ABA Standards for Criminal Justice
Discovery and Trial by Jury
Third Edition

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INTRODUCTION

The American Bar Association last revised its criminal discovery standards in 1978. While the commentary to those standards was updated in 1986, the standards themselves had not undergone any revisions. The Third Edition Criminal Justice Discovery Standards that follow were adopted by the ABA House of Delegates in August of 1994, after three years of review by groups including an updating task force, the ABA Criminal Justice Standards Committee, and the ABA Criminal Justice Section Council.

These discovery standards have been significantly revised to reflect important developments in the law since 1978. Since the adoption of the Second Edition Standards, both state and federal criminal justice systems have continued the trend toward imposing expanded pretrial discovery obligations on the prosecution and the defense in criminal cases. Some state jurisdictions have substantially "open file" systems of criminal discovery by the prosecution. Others have developed a wide variety of systems requiring exchange of information by the parties in advance of a criminal trial. Amendments to the Federal Rules of Criminal Procedure have been adopted and further amendments are currently pending which significantly enlarge the pretrial discovery available in federal criminal cases.

There has, in short, been a growing recognition on the state and federal levels that expanded pretrial discovery in criminal cases is beneficial to both parties and promotes the fair administration of the criminal justice system. In light of these developments, the ABA's criminal discovery standards have been substantially amended to reflect the changes in this area of the law.

There were many areas of common ground among the prosecutors, defense attorneys, judges, and academics who participated in drafting and approving the revised standards. At the outset, there was the practical concern that the Second Edition Standards as written were not applied in any jurisdiction because of a perception that in requiring virtually no disclosure by the defense, they did not serve the interests of justice. The drafters sought to produce a revised set of standards that would be widely implemented across the United States. This required that the standards be perceived as fair by both prosecutors and defense attorneys, be consistent with the defendant's constitutional rights, and also serve the interests of the criminal justice system as a whole.
The drafters also shared the desire to avoid discovery rules that could encourage "game-playing" in criminal cases. They agreed that the standards should provide for judicial supervision of the discovery process, including the power to impose sanctions. There was also a consensus that the discovery rules governing discovery from third parties should be spelled out in greater detail, and that the substance of testifying experts' opinions should be disclosed in advance, as is done in civil cases.

On other issues, there was vigorous debate among the drafters. Some defense counsel strongly resisted the idea of requiring the defense to provide extensive information, beyond producing the defendant for physical identification and disclosing the intent to rely on certain specialized defenses, because of the prosecutor's burden to prove that a crime was committed. Among prosecutors, there was concern that the prosecution should not be burdened with extensive discovery disclosures without requiring meaningful disclosures by the defense. Ultimately, the process of debate resulted in a set of standards which proved acceptable to the wide range of groups involved. These revised discovery standards reflect a carefully crafted balance among the conflicting interests at stake, including practical as well as constitutional concerns, resulting from three years of debate and reflection.

The Third Edition Standards, discussed at length in the sections that follow, essentially call for full disclosure of information in the possession of the prosecution, subject to its right to protect the safety of witnesses and information that is privileged by law, and a very limited obligation to generate discoverable material. With respect to the defense, the drafters concluded that the defense should bear significant disclosure obligations beyond those contained in the prior standards. At the same time, the defense's obligations of disclosure are carefully drafted in light of the constitutional rights of the defendant and the differing burdens on the prosecution and the defense in a criminal case.

The most significant change is in the overall approach of the discovery standards. The "two-track" approach of the Second Edition Standards — which combined limited mandatory discovery with broad additional discovery at the election of the defense — has been changed in favor of a simpler approach which applies the same mandatory discovery rules in all cases. Provisions have been added spelling out the discovery required with respect to expert witnesses. A
standard has been added to authorize the use of discovery depositions in very limited circumstances, subject to a number of conditions. Provisions for discovery from third parties have been detailed and expanded. The standard governing discovery sanctions has been strengthened expressly to provide for the exclusion of evidence as a sanction in appropriate cases. Provisions in the prior discovery standards detailing the procedures that should occur before trial have been omitted as matters more appropriately left for determination by local jurisdictions. Certain additional changes, described in the sections that follow, have also been made.

In approaching the Third Edition Standards, it is essential to recognize that they are intended to be considered in their entirety. Although the obligations of the prosecution and of the defense are treated in separate sections of the standards, they are carefully balanced to provide an overall system that is fair to both sides. A contraction or expansion of the obligations of either the prosecution or the defense, without a correlative change in the obligations of the other side, would upset that balance and impair the goals of the standards. It is the drafters' intent that these standards be considered as a unified system of criminal discovery rules.
PART I.
GENERAL PRINCIPLES

Standard 11-1.1. Objectives of pretrial procedures

(a) Procedures prior to trial should, consistent with the constitutional rights of the defendant:
   (i) promote a fair and expeditious disposition of the charges, whether by diversion, plea, or trial;
   (ii) provide the defendant with sufficient information to make an informed plea;
   (iii) permit thorough preparation for trial and minimize surprise at trial;
   (iv) reduce interruptions and complications during trial and avoid unnecessary and repetitious trials by identifying and resolving prior to trial any procedural, collateral, or constitutional issues;
   (v) minimize the procedural and substantive inequities among similarly situated defendants;
   (vi) effect economies in time, money, judicial resources, and professional skills by minimizing paperwork, avoiding repetitious assertions of issues, and reducing the number of separate hearings; and
   (vii) minimize the burden upon victims and witnesses.

(b) These needs can be served by:
   (i) full and free exchange of appropriate discovery;
   (ii) simpler and more efficient procedures; and
   (iii) procedural pressures for expediting the processing of cases.

History of Standard

This standard amends Second Edition Standard 11-1.1 by adding language to state that pretrial procedures should be “consistent with the constitutional rights of the defendant,” and by including as an additional objective the goal of minimizing the burden on victims and witnesses. Small editorial changes to the standard have also been made.

Related Standards

NDAA, National Prosecution Standards 52.1 (2d ed. 1991)
Commentary

Behind the ABA’s Third Edition Discovery Standards lies the fundamental premise that meaningful pretrial discovery promotes fairness and justice in criminal cases.1 By requiring the prosecution and defense to exchange information in advance of trial, discovery procedures help to inform both sides of the strengths and weaknesses of their case, reduce the risk of trial by ambush, focus the trial process on facts genuinely in dispute, and minimize the inequities among similarly situated defendants.2 These general objectives, which motivate the unified set of discovery rules that follow, are set forth in detail in this standard.

The standard is intended to provide a reference point for courts faced with discovery motions or objections. In deciding such issues, the courts should be guided not only by the language of the particular rule at hand, but also more broadly by the overarching objectives behind requiring such pretrial disclosures. Discovery issues call for the court to apply a common-sense rule of reason, fairness, and rationality.

Standard 11-1.1(a)

Paragraph (a) identifies the specific objectives of discovery and other procedures prior to trial. The Third Edition Standards have added new language stating that such pretrial procedures should be “consistent with the constitutional rights of the defendant.” This addition is particularly important in the context of the Third Edition Standards, which require greatly expanded disclosures by the defense. It is intended to emphasize the importance of adopting pretrial procedures that protect the defendant’s constitutionally-protected rights, provide for participation by defense counsel and, where appropriate, give the defense the opportunity to raise objections.

Subparagraph (i) emphasizes that the primary purpose of pretrial procedures is to achieve the constitutional goal of a fair determination of every criminal charge. At the same time, the standard recognizes that promptness in reaching a determination is an element of fairness. By emphasizing that all types of dispositions — whether by diversion,

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1. “Discovery” refers to the process of receiving and giving information relevant to trial preparation. See Britton v. State, 44 Wis. 2d 109, 117, 170 N.W.2d 785, 789 (1969).
plea, or trial — should be fair and expeditious, the standard recognizes that most criminal cases are disposed of without trial, and that discovery procedures should promote the fairness of those dispositions.

Subparagraph (ii) identifies the need to provide the defendant with information sufficient to form the basis for an informed plea. The informed plea is crucial to the integrity of the criminal justice system because a guilty plea waives the defendant's rights to remain silent, to be tried by an impartial jury, to be confronted with the prosecution witnesses, and to present a defense.3

On a more practical level, a defendant who is ill-informed about the circumstances of the case may make judgments that are costly to the individual as well as to the system. An overly optimistic view of the evidence may lead to a wasteful trial, while an unduly pessimistic view of the evidence may lead to a premature plea that is subsequently challenged. The finality of guilty pleas is particularly important because a substantial majority of all cases are resolved by plea.

Subparagraph (iii) recognizes that preparation is essential to the proper conduct of a trial.4 Experienced trial counsel know that effectiveness at trial depends upon meticulous evaluation and preparation of the evidence to be presented. Where counsel's evaluation and preparation are hampered by a lack of information, the trial becomes a pursuit of truth and justice more by chance than by design.5 This can only lead to a diminished respect for the criminal justice system, the judiciary, and the attorneys who participate. With respect to indigent defendants, ensuring thorough preparation for trial involves not only making sure that information will be made available to the defense, but also that resources are provided to allow the defendant to make meaningful use of that information.6

Subparagraph (iv) addresses a related but distinct aspect of trial preparation. A trial involves considerable expenditure of time, energy, talent, and money — both for the parties and the counsel on both

6. See ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES, Standard 5-1.4 (3d ed. 1992) (each jurisdiction should adopt a plan for indigent defendants which "provide[s] for investigatory, expert and other services necessary to quality legal representation," including "not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process").
sides, and for the court system as a whole. This expenditure can be wasted in several ways: by unnecessary mid-trial interruptions and complications; by trying factual issues that should not be in dispute; by premature termination upon a mistrial; and by an ultimate appellate reversal for trial error. All four types of waste can be averted, or at least minimized, by careful pretrial planning that seeks to identify, and resolve prior to trial, issues that would otherwise surface after scarce resources have been committed to the conduct of the trial.

Subparagraph (v) recognizes the need for equal treatment of similarly situated defendants. When the procedures prior to trial are complex, time consuming, and expensive, the outcome in a particular case may depend more upon the defendant’s financial resources, counsel’s legal skills, access to the prosecutor, or even chance, than upon the merits of the defendant’s case. If pretrial procedures are simple, equally available, and reasonably efficient, similarly situated defendants are more likely to receive similar results.

Subparagraph (vi) identifies the realistic fact that there are budgetary constraints that affect the court system. The criminal justice system, like other government services, has finite resources with which to perform its job. Obviously, resources spent on waste, delay, and repetition are not available for more important judicial tasks.

Subparagraph (vii), which is new in the Third Edition Standards, recognizes the significant burden, in terms of time, money, and emotional energy, that is placed upon victims and witnesses during the criminal process. This standard makes clear that, where it is possible to do so, pretrial procedures should seek to minimize that burden.

**Standard 11-1.1(b)**

Experience since the adoption of the First Edition Discovery Standards in 1970 shows that the objectives identified at that time remain valid today. If there is to be progress toward achieving those objectives, it is important that the criminal justice system provide for the full and free exchange of appropriate discovery, simple and efficient procedures prior to trial, and systems that promote the prompt disposition of criminal cases.

**Standard 11-1.2. Applicability**

These standards should be applied in all criminal cases. Discovery procedures may be more limited than those described in these stan-
Standards in cases involving minor offenses, provided the procedures are sufficient to permit the party adequately to investigate and prepare the case.

**History of Standard**

This standard amends Second Edition Standard 11-1.2, deleting the provision that the discovery standards should apply to all "serious" criminal cases, and instead providing expressly that discovery procedures may be more limited in cases involving "minor offenses," so long as they are sufficient to permit parties adequately to investigate and prepare their cases.

**Related Standards**


**Commentary**

The First and Second Edition Standards provided that the discovery rules should be applied in "all serious criminal cases." In the Third Edition Standards, the drafters have changed this language to provide that discovery procedures should be provided in all criminal cases, but that discovery procedures in cases involving "minor" offenses may appropriately be more limited than those set forth in the body of standards that follow. In such cases, however, the discovery procedures should require disclosures sufficient to permit both parties adequately to investigate and prepare for trial.

Whether the standards use the term "serious criminal cases" as in the prior standard, or "minor offenses" as in the new standard, deciding which cases should be subject to full discovery procedures is not an easy determination. The Supreme Court has held that a serious criminal case, for purposes of the right to trial by jury, is one involving an offense punishable by more than six months in prison.1 At the same time, the Court has held that the right to assigned counsel extends to every case in which the defendant may be sentenced to a prison term of any length.2 It has held that certain other rights attach in misdemeanor cases as well as in those involving felonies.3

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The Second Edition Standards declined to adopt a hard-and-fast rule as to what constituted a "serious" criminal case. For example, the drafters considered, and rejected, a rule which would have required the full panoply of criminal discovery procedures in every case involving a potential prison term. Instead, the drafters emphasized that the discovery rules should apply "in all felonies and in serious misdemeanors," but left each jurisdiction to decide for itself the point at which an offense would be serious enough to warrant application of the discovery standards.

The Third Edition Standards follow the same approach. They emphasize two points: first, that some form of discovery procedures should be available in all criminal cases; and second, that discovery rules may be tailored to reflect the seriousness of the offenses at issue. In cases involving minor offenses, full-fledged discovery will not be necessary to accomplish the objectives of pretrial discovery. Indeed, in such cases, the time and expense involved may be disproportionate to the stakes at issue. Thus, the full set of discovery procedures provided in these standards are not appropriate to every criminal action. At the same time, pretrial discovery sufficient to allow both parties to investigate their case and prepare for trial is essential in every case.

In providing that simpler discovery rules may be applied in cases involving "minor offenses," this standard contemplates that the full set of discovery requirements will be applied in all cases involving felonies or serious misdemeanors. As with the prior standards, however, it is left to each jurisdiction to determine how most appropriately to define the types of cases to which this full set of standards will apply, and what category of "minor" offenses are more appropriately handled through less extensive discovery procedures.

Standard 11-1.3. Definition of "statement"

(a) When used in these standards, a "written statement" of a person shall include:


4. Cf. Ill. S. Ct. R. 411 (limiting discovery to offenses for which the defendant "might be imprisoned in the penitentiary").

5. ABA Standards for Criminal Justice, Discovery and Procedure Before Trial, pp. 11-13 to 11-14 (2d ed. 1980).

6. Compare, e.g., Md. R. 4-262 (providing simple discovery procedures for district court cases), with Md. R. 4-263 (providing fuller discovery procedures for circuit court cases).
(i) any statement in writing that is made, signed or adopted by that person; and
(ii) the substance of a statement of any kind made by that person that is embodied or summarized in any writing or recording, whether or not specifically signed or adopted by that person. The term is intended to include statements contained in police or investigative reports, but does not include attorney work product.

(b) When used in these standards, an “oral statement” of a person shall mean the substance of any statement of any kind by that person, whether or not reflected in any existing writing or recording.

**History of Standard**

This is a new standard which has no analog in the Second Edition Discovery Standards.

**Related Standards**

None.

**Commentary**

A definition of “written” and “oral” statements is necessary to the discovery standards because these terms are important in defining the discovery which must be produced by the prosecution and defense. The terms are used both in the standards governing disclosures by the prosecution and by the defense. Because the exchange of “statements” is perhaps the most fundamental aspect of pretrial discovery, the term should be clearly defined.

**Standard 11-1.3(a)**

Paragraph (a) of this standard defines a “written statement.” Under the first part of this section, a written statement of a person is defined to include “any statement in writing that is made, signed or adopted by that person.” A similar term is included in the Jencks Act, which requires federal prosecutors to disclose to the defense the statements of its trial witnesses that relate to their trial testimony. That Act de-

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fines "statement," in relevant part, to include "a written statement made by [a] witness and signed or otherwise adopted or approved by him." These standards adopt a broader definition.

As used in Standard 11-1.3(a)(i), a "written statement" includes, first of all, documents written by the person himself or herself. This includes notes, letters, memos, or other writings of the person. It also includes statements written by someone else and signed by the person or otherwise adopted by him or her as that person's own statement. An actual signature or initials on the statement are not required. It is enough, for example, that a government agent reads back to a witness notes of an interview with that person, and the witness confirms the accuracy of those notes. The witness has then "adopted" the notes as his or her own statement.

The second part of this definition of "written statement" goes on to define a person's written statement to include, as well, "the substance of a statement of any kind made by that person that is embodied or summarized in any writing or recording, whether or not specifically signed or adopted by that person." A "written statement" in this sense includes documents, such as transcripts, which memorialize the statements of a person, as well as any "recording" of a statement, whether by videotape, audiotape, or other means. Significantly, the definition is not limited to verbatim writings or recordings of a statement, but also includes writings which embody the "substance" of a statement. This term is specifically defined to include police or other investigative reports, but to exclude attorney work product.

In this respect, the term "written statement" in the Third Edition Standards goes beyond the comparable term in the Jencks Act. The federal law limits "statements" to writings made, signed or adopted by the person (as discussed above), grand jury testimony, and substantially verbatim, contemporaneous recordings of the person's oral statements. The drafters of the Third Edition Standards concluded

that this definition is unduly narrow. For example, it would not extend to an investigator’s contemporaneous memorandum of a witness’s oral statements which does not qualify as a “substantially verbatim” recording. The drafters concluded that the objectives of criminal discovery as set forth in Standard 11-1.1 are furthered by the pretrial exchange of such information, subject to appropriate protections for privileged material.

Thus, by including statements of a person that are “embodied or summarized in any writing or recording,” the standard goes beyond simply word-for-word records of the person’s oral statements. It would include, for example, an investigator’s notes of an interview of a person not signed or adopted by that person. While federal law does not generally require the production of investigative agents’ reports of witness interviews, even if these records may be relevant to the case,8 such reports would have to be disclosed under the Third Edition Standards.9 A number of state jurisdictions similarly define discoverable “statements” to include summaries of statements.10

The standard specifically provides that “written statements” that qualify as attorney work product are exempt from disclosure. Nothing in the definition of “written statement” is intended to change the general rule, established in Standard 11-6.1, that disclosure should not be required of records containing the opinions, theories, or conclusions of attorneys.11 Under the Third Edition Standards, the issue may arise whether an attorney’s notes of an interview with a witness are dis-

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9. The Third Edition Standard’s definition of “written statement” would similarly include the interview notes of a defense investigator. Under the substantive discovery provisions, however, such notes would be produced by the defense only with respect to its trial witnesses, and not all witnesses it had interviewed. See discussion of Standard 11-2.2, infra.

10. See, e.g., ALASKA R. CRIM. P. 16(b)(1)(i) (calling for disclosure not only of “written or recorded statements” but also of “summaries of statements” by persons with relevant knowledge); ARIZ. R. CRIM. P. 15.4(a)(1)(iii) (a statement includes a “summary of a person’s oral communications”); FLA. R. CRIM. P. 3.220(b)(1)(B) (defining discoverable statements to include statements “summarized in any writing or recording”).

11. See Standard 11-6.1 (Restrictions on disclosure). It should be noted that the protection for attorney work product contained in the Third Edition Standards is narrower than the common law protection, and does not extend to the work product of investigators.
coverable. By specifically providing that “attorney work product” concerning a person is not a “written statement” of that person, it is the drafters’ intent that the notes of an attorney concerning a witness should rarely, if ever, be required to be produced. Such disclosures significantly impede counsel’s effective trial preparation, add little to the truth-finding process, and risk making counsel into a prospective witness at trial.\(^\text{12}\)

**Standard 11-1.3(b)**

The standard defining “written statements,” discussed at length above, encompasses only existing writings or recordings. This reflects the general rule that neither the government nor the defense has an obligation to memorialize the knowledge and recollection of particular witnesses.\(^\text{13}\) However, the drafters concluded that where a defendant has made a relevant oral statement not memorialized in a writing, the prosecution should disclose the substance of that statement to the defense. See Standard 11-2.1(a)(ii). Standard 11-1.3(b) defines what is an “oral statement.”

\(^{12}\) The only exception to this rule would be if the defense placed its counsel’s notes directly at issue in the case, for example, by using them to impeach a witness at trial. See, e.g., State v. Yates, 111 Wash. 2d 793, 796, 765 P.2d 291, 293 (1988); Worthington v. State, 38 Md. App. 487, 493-94, 381 A.2d 712, 716 (1978). Such an affirmative use would waive the attorney work product protection, and require disclosure of the notes at issue.

\(^{13}\) See, e.g., United States v. Martínez-Mercado, 888 F.2d 1484, 1490 (5th Cir. 1989); United States v. Murphy, 768 F.2d 1518, 1533 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986).
PART II.
DISCOVERY OBLIGATIONS OF THE
PROSECUTION AND DEFENSE

Standard 11-2.1. Prosecutorial disclosure

(a) The prosecution should, within a specified and reasonable
time prior to trial, disclose to the defense the following informa-
tion and material and permit inspection, copying, testing, and pho-
tographing of disclosed documents or tangible objects:

(i) All written and all oral statements of the defendant or
of any codefendant that are within the possession or control of
the prosecution and that relate to the subject matter of the of-
fense charged, and any documents relating to the acquisition of
such statements.

(ii) The names and addresses of all persons known to the
prosecution to have information concerning the offense charged,
together with all written statements of any such person that are
within the possession or control of the prosecution and that
relate to the subject matter of the offense charged. The prose-
cution should also identify the persons it intends to call as wit-
tnesses at trial.

(iii) The relationship, if any, between the prosecution and
any witness it intends to call at trial, including the nature and
circumstances of any agreement, understanding or representa-
tion between the prosecution and the witness that constitutes an
inducement for the cooperation or testimony of the witness.

(iv) Any reports or written statements of experts made in
connection with the case, including results of physical or mental
examinations and of scientific tests, experiments, or compar-
sions. With respect to each expert whom the prosecution intends
to call as a witness at trial, the prosecutor should also furnish to
the defense a curriculum vitae and a written description of the
substance of the proposed testimony of the expert, the expert’s
opinion, and the underlying basis of that opinion.

(v) Any tangible objects, including books, papers, docu-
ments, photographs, buildings, places, or any other objects,
which pertain to the case or which were obtained for or belong
to the defendant. The prosecution should also identify which
of these tangible objects it intends to offer as evidence at trial.
11-2.1 Criminal Justice Discovery Standards

(vi) Any record of prior criminal convictions, pending charges, or probationary status of the defendant or of any co-defendant, and, insofar as known to the prosecution, any record of convictions, pending charges, or probationary status that may be used to impeach of any witness to be called by either party at trial.

(vii) Any material, documents, or information relating to lineups, showups, and picture or voice identifications in relation to the case.

(viii) Any material or information within the prosecutor’s possession or control which tends to negate the guilt of the defendant as to the offense charged or which would tend to reduce the punishment of the defendant.

(b) If the prosecution intends to use character, reputation, or other act evidence, the prosecution should notify the defense of that intention and of the substance of the evidence to be used.

(c) If the defendant’s conversations or premises have been subjected to electronic surveillance (including wiretapping) in connection with the investigation or prosecution of the case, the prosecution should inform the defense of that fact.

(d) If any tangible object which the prosecutor intends to offer at trial was obtained through a search and seizure, the prosecution should disclose to the defense any information, documents, or other material relating to the acquisition of such objects.

History of Standard

In the Second Edition Standards, the prosecution’s disclosure obligations were governed by Standards 11-2.1 and 11-2.3. This standard incorporates provisions from those standards, but also substantially revises the prosecution’s disclosure obligations, as described in detail in the discussion that follows.

Related Standards


ABA, Model Rules of Professional Conduct, Rules 3.4(d), 3.8(d) (1994)

Commentary

Standard 11-2.1 identifies those items which the prosecutor is required to disclose to the defense during pretrial discovery. The standard must be read in conjunction with Standard 11-2.2, governing the defense’s pretrial disclosures to the prosecution. Together, these standards provide a unified system of pretrial discovery that is carefully crafted to comply with applicable constitutional rules and to provide a fair balance of obligations upon the prosecution and defense.¹

The Third Edition Standards do not require that a specific request be made by the defense to trigger pretrial discovery obligations for the government. Such a requirement serves little purpose, and can be a trap for unwitting defense counsel. This neither enhances the fairness of the criminal justice system nor promotes equality among similarly situated defendants. Thus, under the revised rules, the prosecution has disclosure obligations in every criminal case, whether or not a defense request for discovery has been made.

Beyond this change, the rules retain the general system of “open file” discovery adopted in the Second Edition Standards, while imposing certain additional obligations. The prosecution’s disclosure obligations are spelled out in greater detail and, in certain cases, expanded. At the same time, as discussed at length in the following section, the prosecution’s disclosure obligations have been balanced with greatly expanded disclosure obligations by the defense.

Standard 11-2.1(a)

Paragraph (a) sets out the discovery the prosecution should provide to the defense in every criminal case subject to these standards.² Such disclosures should be made at a reasonable time prior to trial, to be specified in advance, so that the defense will have a meaningful opportunity to review and analyze the materials.³ What may be a “rea-

¹. The overall scheme of the revised discovery rules is discussed in the Introduction to these standards. See supra.

². As noted in discussing the applicability of the standards, less extensive discovery rules may be adopted in cases involving minor offenses. See Standard 11-1.2.

³. In addition, the defense should not be required to make its discovery disclosures until after it has received and reviewed the prosecution’s discovery materials. See Standard 11-4.1(b).
The exchange of pretrial discovery should be conducted as early as possible, to enable both parties to make meaningful use of the information.\footnote{4. Cf. Standard 11-2.2 (a) (defense disclosures must also be made a "reasonable time prior to trial"); Standard 11-4.1(b) (concerning order of discovery disclosures).}

The prosecution is not required to deliver to defense counsel or the defendant the discovery materials to be produced or to make a copy of those documents.\footnote{5. See State v. Flynn, 479 N.W.2d 477, 479 (N.D. 1992).}

It is sufficient to make such materials available for the defense to inspect and copy (or, where relevant, photograph or test), whether at the prosecutor’s office or at another suitable location.\footnote{6. See, e.g., United States v. Gleason, 616 F.2d 2, 25 (2d Cir. 1979), cert. denied, 445 U.S. 931 (1980); State v. Addicks, 34 Or. App. 557, 560, 579 P.2d 289, 290 (1978).}

The discovery obligations, set forth below, at times refer to materials in the prosecution’s “possession or control.”\footnote{7. Standard 11-4.3(a) provides, similarly, that the parties’ disclosure obligations under the Discovery Standards: extend to material and information in the possession or control of members of the attorney’s staff and of any others who either regularly report to or, with reference to the particular case, have reported to the attorney’s office. Cf. \textit{Fed. R. Crim. P. 16}(a) (referring to materials in the government’s “possession, custody or control”).} However, the prosecutor does not have “possession or control” of materials held by the court, by private firms, or by other, unrelated agencies.\footnote{8. See, e.g., United States v. Bailleaux, 685 F.2d 1105, 1113 (9th Cir. 1982) (information held by the FBI is in the prosecutor’s possession or control); Birchett v. State, 289 Ark. 16, 18, 708 S.W.2d 625, 626 (1986) (information held by police imputed to prosecutor); State v. Swanson, 307 Minn. 412, 422 n.5, 240 N.W.2d 822, 828 n.5 (1976) (material held by police agency is in prosecutor’s possession); State v. Coney, 272 So. 2d 550 (Fla. App.), \textit{cert. dismissed}, 294 So. 2d 82 (Fla. 1973) (same). \textit{See generally People v. Robinson, 157 Ill.2d 68, 80, 623 N.E.2d 352, 358 (1993) (discussing which persons’ knowledge should be imputed to prosecutor).}}

\footnote{9. If the prosecutor is aware that such an independent agency has possession of relevant discovery materials, the prosecution has an obligation to disclose that fact and to make diligent good faith efforts to convince the agency to produce the materials. \textit{See Standard 11-4.3.} If the efforts are unsuccessful, the court should issue a subpoena for the materials. \textit{Id.; see also, e.g., State v. Blackwell, 120 Wash. 2d 822, 826-28, 845 P.2d 1017, 1020 (1993) (defense may subpoena relevant records not in prosecutor’s possession).}
prosecutors do not have "possession or control" of materials held by federal authorities, and vice versa.\textsuperscript{10}

This provision is necessary both to limit and to clarify the scope of the prosecutor's discovery obligations. The prosecutor is required to produce all relevant information held by the team of prosecution and investigatory personnel, and to make a search for such information. He or she cannot plead personal ignorance if such discovery items are not produced. At the same time, the prosecutor is not required to include within the search the files of government employees who do not regularly report to the attorney, and who have not done so with respect to the particular case.\textsuperscript{11}

\subsection*{(i) Statements of the Defendant and Codefendants}

Under subparagraph (i), the prosecutor must produce to the defense all written or oral statements of the defendant or any codefendant that are within the possession or control of the prosecution and relate to the subject matter of the offense charged. In addition, the prosecutor must disclose any documents relating to the acquisition of such statements.

The requirement that the prosecutor provide the defendant with his or her own statements is fundamental.\textsuperscript{12} If the defendant has given a confession, or has made incriminating statements, the defense should be aware of that fact early in the case, both in order to provide effective counsel to the defendant and to determine whether to challenge any statements obtained through unconstitutional means.\textsuperscript{13} Such information is essential in counselling the defendant whether or not to testify, since a statement obtained in violation of the defendant's rights may still be used as impeachment material if the defendant testifies.\textsuperscript{14} If the defendant has given exculpatory statements, such information

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\textsuperscript{12} See, e.g., United States v. Bailleaux, supra, 685 F.2d at 1113; Davis v. United States, 623 A.2d 601, 604 (D.C. 1993) (noting importance of permitting defendant access to his or her own prior statements).

\textsuperscript{13} See Jackson v. Denno, 378 U.S. 368 (1964).

