examination. Whenever, at any stage of the proceedings, the court has a reasonable doubt as to the defendant's competence, the court shall order a competency examination and appoint a mental-health professional or agency to conduct the examination except:

(1) the court may not order the examination before a lawyer consults with the defendant and the lawyer has an opportunity to be heard by the court; and

(2) if there has not been a judicial [or grand jury] determination that there is probable cause to believe that the defendant committed the crime charged, the court may order the examination only if:

(i) the defendant consents; or

(ii) the court determines from affidavit or testimony that there is probable cause to believe that the defendant committed the crime charged.

RELATED STANDARD: 7-4.4(a)(i), (ii)

COMMENT

This is based upon Standard 7-4.4(a)(i) and (ii), except that in the introductory portion, "reasonable doubt" is substituted for "good faith doubt." Although both formulations are

constitutionally adequate, the well-known reasonable doubt standard is more appropriate here than one focusing upon the court's good faith.

Whereas the Standard's "good faith doubt" formulation is supported in Pate v. Robinson, 383 U.S. 375, 385 (1966), the "reasonable doubt" formulation is supported in a later case also cited in the Standard's Commentary, Drope v. Missouri, 420 U.S. 162 (1975).

(d) Contents of order to appear. An order for examination must:

(1) require the defendant to appear at a specified time and place before a mental-health professional or agency and to cooperate with appropriate interviewing, clinical evaluation, and psychological testing; and

(2) specify that the purpose of the examination is to determine whether the defendant is competent.

RELATED STANDARD: 7-3.5(d)(ii)

COMMENT

This is based upon Standard 7-3.5(d)(ii) and Model Insanity Defense and Post-Trial Disposition Act 304(a).

(e) Contents of order appointing professional. An order appointing a mental-health professional or agency to conduct the examination must specify that:

(1) the purpose of the examination is to determine whether the defendant is competent and set forth the appropriate definition of incompetence stated in these Rules;

(2) the examination may consist of such interviewing, clinical evaluation, and psychological testing as the mental-health professional considers appropriate, within the limits of nonexperimental, generally accepted psychiatric, psychological, or medical practices;

(3) the defendant's lawyer may be present at the examination but may actively participate only if requested to do so by the mental-health professional;

(4) the prosecuting attorney may not be present at the examination;

(5) the mental-health professional or agency must deliver to the court a report complying with subdivisions (h) and (i) within a specified time not exceeding [one month] after the examination is completed unless the time is extended by the court for cause; and

(6) if the mental-health professional concludes that the defendant presents an imminent risk of serious danger to another person, is imminently suicidal, or otherwise needs emergency intervention, the mental-health professional must promptly notify the defendant's lawyer, the prosecuting attorney, and the court.

RELATED STANDARDS: 7-3.2(b), 7-3.5(b), (d)(ii), (v), 7-3.6(c)(i), (iii), 7-4.4(b)

COMMENT

Clause (1) is based upon Standard 7-3.5(d)(ii) and upon Standard 7-4.4(b)'s first sentence. As stated in Standard 7-4.4(b), "The evaluation should not include an evaluation into the defendant's sanity at the time of the offense, civil commitment, or other matters collateral to the issues of competence to stand trial."

The relevant definitions of incompetence are set forth in Rules 444(d) (pleading), 463(b) (standing trial), 615(b) (sentencing), and 711(d) (waiving counsel).

Clause (2) is based upon Model Act 402.

Clause (3) is from Standard 7-3.6(c)(i). Compare Rule 464 below, specifying that the defendant's lawyer may be present at a "dual purpose" examination only with mental-health professional's previous consent.

Clause (4) is from Standard 7-3.6(c)(iii).

Clause (5) is based upon Standards 7-3.5(d)(v) and 7-4.4(c).

Clause (6) is based upon Standard 7-3.2(b).

In line with Standard 7-3.5(b), counsel should provide information that the mental-health professional needs in order to conduct a thorough evaluation.

(f) Release pending examination.

(1) Generally. A defendant otherwise entitled to release may not be involuntarily confined or taken into custody solely because a competency examination has been ordered.

RELATED STANDARD: 7-4.3

COMMENT

This is based upon the first part of Standard 7-4.3's introductory portion. A report of dangerousness under Rule 464(e)(6) could produce a change in conditions of release under Rule 341(i).

(2) Release determination not postponed. If the defendant is entitled to a determination under Rule 341 or 344 of eligibility for release, the determination may not be postponed because of the pendency of competency proceedings.

RELATED STANDARD: 7-4.3(d)

COMMENT

This is based upon Standard 7-4.3(d).

(3) Order to appear for outpatient examination. If the defendant has been released under Rule 341, the court may order the defendant to appear at a designated time and place for outpatient examination. The court may make the appearance a condition of the defendant's release.

RELATED STANDARD: 7-4.3(b)

COMMENT

This is based upon Standard 7-4.3(b).

(4) Temporary confinement. If the defendant has been released under Rule 341 and the court determines that the defendant will not appear for outpatient examination as a condition of release or that adequate examination is impossible without confinement of the defendant, the court may order that the defendant be taken into custody until the examination is completed. The confinement must be in the least restrictive setting and for the minimum amount of time necessary to complete the examination, not to exceed [seven days]. For compelling reasons or circumstances, upon request of the mental-health professional or agency, the court may extend the confinement for up to [seven additional days]. Immediately upon completion of the examination the defendant must be returned to the previous release status.

RELATED STANDARD: 7-4.3(b), (c)

COMMENT

Except for the seven-day limits, this is based upon Standard 7-4.3(b) and (c). See Bennett, A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial, 53 Geo. Wash. L. Rev. 375, 392 (1985) (although most competence evaluations take less than one hour, periods of commitment to determine incompetence commonly range from 15 to 60 days); Winick, Restructuring Competency to Stand Trial, 32 U.C.L.A. L. Rev. 921, 931-32 (1985) (inpatient evaluation is rarely necessary; outpatient evaluation may be completed in several days or weeks).

Under Rule 621 below, at sentencing the defendant must receive credit for any confinement under this or the next provision.

(g) Confining uncooperative defendant for observation. If the court, upon motion and hearing, finds that the defendant refuses to cooperate in the examination or to provide sufficient information to permit a determination of competence, it may order that the defendant

be confined involuntarily for observation to determine the issue of competence. The order may authorize confinement for the time necessary to determine the issue up to [28 days]. The confinement order must specify that the person or agency to whom the order is directed must release the defendant from confinement under this subdivision if the mental-health professional determines the issue of competence before expiration of the time specified.

RELATED STANDARD: 7-4.6(b)

COMMENT

This is similar to Standard 7-4.6(b). That Standard lets confinement continue up to 14 days under an initial order with extensions as necessary up to 60 days, whereupon the prosecutor must show justification for further confinement.

(h) Issues to be addressed in examination report.

(1) Competence. The report of the examination must first address the issue of the defendant's competence. If the mental-health professional determines that the defendant is competent, the report may address issues relating to treatment only as provided in paragraph (2).

RELATED STANDARD: 7-4.5(a)

COMMENT

This is based upon Standard 7-4.5(a).

(2) Treatment. If the mental-health professional determines that the defendant is incompetent or that the defendant is competent but that continued competence is dependent upon maintenance of treatment, the report must address the following issues:

(i) the condition causing the incompetence;

(ii) the treatment required for the defendant to attain or maintain competence, with an explanation of appropriate treatment alternatives in order of choice;

(iii) the availability of the various types of acceptable treatment in the local geographical area, specifying the agencies or settings in which the treatment might be obtained and whether it would be available to an outpatient;

(iv) the likelihood of the defendant's attaining competence under the treatment and the probable duration of the treatment.

RELATED STANDARD: 7-4.5(b)

COMMENT

This is based upon Standard 7-4.5(b).

(3) Need for confinement. If the mental-health professional determines that the only appropriate treatment to attain competence would require that the defendant be taken into custody or involuntarily committed, the report must address the following issues:

(i) whether the defendant, because of the condition causing incompetence, meets the criteria set forth by law for involuntary civil commitment or placement;

(ii) whether there is a substantial probability that the defendant will attain competence within [18 months];

(iii) the nature and probable duration of the treatment required for the defendant to attain competence; and

(iv) alternatives other than involuntary confinement which the mental-health professional considered and the reasons for rejecting the alternatives.

RELATED STANDARD: 7-4.5(c)

COMMENT

This is based upon Standard 7-4.5(c).

(i) Form of report. The report of the examination must:

(1) address the issues specified in subdivision (h);

(2) describe the procedures, tests, and techniques used;

(3) state the mental-health professional's findings and opinions on each issue;

(4) identify the sources of information and present the factual basis for the mental-health professional's findings and opinions, including any statement or information that serves as a necessary factual predicate for the findings or opinions even if the statement or information is of a personal or potentially incriminating nature, but the report must exclude information or opinions concerning:

(i) the defendant's mental condition at the time of the crime charged; and

(ii) any statements made by the defendant regarding the crime charged or any other crime; and

(5) present the reasoning by which the mental-health professional used as a basis for the findings and opinions.

RELATED STANDARD: 7-3.7(b)

COMMENT

This subdivision is based upon the Standard 7-3.7(b). As stated in Standard 7-3.7(b)(i)(E), "The evaluator should express an opinion on a specific legal criterion or standard

only if the opinion is within the scope of the evaluator's specialized knowledge." The exceptions in the last part of clause (4) are based upon Standard 7-3.8(a)'s second sentence.

(j) Furnishing of report. Upon satisfying itself that the report does not contain information or opinions that should have been excluded under subdivision (i)(4), the court shall promptly provide a copy to the prosecuting attorney and the defendant.

RELATED STANDARDS: 7-3.7(c), 7-3.8(a)

COMMENT

This is based upon Standard 7-3.8(a)'s last sentence.

If there is any substantive supplementation of the report, it should be communicated to all parties. See Standard 7-3.7(c).

RULE 465. DUAL PURPOSE EXAMINATION.

The court may order that an examination under Rule 464 be combined with an examination under Rule 425 of the defendant's mental condition at the time of the crime charged or an examination for any other purpose only upon the defendant's consent or a showing of good cause. The order must:

(1) specify that the defendant's lawyer may be present at the examination only with the mental-health professional's previous consent and may actively participate only if requested to do so by the mental-health professional; and

(2) require the mental-health professional to prepare a report under Rule 464(h) and (i) on the issue of competence separate from the report under Rule 425(d) and (e) on mental condition at the time of the crime charged or the report for another purpose.

RELATED STANDARDS: 7-3.5(c), 7-3.6(c)(ii), 7-3.8(a)

COMMENT

The first sentence is based upon Standard 7-3.5(c), clause (1) upon Standard 7-3.6(c)(ii), and clause (2) upon Standard 7-3.8(a)'s first sentence.

RULE 466. COMPETENCY HEARING.

(a) Time for hearing. As soon as practicable after receipt of the report, the court shall conduct a competency hearing unless the prosecuting attorney and the defendant stipulate that a hearing is unnecessary and the court concurs. If no hearing is held, the court may enter an order under subdivision (g) or (h) on the basis of the report and other information adduced.

RELATED STANDARD: 7-4.7(a)

COMMENT

This is based upon Standard 7-4.7(a).

(b) Defendant's rights. At the hearing, the defendant has the same rights as at trial, except for the right of trial by jury.

RELATED STANDARDS: 7-4.7(c), 7-4.8(a)

COMMENT

This is based upon Standards 7-4.7(c) and 7-4.8(a).

If an indigent defendant applies to the court for public funds for an expert witness, whether to grant the application is within the court's discretion in light of the circumstances of the particular case and the fact that the court has appointed an expert who may be called and examined by either party as a court witness. Compare Rule 731(b) below, which provides for state payment of reasonable expert witness fees if the court finds that the witness' testimony could contribute to an adequate defense.

(c) Evidence. The rules of evidence applicable to criminal trials apply at the hearing.

RELATED STANDARD: 7-4.8(b)

COMMENT

This is based upon Standard 7-4.8(b)'s first sentence.

(d) Court witnesses. The mental-health professional who prepared the report or any individual the mental-health professional designated as a source of information for preparation of the report, other than the defendant or the defendant's lawyer, is considered the court's witness and may be called and cross-examined as such by either party.

RELATED STANDARDS: 7-4.8(a)(i), 7-4.8(b)

COMMENT

This is based upon Standard 7-4.8(a)(i)'s last sentence and Standard 7-4.8(b)'s second sentence. A court witness may be cross-examined by a party who calls the witness.

(e) Defendant's lawyer as witness.

(1) Election to be witness. To the extent that doing so does not divulge communication in violation of the attorney-client privilege, the defendant's lawyer may relate to the court, subject to examination by the prosecuting attorney, personal observations of and conversations with the defendant. Those disclosures do not automatically disqualify the lawyer from continuing to represent the defendant.

RELATED STANDARD: 7-4.8(b)(i)

COMMENT

The first sentence is based upon Standard 7-4.8(b)(i).

The last sentence is in line with the Commentary to Standard 7-4.8(b)(i) as well as Rule 3.7 of the ABA Model Rules of Professional Conduct and DR 5-102(A) of the ABA Code of Professional Responsibility which restrict representation at trial by a testifying lawyer. It is

not invariably necessary for another lawyer to conduct the direct examination of the testifying lawyer, but this is good practice.

It should be emphasized that the last sentence contemplates a hearing before a judge without a jury. See Rule 466(b) above; cf. S. Brakel, J. Parry, & B. Weiner, The Mentally Disabled and the Law 703 & n. 120, 744-53 (3d ed. 1985) (three states require jury; eight make it optional). Where a jury is used, it may be appropriate to disqualify the testifying lawyer from acting as advocate at the hearing.

(2) Inquiry by court. The court may inquire of the defendant's lawyer about the attorney-client relationship and the defendant's ability to communicate effectively with the lawyer. However, the court may not require the lawyer to divulge communications in violation of the attorney-client privilege. The prosecuting attorney may not cross-examine a lawyer responding to this inquiry.

RELATED STANDARD: 7-4.8(b)(ii)

COMMENT

This is based upon Standard 7-4.8(b)(ii). See Bishop v. Superior Court, 724 P.2d 23, 28-30 (Ariz. 1986).

(f) Going forward with evidence. If the defendant moved for the examination, the defendant shall go forward with evidence at the hearing. If the examination was on motion of the prosecuting attorney or the court's own motion, the prosecuting attorney shall go forward with evidence unless the court otherwise directs.

RELATED STANDARD: 7-4.8(c)(i)

COMMENT

This is based upon Standard 7-4.8(c)(i).

(g) Competency issue. The court shall first consider the issue of the defendant's competence. If no evidence indicating incompetence has been offered or the court finds by a preponderance of the evidence that the defendant is competent, the court shall enter an order finding that the defendant is competent. Otherwise, the court shall enter an order finding that the defendant is incompetent.

RELATED STANDARD: 7-4.8(c)(ii)

COMMENT

This is based upon Standard 7-4.8(c)(ii).

(h) Treatment issues.

(1) Generally. If the court finds the defendant incompetent, the court shall consider whether to order the defendant to receive treatment. The court shall consider the appropriateness of the treatment, its availability in the geographic area of the court, its probable duration, its likelihood of effecting competence in the reasonably foreseeable future, and the availability of the least restrictive treatment alternative.

RELATED STANDARDS: 7-4.9(a), 7-4.10(c)

COMMENT

This is based upon the introductory portion of Standard 7-4.9(a) and Standard 7-4.9(a)(i)'s first sentence.

As stated in Standard 7-4.10(c):

> A person determined to be incompetent to stand trial and detained or committed for treatment or habilitation or ordered to appear for outpatient treatment or habilitation should have no right to refuse ordinary and reasonable treatment or habilitation designed to effect competence. However, a defendant should have the right to refuse any treatment or habilitation which may impair the defendant's ability to prepare a defense to the charge,

which is experimental or which has an unreasonable risk of serious, hazardous or irreversible side effects.

Sometimes it may be desirable to have a short postponement after finding the defendant incompetent to allow the parties to prepare to address the matter of treatment.

References in these Rules to treatment are intended to include habilitation provided by mental retardation professionals. See Standards 7-4.9(b) and 7-4.10; Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 459-60 (1985).

(2) Competence dependent on continuation of treatment. If the court finds that the defendant's competence depends on the continuation of treatment, the court shall consider whether to order the defendant to continue to receive treatment. The court shall consider the appropriateness of the treatment, its availability in the geographic area of the court, its probable duration, the likelihood that absent treatment the defendant would be incompetent, and the availability of the least restrictive treatment alternative.

RELATED STANDARD: 7-4.9(a)

COMMENT

Like the immediately preceding provision, this is based upon the introductory portion of Standard 7-4.9(a) and Standard 7-4.9(a)(i)'s first sentence.

(3) Released defendant. If the defendant has been released under Rule 341, the court may make outpatient treatment a condition of the release. The court may order the defendant involuntarily confined in an in-patient facility to effect competence only if the court determines by clear and convincing evidence that:

(i) there is substantial probability that the defendant's incompetence will respond to treatment and that the defendant will attain competence within [18 months];

(ii) treatment appropriate for the defendant to attain competence is available in an in-patient facility; and

(iii) no less restrictive appropriate treatment alternative is available.

RELATED STANDARD: 7-4.9(a)(i), (ii)

COMMENT

This is based upon Standard 7-4.9(a)(i)'s second sentence and upon Standard 7-4.9(a)(ii). Evidence of the defendant's dangerousness could produce a change in conditions of release under Rule 341(i).

(4) Defendant in custody. If the defendant is in custody the court may order:

(i) with appropriate security measures, the defendant's transfer to another facility for treatment;

(ii) outpatient treatment with appropriate security measures; or

(iii) treatment to be administered at the facility where the defendant is in custody.

RELATED STANDARD: 7-4.9(a)(i)

COMMENT

This is based upon Standard 7-4.9(a)(i)'s last sentence.

(5) Contents of order. The court's order for treatment to effect competence must:

(i) set forth the court's findings on the issues of competence, treatment, and involuntary confinement;

(ii) identify the mental-health professional or agency to provide the treatment; and

(iii) require the mental-health professional or agency to file reports as specified in Rule 467(a)(1) and (2).

RELATED STANDARD: 7-4.9(b)(i)

COMMENT

This is based upon Standard 7-4.9(b)(i).

(6) Accompanying documents. The court shall attach to the order for treatment copies of supporting information sufficient for a professional or agency involved in providing treatment to ascertain the charge against the defendant and the nature of the condition causing the incompetence.

RELATED STANDARD: 7-4.9(b)(ii)

COMMENT

This is based upon Standard 7-4.9(b)(ii).

RULE 467. PROCEEDINGS REGARDING INCOMPETENT DEFENDANT.

(a) Periodic redetermination of incompetence.

(1) Periodic redetermination report required. The mental-health professional or agency responsible for treatment shall file with the court a redetermination report

on the defendant's current status, with copies to the prosecuting attorney and the defendant's lawyer and with notice to the defendant:

(i) at any time the mental-health professional believes the defendant has attained competence;

(ii) at any time the mental-health professional believes there is not a substantial probability that the defendant will attain competence within [18 months] after the court's determination of incompetence; and

(iii) at intervals not to exceed [three months].

RELATED STANDARD: 7-4.11(a)

COMMENT

This is based upon Standard 7-4.11(a).

(2) Contents of redetermination report. The redetermination report must contain:

(i) a re-evaluation of the issues required by Rule 464(h) to be addressed in the original report of examination;

(ii) a description of the treatment administered to the defendant; and

(iii) if the report concludes that the defendant remains incompetent, an evaluation of the defendant's progress toward attaining competence within [18 months] after the court's determination of incompetence.

RELATED STANDARD: 7-4.11(b)

COMMENT

This is based upon Standard 7-4.11(b).

(3) Hearing on redetermination report. The court shall conduct a hearing as provided in Rule 466 if the mental-health professional in the redetermination report concludes that the defendant is competent. Before the hearing, on motion of a party and a showing of good cause, the court shall order an examination and report by one or more additional mental-health professionals or agencies in accordance with Rule 464(d) through (j).

RELATED STANDARDS: 7-4.7(b), 7-4.11(c)

COMMENT

This accords with Standard 7-4.11(c) except in requiring a hearing if the redetermination report concludes that the defendant has become competent. Even then, as stated in Standard 7-4.7(b):

> If the parties agree on the issue of competence . . . a stipulation containing the factual basis for the agreement may be accepted by the court and the court, after review of the factual basis for the stipulation, should enter the appropriate order on the basis of the stipulation.

(4) Uncontested redetermination report. If the mental-health professional in the redetermination report concludes that the defendant remains incompetent, the court shall review the report and within [ten days] either:

(i) enter an order accepting the report and requiring the defendant to continue to receive treatment; or

(ii) if the court concludes that additional information or examination is necessary, require appropriate action, including the filing of a supplemental report or an examination by one or more additional mental-health professionals or agencies in

accordance with Rule 464(d) through (j) and after receiving the additional report, either order the defendant to continue to receive treatment or conduct a hearing as provided in Rule 466.

RELATED STANDARD: 7-4.11(d)

COMMENT

This is based upon Standard 7-4.11(d).

(5) Motion for redetermination. At any time, on motion of either party and a showing of good cause to believe that the defendant has attained competence or that there is no substantial probability that the defendant will attain competence within [18 months] after the court's determination of incompetence, the court shall order an examination and report by one or more additional mental-health professionals or agencies in accordance with Rule 464(d) through (j) or a hearing as provided in Rule 466.

RELATED STANDARD: 7-4.11(e)(i)

COMMENT

This is based upon Standard 7-4.11(e)(i).

(6) Examination at defense expense. The defendant's lawyer may have the defendant examined at any time at the expense of the defense. Any institution in which the defendant is confined shall make the defendant available to the mental-health professional for examination.

RELATED STANDARD: 7-4.11(e)(ii)

COMMENT

This is based upon Standard 7-4.11(e)(ii)'s first sentence.

(7) Availability of records. The mental-health professional or agency responsible for the defendant's treatment shall make all records necessary to independent examination available at any time to the prosecuting attorney or defendant's lawyer. RELATED STANDARD: 7-4.11(e)(ii)

COMMENT

This is based upon Standard 7-4.11(e)(ii)'s last sentence.

(b) Proceedings while defendant remains incompetent. The fact that the defendant has been determined to be incompetent does not preclude further judicial action, defense motions, or discovery proceedings that may appropriately be conducted without the defendant's personal participation.

RELATED STANDARD: 7-4.12

COMMENT

This is from Standard 7-4.12.

(c) Hearing on unlikelihood of attaining competence. If a mental-health professional concludes in a redetermination report that there is no substantial probability that the defendant will attain competence within [18 months] after the court's determination of incompetence, the court may conduct a hearing on that issue. Before the hearing, on motion of a party or its own motion, the court may order an examination and report on that issue by one or more additional mental-health professionals or agencies. Rule 464(d) through (j) and Rule 466 apply, but the issue is the unlikelihood of the defendant's attaining competence within [18 months] after the court's determination of incompetence.

RELATED STANDARDS: 7-4.11(c)(i), 7-4.13(a)(i)

COMMENT

This subdivision's first sentence is based upon Standard 7-4.13(a)(i). The second sentence is based upon Standard 7-4.11(c)(i).

(d) Defendant not attaining competence. If the court determines that there is no substantial probability that the defendant will attain competence within [18 months] after the court's determination of incompetence, or if [18 months] have elapsed since the court's determination of incompetence, the court:

(1) shall order the defendant released from any confinement or conditions of release related to the instant prosecution, effective two days after the date of the order unless the prosecuting attorney agrees that it may take effect immediately; and

(2) may cause the defendant to be subjected to [commitment procedures].

RELATED STANDARD: 7-4.13(a)

COMMENT

This is based upon Standard 7-4.13(a).

This Rule does not proceed, as does Standard 7-4.13(b), to specify a special commitment procedure whereby a "permanently" incompetent defendant charged with a felony causing or seriously threatening serious bodily harm may be committed for up to the maximum time of sentence if "factual guilt" is determined at a special hearing where the defendant has every right (including jury) that would apply at trial except the right not to be tried while incompetent. Apparently no jurisdiction has yet adopted a procedure precisely like this. It may be inappropriate for inclusion in court rules, as opposed to legislation.

It should be noted that under Rule 467(b) above, the defendant's incompetence should not preclude proceeding upon a motion for pretrial dismissal under Rule 481 below. That proceeding does not have the trial-like attributes of Standard 7-4.13(b)'s special commitment procedure.

(e) Confinement for maximum time. If the defendant has been confined for the [maximum] [presumptive] time of sentence for the crime charged [less statutory good time], the court shall (i) dismiss the information [or indictment] with prejudice and discharge the defendant or (ii) cause the defendant to be subjected to [commitment procedures].

RELATED STANDARDS: 7-4.13(a)(i), (iii), 7-7.7(a)

COMMENT

Although this is not explicitly stated in the Standards, it logically follows from Standards 7-4.13(a)(i), (iii) and 7-7.7(a).

The time of sentence should be computed in light of provisions like good time statutes and sentencing guidelines, using the time applicable absent aggravating circumstances. See footnote 3 to Standard 7-7.7's Commentary, which states in part:

> Since few prisoners actually serve the maximum sentence available under the statute, an approach which would serve the interests of equity and symmetry would set the outer limit for special commitment at two-thirds of the hypothetical maximum sentence. This approach would approximate the reduction the average prisoner achieves through parole and "good time."

See also N.Y. Crim. P. Law 730.50 (McKinney 1984) (cited in Jackson v. Indiana, 406 U.S. 715, 734 n.13 (1972)), requiring dismissal of charges against an incompetent defendant who has been committed for "two-thirds of the authorized maximum term of imprisonment for the highest class felony charged."

RULE 468. ADMISSIBILITY OF EVIDENCE.

Information or testimony given by the defendant in a motion, examination, treatment, or hearing under Rules 464 through 467 and information, opinion, or testimony derived therefrom is privileged and may be used only in a proceeding to determine the defendant's competence and related treatment issues.

RELATED STANDARD: 7-4.6(a)

COMMENT

This is based upon Standard 7-4.6(a). Compare Rule 425(g) above.

RULE 469. DEFENDANT ON MEDICATION.

(a) Generally. A defendant is not incompetent merely because the defendant's competence depends upon continuation of treatment that includes medication.

RELATED STANDARD: 7-4.14(a)

COMMENT

This is based upon Standard 7-4.14(a). See Rule 466(h)(2) above (if court finds competence depends on continuation of treatment, court may order the defendant to continue to receive treatment).

(b) Evidence. If the defendant proceeds to trial with the aid of treatment that may affect demeanor, the court shall permit the defendant and may permit the prosecuting attorney to introduce evidence regarding the treatment and its effects.

RELATED STANDARD: 7-4.14(b)

COMMENT

This is based upon Standard 7-4.14(b). As stated therein, if evidence regarding treatment and its effects is introduced, the court should give appropriate instructions to the jury.

## PART 7

## JOINDER AND SEVERANCE

RULE 471. JOINDER OR DISMISSAL OF CRIMES UPON DEFENDANT'S MOTION.

(a) Related crimes defined. Two or more crimes are related, for the purposes of this Rule, if they are within the jurisdiction of the same court and are based upon the same conduct, upon a single criminal episode, or upon a common plan.

RELATED STANDARD: 13-1.2

COMMENT

This is based upon Standard 13-1.2.

(b) Joinder of related crimes. On motion of the defendant conforming to Rule 451, the court shall join for trial two or more charges of related crimes unless it determines that because the prosecuting attorney does not presently have sufficient evidence to warrant trying one or more of the charges, or for some other reason, the joinder would defeat the ends of justice.

RELATED STANDARD: 13-2.3(a)

COMMENT

This is based upon Standard 13-2.3(a).

(c) Dismissal of related crimes. Upon motion of the defendant conforming to Rule 451, the court shall dismiss a charge of a crime if the defendant was previously convicted or acquitted of a related crime based upon the same conduct or a single criminal episode, unless:

(1) the defendant knew the defendant was charged with the crime by the time under Rule 411 for making pretrial motions, but failed to move for joinder of the charges;

(2) a motion for joinder of the charges was previously denied; or

(3) the court determines that because the prosecuting attorney did not have sufficient evidence to warrant trying the charge before the conviction or acquittal of the related crime, or for some other reason, the dismissal would defeat the ends of justice.

RELATED STANDARD: 13-2.3(b), (c)

COMMENT

This is based upon Standard 13-2.3(b) and (c).

(d) Joinder of unrelated crimes. On motion of the defendant conforming to Rule 451, the court shall join for trial two or more charges of unrelated crimes upon a showing that failure to try the charges together would constitute harassment, unless the court determines that because the prosecuting attorney does not presently have sufficient evidence to warrant trying one or more of the charges, or for some other reason, the joinder would defeat the ends of justice.

RELATED STANDARDS: 13-2.1(b), 13-3.1(c)

COMMENT

Although more detailed, this is consistent with Standard 13-2.1(b), which specifies, "Any two or more offenses committed by the same defendant . . . may be joined for trial, upon application of . . . the defense."

A defendant may wish to have unrelated charges joined because of the time and expense which would be involved in the seriatim trial of a number of charges. This is most likely to be the case when the prosecutor has separately charged the defendant with a large number of crimes which, viewed individually, are not serious but which would require an undue amount of time in court by the defendant and counsel if they were brought up for trial one at a time. Thus, subdivision (d) requires joinder of unrelated crimes on motion of the defendant and a showing that "failure to try the charges together would constitute harassment."

This requirement is qualified by the provision that the court shall not order joinder if it finds that the joinder would defeat the ends of justice. One possibility, specifically identified in subdivision (d), is that the prosecutor does not have sufficient evidence to warrant trying some of the charges at that time. Another, somewhat more likely to be present here than as to related crimes, is that the number of charges and the complexity of the evidence is such that if the

charges were joined the trier of fact would be unable to distinguish the evidence and apply the law intelligently as to each crime. See Standard 13-3.1(c).

RULE 472. SEVERANCE OF CRIMES AND DEFENDANTS ON PARTY'S MOTION.

(a) Severance of crimes. Subject to the defendant's right of joinder under Rule 471, on motion of a party, the court shall sever crimes if:

(1) the crimes are not related crimes;

(2) before trial, the court determines severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each crime; or

(3) during trial, with the defendant's consent or upon a finding of manifest necessity, the court determines severance is necessary to achieve a fair determination of the defendant's guilt or innocence of each crime.

RELATED STANDARD: 13-3.1

COMMENT

This is based upon Standard 13-3.1(a) and (b). As Standard 13-3.1(c) states:

> When evaluating whether severance is "appropriate to promote" or "necessary to achieve" a fair determination of the defendant's guilt or innocence of each offense, the court should consider among other factors whether, in view of the number of offenses charged and the complexity of the evidence offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently to each offense.

(b) Severance of defendants.

(1) Codefendant's statement. On motion of a defendant for severance because a codefendant's out-of-court statement refers to, but is not admissible against, the movant, the court shall determine whether the state intends to offer the statement in evidence as

part of its case in chief. If so, the court shall require the prosecuting attorney to elect one of the following courses:

(i) a joint trial at which the statement is not received in evidence;

(ii) a joint trial at which the statement is received in evidence only after all references to the movant have been deleted, if admission of the statement with the deletions made will not prejudice the movant; or

(iii) severance of the movant.

RELATED STANDARD: 13-3.2(a)

COMMENT

This is based upon Standard 13-3.2(a).

(2) Other grounds. On motion of a party other than under paragraph (1), the court shall sever defendants:

(i) before trial, if the defendants cannot be joined under Rule 231(e) or the court determines severance is appropriate to promote a fair determination of the guilt or innocence of one or more of the defendants; or

(ii) during trial, with the defendant's consent to be severed or upon a finding of manifest necessity, if the court determines severance is necessary to achieve a fair determination of the guilt or innocence of one or more of the defendants.

RELATED STANDARD: 13-3.2(b), (c)

COMMENT

This is based upon Standard 13-3.2(b).

Among other factors to be considered in evaluating whether severance of defendants is appropriate to promote, or necessary to achieve, a fair determination of one or more defendants' guilt or innocence for each crime, Standard 13-3.2(c) and Commentary specify "whether, in view of the number of offenses and defendants charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense and as to each defendant," and whether the defendants "have inconsistent or antagonistic defenses."

(c) Effect of severance on collateral estoppel. A defendant's motion for severance of crimes precludes the defendant from asserting the collateral estoppel defense, so that a finding of fact in the trial of one of the severed crimes does not bar a contrary finding in the trial of another of the severed crimes, unless the motion was made and granted or should have been granted on the specified ground that the trier of fact would be unable to distinguish the evidence and apply the law intelligently as to each crime because of the number of crimes charged and the complexity of the evidence.

COMMENT

This subdivision deals with a situation which will arise infrequently. This is because a collateral estoppel defense under Ashe v. Swenson, 297 U.S. 436 (1970), will be available only as to related crimes, as to which the defendant is unlikely to desire a severance. In the rare instance in which the defendant does want related crimes severed, it is not unfair to provide that the motion precludes assertion of the collateral estoppel defense, given the fact that the prosecution is prepared to proceed with these crimes in one trial and thereby avoid the necessity of a complicated collateral estoppel inquiry prior to a second trial. Under Ashe, such an inquiry can be extremely burdensome upon the prosecution and court, for it necessitates an examination of the full record of the prior proceedings, including the pleadings, evidence, charge, and all other relevant matters in order to determine whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.

An exception is provided when the defendant's motion was made and was granted (or, should have been granted) on the specific ground that the trier of fact would be unable to distinguish the evidence and apply the law intelligently as to each crime because of the number of crimes charged and the complexity of the evidence. In this situation, also unlikely when the crimes are related, the collateral estoppel defense is not precluded. The defendant should not be required to forfeit that defense in order to obtain a fair determination of guilt or innocence.

RULE 473. JOINDER OR SEVERANCE UPON COURT'S OWN MOTION.

(a) Joinder. The court may order two or more [indictments or] informations to be tried together if no party objects and the crimes, and the defendants if more than one, could have been joined in a single [indictment or] information.

RELATED STANDARD: 13-4.1

COMMENT

This is based upon Standard 13-4.1 and Fed. R. Crim. P. 13. Rule 231(d) and (e) above govern whether crimes or defendants could have been joined in a single information.

Even if neither party objects at the time the court orders joinder under this Rule, a party may still obtain a severance under Rule 472 if the motion therefor is timely.

(b) Severance. Subject to the defendant's right of joinder under Rule 471, the court may order a severance of crimes or defendants before trial in order to promote a fair and orderly trial.

RELATED STANDARD: 13-4.2

COMMENT

This derives from Standard 13-4.2 and Fed. R. Crim. P. 14.

If the defendant moves for joinder under Rule 471(b) or (d) above, that motion may be denied only as provided therein.

[RULE 474. BIFURCATION OF MENTAL NONRESPONSIBILITY ISSUES.

On motion of the defendant conforming to Rule 451, the court may order that issues as to the commission of the crime be tried separately from the issue of mental nonresponsibility. The

court shall grant the motion if it determines that trying the issues separately is necessary to prevent substantial prejudice to the defendant.]

RELATED STANDARD: 7-6.7

COMMENT

Except for specifying that the matter be raised by pretrial motion, the first sentence is identical to bracketed 701 of the Model Insanity Defense and Post-Trial Disposition Act. The latter's Comment states:

> No consensus exists today on the question whether the issue of absence of responsibility should be tried in one proceeding with the issue of guilt or whether these issues should be tried separately. At present there are states which require that the issue of absence of responsibility be tried together with the issue of commission of the crime, other states which allow for bifurcation within the discretion of the court, and other states which require bifurcation in all cases. The Model Act does not indicate any preference among these possible procedures. Section 701 is included for any state that wishes to allow bifurcation in the discretion of the trial judge.
>
> In all cases in which a court has ordered bifurcation, Section 701 would permit the court to determine the order for trial of the issues of commission of the crime charged and absence of responsibility.

The second sentence is based upon Standard 7-6.7, which states:

> The defense of mental nonresponsibility [insanity] and all other evidence pertaining to the defendant's responsibility for the acts charged should be heard in a unitary trial unless, upon the defendant's request, the court determines that trying the issue of guilt separately from the issue or responsibility is necessary to prevent substantial prejudice to the defendant.

The Standard's Commentary, after noting that most states make bifurcation subject to the discretion of the court, concludes:

> [T]here may be circumstances in which a two-stage procedure would be warranted, especially if the defendant does not intend to present evidence of mental abnormality on the mens rea issue. In such cases, if the defendant has a colorable defense "on the merits," as well as a colorable defense of mental nonresponsibility, and can show that permitting expert testimony on the latter issue at a unitary trial would jeopardize his merits defense by revealing incriminating or otherwise prejudicial information, courts have been willing to consider bifurcation.

> Although this standard expresses a preference for unitary trials, it would permit bifurcation in cases of this sort. The defendant should not have to waive his fifth amendment right as the price of raising a mental nonresponsibility defense. Instructing the jury to consider an expert's testimony about the defendant's mental state only when deciding the issue of criminal responsibility and to disregard it when reaching conclusions about other issues is ineffective at alleviating the prejudice inherent in the types of cases described above. On the other hand, if the defendant's assertion of a nonresponsibility defense is in essence a "confession and avoidance" admitting the crime but alleging it was excusable, or if the defendant is also presenting expert testimony on mens rea, bifurcation would not seem justifiable, even in cases where psychiatric testimony might prove incriminating. [Footnotes omitted.]

Because this Rule requires a motion "conforming to Rule 451," the defense must request bifurcation by the time set for making pretrial motions unless the court "in the interest of justice" under Rule 451(b) permits the defense to make a later pretrial motion or "for cause shown" under Rule 451(c) permits the defense to make the motion at trial. See Comment to Rule 451(c) above.

## PART 8

## MOTION FOR PRETRIAL DISMISSAL

### RULE 481. MOTION FOR PRETRIAL DISMISSAL.

(a) Motion. On or before the time set under Rule 411, or at a later time before trial if the court permits in the interest of justice, the defendant may move for pretrial dismissal. The motion shall particularize:

(1) the ground on which it is based, which must specify the elements of the crime charged or other necessary parts of the state's case as to which it is believed the prosecuting attorney's evidence is insufficient;

(2) any matters the prosecuting attorney has indicated under Rule 422 the prosecuting attorney intends to use at trial, and any statements discovered under Rule 421(a) or

depositions taken under Rule 431 of individuals the prosecuting attorney has indicated under Rule 422 the prosecuting attorney intends to call as witnesses at trial, which are believed to disprove or show the absence of the elements or other necessary parts specified; and

(3) any lesser included crime as to which it is believed the prosecuting attorney's evidence is also insufficient for the grounds particularized.

COMMENT

Rule 481 generally

The Rule 481 pretrial dismissal procedure is the device provided in these Rules whereby the defendant may obtain a judicial determination as to whether the prosecutor's evidence is sufficient to merit requiring the defendant to stand trial. This function is usually performed in current practice by a preliminary hearing (no such hearing is provided for in these Rules; but see Rule 345, which provides a probable cause hearing for defendants unable to obtain pretrial release). The pretrial dismissal procedure is preferable for the following reasons: (1) it focuses attention more directly upon the prosecutor's case, as the motion is decided upon the basis of that evidence and the depositions and statements of those witnesses the prosecutor plans to introduce or call at trial; (2) because it comes somewhat later, it is feasible to decide the issue solely in terms of admissible evidence (generally not the case at preliminary hearings) and by resort to a higher test, namely, that used for a motion for acquittal at trial (by contrast, only probable cause need be shown at a preliminary hearing); and (3) the motion can be ruled upon on the basis of the prior discovery and depositions, thus rendering unnecessary a lengthy formal hearing or the calling of witnesses to testify.

Subdivision (a)

The time specified in the first sentence will be set under Rule 411, which also provides for the court to set times with respect to certain other matters, such as discovery and pretrial motions. To conform to the present Rule, the court will set the time for this motion so that it may be made after certain other events. Most important, it must remain open to the defendant to move for dismissal after the prosecutor has given notice under Rule 422 as to what evidence the prosecutor will use at trial and after there has been a ruling upon the defendant's suppression motions under Rule 461.

While the specificity called for by clause (1) is not now generally required for a motion for acquittal at trial, in contrast to the generally accepted requirements as to a motion for a directed verdict in a civil action, see 2 A. Wright, Federal Practice & Procedure--Criminal § 466 (2d ed. 1982), it is appropriately required here. Unlike the case where the motion is made at trial, the court has not had an opportunity to observe an orderly presentation of evidence. If

faced only with a general claim of an insufficiency in the prosecutor's case, the court would have to engage in a roving inquiry into all of the evidence the prosecutor intends to offer at trial. Requiring the defendant to be specific at this point identifies the issues for the court and makes it possible for the parties to limit the evidentiary matters which are brought to the court's attention. Illustrative of what the defendant might do by way of particularizing grounds are: in a possession of heroin case, asserting that the element of possession is not proved because the prosecutor's file only shows that the heroin was found in a car in which the defendant was a passenger; in an attempt case, asserting that the defendant's acts shown by the prosecutor's file do not show a substantial step.

Clause (2) requires particularization of any matters, statements, and depositions believed to show the absence of necessary parts of the state's case. Sometimes the prosecutor's case will affirmatively show something inconsistent with guilt (to take the illustration given above, that, for example, the prosecutor's witnesses say that the narcotics were not found in the defendant's possession, but rather were secreted in a car in which the defendant was only a passenger). When that is the case, the defendant will of course want to particularize the statements of those witnesses. On other occasions some element or other essential part of the state's case will simply be missing from the prosecutor's evidence. The defendant may desire, for example, to direct attention to the statement of a witness who would have been expected to speak to the missing matter, although under these circumstances it would suffice for the defendant merely to note that the missing element or part is nowhere accounted for in the prosecutor's evidence.

It must be noted that clause (2) does not grant the defendant an unlimited right to specify anything which the defendant believes tends to show that the defendant is not guilty. Rather, by the tie-in to Rule 422, whereby the prosecutor is required to give notice (sometimes automatically, sometimes on demand) of what the prosecutor's evidence at trial will be, the defendant may only specify evidence the prosecutor has said the prosecutor will use; the defendant is not permitted to bring into the picture any of the defendant's own evidence. That is, the defendant is limited to the following: (i) matters the prosecuting attorney has indicated under Rule 422 the prosecutor intends to use at trial; (ii) statements from the prosecutor's file discovered by the defendant under Rule 421(a) of persons the prosecutor has indicated pursuant to Rule 422 the prosecutor intends to call as witnesses at trial; and (iii) depositions, whether taken by the prosecutor or defendant, of persons the prosecutor has indicated pursuant to Rule 422 the prosecutor intends to call as witnesses at trial. (When the prosecutor indicates the intention to call a particular witness, it is appropriate to permit consideration of the witness' deposition even if not taken by the prosecutor, as the prosecutor had the opportunity to cross-examine that witness at the deposition.)

The limitations stated above have the advantage of ensuring that the pretrial motion is decided, as would a motion for acquittal at the close of the state's case, on the prosecutor's evidence only. This is not unfair to the defendant. If something is missing from the prosecutor's evidence, in the sense that all elements of the crime charged are not covered, then the defendant does not need any of the defendant's own evidence. Likewise, if the prosecutor's

evidence affirmatively shows something inconsistent with guilt, then again the defendant does not need any of the defendant's own evidence. If the prosecutor's evidence standing alone would reasonably permit a finding of guilty beyond a reasonable doubt, then there is no point in having the court consider the defendant's contrary evidence, as then there would be only conflicting evidence, which (by analogy to the generally accepted rule as to motions for acquittal at trial) would not ordinarily justify granting the motion.

Clause (3) reflects the view that, because the court will be looking only at the specified grounds and will have examined only evidence relating thereto, it would be inappropriate to require the court to make a determination as to any possible included crimes absent a particularization of them by the defendant.