\textsuperscript{14} See Harris v. New York, 401 U.S. 222, 224-25 (1971) (statement obtained in violation of Miranda v. Arizona may be used to impeach defendant's testimony).
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is also highly relevant to the defense.\textsuperscript{15} Similarly, disclosure of the statements of any codefendant both assists in the preparation of the defense, and allows for a timely motion to sever where the codefendant's statement implicates the defendant.\textsuperscript{16}

Not surprisingly, there is uniform agreement on the importance of requiring disclosure of the defendant's own statements. Indeed, in at least one state, the defendant has a constitutional right to inspect, in advance of trial, a written confession upon which the prosecution intends to rely.\textsuperscript{17} The Federal Rules of Criminal Procedure provide, similarly, that the defendant is entitled to examine his or her own statements concerning the offense,\textsuperscript{18} as do the rules of many states, subject to varying limitations.\textsuperscript{19}

Most commentators agree as well that any codefendant's statements should be produced. The National Prosecution Standards, promulgated by the National District Attorneys' Association ("NDAA"), provide that the defense should be given "[a]ny known relevant statements" by the defendant or accomplices, as well as "any oral statements" of the defendant or accomplices the prosecution intends to offer as evidence.\textsuperscript{20} A number of states specifically provide for some


\textsuperscript{18} See FED. R. CRIM. P. 16(a)(1)(A). While the defendant has the right to inspect his or her own written statements and certain oral statements, he or she has no right under the federal rules to the statements of codefendants.

\textsuperscript{19} See, e.g., ALA. R. CRIM. P. 16.1(a); ALASKA R. CRIM. P. 16(b)(1)(i); ARK. R. CRIM. P. 17.1(a)(ii); Fla. R. CRIM. P. 3.220(b)(1)(C); IOWA CRIM. P. § 813.2, Rule 13.2a(1); KAN. CODE CRIM. P. § 22-3212(1)(a); KY. R. CRIM. P., Rule 7.24(1)(a); MD. R.S 4-262(a)(2), 4-263(b)(2); N.J.R. CRIM. PRAC. 3:13-3(a)(2); N.D.R. CRIM. P. 16(a)(1)(A)(i); OHIO R. CRIM. P. 16(B)(1)(a); PA. R. CRIM. P. 305.B(1)(b); R.I.R. CRIM. P. 16(a)(1); TEX. CODE CRIM. P., art. 39.14; UTAH R. CRIM. P. 16(a)(1); W. VA. R. CRIM. P. 16(a)(1)(A); WIS. CODE CRIM. P. § 971.23(1); WY. R. CRIM. P. 16(a)(1)(A)(i)(1).

form of production to the defense of codefendants’ or accomplices’ statements. 21

The Third Edition Standards broadly require the disclosure to the defense of any relevant statements of the defendant or any codefendant, whether written or oral, that are within the prosecution’s possession or control. This provision is to be liberally interpreted, and any statement that “relate[s] to the subject matter of the offense charged” should be produced. 22 Where a corporate defendant is concerned, statements “of the defendant” would include statements made by present and former officers and employees of the entity whose admissions or representations may bind the corporation. 23

This provision does not import any of the limitations on discoverable statements that have developed in various jurisdictions. Rather, a relevant statement should be produced whether made before or during the alleged offense, 24 or before or after arrest. 25 It should be produced whether exculpatory or inculpatory, and whether made to a government agent or a third party. 26 Moreover, all relevant statements, written or oral, should be disclosed whether or not the prosecution will seek to introduce those statements at trial. 27

21. See, e.g., ALA. R. CRIM. P. 16.1(b); ALASKA R. CRIM. P. 16(b)(1)(ii); ARIZ. R. CRIM. P. 15.1(a)(2); ARK. R. CRIM. P. 17.1(a)(ii); FLA. R. CRIM. P. 3.220(b)(1)(D); IOWA CRIM. P. § 813.2, Rule 13.2.a.(2); MD. R. 4-263(b)(3); N.D.R. CRIM. P. 16(f)(2); OHIO R. CRIM. P. 16(B)(1)(i)(a); PA. R. CRIM. P. 305.B(2)(c); R.I.R. CRIM. P. 16(a)(3); UTAH R. CRIM. P. 16(a)(1).

22. While the standard does not extend to statements of “accomplices” who are not codefendants, as the rules of some states do, see, e.g., ALA. R. CRIM. P. 16.1(b), the written statements of accomplices (but not their oral statements) will be subject to production under Standard 11-2.1(a)(ii) in any event.


27. Contrast FED. R. CRIM. P. 16(a)(1)(A) (defendant’s oral statements must be disclosed only if government seeks to use at trial and only if defendant knew he was speaking to government agent).
The term "written statement," as used in this provision, is defined to include not only documents created or adopted by the person, but also other records of any type that embody or summarize the person’s statements. Therefore, the prosecution should produce to the defense any affidavits, police reports, tape recordings, interview notes, grand jury transcripts, letters, memoranda, or other documents or recordings of any type that reflect or summarize statements by the defendant or any codefendant. If only portions of a document or a recording contain relevant statements, an excised copy may be produced.

In addition, if the defendant or any codefendant has given oral statements relating to the offense that are not embodied in an existing writing, the prosecution should memorialize these statements and provide them to the defense. This rule is an exception to the general principle that the government is not required to create discoverable material, and reflects the importance of informing the defendant of all of his or her relevant statements, as well as those of codefendants. A requirement to disclose the substance of the defendant’s oral statements is contained in many state law provisions.

Finally, the prosecution should produce to the defense any documents relating to the acquisition of the statements at issue. For example, if the person has signed any document authorizing that a statement be taken, or waiving any rights in relation thereto, such a document would relate to the acquisition of the statement, and should be produced. If similar information is contained in a police report or portion of such a report, the relevant parts also should be produced. Disclosure of this information is necessary to permit the defense to challenge the admissibility of such statements under applicable law.
or to adduce evidence affecting their reliability under the circumstances.

(ii) Disclosure of Potential Witnesses

Subparagraph (ii) calls for the prosecution to disclose the identity of all persons having knowledge about the case, together with any relevant written statements of these persons, and to identify which of these persons it intends to call as witnesses at trial.32

The Second Edition Standards required the prosecution to disclose the "names and addresses of witnesses,"33 which the commentary interpreted to mean simply "prospective prosecution witnesses."34 This language could be interpreted to require the disclosure only of those persons with incriminatory information, and not those with information helpful to the defense. This result is not in the interest of free and fair pretrial discovery, and leads to frequent and troublesome litigation over the question whether the prosecution has suppressed exculpatory evidence.

Thus, this standard has been revised to specify that the prosecution should disclose "all persons known to the prosecution to have information concerning the offense charged." This is intended broadly to encompass all persons with any relevant knowledge, helpful or harmful to either side. A similar provision is contained in the Uniform Rules of Criminal Procedure, which calls upon the prosecution to disclose "the identity of persons having information relating to the case."35 Several state rules call, similarly, for the disclosure of all persons with relevant knowledge.36

If disclosure of the identity of a witness will create a risk of intimidation or injury, the prosecution may move for a protective order limiting or delaying such a disclosure.37 In crafting an appropriate

32. See Standard 11-6.1(b) (concerning disclosure of confidential government informants).
34. Id., Commentary at 11-18. Compare NDAA, NATIONAL PROSECUTION STANDARDS 53.2(a) (2d ed. 1991) (calling for disclosure of the names and addresses of the prosecution's trial and hearing witnesses).
35. NCCUSL, UNIFORM RULES OF CRIMINAL PROCEDURE, Rule, 421(a) (1987).
37. See Standard 11-6.5 (Protective orders).
Criminal Justice Discovery Standards

While protective orders are available for special cases, it is anticipated that in most cases, the names and addresses of persons with relevant information will be promptly disclosed as a routine matter under the discovery standards.

The prosecution must also disclose any "written statements" of those persons with knowledge about the case that are within its possession or control and relate to the offense charged. This provision has a number of precedents. The pretrial disclosure of all relevant statements relating to the case is called for by the Uniform Rules of Criminal Procedure. The National Prosecution Standards provide, more narrowly, for the disclosure in advance of trial of the statements of prosecution witnesses. A number of state jurisdictions have enacted rules requiring disclosure of witness statements, although others bar discovery of such material.

Federal law does not provide, at present, for the mandatory pretrial disclosure of witness statements in most cases. Under the Jencks Act, disclosure of a witness's statements is required only after the witness testifies on direct examination. Some federal courts have criticized

38. NCCUSL, UNIFORM RULES OF CRIMINAL PROCEDURE, Rule 421(a)(1) (1987) (disclosure of all "statements" relating to the case). See also ALASKA R. CRIM. P. 16(b)(1) (disclosure of statements of all persons known to have knowledge of relevant facts).


41. ALA. R. CRIM. P. 16.1(e); ALASKA STAT. § 12.45.050; KAN. CODE CRIM. P. § 22-3213(1); KY. R. CRIM. P. 7.24(2); OHIO R. CRIM. P. 16(B)(2); TEX. CODE CRIM. P. Art. 39.14; W. VA. R. CRIM. P. 16(a)(2); WYO. R. CRIM. P. 16(a)(2).

42. 18 U.S.C. § 3500(b) (Jencks Act); FED. R. CRIM. P. 16(a)(2). A number of state jurisdictions have a similar rule. See, e.g., McAden v. State, 155 Fla. 523, 527, 21 So. 2d 33, 35, cert. denied, 326 U.S. 723 (1945). However, pretrial disclosures of witness statements are required in federal capital cases. See 18 U.S.C. § 3432 (requiring disclosure at least three days in advance of trial); cf. ARIZ. R. CRIM. P. 15.1(g) (requiring additional discovery disclosures in capital cases); N.J.R. CRIM. PRAC. 3:13-4 (same); EX PARTE Monk, 557 So. 2d 832, 836 (Ala. 1989) (court may order broader discovery from prosecution in death penalty cases).
this rule as contrary to the interest of justice and the orderly administration of the judicial system, and in practice most federal prosecutors — at the urging of trial judges — will disclose statements at least a day in advance of the witness’s testimony. Indeed, there are now pending proposed amendments to the Federal Rules of Criminal Procedure which would provide for the pretrial exchange of witness statements in federal criminal cases.

Requiring defense counsel to review witness statements during trial may operate to deny the defendant the effective assistance of counsel, or lead to repeated recesses or continuances, thereby burdening the courts. Thus, the drafters concluded that there should be an obligation to provide statements to the defense in advance of trial, including the statements of all persons with knowledge about the case.

The standard’s requirement to disclose relevant “written statements” extends to statements embodied in any existing writing or recording, whether or not signed or adopted by the person. It extends to the statements of prosecution and defense witnesses alike. Moreover, if a person has made statements relevant to the case that are recorded or summarized in a police report, the portions of the report containing the statements must be disclosed to the defense. The prosecution must also produce any affidavit, transcript, tape recording, letter, memorandum, note, or other record of a relevant statement. The prosecution has no obligation, however, to create a record concerning the recollection of any person (other than its obligation to memorialize the oral statements of the defendant and any codefendant).

43. See, e.g., United States v. Hinton, 631 F.2d 769, 781-82 (D.C. Cir. 1980) (same-day delivery of witness statements may have denied defendant effective assistance of counsel). In addition, some courts have ordered pretrial disclosure of witness statements in exceptional cases upon a showing of particularized need. See, e.g., United States v. Hearst, 412 F. Supp. 863 (N.D. Cal. 1975).

44. As of August of 1995, a proposal to amend Rule 16 to provide for the exchanges of witness lists in federal criminal cases in certain circumstances was pending before the Judicial Conference.

45. See Standard 11-1.3(a) (defining the term “statement”). Attorney work product, however, is protected from disclosure. Id.


47. See Standard 11-1.3(a) and Commentary.

Finally, the prosecution must disclose which persons it intends to call as witnesses at trial. Merely identifying all persons with knowledge of the case may not provide sufficient information to allow defense counsel efficiently and effectively to prepare a case, particularly in complex or large cases, and will not provide the full benefits of pretrial discovery. Pretrial discovery of witness lists helps to streamline trials, to make the criminal justice system more fair, and to eliminate game-playing.

While there is no constitutional requirement, and no requirement under the current federal criminal rules, that the government disclose its witnesses before trial, federal courts have the discretion to order that such disclosures be made. Both the federal courts and the United States Department of Justice have recognized the benefits of this practice. Similarly, the National Prosecution Standards and the Uniform Rules of Criminal Procedure both contemplate the pretrial disclosure of the government's trial witnesses. A number of state jurisdictions also provide for or require the exchange of witness lists in advance of trial.

49. See, e.g., State v. Verlaque, 465 A.2d 207, 214 (R.I. 1983) (noting that an overload of information "can be as useless as no information at all," court disapproves practice of listing all persons interviewed by state, rather than trial witnesses state actually intends to call).
52. See, e.g., United States v. Jackson, 508 F.2d 1001, 1007 (7th Cir. 1975); United States v. Jordan, 466 F.2d 99, 101 (4th Cir. 1972), cert. denied, 409 U.S. 1129 (1973); United States v. Moceri, 359 F. Supp. 431, 434-35 (N.D. Ohio 1973). As noted earlier, changes have been proposed to the Federal Rules of Criminal Procedure which would provide for the pretrial disclosure of witness lists in federal criminal cases, subject to certain conditions. As of August of 1995, those proposed amendments were pending before the Judicial Conference.
54. NDAA, NATIONAL PROSECUTION STANDARDS 53.2(a) (2d ed. 1991); NCCUSL, UNIFORM RULES OF CRIMINAL PROCEDURE, Rule 422(b)(2) (1987).
55. See, e.g., ARIZ. R. CRIM. P. 15.1(a)(1), 15.2(c)(1); ARK. R. CRIM. P. 17.1(a)(i), 18.3; CAL. PEN. CODE § 1054.1(a), 1054.3(a); CONN. R. CRIM. P. §§ 743, 764; MD. R. 4-263(b)(1); N.J.R. CRIM. PRAC. 3:13-3(a)(7); MINN. R. CRIM. P. 9.01, Subd. 1 (1)(a), 9.02, Subd. 1 (3)(a); OHIO R. CRIM. P. 16(B)(1)(e), 16(B)(1)(c); R.I.R. CRIM. P. 16(a)(6), 16(b)(3); W. VA. R.
The drafters concluded that the Third Edition Standards should require both the prosecution and defense\textsuperscript{56} to identify in advance of trial the witnesses each intends to call.\textsuperscript{57} The prosecution’s disclosure obligations under this standard extend to all witnesses whom the prosecutor has the present intention to call at trial, whether in the government’s case-in-chief or in rebuttal.\textsuperscript{58}

While some questioned whether the government should be required to disclose its rebuttal witnesses, the drafters concluded that prosecutorial disclosure of rebuttal witnesses is necessary to fulfill the objective of minimizing surprise at trial.\textsuperscript{59} A number of states expressly provide for the disclosure of information concerning the state’s rebuttal witnesses.\textsuperscript{60}

Once the initial disclosures of the prosecution’s trial witnesses have been made, the prosecutor should inform the defense immediately if it determines that additional trial witnesses may be called.\textsuperscript{61} While the prosecution is required to identify all trial witnesses, whether for direct or rebuttal, at the time initial discovery disclosures are made, in some cases the prosecutor may determine only later that certain witnesses are necessary. If the prosecutor, acting in good faith, concludes that trial witnesses not identified in pretrial discovery are necessary to its case, the court should permit the government to amend its witness list and, if necessary, provide the defense with additional time.

\textsuperscript{56} See Standard 11-2.2(a)(i).

\textsuperscript{57} Because government witnesses are, by definition, persons with “information concerning the offense charged,” the prosecution will already have provided to the defense their relevant written statements under the first sentence of Standard 11-2.1(a)(ii).

\textsuperscript{58} See, e.g., Izazaga v. Superior Court, 54 Cal. 3d 356, 375, 285 Cal. Rptr. 231, 815 P.2d 304, 316-17, modified in other respects, 54 Cal. 3d 611a (1991) (requirement that state disclose its witnesses includes rebuttal witnesses); Hatcher v. State, 568 So. 2d 472, 474 (Fla. App. 1990), review denied, 557 So. 2d 1328 (Fla. 1991) (same).

\textsuperscript{59} The Federal Rules of Criminal Procedure specifically recognize certain circumstances in which disclosure of rebuttal witnesses is essential to pretrial preparation. See FED. R. CRIM. P. 12.1(b) (requiring disclosure of government witnesses who will rebut alibi); FED. R. CRIM. P. 12.3(a)(2) (requiring disclosure of government witnesses who will rebut defense of public authority).

\textsuperscript{60} See, e.g., ARIZ. R. CRIM. P. 15.1(f); COLO. R. CRIM. P. 16, Part II (c); MINN. R. CRIM. P. 9.02, Subd. 1 (3)(c); MD. R. 4-263(b)(1) (state to make advance disclosure of state witnesses who will rebut alibi testimony); PA. R. CRIM. P. 305.C(1)(c) (same); R.I.R. CRIM. P. 16(c) (same); WIS. CODE CRIM. P. § 971.23(8)(d) (same).

\textsuperscript{61} See, e.g., State v. Finnerty, 45 Ohio St. 3d 104, 106-07, 543 N.E.2d 1233, 1236 (1989); State v. Berg, 326 N.W.2d 14, 16 (Minn. 1982).
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to investigate any new witnesses. Permission to add witnesses may be denied, however, if in the court’s judgment the prosecutor’s failure to identify the witness at an appropriate time before trial reflects bad faith conduct or a deliberate and strategic omission.

(iii) Disclosure of Cooperation Agreements

Under subparagraph (iii), the prosecution should disclose to the defense any relationship it has with any of its trial witnesses, and should provide an explanation of the nature and circumstances of any agreement, understanding, or representation that constitutes an inducement for the cooperation or testimony of the witness. Such information goes to the witness’s bias, and may provide impeachment material to which the defense is constitutionally entitled.

Under this provision, the government is required to disclose, first of all, whether any of its trial witnesses are undercover agents, informants, or government cooperators. Several state laws specifically provide for the prosecution to inform the defense if any information was obtained from informants.

62. See, e.g., State v. Lorraine, 66 Ohio St. 3d 414, 422, 613 N.E.2d 212, 220 (1993), cert. denied, 114 S. Ct. 715 (1994) (state is required to disclose only those witnesses it reasonably should have anticipated it was likely to call); Doyle v. State, 875 S.W.2d 21, 22 (Tex. Ct. App. 1994) (absent a showing of bad faith, state should be permitted to add witness to rebut unforeseen testimony); State v. Tennyson, 850 P.2d 461, 472-73 (Utah App. 1993) (to same effect); State v. Jones, 160 Vt. 440, 447, 631 A.2d 840, 845 (1993) (to same effect).

63. The same standards should be applied with respect to the defendant’s requests to call witnesses not identified in advance of trial. See Standard 11-7.1 (providing for discovery sanctions).

64. Compare ALASKA R. CRIM. P. 16(b)(6)(iii) (prosecution must disclose any relevant material and information concerning the relationship of specified witnesses to the prosecuting authority).


67. ARIZ. R. CRIM. P. 15.1(b)(3) (requiring disclosure of any informant’s identity, subject to certain limitations); ARK. R. CRIM. P. 17.1(b)(ii) (requiring disclosure of any relationship between prosecuting authority and its trial witnesses); FLA. R. CRIM. P. 3.220(b)(1)(G) (state must disclose if any information has been provided by confidential informant).
The prosecution is also required to disclose any cooperation agreement or understanding with a witness or the witness’s counsel, and any representations to induce the witness to testify or cooperate. Government witnesses will at times receive some type of consideration based on their agreement to testify, whether in the form of a guilty plea to reduced charges, consideration in sentencing, or otherwise. If such an arrangement has been made, the defense should be informed of the details, including the particular inducement or encouragement which the government has offered, and should be provided a copy of any relevant documents.68

(iv) Disclosure of Expert Reports

Special rules are necessary with respect to expert reports and testimony because of the often complex issues raised, and the specialized knowledge that may be required to understand such materials. Subparagraph (iv) requires the pretrial disclosure to the defense of all reports and written statements of experts made in connection with the case, whether they involve physical or mental examinations, scientific tests, experiments, or comparisons. With respect to expert witnesses whom the government plans to call at trial, the standard requires certain additional disclosures comparable to those required in civil cases.

There is broad agreement that any expert report or test conducted in connection with a criminal case should be provided to the defense in advance of trial, both on the state and federal level.70 Such disclo-


69. See, e.g., ALA. R. CRIM. P. 16.1(d); ALASKA R. CRIM. P. 16(b)(1)(iv); ARIZ. R. CRIM. P. 15.1(a)(3); ARK. R. CRIM. P. 17.1(a)(iv); COLO. R. CRIM. P. 16, Part I, (a)(1)(III); FLA. R. CRIM. P. 3.220(b)(1)(j); IOWA CRIM. P. § 813.2, Rule 13.2.b.(2); KAN. CODE CRIM. P. § 22-3212(a)(2); ILL. S. CT. R. 412(a)(iv); MD. R.S 4-262(a)(2), 4-263(b)(4); MINN. R. CRIM. P. 9.01, Subd. 1 (4); N.J.R. CRIM. PRAC. 3:13-3(a)(4); N.D.R. CRIM. P. 16(a)(1)(D); N.Y. CRIM. PROC. LAW, § 240.20(1)(c); OR. REV. STAT. § 135.815(3); OHIO R. CRIM. P. 16(B)(1)(d); PA. R. CRIM. P. 305.B(1)(e); R.I.R. CRIM. P. 16(a)(5); W. VA. R. CRIM. P. 16(a)(1)(D); WIS. CODE CRIM. P. § 971.23(5); WYO. R. CRIM. P. 16(a)(1)(D).

70. See, e.g., FED. R. CRIM. P. 16(a)(1)(D) (requiring disclosure of all reports “material to the preparation of the defense or ... intended for use by the government as evidence in chief at the trial”); NCCUSL, UNIFORM RULES OF CRIMINAL PROCEDURE, Rule 421(a) (1987) (all expert reports relating to the case). Cf. NDAA, NATIONAL PROSECUTION STAN-
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sures allow counsel to obtain any expert assistance that may be necessary to understand the reports, and obviate the need for continuances or recesses during trial to absorb this information. Some expert reports may prove after examination to be uncontested, thereby eliminating the need for the expert to testify at trial.

The standard specifies that the prosecution should provide the defense access to any expert reports made “in connection with the case.” If made in connection with the case, the expert report must be produced, whether or not helpful to the prosecutor, and whether or not the prosecution will seek to introduce it at trial. Where such tests have been performed, the government must produce test results of medical or psychiatric examinations, autopsy reports, chemical analyses, blood tests, fingerprint comparisons, and forensic reports. However, this standard does not impose on the prosecution any obligation to conduct particular tests in the case, or to explain to the defense its test results.

With respect to testifying experts, the standard requires that the prosecution obtain and provide to the defense in advance of trial the expert’s curriculum vitae, and a written description of the substance of the proposed testimony, the expert’s opinion, and the underlying basis for that opinion. This rule is similar to the disclosure requirement in federal criminal cases, as well as the requirement applicable in federal civil cases and in some state jurisdictions. This is one of the very limited circumstances in which the prosecution is required to disclose test results.

DARDS 53.2(b) (2d ed. 1991) (requiring disclosure of tests of expert witnesses who will be called at trial).


74. See FED. R. CRIM. P. 16(a)(1)(E) (requiring disclosure of a written summary of the expert testimony the government will use in its case-in-chief at trial, describing the witness’s opinions, the basis of those opinions, and the expert’s qualifications).

75. See FED. R. CIV. P. 26(a)(2)(B).

to create discoverable material; a parallel obligation is imposed with respect to the testifying experts of the defense.\textsuperscript{77}

(v) Disclosure of Tangible Objects and Trial Exhibits

Under subparagraph (v), the prosecution must disclose to the defense, in advance of trial, any tangible objects, including documents, papers, books, photographs, or other objects, or buildings or places, that pertain to the case. The prosecution must also disclose any objects that were obtained from or belong to the defendant. Finally, it must identify which tangible objects it intends to offer as evidence at trial.

The Second Edition Standards simply provided that the prosecution should allow pretrial discovery of all tangible objects which “the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused.” The drafters of the Third Edition Standards revised this language to provide that the prosecution should disclose all tangible objects that “pertain to the case.” This is comparable to the language contained in the Uniform Rules of Criminal Procedure.\textsuperscript{78}

The Federal Rules of Criminal Procedure similarly require the production of all tangible objects “material to the preparation of the defense,” in addition to the defendant’s own documents and certain of the prosecution’s trial evidence.\textsuperscript{79} State rules routinely require production by the prosecution of tangible objects, subject to varying formulations.\textsuperscript{80}

Pretrial production of tangible objects relating to the case is essential to permit the defense to prepare for trial and to avoid burdening the

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\textsuperscript{77} See Standard 11-2.2(a)(ii).

\textsuperscript{78} See NCCUSL, UNIFORM RULES OF CRIMINAL PROCEDURE, Rule 421(a) (1987) (prosecutor must produce “papers, objects, photographs and places” that “relate in any way to the case”).

\textsuperscript{79} See FED. R. CRIM. P. 16(a)(1)(C) (prosecutor must produce any tangible objects which “are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial”).

\textsuperscript{80} See ALA. R. CRIM. P. 16.1(1)(c); ARIZ. R. CRIM. P. 15.1(a)(4); ARK. R. CRIM. P. 17.1(a)(v); CAL. PEN. CODE § 1054.1(c); COLO. R. CRIM. P. 16, Part I, (a)(1)(IV); FLA. R. CRIM. P. 3.220(b)(1)(F),(K); IOWA CRIM. P. § 813.2, Rule 13.2.b.(1); KAN. CODE CRIM. P. § 22-3212(b); KY. R. CRIM. P. 7.24(2); MD. R. 4-263(b)(5),(6); MINN. R. CRIM. P. 9.01, Subd. 1 (3); N.J.R. CRIM. PRAC. 3:13-3(a)(1),(6); N.D.R. CRIM. P. 16(a)(1)(C); OHIO R. CRIM. P. 16(B)(1)(c); PA. R. CRIM. P. 305.B(1)(f); R.I.R. CRIM. P. 16(a)(4); TEX. CODE CRIM. P., art. 39.14; UTAH R. CRIM. P. 16(a)(3); W. VA. R. CRIM. P. 16(a)(1)(C); WIS. CODE CRIM. P. § 971.23(4); WYO. R. CRIM. P. 16(a)(1)(C).
courts with lengthy continuances or recesses during trial to examine such objects. In certain cases, the defense may need access to physical evidence in order to perform its own tests.\footnote{Testing by the defense of physical evidence in the possession of the prosecution is also controlled by Standard 11-3.2, concerning testing or evaluation by experts. See Standard 11-3.2(b).} The defense may also need to examine the crime scene.\footnote{See, e.g., United States v. Ahmad, 53 F.R.D. 186, 190 (D. Pa. 1971).} Providing for discovery of relevant objects and sites in advance of trial ensures that issues of admissibility will be raised in an orderly and well-researched fashion, allows the parties to enter into stipulations simplifying the presentation of proof, and encourages directed cross-examination. The availability of protective orders in appropriate cases conditioning or limiting the disclosure should minimize concerns for the security of the evidence.\footnote{See Standard 11-6.5. For example, it would be appropriate to condition the inspection of evidence upon specified restrictions where necessary to ensure the integrity of the exhibit. E.g., Mobley v. State, 251 Ark. 448, 453, 473 S.W.2d 176, 179-80 (1971).}

In addition to disclosing all relevant objects, the government should identify which tangible objects it intends to introduce at trial. Rules requiring disclosures of trial evidence are common in state jurisdictions,\footnote{See, e.g., State v. Eads, 166 N.W.2d 766, 771 (Iowa 1969); State v. Fowler, 101 Ariz. 561, 564, 422 P.2d 125, 128 (1967); State v. Superior Court, 106 N.H. 228, 230, 208 A.2d 832, 833-34 (1965); State v. Winsett, 57 Del. 344, 350-51, 200 A.2d 237, 240 (1964).} and a provision to this effect is included in the National Prosecution Standards.\footnote{Cf. NDAA, NATIONAL PROSECUTION STANDARDS 53.2(c) (2d ed. 1991) (prosecution should produce any tangible objects it intends to introduce at trial).} The standard is not limited to the prosecution's main case,\footnote{Contrast FED. R. CRIM. P. 16(a)(1)(C) (providing for disclosure of tangible objects to be used in government's case-in-chief).} and the prosecution should specify all of the tangible objects it intends to introduce at trial, whether in its case-in-chief or in rebuttal.

**(vi) Disclosure of Pending Charges and Convictions**

Under subparagraph (vi), the prosecutor must disclose to the defense, in advance of trial, any record of prior criminal convictions, pending charges, or probationary status of the defendant and any co-defendant. Insofar as the information is known to the prosecution, the government must also produce any record of convictions, pending charges, or probationary status that could be used for impeachment.
of witnesses to be called at trial by either the prosecution or the defense.

The Second Edition Standards simply provided for the disclosure of "any record of criminal convictions" of the defendant and any codefendant. This standard has been revised in several respects. The new standard provides, first of all, that any pending charges against or probationary status of the defendant and codefendants should be disclosed in addition to any prior convictions. Such information enables defense counsel effectively to advise the defendant whether to plead guilty, and whether to testify at any trial. It puts the defense on notice of any need to move to restrict the use of prior convictions for impeachment purposes. The defendant's prior record will also reveal whether the defendant is subject to any enhanced sentencing provisions, and the range of possible sentences. This, in turn, is important to advising the client concerning plea negotiations.

The Uniform Rules of Criminal Procedure specifically call for disclosure of the defendant's "record of criminal convictions." The Federal Rules of Criminal Procedure provide, in slightly broader terms, that the defendant's "prior criminal record" must be disclosed by the prosecution. Some courts have held that this rule includes a right to receive the criminal records of any codefendant. A number of state rules specifically provide for the disclosure of the criminal records of defendants, and some also provide for disclosure of the criminal records of codefendants.