(b) Production by prosecuting attorney. If the grounds stated in the motion, if true, would justify granting the motion, the court shall direct the prosecuting attorney to produce for examination by the court:

(1) the matters, statements, and depositions particularized in the defendant's motion; and

(2) other matters the prosecuting attorney intends to use at trial and statements or depositions of persons the prosecuting attorney intends to call as witnesses at trial, which the prosecuting attorney believes establish the elements or other necessary parts specified by the defendant under subdivision (a)(1).

COMMENT

This subdivision stresses that the court is not to call upon the prosecutor to produce the materials otherwise necessary to a decision unless the defendant has stated grounds which, if true, would justify granting the motion. If, for example, the defendant claims that the prosecutor's case does not show the presence of a certain element, but the purported omission is not in fact an element of the crime charged, the motion may be denied on that basis.

Clause (1) does not impose an undue burden on the prosecutor. The alternative, namely, to have the defense produce whatever it may have copied, would only lead to confusion.

Clause (2) is not the precise counterpart of subdivision (a)(2), above, in that the prosecutor is not limited to production of those matters and the statements and depositions of those witnesses as to which the prosecutor has given notice under Rule 422. While this may appear to give the prosecutor greater leeway than the defendant, it is justified for two reasons: (i) were it otherwise, the defendant could limit the evidence which the prosecutor could put forward by not making a demand under Rule 422; and (ii) to so limit the prosecutor would attach more serious consequences at the pretrial stage than at the trial itself for a violation of Rule 422 by the prosecutor, for at trial barring evidence is only one of the possible forms of "appropriate relief" under Rule 422(d). In connection with the latter point, it must be emphasized that subdivision (c) of this Rule requires the court to exclude from consideration that evidence and potential testimony which would be inadmissible at trial. This means that if certain evidence will not be admitted at trial as a sanction for violation of Rule 422 by the prosecutor (a somewhat unlikely prospect given the fact that the notice is delinquent but still given before trial), then that same evidence will not be subject to consideration on the motion for pretrial dismissal.

(c) Ruling. The court's ruling on the motion must be made upon the basis of the materials produced by the prosecuting attorney under subdivision (b), except for that evidence and the statements and depositions relating to that potential testimony which would be inadmissible at trial. The court shall rule on the motion as to the crime charged and any lesser included crime particularized in the defendant's motion, and shall grant the motion as to any crime for which it appears, for the reasons particularized in the defendant's motion, there is not evidence which would reasonably permit a finding of guilty beyond a reasonable doubt.

COMMENT

Under this Rule, the court does not conduct a hearing at which evidence is formally introduced, as would occur at a preliminary hearing. Rather, the court rules on the defendant's motion on the basis of physical evidence the prosecutor intends to offer at trial and statements and depositions of witnesses the prosecutor intends to call at trial. Those matters must be produced by the prosecution under subdivision (b) above and thus the first sentence hereof states that the court's ruling must be based upon the materials the prosecutor has produced.

The first sentence's "except" clause, however, precludes taking into account that evidence and the statements and depositions relating to that potential testimony which would be inadmissible at trial. For one thing, this means that evidence suppressed upon a suppression motion may not be considered. Although this differs from the rule usually followed in preliminary hearings, it should be noted that the explanations offered for not applying

exclusionary rules at preliminary hearings (such as that to do so would require the matter of admissibility to be ruled upon twice) have no application here. In addition, under subdivision (c) the court may not consider matters which would not be admitted at trial under other provisions of these Rules. Illustrative is evidence which the prosecutor will be barred from using at trial under Rules 421(e) and 422(d) because of noncompliance with discovery and notice provisions. Likewise, the court does not consider evidence and potential testimony which for other reasons would not be admitted at trial. That is, the rules of evidence which apply at trial are applicable. However, it must be kept in mind that the rules of evidence will not bar consideration of statements and depositions merely because the statements and depositions could not be received at trial; rather, the question is whether the probable testimony of a prosecution witness, as reflected in a statement or deposition, could be received. Such will sometimes not be the case, as where that testimony would violate a privilege which the defendant has claimed or would constitute hearsay.

The last sentence's formula, if "there is not evidence which would reasonably permit a finding of guilty beyond a reasonable doubt," is often used to express the standard to be applied on a motion for acquittal at trial. However, unlike the situation at trial, the qualifying phrase "for the reasons particularized in the defendant's motion" is necessary here, as the court is only passes upon those aspects of the prosecution's case which have been called into question specifically in the defendant's motion.

(d) Dismissal with or without prejudice. The court may grant the motion with or without prejudice. If granted, the order must state whether the dismissal is with or without prejudice.

COMMENT

Because pretrial dismissal occurs after the prosecutor has had the opportunity for discovery and has given notice of the evidence and witnesses the prosecutor intends to use at trial, and because pretrial dismissal would be of relatively little value to the defendant if the prosecutor could always merely reinstitute prosecution, pretrial dismissal generally should be with prejudice. However, because extraordinary circumstances may make it unfair to preclude reinstitution, the court has discretion to dismiss without prejudice.

The prosecution should be permitted to appeal a dismissal with prejudice, but the defendant should not be allowed to appeal an order denying a motion for pretrial dismissal. Unless the state's provisions on appellate procedure already make this clear, they should be amended to so specify.

# PART 9

## PRETRIAL CONFERENCE

### RULE 491. PRETRIAL CONFERENCE.

If a trial is likely to be protracted or otherwise unusually complicated, or upon request by agreement of the parties, the trial court may hold one or more pretrial conferences, with trial counsel present, to consider the possibility of stipulations, orders, and other steps to promote a fair and expeditious trial. At the conclusion of a conference a court-approved memorandum of the matters agreed upon must be signed by counsel and filed. The memorandum is binding upon the parties at trial, on appeal, and in post-conviction proceedings, unless it is set aside or modified by the court in the interest of justice, but admissions of fact by the defendant at the conference may be used against the defendant only if included in a writing signed by the defendant.

RELATED STANDARD: 11-5.4

#### COMMENT

This is based upon Standard 11-5.4 and Fed. R. Crim. P. 17.1.

# ARTICLE V

# TRIAL

## PART 1

## JURY

### RULE 511. TRIAL BY JURY.

(a) Trial by jury[; waiver]. If the defendant has a right to trial by jury, the trial must be by jury [unless the defendant [with the prosecuting attorney's consent] understandingly and voluntarily waives the right in open court, in which case the trial must be by the court. The waiver must occur before selection of the jury begins unless the court for cause allows a later waiver].

RELATED STANDARD: 15-1.2(a), (b)

COMMENT

The first two sentences are based upon Standard 15-1.2(a) and (b). The last sentence establishes a time requirement for waiver. A state whose procedure did not permit waiver of jury would omit the bracketed language.

(b) Stipulation as to size of jury. At any time before verdict the parties may stipulate that the jury shall consist of a number less than that otherwise required by law, if the defendant in open court understandingly and voluntarily waives the right to trial by a full jury.

RELATED STANDARD: 15-1.3(b), (c)

COMMENT

This is based upon Standard 15-1.3(b) and (c).

(c) Additional jurors. The court may direct the selection of additional jurors, in which case immediately before the jury retires to deliberate the court shall cause the requisite number of jurors to be chosen by lot to constitute the jury and discharge any juror not chosen.

RELATED STANDARD: 15-2.7

COMMENT

This derives from Standard 15-2.7 and Fed. R. Crim. P. 24(c).

(d) Challenge to process of selecting prospective jurors. Challenges to the manner of selecting the panel from which prospective jurors are to be drawn are [governed by Section 12 of the Uniform Jury Selection and Service Act].

RELATED STANDARD: 15-2.3

COMMENT

This is to the same effect as Standard 15-2.3. A state which has not enacted the Uniform Jury Selection and Service Act may include reference to its own act in the brackets, or, if it has no act covering the matter, may include language like the following based upon the Uniform Act: "by motion on the ground of substantial failure to comply with the law governing that matter. The motion shall be made within seven days after the movant discovered or by the exercise of diligence could have discovered the grounds therefor, and in any event before the jury is sworn to try the case."

[(e) Trial without a jury. In a case tried without a jury the court shall make a general finding. It may also make special findings, and shall do so if a party at the commencement of trial so requests. Special findings may be in writing or stated orally on the record or may appear in an opinion or memorandum of decision.]

COMMENT

This is to the same effect as Fed. R. Crim. P. 23(c) except that the latter specifies that the request be "before the general finding" rather than "at the commencement of trial."

RULE 512. SELECTION OF JURY.

(a) Preliminary admonitions. If the trial is to be by jury, the court shall give the prospective jurors appropriate admonitions regarding their conduct during the selection process, including the following admonitions:

(1) not to communicate with other prospective jurors or anyone else on any subject connected with the trial or form or express an opinion on the case;

(2) to report promptly to the court any incident involving an attempt by any person improperly to influence a prospective juror or any violation by a prospective juror of the court's admonitions; and

(3) not to read, listen to, or view news reports concerning the case. The court shall explain the reasons for this admonition.

RELATED STANDARD: 15-3.7(a)

COMMENT

This implements Standard 15-3.7(a)'s provision that the court take appropriate steps including admonitions "to ensure that the jurors will not be exposed to sources of information or opinion, or subject to influences, that might tend to affect their ability to render an impartial verdict on the evidence presented in court." As to the particular matters covered, see the Comment to Rule 513(b) below.

(b) Examination. The court shall cause the prospective jurors to be sworn or affirm to answer truthfully the questions they will be asked during the selection process, identify the parties and their lawyers, and briefly outline the nature of the case. The court may put to the prospective jurors appropriate questions regarding their qualifications to serve as jurors in the

case, and shall permit questioning by the parties for the purposes of discovering bases for challenge for cause and enabling an intelligent exercise of peremptory challenges. The court, on motion of a party or its own motion, may direct that any portion of the questioning of a prospective juror be conducted out of the presence of the other prospective jurors.

RELATED STANDARDS: 3-5.3(c), 4-7.2(c), 8-3.5(a), 15-2.4

COMMENT

The first sentence's reference to swearing the jurors is similar to Fla. R. Crim. P. 3.300(a). The balance of the first sentence derives from Colo. R. Crim. P. 24(a)(2). The second sentence is based upon ABA Standards 3-5.3(c), 4-7.2(c), and 15-2.4. The last sentence is in accord with Standard 8-3.5(a) (3d ed. 1991).

(c) Challenges for cause.

(1) Grounds. Any party may challenge a prospective juror for cause on one or more of the following grounds:

(i) the prospective juror is disqualified from jury service [under Section 8(b) of the Uniform Jury Selection and Service Act];

(ii) any ground for challenge for cause provided by law; and

(iii) the prospective juror's exposure to potentially prejudicial information makes the prospective juror unacceptable. A prospective juror who has been exposed to and remembers a report of highly significant information, such as the existence or contents of a confession or other incriminating matter that may be inadmissible in evidence, or a substantial amount of inflammatory information, is subject to challenge without regard to the prospective juror's testimony as to personal state of mind.

RELATED STANDARDS: 8-3.5(b), 15-2.5

COMMENT

In providing only for challenge by parties, and not for excusal by the court, this accords with numerous provisions. See, e.g., Alaska R. Crim. P. 24(c); Cal. Penal Code § 1071 (West 1985); Colo. R. Crim. P. 24(b); Ill. Ann. Stat. ch. 38, para. 115-4(d) (Smith-Hurd Supp. 1987); Maine R. Crim. P. 24(b); Mont. Code Ann. § 46-16-304 (1985); Nev. Rev. Stat. § 175.036(1) (1985); N.Y. Crim. P. Law § 270.15(2) (McKinney 1982); Pa. R. Crim. P. 1106(e); Tex. Crim. P. Code Ann. art. 35.16(a) (Vernon Supp. 1987). It should be the parties' rather than the judge's responsibility to challenge prospective jurors. But see ABA Standard 15-2.5.

Clause (iii) derives from Standard 8-3.5(b).

(2) Time for making challenges. The challenge must be made promptly upon the examination's conclusion, but the court for cause shown may permit it to be made later before jeopardy has attached.

RELATED STANDARD: 15-2.5

COMMENT

This derives from Standard 15-2.5. Regarding when jeopardy attaches, see the Comment to that Standard.

(3) Determination of challenges. Challenges must be tried by the court.

RELATED STANDARD: 15-2.5

COMMENT

This is consistent with Standard 15-2.5 and is in accord with many provisions. See, e.g., Cal. Penal Code § 1083 (West 1985); Colo. R. Crim. P. 24(b)(2); Idaho R. Crim. P. 24(a); Mont. Code Ann. § 46-16-304(1) (1985); Nev. Rev. Stat. § 175.036(2) (1985); N.Y. Crim. P. Law § 270.20(2) (McKinney 1982); Tex. Crim. P. Code Ann. art. 35.21 (Vernon 1966).

(d) Peremptory challenges. Each side is entitled to [_____] peremptory challenges. If additional jurors are selected, each side is entitled to [_____]. If there are two or more defendants, the court shall allow the defendants

additional challenges in the number it deems proper, but each defendant is entitled to the same number as the state if a motion for severance of defendants has been denied. The parties are entitled to exercise their challenges alternately, out of the hearing of the prospective jurors, commencing with the state. If there are two or more defendants, the defendants are entitled to exercise their challenges separately.

RELATED STANDARD: 15-2.6(a)

COMMENT

In providing the prosecution and defense the same number of peremptories, the first sentence accords with many provisions. See, e.g., Cal. Penal Code § 1070 (West 1985); Colo. R. Crim. P. 24(d)(2); Fla. R. Crim. P. 3.350; Idaho R. Crim. P. 24(b); Ill. Ann. Stat. ch. 38, para. 115-4(e) (Smith-Hurd Supp. 1987); La. Code Crim. P. art. 799 (West Supp. 1987); Mont. Code Ann. § 46-16-305 (1985); N.Y. Crim. P. Law § 270.25(2) (McKinney 1982); Tex. Crim. P. Code Ann. art. 35.15 (Vernon 1966 & Supp. 1987); Wis. Stat. § 972.03 (West 1985).

The bracket in the second sentence might be used to denote either one additional challenge for each additional juror, or one if there are one or two additional jurors and two if there are three or four additional jurors.

Except for making it mandatory to allow some additional challenges, the first part of the third sentence is to the same effect as Fed. R. Crim. P. 24(b). See ABA Standard 15-2.6(a) ("Peremptory challenges should be limited to a number no larger than ordinarily necessary to provide reasonable assurance of obtaining an unbiased jury, but the trial judge should be authorized to allow additional peremptory challenges when special circumstances justify doing so"). The last part of the sentence reflects the view that if the defendants would have been tried separately but for the court's ruling under Rule 472(b), in fairness they should each have the full number of challenges.

The penultimate sentence's provision for alternate exercise, commencing with the state, accords with many provisions. See, e.g., Alaska R. Crim. P. 24(d); Cal. Penal Code § 1088 (West 1985); Colo. R. Crim. P. 24(d)(4); Maine R. Crim. P. 24(c)(2); Mont. Code Ann. § 46-16-304 (1985); Nev. Rev. Stat. § 175.051(3) (1985); Pa. R. Crim. P. 1106(e); Wis. Stat. Ann. § 972.04(1) (West 1985). The reference to exercising the challenges out of the prospective jurors' hearing derives from Standard 15-2.7(c)'s Commentary.

The last sentence derives from Tex. Crim. P. Code Ann. art. 35.15 (Vernon 1966 & Supp. 1987) and Wis. Stat. § 972.03 (West 1985).

RULE 513. TRIAL JURORS.

(a) Oath. The court shall cause the jurors to be sworn or affirmed to try the case in a just and impartial manner and according to the law and the evidence.

COMMENT

This derives from Alaska R. Crim. P. 24(f), Fla. R. Crim. P. 3.360, La. Code Crim. P. art. 790 (West 1981), Nev. Rev. Stat. § 175.111 (1985), Pa. R. Crim. P. 1110, and Tex. Crim. P. Code Ann. art 35.22 (Vernon 1966). This subdivision takes no position on the issue of jury nullification.

(b) Admonitions. The court shall give the jurors appropriate admonitions regarding their conduct during the case, including the following admonitions:

(1) not to communicate with other jurors or anyone else on any subject connected with the trial or form or express an opinion on the case until it is finally submitted to the jury;

(2) to report promptly to the court any incident involving an attempt by any person improperly to influence a member of the jury or any violation by a juror of the court's admonitions; and

(3) not to read, listen to, or view any news reports concerning the case. The court shall explain the reasons for this admonition.

RELATED STANDARD: 8-3.6(d)

COMMENT

The admonitions specified in clause (1) are commonly required. See, e.g., Alaska R. Crim. P. 27(c)(1); Cal. Penal Code § 1122 (West 1985); Mont. Code Ann. § 46-16-501(2)(a) (1985); Nev. Rev. Stat. § 175.401(1), (3) (1985).

Clause (2) derives from Nev. Rev. Stat. § 175.121(1)(b) (1985) and N.Y. Crim. P. Law § 270.40 (McKinney 1982).

Clause (3) is in accord with ABA Standard 8-3.6(d) (3d ed. 1991), Nev. Rev. Stat. § 175.401(2) (1985), and N.Y. Crim. P. Law § 270.40 (McKinney 1982). Standard 8-3.6(d) (3d ed. 1991) sets forth an appropriate admonition which includes an explanation of the reasons.

(c) Preliminary instructions. The court shall give the jury preliminary instructions appropriate for its guidance in hearing the case. Rules 523(a), (b), (e), (f), and (g) and 531(b) apply to preliminary instructions.

RELATED STANDARD: 15-3.6(e)

COMMENT

Except for making it mandatory to give some preliminary instructions, see N.Y. Crim. P. Law §§ 270.30(2), 270.40 (McKinney 1982), the first sentence accords with ABA Standard 15-3.6(e).

The last sentence is similar to Mont. Code Ann. 46-16-401(1) (1985) and Wis. Stat. Ann. § 972.10(1)(b) (West Supp. 1987).

(d) Sequestration. The court, on motion of the defendant shall, or on its own motion may, order sequestration of the jury if it appears the case is of such notoriety or the issues are of such nature that, absent sequestration, highly prejudicial matters are likely to come to the jurors' attention. The court may order sequestration in any other case on motion of the defendant or on motion of the state with the consent of the defendant. A motion to sequester may be made at any time. The jury must not be informed which party requested sequestration.

RELATED STANDARD: 8-3.6(b)

COMMENT

The first, third, and fourth sentences are in accord with ABA Standard 8-3.6(b) (3d ed. 1991).

Except for requiring the defendant's consent, the second sentence is similar to many provisions. See e.g., Cal. Penal Code § 1121 (West 1985); Ill. Ann. Stat. ch. 38, para. 115-

4(m) (Smith-Hurd Supp. 1987); La. Code Crim. P. art. 791(C) (West 1981); Mont. Code Ann. § 46-16-501(1) (1985); Nev. Rev. Stat. § 175.391 (1985); N.Y. Crim. P. Law § 270.45 (McKinney 1982); Pa. R. Crim. P. 1111; Tex. Crim. P. Code Ann. art. 35.23 (Vernon 1966); Wis. Stat. § 972.12(1) (West 1985). Since jurors' dislike for sequestration may turn them against the defendant, sequestration other than under the first sentence should be only on the defendant's motion or with the defendant's consent.

(e) Note taking. If note taking by the jurors will likely assist them in their deliberations, the court may permit them to take notes under appropriate conditions and admonitions. Jurors may disclose their notes only to other jurors during deliberations.

RELATED STANDARD: 15-3.2

COMMENT

Except for leaving permission for note taking to the court's discretion, this is based upon ABA Standard 15-3.2. That Standard's Commentary notes that leaving this to the court's discretion is the position of the great majority of states that have ruled on the question.

(f) Discharge of juror. On motion of a party, the court shall discharge a juror found to be disqualified or unable to perform the juror's duties. A juror is disqualified if, had the juror been subject to the same objection as a prospective juror, the juror could have been successfully challenged for cause therefor and:

(1) the movant could not reasonably have asserted the objection in a challenge for cause; or

(2) the motion is by the defendant, discharging the juror is necessary to preserve the defendant's constitutional right to an impartial jury or to a fair trial, and the defendant did not understandingly and voluntarily forego asserting the objection in a challenge for cause.

RELATED STANDARDS: 8-3.6(e), 15-2.7

COMMENT

Discharge is authorized only "upon motion of a party" because each party has a right to have the case tried by the jurors who have been selected, absent a proper showing by the other party. Although the court may bring matters to the parties' attention and suggest the possibility of a motion to discharge a juror, it should not discharge a juror upon its own motion.

The first sentence's "disqualified or unable to perform" standard accords with ABA Standard 15-2.7.

The second sentence's introductory portion uses the approach of Standard 8-3.6(e) (3d ed. 1991) which, however, applies only to claims of exposure during trial to prejudicial material.

Clause (1) reflects the view that, except as provided in clause (2), each party is entitled to trial by the jurors who have been selected unless the other side shows not only grounds for discharging a juror but also that it could not reasonably have asserted the objection in a challenge for cause.

Clause (2) reflects the view that the defendant is entitled to an impartial jury and a fair trial except to the extent that the defendant waived the right thereto by understandingly and voluntarily electing not to challenge a juror for cause.

(g) Questioning as to grounds for discharge. The court, on motion of a party shall or on its own motion may, question a juror, outside the presence of the other jurors, as to possible grounds for discharge of any juror.

RELATED STANDARD: 8-3.6(e)

COMMENT

This is in accord with ABA Standard 8-3.6(e) (3d ed. 1991) which, however, applies only to situations of dissemination during trial of potentially prejudicial material.

(h) Discharge of jury. The court shall discharge the jury after it has rendered its verdict or a mistrial is declared.

COMMENT

This is similar to Cal. Penal Code § 1140 (West 1985), Fla. R. Crim. P. 3.560, and Nev. Rev. Stat. § 175.461 (1985). Regarding mistrial, see Rule 541 below.

## PART 2

## PROCEEDINGS AT TRIAL

### RULE 521. ORDER OF PROCEEDING UPON TRIAL.

(a) Generally. Unless the court for cause otherwise permits, the parties shall proceed with the trial in the following order:

(1) The prosecuting attorney shall make an opening statement.

(2) The defendant's lawyer or, if the defendant is proceeding without counsel or the court in its discretion permits, the defendant, may make an opening statement or may defer doing so until after the close of the state's case in chief.