Under the Third Edition Standards, the prosecution must make reasonable efforts to determine whether any criminal record exists for the
defendant and any codefendant. The Uniform Rules of Criminal Procedure impose a similar obligation, as do the Federal Rules, which require the prosecutor to exercise "due diligence" in determining whether the specified criminal records exist.

Beyond the criminal records of defendants and codefendants, the Third Edition Standards have been revised to include certain disclosure requirements regarding trial witnesses' criminal records. Some jurisdictions provide by statute or rule for routine disclosures in this area, including disclosures related to both the criminal records of state witnesses and of defense witnesses. In other states, if the criminal record of a witness would provide impeachment material, a number of courts have held that such materials should be produced. If a witness is the subject of pending criminal charges or is in a probationary status, it may provide evidence of the witness's bias, or incentive to give testimony favorable to the prosecution. Certain types of prior convictions may call the witness's truthfulness into question. Providing the defense with this evidence before trial enables defense counsel better to assess the credibility of witnesses, and to prepare targeted cross-examination.

While the Third Edition Standards call for the pretrial disclosure of any convictions, pending charges, and probationary status of wit-
nesses, this standard is subject to important limitations. With respect to witnesses, the government is only required to produce criminal records that are "known to the prosecution." It would place a significant burden on the prosecution to routinely require records searches for all trial witnesses. Thus, this standard imposes no obligation to take affirmative steps to determine whether any trial witness has a criminal record. In addition, the prosecution must produce only those criminal records which may be used for impeachment of the witness. However, if the prosecution runs a general criminal records search for the defense witnesses, such a search should also be run for the prosecution witnesses.

(vii) Disclosure of Line-Up Information

Under subparagraph (vii), the prosecution must make pretrial disclosure of any material, documents, or information relating to any line-up, show-up, or picture or voice identification conducted in relation to the case. Information relating to identification procedures used in the case must be produced during discovery in order to allow the defense a meaningful opportunity to investigate and raise considered objections.

For example, identification procedures conducted without the presence of defense counsel may give rise to constitutional objections under the Sixth Amendment. Exclusion of the out-of-court identification is the sanction for such a constitutional violation. If the procedures used are unduly suggestive, line-ups and show-ups may also give rise to due process objections. It is important to ensure

100. See, e.g., State v. Coney, supra, 294 So. 2d at 87.
101. At the same time, if the prosecution has such impeachment material in its possession, it must be produced, whether that material relates to prosecution witnesses or witnesses for the defense.
102. See, e.g., Mo. R. 4-263(a)(2)(C) (state must disclose material and information concerning pretrial identification of defendant by state witness); PA. R. CRIM. P. 305.B(1)(d) (to same effect).
105. Due process is denied where the identification procedure is so unduly suggestive as to give rise to a substantial likelihood of misidentification. See Manson v.
that any such objections may be identified and raised prior to the commencement of trial.

Under this standard, the defense would be entitled, for example, to examine any photo arrays used to identify the defendant,\textsuperscript{106} and any composite drawings reflecting witnesses' descriptions of a suspect.\textsuperscript{107} The defense would also be entitled to know the procedures followed in any identifications in the case, and to obtain any documents related thereto. By disclosing this evidence prior to trial, any related suppression motions may be resolved before trial, which promotes the smooth functioning of the criminal justice system.

**(viii) Disclosure of Brady Material**

Under the United States Supreme Court's decision in \textit{Brady v. Maryland}, the prosecution is constitutionally required, as a matter of due process, to disclose upon defense request any evidence "favorable to the accused" that is "material either to guilt or to punishment."\textsuperscript{108} Subparagraph (viii) implements that constitutional directive.

Thus, the prosecution is required to disclose to the defense any material or information in its possession or control that tends to negate the guilt of the defendant as to the offense charged or which would tend to reduce the punishment of the defendant. Similar requirements are included in the Uniform Rules of Criminal Procedure\textsuperscript{109} and in the National Prosecution Standards.\textsuperscript{110}

The rule also supplements \textit{Brady} in several respects. First, while the Supreme Court did not specify the timing of such disclosures, the standard makes clear that disclosures of exculpatory information are to be made as part of the pretrial discovery process. Second, the standard does not require any request by the defense to trigger the pro-


\textsuperscript{110} See NDAA, \textsc{National Prosecution Standards} 53.5 (2d ed. 1991). See also ABA \textsc{Standards for Criminal Justice, The Prosecution Function}, Standard 3-3.11(a) (3d ed. 1993); ABA, \textsc{Model Rules of Professional Conduct}, Rule 3.8(d) (1994).
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11-2.1(b)

Prosecution's obligation to produce any evidence that would tend to negate the defendant's guilt or mitigate the punishment. A requirement that a request be made to obtain such discovery can become a trap for unknowledgeable defense counsel, and is contrary to the discovery standards' objective to eliminate game-playing.

Some types of information in the prosecution's hands will be obviously exculpatory. Such material clearly includes, for example, evidence that a government witness has perjured himself, the names of witnesses who would testify favorably for the defense, or the existence of eyewitnesses who could not identify the defendant as the perpetrator in a line-up. As to other types of evidence, whether a particular item of information is exculpatory in nature may be less clear.

The Supreme Court has emphasized, however, that the standard for exculpatory evidence is "inevitably imprecise." Thus, "the prudent prosecutor will resolve doubtful questions in favor of disclosure." As a prophylactic measure against reversible error, and to save court time arguing about discovery omissions, prosecuting attorneys should generally disclose all material that is possibly exculpatory of the defendant. If the prosecution becomes aware, after trial, of exculpatory materials not previously produced, that information, too, should be promptly produced to the defendant.

Standard 11-2.1(b)

While Paragraph (a) of the Prosecutorial Disclosure Standard (discussed at length above) specifies the discovery that should be produced by the prosecution in every case, Paragraphs (b) through (d)
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concern those cases in which certain specialized evidentiary issues will arise, calling for additional discovery disclosures.

Paragraph (b) concerns those cases in which the prosecution intends to use character, reputation, or other act evidence. These types of materials present special evidentiary issues. As a general rule, for example, the defendant's character must be introduced as an issue by the defense in the first instance, while the victim's character will be relevant only in a narrow category of cases. With respect to a witness, only character evidence concerning a reputation for truthfulness may generally be used at trial, and this rule is itself subject to complex limitations. Evidence of other crimes, wrongs, or acts is admissible only for limited and specific purposes.

The Second Edition Standards provided that the prosecution should disclose if it "intends to offer (as part of the proof that the defendant committed the offense charged) evidence of other offenses." The Third Edition Standards expand somewhat on this language, and require that if the prosecution intends to use any "character, reputation or other act evidence," it should notify the defense of that intention and of the substance of the evidence to be used. A correlative requirement is included in the standard governing the disclosure obligations of the defense.

These changes reflect the drafters' conclusion that all three types of evidence present potential evidentiary issues which should be disclosed and resolved prior to trial. A similar disclosure obligation for "other act" evidence is contained in the Federal Rules of Evidence, as well as in the rules of some state jurisdictions. Commentary to the federal rule emphasizes that pretrial notice of such evidence serves

117. See, e.g., FED. R. EVID. 404(a)(1), (2). In addition, even where admissible, character may only be proved with certain types of evidence. See, e.g., FED. R. EVID. 405.
118. See, e.g., FED. R. EVID. 608.
119. See, e.g., FED. R. EVID. 404(b).
120. Cf. NCCUSL, UNIFORM RULES OF CRIMINAL PROCEDURE, Rule 422 (1987) (requiring disclosure of prosecutor's intent to use other, uncharged crimes as part of the proof).
121. See Standard 11-2.2(b) (requiring disclosure of intent to use, and substance of, any character, reputation or other act evidence not relating to defendant).
122. See FED. R. EVID. 404(b) (upon defense request, prosecution must provide reasonable notice in advance of trial of its intent to introduce evidence of other acts, crimes and wrongs).
123. See, e.g., ARIZ. R. CRIM. P. 15.1(a)(6); FLA. STAT. ANN. § 90.404(2)(b); TEX. R. CRIM. EVID. 404(b).
to "reduce surprise and promote early resolution on the issue of admissibility."124

**Standard 11-2.1(c)**

Under paragraph (c), if the defendant's conversations or premises have been subjected to wiretapping or other electronic surveillance in connection with investigation or prosecution of the case, the prosecutor is required to inform the defense as part of its pretrial discovery obligations. This rule serves several functions.

First, the rule allows the defense an opportunity to challenge the legality of the surveillance and the admissibility of any fruits of the surveillance efforts. Because electronic surveillance is a highly intrusive investigative method, the Fourth Amendment's prohibition against unlawful searches and seizures requires that certain standards be met (and the court's authorization obtained) for the use of such surveillance methods.125 If the constitutional and statutory requirements are not followed, the results of the surveillance may be subject to exclusion from evidence at trial. The pretrial determination of such issues is particularly important because the outcome may well render a trial unnecessary, whether because a ruling against the government leads it to decline prosecution, or because a ruling against the defense leads to a guilty plea.

In addition, the rule allows the prosecution to take advantage of any pretrial appellate remedies from an adverse evidentiary ruling on an electronic surveillance issue, without risking double jeopardy consequences. Thus, such pretrial disclosures are in the interests of both parties, as well as the court system as a whole. The Uniform Rules of Criminal Procedure contain a similar disclosure requirement,126 as do some provisions of state law.127

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124. See Commentary to FED. R. EVID. 404(b) at 226 (West 1994).
126. See NCCUSL, UNIFORM RULES OF CRIMINAL PROCEDURE, Rule 422(a)(1)(i) (1987) (requiring disclosure of evidence to be used against the defendant that was obtained as a result of a wiretap or any form of electronic eavesdropping).
Standard 11-2.1(d)

Evidence obtained as a result of a search and seizure may also present constitutional and evidentiary issues which should be resolved prior to trial. The Fourth Amendment's prohibition against unlawful searches and seizures is the subject of an extensive body of case law delineating the requirements of this constitutional provision.\(^\text{128}\) The exclusion of evidence may be a permissible sanction, in some cases, for an unconstitutional search and seizure. It is in the interests of both parties, and the court, to encourage the early resolution of such evidentiary issues.

Under paragraph (d), if the prosecution intends to offer as evidence at trial any tangible object obtained through a search and seizure, the prosecutor must disclose to the defense any information, documents, or other material relating to the acquisition of that object. A similar provision is contained in the Uniform Rules of Criminal Procedure,\(^\text{129}\) as well as in some state rules.\(^\text{130}\)

Standard 11-2.2. Defense disclosure

(a) The defense should, within a specified and reasonable time prior to trial, disclose to the prosecution the following information and material and permit inspection, copying, testing, and photographing of disclosed documents and tangible objects:

(i) The names and addresses of all witnesses (other than the defendant) whom the defense intends to call at trial, together with all written statements of any such witness that are within


\(^{129}\) See NCCUSL, UNIFORM RULES OF CRIMINAL PROCEDURE, Rule 422(a)(1)(i) (1987) (requiring prosecutor to disclose any evidence to be used against defendant which results from search and seizure).

\(^{130}\) See, e.g., ALASKA R. CRIM. P. 16(b)(6)(i) (requiring disclosure of any relevant material and information concerning specified searches and seizures); ARIZ. R. CRIM. P. 15.1(b)(2) (requiring disclosure if there has been a search warrant executed); ARK. R. CRIM. P. 17.1(c)(i) (requiring disclosure of any relevant material concerning specific searches and seizures); FLA. R. CRIM. P. 3.220 (b)(1)(f) (requiring disclosure of whether there has been a search and seizure and any documents relating thereto); MD. R. 4-263(a)(2) (state must disclose relevant material and information concerning specific searches and seizures); NJ.R. CRIM. PRAC. 3:13-3(a)(10) (state must disclose warrants which have been executed and related papers); R.I.R. CRIM. P. 16(a)(9) (to same effect).
the possession or control of the defense and that relate to the subject matter of the testimony of the witness. Disclosure of the identity and statements of a person who will be called for the sole purpose of impeaching a prosecution witness should not be required until after the prosecution witness has testified at trial.

(ii) Any reports or written statements made in connection with the case by experts whom the defense intends to call at trial, including the results of physical or mental examinations and of scientific tests, experiments, or comparisons that the defendant intends to offer as evidence at trial. For each such expert witness, the defense should also furnish to the prosecution a curriculum vitae and a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion.

(iii) Any tangible objects, including books, papers, documents, photographs, buildings, places, or any other objects, which the defense intends to introduce as evidence at trial.

(b) If the defense intends to use character, reputation, or other act evidence not relating to the defendant, the defense should notify the prosecution of that intention and of the substance of the evidence to be used.

(c) If the defense intends to rely upon a defense of alibi or insanity, the defense should notify the prosecution of that intent and of the names of the witnesses who may be called in support of that defense.

History of Standard

In the Second Edition Discovery Standards, the disclosure obligations of the defense were set forth in Standards 11-3.2(a) and 11-3.3. This standard incorporates provisions from those prior standards, but also substantially revises the disclosures which the defense should make during pretrial discovery. These changes are discussed in detail in what follows.

Related Standards

NDAA, National Prosecution Standards 54.3, 54.4 (2d ed. 1991)
ABA, Model Rules of Professional Conduct, Rule 3.4(d) (1994)

Commentary

This standard establishes the basic pretrial disclosure obligations of the defense in a criminal case. It calls for the pretrial production by the defense of five general types of information: (1) an identification of the defendant’s trial witnesses and provision of their statements; (2) a summary of the testimony of the defendant’s expert witnesses to be called at trial; (3) the provision of tangible objects the defendant will introduce at trial; (4) notice of any character, reputation, or other act evidence, not relating to the defendant, which the defense will use at trial; and (5) notice of the defendant’s intent to rely on a defense of alibi or insanity.

This reflects a significant change from the Second Edition Standards, which called for far more limited disclosures by the defense. The change is a considered one. The defense attorneys, prosecutors, judges, and academics revisiting these discovery standards concluded that unless meaningful pretrial disclosures are required of both parties in a criminal case, pretrial discovery cannot serve its intended purposes to enhance the fairness and the efficiency of the criminal justice system. In these standards, while the defense gives up its ability to hold its hand essentially closed until trial, it receives disclosures by the prosecution that significantly enhance its ability to prepare an effective defense. The two standards go hand-in-hand, and must be read together.

The drafters also decided, after considered debate, that the provisions allowing the defense to elect whether or not to participate in significant discovery procedures, which were an important part of the Second Edition Standards, should not be preserved in the Third Edition Standards. While defense election procedures are used in the federal rules,1 as well as the rules of a number of states,2 it was the conclusion of the drafters that the defense’s “choice” whether to participate in discovery is more illusory than real. Rarely, if ever, can

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the defense afford to forego obtaining pretrial discovery from the prosecution, which is needed to prepare a meaningful defense.

At the same time, requiring specific requests before discovery obligations are triggered needlessly complicates the discovery rules, and can be a trap for unknowledgable counsel. The drafters concluded that to be most effective, the discovery standards should provide for mandatory, reciprocal discovery from both parties, with protections against disclosures that would infringe the defendant’s constitutional rights.

The defense disclosure obligations in this standard are carefully crafted to pass constitutional muster. First, the disclosure obligations extend only to evidence the defense will introduce at trial, and do not require the production of any other results of the defense’s investigation. This is an important limitation. The Supreme Court has held requiring pretrial disclosure of the defendant’s trial evidence does not unconstitutionally compel the defendant to incriminate himself, but merely requires him to “accelerate the timing of his disclosure.” When limited to the defendant’s trial evidence, a pretrial disclosure rule is constitutional under the Fifth Amendment.

Second, the discovery rules are also carefully drafted to impose reciprocal requirements on the prosecution and the defense. Indeed, if anything, they require broader disclosures by the prosecution than the defense. This satisfies the Due Process Clause, which requires that a system of discovery rules requiring defense disclosures be “carefully hedged with reciprocal duties requiring state disclosure to the defendant.”

Third, the discovery rules contain specific provisions to protect the defendant’s right against self-incrimination. The defense may not be required to produce any statements by the defendant that are in its possession or control, nor may the defendant be required to submit to a deposition. Moreover, the defense is not required to indicate in advance whether the defendant will testify at trial.

3. See Williams v. Florida, 399 U.S. 78, 85 (1970). See also State v. Drewry, 661 A.2d 1181, 1184-86 (N.H. 1995) (requiring disclosure of witnesses defense will call at trial does not violate constitutional privilege against self-incrimination); Izazaga v. Superior Court, 54 Cal. 3d 356, 369, 285 Cal. Rptr. 231, 239, 815 P.2d 304, 312 (disclosure requirements concerning solely those witnesses the defense will call at trial does not violate the Fifth Amendment), modified in other respects, 54 Cal. 3d 611a (1991).

Fourth, the rules also protect the defendant's constitutional right to confront the witnesses against him. To this end, the defendant is entitled to be present at a deposition to preserve a witness's testimony, since the purpose of such discovery is to obtain a substitute for trial testimony.

Finally, provisions are included to protect the defendant's constitutional Sixth Amendment right to counsel. Thus, the defendant has the right to the presence of counsel at procedures to take physical evidence, such as line-ups, physical examinations, and so on. Defense counsel may be excluded from such procedures only with respect to psychiatric examinations, and only upon court order.

Standard 11-2.2(a)

Paragraph (a) sets out the discovery that the defense should provide to the prosecution in every criminal case that is subject to these discovery standards. Such disclosures should be made at a reasonable time prior to trial, specified in advance. The disclosures required of the defense under this standard should generally occur after the defense has received its discovery from the prosecution. The requirement that the defendant "disclose" the materials to the prosecution is satisfied by making those materials available for the prosecution to inspect and copy (or, where relevant, photograph or test), at a suitable location.

(i) Disclosure of Trial Witnesses and Their Statements

The most significant change in the defense disclosure standard is the addition of a requirement that the defense make advance disclosure of its trial witnesses. Subparagraph (i) provides that the defense should disclose to the prosecution the name and address of all witnesses whom it intends to call at trial. The defense should also provide any written statements of those witnesses that are within its possession or control and relate to the subject matter of their testimony.

This disclosure obligation is subject to several important limitations. The defense is not required to disclose whether or not the defendant will testify, nor to produce any statement of the defendant. With re-

5. As noted earlier, simpler discovery rules may be adopted in cases involving minor offenses. See Standard 11-1.2.
7. See Standard 11-4.2 (governing the manner of performing disclosure).
8. Contrast ARIZ. R. CRIM. P. 15.2(b) (requiring disclosure if the defendant will testify).
spect to pure impeachment witnesses, the defense is not required to disclose any information until after the prosecution witness whose testimony will be impeached has testified at trial.

The mutual exchange of witness lists in advance of trial is recognized to be a salutary practice. Even in the absence of written rules requiring the disclosure of trial witnesses, some courts will order that both the prosecution and the defense disclose their witness lists, to promote an orderly trial process. A number of state jurisdictions require the defense to disclose its trial witnesses as part of a system of reciprocal pretrial discovery.9

The National Prosecution Standards would require the advance disclosure of trial witnesses by both the prosecution and defense.10 The Justice Department Manual similarly suggests that, in certain cases, federal prosecutors may wish to seek reciprocal disclosure of the identity of the trial witnesses for the prosecution and the defense.11 Considering all of the arguments for and against, the drafters of the Third Edition Standards concluded that including a requirement that the parties exchange witness lists in advance of trial is important to the effectiveness of the discovery standards.12

The standard also requires the disclosure of the “written statements” of any of defense’s trial witnesses that are within its possession or control. Requirements that the defense provide pretrial discovery of the statements of its trial witnesses are contained in a number of state rules.13 The National Prosecution Standards also pro-

9. See, e.g., ARIZ. R. CRIM. P. 15.2(b), 15.2(c)(1); ARK. R. CRIM. P. 18.3; CAL. PEN. CODE § 1054.3(a); COLO. R. CRIM. P. 16, Part II, (c); FLA. R. CRIM. P. 3.220(d)(1)(A); MINN. R. CRIM. P. 9.02, Subd. 1 (3)(a); N.J.R. CRIM. PRAC. 3:13-3(b)(3); OHIO R. CRIM. P. 16(C)(1)(c); PA. R. CRIM. P. 305.C(2)(b); R.I.R. CRIM. P. 16(b)(3); W. VA. R. CRIM. P. 16(b)(1)(C); WIS. CODE CRIM. P. § 971.23(3)(a).
10. See NOAA, NATIONAL PROSECUTION STANDARDS 53.2(a), 54.3(a) (2d ed. 1991).
12. See, e.g., State v. Drewry, 661 A.2d 1181, 1183 (N.H. 1995) (noting the “overriding necessity of the exchange of witness lists for the fair and efficient conduct of trials”). As noted earlier, defense disclosures will generally be made only after the prosecution has made its disclosures. Thus, the defense will not be required to decide on its trial witnesses until after it knows who the prosecution plans to call. See Standard 11-4.1(b).
13. See, e.g., CAL. PEN. CODE § 1054.3(a); FLA. R. CRIM. P. 3.220(d)(1)(B); PA. CODE § 1054; MINN. R. CRIM. P. 9.02, Subd. 1 (3)(b); N.J.R. CRIM. PRAC. 3:13-3(b)(3); R.I.R. CRIM. P. 16(b)(4).
provide for the prosecution and the defense to disclose, in advance of trial, the relevant statements of their trial witnesses.\(^{14}\) The drafters concluded that allowing both parties advance access to the statements of trial witnesses enhances the fairness of the proceeding, and minimizes mid-trial recesses and continuances otherwise necessary to allow the parties to absorb these materials during trial.

The meaning of a "written statement" for purposes of these rules is discussed at length in connection with Standard 11-1.3(a), which defines the term, and with Standard 11-2.1(a)(i) and (ii), which requires the prosecution to disclose specified written statements. The term includes both statements that the witness has created, signed, or adopted, and writings that embody or summarize the witness's knowledge, whether or not signed or adopted by the witness. Notes or memos written by defense counsel would generally qualify as attorney work product, which is exempt from disclosure.\(^{15}\) However, memoranda prepared by defense investigators reflecting relevant statements by the defense's trial witnesses must be produced.\(^{16}\)

The requirement to produce relevant written statements of the defendant's trial witnesses extends only to those statements within the defense's "possession or control." This term would include any statements held by the defense attorney or his staff, investigators, or others reporting to him.\(^{17}\) However, defense counsel does not have "possess-
sion or control" of materials held by third parties who are not part of the defense team.\footnote{18}

Finally, the standard contains an important limitation on the timing of the disclosures required with respect to defense impeachment witnesses. Where a defense witness’s testimony will support a substantive defense to the offense charged, the disclosure of the witness’s name and address, and any relevant statements, must be made in advance of trial. However, where a defense witness will be called for the sole purpose of impeaching a prosecution witness’s anticipated testimony, disclosures concerning that witness are delayed until after the prosecution witness has testified.\footnote{19} Courts should, where necessary, provide the prosecution with additional time to investigate any such impeachment witness.

By delaying the disclosure of the defendant’s impeachment witnesses, this standard contrasts with the obligation imposed on the prosecution, which must disclose its rebuttal witnesses in advance of trial.\footnote{20} After significant debate, the drafters concluded that this difference was necessary because requiring advance disclosure of defense impeachment witnesses could unfairly require the defense to assist the prosecution in the presentation of its case-in-chief.

Thus, the standard delays the required disclosures concerning the defense’s pure impeachment witnesses until after the prosecution witness has given the testimony to be impeached. Where a defense witness’s testimony will both support a substantive defense and provide impeachment material, that witness must be identified in advance of trial. In such a case, the defense must also make pretrial disclosure of those portions of any written statement that relate to the witness’s relevant, nonimpeachment testimony. As to the government’s witnesses whom the defense merely intends to cross-examine, no disclosure requirement is imposed.\footnote{21}

\footnote{18. If defense counsel is aware that third parties have possession of relevant discovery materials, he or she has an obligation to disclose that fact and to make diligent good faith efforts to convince the third party to produce the materials. See Standard 11-4.3. If the efforts are unsuccessful, the court should issue a subpoena for the materials. \textit{Id.}}\footnote{19. Compare, e.g., Wis. Code Crim. P. § 971.23(3)(a) (requirement to disclose trial witnesses does not apply to impeachment witnesses).} \footnote{20. See discussion of Standard 11-2.1(a)(ii), supra.} \footnote{21. See, e.g., People v. Castro, 835 P.2d 561, 562-63 (Colo. App. 1992) (defense does not “call” witnesses it merely cross-examines), aff’d, 854 P.2d 1262 (Colo. 1993).}
(ii) Disclosure of Expert Reports

Under subparagraph (ii), for each expert witness whom the defense plans to call at trial, the defense must obtain and provide to the government a summary of the witness's proposed testimony. This rule is necessary in order to provide the government reasonable time to analyze the proposed testimony, raise any objections, and consult or retain experts concerning possible rebuttal testimony.

Expert testimony is often complex, and may require detailed analysis. Test results and statistical analyses may be subject to different interpretations, depending on the analytical model used. If reports are not available until after an expert has testified, a lengthy adjournment may be necessary prior to cross-examination—particularly if the government must consult its own expert to understand the report. Thus, there is broad agreement among commentators that any expert reports or tests that the defense intends to introduce as evidence at trial should be provided to the prosecution in advance.

Many state jurisdictions impose similar disclosure rules.

With respect to experts who will testify for the defendant, the standard requires that the defense obtain and provide to the government, in advance of trial, the expert’s curriculum vitae and a written description of the substance of the proposed testimony, the expert’s


24. See, e.g., FED. R. CRIM. P. 16(b)(1)(C) (requiring disclosure of a written summary of the testimony of defense trial experts where the defense has requested analogous material from the prosecution). See also NCCUSL, UNIFORM RULES OF CRIMINAL PROCEDURE, Rule 423(g) (1987); NDAA, NATIONAL PROSECUTION STANDARDS 54.2 (2d ed. 1991).

25. See, e.g., ALA. R. CRIM. P. 16.2(c); ALASKA R. CRIM. P. 16(c)(4); ARIZ. R. CRIM. P. 15.2(c)(2); ARK. R. CRIM. P. 18.2; CAL. PEN. CODE § 1054.3(a); COLO. R. CRIM. P. 16, Part II, (b); FLA. R. CRIM. P. 3.220(d)(1)(B)(ii); IOWA CRIM. P. § 813.2, Rule 13(3)(b); KAN. CODE CRIM. P. § 22-3212(c); KY. R. CRIM. P. 7.24(3)(A)(ii); MD. R. 4-263(d)(2); MINN. R. CRIM. P. 9.02, Subd. 1 (2); N.J.R. CRIM. PRAC. 3:13-3(b)(1); N.D.R. CRIM. P. 16(b)(1)(B); OHIO R. CRIM. P. 16(C)(1)(b); PA. R. CRIM. P. 305.C(2)(a); R.I.R. CRIM. P. 16(b)(2); W. VA. R. CRIM. P. 16(b)(1)(B); WIS. CODE CRIM. P. § 971.23(5); WYO. R. CRIM. P. 16(b)(1)(B). See also Caldwell v. State, 260 Ga. 278, 291, 393 S.E.2d 436, 445 (1990).
opinion, and the underlying basis for that opinion. This rule is similar to the disclosure requirement applicable in federal civil cases.\(^{26}\)

(iii) Disclosure of Tangible Objects

Subparagraph (iii) is a new provision that requires the defense to make pretrial disclosure to the prosecution of any tangible objects, such as books, papers, documents, photographs, buildings, or places, which the defense intends to introduce as evidence at trial. While such a rule was not contained in the Second Edition Standards, the drafters concluded that the pretrial exchange of relevant tangible objects is essential to the objectives of the discovery standards.\(^{27}\) Such disclosures help to reduce surprise at trial and minimize mid-trial recesses and delays, and allow the prosecution to investigate the authenticity of exhibits prior to trial.

Similar provisions are contained in the Federal Rules of Criminal Procedure, the Uniform Rules of Criminal Procedure, and the National Prosecution Standards. Each provides for the defense to disclose to the prosecution, in advance of trial, any tangible objects within its possession or control which it intends to introduce as evidence at trial, subject to varying limitations.\(^{28}\) For example, while the Federal Rules limit the defense's disclosure of tangible objects to its "evidence in chief" at the trial, the Uniform Rules and the Prosecution Standards require disclosure of all such evidence the defense intends to offer. A number of state rules also require pretrial disclosure of tangible objects which the defendant intends to introduce at trial.\(^{29}\)

\(^{26}\) Compare Fed. R. Civ. P. 26(a)(2)(B). See also, e.g., Fed. R. Crim. P. 16(b)(1)(c) (defendant who seeks expert witness discovery from government must provide written summary of defense expert's testimony); N.J.R. Crim. Prac. 3:13-3(b)(5) (requiring that defense obtain report from its expert trial witness to provide to prosecution).

\(^{27}\) The prosecution is required both to produce to the defense all tangible objects relating to the case, and to specify which tangible objects it intends to introduce at trial. See Standard 11-2.1(a)(v).

\(^{28}\) See Fed. R. Crim. P. 16(b)(1)(A) (obligation to disclose tangible objects imposed only if defense seeks documentary or expert discovery from prosecution); NCCUSL, Uniform Rules of Criminal Procedure, Rule 423(i) (1987) (same); NDAA, National Prosecution Standards 54.3(c) (2d ed. 1991) (no such limitation).