(3) The state shall present its case in chief.

(4) The defendant may present a case in chief.

(5) The state and the defendant may present rebuttal evidence in successive rebuttals as required. The court for cause may permit a party to present evidence not of a rebuttal nature, but if the state is permitted to present further evidence in chief the defendant may respond with further evidence in chief.

(6) The prosecuting attorney may make a closing argument.

(7) The defendant's lawyer or, if the defendant is proceeding without a lawyer or the court in its discretion permits, the defendant, may make a closing argument.

COMMENT

The introductory portion's "unless" clause is to the same effect as Cal. Penal Code § 1094 (West 1985) and Mont. Code Ann. § 46-16-402 (1985).

The balance of this subdivision is similar to a number of provisions. See e.g., Alaska R. Crim. P. 27(a); Cal. Penal Code § 1093 (West Supp. 1987); La. Code Crim. P. art. 765 (West 1981); Mont. Code Ann. § 46-16-401 (1985); Nev. Rev. Stat. § 175.141 (1985); N.Y. Crim. P. Law § 260.30 (McKinney 1982); Tex. Crim. P. Code Ann. art. 36.01 (Vernon 1981).

Clause (1) is to the same effect as language in each of these provisions.

Clause (2)'s reference to who makes the defense opening statement is similar to language in the Alaska, California, and Nevada provisions specifying that the defendant or counsel may do so. Some state constitutions provide that a criminal defendant may defend in person or by counsel or both. See United States v. Plattner, 330 F.2d 271, 275 nn.6-8 (2d Cir. 1964). Under such provisions or otherwise, some states might recognize a right on the part of a defendant with counsel to make an opening statement personally. Unless required by state constitution no such right should be recognized; it should be left to the court's discretion whether to allow a defendant with counsel to make an opening statement personally.

In making it permissive rather than mandatory for the defense to make an opening statement, clause (2) accords with the California, Louisiana, Montana, Nevada, and New York provisions.

In allowing the defense to elect to make its opening statement after rather than before the state's case in chief, clause (2) accords with the Alaska, Montana, and Nevada provisions.

Clauses (3) and (4) are to the same effect as language in each of the previously cited provisions. The words "in chief" are from the Alaska provision.

Clause (5) is similar to language in the California, Montana, Nevada, and New York provisions, and to Tex. Crim. P. Code Ann. arts. 36.01(7), .02 (Vernon 1981).

In specifying that the prosecution may make a closing argument, clause (6) accords with the Alaska, California, and Montana provisions. The Louisiana and Nevada provisions require the prosecution to make a closing argument, while the New York provision has the defense argue first. Tex. Crim. P. Code Ann. art 36.07 (Vernon 1981) lets the judge decide who argues first. As stated in the Advisory Committee Note to Fed. R. Crim. P. 29.1, "fair and effective administration of justice is best served if the defendant knows the argument actually made by the prosecution in behalf of conviction before the defendant is faced with the decision whether to reply and what to reply."

Clause (7) is similar to language in the Alaska provision. Regarding who makes the defense argument, see the fourth paragraph of this Comment.

(b) Further argument. The court may allow both sides to make further argument within limits it prescribes.

COMMENT

This differs from the general approach of providing a rebuttal argument to the prosecution only, see Fed. R. Crim. P. 29.1. It rather leaves to the court's discretion whether to permit further argument, so that if the state is permitted to make a rebuttal argument the defense has an opportunity to be heard as to it. Cf. Minn. R. Crim. P. 26.03(11)(h), (i) (defense argues after prosecution).

(c) Two or more defendants. If there are two or more defendants and they do not agree as to their order of proceeding, the court shall determine their order of proceeding.

COMMENT

This is similar to language in La. Code Crim. P. art. 765 (West 1981) and Mont. Code Ann. § 46-16-401(6) (1985).

RULE 522. TRIAL MOTION FOR ACQUITTAL.

(a) Motion. After the close of the state's case in chief or at the close of all the evidence, the court, on motion of the defendant or its own motion, shall order the entry of a judgment of acquittal as to any crime charged or lesser included crime from which the evidence would not reasonably permit a finding of guilty beyond a reasonable doubt.

RELATED STANDARD: 15-3.5(a)

COMMENT

This derives from ABA Standard 15-3.5(a).

This subdivision takes no position on the practice existing in some states of allowing the motion to be made on the basis of the state's opening statement, e.g., where the opening statement shows a fatal flaw in the state's case. Under that practice the motion should not be granted without giving the prosecutor an opportunity to correct the statement.

(b) Reservation of decision on motion. If the motion is made after the close of the state's case in chief, the court shall rule upon it before calling upon the defendant to present the defendant's case in chief. If it is made at the close of all the evidence in a jury case, the court may reserve decision and decide it while the jury is deliberating or after it returns a guilty verdict or is discharged without having returned a verdict.

RELATED STANDARD: 15-3.5(b)

COMMENT

This is based upon Standard 15-3.5(b).

RULE 523. INSTRUCTIONS.

(a) Requests for instructions. At the close of the evidence, or at an earlier time during the trial as the court reasonably directs, a party may submit to the court written requests that it instruct the jury on the law as set forth in the requests.

RELATED STANDARD: 15-3.6(b), (c)

COMMENT

This derives from ABA Standard 15-3.6(c) and Fed. R. Crim. P. 30. The requests must be served upon each party by virtue of Rule 752(a) below. As Standard 15-3.6(b) states:

> A collection of accurate, impartial, and understandable pattern jury instructions should be available for use in criminal cases in each jurisdiction. Counsel and the court should nonetheless remain responsible for ensuring that the jury is adequately instructed as dictated by the needs of the individual case, and to that end should modify and supplement the pattern instructions whenever necessary.

(b) Hearing on instructions. Before closing arguments, the court shall conduct a hearing out of the presence of the jury, at which it shall afford the parties an opportunity to be

heard as to what instructions should be given, furnish the parties a copy of all instructions it proposes to give, and afford the parties an opportunity to object to any proposed instruction or omission of instruction. An objection must state with particularity the matter objected to and the grounds for the objection. If the court determines after closing arguments that other instructions should be given, it shall conduct another hearing as to them.

RELATED STANDARD: 15-3.6(d)

COMMENT

This derives from Standard 15-3.6(d).

The hearing must be recorded by virtue of Rule 754(a)(10), but this subdivision does not preclude the common practice of conducting an informal conference (which per Rule 754(a)(13) need be recorded only upon request of a party), in addition to the hearing provided hereby.

(c) Time for instructions. The court shall read the instructions to the jury after closing arguments, but if all parties consent it may read some or all of them before closing arguments.

RELATED STANDARD: 15-3.6(e)

COMMENT

This derives from Standard 15-3.6(e), except it gives the court discretion with the parties' consent to read some or all of the instructions before closing arguments. The Standard's Commentary specifies that this exception is not inconsistent with the Standard.

(d) Mental nonresponsibility. If [mental nonresponsibility] is an issue, the court shall instruct the jury that it may consider the verdict of not guilty by reason of [mental nonresponsibility] only after finding, beyond a reasonable doubt, that the defendant committed the crime charged.

RELATED STANDARD: 7-6.10(a)

COMMENT

This is based upon Standard 7-6.10(a)'s second sentence and Model Insanity Defense and Post-Trial Disposition Act 704.

Model Act §§ 703 and 704 provide further detail regarding instructions. The jury's finding that a defendant acquitted on mental nonresponsibility grounds committed the crime charged is a basis for the special commitment procedures under Standards 7-7.1 through 7-7.11 and Model Act §§ 901 through 907.

Regarding instructions on treatment to effect or maintain competence as affecting the defendant's demeanor, see Rule 468(b) above.

(e) Limitations upon comment and instructions. The court may not summarize the evidence, express or otherwise indicate to the jury any personal opinion on the weight or creditability of any evidence, nor give any instruction regarding the desirability of reaching a verdict other than a single instruction that informs the jury substantially as follows:

(1) in order to return a verdict, each juror must agree thereto;

(2) jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(3) each juror must decide the case, but only after an impartial consideration of the evidence with the other jurors;

(4) in the course of deliberations, a juror should not hesitate to reexamine the juror's own views and change the juror's opinion if convinced it is erroneous; and

(5) no juror should surrender the juror's honest conviction as to the weight or effect of the evidence solely because of the opinion of other jurors, or for the mere purpose of returning a verdict.

RELATED STANDARDS: 15-3.8(a), 15-4.4

COMMENT

The prohibition on summarizing the evidence derives from La. Code Crim. P. arts. 772, 806 (West 1981) and Tex. Crim. P. Code Ann. art. 36.14 (Vernon Supp. 1987). See Colo. R. Crim. P. 30 (court "shall not comment upon the evidence"). The balance of this subdivision is based upon Standards 15-3.8(a) and 15-4.4.

(f) Objections after instructions. Before the jury retires for deliberations, each party must be afforded an opportunity out of the hearing of the jury and, upon the request of any party, out of the presence of the jury, to object to any instruction or omission of instruction. Unless otherwise permitted by the court in the interest of justice, a party may object only to a matter to which the party could not reasonably have objected under subdivision (b). An objection must state with particularity the matter objected to and the grounds for the objection.

RELATED STANDARD: 15-3.6(d)

COMMENT

The first sentence derives from Fed. R. Crim. P. 30.

The second sentence reflects the view that except as to matters to which the party could not reasonably have objected at the hearing on instructions--e.g., the manner of reading the instructions or misreading of them--the party should be able to object at this late point only if permitted by the court in the interest of justice.

The last sentence derives from Standard 15-3.6(d) and Fed. R. Crim. P. 30.

(g) Failure to object. Unless otherwise permitted on the ground that it is required in the interest of justice, a party may not assign as error any instruction or omission of instruction unless the party objected under subdivision (b) or (f).

RELATED STANDARD: 15-3.6(d)

COMMENT

This derives from Standard 15-3.6(d) and Fed. R. Crim. P. 30.

PART 3

SUBMISSION TO JURY

RULE 531. RETIREMENT OF JURY.

(a) Directions upon retirement. The court shall direct the jury to select one of its members to preside over the deliberations and sign any verdict agreed upon, and admonish the jurors that until they are discharged as jurors in the case they may communicate upon subjects connected with the trial only while the jury is deliberating its verdict in the jury room.

COMMENT

As to the court's direction, this accords with Fla. R. Crim. P. 3.391. The description of the presiding juror's duties, is from La. Code Crim. P. art. 792 (West 1981). The admonition derives from Alaska R. Crim. P. 27(c)(2).

(b) Submission of instructions and verdict forms. The court shall submit to the jury one or more copies of the instructions and appropriate written forms of verdict.

RELATED STANDARD: 15-4.1(a)

COMMENT

As to instructions, this accords with Cal. Penal Code § 1137 (West 1985), Colo. R. Crim. P. 30, Nev. Rev. Stat. § 175.441(2) (1985), and Tex. Crim. P. Code Ann. art. 36.18 (Vernon 1981). Standard 15-4.1(a) specifies that the court may submit copies of the instructions with both parties' consent. If all instructions were not typed in clean copy when the court read them to the jury, the court would either have them so typed or have a transcript of them prepared.

Regarding verdict forms, this accords with Colo. R. Crim. P. 31(a)(1) and Ill. Ann. Stat. ch. 38, para. 115-4(j) (Smith-Hurd Supp. 1987). Cf. Standard 15-4.1(a) (court may permit jury to take a copy of the charges against the defendant).

(c) Submission of exhibits. The court shall submit to the jury all exhibits, other than depositions, received in evidence except exhibits that the parties agree may not be submitted or the court excludes from the submission for good cause.

RELATED STANDARD: 15-4.1(a), (b)

COMMENT

This is similar to Standard 15-4.1(a) in letting the court's judgment control submission of exhibits, but channels that judgment by specifying submission unless the court excludes it for good cause. As Standard 15-4.1(b) states:

> Among the considerations the court should take into account in making this determination are:
>
> (i) whether the material will aid the jury in proper consideration of the case;
>
> (ii) whether any party will be unduly prejudiced by submission of the material; and
>
> (iii) whether the material may be subjected to improper use by the jury.

The parties may be heard regarding submission of exhibits in conjunction with the Rule 523(b) hearing on instructions.

(d) Submission of other evidence. Upon agreement of the parties, the court in its discretion may submit to the jury all or any part of a deposition that has been received in evidence or of a prepared transcript or recording of testimony.

RELATED STANDARD: 15-4.1

COMMENT

This is based upon the third paragraph of Standard 15-4.1's Commentary, which states, "The standard is not intended to be inconsistent with such provisions as the Maryland

court rule that depositions 'may not be taken into the jury room, except by agreement of all parties and with consent of the court.'"

RULE 532. JURY DELIBERATIONS.

The jurors must be kept together for deliberations as the court reasonably directs. If the court permits the jury to recess its deliberations, it shall admonish the jurors not to discuss the case until they reconvene in the jury room. If the deliberations are recessed, the jurors may not be sequestered unless the court so orders.

RELATED STANDARDS: 15-3.7(a), 15-4.4(b)

COMMENT

The first sentence is subject to that part of ABA Standard 15-4.4(b) which states, "The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals." The second sentence derives from Alaska R. Crim. P. 27(c)(2), (e)(2).

As to when jurors should be sequestered under the last sentence, see Standard 15-3.7(a).

RULE 533. JURY REQUEST TO REVIEW EVIDENCE.

If the jury, after retiring for deliberations, requests a review of any evidence, the court, after notice to the parties, shall recall the jury to the courtroom. If the jury's request is reasonable, the court shall have any requested portion of the testimony read or played back to the jury and permit the jury to reexamine any requested exhibit received in evidence. The court need not submit evidence to the jury for review beyond that specifically requested by the jury, but the court also may have the jury review other evidence relating to the same factual issue in order to avoid undue emphasis on the evidence requested. If it is likely that the jury cannot otherwise adequately consider any evidence reviewed, the court may permit the jury to take the evidence,

including any part of a deposition or of a prepared transcript or recording of the testimony, to the jury room if it appears:

(1) no party will be unduly prejudiced; and

(2) the evidence is not likely to be improperly used by the jury.

RELATED STANDARD: 15-4.2

COMMENT

The first three sentences derive from Standard 15-4.2.

Under the second sentence, if the jury's request is reasonable, the court must permit the jury to reexamine exhibits even though they have been excluded from the submission under Rule 531(c) above.

The last sentence is somewhat similar to provision in La. Code Crim. P. art. 793 (West 1981) and Tex. Crim. P. Code art. 36.25 (Vernon 1981). The reference "any evidence reviewed" includes not only that requested but also any evidence submitted under the third sentence to avoid undue emphasis.

RULE 534. ADDITIONAL INSTRUCTIONS.

(a) Upon request by jury. If the jury, after retiring for deliberations, requests additional information, the court, after notice to the parties, shall recall the jury to the courtroom and give additional instructions necessary to respond properly to the request or direct the jury's attention to a portion of the original instructions.

RELATED STANDARD: 15-4.3(a)

COMMENT

This derives from ABA Standard 15-4.3(a).

(b) For correction or clarification. The court, after notice to the parties, may recall the jury to the courtroom and give it additional instructions in order to:

(1) correct or withdraw an erroneous instruction;

(2) clarify an ambiguous instruction; or

(3) instruct the jury on any matter it should have covered in the original instructions.

RELATED STANDARD: 15-4.3(c)

COMMENT

This is based upon Standard 15-4.3(c).

(c) Other instructions. If the court gives additional instructions, it may also give or repeat other instructions in order to avoid undue emphasis on the additional instructions.

RELATED STANDARD: 15-4.3(b)

COMMENT

This derives from Standard 15-4.3(b).

(d) Hearing; instructions; objections; failure to object. Before giving additional instructions, the court shall conduct a hearing as provided in Rule 523(b). Rules 523(b), (f), and (g) and 531(b) apply to additional instructions.

RELATED STANDARD: 15-4.3(d)

COMMENT

This derives from Standard 15-4.3(d).

RULE 535. VERDICT.

(a) Form. The verdict must be in writing and be general [but if the defendant interposes a defense that cannot be reflected in a general verdict and evidence of the defense is

given at trial, the jury, if it so finds, shall declare the finding in its verdict]. [The verdict must be accompanied by any special findings required by law.] With the consent of the parties, the court may authorize rendition of a sealed verdict under conditions it directs.

COMMENT

The requirement that the verdict be general derives from Mont. Code Ann. § 46-16-603 (1985) and Tex. Crim. P. Code art. 37.07(1) (Vernon 1981). As pointed out in 2 A. Wright, Federal Practice & Procedure--Criminal § 512 (2d ed. 1982), "Special verdicts might be acceptable if the only duty of the jury were to find the facts, leaving it to the court to apply the law," but "[i]n criminal cases, however, it has always been the function of the jury to apply the law, as given by the court in its charge, to the facts."

Some states may deem it appropriate to include one or both of the bracketed references. The first derives from N.D.R. Crim. P. 31(e)(4). The second derives from Alaska R. Crim. P. 31(e) and Tex. Crim. P. Code art. 37.07(1) (Vernon 1981).

The last sentence is rather similar to Alaska R. Crim. P. 31(f), Colo. R. Crim. P. 31(a)(2), Fla. R. Crim. P. 3.470, Ill. Ann. Stat. ch. 38, para. 115(l) (Smith-Hurd Supp. 1987), and Pa. R. Crim. P. 1121.

(b) Mental nonresponsibility. If [mental nonresponsibility] is an issue, the verdict must be either guilty, not guilty, or not guilty by reason of [mental nonresponsibility].

RELATED STANDARD: 7-6.10(a)

COMMENT

This is based upon Standard 7-6.10(a)'s first sentence and is consistent with Model Insanity Defense and Post-Trial Disposition Act 704. A defendant acquitted on mental nonresponsibility grounds may be subject to special commitment procedures under Standards 7-7.1 through 7-7.11 and Model Act 901 through 907.

(c) Return. The verdict must be unanimous. It must be returned by the jury in open court.

RELATED STANDARD: 15-1.1

COMMENT

This is based upon ABA Standard 15-1.1's last sentence and Fed. R. Crim. P. 31(a). Compare Standard 15-1.3(b), which specifies that "[a]t any time before verdict, the parties with approval of the court may stipulate . . . that the verdict may be less than unanimous."

(d) Several defendants. If there are two or more defendants, the jury may return a verdict with respect to any defendant as to whom it agrees.

COMMENT

This is based upon Fla. R. Crim. P. 3.520, and is consistent with Fed. R. Crim. P. 31(b).

(e) Several crimes. If there are two or more crimes for which the jury could return a verdict, it may return a verdict with respect to any crime, including a lesser included crime, for which verdict forms are submitted, as to which it agrees.

COMMENT

Except for specifying submission of verdict forms for a lesser included crime, this derives from Cal. Penal Code §§ 1159, 1160 (West 1985), N.J. Rules of Court 3:19-1, and Pa. R. Crim. P. 1120(d).

(f) Poll of jury. The court, upon request of a party shall, or on its own motion may, cause the jury to be polled when the verdict is returned. The poll must be conducted by the court or clerk of court asking each juror individually whether the verdict announced is the juror's verdict. If any juror does not respond in the affirmative, the court may direct the jury to retire for further deliberations or declare a mistrial.

RELATED STANDARD: 15-4.5

COMMENT

This is based upon Standard 15-4.5.

## PART 4

## MISTRIAL

RULE 541. MISTRIAL.

(a) For prejudice to defendant. On motion of a defendant, the court may declare a mistrial at any time during the trial. The court shall declare a mistrial on the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct in or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case. If there are two or more defendants, a mistrial may not be declared as to a defendant who does not make or join in the motion.

### COMMENT

Rule 541 generally

This rule is generally similar to Idaho Crim. R. 29.1 and N.Y. Crim. P. Law § 280.10 (McKinney 1982).

Subdivision (a)

The first sentence makes clear that the defendant may not assert error in the court's granting the defendant's mistrial motion. See La. Code Crim. P. art 775(1) (West 1981).

The second sentence derives from Idaho Crim. R. 29.1(a), La. Code Crim. P. art. 775 (West 1981), and N.Y. Crim. P. Law § 280.10(1) (McKinney 1982).

The last sentence is to the same effect as that of Idaho Crim. R. 29.1(a) and N.Y. Crim. P. Law § 280.10(1) (McKinney 1982).

(b) For prejudice to state. On motion of the state, the court may declare a mistrial if there occurs during the trial, either in or outside the courtroom, misconduct by the defendant, the defendant's lawyer, or someone acting at the defendant's or lawyer's behest, resulting in substantial and irreparable prejudice to the state's case. If there are two or more defendants, a mistrial may not be declared as to a defendant if neither that defendant, that defendant's lawyer, nor a person acting at that defendant's or lawyer's behest participated in the misconduct, or if the state's case is not substantially and irreparably prejudiced as to that defendant.

COMMENT

This derives from Idaho Crim. R. 29.1(b) and N.Y. Crim. P. Law § 280.10(2) (McKinney 1982). The first sentence specifies "may" (as opposed to "must," as in the New York provision) to make clear that the defendant may not assert error in the court's refusing to grant the State's motion.

(c) For impossibility of proceeding. On motion of a party or its own motion, the court may declare a mistrial if:

(1) the trial cannot proceed in conformity with law;

(2) it appears there is no reasonable probability of the jury's agreement upon a verdict; or

(3) upon a poll of the jury there is not unanimous concurrence with the verdict returned.

RELATED STANDARD: 15-4.4(c)

COMMENT

This derives from Idaho Crim. R. 29.1(c).

Clause (1) covers, e.g., discharge of a juror under Rule 513(f) (absent stipulation under Rule 511(b) or additional juror under Rule 511(c)).

Clause (2) accords with ABA Standard 15-4.4(c).

Clause (3) ties in with the last sentence of Rule 535(f) above, which specifies that the court may direct the jury to retire for further deliberations or declare a mistrial.

## PART 5

## POST-TRIAL MOTIONS

### RULE 551. POST-TRIAL MOTION FOR ACQUITTAL.

(a) Upon mistrial. If a mistrial is declared anytime after the close of the state's case in chief, the court, on motion of the defendant or its own motion, may order the entry of a judgment of acquittal as to any crime charged, or lesser included crime, for which the evidence would not reasonably permit a finding of guilty beyond a reasonable doubt. The acquittal does not bar prosecution for any crime as to which the court does not order an acquittal.