\(^{29}\) See, e.g., Ala. R. Crim. P. 16.2(a); Ariz. R. Crim. P. 15.2(c)(3); Cal. Pen. Code § 1054.3(b); Iowa Crim. P. § 813.2, Rule 13(3)(a); Kan. Code Crim. P. § 22-3212(c); Ky. R. Crim. P. 7.24(3)(A)(i); Minn. R. Crim. P. 9.02, Subd. 1 (1); N.J.R. Crim. Prac. 3:13-3(b)(2); N.D.R. Crim. P. 16(b)(1)(A); Ohio R. Crim. P. 16(C)(1)(a); R.I.R. Crim. P. 16(b)(1); W. Va. R. Crim. P. 16(b)(1)(A); Wis. Code Crim. P. § 971.23(4); Wyo. R. Crim. P. 16(b)(1)(A).
The Third Edition Standard requires the disclosure of all tangible objects the defense "intends to introduce as evidence at trial," whether in its case-in-chief or otherwise. This includes any tangible objects, such as documents, tapes, or other materials, which the defense intends to use at trial to impeach a witness. The drafters concluded that, in contrast to impeachment witnesses, the pretrial disclosure of tangible impeachment evidence is necessary to allow the government to examine such materials, and seek the pretrial resolution of any objections related to their authenticity.

This disclosure requirement, however, should not be interpreted in any manner that would deny the defendant a fair opportunity to present evidence at trial. Despite the exercise of due diligence, the defense may learn during trial of additional relevant evidence that it wishes to introduce, or evidence previously known to the defense may become relevant as the trial develops. New impeachment evidence may become available. Where defense counsel has acted in good faith, the defendant should not be precluded from introducing tangible evidence at trial, even if it was not produced during pretrial discovery.30

Standard 11-2.2(b)

The introduction of character, reputation, or other act evidence are all subject to complex evidentiary rules. These rules are discussed at some length in connection with the prosecution disclosure standards.31 With respect to a witness, for example, only character evidence concerning the person’s reputation for truthfulness may be used at trial, and this is subject to a number of limitations.32

Because character, reputation, and other act evidence is frequently the subject of evidentiary objections, it is particularly appropriate to require advance disclosure of such evidence. This allows such disputes to be resolved in advance of trial, so that both parties will know the scope of the evidence to be admitted. While the Second Edition Standards did not impose such a requirement on the defense, these

30. Where defense counsel has acted in bad faith, the extreme sanction of excluding evidence may be warranted in certain exceptional cases. See Taylor v. Illinois, 484 U.S. 400, 416-17 (1988); cf. Commentary to Standard 11-7.1.
31. See Commentary to Standard 11-2.1(b).
32. See, e.g., FED. R. EVID. 608 (evidence of untruthful character may be used to attack witness’s credibility; thereafter, evidence concerning his or her truthfulness may be used to rehabilitate).
policy reasons are equally applicable whether the disclosures are re-
quired of the prosecution or the defense.

Thus, just as the Third Edition Standards require the prosecution to
give advance notice of its intent to rely on character, reputation, or
other act evidence (and the substance of the evidence to be used),33
under subparagraph (iii) the defense is required to make disclosure
of any character, reputation, or other act evidence it plans to use in
questioning any witness at trial. The defense is not required to disclose
whether it intends to use character, reputation, or other act evidence
relating to the defendant.34

**Standard 11-2.2(c)**

The Second Edition Standards required advance disclosure by the
defendant of any intent to rely upon a defense based upon an alibi or
a "mental disease, mental defect, or other condition bearing on the
defendant's mental state."35 The Third Edition Standards provide,
slightly more narrowly, that the defendant must make advance dis-
closure of any intent to rely upon a defense of "alibi or insanity." While
this disclosure requirement is less important under the new
discovery standards, providing notice of these specialized defenses
continues to serve a useful function.

Numerous jurisdictions require that the defense disclose in advance
of trial an intention to rely upon certain specialized defenses such as
alibi or insanity. Such rules have long been upheld as constitutional.36
A majority of the states require some form of advance notice of an
alibi defense37 or insanity defense.38 The Federal Rules require the ad-

33. See Standard 11-2.1(b).
34. This proviso, however, does not relieve the defense of its obligation to identify
and provide statements for any character witnesses it plans to call at trial. See Standard
11-2.2(a)(i).
35. See ABA STANDARDS FOR CRIMINAL JUSTICE, DISCOVERY AND PROCEDURE BEFORE
TRIAL, Standard 11-3.3(a) (2d ed. 1980).
of alibi defense).
37. See R. Mosteller, Discovery Against The Defense: Tilting the Adversarial Balance, 74
CAL. L. REV. 1567, 1574 n.16, 1577 n.25 (1986) (14 states adopted notice of alibi rules
between 1927 and 1942; 25 additional states adopted such rules between 1970 and 1984).
See, e.g., COLO. R. CRIM. P. 16, Part II, (d); MD. R. 4-263(d)(3); MINN. R. CRIM. P. 9.02,
Subd. 1 (3)(a),(c); N.D.R. CRIM. P. 12.1; PA. R. CRIM. P. 305.C(1)(a); R.I.R. CRIM. P. 16(c);
UTAH R. CRIM. P. 16(c); W. VA. R. CRIM. P. 12.1; WIS. CODE CRIM. P. § 971.23(8); WYO.
R. CRIM. P. 12.1.
38. See, e.g., ALASKA R. CRIM. P. 16(c)(5); KY. R. CRIM. P. 7.24(3)(B)(i); MINN. R. CRIM.
vance disclosure of alibi and insanity defenses, and also of defenses based on other mental conditions or on public authority (for example, a claim that the defendant was working for an intelligence agency).39 Both the Uniform Rules of Criminal Procedure and the National Prosecution Standards call for the pretrial disclosure of alibi and insanity defenses.40

The pretrial disclosure of the defendant's intent to invoke the specialized defenses of alibi and insanity is important because it avoids surprise at trial, allows both parties to prepare their cases, and minimizes mid-trial delays. The defendant's invocation of an insanity defense, for example, may entitle the prosecution to seek a psychiatric examination of the defendant.41 Where alibi witnesses will be called, the prosecution needs time to investigate the credibility of those witnesses. Pretrial disclosure of these defenses allows such preparations to be completed prior to trial. For these reasons, the Third Edition Standards require that if the defense intends to rely upon a defense of alibi or insanity, it must notify the prosecution of that intent and of the names of the witnesses who may be called in support of that defense.

While the drafters considered whether the disclosure obligation should extend to defenses in addition to alibi and insanity,42 they concluded that requiring disclosure of all defenses is unnecessary, since the Third Edition Standards expand the pretrial disclosure obligations of the defense to include disclosure of its trial witnesses and evi-
dence.\textsuperscript{43} Thus, the government will already have in hand significant information concerning anticipated defenses. In addition, with respect to defenses based on mental condition, the prosecution will already receive from the defense a report for any psychiatric experts to be called to support such a defense.\textsuperscript{44}

Nonetheless, a disclosure requirement in this area continues to serve a valuable function, particularly with respect to alibi defenses. The prosecution will not necessarily be able to determine, from reviewing a list of defense witnesses, whether the defendant will rely on an alibi defense, and which witnesses relate to that defense. With respect to insanity defenses, by requiring formal disclosure of such a defense, the prosecution will be placed on notice that it must obtain court approval for any appropriate examinations of the defendant that it may wish to conduct.\textsuperscript{45}

**Standard 11-2.3. The person of the defendant**

(a) After the initiation of judicial proceedings, the defendant should be required, upon the prosecution’s request, to appear within a time specified for the purpose of permitting the prosecution to obtain fingerprints, photographs, handwriting exemplars, or voice exemplars from the defendant, or for the purpose of having the defendant appear, move, or speak for identification in a lineup or try on clothing or other articles. Whenever the personal appearance of the defendant is required for the foregoing purposes, reasonable notice of the time and place of such appearance should be given by the prosecuting attorney to the defendant and the defendant’s counsel.

(b) Upon motion by the prosecution, with reasonable notice to defendant and defendant’s counsel, the court should, upon an appropriate showing, order the defendant to appear for the following purposes:

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


\textsuperscript{44} See Standard 11-2.2(a)(ii).

\textsuperscript{45} See Standard 11-2.3(b). See generally ABA Standards for Criminal Justice, Criminal Justice Mental Health Standards, Standard 7-3.4 (1986).
(ii) to permit the taking of samples of other materials of the body;
(iii) to submit to a reasonable physical or medical inspection of the body; or
(iv) to participate in other reasonable and appropriate procedures.

(c) The motion and order pursuant to paragraph (b) above should specify the following information where appropriate: the authorized procedure, the scope of the defendant's participation, the name or job title of the person who is to conduct the procedure, and the time, duration, place, and other conditions under which the procedure is to be conducted.

(d) The court should issue the order sought pursuant to paragraph (b) above if it finds that:
(i) the appearance of the defendant for the procedure specified may be material to the determination of the issues in the case; and
(ii) the procedure is reasonable and will be conducted in a manner which does not involve an unreasonable intrusion of the body or an unreasonable affront to the dignity of the individual; and
(iii) the request is reasonable.

(e) Defense counsel may be present at any of the foregoing procedures unless, with respect to a psychiatric examination, it is otherwise ordered by the court.

History of Standard

This revises Second Edition Standard 11-3.1, which set forth the procedures for obtaining physical evidence from the defendant. The principal changes were to eliminate the requirement that a court order be obtained before the defendant must appear for identification in a line-up or to try on articles, and to amend the standard which the court applies in ruling on motions to obtain physical evidence from the defendant. In addition, explicit provision is made for defense counsel's presence at such procedures, unless the court orders otherwise in the case of a psychiatric examination.

Related Standards

NDAA, National Prosecution Standards 54.1 (2d ed. 1991)
Commentary

This standard sets out the procedures for obtaining physical evidence from the defendant following the initiation of judicial proceedings. These procedures are divided into two categories. Routine physical evidence, including fingerprints, photographs, handwriting samples, and participation in line-up or show-up procedures, are to be provided upon the prosecution's request. Such evidence is nontestimonial and nonintrusive, and will not generally require judicial review. Any other procedures for obtaining bodily samples or for physical or mental examination of the defendant requires a court order, which is issued only upon a showing that the evidence is material and that both the request and proposed procedures are reasonable.

Standard 11-2.3(a)

Frequently, the police or agents will have obtained the defendant's fingerprints and photograph prior to arraignment. Such pre-arraignment procedures, however, are not treated in these discovery standards. Instead, paragraph (a) is limited to procedures to obtain routine physical evidence after judicial proceedings have been initiated against the defendant, whether by indictment, information, or otherwise. This standard is included to encourage the use of noncustodial methods of arrest, such as summonses, appearance tickets, and the like, by allowing the prosecution to obtain, on demand, certain information normally acquired before the filing of charges.

Certain of the physical evidence which must be produced by the defendant upon demand under this standard — fingerprints, photographs, handwriting exemplars, and voice exemplars — will not implicate the defendant's constitutional rights. Such evidence is held to be nontestimonial, and thus its compelled disclosure does not infringe the defendant's Fifth Amendment right against self-incrimination.1 Moreover, such evidence involves physical characteristics exposed to the public, as to which the defendant has no reasonable expectation of privacy. Thus, its required disclosure does not raise issues under the Fourth Amendment, particularly when it follows the probable

cause finding necessary for the initiation of judicial proceedings.\(^2\) Nor does the defendant have a Sixth Amendment right to have counsel present when giving such exemplars.\(^3\) Therefore, it is particularly appropriate to provide that these types of evidence be disclosed upon prosecution demand.

With respect to the defendant's participation in line-ups or show-ups, or other identification procedures, there is a greater potential for constitutional issues to be raised. While they do not raise issues of self-incrimination under the Fifth Amendment,\(^4\) the defendant has a Sixth Amendment right to have counsel present during such procedures,\(^5\) and may object to any procedures which are so unduly suggestive as to raise due process concerns.\(^6\) Under the Second Edition Standards, the prosecution was required to obtain a court order to compel the defendant's appearance for such purposes.\(^7\)

Such a rule, however, places a significant burden on the parties and the courts because of the frequency of the need for identification procedures. In addition, the defendant's constitutional rights may be protected by provisions less burdensome than requiring the government to obtain a court order in every case. The drafters of the Third Edition Standards concluded that these procedures, as a general matter, should be performed by agreement of the parties without judicial intervention.

The standard provides that the defendant, upon prosecution request, must present himself for the purpose of appearing, moving or speaking for identification in a lineup, or trying on clothes or other articles (such as wigs or jewelry). To protect the defendant's consti-


\(^7\) See ABA Standards for Criminal Justice, Discovery and Procedures Before Trial, Standard 11-3.3(c)(i) (2d ed. 1980).
Criminal Justice Discovery Standards

11-2.3(b)

Paragraphs (b), (c) and (d) set forth the procedures and standards to be applied in seeking any other type of physical evidence from the defendant. This includes, for example, the taking of bodily specimens (such as blood, urine, saliva, breath, hair, nails, or other materials), submission to X-rays or other physical examinations, and other reasonable and appropriate procedures. Mental examinations of the defendant are among the procedures that may be ordered under this standard.

Such procedures may only be performed upon motion and court approval, with notice to the defendant and his or her counsel. These procedures are necessary to ensure that there is a legitimate need for the procedures, and that they will not be performed in an unduly intrusive manner. The defendant has a Fourth Amendment right to be free of unreasonable searches and seizures, including unreasonable searches of his body. The Supreme Court has held that even as minor an intrusion as the removal of fingernail scrapings must comply with the Fourth Amendment. Thus, to obtain bodily samples from the defendant (unlike evidence of his external physical attributes such as appearance, voice, or handwriting), the prosecution must obtain a court order, and must give the defendant an opportunity to raise objections.

A significant change from the Second Edition Standards is that the procedures governed by paragraph (b) are not limited to "non-testimonial" evidence. Thus, the procedures which may be authorized include psychiatric examinations as well as physical tests. This change reflects rulings by the courts that defendants who raise an insanity

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8. See Standard 11-6.5.
defense, or otherwise put their mental condition into question in a
criminal case, must submit to an examination by a prosecution-ap­
pointed mental health professional.\textsuperscript{12}

\textbf{Standard 11-2.3(c)}

Paragraph (c) explains the types of conditions that the court should
specify in an order granting permission to conduct physical tests or
mental examinations of the defendant. Such an order should specify,
where appropriate, the procedure that is being authorized, the scope
of the defendant's participation, the name or job title of the person
performing the procedure, and the time, duration, place, and other
conditions under which the procedure is to be performed.

\textbf{Standard 11-2.3(d)}

Under paragraph (d), an order requiring the defendant to submit
to procedures to obtain physical evidence should only be issued if the
court finds that three conditions are met: (1) the information sought
is material to determination of issues in the case; (2) the proposed
procedure is reasonable and does not involve undue intrusion of the
body or an unreasonable affront to the defendant's dignity; and (3)
the request is reasonable. This test is substantially similar to the test
contained in the Second Edition Standards.

This standard ensures that any physical procedures to be performed
on the defendant will comport with the Fourth Amendment's prohi­
bition against unreasonable searches and seizures.\textsuperscript{13} The standard is
intended to be co-extensive with the requirements of that constitu­
tional provision. The provision for judicial supervision of such pro­
cedures is particularly important where the prosecution seeks to per­
form unusual or experimental discovery procedures.

To order that procedures be performed, the court must first find
that requiring the defendant's appearance for the contemplated pro­
cedures is "material to the determination of the issues in the case." A
similar, although slightly higher, standard is contained in the Uniform

\footnotesize{12. See United States v. Byers, 740 F.2d 1104, 1115 (D.C. Cir. 1984) (en banc); Hartless
v. State, 327 Md. 558, 564, 611 A.2d 581, 584 (1992); State v. Hutchinson, 111 Wash. 2d
872, 880, 766 P.2d 447, 452 (1989). See also, e.g., ALASKA R. CRIM. P. 16(c)(5) (defendant
who raises insanity defense must submit to examination by court-appointed psychia­
trist). See generally ABA STANDARDS FOR CRIMINAL JUSTICE, CRIMINAL JUSTICE MENTAL
HEALTH STANDARDS, Standard 7-3.4 (1986).

Rules of Criminal Procedure. These require a showing of "good cause" to believe that the evidence sought "may be relevant and material in determining whether the defendant committed a crime charged" before the court may issue an order requiring the defendant to submit to physical procedures.\(^\text{14}\) Under the Third Edition Standard, the prosecution must show that the evidence to be generated from the proposed procedure is relevant to issues in the case.

If the court finds that the prosecution is seeking material evidence, it must next consider whether the proposed procedure is reasonable, and will be conducted in a manner that will not involve unreasonable intrusion into the defendant's body or an unreasonable affront to his or her dignity. This test is concerned with the general reasonableness of the contemplated procedure — for example, whether the procedure involves a routine and accepted medical practice.\(^\text{15}\) It is also concerned with the impact of that procedure on the defendant, whether, for example, equivalent evidence could be obtained through an equally suitable but less onerous procedure. If the procedure involves an "unreasonable" intrusion or affront to the defendant's dignity, it should not be permitted.\(^\text{16}\)

Finally, the court must also consider whether the request is reasonable, considering both the benefits to the prosecution and the detriment to the defendant. If a procedure will create minimal benefits to the prosecution, but will impose a significant burden on the defense, such a request would not be reasonable in this sense.\(^\text{17}\) Other factors that may be relevant to the reasonableness of the request include the possibility that it is designed to harass the defendant, the availability of the requested evidence from other sources, and the timing of the application.\(^\text{18}\)


\(^{17}\) Cf. Camara v. Municipal Court, 387 U.S. 523, 539 (1967) (balancing society's interest and the personal interest at stake in the intrusion).

Standard 11-2.3(e)

Paragraph (e) provides that the defendant has a right to the presence of counsel at procedures to gather bodily evidence from him, except if the court orders otherwise in the case of a psychiatric examination. This is a new provision included in the standard to ensure that the defendant's right to the presence of counsel during certain physical procedures will be protected. Similar rules are applicable in a number of state jurisdictions.

This right may be waived by the defendant in appropriate instances. For example, there may be no need for the presence of counsel at such routine procedures as fingerprinting or photographing the defendant. Defense counsel should attend identification procedures such as line-ups, which may create a risk of harm to the defendant's rights if the procedures used are suggestive or unfair.

With respect to psychiatric examinations, the courts have held that the defendant does not have a right to have counsel present at such an examination. Defense counsel does not have a legitimate function at such an examination, since, unlike a line-up, he or she is not there to make objections which may eliminate constitutional defects in the procedure. Thus, this standard provides that defense counsel may be excluded from a psychiatric examination of the defendant, but only upon order of the court.

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19. See discussion, supra, concerning the defendant's Sixth Amendment and Due Process rights.

20. See, e.g., ALA. R. CRIM. P. 16.2(b) (defendant entitled to have counsel present at procedures to gather physical evidence); ALASKA R. CRIM. P. 16(c)(3) (right to counsel at line-up and giving of speech or handwriting exemplar); ARIZ. R. CRIM. P. 15.2(a) (defendant has right to presence of counsel at procedures to gather physical evidence).


22. Id. In addition, if the defendant has put the question of his or her sanity in issue, the defendant has no privilege against self-incrimination applicable to statements made during the prosecution's psychiatric examination. United States v. Byers, supra, 740 F.2d at 1111 (citing cases); State v. Pawlyk, 115 Wash. 2d 457, 460, 800 P.2d 338, 340 (1990).
PART III.
SPECIAL DISCOVERY PROCEDURES

Standard 11-3.1. Obtaining nontestimonial information from third parties

(a) Upon motion by either party, if the court finds that there is good cause to believe that the evidence sought may be material to the determination of the issues in the case, the court should, in advance of trial, issue compulsory process for the following purposes:

(i) To obtain documents and other tangible objects in the possession of persons not parties to the case.

(ii) To allow the entry upon property owned or controlled by persons not parties to the case. Such process should be issued if the court finds that the party requesting entry has met the standard that the government would be required to meet to obtain access to the property at issue.

(iii) To obtain from a third party fingerprints, photographs, handwriting exemplars, or voice exemplars, or to compel a third party to appear, move or speak for identification in a lineup, to try on clothing or other articles, to permit the taking of specimens of blood, urine, saliva, breath, hair, nails, or other materials of the body, to submit to a reasonable physical or medical inspection of the body, or to participate in other reasonable and appropriate procedures. Such process should be issued if the court finds that:

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

(2) the request is reasonable.

(b) The motion and the order should specify the following information where appropriate: the authorized procedure; the scope of participation of the third party; the name or job title of the person who is to conduct the procedure; and the time, duration, place and other conditions under which the procedure is to be conducted.

(c) A person whose interests would be affected by the compulsory process sought should have the right and a reasonable oppor-
11-3.1 Criminal Justice Discovery Standards

The opportunity to move to quash the process on the ground that compliance would subject the person to an undue burden, or would require the disclosure of material that is privileged or otherwise protected from disclosure, or would otherwise be unreasonable.

History of Standard

In the Second Edition Standards, the procedures for obtaining evidence from third parties are set forth in Standard 11-4.8. This incorporates provisions from that standard, but also substantially expands upon the provisions for third-party discovery, as set forth in detail below.

Related Standards


Commentary

In the Second Edition Standards, a single provision governed all aspects of obtaining evidence from third parties. Prior Standard 11-4.8(a) authorized the courts to issue orders requiring third parties to participate in the taking of depositions, to submit to identifications and tests, and to permit the review and copying of records and documents.

In the Third Edition Standards, the procedures for obtaining testimonial and nontestimonial information from third parties have been separated into different standards. Standards 11-5.1 and 5.2 govern requests for depositions of third parties. Standard 11-3.1, discussed in this section, is limited to requests for nontestimonial information, such as documents, tangible objects, inspections of property, fingerprints, photos, other exemplars, and physical examinations.

In criminal cases, significant evidence may be in the exclusive possession of third parties. To allow for effective trial preparation and to eliminate surprise, the discovery standards must provide some mechanism for allowing both the prosecution and defense access to this information during the discovery period. At the same time, third par-

1. While the prosecution generally has the power before indictment to issue grand jury subpoenas to obtain access to third party evidence, that power is not usually avail-
ties have legitimate privacy interests that may be infringed by requiring them to disclose information. Thus, careful judicial supervision is required of discovery requests to third parties.2

Special issues are also presented with third-party discovery because such persons frequently will not be represented by counsel. By making all third-party discovery subject to judicial control, the court can make appropriate accommodations for third parties' inexperience with legal proceedings, and for any difficulty the third party may have in accumulating or submitting the ordered discovery. Solicitude for the interests and concerns of third parties must be balanced against the parties' legitimate need for information in their possession.

The Federal Rules of Criminal Procedure provide that the court may issue subpoenas, in advance of trial, commanding that third parties produce books, papers, documents, or other objects.3 The comparable provisions in the Uniform Rules of Criminal Procedure allow nontestimonial evidence to be obtained from third parties on a "probable cause" showing.4

**Standard 11-3.1(a)**

Paragraph (a) describes the types of information that may be sought from third parties, and sets out the standard to govern such requests.5 In each instance where the prosecution or defense seeks information from a third party, that party must make a motion with the court. The court should grant compulsory process only if it finds "good cause to

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3. See FED. R. CRIM. P. 17. See also Branzenburg v. Hayes, 408 U.S. 665 (1972) (upholding court's subpoena power over third party). See also, e.g., ALASKA R. CRIM. P. 17(c) (court may issue subpoenas to require pretrial disclosure of documents or objects by third parties); OHIO R. CRIM. P. 17(C) (same); W. VA. R. CRIM. P. 17(c) (same).

4. See NCCUSL, UNIFORM RULES OF CRIMINAL PROCEDURE, Rules 436, 437 (1987); see also id. Rule 433 (providing for physical and mental examinations of third parties upon showing that they are "essential" witnesses and there is "probable cause" to believe their testimony is not credible).

5. The Second Edition Standards did not expressly state the standard that should govern in deciding whether to order third-party disclosures. See ABA STANDARDS FOR CRIMINAL JUSTICE, DISCOVERY AND PROCEDURES BEFORE TRIAL, Standard 11-4.8(a) (2d ed. 1980).
believe” that the evidence sought “may be material to the determination of issues in the case.”

Under the provision, the parties may seek access to documents or other tangible objects in the hands of third parties. They may also seek access to property owned or controlled by third parties, subject to additional limitations. Such requests raise special concerns because a person’s home and property is constitutionally protected against unreasonable searches and seizures.

Thus, the standard provides that where a party seeks to inspect property, the court should issue the process if it finds that the party requesting entry to property has met the standard that the government would be required to meet to obtain access to the property at issue. In other words, there must be probable cause to believe that information relevant to the crimes charged will be found on the premises. Absent this limitation, there is too great a danger of unconstitutional infringement on third parties’ privacy interests.

Finally, the prosecution or defense may request certain physical evidence from third parties. It may seek to have a third party provide fingerprints, photographs, handwriting or voice samples, to participate in identification procedures such as a line-up, or to try on clothing or other articles. It may also seek to obtain specimens of the third party’s blood, urine, saliva, breath, hair, nails, or other bodily materials, or to have the third party submit to a medical examination.

To grant such a request, the court must first find that the proposed procedure is reasonable and will not involve an undue intrusion of the body or affront to the person’s dignity. For example, requiring persons to provide fingerprints, photos, handwriting or voice exemplars, or other evidence of outward appearance are procedures which are held to be reasonable and non-intrusive. Other procedures may

6. As noted, the Uniform Rules of Criminal Discovery require a “probable cause” showing instead of “good cause.” See NCCUSL, UNIFORM RULES OF CRIMINAL PROCEDURE, Rules 436(a)(2), 437(a)(2) (1987) (process to be issued if there is “probable cause” to believe that third-party nontestimonial information “may be of material aid in identifying who committed the crime”).


involves greater intrusions, but may nonetheless be considered reasonable if the evidence sought is highly material.\(^9\)

Second, the court must also find that the request is reasonable. A request would not be reasonable, for example, if equivalent evidence already exists or can readily be obtained elsewhere.\(^10\) Particularly sensitive questions are presented with respect to requests for involuntary psychiatric examinations of third parties,\(^11\) or physical examinations of sex abuse victims.\(^12\) This standard calls for the court, based on the circumstances of the case, to balance the privacy interests of the third party against the party’s need for the information sought. If the detriment and inconvenience to the third party outweigh the benefit of disclosure to the requesting party, the court should deny disclosure.

**Standard 11-3.1(b)**

Paragraph (b) specifies the information that should be contained in a motion seeking non-testimonial information from third parties. Such a motion should specify, where appropriate, the procedure to be performed, the scope of the third party’s participation, the name or job title of the person to perform the procedure, and the time, duration, and other conditions under which it will be conducted.

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\(^9\) A finding of “reasonableness” for such bodily searches may be required by the Fourth Amendment. See *Winston v. Lee*, 470 U.S. 753, 760 (1985).

\(^10\) Cf. NCCUSL, UNIFORM RULES OF CRIMINAL PROCEDURE, Rules 436(a)(3), 437(a)(3) (1987) (to obtain third-party non-testimonial evidence, party must show that “the evidence sought cannot practicably be obtained from other sources”).


\(^12\) See, e.g., *State v. Farr*, 558 So. 2d 437, 438 (Fla. App. 1990) (defendant who sought second medical examination of child sex abuse victim failed to show that compelling circumstances required such examination, or any threat of deprivation of due process); *State v. Drab*, 546 So. 2d 54, 56 (Fla. App. 1989), *review denied*, 553 So. 2d 1164 (Fla. 1989) (same).
Standard 11-3.1(c)

The Third Edition Standards add a new standard making clear that third parties have the right to move to quash compulsory process requiring them to disclose information. Under paragraph (c), third parties whose interests are affected must be given a reasonable opportunity to move to quash on grounds that compliance would involve an undue burden, would require the disclosure of privileged or protected information, or would otherwise be unreasonable. Such a motion may be filed before or after process issues.13

The courts must be particularly careful to protect third parties against unnecessary intrusions, because the judicial system relies heavily on the willing participation of citizens in the prosecution and defense of criminal defendants. The courts should carefully consider any motions to quash filed by interested third parties, as well as any informal objections received by unrepresented parties.

Standard 11-3.2. Preservation of evidence and testing or evaluation by experts

(a) If either party intends to destroy or transfer out of its possession any objects or information otherwise discoverable under these standards, the party should give notice to the other party sufficiently in advance to afford that party an opportunity to object or take other appropriate action.

(b) Upon motion, either party should be permitted to conduct evaluations or tests of physical evidence in the possession or control of the other party which is subject to disclosure. The motion should specify the nature of the test or evaluation to be conducted, the names and qualifications of the experts designated to conduct evaluations or tests, and the material upon which such tests will be conducted. The court may make such orders as are necessary to make the material to be tested or examined available to the designated expert.

13. In many cases, the third party may not receive notice of the request until served with the compulsory process itself. While the drafters considered requiring that the party seeking to obtain evidence serve any interested third parties, such a requirement is not practicable because it may not be evident whom all of the interested parties will be.
(i) The court should condition its order so as to preserve the integrity of the material to be tested or evaluated.
(ii) If the material is contraband material or a controlled substance, the entity having custody of the material may elect to have a representative present during the testing of the material.

History of Standard

This standard incorporates and applies to both sides Second Edition Standard 11-2.1(b)(iii), which provided that the prosecution may not destroy or transfer out of its possession any discoverable objects without providing advance notice to the defense. In addition, the standard includes a new provision setting forth procedures to govern requests to test physical evidence in the possession of the opposing party.

Related Standards

NCCUSL, Uniform Rules of Criminal Procedure, Rule 421(a) (1987)

Commentary

In the Second Edition Standards, the prosecution was required to notify the defense if it intended to conduct scientific tests which may consume or destroy the subject of the test, or to dispose of relevant physical objects. A similar provision is included in the Uniform Rules of Criminal Procedure. The Third Edition Standards expand on this obligation, making it applicable to both sides in a criminal case, and adding a provision that enables each party to conduct tests on evidence within the possession of the other party, subject to certain conditions.

This provision is necessary to ensure that both parties will have equal access to the relevant physical evidence, and will be able to conduct whatever testing or evaluation may be necessary for trial preparation.