RELATED STANDARD: 15-3.5(a), (c)

#### COMMENT

This derives from ABA Standard 15-3.5(a) and (c).

The first sentence provides that the court "may" (rather than "shall") order a mistrial because in some circumstances it would be inappropriate. For example, if a mistrial is declared during a defendant's case in chief in which the defendant has presented enough evidence so that at that point the whole evidence would not reasonably permit a finding of guilty beyond a reasonable doubt, it would be unfair to order an acquittal if (but for the mistrial) the state might have presented evidence to rebut the defendant's case in chief. This would be especially unfair if the mistrial was occasioned by the defendant's own misconduct. But in other circumstances, e.g., where the mistrial occurs immediately at the close of the state's case in chief or at any time after the close of all the evidence, the court should order an acquittal if this subdivision's requirements are met.

(b) Upon verdict of guilty. If the jury returns a verdict of guilty, the court, on motion of the defendant or its own motion, shall order the entry of a judgment of acquittal as to any crime specified in the verdict, or lesser included crime for which the evidence does not or would not reasonably permit a finding of guilty beyond a reasonable doubt. If the court directs an acquittal for the crime specified in the verdict, but not a lesser included crime, it may either:

(1) modify the verdict accordingly, or

(2) grant the defendant a new trial as to the lesser included crime.

RELATED STANDARD: 15-3.5(a), (c)

COMMENT

The first sentence derives from Standard 15-3.5(a) and (c).

The last sentence derives from Cal. Penal Code § 1181(6) (West 1985), Fla. R. Crim. P. 3.620, and Mont. Code Ann. § 46-16-702(3)(c) (1985).

In the situation specified, the court should grant the defendant a new trial rather than merely modifying the verdict if the error in finding the defendant guilty of the crime specified might have infected the jury's presumed finding of guilt as to the included crime.

(c) Time for motion. Unless the court otherwise permits in the interest of justice, a motion for acquittal must be made within [ten] days after mistrial or verdict or within any further time the court allows during the [ten-] day period.

RELATED STANDARD: 15-3.5(c)

COMMENT

Except for the "unless" clause, this derives from Colo. R. Crim. P. 29(c) and N.J. Rules of Court 3:18-2. It is consistent with Standard 15-3.5(c)'s provision that the motion be made within the time set by statute or rule or within such further time as the court may fix.

RULE 552. NEW TRIAL.

(a) Motion. On motion of the defendant, the court may grant the defendant a new trial if required in the interest of justice. Unless the defendant's noncompliance with these Rules precludes asserting the error, the court shall grant the motion:

(1) for an error by reason of which the defendant is constitutionally entitled to a new trial; or

(2) for any other error unless it appears beyond a reasonable doubt that the same verdict or finding would have resulted absent the error.

RELATED STANDARD: 8-3.7

COMMENT

The first sentence derives from Fed. R. Crim. P. 33. The introductory portion of the second sentence has reference to such matters as those included in Rules 451(c) above (certain matters may be asserted only by pretrial motion), 523(b), (f), (g) above (objections regarding instructions), and 755 below (manner of preserving objection).

Clause (1) refers to the "automatic reversal" class of constitutional errors--deprivation of "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." See 3 A. Wright, Federal Practice & Procedure § 855 at 328-30 (2d ed. 1982); Love v. State, 457 P.2d 622, 632 (Alaska 1969).

Clause (2) relates to constitutional errors other than those requiring automatic reversal and to errors not of constitutional dimensions. The standard is that required by the United States Supreme Court for constitutional errors other than those requiring automatic reversal. See 3 A. Wright, supra § 855 at 331-33. It is appropriate to apply the same standard to nonconstitutional errors, at least at the trial court level where the court has more than just a cold record upon which to base its decision and where there would not be the lapse of time there would with an appellate court raising the possibility that an ordered new trial could not in fact be had. A lesser standard would often produce the prospect that the defendant was in fact convicted upon a standard less than proof beyond a reasonable doubt. And it would be counterproductive to rehabilitation to in effect tell a defendant that although there was error in the conviction, the error does not matter, unless this standard is used. A state might wish to use a different standard on appeal. See, e.g., Love v. State, 457 P.2d 622 634 (Alaska 1969) ("whether we can fairly say that the error did not appreciably affect the jury's verdict"). But see Saltzburg, The Harm of Harmless Error, 59 Va. L. Rev. 988, 989 (1973) ("reversal where it is 'reasonably possible' that a trial mistake has affected the verdict"). Compare Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights shall be disregarded").

This subdivision is consistent with ABA Standard 8-3.7 (3d ed. 1991) (new trial because of prejudicial publicity).

(b) Trial by court. If the trial was by the court without a jury, the court, with the defendant's consent and in lieu of granting a new trial, may vacate any judgment entered, receive additional evidence, and direct the entry of a new judgment.

COMMENT

This derives from Fed. R. Crim. P. 33.

(c) Time for motion based on newly discovered evidence. A motion for a new trial based on the ground of newly discovered evidence must be made with reasonable diligence, considering the nature of the allegations in the motion. The court may grant it even though an appeal is pending.

COMMENT

The first sentence uses the same timeliness standard as is provided for withdrawal of plea by Rule 444(g) above and ABA Standard 14-2.1(b)(i). Fed. R. Crim. P. 33 specifies that the motion may be made only within 2 years, but there is "no reason, in logic, in justice, or in expediency" for that type of limitation. See 2 A. Wright, Federal Practice & Procedure--Criminal § 558 at 362 (2d ed. 1982) (quoting Cummings, The Third Great Adventure, 3 F.R.D. 283, 287 (1943)).

The second sentence rejects the approach of Fed. R. Crim. P. 33 that if an appeal is pending the court may grant the motion only on remand of the case.

(d) Time for motion based on other ground. Unless otherwise permitted by the court in the interest of justice, a motion for a new trial based upon any ground other than newly discovered evidence must be made within [ten] days after verdict or finding of guilty or within any further time the court allows during the [ten-] day period.

COMMENT

Except for the "unless" clause, this derives from N.J. Rules of Court 3:20-2.

# ARTICLE VI

# SENTENCING AND JUDGMENT

## PART 1

## SENTENCING

### RULE 611. COMMITMENT OR RELEASE PENDING SENTENCING.

Upon acceptance of a plea to, or a verdict or finding of guilty of, a crime punishable by incarceration, the court, pending sentencing, may continue or modify conditions of release or commit the defendant with or without conditions of release.

#### COMMENT

Rules 611 through 641 generally

Rules 611 through 641 cover matters respecting sentencing which are appropriate for court rule. Many matters relating to sentencing, such as whether to permit the fixing of minimum sentences or the fixing of maximum sentences of imprisonment shorter than the term fixed by statute, concurrent versus consecutive sentences, and the types of correctional institutions and programs available, can be dealt with only by legislation since they involve matters of substantive, as distinguished from procedural, law. See Model Sentencing and Corrections Act. Rules 611 through 641 are directed to those aspects of sentencing which involve the court's duties--imposition of sentence or other disposition, correction of sentence, reduction of sentence, and revocation of probation, and are drafted broadly enough to implement whatever correctional system a state may have.

Rule 611

This is similar in effect to the many provisions which specify, "Pending sentence, the court may commit the defendant or continue or alter the bail." See e.g., Alaska R. Crim. P. 32(a); Nev. Rev. Stat. § 176.015(1) (1985); N.J. Rules of Court 3:21-4(a).

### RULE 612. PRESENTENCE INVESTIGATION.

(a) Making; report. Upon accepting a plea or upon a verdict or finding of guilty, the court [may] [shall] direct the [probation service] to make a presentence investigation and report [and shall so direct .....]. The report must be submitted to the court. Except as provided in subdivisions (b) and (c), the court shall furnish a complete copy of the report to each party.

RELATED STANDARDS: 18-5.1(b), 18-5.2(a), 18-5.4(b)

COMMENT

In making clear that a presentence investigation should normally be initiated only upon a determination of guilt, the first sentence accords with ABA Standard 18-5.2(a). (Rule 443(b), in line with Standard 14-3.3(c), authorizes the court to direct the making of a presentence investigation and report to aid it in determining whether to concur in a plea agreement.)

In providing that a presentence investigation and report may be used in any case, the first sentence accords with Standard 18-5.1(b).

Some states may wish to use the bracketed "shall," rather than "may," to require the presentence investigation and report in every case.

Other states may wish to use the bracketed language at the end of the first sentence to specify certain types of cases where the presentence investigation and report is mandatory. See Standard 18-5.1(b) (where incarceration one year or more is possible or defendant is under 21 years old or first offender unless defense waives and court specifically finds it has sufficient information).

The last two sentences derive from Standard 18-5.4(b).

(b) Excision. Upon request of the [probation service] or on its own motion, the court may excise from both parties' copies any portion of the report disclosure of which is likely to result in serious physical or other harm to a person other than the defendant, or serious physical harm to the defendant.

RELATED STANDARD: 18-5.4(b)

COMMENT

This is based upon Standard 18-5.4(b)'s second sentence.

[(c) Protective order. Upon request of the [probation service] or on motion of a party or its own motion, the court may order the defendant's lawyer not to disclose to the defendant diagnostic opinion disclosure of which the court finds would seriously interfere with a program of treatment for the defendant.]

RELATED STANDARD: 18-5.4(b)

COMMENT

This is based upon Standard 18-5.4(b)'s third sentence.

(d) Modification of report. On motion of a party, the court may order an in-camera hearing on whether to delete, correct, or supplement information in the report.

RELATED STANDARD: 18-5.5(c)

COMMENT

This is in line with Standard 18-5.5(c)'s provision for presentence conferences.

(e) Factual summary. If information is excised under subdivision (b) or an order is made under subdivision (c), the court, at the beginning of the sentencing hearing under Rule 614, shall:

(1) state for the record the reasons for its action;

(2) provide the parties a factual summary of the information withheld to the extent feasible without causing the harm specified in subdivision (b) or (c); and

(3) afford the parties a reasonable opportunity to be heard regarding the court's action and the summary without disclosing the excised or protected matter.

RELATED STANDARD: 18-5.4(b)

COMMENT

This is based upon Standard 18-5.4(b)'s fourth sentence.

RULE 613. COURT AUTHORIZATION OF EXPENDITURES FOR MENTAL-HEALTH PROFESSIONAL.

Upon a showing of a likely need for services of a mental-health professional regarding issues relevant to sentencing and that the defendant because of inability to pay is unable to obtain those services, the court shall authorize reasonable expenditures from public funds for the defendant's retention of the services of one or more mental-health professionals to examine the defendant and assist in the defendant's presentation at the sentencing hearing.

RELATED STANDARDS: 7-9.3, 7-9.4

COMMENT

This is based upon Standard 7-9.4.

See Ake v. Oklahoma, 470 U.S. 68, 80 (1985) ("when the State has made the defendant's mental condition relevant . . . to the punishment he might suffer, the assistance of a psychiatrist may be crucial to the defendant's ability to marshal his defense").

See also Standard 7-9.3 ("Evidence of mental illness or mental retardation should be considered as a possible mitigating factor in sentencing a convicted offender").

This Rule is worded similarly to Rule 424 above, but does not include counterparts to that Rule's provisions for ex parte application and temporary sealing of records.

As stated in Rule 424's Comment, the "unable to obtain" language recognizes that in many jurisdictions the public defender office will have standing arrangements for mental-health professionals' services.

RULE 614. SENTENCING HEARING.

Before imposing sentence or making any other disposition upon acceptance of a plea or upon a verdict or finding of guilty, the court shall conduct a sentencing hearing without unreasonable delay, as follows:

(1) the court shall afford the parties an opportunity to be heard on any matter relevant to sentencing;

(2) [except in capital cases,] the court shall accord due consideration to the views of the victim or close relative of a deceased or incapacitated victim [pursuant to the statute on rights of crime victims];

(3) except as provided in Rule 713, the court shall address the defendant personally to ascertain whether the defendant wishes to make a statement in the defendant's own behalf and to present any information in mitigation of punishment or reason why the defendant should not be sentenced and, if the defendant does, afford the defendant a reasonable opportunity to do so;

(4) the court shall impose sentence or make any other disposition authorized by law; and

(5) except as provided in Rule 713, the court shall inform the defendant personally of any right the defendant has to appeal and the right to appointment of a lawyer, upon request, under the conditions specified in Rule 321(b).

RELATED STANDARDS: 18-2.1(b), 18-2.3, 18-2.4, 18-6.4(a)(i), (ii), (iii)

COMMENT

The introductory portion derives from ABA Standard 18-6.4(a) and Fed. R. Crim. P. 32(a)(1).

Clause (1) is to the same effect as Standard 18-6.4(a)(i), (ii).

Clause (2)'s bracketed exception responds to Booth v. Maryland, 107 S. Ct. 2529 (1987), where a 5-4 Court per Justice Powell held that it violates the eighth amendment to introduce a victim impact statement at the sentencing phase of a capital murder trial. The balance of clause (2) parallels similar provisions in Rules 442(a)(1), (2), and 444(a) above regarding pretrial diversion and no contest pleas. Statutes commonly provide for consideration of the victim's views at sentencing. See, e.g., Cal. Penal Code 679.02(a)(3), 1170(b), 1191.1 (West Supp. 1987); Del. Code Ann. tit. 11, 4331(d), (e) (Supp. 1986); Fla. Stat. Ann. 921.143 (West 1985); Ill. Ann. Stat. ch. 38, paras. 1404(6), 1406 (Smith-Hurd Supp. 1986); Ind. Code Ann. 35-38-1-8(b) (West 1986); Ky. Rev. Stat. Ann. 421.500(5)(b), .520 (Michie/Bobbs-Merrill Supp. 1986); Minn. Stat. 609.115(1b), (1c) (Supp. 1986); Mo. Ann. Stat. 557.041(2), (3), 595.209(3) (Vernon Supp. 1987); Ohio Rev. Code Ann. 2943.04.1 (Anderson 1987); Tex. Crim. P. Code Ann. arts. 56.03, .04(c) (Vernon Supp. 1987).

The court may ascertain the victim's views in any reasonable manner. Since only "due" consideration is required, the court is not barred from proceeding if the victim is unavailable.

Clause (3) derives from N.D.R. Crim. P. 32(a)(1) and Wis. Stat. Ann. § 972.14 (West 1985). Regarding allocution, see Standard 18-6.4(a)(iii). Regarding statement why defendant should not be sentenced, see Cal. Penal Code § 1200 (West 1982); Fla. R. Crim. 3.720(a); Tex. Crim. P. Code Ann. art. 42.07 (Vernon Supp. 1987).

Clause (4) provides not only for imposition of sentence but for any other disposition authorized by law, e.g., probation or conditional deferred imposition of sentence. See Standards 18-2.1(b), 18-2.3, 18-2.4.

Clause (5) derives from Alaska R. Crim. P. 32.1, Colo. R. Crim. P. 32(c), and N.D.R. Crim. P. 32(a)(2).

RULE 615. INCOMPETENCE AT TIME OF SENTENCING.

(a) Incompetence at time of sentencing defined. A defendant is incompetent at the time of sentencing if the defendant lacks:

(1) sufficient present ability to consult with a reasonable degree of rational understanding with the defendant's lawyer;

(2) sufficient present ability otherwise to assist in the proceeding; or

(3) a rational as well as factual understanding of the sentencing proceedings.

RELATED STANDARD: 7-5.2(a)(i)

COMMENT

This is based upon Standard 7-5.2(a)(i).

(b) Procedures. Rules 464 and 466 apply to incompetence at the time of sentencing.

RELATED STANDARDS: 7-5.2(a)(ii), (c), 23-5.1(a)

COMMENT

This is to the same effect as Standard 7-5.2(a)(ii).

By incorporating Rule 464(a), this requires the prosecutor or defense counsel to advise the court of any good-faith doubt of the defendant's competence at the time of sentencing. By incorporating Rule 466(h)(1) (court ordering treatment) and Rule 466(h)(4) (treatment for defendant in custody), subdivision (c) is to the same effect as Standard 7-5.2(c), which specifies:

> If the sentence imposed is one involving incarceration or other significant restraint on liberty, the defendant should receive adequate treatment or habilitation to restore competence during the time the defendant is serving the sentence, pursuant to Standard 23-5.1.

Standard 23-5.1(a), in the "Legal Status of Prisoners" chapter approved in 1981, provides:

> Prisoners should receive routine and emergency medical care, which includes the diagnosis and treatment of physical, dental, and mental-health problems. A prisoner who requires care not available in the correctional institution should be transferred to a hospital or other appropriate place for care.

It should be noted that this subdivision does not incorporate Rule 467, providing for periodic redetermination hearings and release of a defendant not attaining competence within 18 months.

(c) Finding of incompetence. If the court finds the defendant incompetent, the court shall make a specific finding of the nature of the incompetence and the extent to which the sentencing proceeding is affected by it.

RELATED STANDARD: 7-5.2(a)(iii)

COMMENT

This is based upon Standard 7-5.2(a)(iii).

(d) Sentencing incompetent defendant. The court [in a noncapital case] may sentence a defendant even though the defendant is incompetent at the time of sentence, subject to reconsideration of the sentence under subdivision (e).

RELATED STANDARDS: 7-5.2(a), 7-5.5, 7-5.6, 7-5.7

COMMENT

This derives from Standard 7-5.2(a)'s first sentence. Because execution of the sentence will be commenced, the bracketed words should be omitted only in a state that does not have capital punishment. Regarding incompetence to be executed, see Standards 7-5.5 through 7-5.7 (added in 1987); Ford v. Wainwright, 106 S. Ct. 2595 (1986).

In deciding whether to proceed with sentencing, the court will consider the factors specified in subdivision (c) above.

(e) Attaining of competence. If a defendant who was incompetent at the time of sentencing attains competence, the court, upon the defendant's motion, shall hold a hearing to reconsider the sentence. The court shall reconsider the sentence imposed in light of the matters presented at the hearing.

RELATED STANDARD: 7-5.2(b)

COMMENT

This is to the same effect as Standard 7-5.2(b), which specifies:

> A defendant who has been sentenced while incompetent at time of sentence should have the right, upon regaining competence, to exercise the right of allocution and to present to the court at a hearing matters of mitigation which were not presented to the court at the sentencing proceeding because of the defendant's incompetence at that time and the judge should reconsider the sentence imposed in the light of such matters.

## PART 2

## JUDGMENT

### RULE 621. JUDGMENT.

The judgment must set forth the plea, verdict, or finding, and the adjudication. If the defendant is convicted, it must set forth the sentence or other disposition. The defendant must receive credit for any confinement because of inability to secure release under Rules 211 through 345 or because of examination, observation, or treatment under Rules 464 through 467. The judgment must be signed by a judge of the court and entered of record.

RELATED STANDARDS: 7-4.15, 10-5.13

#### COMMENT

The first, second, and last sentences derive from Fed. R. Crim. P. 32(b)(1). The third sentence is based upon ABA Standards 7-4.15 and 10-5.13.

## PART 3

## CORRECTION OR REDUCTION OF SENTENCE

### RULE 631. CORRECTION OF ILLEGAL SENTENCE.

The court may correct an illegal sentence or other disposition at any time.

COMMENT

This derives from Fed. R. Crim. P. 35(a).

RULE 632. CORRECTION OF SENTENCE ILLEGALLY MADE.

The court may correct a sentence imposed, or other disposition made, in an illegal manner, within [four months] after:

(1) the sentence is imposed or other disposition is made; or

(2) remand from an appellate court.

COMMENT

This derives from Fed. R. Crim. P. 35.

RULE 633. REDUCTION OF SENTENCE.

The court may reduce a sentence within [four months] after:

(1) the sentence is imposed; or

(2) remand from an appellate court.

RELATED STANDARDS: 18-7.1(a), 18-7.3(a)

COMMENT

This derives from Fed. R. Crim. P. 35(b), and is consistent with ABA Standard 18-7.1(a).

This Rule, unlike Rules 631 and 632 above, applies only to sentences and not to other dispositions; the court has continuing jurisdiction to ameliorate conditions of probation or conditions of deferred imposition of sentence. See Standard 18-7.3(a).

## PART 4

## REVOCATION OF PROBATION

### RULE 641. REVOCATION OF PROBATION [OR DEFERRED IMPOSITION OF SENTENCE].

(a) Order for revocation hearing. If affidavit or testimony shows probable cause to believe that the defendant has violated a condition of probation [or condition of deferred imposition of sentence], the court may issue an order for hearing on revocation thereof. The order shall state the essential facts constituting the violation and order the defendant to appear at a specified time and place for the hearing. The order must be served by delivering a copy to the defendant personally. If affidavit or testimony shows probable cause to believe that the defendant would not appear in response to the order, the court by order may direct a [law enforcement officer] to bring the defendant forthwith before the court.

RELATED STANDARD: 18-7.5(a), (d)(i)

#### COMMENT

The first sentence derives from La. Code Crim. P. art. 899(A) (West 1984) and N.Y. Crim. P. Law §§ 410.30, 410.40 (McKinney 1983).

The bracketed language in the Rule's heading and in subdivision (a)'s first sentence may be included by states which have deferred imposition of sentence as an available disposition. Reference to any other revocable type of disposition a state may have could also be included.

The second sentence is based upon ABA Standard 18-7.5(d)(i).

The last sentence derives from Standard 18-7.5(a).

(b) Appearance of defendant. When the defendant appears, the court shall proceed in conformity with Rule 321(a) and (b) and inform the defendant that the state must prove the violation [by clear and convincing evidence] unless the defendant admits it and that the defendant is entitled to present evidence and to have the court's aid in securing the attendance of witnesses in the defendant's behalf. The court shall set a time for the revocation hearing unless:

(1) the defendant does not desire time to obtain evidence or witnesses, and either has a lawyer or makes a waiver of counsel which is accepted under Rule 711; and

(2) the defendant admits the violation or the state is ready to proceed with its evidence.

RELATED STANDARDS: 18-7.5(d), (e)(iii)

COMMENT

This is based upon Standard 18-7.5(d). The first sentence's bracketed reference to clear and convincing evidence is based upon Standard 18-7.5(e)(iii). See Rule 641(e) and Comment below.

Proceeding in conformity with Rule 321(a) and (b) above the court will inform the defendant of the defendant's rights and provide for representation by counsel, including appointed counsel if the defendant is unable to retain counsel.

(c) Conditions of release. If the court sets a time for a revocation hearing and the defendant is in custody pursuant to an order under subdivision (a), the court may prescribe conditions of release. If the court does not prescribe conditions of release or, if prescribed, they result in detention of the defendant, and the revocation hearing is not set for a time within [five] days after the appearance, the court shall inform the defendant of the right to a hearing on conditions of release and shall set the time for that hearing.

COMMENT

The first sentence, leaving to the court's discretion whether to prescribe conditions of release, is to the same effect as Fed. R. Crim. P. 32.1(a)(1)'s penultimate sentence.

The last sentence is necessary in light of Gagnon v. Scarpelli, 411 U.S. 778 (1973). Although the Gagnon Court stated broadly, "we hold that a probationer . . . is entitled to a preliminary and a final hearing," id. at 782, a preliminary hearing should not be necessary if the defendant is not in custody. Nor should a preliminary hearing be necessary even for a defendant in custody if the (final) revocation hearing is held within five days, the time limit set by Rule 344(a) for a hearing on conditions of release.

(d) Hearing on conditions of release. Rule 344 governs a hearing on conditions of release if the hearing is required, as if the defendant were detained pending trial and the violation for which the revocation hearing is ordered under subdivision (a) were a crime.

COMMENT

Hearings on conditions of release in revocation proceedings will be quite rare because, as indicated in the immediately preceding Comment, a hearing need not be held if the defendant is not in custody or if the main revocation hearing is held within five days. As to the nature and scope of and proceedings at the hearing on conditions of release, see Rule 344 above.

(e) Revocation hearing. At the revocation hearing the state and the defendant may offer evidence and cross-examine witnesses. If the defendant admits the violation or the court finds [by clear and convincing evidence] that the defendant committed it, the court may make any disposition authorized by law.

RELATED STANDARD: 18-7.5(d), (e)

COMMENT

This derives from ABA Standard 18-7.5(d) and (e). The second sentence's bracketed reference to clear and convincing evidence is from Standard 18-7.5(e)(iii). The Commentary thereto specifies:

> Various standards of proof currently apply to the revocation hearing. The dominant federal rule is that the trial court be "reasonably satisfied" that the violation in fact occurred. In several states, however, a "reasonable doubt" standard must be met, at

least where the violation itself involves a crime. These standards take the intermediate position that the fact of a violation should be proven by "clear and convincing" evidence. Underlying this position is the premise that a liberty interest should not be sacrificed simply on the "preponderance" standard, which is normally applicable only to civil trials. Otherwise, an unfortunate incentive might arise to use the revocation hearing as a substitute for a criminal prosecution with its higher standard of proof. Even where this incentive is not present, the focus of the law should be on the precipitating event that is said to justify the loss of present liberty. Where the original crime did not require incarceration, subsequent behavior that is considered sufficient to justify confinement should be established under a standard that approaches providing the same assurance of factual accuracy that a criminal trial does.

# ARTICLE VII

# GENERAL PROVISIONS

## PART 1

## RIGHTS OF DEFENDANT

### RULE 711. RIGHT TO COUNSEL.

(a) Waiver. The defendant does not waive the right to legal counsel at any stage of the proceedings after appearance under Rule 311 or 312 unless the court at that stage accepts a waiver of counsel. The court may not accept a waiver of counsel unless it is made expressly and voluntarily and the court is satisfied that the defendant fully understands:

(1) the nature of the charge and the range of possible penalties therefor;

(2) that a defense lawyer can render important assistance in determining the existence of possible defenses to the charge and in preparing for and representing a defendant at trial or, in the event of a plea, in consulting with the prosecuting attorney as to the possible reduced charges or lesser penalties, and in presenting to the court matters that might lead to a lesser penalty;

(3) if the defendant is in custody, that a defense lawyer can render important assistance in presenting to the court matters respecting conditions of release; and

(4) the nature of the particular stage of the proceedings and the defendant's rights at that stage.

RELATED STANDARDS: 5-8.2, 6-3.6(a)

COMMENT

The first sentence is to the same effect as the last sentence of ABA Standard 5-8.2(b) (3d ed. 1991), which states, "If a waiver is accepted, the offer should be renewed at each subsequent stage of the proceedings at which the accused appears without counsel."

The introductory portion of the second sentence is in accord with Standard 5-8.2(a) (3d ed. 1991) and Standard 6-3.6(a).

Clause (1) derives from Standard 6-3.6(a)(iii).

Clause (2) corresponds to that part of ALI Model Code of Pre-Arraignment Procedure § 310.1(5) (1975) which requires that the defendant be "advised by the court of the significance of counsel for someone in his position" and to Alaska R. Crim. P. 39(b)(3) which requires the defendant to demonstrate "that he understands the benefits of counsel and knowingly waives the same."

With regard to clause (3), see the Note to ALI § 310.1(5), which reflects the view that the assistance of counsel is of crucial importance on the issue of pretrial release, so that the judge's advice to the defendant should "include the significance of counsel with respect to securing the defendant's release from custody."

Clause (4) corresponds to that part of ABA Standard 6-3.6(a)(iii) which requires the court to be satisfied that the defendant "comprehends the nature of the . . . proceedings . . . and any additional facts essential to a broad understanding of the case."

(b) Consultation required. The court, in the case of a misdemeanor, may and, in the case of a felony, shall refuse to accept a waiver of counsel unless a lawyer consults with the defendant before the defendant waives counsel. If a lawyer did not consult with the defendant before the defendant waived counsel, the court may not sentence the defendant to any term of incarceration.

RELATED STANDARD: 5-8.2(b)

COMMENT

This is similar to the second sentence of Standard 5-8.2(b) (3d ed. 1991), which specifies "No waiver should be accepted unless the accused has at least once conferred with a lawyer."

A defendant may not frustrate subdivision (b)'s requirements by purporting to refuse to communicate with the consulting lawyer. The consulting lawyer's role may be quite limited; essentially it is to make sure that the defendant fully understands the consequences of electing to proceed without counsel.

When a defendant seeks to waive counsel in a misdemeanor case, the prosecutor should alert the court if the prosecutor will seek incarceration.

(c) Standby counsel. Notwithstanding acceptance of a waiver, the court may appoint standby counsel to assist when called upon by the defendant, to call the court's attention to matters favorable to the defendant upon which the court should rule on its own motion, and if it becomes necessary for a fair trial, to conduct the defense.

RELATED STANDARDS: 6-3.7, 7-5.3(d)(i)

COMMENT

This is based upon Standards 6-3.7 and 7-5.3 (d)(i).

(d) Incompetence to waive counsel. A defendant is incompetent to waive counsel if the defendant lacks sufficient present ability to comprehend and appreciate the matters specified in subdivision (a). Rules 464 through 466 apply to incompetence to waive counsel.

RELATED STANDARD: 7-5.3(c), (d)

COMMENT

This is based upon Standard 7-5.3(c).

Because the incorporated provisions include Rule 466(a), (g), and (h) (but not Rule 467(a) regarding periodic redetermination hearings) and because Rule 711(c) covers standby counsel, this subdivision is to the same effect as Standard 7-5.3(d), which specifies:

> After obtaining the report of the evaluators, the court should hold a hearing on the issues raised . . .

(i) If, after hearing, the court determines that the defendant is competent to waive counsel and to represent himself or herself, the court should proceed with the cause. The court in any such case should consider the appointment of standby counsel . . . to assist the defendant or, if it should prove necessary, to assume representation of the defendant.

(ii) If, after hearing, the court should determine that the defendant is incompetent to waive counsel and is incompetent to stand trial or to plead, the court should proceed to issues of treatment and habilitation . . .

(iii) If, after hearing, the court should determine that the defendant is competent to stand trial but is incompetent to waive counsel and to proceed without assistance of counsel, the court should appoint counsel to represent the defendant and should proceed to trial of the case.

RULE 712. PLACE OF TRIAL.

Except as otherwise permitted by law or in Rule 462, a criminal prosecution must be tried in the [county] in which the crime was committed.

COMMENT

This is similar to Maine R. Crim. P. 18. This Rule restricts only the place of trial, and not other procedures in the prosecution. Rule 231(f) above requires the information to be filed in the county where the crime was allegedly committed, but other proceedings in the case short of trial should not be restricted to that county. This is especially true in rural areas where a judicial district comprises several counties.

RULE 713. PRESENCE AT TRIAL AND SENTENCING HEARING.

(a) Right of presence. The defendant has a right to be present at every stage of the trial, including all proceedings specified in Rules 512(b) through 531 and 533 through 535, and at the sentencing hearing under Rule 614.

COMMENT

This is similar to Fed. R. Crim. P. 43(a).

This Rule deals only with the defendant's presence at trial proceedings and at the sentencing hearing. Presence at other proceedings is covered by the Rules dealing with those proceedings. See, e.g., Rules 431(g) (deposition), 437(e) (nontestimonial evidence procedure).

(b) Required presence. The defendant must be present at every stage of the trial and at the sentencing hearing, but if the defendant will be represented by a lawyer at the trial or hearing, the court may:

(1) excuse the defendant from being present at the trial or part thereof, or the sentencing hearing, if the defendant in open court understandingly and voluntarily waives the right to be present;

(2) direct that the trial or part thereof or sentencing hearing be conducted in the defendant's absence if the court determines that the defendant understandingly and voluntarily failed to be present after personally having been informed by the court of:

(i) the right to be present at the trial or hearing;

(ii) when the trial or hearing would commence; and

(iii) the authority of the court to direct that the trial or hearing be conducted in the defendant's absence; or

(3) direct that the trial or part thereof be conducted in the defendant's absence if the court justifiably excluded the defendant from the courtroom because of the defendant's disruptive conduct.

COMMENT

The opening language, imposing an obligation to be present, derives from Fed. R. Crim. P. 43(a). Although the obligation probably was based initially on the concept that presence was necessary to have jurisdiction to try the case, see Goldin, Presence of Defendant at Rendition of Verdict in Felony Cases, 16 Colum. L. Rev. 18 (1916), it is justified today on other grounds, particularly that (1) the defendant's presence is often necessary to allow the jury to examine the

defendant's physical characteristics in connection with evidence relating to those characteristics and (2) the defendant's presence is desirable to promote the appearance of justice--a factor of significance to the public at large as well as to the court and jury in the particular case. See Cohen, Trial in Absentia Re-examined, 40 Tenn. L. Rev. 153, 176-80 (1973). Although accepting these grounds, this subdivision recognizes that there may be situations in which the first does not apply and the second is offset by other considerations. Accordingly, it recognizes three situations in which all or part of the trial may proceed in the defendant's absence. In all three situations, a prerequisite to permitting trial in the defendant's absence is the presence of a lawyer representing the defendant.

Express waiver

Clause (1) is based upon Ill. Ann. Stat. Ann. ch. 38, paras. 115-3(a), 115-4(h) (Smith-Hurd Supp. 1987) and Miss. Code Ann. § 99-17-9 (1973). See Fed. R. Crim. P. 43(c)(2)(misdemeanors); Davidson v. State, 108 Ark. 191, 158 S.W. 1103 (1913) (portion of felony trial); People v. La Barbera, 274 N.Y. 339, 8 N.E.2d 884 (1937) (same).

The requirement that the waiver be made in open court also provides an opportunity for the defendant to waive the right to jury trial, if so desired. When the defendant appears for the purpose of waiving the right to be present, the court should personally examine the defendant to determine that the waiver is made understandingly and voluntarily. The requirement that the defendant personally appear to waive the right is inconsistent with current provisions relating to the acceptance of a written waiver in misdemeanor cases. See, e.g., Fed. R. Crim. P. 43(c)(2); Wis. Stat. Ann. § 971.04(2) (West 1985). If a jurisdiction adopts special rules governing minor offenses (see Rule 111 above (scope)), a departure from this subdivision by permitting written waiver without personal appearance may be desirable in cases in which conviction will not result in incarceration.

Acceptance of a voluntary waiver rests in the discretion of the court, except that a waiver may not be accepted if the defendant is not represented by counsel who will proceed in the defendant's absence. See La. Code Crim. P. art. 833 (West 1984); Wis. Stat. Ann. § 971.04(2) (West 1985).

The court should not excuse the defendant from being present when the jury must observe the defendant's physical characteristics in connection with prosecution evidence relating to those characteristics (e.g., testimony relating to identification). See United States v. Fitzpatrick, 437 F.2d 19, 27 (2d Cir. 1970); State v. Super, 281 Minn. 451, 161 N.W.2d 832, 837 (1968); State v. Vincent, 222 N.C. 543, 23 S.E.2d 832 (1943). Similarly, the prosecution may, in a particular case, have a right to have prospective jurors view the defendant to be sure that the defendant is not known to them. Where the defendant's presence is not required on such grounds, the primary interest in insisting that the defendant be present relates to the appearance of justice. The prosecutor's view should be heard on this point, but need not be controlling. There may be instances where the defendant's physical appearance would be so prejudicial to the defendant that the court may find that the interests of justice favor excusing the defendant from

the obligation to appear. In some cases, less significant grounds for requesting an excuse (e.g., the defendant's convenience) may be acceptable, depending upon other factors (e.g., the significance of the crime, whether the trial is to a judge or jury, and whether the defendant desires to be excused from attending only a portion of the proceedings). If the case is to be tried to a jury and the prosecutor believes that the jury will hesitate to convict the defendant because of their concerns relating to trial "in absentia," the prosecutor may request that the judge inform the jury that the trial is proceeding without the defendant at the defendant's own request. The court also may inform the jury that no adverse significance should be attached to the defendant's waiver of the right to be present. See Cohen, supra, at 193.

Voluntary absence

Most jurisdictions recognize the authority of the court to proceed with the trial in the absence of the defendant, at least in non-capital cases, when the defendant has voluntarily absented himself. The majority of such provisions apply only when the defendant voluntarily absents himself after the trial commences. See, e.g., Fed. R. Crim. P. 43(b)(1); Fla. R. Crim. P. 3.180(b); N.J. Rules of Court 3:16; Tex. Crim. P. Code art. 33.03 (Vernon Supp. 1987). Several jurisdictions have broader provisions permitting the trial to commence when the defendant voluntarily fails to appear at the time set for trial. See, e.g., Ariz. R. Crim. P. 9.1; Pa. R. Crim. P. 1117(a).

Clause (2) proceeds on the premise that the controlling feature in application of the voluntary-absence provision should be the likelihood of waiver. Accordingly, the provision requires that the defendant have been personally told by the court when the trial or hearing will commence and what may result from failure to attend. Even then, it is possible that the court, despite inquiry as to the defendant's whereabouts, may conclude that a defendant has voluntarily waived who has in fact been prevented from attending. But the determination on this point is not conclusive. A conviction obtained in the defendant's absence could, of course, later be set aside if it were shown that the defendant's absence was not voluntary. See, e.g., Fleming v. Commonwealth, 280 S.W.2d 148 (Ky. Ct. App. 1955). It should be noted in this regard that the concept of voluntariness as used in this subdivision excludes those situations in which the defendant was unable to attend for good cause. Cf. Tacon v. Arizona, 410 U.S. 351, 355 (1973) (Douglas, J., dissenting) (no voluntary waiver when defendant lacked funds to return to jurisdiction). Of course, before determining that the defendant voluntarily absented himself, the trial court must make careful inquiry. See Cureton v. United States, 396 F.2d 671 (D.C. Cir. 1968); People v. Semecal, 69 Cal. Rptr. 761 (App. Div. Super. Ct. 1969).

While clause (2) applies to the sentencing hearing, there usually is little value in imposing a sentence of imprisonment on a defendant whose whereabouts are currently unknown, even if the defendant is voluntarily absent and appreciates the consequences of the absence. Accordingly, it seems likely that the clause (2) authority to proceed with the sentencing hearing will be utilized primarily in cases in which the court desires to impose a fine.

It should be noted that even though the court proceeds with a trial or hearing in the defendant's absence, under subdivision (c) below it may still direct that all efforts be made to find the defendant so that the defendant can at least be present during a part of the trial or hearing.

Disruptive conduct

Clause (3) is based upon Fed. R. Crim. P. 43(b)(2). It does not attempt to define that behavior that is so disruptive as to justify exclusion, those warnings that should be advanced before exclusion is ordered, or the appropriate conditions or length of the exclusion. Compare Cal. Penal Code § 1043(b), (c) (West 1985); N.Y. Crim. P. Law §§ 260.20, 340.50(3) (McKinney 1982 & 1983). These are matters that are best left to case law development in light of Illinois v. Allen, 397 U.S. 337 (1970). Clause (3) does not extend to the sentencing hearing since the use of alternative means for dealing with the disruptive defendant presents less difficulty in the setting of a sentencing hearing than a trial. Also it imposes less burden on the administration of justice to temporarily continue a sentencing hearing than to declare a mistrial.

Corporations

This subdivision does not treat the separate problems presented by the failure of a corporation to appear for trial.

(c) Obtaining presence of unexcused defendant. If the defendant is not present at the trial or part thereof or the sentencing hearing and the defendant's absence has not been excused, the court by order may direct a [law enforcement officer] to bring the defendant forthwith before the court for the trial or hearing.

COMMENT

This applies to all situations other than that in which the defendant's absence has been excused under subdivision (b)(1) above. Accordingly, as indicated in the immediately preceding Comment, it may be used either together with or in lieu of the action authorized by subdivision (b)(2) above.

RULE 714. PUBLIC RIGHT OF ACCESS.

(a) Courtroom open to public. The trial and other courtroom proceedings must be open to the public, except as provided in this Rule.

RELATED STANDARD: 8-3.2(a)

COMMENT

This is in accord with ABA Standard 8-3.2(a) (3d ed. 1991).

(b) Grounds for temporary deferral of public access. On motion of the defendant or the prosecuting attorney with the defendant's consent, or on its own motion, the court may order temporary deferral of public access to all or part of a pretrial proceeding or, if the jury is not sequestered, courtroom trial proceedings occurring outside the jury's presence if the court finds the deferral is necessary for a compelling reason that cannot be adequately protected by reasonable alternative means. The court shall state its findings and conclusions in open court if it orders a deferral.

RELATED STANDARDS: 8-3.2(b)

COMMENT

This is generally consistent with Standard 8-3.2(b) (3d ed. 1991).

The standard for deferral derives from Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982), where the court stated:

> [T]he circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.

Regarding this subdivision's last sentence, see Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984) (findings must be specific enough that reviewing court can determine whether order was proper).

(c) Duration of deferral. The court may not continue the deferral longer than the reason therefor exists.

COMMENT

This ensures that the deferral will persist only to the extent necessary to protect the important interest specified in subdivision (b) above.

(d) Means of deferral. The deferral must be by means of excluding the public from the courtroom, making at public expense a full transcript or sound recording of all parts of the trial or courtroom proceeding the public would have heard had it not been excluded, and opening the transcript or sound recording to public inspection as soon as the reason for deferral ceases to exist and in any case not later than immediately after disposition of the case at the trial court level.

COMMENT

Regarding proceedings to be recorded, see Rule 754(a).

(e) Audio-visual recording. The court may also order that all parts of the trial or courtroom proceeding the public would have heard had it not been excluded be recorded by audio-visual recording. If the court so orders, the audio-visual recording must be shown once, not later than shortly after disposition of the case at the trial court level, at a time and place set by the court and open to the public.

COMMENT

This authorizes the court to order audio-video or sound motion picture recording, to provide the public with the best-possible equivalent to being present at the trial.

## PART 2

## SCHEDULING TRIALS

### RULE 721. THE TRIAL CALENDAR.

(a) Court control; duty to report. The court shall provide for the assignment of cases on the calendar in accordance with this Rule, and may provide by general or special rule for the effective administration of the calendar. The [appropriate official] shall file a written report with the court periodically, as directed by the court, indicating the status of each case not set for trial, including whether the defendant is being held in custody pending trial and, if so, how long the defendant has been in custody.

RELATED STANDARD: 12-1.2(a)

#### COMMENT

This derives from ABA Standard 12-1.2(a).

(b) Priorities in scheduling criminal cases. Insofar as is practicable, trials of criminal cases must have priority over civil cases. In determining priority among criminal cases, the court shall consider, among others, the following factors:

(1) the right of a defendant to a prompt trial under Rule 722;

(2) whether the defendant is in custody;

(3) the relative gravity of the offense charged; and

(4) the relative complexity of the case.

RELATED STANDARD: 12-1.1

COMMENT

This is based upon Standard 12-1.1 and the Commentary thereto.

(c) Motion to advance. On motion of a party and a showing of cause, the court may advance the case on the calendar.

COMMENT

Illustrative of appropriate situations for advancement are where it would minimize the risk that evidence would be lost or the amount of inconvenience to witnesses or the parties.

(d) Motion for continuance. The court may grant a continuance only on motion of a party and a showing of cause and only for so long as necessary.

RELATED STANDARD: 12-1.3

COMMENT

This derives from Standard 12-1.3.

RULE 722. LIMITS ON TIME BEFORE TRIAL.

(a) Discharge for lack of prompt trial. If the trial of the defendant is not commenced within [four months] after the applicable date specified in subdivision (d), excluding only the periods specified in subdivision (f), the court, on motion of the defendant, shall dismiss the information [or indictment] with prejudice and discharge the defendant.

RELATED STANDARDS: 12-2.1, 12-4.1

COMMENT

Rule 722 generally

This Rule is supportive of the constitutional right to a speedy trial. As the Supreme Court has noted, "the right to speedy trial is a more vague concept than other procedural rights," in that a determination as to whether the right has been denied in an individual case requires an ad hoc weighing of four factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 521 (1972).

For this reason, as the Court acknowledged in Barker, id. at 523, there is merit to a more rigid approach which requires that a defendant be offered a trial within a specified time period. Such an approach will foreclose, except under the most unusual of circumstances, any necessity for applying the amorphous balancing test of Barker.