Standard 11-3.2(a)

If either party intends to destroy or transfer out of its possession any objects or information that would otherwise be discoverable un-

2. See NCCUSL, UNIFORM RULES OF CRIMINAL PROCEDURE, Rule 421(a) (1987).
der these standards,\(^3\) that party must give notice in sufficient time to allow the opposing party to object or take other appropriate action. For example, a party may wish to seek a court order requiring that specified evidence in the hands of its opponent be preserved for use at trial.

A special situation is presented when the prosecution intends to conduct tests which will consume or destroy the evidence, thereby precluding the defense from conducting its own tests.\(^4\) In such cases, appropriate arrangements must be made to protect the interests of both sides. This might include, for example, providing for the defense to have a representative present at the test, or requiring that certain evidence be preserved for defense testing.

Where the parties cannot agree, the procedures to be followed should be decided by the court on a case-by-case basis.

**Standard 11-3.2(b)**

This standard, which is new, provides that either party, upon motion, should be permitted to conduct evaluations or tests on physical evidence in the possession of the other side. This standard fleshes out Standard 11-2.1(a)(v), which requires that the prosecution allow defense testing of tangible objects in its possession which are subject to disclosure, and Standard 11-3.1(a)(iii), which imposes a corresponding obligation on the defense. Similar provisions are contained in some state rules.\(^6\)

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\(^3\) The basic scope of materials discoverable under these standards are governed by Standard 11-2.1 with respect to the prosecution, and Standard 11-2.2 with respect to the defense.

\(^4\) See, e.g., Green v. Commonwealth, 684 S.W.2d 13, 16 (Ky. Ct. App. 1984) (destruction of drug sample renders test results inadmissible unless defendant is provided a reasonable opportunity to participate in testing, or is provided with notes and other information necessary to obtain his own expert evaluation); Calvert v. Commonwealth, 708 S.W.2d 121, 124 (Ky. Ct. App. 1986) (same holding with respect to blood samples).

\(^5\) Cf. NCCUSL, UNIFORM RULES OF CRIMINAL PROCEDURE, Rule 421(a) (1987) (where prosecution tests will consume the evidence, prosecution should give defense "reasonable notice and opportunity to be present and to have an expert observe or participate in the test or experiment"); MINN. R. CRIM. P. 9.01, Subd. 1 (4) (to similar effect).

\(^6\) See, e.g., ARIZ. R. CRIM. P. 15.1(c), 15.2(d); MINN. R. CRIM. P. 9.01, Subd. 1 (4); WIS. CODE CRIM. P. § 971.23(5); cf. James v. Commonwealth, 482 S.W.2d 92, 94 (Ky. 1972) (finding implicit in discovery rules a defense right to test relevant materials).
Such a motion should specify the nature of the test, the names and qualifications of the expert to perform it, and the item upon which the test will be conducted. The court may make such orders as are necessary to allow the test to proceed. Where appropriate, the court may impose conditions to preserve the integrity of the material to be tested or evaluated.7

Under this provision, for example, the defense may seek to conduct its own ballistic tests or analysis of body tissues, clothing, or other materials.8 The defense may also submit controlled substances for independent testing.9 With respect to tests of contraband or controlled substances, the standard provides that the entity with custody may elect to have a representative present during the testing.10


10. See Standard 11-3.2(b)(ii).
PART IV.
TIMING AND MANNER OF DISCLOSURE

Standard 11-4.1. Timely performance of disclosure

(a) Each jurisdiction should develop time limits within which discovery should be performed. The time limits should be such that discovery is initiated as early as practicable in the process. The time limit for completion of discovery should be sufficiently early in the process that each party has sufficient time to use the disclosed information adequately to prepare for trial.

(b) The time limits adopted by each jurisdiction should provide that, in the general discovery sequence, disclosure should first be made by the prosecution to the defense. The defense should then be required to make its correlative disclosure within a specified time after prosecution disclosure has been made.

(c) Each party should be under a continuing obligation to produce discoverable material to the other side. If, subsequent to compliance with these standards or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the other party should promptly be notified of the existence of such additional material. If the additional material or information is discovered during or after trial, the court should also be notified.

History of Standard

This standard incorporates the provisions of Second Edition Standard 11-4.2, which imposes on both parties a continuing duty to disclose information. It also contains new and expanded provisions concerning the timing of discovery disclosures. In the Second Edition Standards, the issue of timing was addressed only in Standard 11-2.2(a), which simply provided that the prosecution should make disclosure to the defense as soon as practicable following a request.

Related Standards

NCCUSL, Uniform Rules of Criminal Procedure, Rules 421(a), (c), 422(a) (1987)
Commentary

This standard deals with the timing of the disclosures required of each party under the discovery standards, and the parties' continuing obligation to produce discoverable material.

*Standard 11-4.1(a)*

While the discovery standards specify the steps which should be included in discovery in a criminal case, they leave to local jurisdictions to determine the appropriate time limits within which that discovery should be performed. Each jurisdiction should develop specific time limits to this end. Paragraph (a) specifies that these limits should have two objectives. They should ensure that discovery will begin as early as practicable following the initiation of judicial proceedings. At the other end, they should impose time limits for discovery sufficiently in advance of trial to give each party adequate time to use the disclosed information to prepare its case.

*Standard 11-4.1(b)*

Paragraph (b) provides that, as a general matter, the time limits adopted by each jurisdiction should provide that disclosure first be made by the prosecution to the defense. Within a set time thereafter, the defense should then be required to make its corresponding disclosures. This general sequence is essential since the defense cannot meaningfully determine what defenses, witnesses, and evidence it will put on until after it learns the case that the prosecution plans to mount.\(^1\)

*Standard 11-4.1(c)*

Paragraph (c) makes clear that neither the prosecution nor the defense satisfies its obligations under these discovery standards simply by disclosing those items on hand at the time that obligation arises. Rather, the duty to disclose continues, and attaches to all relevant information that may subsequently be acquired, developed, or located by the party. The Federal Rules of Criminal Procedure impose on both parties a continuing duty to disclose information acquired before or after

\(^1\) Compare FLA. R. CRIM. P. 3.220(d)(2) (defense makes disclosures following receipt of corresponding disclosures from prosecution).
during trial, as do a number of state rules. The Uniform Rules of Criminal Procedure impose such a continuing duty on the prosecution.

The continuing duty of disclosure has several important purposes. It ensures that discoverable materials will be promptly disclosed to the other side, thereby permitting meaningful trial preparations. It also minimizes the "game-playing" that would occur if a disclosure duty attached only at the time initial disclosures were required, and obviates the need for both parties to make periodic pro forma demands for the disclosure of any relevant materials that have surfaced since the last request. This continuing duty to disclose may have constitutional as well as practical underpinnings.

The duty to disclose under this standard continues indefinitely. Obviously, information found or developed during trial may affect the outcome. Even after trial, however, the discovery of exculpatory material may require reevaluation of the fairness of the conviction or of the sentence. The discovery of incriminating evidence, by contrast, may affect the defendant's decision to challenge the conviction or sentence by appeal or collateral attack.

If, before the beginning of a trial, a party discovers additional information which is subject to disclosure, it is sufficient to promptly notify the opposing party. However, where such information is discovered during or after trial in the case, the party must also notify the court. This notice requirement permits the court to act promptly, during trial, to ensure the fairness of the proceedings. Depending upon

2. See Fed. R. Crim. P. 16(c).
3. See, e.g., Ala. R. Crim. P. 16.3; Alaska R. Crim. P. 16(d)(2); Ariz. R. Crim. P. 15.6; Ark. R. Crim. P. 19.2; Colo. R. Crim. P. 16, Part III, (b); Fla. R. Crim. P. 3.220(j); Iowa Crim. P. § 813.2, Rule 13(5); Kan. Code Crim. P. § 22-3212(g); Ky. R. Crim. P. 7.24(8); Md. R. 4-263(h); Minn. R. Crim. P. 9.03, Subd. 2; N.J.R. Crim. Prac. 3:13-3(f); N.D.R. Crim. P. 16(c); Ohio R. Crim. P. 16(D); Pa. R. Crim. P. 305.D; R.I.R. Crim. P. 16(h); Utah R. Crim. P. 16(b),(c); W. Va. R. Crim. P. 16(c); Wis. Code Crim. P. § 971.23(7); Wyo. R. Crim. P. 16(c). See also Commonwealth v. Bryant, 390 Mass. 729, 747, 459 N.E.2d 792, 803-Q4 (1984).
5. See, e.g., Schwartzmiller v. Winters, 99 Idaho 18, 20, 576 P.2d 1052, 1054 (1978) (prosecution's failure to inform defendant of victim's actions in changing testimony and in suborning perjury of a friend denied defendant the right to adequate time to prepare a defense challenging victim's veracity).
the nature of the information, the court may grant a continuance or take other action to minimize any prejudice resulting from the timing of the disclosure.

Similarly, providing notice to the court following trial ensures that the information will get proper attention. For example, if information affecting the fairness of a conviction surfaces only after defendant's counsel has been discharged, the court may need to appoint new counsel to evaluate that information on the defendant's behalf.

Standard 11-4.2. Manner of performing disclosure

Disclosure may be accomplished in any manner mutually agreeable to the parties. Absent agreement, the party having the burden of production should:

(a) notify opposing counsel that material and information, described in general terms, may be inspected, obtained, tested, copied, or photographed during specified reasonable times; and

(b) make available to opposing counsel at the time specified such material and information and suitable facilities or other arrangements for inspection, testing, copying, and photographing of such material and information.

History of Standard

This standard incorporates and makes applicable to both sides Second Edition Standard 11-2.2(b), which governed the manner of performing prosecutorial disclosures.

Related Standards

NCCUSL, Uniform Rules of Criminal Procedure, Rules 421(a), 422(a) (1987)

Commentary

This standard governs the manner of performing disclosures required under the discovery standards. Such disclosures may be accomplished in any manner agreeable to the parties, and the parties are encouraged to agree upon a mutually acceptable arrangement for making such productions.
If the parties cannot agree on a manner of production, the party producing the materials should notify the other side that material and information, described in general terms, may be examined during specified times. The times provided must be reasonable, and must give the other side sufficient time to review and copy the materials, or otherwise examine them. The party making the production must also provide suitable copying or testing facilities.  

The nature of the access to be afforded will differ depending on the type of information being disclosed. Physical evidence may need to be manipulated or tested, sites or buildings may need to be photographed, and documents copied. In every instance, the party making the production has the duty to ensure that the other side is given reasonable access to the information being disclosed, and to seek any protective orders necessary to ensure the integrity of the evidence. Neither party has a duty to interpret or explain the significance of discovery materials for the other side.

**Standard 11-4.3. Obligation to obtain discoverable material**

(a) The obligations of the prosecuting attorney and of the defense attorney under these standards extend to material and information in the possession or control of members of the attorney’s staff and of any others who either regularly report to or, with reference to the particular case, have reported to the attorney’s office.

(b) The prosecutor should make reasonable efforts to ensure that material and information relevant to the defendant and the offense charged is provided by investigative personnel to the prosecutor’s office.

(c) If the prosecution is aware that information which would be discoverable if in the possession of the prosecution is in the possession or control of a government agency not reporting directly to the prosecution, the prosecution should disclose the fact of the existence of such information to the defense.

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1. As to nonindigent defendants, the government may require the defense to reimburse copying costs where there are voluminous records in the case. See United States v. Freedman, 688 F.2d 1364, 1366 (11th Cir. 1982).

2. See, e.g., NDAA, NATIONAL PROSECUTION STANDARDS 53.3, 54.4 (2d ed. 1991) (concerning access to buildings or places).

(d) Upon a party's request for, and designation of, material or information which would be discoverable if in the possession or control of the other party and which is in the possession or control of others, the party from whom the material is requested should use diligent good faith efforts to cause such material to be made available to the opposing party. If the party's efforts are unsuccessful and such material or others are subject to the jurisdiction of the court, the court should issue suitable subpoenas or orders to cause such material to be made available to the party making the request.

(e) Upon a showing that items not covered in the foregoing standards are material to the preparation of the case, the court may order disclosure of the specified material or information.

**History of Standard**

This standard incorporates and makes applicable to both sides three provisions of the Second Edition Standards, each of which had applied only to one side: Second Edition Standard 11-2.1(d), which defined the scope of materials considered to be within the prosecution's possession or control; Second Edition Standard 11-2.4, which imposed on the prosecution an obligation to attempt to obtain and provide to the defense discoverable materials held by other personnel; and Second Edition Standard 11-2.5(a), which empowered the court to order disclosure to the defense of additional material information not specified in the standards.

The standard also includes two provisions applicable specifically to the prosecution. It incorporates and amends Second Edition Standard 11-2.2(c), governing the prosecution's duty to take steps to ensure that relevant material is provided to the prosecutor by investigatory personnel. Finally, the standard includes a new provision specifying that the prosecution should inform the defense if it is aware that another government agency holds discoverable information.

**Related Standards**

NCCUSL, Uniform Rules of Criminal Procedure, Rules 421(a), (d) (1987)
NDAA, National Prosecution Standards 53.5 (2d ed. 1991)

**Commentary**

This standard is drawn from various provisions of the Second Edition Standards. Some of those standards governed the prosecution's duty
to disclose, while others were limited to the defense. This standard is intended to bring together, in a single rule applicable to both sides, the general obligations of both parties to obtain discovery information.

**Standard 11-4.3(a)**

Frequently, these discovery standards require the disclosure of information in a party's "possession or control." This standard explains the meaning of that term. The disclosure obligations of the prosecuting and defense attorney under these standards extend, not only to materials and information that they personally hold, but also to materials and information in the possession or control of the attorney's investigative or legal staff. This includes both persons who regularly report to the attorney's office, and any who have done so with respect to the particular case. Similar provisions are included in a number of state rules.¹

The effect of this standard is to charge each attorney with responsibility for information known to people within his or her scope of authority. In responding to a discovery request, the attorney must search for materials and information held by any member of the defense or prosecuting team, including investigators. At the same time, the standard discharges the attorney for responsibility for material and information known to persons who do not regularly, and have not in the particular case, reported to that attorney's office.

For example, the prosecutor is not responsible for ascertaining and producing any information known to government employees or agencies who have no connection with the prosecutor. Such persons, while they may be connected with the sovereign entity prosecuting the matter, are effectively in the position of third parties with respect to the case.² However, the prosecution will generally be held responsible for information in the possession of the police or others investigating the case.³

¹ See Alaska R. Crim. P. 16(b)(4); Ariz. R. Crim. P. 15.1(d), 15.2(e); Colo. R. Crim. P. 16(a)(3); Md. R.S 4-262(c), 4-263(g); Minn. R. Crim. P. 9.01, Subd. 1 (7).
² However, if the prosecutor is aware that other government employees have relevant information, he or she must disclose that fact to the defense. See Standard 11-4.3(c).
Standard 11-4.3(b)

This standard augments the provision above. It requires the prosecutor to make reasonable efforts to ensure that material and information relevant to the case will routinely come within the possession or control of the prosecutor’s office. This standard is a modified version of prior Standard 11-2.2(c). It is limited to the prosecution because concerns for ensuring an adequate flow of information are likely to be particularly acute in the case of government agencies.

Ensuring a regular flow of information to the prosecutor’s office is necessary so that the defense will receive all of the discovery to which it is entitled, under the rules and as a constitutional matter. Such procedures also benefit the prosecution by ensuring that discoverable materials will be located and provided to the defense in a timely fashion. If materials that should have been produced during discovery are only found belatedly, it may require a trial continuance or recess, and risks more severe sanctions as well.

Standard 11-4.3(c)

This standard, which is new, is also limited to the prosecution. It requires that if the prosecuting attorney is aware that discoverable information is in the possession or control of a government agency not reporting directly to the prosecution, it must disclose to the defense that such information exists.

The standard does not impose any obligation on the prosecution to ascertain whether other agencies have relevant information. However, if the prosecution is aware that another agency has information which is relevant to the case, it must provide to the defense a general de-

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4. That standard required the prosecution to ensure a flow of information between investigators and the prosecutor sufficient to place within his or her control all information relevant to the case. See ABA Standards for Criminal Justice, Discovery and Procedures Before Trial, Standard 11-2.2(c) (2d ed. 1980). Cf. Colo. R. Crim. P. 16(b)(4) (to same effect).
5. See Kyles v. Whitley, 115 S. Ct. 1555, 1567 (1995) (in order to satisfy Brady obligations, “the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police”); People v. District Court of Colorado’s Seventeenth Judicial District, 793 P.2d 163, 167 (Colo. 1990) (prosecution’s duty to have system in place to preserve discoverable evidence).
7. As explained below, the prosecution must also make diligent good faith efforts to procure the disclosure of that information. See Standard 11-4.3(d).
scription of the information and the identity of the agency possessing it. This disclosure is necessary to put the defense on notice of the need to seek a subpoena to obtain the information.8

The issue of access to materials held by third parties is particularly important with respect to prosecution disclosures because there are frequently other government agencies that may have possession of relevant information in a criminal case. In the federal system, the prosecutor's disclosure obligation broadly extends to any discoverable material "within the possession, custody or control of the government," a term that encompasses agencies beyond the prosecuting attorney.9

The Uniform Rules of Criminal Procedure also contemplate that the defendant should be able to obtain information in the possession of government departments outside the prosecutor's office. However, in contrast to this standard, they accomplish this end by requiring that the prosecutor attempt to arrange such disclosures by the agency in possession of the evidence.10

Standard 11-4.3(d)

This standard is related to the preceding paragraph, and also concerns the situation in which an attorney is aware of discoverable information held by a third party. However, this provision, which applies to both the prosecution and the defense,11 imposes obligations that go beyond merely notifying the other side. For this reason, the standard requires that a specific request have been made for the materials at issue.

If a party receives a request for discoverable material or information, and is aware (or is made aware) that the material or information is held by others, the party must use "diligent good faith efforts" to

10. See NCCUSL, Uniform Rules of Criminal Procedure, Rule 421(d) (1987) (requiring "diligent good faith efforts"). See also, e.g., Ark. R. Crim. P. 17.3(a); Colo. R. Crim. P. 16(c)(1); Minn. R. Crim. P. 9.01, Subd. 2 (1).
11. The Second Edition Standard on which this is based, by contrast, applied only to the prosecution. See ABA Standards for Criminal Justice, Discovery and Procedures Before Trial, Standard 11-2.4 (2d ed. 1980).
cause that material to be made available to the requesting party. This provision is intended to encourage the parties to use voluntary discovery methods. Thus, each party may seek third-party information initially from the other side, before resorting to a subpoena. However, if the opposing party’s good faith efforts to obtain the information are unsuccessful, the court should issue suitable subpoenas to cause the material to be produced. Similar rules providing the court with subpoena power to ensure that the defense receives discoverable information not in the prosecution’s possession or control are in place in a number of the states.

Nothing in this standard is intended to impose on either side a duty to canvass for discoverable information from other agencies and offices, unless they are a part of the prosecution or defense.

**Standard 11-4.3(e)**

This is a catch-all provision which specifies that, upon a showing that items not covered in the discovery standards are “material to the preparation of the case,” the court may order disclosure of the specified materials or information. While this provision applied only to the defense in the Second Edition Standards, the Third Edition Standards permit either party to make such a motion.

Normally, the disclosures available under the unified system of discovery rules set forth in these standards will provide both parties with sufficient information to allow effective trial preparation. However, in particular cases a party may need additional material information that is outside the scope of the standards. In such cases, this provision authorizes a court to require that such disclosures be made. It is designed to ensure that the courts will have the flexibility needed to make the discovery rules work in a wide range of criminal cases.

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12. See Standard 11-3.1 (authorizing such subpoenas).
13. See, e.g., ALASKA R. CRIM. P. 16(b)(5); ARIZ. R. CRIM. P. 15.1(e); ARK. R. CRIM. P. 17.3(b); COLO. R. CRIM. P. 16(c)(2).
PART V.
DEPOSITIONS

Standard 11-5.1. Depositions to perpetuate testimony

(a) After an indictment or information upon which a defendant is to be tried is filed, upon motion of the defense or the prosecution, the court may order a deposition taken to perpetuate the testimony of a prospective material witness if the court finds that there is reason to believe that the witness will be unable to be present and to testify at trial because of serious illness or other comparably serious reason, and that it is necessary to take the witness's deposition to prevent a failure of justice. The motion should be verified or the grounds for the motion supported by affidavit.

(b) In the order for the deposition, the court may also require that any designated books, papers, documents, or tangible objects, not privileged, be produced at the time and place of the deposition.

(c) The court should make provision for the defendant to be present at the taking of the deposition and should make such other provisions as are necessary to preserve the defendant's right to confrontation of witnesses.

(d) A deposition so taken and any evidentiary material produced at such deposition may be introduced in evidence at trial, subject to applicable rules of evidence. However, no deposition taken under this section should be used or read in evidence when the attendance of the deposed witness can be procured, except for the purpose of contradicting or impeaching the testimony of the deponent.

History of Standard

This standard, which specifies the conditions and procedures for depositions to perpetuate the testimony of certain witnesses, substantially expands upon the comparable provision in the Second Edition Standards. In the prior edition, the issue of depositions was addressed by Standard 11-4.8(a)(i), which simply provided that the court could order third parties to "participate in the taking of depositions."

Related Standards

Commentary

The issue of allowing depositions in criminal cases was the subject of extensive debate during the preparation of the Third Edition Standards. The prior standards provided, on this question, that upon request by the prosecutor or defense counsel, the court should have authority to order third parties to "participate in the taking of depositions." Commentary to this standard indicated that such depositions should be "primarily used to preserve the testimony of a witness who may not be available when the case comes to trial." In addition, the drafters contemplated that such depositions would allow the defense, in appropriate cases, to discover "facets of the case that are crucial to the defense" that are not explained in any witness statement.

In the fifteen years since the Second Edition Standards were adopted, there has not been a significant movement toward the expanded use of depositions in criminal cases. Some states permit depositions in criminal cases, subject to various limitations. At the same time, depositions entail time and expense, and may place a significant burden on third parties such as witnesses and victims. The potential for harassment is particularly acute in cases involving sexual misconduct or abuse. Thus, many jurisdictions have been reluctant to import this aspect of civil discovery into the criminal justice system without imposing careful conditions on its use.

After extensive debate, the drafters of the Third Edition Standards decided that it is appropriate to provide for a limited role for depositions in criminal cases in specified circumstances, and to treat separately the different types of depositions (those for preserving testimony and for discovery). In the revised rules, Standard 11-5.1 governs depositions to perpetuate testimony, while Standard 11-5.2 (discussed

2. ABA Standards for Criminal Justice, Discovery and Procedures Before Trial, Commentary at 11-70 (2d ed. 1980).
in the following section) governs discovery depositions. Both standards place significant conditions on the circumstances under which such depositions will be available, and both contemplate that depositions will only be permitted upon judicial approval. Neither type of deposition may be taken before an indictment or information is issued in the case.\(^5\)

While these standards establish the basic requirements for a deposition in a criminal case, they leave to local jurisdictions the development of appropriate rules to govern the mechanics and procedures under which such depositions will be conducted.\(^6\)

**Standard 11-5.1(a)**

Paragraph (a) of this standard sets out the conditions under which a deposition to perpetuate testimony may be taken. Following the filing of an indictment or information, either the defense or the prosecution may move to take a deposition to perpetuate testimony, which motion must be verified or supported by affidavit. By permitting such depositions only upon written motion and court order, the standards make clear that judicial supervision is an important check in ensuring the appropriate use of the deposition procedure.\(^7\)

The court should grant a motion to take a deposition to perpetuate testimony if it finds that the following conditions are met: the person sought to be deposed is a "prospective material witness;" there is reason to believe that the witness "will be unable to be present and testify at trial because of serious illness or other comparably serious reason;" and it is "necessary to take the witness's deposition to pre-

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5. Standard 11-5.1 spells out this limitation expressly. The same limitation is implicit in Standard 11-5.2, which refers to the taking of depositions of persons "other than the defendant," a term that is relevant only after an indictment or information has issued. Cf. In re Application of Eisenberg, 654 F.2d 1107, 1113 n.9 (5th Cir. 1981) (federal rules do not permit pre-indictment deposition); contrast NCCUSL, UNIFORM RULES OF CRIMINAL PROCEDURE, Rule 432 (1987) (authorizing prosecutor's use of "investigatory depositions" of witnesses).

6. Cf. NCCUSL, UNIFORM RULES OF CRIMINAL PROCEDURE, Rule 431(e)(f) (1987) (governing how and where a deposition should be taken).

7. By contrast, the Uniform Rules of Criminal Procedure provide that depositions in a criminal case may be freely taken by both parties within a specified time period, and that any party or deponent objecting may file a motion for a protective order. NCCUSL, UNIFORM RULES OF CRIMINAL PROCEDURE, Rule 431(4) (1987). The Third Edition Standards take a more restrictive approach, requiring a court order approving each deposition.
vent a failure of justice." Each of these conditions is discussed in turn below.

The requirement that the deponent be a "prospective material witness" means that depositions should be ordered only where a party seeks to preserve the testimony of a relevant witness who will likely be unavailable at trial or a hearing. Similar language is used in the Federal Rules of Criminal Procedure, which provide that the "testimony of a prospective witness of a party" may be taken and preserved for use at trial under certain conditions.8

However, there is one significant difference between this standard and the analogous federal rule. Commentary to this federal rule makes clear that such a deposition may be taken only of "the party's own witness."9 The drafters of the Third Edition Standards do not adopt this limitation on depositions to preserve testimony. Rather, under Standard 11-5.1, the purpose of the deposition is to preserve testimony of any relevant witness who is likely to be unavailable for a hearing or trial, whether that witness would be called by the party taking the deposition or the adverse party. Where a party seeks instead to discover the knowledge of a witness, such a motion is more properly brought under Standard 11-5.2, governing discovery depositions.10

The use of the term "material" in describing the witnesses who may be deposed provides an important limitation under the standard. This makes clear that depositions to preserve testimony are available only for those prospective witnesses whose testimony is important to some aspect of the case, and not for witnesses whose testimony is peripheral or of dubious significance.11

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8. FED. R. CRIM. P. 15(a).
9. FED. R. CRIM. P. 15(a), Commentary at 70 (1994 ed.) (noting that Rule 15(a) rule does not authorize "a discovery deposition of an adverse witness"). See also H. REP. No. 94-247 (under Rule 15(a), "a party may only move to take the deposition of one of its own witnesses, not one of the adversary party's witnesses").
10. By the same token, the prosecution may not seek to take a deposition to preserve the testimony of the defendant, who is not a "witness," and is not one of the prosecution's witnesses. The constitutional issues that would be raised by such a request are addressed, infra, in connection with Standard 11-5.2, governing discovery depositions.
In addition, a deposition to preserve testimony should be ordered only if there is reason to believe that the witness will be unable to be present and testify at trial because of "serious illness or other comparably serious reason." In this respect, the standard is narrower than the federal rule, which provides instead that such depositions may be used as substantive evidence whenever the witness will be "unavailable" for trial. Such "unavailability" includes not only physical absence, but the witness's refusal to testify, invocation of privilege, or claimed lack of memory.

Under Standard 11-5.1, by contrast, for the court to order that a deposition proceed, there must be reason to believe that the witness cannot be physically present and testify at trial or a hearing because of "serious illness," whether physical or mental (for example, a deteriorating mental condition), or some other comparably serious reason. The latter term is not defined, in order to leave the courts discretion to order a deposition in appropriate cases not involving a witness's serious illness.

Finally, the court must find that taking a deposition to preserve testimony is necessary to "prevent a failure of justice." This leaves

12. Compare N.J.R. CRIM. PRAC. 3:13-2 (authorizing deposition of material witness who is likely to be unable to testify at trial because of "death or physical or mental incapacity").

13. FED. R. CRIM. P. 15(e) (incorporating by reference Rule 804(a) of the Federal Rules of Evidence). In addition, the federal rule makes "unavailability" of the witness a condition of using the deposition at trial or hearing, rather than a condition of granting permission to take the deposition in the first instance.

14. FED. R. EVID. 804(a).


16. Examples of such "comparably serious reasons" that a witness could not be present and testify include situations as: a witness incarcerated in a foreign prison who will not be permitted to leave (e.g., United States v. Sines, 761 F.2d 1434, 1439 (9th Cir. 1985)); a foreign national not subject to subpoena and unwilling to attend voluntarily, (e.g., United States v. Johnpoll, 739 F.2d 702, 709 (2d Cir.), cert. denied, 469 U.S. 1075 (1984)); an illegal alien witness who will deported or leave the country by the time of trial, (e.g., United States v. Allie, 978 F.2d 1401, 1404-05 (5th Cir. 1992), cert. denied, 113 S. Ct. 1662 (1993)); or a witness who is a seafarer about to be discharged (e.g., United States v. McLaughlin, 137 F.R.D. 198, 199 (D. Mass. 1991)).

17. Cf. FED. R. CRIM. P. 15(a) (taking deposition must be in the "interest of justice").
to the court’s discretion, on a case-by-case basis, the decision whether the requested deposition seeking to preserve a witness’s testimony is necessary to the ends of justice.

**Standard 11-5.1(b)**

In the order for a deposition to preserve testimony, the court may also require that designated books, papers, documents, or tangible objects, not privileged, be produced at the time and place of the deposition. A comparable provision is contained in the Federal Rules of Criminal Procedure, as well as in the Uniform Rules of Criminal Procedure, and in state law deposition rules. In a separate provision, the Third Edition Standards provide for the prosecution and defense to subpoena evidence from third parties independent of a deposition request.

**Standard 11-5.1(c)**

In ordering that a deposition to preserve testimony proceed, the court should make provision for the defendant’s attendance at that deposition, as well as such other provisions as are necessary to preserve the defendant’s right to confrontation of witnesses. Such provisions are essential because a deposition to preserve testimony, by its very nature, may be used to take the place of the witness’s live testimony at a trial or hearing.

Courts hold that the exclusion of the defendant from a deposition where the testimony is taken for introduction at trial conflicts with the defendant’s right to confrontation. Of course, the defendant may voluntarily and knowingly waive the right to be present at such a deposition. Such waiver may occur in writing, by the defendant’s failure to appear at the deposition after written notice, by the defendant’s departure from or disruptive behavior at the deposition, or through other circumstances clearly indicating an intent to waive the right.