Subdivision (a)

This subdivision is based upon ABA Standards 12-2.1 and 12-4.1. The bracketed reference to four months derives from President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 155 (1967) and National Institute of Law Enforcement and Criminal Justice, Analysis of Pretrial Delay in Felony Cases--A Summary Report 11 (1972). Expressing the time in months rather than days make it easier to determine whether the time has elapsed. Although all months do not have an equal number of days, this does not mean that expressing the speedy trial time limits in terms of months is a denial of equal protection. People v. Walker, 34 Ill. 2d 23, 213 N.E.2d 552 (1966).

(b) Release for lack of prompt trial. If the defendant has been in custody for [two months] following the applicable date specified in subdivision (d), excluding only the periods specified in subdivision (f), and trial has not yet commenced, the court, on motion of the defendant, shall order the defendant released on personal recognizance under Rule 341(a)(1) through (4).

RELATED STANDARD: 12-4.2

COMMENT

This is based upon Standard 12-4.2. The bracketed reference to two months derives from National Institute of Law Enforcement and Criminal Justice, Analysis of Pretrial Delay in Felony Cases--A Summary Report 11 (1972).

If the time specified herein runs, the prosecution proceeds with the defendant released on personal recognizance. Only if the time specified in subdivision (a) also runs is the defendant entitled to dismissal with prejudice.

(c) Time for motion. A motion under subdivision (a) or (b) may be made only before commencement of trial, unless:

(1) the defendant was not represented by a lawyer and was not personally informed by the court of the defendant's rights under this Rule; or

(2) the court permits the motion in the interest of justice.

RELATED STANDARD: 12-4.1

COMMENT

The introductory portion derives from Standard 12-4.1's last sentence. Clause (1) is based upon Rule 8 of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases. Clause (2) permits the court to allow a late motion under other compelling circumstances.

(d) When time begins to run. The time for trial begins to run, without demand by the defendant, on the date an information charging the crime or, if the crime was then chargeable, charging a crime arising from the same conduct or same criminal episode, is filed under Rule 231(f) [or, if the prosecution is initiated by indictment, on the date an indictment charging the crime is returned], unless:

(1) the information [or indictment] was dismissed on motion of the defendant, in which case the time begins to run on the date a subsequent information charging the crime is filed under Rule 231(f) [or, if the prosecution is later initiated by indictment, on the date an indictment charging the crime is returned]; or

(2) the defendant is to be retried following a mistrial, an order for a new trial, or an appeal or collateral attack, in which case the time begins to run on the date the order occasioning the retrial becomes final.

RELATED STANDARD: 12-2.2

COMMENT

This is based upon Standard 12-2.2. The words "if the crime was then chargeable" are added in the introductory portion to prevent situations such as a murder trial's time running from the filing of an assault information long before the victim died.

The bracketed language is required only in jurisdictions which permit prosecution by indictment. If the prosecution is initiated by indictment (i.e., the defendant is indicted before an information is filed, which per Rule 231(f) will not likely be the case if the defendant is first cited, summoned or arrested), then the speedy trial time runs from the date the indictment is returned.

(e) When trial begins. For purposes of this Rule, the trial commences at the beginning of the first proceeding under Rule 521.

COMMENT

Normally the first proceeding under Rule 521 above will be the prosecutor's opening statement. The time of jury selection does not constitute the beginning of the trial under this Rule--such a starting point is inappropriate here because of the practice in some jurisdictions of selecting juries prior to the time set for commencing trial. However, it should be noted that subdivision (f)(4) below excludes the period of jury selection in computing the time for commencing trial.

(f) Excluded time periods. The following periods of time are excluded in computing the time for trial:

(1) the period of proceedings for the determination of competence and the period during which the defendant is incompetent to stand trial;

(2) any period of delay resulting from a pretrial motion involving matters of unusual complexity, including the time needed to prepare for a hearing on the motion, the time of the hearing, the time not exceeding [15 days] while the matter is under advisement, and the time needed to comply with the court's ruling on the motion;

(3) any period of delay resulting from an interlocutory appeal, but not to exceed [two months] if the appeal was taken by the prosecuting attorney and the time being determined is time for release under subdivision (b);

(4) the period of jury selection;

(5) any period during which proceedings in the instant case are delayed because of proceedings relating to the prosecution of the defendant on other charges;

(6) the period of a continuance granted at the request or with the consent of the defendant; a defendant without counsel may not consent to a continuance unless the defendant has been advised by the court of the defendant's rights under this Rule and the effect of the consent;

(7) the period of a continuance granted at the request of the prosecuting attorney, if:

(i) the continuance is granted because of the unavailability of evidence material to the state's case and the prosecuting attorney has exercised reasonable diligence to obtain the evidence and there are reasonable grounds to believe the evidence will become available within a reasonable time; or

(ii) the continuance is granted to allow the prosecuting attorney additional time to prepare the state's case and the additional time is justified by exceptional circumstances of the case;

(8) any period of delay resulting from the absence of the defendant; a defendant is absent whenever:

(i) the defendant fails to appear at a proceeding for which notice has been given under these Rules;

(ii) the defendant's whereabouts are unknown and the defendant is attempting to avoid apprehension or prosecution; or

(iii) the defendant's whereabouts cannot be ascertained by reasonable diligence;

(9) any period of delay resulting from the unavailability of the defendant; a defendant is unavailable whenever the defendant's whereabouts are known but the defendant's presence for trial cannot be obtained by reasonable diligence;

(10) with respect to a defendant incarcerated under a sentence of imprisonment, the period of time commencing under subdivision (d) and until the defendant's presence for trial has been obtained, provided the prosecuting attorney has exercised reasonable diligence:

(i) in seeking to obtain the defendant's presence for trial upon receipt of a demand from the defendant for trial; and

(ii) if the defendant has not previously demanded trial, in filing a detainer with the official having custody of the defendant requesting that official to advise the defendant of the right to demand trial;

(11) if an information [or indictment] was dismissed by the prosecuting attorney and an information charging the same crime is later filed under Rule 231(f) [or, if the prosecution is later initiated by indictment, an indictment charging the same crime is returned], the period from dismissal of the first information [or indictment] to the filing of the subsequent information [or the return of the later indictment];

(12) any period of delay resulting from congestion of the trial docket if the congestion is attributable to exceptional circumstances;

(13) a reasonable period of delay during which the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance; and

(14) other periods of delay occasioned by exceptional circumstances.

RELATED STANDARDS: 12-2.3, 12-3.1, 12-3.2

COMMENT

This is based upon Standard 12-2.3. Regarding clause (10), see Standards 12-3.1 and 12-3.2. As stated in Standard 12-2.3's Commentary:

> Although it is appropriate to allow added time under certain exceptional circumstances, such as those that result in the unavailability of the prosecutor or the judge at the time the trial is scheduled, delay arising out of the chronic congestion of the trial docket should not be excused . . . .
>
> Although it is fair to expect the state to provide the machinery needed to dispose of the usual business of the courts promptly, it does not appear feasible to impose the same requirements when certain unique, nonrecurring events have produced an inordinate number of cases for court disposition.

PART 3

WITNESSES

RULE 731. SUBPOENA.

(a) For attendance of witnesses; issuance; form. The clerk or, as to a proceeding before a [magistrate], the [magistrate] shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall fill in the blanks before it is served. The subpoena shall state the name of the court and the title, if any, of the proceeding, and shall command each individual to whom it is directed to attend and give testimony at a specified time and place.

COMMENT

This is based upon Fed. R. Crim. P. 17(a).

(b) Costs and fees of witnesses for defendant. The costs of service and regular witness fees for up to [eight] witnesses subpoenaed in behalf of the defendant from within the state must be paid in the same manner as similar costs and fees of witnesses subpoenaed in behalf of the state. The costs of service and witness fees, including reasonable expert witness fees, if any, of any other witness subpoenaed in behalf of the defendant must be so paid if the court, on motion of the defendant heard ex parte, finds that the testimony of the witness could contribute to an adequate defense. All records respecting defense subpoenas must be sealed until after disposition of the case.

RELATED STANDARD: 5-1.4

COMMENT

This subdivision covers only initial payment of the expenses specified, and does not speak to the question whether the expenses should be made "costs" assessable against the defendant if convicted.

The first sentence adopts the approach of, e.g., Idaho Code § 19-3008 (Supp. 1987) (five witnesses), La. Code Crim. P. Ann. art. 738 (West 1981) (six in misdemeanor and 12 in felony case), (West 1981), and Mont. Code Ann. § 46-15-103 (1985) (six).

The second sentence is similar to provision in Idaho Code § 19-3008 (Supp. 1987). Compare Tex. Crim. P. Code Ann. art. 24.03 (Vernon 1966) (sworn application stating materiality for any subpoena). La. Code Crim. P. Ann. art. 739 (West 1981) and Mont. Code Ann. § 46-15-103 (1985) are similar except that they require indigency as well as a showing for additional witnesses. Some provisions require both indigency and a showing for any of these expenses to be paid in the same manner as for prosecution witnesses. See, e.g., Fed. R. Crim. P. 17(b). The words "including reasonable expert witness fees, if any" are included to make explicit what many courts have found implicit in Fed. R. Crim. P. 17(b), 2 A. Wright, Federal Practice and Procedure--Criminal § 272, at 136 & n. 2(2d ed. 1982). See ABA Standard 5-1.4 (3d ed. 1991).

The last sentence is to the same effect as provision in Maine R. Crim. P. 17(b). Referring to Fed. R. Crim. P. 17(b)'s provision for ex parte defense application, 2 A. Wright, supra, § 272, at 140 observes that "it would seem that the secrecy of the application should be maintained after it is granted."

(c) For production of documentary evidence and of objects. A subpoena may also command the individual to whom it is directed to produce the books, papers, documents, photographs, or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct the matters designated in the subpoena be produced before the court at a time before the trial or before they are to be offered in evidence and upon their production may permit the matters or portions thereof to be inspected, photographed, and copied by the parties.

COMMENT

This is based upon Fed. R. Crim. P. 17(c).

(d) Service. A subpoena may be served as provided in a civil action.

COMMENT

This is based upon N.Y. Crim. P. Law § 610.40 (McKinney 1984).

(e) Witnesses from without the state. Attendance of witnesses from without the state must be secured as provided by law.

COMMENT

This is based upon Idaho R. Crim. P. 17(d)(2). See Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings.

(f) For taking deposition; place of examination. Upon a party's filing proof of service of notice to take a deposition in conformity with Rule 431, the clerk or a [magistrate] of the court before which trial is to be had shall issue to the party subpoenas for named or described individuals. Unless the court otherwise permits, a subpoena may command an individual to attend a deposition only at a place within the [county], or within [50] miles of the place, in which the person resides, is employed, or transacts business in person.

COMMENT

The first sentence is to the same effect as Vt. R. Crim. P. 17(f)(1) and the first sentence of Fed. R. Civ. P. 45(d)(1).

The last sentence is to the same effect as Maine R. Crim. P. 17(f)(2). The county of residence, employment, or business limitation also appears in Fla. R. Crim. P. 3.220(d)(1), Idaho Crim. P. R. 17(e) and Nev. Rev. Stat. § 174.375(2) (1985). The 50 mile limitation also appears in Vt. R. Crim. P. 17(f)(2).

(g) Contempt. Failure by any individual without lawful excuse to obey a subpoena served upon the individual is a contempt of the court from which the subpoena was issued.

COMMENT

This derives from Fed. R. Crim. P. 17(g).

RULE 732. IMMUNITY.

(a) Compelling production of information despite assertion of privilege. In any proceeding under these Rules, if a witness refuses to answer or produce information on the basis of the privilege against self-incrimination, the [district] court, unless it finds that to do so would not further the administration of justice, shall compel the witness to answer or produce information if:

(1) the prosecuting attorney makes a written request to the [district] court to order the witness to answer or produce information, notwithstanding the claim of privilege; and

(2) the [district] court informs the witness that by so doing the witness will receive immunity under subdivision (b).

COMMENT

This subdivision requires, as do the Model State Witness Immunity Act (1952), the Organized Crime Control Act of 1970, 18 U.S.C. § 6002 (1982), and most recent immunity statutes, that as a precondition of immunity the witness claim the privilege against compulsory self-incrimination. This avoids the possibility of gratuitous grants of immunity. Immunity should be used only when necessary to overcome refusal to produce information, only to obtain evidence not otherwise available. It should not be granted for evidence given without objection. Moreover, the requirement of an assertion of the privilege gives the prosecution some notice of matters the witness deems incriminating and thus affords the prosecutor a better basis for considering the advisability of a grant in a given situation. See Commentary to Model Act at 11-

12; Dixon, Comment on Immunity Provisions, in 2 Working Papers of the Nat'l Comm'n on Reform of Federal Criminal Laws 1405, 1422 (1970).

As does the Model Act, see Commentary at 12-13, this subdivision operates on the basis that immunity is essentially a law enforcement instrument and the enforcement authorities constitute the proper agency to exercise the principal control over immunity grants. No grant may be made except on the prosecutor's written request; the court has no power to initiate. But the court retains authority to prevent abuses.

(b) Nature and scope of immunity. If, but for this Rule, the witness would have been privileged to withhold the answer or information given, and the witness complies with an order under subdivision (a) compelling the witness to answer or produce information, the witness may not be prosecuted or subjected to criminal penalty in the courts of this State for or on account of any transaction or matter concerning which, in compliance with the order, the witness gave answer or produced information.

COMMENT

This is substantially identical to provision in the Model State Witness Immunity Act, and very similar to provision in the Compulsory Testimony Act of 1893, 27 Stat. 443, which became the prototype for numerous federal immunity statutes enacted by Congress up until the 1970 Crime Control Act.

The 1970 Act abandoned the "transactional" immunity standard, which had been the federal legislation model for some 80 years in favor of what is variously called "testimonial," "use and derivative use" or "use-plus-fruits" immunity, providing (with exceptions for perjury and contempt) that when a witness is granted immunity and compelled to answer, "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony of other information) may be used against the witness in any criminal case." 18 U.S.C. § 6002 (1982).

In Kastigar v. United States, 406 U.S. 441 (1972), a 5-2 majority sustained the provisions of the Act against constitutional challenge, spelling an end, at least for the near future, to a lengthy debate over the constitutionally required scope of immunity provisions.

Subdivision (b) nevertheless retains transactional immunity for policy reasons. "Use and derivative use" immunity does not leave the witness in the same position vis-a-vis the government as the witness would have occupied had the witness not been compelled to testify.

If the witness is prosecuted for the crime about which the witness testified, as a practical matter, it will be extraordinarily difficult to determine whether the government's evidence was obtained independently of the compelled disclosure. Although the burden of proof is on the government to prove that the evidence it introduces is derived from an "independent" source, this protection is largely illusory.

Cross examination at trial poses particular hazards. As pointed out by Chief Judge Seitz, concurring in United States ex rel. Catena v. Elias, 449 F.2d 40, 45 (3d Cir. 1971), if a person, after being granted use immunity, is subsequently prosecuted for the same or a related transaction and chooses to take the stand in his own defense, the prosecutor has a significant advantage:

> [On cross-examination], the prosecutor is obviously in a position to tailor his questions, consciously or otherwise, on the basis of his knowledge of the defendant's prior [compelled] testimony and can do so without any overt reference to the testimony given under immunity. In these circumstances, could defense counsel effectively object on the ground that the immunity grant was thereby violated? I think not. Indeed, how could a trial judge do other than accept the prosecutor's representation, which might well be in good faith, that the questions were not inspired by the testimony given by the defendant under immunity? Furthermore, this same possibility may adversely influence a defendant to forego entirely his right to testify in his own behalf even though he is advised that his prior disclosures cannot be used against him.

The authors of the leading article on the meaning of Harris v. New York, 401 U.S. 222 (1971), suggest that there is a real possibility that an incriminating statement obtained as the result of a grant of "use" immunity--or at least physical or documentary evidence produced or discovered as a result of such immunity--may be used to impeach a defendant's testimony. See Dershowitz & Ely, Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority, 80 Yale L.J. 1198, 1223 (1971). If this is so, then plainly "use and derivative use" immunity would not be coterminous with the privilege against compulsory self-incrimination.

It would also not be coterminous if the government focused its investigation or concentrated all available resources on a person as a result of testimony the person was compelled to supply under use immunity. Nor would it be coterminous if the prosecution could call a witness whose existence, identity, or whereabouts was revealed by testimony previously compelled from the defendant.

Moreover, transactional immunity will provide more and better information for the prosecution. A witness granted only use immunity is likely to tell less (and less likely to tell the truth) than one testifying under a transactional grant. See Note, The Unconstitutionality of Use Immunity: Half a Loaf Is Not Enough, 46 So. Cal. L. Rev. 202, 219-20 (1972); Note, Immunity from Prosecution and the Fifth Amendment: An Analysis of Constitutional Standards, 25 Vand. L. Rev. 1207, 1229 (1972).

(c) Exception for perjury and contempt. A witness granted immunity under this Rule may nevertheless be subjected to criminal penalty for perjury, false swearing, or contempt committed in answering, failing to answer, or failing to produce information in compliance with the order.

COMMENT

It may be excess of caution to add a provision such as this subdivision, taken from the Model State Witness Immunity Act (1952), because this exception to immunity is well established, even absent an express provision. See Commentary to Model Act at 190.

## PART 4

## SUBSTITUTION OF JUDGE

### RULE 741. SUBSTITUTION OF JUDGE.

(a) On demand. A defendant may obtain a substitution of the judge before whom a trial or other proceeding is to be conducted by filing a demand therefor, but if trial has commenced before a judge, a demand may not be filed as to that judge. A defendant may not file more than one demand in a case. If there are two or more defendants, a defendant may not file a demand, if another defendant has filed a demand, unless a motion for severance of defendants has been denied. The demand must be signed by the defendant or the defendant's lawyer, and must be filed at least [ten days] before the time set for commencement of trial and at least [three days] before the time set for any other proceeding, but it may be filed within [one day] after the defendant ascertains or should have ascertained the judge who is to preside at the trial or proceeding.

RELATED STANDARD: 6-1.7

COMMENT

This is similar to the provision regarding federal judges called for by the ABA's August 1979 Resolution regarding Motion for Peremptory Transfer to Another Judge quoted in footnote 9 of Standard 6-1.7's Commentary. As to the prevalence of and reasons for this type of provision, see Staff Report, Disqualification of Judges for Prejudice or Bias--Common Law Evolution, Current Status, and the Oregon Experience, 48 Or. L. Rev. 311, 347, 401 (1969).

In limiting use of this procedure to defendants, this subdivision accords with Wis. Stat. Ann. § 970.20(2) (West 1985). This reflects the view that extending the procedure to prosecutors, who are constantly before the court, would present a danger of its being used to exert improper influence on judges.

The first sentence's exception makes it clear that a demand cannot be used to prevent the judge who presided over trial from sentencing or hearing post-trial motions (although it can be used if a different judge is called in to conduct a proceeding after trial has commenced). The same judge should be able to conduct all proceedings in a case which occur after trial commences.

However, this subdivision does not prohibit a demand after a judge has ruled upon a contested matter in pretrial proceedings. Although such a prohibition would probably reduce judge shopping, its disadvantages outweigh this benefit. It would increase the frequency of demands because a party who did not want the judge to preside at trial would have to use the demand at the outset of the prosecution even though it (like the vast majority of prosecutions) is ultimately disposed of without trial, or even though the judge in question may not end up with the trial anyway. Requiring the demand to be made at the prosecution's outset would cause unnecessary inconvenience in areas where the substitute judge would have to be brought in from another area. It would seem to put young and non-local lawyers at a disadvantage as compared to lawyers with more experience with the area's judges. On balance, it is preferable to allow the demand to be deferred before trial until the case reaches the stage (which it probably will never reach) at which a party deems the demand essential.

The second and third sentences provide for one demand in the case per defendant, except where defendants are voluntarily tried together. Where defendants are tried together against their wishes each defendant should have a separate right to file a demand.

The last sentence derives from Minn. Stat. Ann. § 542.16(1) (West Supp. 1987) and N.D. Cent. Code § 29-15-21(2) (Supp. 1987).

(b) Recusal. A judge without a motion may recuse himself [or herself] from presiding over a trial or other proceeding.

RELATED STANDARD: 6-1.7

COMMENT

A judge should disqualify himself or herself under this Rule "whenever the judge has any doubt as to his or her ability to preside impartially in a criminal case or whenever the judge believes his or her impartiality can reasonably be questioned." ABA Standard 6-1.7.

(c) Disqualification for cause. A judge may not preside over a trial or other proceeding if on motion of a party it appears that the judge is disqualified for a cause provided [by law or by the Code of Judicial Conduct]. The motion to disqualify must be heard before another judge regularly sitting in the same court or a judge designated by [the appropriate assigning authority], and, unless otherwise ordered by that judge for cause, must be made at least [10 days] before the time set for commencement of trial and at least [three days] before the time set for any other proceeding, but it may be made within [one day] after the party ascertains or should have ascertained the judge who is to preside at the trial or proceeding.

COMMENT

States may insert the appropriate references in the first sentence's brackets. The matter is covered by Canon 3C of the ABA Code of Judicial Conduct.

On the principle that one should not judge one's own case, see Mayberry v. Pennsylvania, 400 U.S. 455 (1971), this subdivision provides that motions to disqualify be heard by a judge other than the one sought to be disqualified. See La. Code Crim. P. art. 675 (West 1981).

The time limits accord with those in subdivision (a) above, but may be relieved from for cause.

(d) Designation of substitute judge. Upon the filing of a demand under subdivision (a) or disqualification under subdivision (b) or (c), the judge shall take no further action in the case, except to prescribe conditions of release if requested to do so by the defendant, and [the appropriate assigning authority] shall designate another judge.

COMMENT

This derives from Wis. Stat. Ann. § 971.20(8), (9) (West 1985). Regarding the assigning authority, see id. § 971.20(8) (chief judge); Alaska R. Crim. P. 25(a) (presiding judge or chief justice); Colo. R. Crim. P. 21 (b)(3) (chief judge or chief justice).

(e) Disability during trial. If by reason of termination of office, death, sickness, or other disability the judge before whom a trial has commenced is unable to proceed with the trial, a successor in office, another judge regularly sitting in the same court, or a judge designated by [the appropriate assigning authority], may:

(1) order a new trial; or

(2) if the parties consent or the trial is by jury and the judge certifies to having become familiarized with the record, proceed with trial.