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22. Compare N.J.R. Crim. Prac. 3:13-2(b) (all parties and counsel have right to be present at deposition to preserve testimony).
Beyond protecting the defendant's right to be present at the deposition, the standard recognizes that "other provisions" may also be necessary to protect the defendant's constitutional right to confrontation of witnesses. Protecting the defendant's right to have counsel present at such a deposition is, of course, fundamental to preserving the defendant's rights. In every case, opposing counsel must be given notice of the requested deposition and an opportunity to object, as well as the opportunity to attend any deposition that goes forward.

In addition, special problems are presented by cases involving indigent defendants. If funding to enable such persons to participate in discovery is not provided, the defendant's right to take a deposition will mean little, and the differences between poor and wealthy defendants will be exacerbated, contrary to the purposes of the discovery rules. In such cases, provision should be made to ensure that financial resources are provided to enable the defendant to attend any depositions ordered at the request of the prosecution, as well as to conduct any depositions of defense witnesses whose testimony must be preserved. Provisions authorizing such expenditures are expressly included in the Federal Rules of Criminal Procedure, in the Uniform Rules of Criminal Procedure, and in the rules of several states.

25. Cf., e.g., NCCUSL, Uniform Rules of Criminal Procedure, Rule 431(g)(2) (1987) (unless defense counsel is present and defendant knowingly waives right to attend, defendant must be present at deposition to preserve testimony). See also, e.g., ARIZ. R. CRIM. P. 15.3(d) (defendant has right to be present at depositions to preserve testimony).


27. See Standard 11-1.1(v), supra.

28. See FED. R. CRIM. P. 15(c) (where deposition is requested by prosecution or by indigent defendant, the court may direct that the government pay the costs of travel and subsistence of defendant and his or her attorney, as well as costs of deposition transcript); see also, e.g., United States v. King, 552 F.2d 833, 838 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977) (requiring government to pay defense deposition expenses); United States v. Largan, 330 F. Supp. 296, 299 (S.D.N.Y. 1971) (same).

29. NCCUSL, Uniform Rules of Criminal Procedure, Rule 431(h) (1987) (where deposition is requested by prosecution or by indigent defendant, the court may direct that the government pay the costs of travel and subsistence of defendant and his or her attorney, as well as costs of deposition transcript).

30. FLA. R. CRIM. P. 3.220(o) (providing that county shall pay reasonable costs of discovery for indigent defendants); VT. R. CRIM P. 15(c) (similar to FED. R. CRIM. P. 15(c)).
Standard 11-5.1(d)

The transcript of a deposition taken to preserve a witness's testimony may be used only in specified circumstances. It may be introduced as substantive evidence at trial, in whole or in part, only if the attendance of the deposed witness cannot be procured. Its use is subject to applicable evidentiary rules. And if the deponent testifies at trial, the transcript may be used only for the purpose of contradicting or impeaching the deponent's testimony.

These provisions reflect the constitutional rule that the Confrontation Clause of the Sixth Amendment requires that the government make a "good faith effort to obtain [the witness's] presence at trial" before deposition testimony of that witness will be admitted. They also reflect the practical judgment that the testimony of a live trial witness is preferable to deposition testimony. Live testimony allows the fact-finder to assess the witness's demeanor and credibility, which a deposition transcript does not. Even a videotaped deposition cannot substitute for the witness's presence at trial, where objections can be made and ruled upon contemporaneously, and clarifying or follow-up questions can be posed to the witness.

Thus, when the attendance of the deposed witness can be procured, the standard does not permit the use of the deposition as substantive evidence. Even in such cases, however, the deposition may be used for purposes of impeaching the witness.

Standard 11-5.2. Discovery depositions

(a) On motion of either the prosecution or the defense, the court should order the taking of a deposition upon oral examination of any person other than the defendant, concerning information relevant to the offense charged, but only upon a showing that:

(i) the name of the person sought to be deposed has been disclosed to the movant by the opposing party through the exchange of names and addresses of witnesses or has been discovered during the movant's investigation of the case; and

32. Cf. Fed. R. Crim. P. 15 (e) (deposition may be used as substantive evidence where witness is "unavailable" at trial); NCCUSL, Uniform Rules of Criminal Procedure, Rule 431(i) (1987) (same).
(ii) no writing, summarizing the relevant knowledge of the person sought to be deposed, adequate to prevent surprise at trial, has been furnished to the movant; and

(iii) the movant has taken reasonable steps to obtain a voluntary oral or written statement from the witness, but the witness has refused to cooperate in giving a voluntary statement; and

(iv) the taking of a deposition is necessary in the interests of justice.

(b) The defendant may not be present at the deposition unless the court orders otherwise for good cause shown.

(c) The procedure for taking a discovery deposition, including the scope of the examination, should be in accordance with express rules to be written for depositions in criminal proceedings.

(d) Unless otherwise stipulated by the parties, a discovery deposition should be admissible at a trial or hearing only for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(e) A person whose deposition is sought should have the right to move to quash on the ground that compliance would subject the person to an undue burden, or would require the disclosure of material that is privileged or otherwise protected from disclosure, or would otherwise be unreasonable.

History of Standard
This standard, which specifies the conditions and procedures for discovery depositions under limited circumstances, substantially expands upon the comparable provision in the Second Edition Standards. The issue of depositions was previously addressed by Second Edition Standard 11-4.8(a)(i), which simply provided that the court could order third parties to “participate in the taking of depositions.”

Related Standards
NDAA, National Prosecution Standards, 55.5 (2d ed. 1991)

Commentary
As noted in the commentary to Standard 11-5.1, above, the Third Edition Standards reflect the determination that a separate standard
should govern requests to conduct depositions for discovery purposes. Whether, and under what circumstances, discovery depositions should be available was the subject of vigorous debate among the drafters. Opponents of discovery depositions cited the cost, particularly for those jurisdictions and those defendants with limited resources, as well as the burden on both parties, and the toll on victims and witnesses. Advocates argued that discovery depositions promote fairness and serve the interests of the parties and the judicial system as a whole by eliminating surprise and allowing both parties equal access to witnesses in advance of trial.

The ultimate consensus was that discovery depositions should be allowed for both parties, but under very limited conditions, and only where a party could otherwise be surprised at trial by the witness’s testimony. Thus, the standard requires a written motion and court order before such a deposition may proceed. This reflects the importance of judicial supervision of such requests.

**Standard 11-5.2(a)**

A motion for a discovery deposition should be granted only upon a showing that: the deposition involves a person (other than the defendant) who has “information relevant to the offense charged;” the name of the deponent has been learned from the other side during discovery or from the movant’s investigation; no writing summarizing the relevant knowledge of the person “adequate to prevent surprise at trial” has been furnished to the movant; the movant has taken reasonable steps to obtain a voluntary oral or written statement from the witness, but the witness has refused to cooperate; and the deposition is “necessary in the interests of justice.”

The proposed deponent must have “information relevant to the offense charged.” This limits discovery depositions to persons who have concrete information relating to some aspect of the offense charged or

1. For example, the standards issued by the National District Attorney’s Association take the position that no discovery depositions should be permitted. NDAA, NATIONAL PROSECUTION STANDARDS 55.5 (2d ed. 1991).


3. Compare, e.g., Ariz. R. Crim. P. 15.3(a)(2) (discovery deposition may be taken where the person’s testimony is “material to the case or necessary adequately to prepare a defense or investigate the offense,” he “was not a witness at the preliminary hearing,” and he “will not cooperate in granting a personal interview”).
Criminal Justice Discovery Standards 11-5.2(a)

defenses thereto. Depositions should not be permitted, under Standard 11-5.1, where they would simply harass the deponent or create added expense for the other side. In addition, the name of the person sought to be deposed must have been learned by the movant as a result of the disclosure of witnesses’ names by the other party or the movant’s own pretrial investigation. The most significant precondition for discovery depositions, however, is the requirement that the movant show that he or she has not been furnished any “writing, summarizing the relevant knowledge of the person sought to be deposed, adequate to prevent surprise at trial.”

Under the revised discovery standards, certain written statements of relevant witnesses must be provided to the opposing side. Specifically, the prosecutor must provide to the defense all written statements in his possession or control of persons with information concerning the offenses, and must memorialize, in writing, any relevant oral statements of the defendant and any codefendants. The defense must provide to the prosecutor all written statements in its possession or control for any of the defense’s trial witnesses. Both sides must obtain and provide to opposing counsel a written report for any expert witnesses it intends to call at trial.

The discovery deposition provision comes into play in the situation in which no statements of an adverse witness have been furnished, or when a statement that has been furnished does not inform counsel of the substance of that witness’s testimony adequately to prevent surprise at trial. In such an instance, the party must first take reasonable steps to obtain from that witness a voluntary oral or written statement. If the witness refuses to cooperate in giving a voluntary statement, that party may then move for an order permitting a discovery deposition.

Before ordering the deposition, the court must find that the taking of the deposition sought is “necessary in the interests of justice.” As under Standard 11-5.1, governing depositions to perpetuate testimony, this standard vests the trial court with discretion to decide

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4. A similar requirement is contained in the Florida Rules of Criminal Procedure, which permits the defense to take the deposition only of those intended prosecution trial witnesses whose knowledge of the case is not “fully set out in a police report or other statement furnished to the defense.” FLA. R. CRIM. P. 3.220(b)(1)(A)(ii).
5. See Standard 11-2.1(a) and (b), supra.
whether the discovery deposition sought is appropriate and necessary in the circumstances of the case at hand. If the conditions for seeking a discovery deposition are met, and the court finds that the requested deposition is necessary to prevent surprise at trial on relevant aspects of the witness’s testimony, such a deposition would be "necessary in the interests of justice."

**Standard 11-5.2(b)**

The defendant is not permitted to be present at a discovery deposition unless the court orders otherwise for good cause shown. This rule is in contrast with depositions to perpetuate testimony, for which the court must make arrangements for the defendant to attend. This difference reflects both constitutional distinctions between the two types of depositions, as well as pragmatic concerns.

As a constitutional matter, the defendant has no constitutional right to attend a discovery deposition because the deposition, by its nature, is merely a pretrial information-gathering device. There is no issue concerning the defendant’s right to confront witnesses. Indeed, such a deposition may not be introduced as substantive evidence in the case, unless both parties agree.

Depositions to perpetuate testimony, by contrast, may only be conducted where there is reason to believe that the witness will not be present at trial. The deposition is specifically intended to substitute for live trial testimony, and may be introduced as substantive evidence if the witness’s presence at trial cannot be obtained. For this reason, the defendant has a constitutional right to be present.

Thus, with respect to discovery depositions, the question whether the defendant should have a right to attend is a policy issue. A client can provide important assistance in his or her defense by attending a deposition in the case. At the same time, requiring state and federal authorities to transport and supervise incarcerated defendants at discovery depositions would potentially create a significant financial and administrative burden. In addition, the defendant’s presence in a small deposition room can be intimidating to the deponent in certain

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8. Compare Fla. R. Crim. P. 3.220(h)(6) (defendant may not be present at discovery deposition except by stipulation or by court order upon good cause shown).
10. See discussion of Standard 11-5.2(d), supra.
11. See Standard 11-5.1(d).
cases. Thus, the drafters decided that the defendant should not be present at a discovery deposition, unless the court orders otherwise for good cause shown.

**Standard 11-5.2(c)**

Standards 11-5.1 and 5.2 establish the basic legal standards under which depositions should be permitted in criminal cases. They do not, however, spell out details concerning the appropriate procedures for obtaining or conducting such a deposition. Each jurisdiction adopting these rules should promulgate its own express rules to govern depositions in criminal cases, addressing procedural issues such as the place and manner of taking such depositions and the permissible scope of examination.

**Standard 11-5.2(d)**

As noted above in discussing Standard 11-5.1(d), a discovery deposition may be used at trial solely for the purpose of impeaching or contradicting the deponent’s testimony as a witness, unless both parties otherwise stipulate. Thus, if one of the parties objects, a discovery deposition may not be introduced as evidence, even if the witness is no longer available at the time of trial.

**Standard 11-5.2(e)**

Discovery depositions may infringe upon the privacy rights or privileges held by third parties. Such parties must be given an opportunity to object and seek protection against all or part of a deposition. While such a person may also seek a protective order under Standard 11-6.5—which provides that the court may order that specified disclosures be conditioned, restricted, or deferred—an independent provision to

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12. See, e.g., Fla. R. Crim. P. 3.220(h)(6)(A) (in ruling upon defendant’s request to attend deposition, court should consider the need for the physical presence of the defendant to obtain effective discovery, the intimidating effect of the defendant’s presence on the witness, if any, and any cost or inconvenience relating to the defendant’s presence).

13. Obviously, good cause for allowing the defendant to attend a discovery deposition would also be shown if the defendant is proceeding pro se.

14. Cf. Fla. R. Crim. P. 3.220(h)(1) (discovery depositions may be used “by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness”).
similar effect is included in this standard to emphasize the importance of third parties' rights.

Where submitting to a discovery deposition in a criminal case would cause a person an undue burden, would require the disclosure of material that is privileged, or would otherwise be unreasonable, that person is entitled to move to quash. Such a motion may be filed in response to a motion seeking a deposition, but it may also be filed following an order granting a requested deposition. While notice requirements are not specifically included in this standard, to make the provision meaningful, it is essential that local jurisdictions require contemporaneous notice to the putative deponent that his or her deposition is being sought.
PART VI.
GENERAL PROVISIONS GOVERNING DISCOVERY

Standard 11-6.1. Restrictions on disclosure

(a) Disclosure should not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting attorney or the defense attorney, or members of the attorney's legal staff.

(b) Disclosure of an informant's identity should not be required where such identity is a prosecution secret and where a failure to disclose will not infringe the constitutional rights of the defendant. Disclosure should not be denied of the identity of witnesses to be produced at a hearing or trial.

(c) Disclosure should not be required where it involves a substantial risk of grave prejudice to national security and where a failure to disclose will not infringe the constitutional rights of the defendant. Disclosure should not be denied regarding witnesses or material to be produced at a hearing or trial.

(d) Disclosure should not be required from the defense of any communications of the defendant, or of any other materials which are protected from disclosure by the state or federal constitutions, statutes or other law.

(e) The court should have the authority to deny, delay, or otherwise condition disclosure authorized by these standards if it finds that there is substantial risk to any person of physical harm, intimidation, or bribery resulting from such disclosure which outweighs any usefulness of the disclosure.

History of Standard

This standard incorporates, with small modifications, the following Second Edition Standards, all of which relate to materials protected from disclosure: Standard 11-2.6, which in certain circumstances protects from disclosure the prosecutor's attorney work product, confidential informants, and national security information; Standard 11-3.2(b)(i), which protects in certain circumstances against disclosure of
the defense's attorney work product; and Standard 11-3.2(b)(ii), which protects the defendant's confidential communications. In addition, the standard incorporates and makes applicable to both sides Second Edition Standard 11-2.5(b), which specifies the court's authority to delay, deny, or condition disclosures in appropriate cases.

**Related Standards**

NCCUSL, Uniform Rules of Criminal Procedure, Rule 421(b), 423(k) (1987)
NDAA, National Prosecution Standards 55.2 (2d ed. 1991)

**Commentary**

This standard exempts from or restricts the disclosure of special categories of information, including attorney work product, the identity of informants, national security secrets, and communications of the defendant. It also provides general authority (beyond the provision for protective orders) for courts to deny, delay, or otherwise condition disclosures where a risk of harm, intimidation, or bribery outweighs the usefulness of a disclosure.

Although full automatic or "demand" discovery of many items can be mutually beneficial to the prosecution and defense, both sides have some legitimate and vital interests that are not served by unlimited disclosure. This standard addresses the general categories of information which frequently lead to such objections.

**Standard 11-6.1(a)**

Paragraph (a) exempts from production legal research and any other records to the extent that they "contain the opinions, theories or conclusions" of an attorney or members of his or her "legal staff." This formulation is similar to the work-product rule applicable in criminal cases in a number of states.¹

The "attorney-work-product" rule under this standard establishes a two-fold test. *First*, the paper or document at issue must be prepared

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¹ See, e.g., ALASKA R. CRIM. P. 16(b)(8); COLO. R. CRIM. P. 16(e)(1); FLA. R. CRIM. P. 3.220(g)(1); MD. R. 4-263(c)(1); PA. R. CRIM. P. 305.G. See also, e.g., Commonwealth v. Paszko, 391 Mass. 164, 186, 461 N.E.2d 222, 236 (1984) (defense investigator's report is not attorney work product).
by a prosecuting or defense attorney or a member of the attorney’s legal staff. Papers or documents prepared by other investigative personnel are not exempt. In this respect, the standard is narrower than the attorney-work-product rules set forth in the Uniform Rules of Criminal Procedure, and in some state criminal rules, which extend to the work of investigators.

Second, the contents of the paper must be judgmental rather than factual. Material or information consisting of the opinion of a lawyer, such as comments to the effect that a witness is truthful, or selective notations of a witness’s recollections, would be exempt; factual material or information, such as a memorandum that merely recites verbatim a witness’s comments, may be discoverable. As noted earlier, however, an attorney’s notes of a witness interview will usually, if not always, constitute attorney work product that is not producible as a statement of that witness. Other examples of protected material include: notes relating to trial strategy, to theoretical arguments and supporting authority, and to direct and cross-examination; office memoranda on legal questions, evidence, prospective jurors, and other aspects of the case (other than expert reports); and summaries and analyses of the case file, of anticipated witnesses or their testimony, and of the probability of obtaining certain evidence.

It should also be noted that even where the attorney-work-product rule applies, the protection of that rule can be waived by conduct or statements inconsistent with an intent to preserve the confidentiality of those records. For example, if otherwise privileged items are voluntarily produced during discovery, the attorney-work-product protection will be waived. Similarly, if a party makes the testimony of its attorney or legal staff a relevant issue in the case, it cannot simultaneously withhold privileged material concerning that issue. For example, if the defense

2. See NCCUSL, Uniform Rules of Criminal Procedure, Rules 421(b), 423(k) (1987) (legal work product encompasses work of attorney, his or her staff, and “an agent of [the] attorney not intended to be called as a witness”). Cf. Fed. R. Civ. P. 26(b)(3) (work product includes work prepared in anticipation of litigation by a party or the party’s representatives or agents).


5. See Standard 11-1.3(a)(ii) (attorney work product concerning a person is not a “written statement” of that person).
were to impeach a witness by introducing an attorney’s account of a conversation with that witness, it would waive any attorney work product for the attorney’s notes of that conversation.6

**Standard 11-6.1(b)**

Paragraph (b) provides that the identity of a confidential government informant must be disclosed only if the informant will be a witness at a hearing or trial, or if denial of that information will infringe the defendant’s constitutional rights. Rules attaching similar conditions to the disclosure of confidential informants apply in many state jurisdictions.7

As these rules reflect, the government has a legitimate interest in maintaining the confidentiality of informants’ identities to create a climate in which persons will be willing to cooperate with the police and authorities without fear of retaliation from defendants. In addition, where an informant is continuing to work with the police, disclosure of his or her identity may jeopardize an ongoing investigation or preclude the informant from assisting law enforcement activities in the future.

This standard recognizes the legitimacy of these prosecutorial and public interests by providing that the identity of confidential government informants may be withheld in certain situations. However, this standard provides only a qualified privilege against disclosure. Such information may not be withheld where it would threaten the fairness of the proceeding or otherwise infringe the defendant’s constitutional rights. Where a prosecutor persists in unjustifiably withholding the identity of an informant, the court may dismiss the indictment.8

If three conditions are met, a confidential informant’s identity is exempt from disclosure during discovery. First, the identity of the person must be “a prosecution secret.” If the informant’s identity has not been kept secret, no legitimate prosecutorial interest is served by declining to identify that person in pretrial discovery.

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7. See Ariz. R. Crim. P. 15.4(b)(2); Ark. R. Crim. P. 17.5(b); Colo. R. Crim. P. 16(e)(2); Fla. R. Crim. P. 3.220(g)(2); Md. R. 4-263(c)(2). See also, e.g., Commonwealth v. Jennings, 428 Pa. Super. 297, 305-06, 630 A.2d 1257, 1261-62 (1993) (defendant must show that discovery of confidential informant is material to the defense).
Second, the informant's identity also may not be withheld if it would result in infringement of any of the defendant's constitutional rights. In certain situations, fundamental fairness requires that the identity of the informant be disclosed to the defense. For example, if the confidential informant were a participant or intimately involved in the underlying crime, the defendant's interest in disclosure would outweigh the prosecution's interest in confidentiality.9 Where the informant was not a participant in the crime, fairness may require consideration of such factors as whether the informant was a witness to the crime, whether other witnesses are in a position to testify, and whether the informant's testimony is likely to vary from that of other witnesses.10

Finally, disclosure is required where the informant is an anticipated witness for the government at a hearing or trial. Where the identity of the witness will be revealed publicly in the case, the interest in confidentiality is diminished, while the defendant's interest in obtaining discovery concerning that person is heightened. If there are special circumstances which call for a delay in the disclosure of information concerning the informant — such as the continued participation of that informant in other investigations, which will be compromised by immediate disclosure — the court may delay such disclosures or attach other conditions which protect the confidentiality of the informant's identity.11

Standard 11-6.1(c)

Paragraph (c) protects from disclosure information which would involve a "substantial risk of grave prejudice to national security"


where a failure to disclose would not infringe the constitutional rights of the defendant. However, disclosure should not be denied concerning witnesses or materials to be introduced at a hearing or at trial.\textsuperscript{12}

This standard is similar to the standard governing confidential informants, discussed above. In essence, national security material and information which are presently secret, and as to which continued secrecy are important, may be withheld from disclosure during discovery, unless the information forms a central part of the case against the defendant or the secret will be disclosed at a hearing or trial.

In federal criminal cases, the Classified Information Procedures Act sets up a complex set of rules governing discovery of classified information which will be used by the prosecution or defense in a federal criminal case.\textsuperscript{13}

\textit{Standard 11-6.1(d)}

Under paragraph (d), the defense may not be required to disclose any of the defendant's communications.\textsuperscript{14} This provision is included to protect the defendant's Fifth Amendment privilege against compelled self-incrimination. In addition, insofar as the defendant has communicated with defense counsel, material reflecting those communications is also subject to the defendant's Sixth Amendment right to counsel.\textsuperscript{15} Similar provisions exempting from disclosure the defendant's communications with counsel are contained in some state criminal rules.\textsuperscript{16}

In addition, the standard provides that disclosure should not be required of any other materials which are protected from disclosure by the state or federal constitutions, statutes or other law. Other privileges may attach to certain information or materials, such as the doctor-patient privilege, husband-wife privilege, priest-penitent privilege, or other statutory, common law, or constitutional privileges. Disclosure of such materials should not be required unless the privilege is not applicable under the circumstances or has been waived.

\textsuperscript{12} Compare \textit{Ark. R. Crim. P. 17.5(c)} (to same effect).

\textsuperscript{13} See \textit{Classified Information Procedures Act, Pub. L. No. 96-456}, and regulations thereunder.

\textsuperscript{14} Under Standard 11-2.1(a)(i), of course, any statements of the defendant in the prosecution's possession or control must be produced.


\textsuperscript{16} See, \textit{e.g.}, \textit{N.J. R. Crim. Prac. 3:13-3(c)} (no disclosure of communications of defendant to his attorneys or agents).
**Standard 11-6.1(e)**

Paragraph (e) provides supplemental authority, in addition to the court's general authority to enter a protective order, to deny, delay or otherwise condition disclosures if they would create a "substantial risk to any person of physical harm, intimidation or bribery" which outweighs any usefulness of the disclosure.

**Standard 11-6.2. Failure of a party to use disclosed material at trial**

The fact that a party has indicated during the discovery process an intention to offer specified evidence or to call a specified witness is not admissible in evidence at a hearing or trial.

**History of Standard**

This amends and applies to both sides Second Edition Standard 11-3.2(c), which precluded the prosecution from mentioning the defendant's failure to use information disclosed during discovery. The standard has eliminated the prior provision that information obtained from the defense could not be used by prosecution at trial except to "refute the matter disclosed."

**Related Standards**

NCCUSL, Uniform Rules of Criminal Procedure, Rule 423(b) (1987)
NDAA, National Prosecution Standards 13.4(B)(1) (2d ed. 1991)

**Commentary**

Under this standard, neither party may seek to admit into evidence at trial or hearing the fact that the other party indicated during the discovery process an intention to offer certain evidence, or to call a certain witness. Similar rules are contained in the Uniform Rules of Criminal Procedure,¹ as well as in the Federal Rules of Criminal Procedure² and in some state rules.³

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² See Fed. R. Crim. P. 12.1(f) (alibi defenses); 12.2(e) (insanity defenses); 12.3(e) (public authority defenses).
³ See, e.g., Iowa Crim. P. § 813.2, Rule 13.4; Ky. R. Crim. P. 7.24(3)(D); Minn. R. Crim. P. 9.01, Subd.1 (1)(b), 9.02, Subd. 4; Ohio R. Crim. P. 16(3)(4), 16(3)(3); Pa. R.
This standard makes clear that neither party is obliged to introduce at trial the information it has disclosed during the discovery process. The purposes of providing for pretrial discovery are to avoid surprise at trial, to enable both parties adequately to prepare, and to avoid unnecessary trial delays or continuances. Pretrial discovery is not intended to preclude a party from revising its trial strategy. Thus, under this standard, a party may not be forced to introduce any evidence that was disclosed, nor may the other side call attention to such an omission. For example, if the defense discloses an intent to rely upon an alibi defense, but decides before trial to abandon that defense, the prosecution may not introduce at trial evidence concerning the defendant's alleged alibi. The same would be true with respect to the disclosure of an intent to raise an insanity defense.

While the comparable Second Edition Standard was limited to disclosures by the defense, the drafters concluded that this rule should apply to both sides in a criminal case. In addition, the Second Edition Standards went on to provide that information disclosed by the defense in discovery is not admissible in evidence except to refute the fact disclosed. The Third Edition Standards do not contain this limitation. It was the consensus of the drafters that this requirement, which is not constitutionally required, adds undue complexity to the trial process. Thus, under this standard, information disclosed by the defense during discovery is available for both cross-examination and evidentiary purposes.

Standard 11-6.3. Investigations not to be impeded

Neither the counsel for the parties nor other prosecution or defense personnel should advise persons (other than the defendant) who

CRIM. P. 305.C(1)(f); R.I.R. CRIM. P. 16(e); WIS. CODE CRIM. P. § 971.23(3)(b).
4. See, e.g., FED. R. CRIM. P. 12.1(f) (inadmissibility of withdrawn alibi defense).
5. See, e.g., ALASKA R. CRIM. P. 16(c)(5) (prosecution may not comment at trial on defendant's notice of intent to raise an insanity defense).
6. See ABA STANDARDS FOR CRIMINAL JUSTICE, DISCOVERY AND PROCEDURES BEFORE TRIAL, Standard 11-3.2(c) (2d ed. 1980).
7. See ABA STANDARDS FOR CRIMINAL JUSTICE, DISCOVERY AND PROCEDURES BEFORE TRIAL, Standard 11-3.2(c) (2d ed. 1980). Compare ALASKA R. CRIM P. 16(c)(4) (expert reports received from defense may only be used by prosecution for cross-examination or rebuttal).
8. The Supreme Court has rejected the view that the defendant may never be constitutionally required to provide evidence that may assist in convicting him. See Williams v. Florida, 399 U.S. 78 (1970).
have relevant material or information to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor should they otherwise impede opposing counsel’s investigation of the case.

**History of Standard**

This standard incorporates Second Edition Standard 11-4.1, with minor editorial changes.

**Related Standards**

ABA, Code of Professional Responsibility DR7-109(B)
ABA, Model Rules of Professional Conduct, Rule 3.4(a), (f) (1994)

**Commentary**

The standard imposes a duty on prosecution and defense counsel, and their respective staffs, to refrain from impeding the investigation of the charges either by advising potential witnesses not to discuss the case with opposing counsel or by taking other steps that would prevent or interfere with further investigation by opposing counsel. A similar provision is included in the Uniform Rules of Criminal Procedure, as well as in a number of state rules.

Obstruction or interference with opposing counsel’s investigation and preparation of the case frequently takes the form of instructing witnesses not to talk with opposing counsel or their staffs. However, it may take the form of more subtle instructions. Other techniques of...
obstruction can range from the obviously improper withholding or concealing of material evidence\(^6\) to the withholding or delaying of required disclosures until the information disclosed cannot be used for pretrial preparation.\(^6\)

Opportunities for obstruction are limited only by counsel's ingenuity, and some of the opportunities are virtually undetectable. Effective implementation of the discovery standards must rely to a large extent on the integrity of counsel and the cooperative attitude with which parties conduct discovery.\(^7\) To encourage the appropriate application of this standard, the court may choose to remind both parties of their duty to refrain from impeding the investigation of the case by opposing counsel.\(^8\)

**Standard 11-6.4. Custody of materials**

Any materials furnished to an attorney pursuant to these standards should be used only for the purposes of preparation and trial of the case, and should be subject to such other terms and conditions as the court may provide.

**History of Standard**

This is a modification of Second Edition Standard 4.3, which concerned an attorney's custody of materials obtained through discovery. The standard was revised to eliminate the requirement that such materials "remain in the attorney's exclusive custody."


\(^6\) See, e.g., Rembert v. State, 284 So. 2d 428, 429-30 ( Fla. App. 1973) (defense not given list of thirty-six prospective witnesses until day before trial), cert. denied, 292 So. 2d 368 (Fla. 1974).

\(^7\) See, e.g., United States v. Percevault, 490 F.2d 126, 132 (2d Cir. 1974) (advocates conducting discovery with a "spirit of cooperation").