RELATED STANDARD: 15-3.3

COMMENT

This is based upon Standard 15-3.3, but covers bench trials (with the parties' consent) as well as jury trials.

(f) Disability after verdict or finding of guilty. If by reason of termination of office, absence from the [district], death, sickness, or other disability, the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilty, a successor in office, another judge regularly sitting in the same

court, or a judge designated by [the appropriate assigning authority] may perform those duties or order a new trial.

RELATED STANDARD: 18-6.1(a)

COMMENT

This is based upon Fed. R. Crim. P. 25(b), and is consistent with Standard 18-6.1(a).

## PART 5

## GENERAL REQUIREMENTS

### RULE 751. MOTIONS.

An application to the court for an order must be by motion. A motion other than one made during a trial or hearing must be in writing, unless the court permits it to be made orally. [The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.] It must state the grounds upon which it is made and set forth the relief or order sought. If factual issues are involved in determining a motion, the court shall make essential findings.

COMMENT

The first, second, and fourth sentences derive from Fed. R. Crim. P. 47.

The third, optional, sentence derives from Fed. R. Civ. P. 7(b)(1), Maine R. Crim. P. 47, and N.D.R. Crim. P. 47, and may be included if it is desired to require the party, as opposed to the clerk, to serve the notice of a motion's hearing.

The last sentence derives from Fed. R. Crim. P. 12(e) which, however, applies only to pretrial motions. Here the reference is to all motions.

RULE 752. SERVICE AND FILING OF PAPERS.

(a) Service; when required. A written motion, other than one heard ex parte, and any document supporting it [and notice of the hearing of the motion] must be served upon each party at least [two] days before the date set for the hearing, unless the court otherwise directs. Every written notice and similar paper must be served upon each party.

COMMENT

Except for substituting "document" for "affidavit" and substituting "[two] days" for five days, this is to the same effect as provision in Fed. R. Crim. P. 45(d). The latter provision's "5 days" derives from Fed. R. Civ. P. 6(d), and seems too long for criminal cases. In situations where two days notice is insufficient, the court may direct a longer period under the first sentence's "unless" clause (although that clause would more often be used to shorten the period).

The optional bracketed language in the first sentence may be omitted where it is desired to have the clerk rather than the party notify the parties as to the time for hearing.

(b) Service; how made. Except in situations in which these Rules specify delivery to the defendant personally:

(1) service upon a party represented by a lawyer must be made upon the lawyer unless the court also orders service upon the party; and

(2) service must be made in the manner provided in a civil action.

COMMENT

Apart from the reference to provisions requiring service upon the defendant personally, this is to the same effect as Fed. R. Crim. P. 49(b).

(c) Notice of orders. The court or clerk shall promptly mail to or otherwise serve a copy of any written order upon each party and notice of any other order made out of a party's presence upon that party, except:

(1) the court may limit the application of this requirement as to an order resulting from in-camera proceedings authorized under these Rules; and

(2) an order or notice or order respecting issuance of a subpoena under Rule 731(b) need be served only upon the movant.

COMMENT

Apart from the exceptions, this is similar to that part of Fed. R. Crim. P. 49(c), which specifies, "Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party a notice thereof and shall make a note in the docket of the mailing."

The "or otherwise serve" feature derives from N.D.R. Crim. P. 49(c).

The authorization for the court, as well as the clerk, to serve copies of orders, makes it possible for this to be done in open court without involving the clerk.

The "order made out of party's presence" feature derives from Colo. R. Crim. P. 49(c).

(d) Filing. Papers required to be served must be filed with the court. Papers filed must be filed in the manner provided in a civil action.

COMMENT

This is based upon Fed. R. Crim. P. 49(d).

RULE 753. TIME.

(a) Computation. [In computing any designated period of time, the day from which the period begins to run is excluded. The last day of the period is included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. If the period is less than [seven] days, any intermediate Saturday, Sunday, or legal holiday is excluded in the computation.]

COMMENT

This optional subdivision derives from Fed. R. Crim. P. 45(a).

(b) Additional time after service by mail. Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon the party and the notice or other paper is served upon the party by mail, [three] days are added to the prescribed period.

COMMENT

This is based upon Fed. R. Crim. P. 45(e).

(c) Time for service by mail. If a paper is served by mail, it must either be mailed at least [three] days before, or be received by, any time otherwise prescribed for service.

COMMENT

This is included because, although it has been argued that a provision like subdivision (a) above requires service by mail to be three days earlier than the time otherwise required for service, see 3A A. Wright, Federal Practice & Procedure--Criminal § 755 (2d ed. 1982), on its face it does not.

RULE 754. RECORDING OF PROCEEDINGS.

(a) Proceedings to be recorded. All oral portions of the following shall be recorded in full:

(1) testimony at any proceeding, including any testimony in support of the issuance of any arrest warrant, summons, or order directing a [law enforcement officer] to take any individual into custody or to bring any individual before the court, and any testimony

respecting whether there is probable cause to believe that the defendant committed the crime charged;

(2) proceedings upon the defendant's appearance under Rule 321;

(3) hearings under Rules 344 and 345;

(4) proceedings respecting waiver of rights, including proceedings under Rules 431(g)(2), 511(a), (b), 711(a), and 713(b)(1);

(5) depositions under Rules 431 and 432;

(6) conferences respecting concurrence in a plea agreement under Rule 443(b);

(7) proceedings respecting pleas under Rule 444;

(8) pretrial conferences under Rule 491;

(9) hearings upon motions;

(10) trial proceedings, including all proceedings specified in Rules 512 through 531 and 533 through 535;

(11) sentencing hearings under Rule 614;

(12) proceedings respecting revocation of probation [or of deferred imposition of sentence] under Rule 641; and

(13) upon the request of a party, informal conferences in chambers.

RELATED STANDARDS: 8-3.5(a), 10-4.2(c), 11-5.4(d), 14-1.7, 15-1.3(c), 15-3.6(f), 15-4.3(d), 18-6.7(e),
18-7.5(e)(v)

COMMENT

Clause (10)'s reference to "all proceedings specified in Rules 512 through 531 and 533 through 535" makes it clear that some things which have not always been recorded, e.g., arguments to the jury, hearings on instructions, and the giving of instructions, must be recorded.

This subdivision implements numerous ABA Standards requiring proceedings to be recorded. See, e.g., Standards 8-3.5(a) (3d ed. 1991) (examination of prospective jurors regarding prejudicial publicity); 10-5.2(c) (first appearance); 11-5.4(d) (pretrial conference); 14-1.7 (proceedings respecting pleas); 15-1.3(c) (waiver of full jury); 15-3.6(f) (jury instructions and related objections and rulings); 15-4.3(d) (additional instructions and related objections and rulings); 18-6.7(a) (sentencing hearing); 18-7.5(e)(v) (probation revocation hearing).

(b) Recorded defined. As used in these Rules, "recorded" means taken verbatim by accurate and reliable sound recording, audio-visual recording, or stenographic means.

COMMENT

This states the overall standard. It contemplates that as to proceedings before it, the court will designate the particular means of recording, and may designate different means for different proceedings. As to depositions, Rule 431(e)(2) provides for the party taking the deposition to specify the means of recording in the notice, but Rule 431(d) authorizes the court, upon a party's or the deponent's motion, to change the manner of recording. As to investigatory depositions, Rule 432(d)(1) provides recording by such means as the prosecutor designates.

(c) Access. Except as otherwise provided in these Rules regarding in-camera proceedings, any party must be permitted under reasonable conditions to listen to or view and copy or record any sound or audio-visual recording of any proceeding in the case and to inspect and copy or photograph any prepared transcript of any proceeding in the case. On motion of the defendant and a showing of financial inability to bear the expense, the court shall order the state to assume the cost of furnishing the defendant a copy of the recording or transcript.

COMMENT

The first sentence provides access similar to that provided in Rule 421(a) above (duty of prosecuting attorney to allow access). Where sound or video recording is used, it should eliminate much unnecessary transcription, and where stenographic means are used it should eliminate much unnecessary copying.

(d) Preparation of transcript. On motion of a party, the court shall order the preparation of a transcript of all or a portion of any proceeding in the case, if the party shows that it is reasonably necessary to the party's case.

RELATED STANDARD: 6-1.6

COMMENT

This subdivision, consistent with ABA Standard 6-1.6, authorizes court intervention if a party is unable without a court order to get the reporter to transcribe all or a portion of a proceeding.

RULE 755. PRESERVING OBJECTION.

Except as otherwise provided in these Rules, a party sufficiently preserves an objection to a ruling or order of the court if, at the time the ruling or order is made or sought, the party makes known to the court the action the party desires the court to take or the objection to the court's action and the grounds for the objection. If the ruling is one admitting [or excluding evidence, the party sufficiently preserves an objection by complying with Rule 103(a) of the Uniform Rules of Evidence] [evidence, the party sufficiently preserves an objection by timely objecting or moving to strike, stating the specific ground of objection if the specific ground is not apparent from the context. If the ruling is one excluding evidence, the party sufficiently preserves an objection if the substance of the evidence is made known to the court by offer or is apparent from the context of the interrogation]. If a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice the party. Exceptions are unnecessary.

RELATED STANDARDS: 11-5.3(d), 12-4.1, 13-3.3(a), (c), 15-3.6(d)

COMMENT

The first and last two sentences derive from Fed. R. Crim. P. 51. The intervening material provides for a cross-reference to, or an incorporation of the essence of, Unif. R. Evid. 103(a).

This Rule is consistent with various ABA Standards. See, e.g., Standards 11-5.3(d) (failure to raise error or issue at pretrial motion hearing); 12-4.1 (failure to assert speedy trial right); 13-3.3(a), (c) (failure to timely seek severance); 15-3.6(d) (failure to object to or tender instruction).

RULE 756. ERROR NOTICED BY COURT.

The court at any time may call any error to the attention of the parties and, if required in the interest of justice, take appropriate action with respect to an error affecting substantial rights, although an objection was not preserved by a party.

RELATED STANDARDS: 6-1.1(a), 11-5.3(b), (c), 13-4.1, 15-3.5(a), 15-3.6(d)

COMMENT

This derives from ABA Standard 6-1.1(a)'s second sentence ("The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial") and Fed. R. Crim. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court"). See Rule 451(c)(1) above ("lack of jurisdiction of the court over the person or subject matter . . . can be raised at any time").

This Rule is consistent with various ABA Standards. See, e.g., Standards 11-5.3(b),(c) (court may raise matters on own initiative at pretrial motion hearing); 13-4.1 (joinder on court's own motion); 13-4.2 (severance on court's ownmotion); 15-3.5(a) (judgment of acquittal on court's own motion); 15-3.6(d) (substantial defect or omission in instruction not waived by failure to object or tender instruction).

PART 6

APPLICATION

RULE 761. COURT DEFINED.

As used in these Rules, "court" means _____.

COMMENT

This provides a place for definition of the term "court" as it is used throughout the Rules. States without a unitary court system would typically provide "the district court or magistrate having jurisdiction to try the crime." Some states might wish at this point to provide, or to authorize the making of local court rules under Rule 762 below to provide for some expansion of magistrates' normal roles in cases triable only by courts of general criminal jurisdiction. For example, some states may desire to allow a magistrate (or a magistrate admitted to the bar) to issue in felony cases at least some of the nontestimonial evidence orders covered by Rules 434 through 438 above at least if the motion is made (as it sometimes may be) while the magistrate is still otherwise involved in the case. Others may wish to allow magistrates or magistrates designate by the court with jurisdiction over felony cases to perform certain duties of the "court" in felony cases when no judge of the court with felony jurisdiction is available.

A state might also use this Rule as a place to define the term "magistrate" or any term it has substituted for "magistrate" throughout these Rules.

RULE 762. RULES OF COURT.

[District] courts [and magistrates] may make rules for the conduct of criminal proceedings not inconsistent with these Rules [with the approval of the [Supreme Court]]. Copies of the rules must be [furnished to the [State Judicial Administrator] and] made available to the public.

RULE 763. PRACTICE WHEN PROCEDURE NOT SPECIFIED.

In any situation not provided for by rule or statute, the court may proceed in any lawful manner not inconsistent with these Rules or any applicable statute.

RULE 764. APPENDIX OF FORMS.

The forms contained in the Appendix of forms are illustrative and not mandatory.

RULE 765. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

These Rules must be applied and construed to effectuate their general purpose to make uniform the rules of criminal procedure among states adopting them.

RULE 766. SHORT TITLE.

These Rules may be cited as the Uniform Rules of Criminal Procedure (1987).

RULE 767. SEVERABILITY.

If any provision of these Rules or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of these Rules which can be given effect without the invalid provision or application, and to this end the provisions of these Rules are severable.

RULE 768. EFFECT ON EXISTING LAWS AND RULES.

[These Rules supersede the following acts and rules of court and parts thereof:

(1) _____

(2) _____

(3) _____

(4) all other acts and rules of court, or parts thereof, to the extent that they are inconsistent with these Rules.]

RULE 769. TIME OF TAKING EFFECT.

These Rules shall take effect _____.

# APPENDIX OF FORMS

Form

1. Law Enforcement Officer's Citation.

2. Information.

3. Prosecuting Attorney's Citation.

4. Summons.

5. Arrest Warrant.

6. Statement of Representation.

7. Order Setting Times.

FORM 1. LAW ENFORCEMENT OFFICER'S CITATION (Rule 222 (a), (b))

STATE OF _____ MAGISTRATE'S COURT

COUNTY OF _____ CITY OF _____

State of _____) File No. _____
)
vs. )
) LAW ENFORCEMENT
_____)
Defendant ) OFFICER'S CITATION

TO THE ABOVE-NAMED DEFENDANT:

PLEASE TAKE NOTICE, That unless you appear before the above-named Court at [address] _____, [city] _____, [state] _____ at __:__ _.m. on _____, _____ __, 19__, an application may be made for the issuance of a Summons or a Warrant for your arrest.

I will request the Prosecuting Attorney to file with the Court an Information charging you with the following crime: That on or about _____ __, 19__ at about __:___ _.m. at [address] _____, [city] _____, _____County [state] _____, you did unlawfully [description of crime--desirable to also specify section violated]

_____

_____

I will request that the Information be filed before the end of the second business day before the date specified above for your appearance before the Court. If an information is not so filed, you will not have to appear and the Prosecuting Attorney will notify you not to appear.

You are entitled to be represented by a lawyer. If for any reason you are unable to obtain a lawyer, you are entitled to the services of an appointed lawyer or the Public Defender. To obtain those services, you should contact the Public Defender's office at _____, _____, _____, telephone _____.

Issued: _____, ___, 19___ in [city or county] _____, _____.

_____
[signature]

_____
[rank, badge number]

_____

_____ Police Department

PROMISE TO APPEAR

I promise to appear before the above-named Court at the time and place specified. (Signing this promise is not an admission of guilt.)

Date: _____ __, 19__ _____

FORM 2. INFORMATION (Rule 231(c))

STATE OF _____ MAGISTRATE'S COURT

COUNTY OF _____ CITY OF _____

State of _____) File No. _____
)
vs. )
) INFORMATION
_____)
Defendant )

The Prosecuting Attorney of _____CHARGES: That on or about _____ __, 19___ at about ___:__ _.m. at [address] _____, [city] _____, _____ County, [state] _____, the above-named Defendant did unlawfully [essential facts constituting the offense--desirable to also specify ordinary name of offense] _____

_____

in violation of [designation of law violated] _____, for which the maximum possible incarceration that may be imposed upon conviction is _____.

Dated: _____ __, 19___ _____
Prosecuting Attorney

_____

_____

FORM 3. PROSECUTING ATTORNEY'S CITATION (Rule 222(a), (c))

STATE OF _____ MAGISTRATE'S COURT

COUNTY OF _____ CITY OF _____

State of _____) File No. _____
)
vs. )
) PROSECUTING ATTORNEY'S
_____) CITATION
Defendant )

TO THE ABOVE-NAMED DEFENDANT:

PLEASE TAKE NOTICE, That unless you appear before the above-named Court at [address] _____, [city] _____, [state] _____at __:__ _.m. on _____, _____, 19__, an application may be made for the issuance of a Summons or a Warrant for your arrest.

I intend to file an Information, a copy of which is attached, with the Court on _____ __, 19__, before the time for your appearance.

You are entitled to be represented by a lawyer. If for any reason you are unable to obtain a lawyer, you are entitled to the services of an appointed lawyer or the Public Defender. To obtain those services, you should contact the Public Defender's office at _____, _____, _____, telephone _____.

Issued: _____ __, 19__ in [city or county] _____, _____

[signature] _____

[title] _____

[jurisdiction] _____

PROOF OF SERVICE

I certify that I served this Citation today by sending a copy of it and of the Information by certified mail to the above-named Defendant at

[address] _____

Dated: _____ __, 19__

[signature] _____

[title] _____

[jurisdiction] _____

FORM 4. SUMMONS (Rule 222(a), (d))

STATE OF _____ MAGISTRATE'S COURT

COUNTY OF _____ CITY OF _____

State of _____) File No. _____
)
vs. )
) SUMMONS
_____)
Defendant )

THE STATE OF _____ TO THE ABOVE-NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED, to appear before the above-named Court at _____, _____, _____ at __:__ _.m. on _____, _____ __, 19__, in respect to the Information a copy of which is attached.

If you do not so appear an application may be made for the issuance of a Warrant for your arrest.

You are entitled to be represented by a lawyer. If for any reason you are unable to obtain a lawyer, you are entitled to the services of an appointed lawyer or the Public Defender. To obtain those services, you should contact the Public Defender's office at _____, _____, _____, telephone _____.

Issued: _____ __, 19__ in [city or county] _____, _____.

BY THE COURT:

[signature] _____
Judge

PROOF OF SERVICE

I hereby certify that I served this Summons today by sending a copy of it and of the Information by certified mail to the above-named Defendant at [address] _____, _____, _____

Dated: _____, 19__ [signature] _____

[title] _____

[jurisdiction] _____

FORM 5. ARREST WARRANT (Rule 222 (e))

STATE OF _____ MAGISTRATE'S COURT

COUNTY OF _____ CITY OF _____

State of _____) File No. _____
)
vs. )
) ARREST WARRANT
_____)
Defendant )

THE STATE OF _____ TO ALL LAW ENFORCEMENT OFFICERS IN THE STATE:

YOU ARE HEREBY COMMANDED to arrest the above-named Defendant charged in the Information, a copy of which is attached, and without unnecessary delay to bring the Defendant before a magistrate [unless the Defendant first meets the following conditions of release: _____

_____].

[Restrictions on manner of execution: _____

_____].

Issued: _____ __, 19__ [signature] _____

[title] _____

[location of office] _____

NOTICE TO THE ABOVE-NAMED DEFENDANT:

You have the right to remain silent. Anything you say, orally or in writing, will be used against you.

You will not be questioned unless you wish.

You have the right to consult with a lawyer before being questioned or saying anything and to have a lawyer present during any questioning.

If you wish to consult with a lawyer but are unable to obtain one you will not be questioned until you have had the assistance of a lawyer.

If you are unable to pay for the services of a lawyer, one will be provided for you.

If at any time during any questioning you desire to consult with a lawyer or desire questioning to stop, questioning will stop.

The officer will inform you where you will be taken. If you are taken to a place of detention you will be permitted upon arrival to communicate with a lawyer and relatives or friends. You will be brought before the court without unnecessary delay.

RETURN OF OFFICER: I hereby certify that I arrested the above-named Defendant at __:__ _.m. on _____ __, 19__ at _____, _____.

Dated: _____ __, 19__ [signature] _____

[rank, badge number] _____

_____ Police Department

I hereby certify that I released the above-named Defendant upon the above conditions of release at __:__ _.m. on _____ __, 19__.

Dated: _____ __, 19__ [signature] _____

[rank, badge number] _____

_____ Police Department

I hereby certify that I brought the above-named Defendant before _____, a magistrate of _____ County, at __:__ _.m. on _____ __, 19__.

Dated: _____, 19__ [signature] _____

[rank, badge number] _____

_____ Police Department

FORM 6. STATEMENT OF REPRESENTATION (Rule 312)

STATE OF _____ MAGISTRATE'S COURT

COUNTY OF _____ CITY OF _____

State of _____) File No. _____
)
vs. )
) STATEMENT OF REPRESENTATION
_____)
Defendant ).

The undersigned represents the above-named Defendant in the above-entitled case. The Defendant agrees to appear at all appropriate times, to report any change of address to the court, to refrain from committing any crimes, and to refrain from threatening or otherwise interfering with potential witnesses.

Date: _____, 19__ _____
Attorney at Law

_____

_____

_____

Telephone: _____

FORM 7. ORDER SETTING TIMES (Rule 411)

STATE OF _____ MAGISTRATE'S COURT

COUNTY OF _____ CITY OF _____

State of _____) File No. _____
)
vs. )
) ORDER SETTING TIMES
_____)
Defendant )

The Defendant in the above-entitled case having appeared, it is hereby ORDERED that:

1. The Prosecuting Attorney shall furnish the matters specified in Rule 422(a) on or before _____ __, 19__.

2. The Defendant may request the matters specified in Rule 422(b) after _____ __, 19__.

3. The Defendant shall notify the Prosecuting Attorney under Rule 423(a), (b), and (d) on or before _____ __, 19__.

4. The Defendant shall notify the Prosecuting Attorney under Rule 423(e) on or before _____ __, 19__.

5. The Defendant shall furnish a report under Rule 423(f) on or before _____ __, 19__.

6. The Prosecuting Attorney may request a report or statement under Rule 423(g) and access to matters under Rule 423(i) after _____ __, 19__.

7. Discovery depositions under Rule 431 may be taken only with leave of court after _____ __, 19__.

8. Pretrial motions under Rule 451 may be made on or before _____, __, 19__.

9. A motion for a pretrial dismissal under Rule 481 may be made on or before _____ __, 19__.

10. A pretrial conference under Rule 491

_____

_____

11. After _____ __, 19__, if the case is not disposed of by plea or otherwise, the Court will set it for trial.

Dated: _____ __, 19__ BY THE COURT:

_____
Judge