\(^8\) See, e.g., COLO. R. CRIM. P. 16, Part III (a) (imposing on the court duty to determine that both parties are aware of requirement to refrain from impeding other side's investigation).
Related Standards

None.

Commentary

This standard provides that attorneys who receive information or materials under these discovery standards should use those materials only for purposes related to the preparation and trial of the case. In addition, the court may attach other terms or conditions to the attorney’s custody or use of discovery items. The standard applies to both the prosecution and the defense.

Such restrictions on disclosure may be necessary because of confidentiality requirements imposed by other laws or rules, such as the federal laws restricting the use of classified information,1 and limiting disclosure of the fruits of electronic surveillance efforts.2 Other restrictions may be imposed by state law, such as rules requiring confidentiality for medical records or adoption records.3 Some state jurisdictions have similar rules.4

The drafters eliminated the requirement that materials obtained during discovery remain in the “exclusive custody” of the attorney because that restriction unduly hampers the attorney’s ability to prepare his or her case, which may require providing discovery materials to investigators, experts, consultants, or others in addition to the attorney himself or herself.

Standard 11-6.5. Protective orders

Upon a showing of cause, the court may at any time order that specified disclosures be restricted, conditioned upon compliance with protective measures, or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled is disclosed in sufficient time to permit counsel to make beneficial use of the disclosure.

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3. See, e.g., ALASKA R. CRIM. P. 16(d)(3) (specifying certain records for which court may attach conditions concerning disclosure).
4. See, e.g., ARK. R. CRIM. P. 19.3; COLO. R. CRIM. P. 16, Part III, (c); MINN. R. CRIM. P. 9.03, Subd. 4.
History of Standard

This is the same, with one small change, as Second Edition Standard 11-4.4, which provided the court with authority to issue protective orders in appropriate cases.

Related Standards

NDAA, National Prosecution Standard 13.5(A) (2d ed. 1991)

Commentary

The standard authorizes the court, upon a showing of cause, to order that disclosures otherwise required by the discovery standards be restricted, conditioned, or deferred. Any protective order must provide that the required disclosures be made in sufficient time for opposing counsel to make effective use of those materials in the preparation of his or her case.

The provision for protective orders is an essential part of the discovery standards. It enables the parties to seek relief from discovery requirements where disclosures required by the rules would be harmful, inappropriate or unfair in the circumstances of a particular case. Protective orders are expressly authorized by the Federal Rules of Criminal Procedure, by the Uniform Rules of Criminal Procedure, and by the National Prosecution Standards. A number of state laws also expressly provide authority for the court to enter protective orders where appropriate.

While those opposing pretrial discovery in criminal cases have traditionally cited the fear that such disclosures will subject victims and

1. FED. R. CRIM. P. 16(d)(1).
4. See, e.g., ALA. R. CRIM. P. 16.4; ARIZ. R. CRIM. P. 15.5(c); ARK. R. CRIM. P. 19.4; COLO. R. CRIM. P. 16, Part III, (d); FLA. R. CRIM. P. 3.220(b)(2),(e),(l); IOWA CRIM. P. § 813.2, Rule 13.6(a); KAN. CODE CRIM. P. § 22-3212(e); KY. R. CRIM. P. 7.24(6); MD. R. 4-263(c)(3),(i); MINN. R. CRIM. P. 9.03, Subd. 5; N.J.R. CRIM. PRAC. 3:13-3(d); N.D.R. CRIM. P. 16(d)(1); OHIO R. CRIM. P. 16(E)(1); PA. R. CRIM. P. 305.F; R.I.R. CRIM. P. 16(f); UTAH R. CRIM. P. 16(f); W. VA. R. CRIM. P. 16(d)(1); WIS. CODE CRIM. P. § 971.23(6).
witnesses to threats or other abuse, lead to the loss or destruction of physical evidence, or otherwise adversely affect the integrity of the case to be presented at trial, experience suggests that discovery does not pose such problems in the vast majority of cases. In those unusual cases where such problems are presented, protective orders are an appropriate method of ensuring that pretrial disclosures will not jeopardize victims, witnesses, or evidence.

Protective orders are available to the prosecution and the defense, and to third parties as well. For example, the prosecution might seek an order containing conditions to protect the chain of custody of tangible evidence to be introduced at trial, or to protect witnesses who received threats of harm. The defense might seek a protective order against disclosures which would violate his or her rights against self-incrimination. A third party might seek conditions which protect its interest in maintaining certain information confidential. In short, the provisions of the protective order may be designed to protect a victim or witness, to ensure the safety of evidence, to establish procedures for disclosure of particular materials, to regulate the timing of speci-

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7. See Standard 11-3.1(c) (third party from whom nontestimonial information is sought may move to quash); Standard 11-5.2(e) (third party whose discovery deposition is sought may move to quash).
9. See, e.g., Holmes v. State, 557 So. 2d 933, 936 (Fla. App.) (protective order granted where there is an actual threat of harm), cert. denied, 567 So. 2d 435 (Fla. 1990).
10. See, e.g., People v. Miller, 159 Misc. 2d 1090, 1091, 608 N.Y.S.2d 50, 51 (1994) (protecting against disclosure of defendant's personal medical records which included defendant's statements to treating medical personnel).
11. Compare In re Pittsburgh Action Center Against Rape, 494 Pa. 15, 29, 428 A.2d 126, 133 (1981) (ordering court to fashion protective order which precluded defendant in rape case from disseminating confidential information received from rape crisis center that treated the victim) with Post-Newsweek Stations v. Doe, 612 So. 2d 549, 552-53 (Fla. 1992) (John Does on "client list" of alleged prostitute disclosed during discovery in criminal case lacked privacy interest to justify restricting public access to their names).
fied discovery, or otherwise to regulate and control any aspect of the discovery procedures.\textsuperscript{12}

Protective orders should be narrowly tailored to meet the particular interests at stake. If there is a less restrictive solution than withholding information entirely, that solution is preferable.\textsuperscript{13} Courts must also ensure that the protected material is disclosed in sufficient time for the opposing party to make use of it at trial. For example, where disclosure of witnesses is delayed or withheld due to concerns for their safety, there must be some provision made to allow the defense to learn the necessary information in time to prepare for trial.\textsuperscript{14}

Standard 11-6.6. Excision

When some parts of material or information are discoverable under these standards and other parts are not discoverable, the discoverable parts should be disclosed. The disclosing party should give notice that nondiscoverable parts have been withheld and the nondiscov­erable parts should be sealed, preserved in the records of the court, and made available to the appellate court in the event of an appeal.

History of Standard

This is the same as Second Edition Standard 11-4.5, with minor editorial corrections.

Related Standards

NCCUSL, Uniform Rules of Criminal Procedure, Rule 421(b)(4), 423(b) (1987)

\textsuperscript{12} The types of findings which may justify the issuance of a protective order are also addressed in Standard 11-6.1(e), which specifies that protective orders may be issued where the court finds a "substantial risk to any person of physical harm, intimidation or bribery resulting from [the] disclosure which outweighs any usefulness of the disclosure." See also State v. Vincent, 156 Vt. 259, 264, 591 A.2d 65, 68 (1991) (discussing standard for entry of protective order).

\textsuperscript{13} See, e.g., ALASKA R. CRIM. P. 16(d)(3)(B) (addresses and phone numbers of witnesses not to be provided to defendant); People v. Thurman, 787 P.2d 646, 655-56 (Colo. 1990) (witness's address to be provided to defense counsel alone).

\textsuperscript{14} See, e.g., ARIZ. R. CRIM. P. 15.5(a) (disclosure of witnesses' names may not be deferred past five days before trial).
NDAA, National Prosecution Standards 13.5(B) (2d ed. 1991)

Commentary

Documents may at times contain both information that is discoverable, and information that is not relevant to the case or is protected from disclosure. This standard provides that any discoverable parts of such materials are to be disclosed, and the nondiscoverable parts are to be sealed, preserved, and made available upon appeal. The same provision was contained in the Second Edition Standards.

Excision under this standard may be made in the first instance either by the disclosing party or by the court. To the extent that such decisions can be made by the parties without need for judicial intervention, the disclosure process can be expedited and judicial resources conserved. In difficult cases, however, the disclosing party may elect to submit the issue of excision to the court.

While there is no express provision for excision in the federal rules, some state laws contain such provisions. In addition, the Uniform Rules of Criminal Procedure authorize excision in a number of instances. While the Uniform Rules do not make any provision for the excised portions to be preserved or made available on appeal, such a provision is important to enable the court of appeals to review any objections that have been made in this regard.

The standard also expressly provides for the disclosing party to give notice that excisions have been made. Such notice is essential to enable the opposing party to raise before trial any issues concerning the propriety or extent of the excisions. The Uniform Rules contain similar provisions, requiring that any excisions be made "in a manner showing that there has been excision."\(^4\)

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1. See Standard 11-1.1.
2. See, e.g., ALASKA R. CRIM. P. 16(d)(5); ARIZ. R. CRIM. P. 15.5(b); ARK. R. CRIM. P. 19.5; COLO. R. CRIM. P. 16, Part III, (e); MINN. R. CRIM. P. 9.03, Subd. 7.
3. Rule 421(b)(4) of the Uniform Rules of Criminal Procedure authorizes the prosecution to excise legal work product from otherwise discoverable material. Rule 423(b)(1) of the Uniform Rules of Criminal Procedure authorizes the defense to excise communications of the defendant from discoverable defense evidence. Finally, Rule 423(b)(3) of the Uniform Rules of Criminal Procedure authorizes the defense to excise legal work product from reports on prospective jurors.
4. See NCCUSL, UNIFORM RULES OF CRIMINAL PROCEDURE, Rules 421(b)(4) and 423(b)(3) (1987).
11-6.7 Criminal Justice Discovery Standards

**Standard 11-6.7. In camera proceedings**

Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or any portion of such showing, to be made in camera. A record should be made of both in court and in camera proceedings. Upon the entry of an order granting relief following a showing in camera, all confidential portions of the in camera portion of the showing should be sealed, preserved in the records of the court, and made available to the appellate court in the event of an appeal.

**History of Standard**

This is the same as Second Edition Standard 11-4.6, with small editorial corrections.

**Related Standards**

NDAA, National Prosecution Standards 13.5(A) (2d ed. 1991)

**Commentary**

This standard provides that applications for denial or regulation of discovery may be heard by the court *in camera*, outside of the presence of the opposing party. However, any proceedings on such an application must be recorded, and any *in camera* portions of the record must be sealed, preserved, and made available for review upon appeal. Comparable provisions are included in the Federal Rules of Criminal Procedure,1 the National Prosecution Standards,2 the Uniform Rules of Criminal Procedure,3 and in state rules.4

1. FED. R. CRIM. P. 16(d)(1). The rule provides that any party may request to make a showing "in the form of a written statement to be inspected by the judge alone."
4. See, e.g., ALASKA R. CRIM. P. 16(d)(6); ARK. R. CRIM. P. 19.6; COLO. R. CRIM. P. 16, Part III, (f); FLA. R. CRIM. P. 3.220(m); KY. R. CRIM. P. 7.24(6); MINN. R. CRIM. P. 9.03, Subd. 6; PA. R. CRIM. P. 305.F; R.I.R. CRIM. P. 16(f); UTAH R. CRIM. P. 16(f); W. VA. R. CRIM. P. 16(d)(1); WYO. R. CRIM. P. 16(d)(1).
The procedure for in camera proceedings may be requested by the prosecution, the defense, or a third party. The court normally should grant such a request when arguably confidential information must be revealed to the court before it can make a determination on the discoverability of the items in question.\(^5\)

The provision for making and preserving a record ensures that the court’s ruling can be reviewed on appeal, and thus protects any excluded parties from arbitrary or capricious action.\(^6\) The provision for sealing the record in the event that disclosure is denied or regulated ensures the continued confidentiality of information revealed during the in camera proceedings.

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\(^6\) The making of the record also permits the excluded party to learn exactly what happened during the in camera portion of a proceeding, if the court should conclude on appeal that the request for in camera proceedings was unnecessary.
PART VII.
SANCTIONS

Standard 11-7.1. Sanctions

(a) If an applicable discovery rule or an order issued pursuant thereto is not promptly implemented, the court should do one or more of the following:

(i) order the noncomplying party to permit the discovery of the material and information not previously disclosed;
(ii) grant a continuance;
(iii) prohibit the party from calling a witness or introducing into evidence the material not disclosed, subject to the defendant's right to present a defense and provided that the exclusion does not work an injustice either to the prosecution or the defense; and/or
(iv) enter such other order as it deems just under the circumstances.

(b) The court may subject counsel to appropriate sanctions, including a finding of contempt, upon a finding that counsel willfully violated a discovery rule or order.

History of Standard

The issue of sanctions for violation of discovery rules and orders was addressed in Second Edition Standard 11-4.7. This incorporates and amends that standard, adding language which specifies that exclusion of evidence is a permissible sanction under specified conditions, and that the court may find individual attorneys in contempt of court as a discovery sanction for willful discovery violations.

Related Standards

NCCUSL, Uniform Rules of Criminal Procedure, Rules 421(e), 422(d), 423(m) (1987)
NDAA, National Prosecution Standards 56.4, 56.5 (2d ed. 1991)

Commentary

Imposing sanctions for violations of the discovery rules in appropriate cases is essential to the success of the discovery standards. If
applicable discovery rules or orders under those rules are not promptly implemented, this standard provides that the court "should" impose an appropriate sanction. While the Second Edition Standard stated that the court "may" impose a sanction in such cases, this language has been strengthened to emphasize the importance of judicial enforcement of the requirements of the discovery standards.

Sanctions may include ordering that the discovery be produced, granting a continuance of the trial date, excluding evidence in exceptional cases, or fashioning other relief. The court may in addition subject counsel personally to sanctions, including a finding of contempt, if it finds that he or she has willfully violated a discovery rule or order.

The discovery standards contemplate that most lawyers, parties, and others within the criminal justice system will attempt conscientiously to fulfill the duties assigned to them. To a large extent, discovery should proceed under these standards by direct exchanges between the parties pursuant to a court-established schedule, without need for continuing involvement of the court.\(^1\) However, a provision for sanctions is essential to ensure that parties and attorneys understand that these standards impose mandatory obligations, the breach of which may bring serious consequences. The provision also serves to suggest a range of appropriate remedies for noncompliance.

The sanctions apply both when a discovery rule or order is not implemented at all, and when it is implemented in a manner that effectively deprives the party receiving it of the benefit of the disclosure. The court may properly consider imposing sanctions prior to as well as during or after trial. The court may consider sanctions at the request of a party who has been deprived of discovery, or upon its own initiative.

In either case, the court may consider the objectives of the discovery standards, any discovery agreements between the parties, the nature, extent and timing of the nondisclosure, and any other factors that may be relevant in deciding on an appropriate sanction.\(^2\) Where the court learns of a discovery violation, it is appropriate to conduct a hearing

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1. Exceptions exist for certain types of discovery which require a court order, such as depositions or certain types of physical examinations of the defendant.
to determine the circumstances of the violation, whether it was willful or inadvertent, and the harm resulting from the nondisclosure.\(^3\)

Where there is an alleged discovery violation, it is important that the trial court take all necessary evidence, and explain in detail the rationale for its decision to award or deny sanctions. Similarly, it is essential that appellate courts reviewing decisions concerning alleged discovery violations take such allegations very seriously. If appellate courts excessively apply the harmless error doctrine to overlook discovery violations, the result will severely undermine the effectiveness of this body of discovery rules.

**Standard 11-7.1(a)**

Paragraph (a) suggests a range of possible remedies to incidents of noncompliance with the discovery standards. *First*, the court may issue an order directing a noncomplying party to disclose specific information or material by a set date. Such an order would be appropriate, for example, where noncompliance was the result of a misunderstanding, was based on a legitimate disagreement, or was otherwise made in good faith, and issuing such an order will ensure that the opposing side will get the full benefit of the disclosure. Orders that further discovery be produced are among the sanctions provided by the Federal Rules of Criminal Procedure,\(^4\) the National Prosecution Standards,\(^5\) and the Uniform Rules of Criminal Procedure.\(^6\)

*Second*, the court is also authorized to grant a continuance. A continuance would be appropriate where, for example, required disclosures were made too late to be of use, and additional time is necessary to allow the opposing party an opportunity to analyze the materials. A continuance may also be combined with an order requiring specified disclosures. Continuances are authorized sanctions under the Federal Rules of Criminal Procedure, the National Prosecution Standards, and the Uniform Rules of Criminal Procedure.\(^7\)

*Third*, a new provision in the Third Edition Standards expressly authorizes the exclusion of evidence as an appropriate sanction, "sub-

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4. See FED. R. CRIM. P. 16(d)(2).
6. See NCCUSL, UNIFORM RULES OF CRIMINAL PROCEDURE, Rules 421(e), 422(d), 423(m) (1987).
7. See notes 4–6, supra. See also, e.g., Reed v. State, 312 Ark. 82, 88, 847 S.W.2d 34, 37 (1993).
ject to the defendant's right to present a defense" and provided that the exclusion "does not work an injustice either to the prosecution or the defense." This provision makes clear that evidence may be excluded as a discovery sanction in appropriate cases, and also explains the standards which should govern such rulings. The Federal Rules of Criminal Procedure provide for the exclusion of evidence as an appropriate sanction, as do the National Prosecution Standards. Numerous state laws similarly authorize the exclusion of evidence as a discovery sanction.

There is no absolute constitutional bar to the exclusion of defense evidence as a sanction for discovery violations. The Supreme Court has specifically held that defense witnesses may be precluded from testifying at trial as a sanction for counsel's willful discovery violations designed to obtain a strategic advantage. However, the exclusion of defense witnesses may raise issues concerning the defendant's Sixth Amendment right to present witnesses in his or her own defense, and can lead to an unfair conviction. On the other hand, the exclusion of prosecution evidence as a discovery sanction may result in a windfall to the defense. Either result would defeat the purposes

8. FED. R. CRIM. P. 16(d)(2); NDAA, NATIONAL PROSECUTION STANDARDS 56.4 (2d ed. 1991). The Uniform Rules of Criminal Procedure neither provide for nor rule out the sanction of exclusion of evidence. See NCCUSL, UNIFORM RULES OF CRIMINAL PROCEDURE, Rules 421(e), 422(d), 423(m) (1987).

9. See, e.g., ALA. R. CRIM. P. 16.5; ARIZ. R. CRIM. P. 15.7(a)(4); ARK. R. CRIM. P. 19.7(a); CAL. PEN. CODE § 1054.5(b); COLO. R. CRIM. P. 16, Part III, (g); FLA. R. CRIM. P. 3.220(b)(3), (n)(1); IOWA CRIM. P. § 813.2, Rule 13.6(c); KAN. CRIM. P. § 22-3212(g); KY. R. CRIM. P. 7.24(3)(C),(9); MD. R. 4-263(i); NJ.R. CRIM. PRAC. 3:13-3(f); N.D.R. CRIM. P. 16(d)(2); OHIO R. CRIM. P. 16(E)(3); PA. R. CRIM. P. 305E; R.I.R. CRIM. P. 16(i); UTAH R. CRIM. P. 16(g); V. VA. R. CRIM. P. 16(d)(2); WIS. CODE CRIM. § 971.23(7); WYO. R. CRIM. P. 16(d)(2). See generally Taliaferro v. State, 295 Md. 376, 387-88, 456 A.2d 29, 35-36, cert. denied, 461 U.S. 948 (1983) (listing provisions of 32 states and the District of Columbia which allow exclusion of testimony as a sanction for failure to provide notice of an alibi defense).


of the discovery standards. Thus, such orders should be issued only in extreme cases.

Finally, the court also has general authority to enter an order, not specified in the standard, imposing appropriate remedies for a discovery violation. Such orders may include, for example, postponing the opposing party's duty to make its corresponding discovery disclosures, or postponing cross-examination of a witness who was not disclosed in advance of trial.

The Uniform Rules of Criminal Procedure also specify that a discovery sanction may include granting a mistrial. However, because of double jeopardy considerations, before granting a mistrial, the court should consider whether the discovery violation can be cured by a continuance. A mistrial should not be granted unless the defendant agrees, or such a course is necessary to prevent a miscarriage of justice. Similarly, while some courts have dismissed charges against a defendant as a sanction for discovery violations by the prosecution, this sanction is wasteful of judicial and investigative resources, and should be imposed only where no less severe sanction will remedy the violation.

12. Cf. Ariz. R. Crim. P. 15.7(b) (if defendant fails to provide discovery, court may order that state provide only Brady material to the defense); Conn. R. Crim. P. § 747(3) (court may relieve defendant from making required disclosures); N.D.R. Crim. P. 16(d)(2) (authorizing as a sanction an order relieving moving party of duty to make disclosures).


14. See NCCUSL, UNIFORM RULES OF CRIMINAL PROCEDURE, Rules 421(e), 422(d), 423(m) (1987); see also Ariz. R. Crim. P. 15.7(a)(5); Fla. R. Crim. P. 3.220(n)(1); Md. R. 4-263(i); State v. Smothers, 605 S.W.2d 128, 132 (1980), (en banc), cert. denied, 450 U.S. 1000 (1981).


18. See, e.g., Cal. Pen. Code § 1054.5(c) (charges should be dismissed as discovery sanction only when constitutionally required); State v. Theriault, 590 So. 2d 993, 996 (Fla. App. 1991) (where defendant is not irreparably prejudiced by prosecution's discovery violation, dismissal of charges punishes the public, not the prosecutor, and cre-
In approaching the issue of sanctions, the courts should use a flexible approach which fully cures the harm caused by the failure to disclose, while not creating an undue advantage to the opposing side. A sanction should not be more punitive than is necessary to remedy the discovery violation. At the same time, where a pattern emerges of discovery violations by a particular person or office, the court should also consider the need to impose sanctions that will deter future violations. As noted below, where the violation is willful, the court should consider sanctioning the lawyer individually in addition to any sanctions imposed under this section.

**Standard 11-7.1(b)**

Paragraph (b) specifically authorizes the court to take action against an attorney personally if noncompliance with a discovery rule or order is the result of the attorney’s willful violation. In the Third Edition Standards, this provision has been amended expressly to state that the available sanctions against an attorney include use of the court’s contempt power. The court may also refer the attorney to the

19. See People v. District Court, 808 P.2d 831, 837 (Colo. 1991) (court framing sanction should try to restore “level playing field” that existed before discovery violation); State v. Darcy, 442 A.2d 900, 903 (R.I. 1982) (sanction should ensure that defendant is placed in “as favorable a position as he would have been had the information been furnished in timely fashion”); Davis v. State, 623 A.2d 601 (D.C. 1993) (range of sanctions available is broad, sanction must be fair); State v. Miller, 466 N.W.2d 128, 132 (N. Dak. 1991) (discussing range of sanctions).

20. See, e.g., Hernandez v. State, 572 So. 2d 969, 971-72 ( Fla. App. 1990) (exclusion of undisclosed defense witness was in error where prejudice to state could have been averted by trial recess); State v. Marchellino, 304 N.W.2d 252, 257 (Iowa 1981) (exclusion of undisclosed defense witness was in error where lesser sanctions would remedy violation); State v. Schwartz, 605 So. 2d 1000, 1001 (Fla. App. 1992) (excluding testimony of informant, who was essential state witness, was erroneous where no lesser discovery sanctions were considered); In re F.E.F., 156 Vt. 503, 515, 594 A.2d 897, 905 (1991) (sanction should not be harsher than necessary to accomplish goals of discovery rules).

21. Compare ALASKA R. CRIM. P. 16(e)(2) (providing for sanctions against counsel for willful violations of discovery rules); ARK. R. CRIM. P. 19.7(b) (same); FLA. R. CRIM. P. 3.220(n)(2) (same).

22. Cf. NDAA, NATIONAL PROSECUTION STANDARDS 56.4 (2d ed. 1991) (providing for contempt power); FLA. R. CRIM. P. 3.220(n)(2) (sanction against attorney may include “contempt proceedings”); MINN. R. CRIM. P. 9.03, Subd. 8 (to same effect); In re Pittsburgh Action Against Rape, 494 Pa. 15, 29, 428 A.2d 126, 133 (1981) (contempt citation against third party for refusing to obey discovery order); State v. Khong, 29 Ohio App. 3d 19, 29-30, 502 N.E.2d 682, 692 (1985) (prosecutor’s willful discovery violation may
appropriate jurisdiction for professional disciplinary action. The Court's power to impose sanctions on individual lawyers is in addition to its power to impose whatever sanction is necessary to return the parties to a "level playing field."

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23. See, e.g., Gilbert v. State, 547 So. 2d 246, 249 (Fla. App. 1989) (where prosecutor told witness not to speak to defense counsel, appropriate sanction may include instituting grievance proceedings), review denied, 557 So. 2d 35 (Fla. 1990).
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INTRODUCTION

The Trial by Jury Standards contained in this chapter of the ABA Criminal Justice Standards resolve important issues relating to various aspects of jury trials in criminal cases. They include standards relating to resolution of the question of when the right to a jury trial should attach, they cover jury selection and appropriate jury procedures during trial, and they include discussion of the acceptance and impeachment of jury verdicts. This third edition of the Trial by Jury Standards contains significant improvements over the first and second editions. While many of the Third Edition Standards are unchanged in substance from prior editions, the text in many of the standards has been updated and improved; in addition, new standards have been added to address jury trial problems and concerns which have arisen since promulgation of the Second Edition Standards.

The Third Edition Standards in this chapter result from an effort of more than two years, initiated with the appointment of an updating task force in the spring of 1991 by the Criminal Justice Standards Committee. The Task Force was chaired by a state supreme court justice, and had as members a judge, two prosecutors and two defense counsel, as well as liaisons from the National District Attorneys Association, the National Association of Attorneys General, the Department of Justice, the National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, the ABA Criminal Justice Section Council, the ABA Criminal Justice Section Grand Jury Committee, and the ABA Judicial Administration Division. In October of 1992, a draft third edition was presented by the Task Force to the Criminal Justice Section Council for its review.

The resulting Third Edition Standards are the product of careful analysis and review by representatives of all segments of the criminal justice system: judges, prosecutors, defense counsel, court personnel, and academics active in criminal justice teaching and research. Circulation of earlier drafts of these standards to a wide range of outside consultants and experts provided a rich array of comment and criticism, consideration of which has greatly strengthened the final product.

Moreover, since the adoption of the Second Edition Standards in 1978, a number of legal, constitutional, and societal issues arose which strongly suggested that the standards be revisited, that some of the underlying policy be reconsidered, and that some of the commentary be revised. For example, the right to trial by jury was recently ad-
dressed by the United States Supreme Court in the case of *Blanton v. Las Vegas*. Although the Court reaffirmed the "serious" and "petty" case distinction as that which determines whether the right of trial by jury attaches, the amount of a fine below which an offense is deemed petty was raised to $5,000. The Court did, however, reaffirm the principle that the right to trial by jury was mandatory only in serious cases, those in which potential imprisonment upon conviction was a term of more than six months.

The Court has also recently revisited the alleged use of peremptory challenges to strike potential jurors because of their race, an important issue not addressed in prior editions of these standards. The Court firmly established the principle, now reflected in these standards, that neither the prosecutor nor defense counsel is permitted to use peremptory challenges in a racially discriminatory manner.

Since the first edition of these standards was promulgated, various courts have experimented with ways to make the jury selection process more efficient and unbiased. Some courts have used juror questionnaires to lessen the time spent on voir dire; other courts have adopted the "alternative strike" method for selecting jurors. Some courts have permitted jurors to take notes; other courts have permitted jurors to question witnesses. The propriety of innovations such as these is addressed in the Third Edition Standards. In addition, the explosive public reaction to recent high-profile jury trials, apparently based on the widespread impression that the process was not fair to the victims, led to the conclusion that both the substantive and the apparent fairness of the jury trial process should be addressed. Finally, the Americans with Disabilities Act established rights for disabled citizens, rights which were not adequately addressed in the existing standards.

In short, over the past twenty-five years since the Trial by Jury Standards were first adopted, many important and relevant changes have taken place in the criminal justice system and in our larger society. Issues have arisen that were not contemplated in the earlier standards. Procedures have been developed that were not envisioned at that time. It was these changes, new issues, and new procedures that demonstrated a need to revisit these standards, to expand, revise, or reaffirm them, as appropriate. The resulting Third Edition Standards reflect studied consideration of all of these matters and contain useful and appropriate guidelines for jury trials in our criminal justice system today.
PART I.
THE RIGHT TO TRIAL BY JURY

Standard 15-1.1. Right to jury trial

(a) Jury trial should be available to a party, including the state, in criminal prosecutions in which confinement in jail or prison may be imposed.

(b) The jury should consist of twelve persons, except that a jury of less than twelve (but not less than six) may be provided when the penalty that may be imposed is confinement for six months or less.

(c) The verdict of the jury should be unanimous.

(d) This chapter does not apply to procedures of military justice tribunals.

History of Standard

The desirability of the right to trial by jury in cases involving any potential imprisonment has been retained. Section (d) has been added to the standard to make it clear that these standards do not apply to military tribunals.

Related Standards

ABA Standards Relating to Trial Courts 2.10 (1976)
National District Attorneys Association National Prosecution Standards 74.1, 74.2 (2d ed. 1991)

Commentary

Standard 15-1.1 establishes the general aspirational framework for the availability of the right to trial by jury in criminal cases and delineates the minimum requirements for that right. In so doing, it is important to acknowledge that this standard establishes goals that exceed the constitutional requirements of the Sixth Amendment to the Constitution of the United States, as currently interpreted by the
Supreme Court. On the issue of the applicability of the right, the standard provides that a jury trial should be available to all defendants who face the possibility of imprisonment for any time, although the Supreme Court has interpreted the constitutional right to apply only to those defendants facing a potential imprisonment of more than six months. In addressing the requirement of jury size, it again establishes a requirement that exceeds the constitutional requirement in that juries of six persons are permitted only for "petty offenses." Finally, this standard provides that a jury verdict must be unanimous, although jury unanimity is not constitutionally required by the Supreme Court in state prosecutions.

Availability of the Right to Trial by Jury

In 1968, the Supreme Court in Duncan v. Louisiana\(^1\) held that the constitutional right to trial by jury is applicable to the states through the Fourteenth Amendment, and explained that a defendant is constitutionally entitled to a jury trial for "serious crimes," but not for "petty offenses." In 1970, the Court further explained the distinction in Baldwin v. New York,\(^2\) holding that no offense could be considered "petty" if imprisonment of more than six months could result.\(^3\) Finally, in 1989, the Supreme Court addressed the "serious/petty" distinction in Blanton v. Las Vegas,\(^4\) and reaffirmed these earlier holdings.

The question of whether a fine alone could ever be considered "serious," thus entitling a defendant to a jury trial, has had a somewhat different history. Although the Court strongly hinted in Baldwin that a fine of over $500 would be considered serious, in the later case of Muniz v. Hoffman,\(^5\) the Court held that a $10,000 fine for a 13,000 member union was not serious because of the size and resources of the union.\(^6\) In Blanton, although the earlier cases indicated that a fine of

\(^1\) 391 U.S. 145 (1968).
\(^5\) 422 U.S. 454 (1975).
\(^6\) Whether this holding means that the seriousness of the offense may be determined by the relative ability of the defendant to pay the fine remains to be seen. In United States v. McAlister, 630 F.2d 772 (10th Cir. 1980), the court held that an authorized $1,000 fine was serious.
more than $500 would be considered serious, the Court noted that comparable federal laws providing for six months' or less imprisonment provided for a fine of up to $5,000. The Court, however, refused to draw a specific line of demarcation as it had in Baldwin with respect to length of imprisonment. Apparently, therefore, a fine of up to $5,000 will not be regarded as serious, although it is still unclear whether a fine of any amount more than $5,000 will be considered invariably serious or petty.

The subsidiary question of applicability of the right to trial by jury to a situation where the defendant is charged with multiple "petty" offenses is one which has arisen in a number of different cases with varying results. The situation has occurred frequently when a defendant has been charged with multiple contempts of court. In general, in such a case, it has been held that where the aggregate potential punishment facing the defendant is more than six months, the combined offenses are considered "serious" and the constitutional right to trial by jury is applicable.

The states vary in providing a state right to jury trial in criminal cases, whether the right is constitutional or statutory. Many states follow the federal rule by refusing trial by jury to a defendant charged with those minor crimes defined in the state as "petty offenses" or "infractions." Other states, following the earlier lead of the ABA standards, provide for trial by jury in all cases where there is potential imprisonment. Some states have constitutional provisions for non-jury trials of petty offenses in the first instance, with right to de novo jury trial on appeal.

The Constitution, of course, establishes those minimum requirements of procedural or substantive fairness below which a jurisdiction may not go. These standards, on the other hand, are aspirational

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7. Blanton, supra note 4, at 545-46.
10. See, e.g., FLA. STAT. § 918.0155 (1986). The statute provides that a defendant does not have the right to jury trial for offenses carrying a potential punishment of less than six months if the judge announces, prior to trial, that the defendant will not be imprisoned if convicted.
11. See, e.g., DEL. CONST. art. IV, § 28 (misdemeanors); N.H. CONST. pt. 2, art. 77 (crimes not punishable by imprisonment in state prison); N.C. CONST. art. I, § 24 (petty misdemeanors); VA. CONST. art. 1, § 8 (offenses not felonious).
rather than minimal requirements of law. Standard 15-1.1(a) articulates a more stringent requirement than does current constitutional law and, in so doing, recognizes that punishments of less than six months' imprisonment can be quite serious to the individual. Even a short period of imprisonment is, for most individuals, sufficiently serious to warrant trial by jury. If a person is to be punished by imprisonment for any period of time, that person should be entitled to the fundamental right of trial by jury. The specter of imprisonment for five months and twenty-nine days might not be considered serious by some, but imprisonment for any period of time, however short, would be viewed as catastrophic by others. This standard also recognizes that the availability of jury trial is beneficial to the prosecution and to society as a whole, not simply to the accused. Accordingly, section (a) provides that the right should be available to both the prosecution and the defense.

The primary reason given for denying the right to trial by jury is that it places too great a burden on the system, that to provide a jury trial for a myriad of petty offenses is a luxury which government cannot afford. The fact is that even when trial by jury is available, the great majority of cases are resolved without trial. Despite the relatively low ratio of jury trials to offenses charged, the jury, by being available to the parties, exerts both a symbolic and a real impact on all cases in the system. Throughout the process, decisions of the participants are directed by their expectations of what the jury would do were the case to proceed to trial. It is trial by jury that is the universally recognized hallmark of the Anglo-American system of criminal justice, the reliance on a number of lay citizens called to interpose their judgment between the government and the citizen. It is a function no less important when the government attempts to imprison a citizen for a day or a week than when the government attempts to imprison a citizen for a year or for life.

Size of the Jury

In the federal system, and in many of the states, a jury usually consists of twelve persons. Current constitutional law, however, permits a smaller number of jurors. The issue of the constitutionally acceptable minimum number of jurors came before the Supreme Court

in the case of Williams v. Florida. The Court found that the number "twelve" was an historical accident, and, holding that legislatures should be free to determine the appropriate size of the jury, approved Florida's use of six-person criminal juries. Later, in Ballew v. Georgia, the Court concluded that the minimal number of jurors constitutionally acceptable was six.

States now vary in their approach to this issue. Many states have constitutional provisions similar to the Sixth Amendment, which provide for "jury trial" or "trial by jury." Most of these provisions have been interpreted as requiring a twelve-person jury. Seven states permit juries of fewer than twelve persons in felony trials; twenty-four states use such juries in misdemeanor cases. No state, however, permits fewer than a twelve-person jury in a capital case. Most of these provisions are not inconsistent with section (b) of this standard, since the provision for juries of fewer than twelve persons is limited to petty offenses or to courts having jurisdiction over only petty offenses.

Standard 15-1.1(b) also adopts a requirement stricter than the constitutional standard currently established by the Court. Although it permits the use of six-person juries for petty offenses, defined as offenses with potential imprisonment of six months or less, it mandates the use of twelve-person juries in all other cases. Section (b) reflects a balancing of the preference for the twelve-person jury with a practical concern for the lower cost and perceived efficiencies associated with a smaller jury.

Requirement that the Verdict be Unanimous

Standard 15-1.1(c) requires without exception that criminal juries be unanimous. As was the case with the preceding subsection, this standard establishes a requirement more stringent than that currently dictated by the Supreme Court.

In the 1972 case of Apodaca v. Oregon, the Supreme Court concluded that the Sixth Amendment did not require that state jury verdicts be unanimous. The Court based its decision on the "function

15. 1 F. BUSCH, LAW AND TACTICS IN JURY TRIALS § 24 (1959).
served by the jury in contemporary society," that of interposing a group of laymen between the accuser and accused, and then concluded that "[a] requirement of unanimity, however, does not materially contribute to the exercise of this common-sense judgment." 18

Although state court jury unanimity is not constitutionally required, there are substantial reasons why it should be the preferred standard. Most importantly, a unanimity requirement enhances the reliability of the jury's verdict. The non-unanimous jury, by diluting or eliminating the power of the minority to require the majority both to listen to and respect the minority opinions during the deliberative process, severely diminishes the effect that a minority position can have in focusing the deliberations on that minority's concerns. 19 The result is that the jurors need not debate as fully nor consider the concerns of the minority at any length. 20 In addition, the requirement of unanimity has an impact on jury compromise, or the eventual verdict of a lesser included offense. If unanimity is required, the jurors at the extremes may be driven to a compromise which they would otherwise reject, and a fairer verdict may result. 21

One of the primary arguments in favor of the non-unanimous verdict is that it is more efficient and less time consuming, lessening the number of hung juries. However, the incidence of hung juries is not large. Kalven and Zeisel found that, in the most difficult cases, the incidence of hung juries was about ten percent, dropping to two percent when the cases were not overly difficult. 22 Interestingly enough, although the incidence of hung juries is relatively small, eliminating the unanimity requirement would reduce that number by only about thirty-four percent. 23 Thus, two-thirds of the juries would have been hung juries even with a majority rather than a unanimity requirement.

Standard 15-1.2. Waiver of trial by jury

(a) Cases required to be tried by jury should be so tried, unless jury trial is waived with the consent of the prosecutor.

18. Id. at 410.
22. Supra note 12, at 457.
23. Id. at 461.
(b) The court should not accept a waiver unless the defendant, after being advised by the court of his or her right to trial by jury and the consequences of waiver of jury trial, personally waives the right to trial by jury in writing or in open court on the record.

(c) A defendant may not withdraw a voluntary and knowing waiver as a matter of right, but the court, in its discretion, may permit withdrawal prior to the commencement of the trial.

(d) A defendant may withdraw a waiver of jury trial as a matter of right, and a prosecutor may withdraw consent to a waiver as a matter of right if there is a change in the trial judge.

History of Standard

In section (b), the advice which should be given to a defendant was expanded to include the consequences of jury trial waiver. In addition, section (d) was added, providing to either party the right to withdraw a waiver or consent if there is a change in the judge who is to hear the case.

Related Standards

ABA Standards for Criminal Justice 4-5.2 (3d ed. 1993)
ABA Standards Relating to Trial Courts 2.10 (1976)

Commentary

Waiver of Jury Trial

Standard 15-1.2(a) permits a defendant’s waiver of a jury trial in any criminal case, reflecting a policy conclusion that a jury trial should not be required in every case. Notably, this is conditioned upon consent of the prosecution. Current practice throughout the country varies.

Waiver of jury trial is now generally permitted except when expressly prohibited by a constitutional or statutory provision, as is the case in a few jurisdictions with respect to capital cases.¹

The more controversial question is whether the waiver of a jury trial by a defendant should be viewed as a matter of right, or whether it should be conditioned upon the consent of the court and/or approval of the prosecuting attorney. In Singer v. United States, the Supreme Court held that the ability to waive a jury does not translate into a constitutional right to a bench trial. Similarly, whether waiver of a jury trial must constitutionally be conditioned on the consent of the prosecution and the court remains unclear. In Patton v. United States, the Supreme Court approved language which appears to condition the defendant's waiver on both prosecutorial acquiescence and court approval. Whether or not the prosecutor's consent is constitutionally required, however, section (a) of this standard takes the position that it should be required as a matter of policy.

Nature of Waiver

An effective waiver of the right to trial by jury must be a knowing and voluntary waiver. Section (b) provides that: (1) a defendant be advised of the right to jury trial; (2) the defendant personally waive this right; and (3) the defendant do so either in writing or in open court on the record.

The decision whether or not to waive a jury trial is an important matter to be decided by a defendant; it is not a tactical decision left only to defense counsel.

Withdrawal of Waiver

The prevailing view, adopted in this standard, is that approval of withdrawal of a voluntary and knowing waiver of trial by jury lies in the discretion of the court. The contrary view has been rejected. The
tactical or arbitrary exercise of such absolute power by a defendant could result in unreasonable delay and/or significant inconvenience to everyone involved.

This standard also limits withdrawal, even with consent of the court, to the time prior to the commencement of trial. Moreover, it is appropriate for a jurisdiction to specify in its rules of procedure a reasonable time period before trial after which a waiver may not be withdrawn. The decisional law sensibly establishes that a motion made after trial is under way is untimely.7

Section (d) does, however, recognize one situation in which either party should have an absolute right to withdrawal of a jury trial waiver. With the substitution of the trial judge, the premise upon which jury trial was waived has changed. The underlying philosophy establishing trial by jury as the preferred mechanism for resolution of a criminal case should take precedence over the desire for efficiency in administration in this situation.

Standard 15-1.3. Waiver of full jury or of unanimous verdict

(a) At any time before verdict, the parties, with the approval of the court, may stipulate that the jury shall consist of any number less than that required for a full jury.

(b) At any time before verdict, the parties, with the approval of the court, may stipulate that the verdict may be less than unanimous. The stipulation should be clear as to the number of concurring jurors required for the verdict to be valid.

(c) The court should not accept such a stipulation unless the defendant, after being advised by the court of his or her right to trial by a full jury, personally waives the right to trial by a full jury, or the right to a unanimous verdict, in open court on the record.

History of Standard

A sentence was added to section (b) to indicate that, if the verdict is to be by less than a unanimous jury, the number of jurors who must concur should be made clear at the time of the election. In addition,

7. Id. at 922.
pursuant to section (c), if the right to a unanimous jury is to be waived, the waiver should be in open court and on the record.

**Related Standards**

ABA Standards for Criminal Justice 4-5.2 (3d ed. 1993)
ABA Standards Relating to Trial Courts 2.10 (1976)
National Advisory Commission on Criminal Justice Standards and Goals, Courts 4.14 (1973)
National District Attorneys Association National Prosecution Standards 74.1, 75.1 (2d ed. 1991)

**Commentary**

Historically, a defendant's right to trial by jury, guaranteed by the Sixth Amendment, has included the right to a jury comprised of twelve persons, and a requirement that the jury verdict be unanimous. Recent Supreme Court decisions, however, have held that the Constitution does not require a twelve-person jury, nor does it demand jury unanimity. Standard 15-1.1 provides that twelve jurors should be required in all serious cases, that a jury of no fewer than six persons should be required for petty cases, and that the jury verdict should be unanimous. Standard 15-1.3 addresses the ability of the parties to stipulate that juries may consist of less than the requisite number and that a jury verdict need not be unanimous.

A reduction in jury size or a nonunanimous verdict alters fundamental aspects of the jury process and should never be considered unless all parties—the defendant, defense counsel, prosecutor, and trial judge—concur. Accordingly, this standard provides that the defense and the prosecution must both stipulate to such a change, the court must approve the stipulation, and the defendant must specifically waive the reduction in size or nonunanimous verdict. The re-

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1. See Standard 15-1.1(b), supra.
2. See Standard 15-1.1(c).
3. See Patton v. United States, 281 U.S. 276 (1930), upholding Fed. R. Crim. P. 23(b), which allows the parties to stipulate to less than a 12-person jury.
requirement of court consent is designed to insure that the waiver is knowing and voluntary.

The decision to waive the full number of jurors or the requirement of a unanimous verdict must be a personal decision of the defendant, since it incorporates at least a partial waiver of the right to trial by jury. Consequently, the court should apprise the defendant of his or her rights before such a waiver is accepted to ensure that he or she fully understands the consequences of waiver. To assure a knowing and voluntary waiver, this standard requires that the stipulation of the parties and the defendant's waiver be in open court and on the record. The stipulation should clearly state the number of concurring jurors required for a valid verdict. This is to avoid issues on appeal and to give the trial court the opportunity to review or modify the stipulation to ensure that it meets constitutional requirements.

The qualification in sections (a) and (b) of "at any time before verdict" provides flexibility for the parties to react to the special circumstances of a case. The waiver contemplated may arise at any of three stages in the prosecution. The first situation occurs with a pretrial agreement to try the case with a jury smaller than twelve persons. The second situation arises upon agreement of the parties, either before trial or after the trial has begun, that if one or more jurors should be excused for some acceptable reason such as serious illness, the trial may continue with fewer than the requisite number of jurors and a valid verdict may be returned by the remaining jurors. In the third situation, the necessity to proceed with fewer than the requisite number of jurors arises when, after a juror is excused for some serious reason, it is desirable to continue the trial to a verdict. This standard is based on the premise that there is no good reason for refusing to permit a knowing and intelligent waiver of a full jury, even at that time.

**Stipulation to Reduction in Jury Size**

It has been argued that a reduction in jury size can result in saving time and in a greater efficiency in trials. Experience with six-member juries has shown that the reduction in jury size saves considerable time in jury selection and in the trial itself, uses available judicial resources more efficiently, and substantially decreases the cost of the
jury system.\textsuperscript{4} It has been further argued that this time savings results in the more efficient use of available judicial resources with resultant economic savings.\textsuperscript{5} Because of these potential efficiencies resulting from the smaller jury, it is appropriate to permit defendants in criminal cases to elect to be tried by a jury of fewer than twelve upon stipulation. The lower number should, however, be fixed by statute or rule of court. In those jurisdictions which provide that defendants have a constitutional right to juries of twelve, the number would have to be incorporated in the constitution itself.

Under the federal Constitution, trial by fewer than twelve but no fewer than six jurors is valid. In \textit{Williams v. Florida},\textsuperscript{6} the Court held that the Sixth Amendment’s guarantee of trial by jury was not violated by use of six person juries. Later, in \textit{Ballew v. Georgia},\textsuperscript{7} the Supreme Court decided that a jury should be comprised of no fewer than six persons. The Court reversed a conviction by a five-person jury, holding that a trial before a five-person jury deprives a defendant of the constitutional right to jury trial guaranteed by the Sixth and Fourteenth Amendments.

Stipulation to a jury of fewer than twelve persons is permitted by the federal rules and by most of the states. Rule 23(b) of the Federal Rules of Criminal Procedure reads: ‘‘Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12.’’ This rule was held to be constitutional in \textit{Patton v. United States}.\textsuperscript{8}

\textbf{Nonunanimous Verdicts}

As a matter of federal constitutional law, unanimous juries are not required in state criminal trials. In \textit{Apodaca v. Oregon}, the Supreme Court held that states need not require unanimous verdicts under the


\textsuperscript{5} Id.

\textsuperscript{6} 399 U.S. 78 (1970).

\textsuperscript{7} 435 U.S. 223 (1978).

\textsuperscript{8} 281 U.S. 276 (1930).
Sixth Amendment.⁹ Later, in the same way that Ballew addressed how far jury size could be reduced, Johnson v. Louisiana¹⁰ addressed the minimum size of the majority upon which a nonunanimous verdict could be based. In Johnson v. Louisiana, the Court held that a nine-to-three majority verdict did not violate the defendant’s right to equal protection and due process of law. In Burch v. Louisiana, the Court subsequently held that a conviction by a nonunanimous six-person jury does violate the Sixth Amendment right of an accused to trial by jury.¹¹ The Court found that lines must be drawn on the number of jurors participating in nonunanimous verdicts if the substance of the jury trial right was to be preserved.¹²

There is significant scholarly debate on the issue of whether a unanimous verdict should be required in a trial by jury. Because of the values inherent in requiring unanimity, Standard 15-1.1 provides that a unanimous verdict should be required in all cases.¹³ A requirement that jury debate continue until a unanimous verdict is reached leads to a more thorough and careful consideration of the facts and issues in jury deliberations.¹⁴ In addition, but no less important, the requirement of a unanimous verdict creates a heightened sense of accuracy in fact finding, legitimacy in the verdict, and overall justice, both for society and for the defendant.¹⁵ In recognition of this consideration, the Uniform Rules of Criminal Procedure do not permit nonunanimous juries, even with waiver by the defendant.¹⁶

Although not specified in this standard, there are numbers of jurors below which the verdict cannot be considered valid, even upon stipulation of the parties. In a six-person jury, unanimity must be required as a matter of constitutional law. Even with a twelve-person jury, following the reasoning of the Supreme Court in Johnson v. Louisiana, a nonunanimous verdict by a majority of fewer than nine of the twelve jurors cannot be permitted.

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¹² Id. at 137.
¹³ See Standard 15-1.1 and Commentary, supra.
¹⁵ Id.
Standard 15-1.4. Change of venue or continuance

The following standards govern the consideration and disposition of a motion in a criminal case for change of venue or continuance based on a claim of threatened interference with the right to a fair trial.

(a) 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.

(b) A motion for change of venue or continuance should be granted whenever there is a substantial likelihood that, in the absence of such relief, a fair trial by an impartial jury cannot be had. A showing of actual prejudice should not be required.

(c) If a motion for change of venue or continuance is made prior to the impaneling of the jury, the court may defer ruling until the completion of voir dire. The fact that a jury satisfying prevailing standards of acceptability has been selected should not be controlling if the record shows that the criterion for the granting of relief set forth in paragraph (b) has been met.

(d) It should not be a ground for denial of a change of venue that one such change has already been granted. The claim that the venue should have been changed or a continuance granted should not be considered to have been waived by the waiver of the right to trial by jury or by the failure to exercise all available peremptory challenges.

(e) After the court has determined, on the criteria set forth above, that a change of venue should be granted, the appropriate authority should designate the geographical location to which venue will be changed. In determining the location to which venue should be changed, the appropriate authority should consider the following factors:

1. The nature and extent of pretrial publicity, if any, in the proposed venue;
2. The relative burdens on the respective courts in changing to the proposed venue;
3. The relative hardships imposed on the parties, witnesses, and other interested persons with regard to the proposed venue;
4. The racial, ethnic, religious and other relevant demographic characteristics of the proposed venue, insofar as they may affect the likelihood of a fair trial by an impartial jury;
(5) Any other factor which may be required by the interests of justice.

**History of Standard**


**Related Standards**

ABA Standards for Criminal Justice 8-3.3 (3d ed. 1992)

**Commentary**

Standard 15-1.4 is in large part identical to Standard 8-3.3, Fair Trial and Free Press. The reader is directed to that standard for additional commentary.

Considerations relating to change of venue have been among the more controversial contemporary legal issues. The right to insist on a trial in a particular venue is granted to a defendant by the Constitution of the United States in two separate provisions, and is also granted in most state constitutions in order to help preserve the defendant's right to a fair trial.¹

There are numerous reasons for preferring trial in the place of the offense. In the average case, holding the trial in the place where the crime was committed is beneficial to both the prosecution and the

¹. Article III, Section 2, Clause 3 of the United States Constitution reads:
The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have direction.
The Sixth Amendment to the United States Constitution reads:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .

See also, e.g., the Florida Constitution, Article I, Section 16, which provides:
In all criminal prosecutions the accused shall . . . have the right . . . to a speedy and public trial by impartial jury in the county in which the crime was committed.

For an analysis of the history of this provision, see Kershen, Vicinage, 29 OKLA. L. REV. 801 (1976).
defense. The trial will take place in a location where the defendant may receive support from family and friends more easily.\(^2\) Costs of travel to a distant locale do not have to be incurred by either the defense or the prosecution. It is easier for the witnesses to attend the trial. The jurors are familiar with the geographic area. The jury as a whole reflects the attitudes and the viewpoints of the community in which the defendant was allegedly engaged in conduct and where he or she may well reside, and against which the offense was allegedly committed. This eliminates "forum shopping" as well.

Trial in the community where the crime occurred affords the citizens of the affected location an opportunity for direct participation in government.\(^3\) The jurors from the area involved, the "vicinage," are able to judge the facts and the law in the light of the conscience of the community.\(^4\)

On the other hand, the very reasons which make it generally preferable to hold the trial in the geographic area of the crime also give rise to the possibility of unfairness to the parties. The fact that the offense was committed in their community might serve to prejudice the jury against the accused. Conversely, if the law which is allegedly violated is an unpopular law, or the defendant is particularly well liked in the community, then the jurors might be inclined to engage in jury nullification and thus not give the prosecution a fair trial.

### Availability of Venue Change

Currently, all fifty states provide for a change of venue when hostility or prejudice to the defendant precludes the possibility of an impartial trial.\(^5\) This right is not necessarily available to the prosecution. In the federal courts, change of venue is governed by Rule 21, Federal Rules of Criminal Procedure, which does not give this right to the

\(^2\) This benefit to the defendant of this provision has been questioned. Since it provides for trial in the place where the offense has occurred rather than in the place of the accused's residence, it might serve just as easily to ensure that the accused is required to face trial in a geographically distant jurisdiction. See comments of Mr. Pendleton of Virginia during the debates at the ratification convention. Kershen, supra note 1.

\(^3\) Kershen believes that this was the most important consideration to the drafters of the Sixth Amendment in selecting the test for venue. Kershen, supra note 1, at 839.

\(^4\) See Kershen, supra note 1, at 842.

prosecution. When the prosecution believes that it cannot obtain a fair trial in the location of the initial venue, it may move for a change of venue in some, but not all of the states.6

Standard 15-1.4 is based on the premise that, while the constitutional right to venue is phrased only in terms of a defendant's right, the underpinnings of the right as adopted by the framers of the Constitution reflect two other interests as well. In addition to the interest of the defendant, placing the venue of the trial at the location of the events at issue serves both the interest of the government in obtaining a fair trial and the interest of the citizens in participating in the activities of government. While the right of the defendant to a jury from the vicinage and the right of the defendant to a trial by impartial jury must be preserved, the interests of the government and of the community should also be recognized. Therefore, paragraph (a) provides that the motion for change of venue should be available to both the defense and the prosecution, unless otherwise constitutionally or legally precluded.7

Criteria for Change of Venue

Paragraph (b) sets out the grounds for determining whether a change of venue should be granted. It differs somewhat from its counterpart in the Fair Trial and Free Press Standards.8 That standard, based on the relationship between the press and the judicial system, provides for change of venue only in situations where the motion for transfer is based on adverse pretrial publicity. Standard 15-1.4 recognizes, in contrast, that pretrial publicity is only one basis for a change of venue. For example, the fact that a criminal case involves a business entity which is the primary employer in the region may be a factor sufficient to bias a jury panel.

6. See, e.g., FLA. R. CRIM. P. 3.240; See also Ashley v. State, 72 Fla. 137, 72 So. 2d 647 (1916).
7. Some federal courts have decided, however, that, under the Sixth Amendment, a change of venue may never be granted over the defendant's objection. United States v. DiJames, 731 F.2d 758 (11th Cir. 1984); United States v. Abbott Laboratories, 505 F.2d 565 (4th Cir. 1974), cert. denied, 420 U.S. 990 (1975). See also Kafker, The Right to Venue and the Right to an Impartial Jury: Resolving the Conflict in the Federal Constitution, 52 U. CHI. L. REV. 729 (1985).
Criminal Justice Trial by Jury Standards

Paragraph (b) rejects the requirement of actual prejudice to justify a change of venue. It may be impossible for a party to demonstrate actual adverse impact before trial, and therefore, in the interest of fairness, a change of venue should be granted where the prosecution or the defense can show a substantial likelihood that a fair trial by an impartial jury cannot be had.

Some courts have required a stronger showing when the motion for a change of venue is made by the prosecution or by the court on its own motion than when the motion is made by the defense. For example, Florida requires that, in order to change venue on motion of the prosecution, the prosecution must demonstrate that it is impossible to obtain a fair trial in the location of the offense.9 California has required a heightened showing for a judge to order a change of venue sua sponte.10 This standard does not address the issue of whether the court should change the venue of a trial sua sponte.

Rulings on Change of Venue

Paragraphs (c) and (d) are identical to those in the Fair Trial and Free Press Standards, Standard 8-3.3.

Selection Criteria for New Venue

Paragraph (e) moves significantly beyond the factors set out in Standard 8-3.3, Fair Trial and Free Press. Paragraph (e) delineates the factors the court should consider in determining the new location of the trial after a change of venue has been granted. Two of the requirements are logistical: the hardship on parties and witnesses, and the relative burdens on the courts. However, the fourth requirement, that the court should consider the “racial, ethnic, religious and other relevant demographic characteristics of the proposed venue, insofar as they may affect the likelihood of a fair trial by an impartial jury,” directly reflects the values underlying the common law concept of vicinage, and provides that these values be retained in choosing the

10. See Jackson v. Superior Court, 13 Cal. App. 3d 440, 91 Cal. Rptr. 565 (1970), construing CAL. PENAL CODE § 1033, which allows the court to change venue on its own motion “when it appears as a result of the exhaustion of all of the jury panels called that it will be impossible to secure a jury . . . .”
place to which the trial is moved. In addition to protecting the rights of the defendant, the underlying purposes of the vicinage requirement include the concepts of maintaining fairness to the prosecution and of recognizing community values as those values are expressed through the verdict of the jury.\(^{11}\) In particular, where the racial demographics of the proposed place of venue differ significantly from those of the original venue, members of the minority racial community may perceive unfairness based upon potential racial bias. At the very least, in such circumstances, the community's perception of the impartiality of the criminal justice system may be compromised.

Therefore, although the fairness of the criminal trial to the individual defendant is of primary importance, this standard directs the trial court to consider, as well, factors related to the interests of the government and of the community as a whole in determining the location to which the trial should be transferred.\(^{12}\) Although this standard does not specify the weight to be given the various factors, it does direct the attention of the judge to those factors which reflect the interests of the community and the government, while ensuring that the defendant's fair trial right is preserved.

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11. For a discussion of the history of the vicinage concept as it applies to venue, see Kershen, supra note 1.

PART II.
JURY SELECTION

Standard 15-2.1. Selection of prospective jurors

The selection of prospective jurors should be governed by the following general principles:

(a) The names of those persons who may be called for jury service should be selected at random from sources which will furnish a representative cross-section of the community.

(b) Jury officials should determine the qualifications of prospective jurors by questionnaire or interview, and disqualify those who fail to meet specified minimum requirements.

(c) All persons should be eligible for jury service who are eighteen years of age, are United States citizens whose civil rights have not been lost by reason of criminal conviction or whose civil rights have been restored, are residents of the geographical district in which they are summoned, and are able to communicate in English.

(d) A person should be excused from jury service only for mental or physical disability which, despite reasonable accommodation for the disability, substantially impairs the capacity to serve or prior jury service within the previous year. Temporary deferral of service should be permitted in cases of public necessity, undue hardship, temporary disability, or extreme inconvenience. Requests for excuse from service should be determined under the direct supervision of a judge.

History of Standard

Paragraphs (c) and (d) have been revised to conform to the ABA Standards Relating to Juror Use and Management as well as the Americans with Disabilities Act by eliminating many of the exclusions formerly contained in the standards.

Related Standards

ABA Standards for Criminal Justice 3-5.3, 4-7.2 (3d ed. 1993)
ABA Standards for Criminal Justice 8-3.5 (3d ed. 1992)
ABA Standards Relating to Juror Use and Management 1-6, 10, 11 (1992)
National Conference of Commissioners on Uniform State Laws, Uniform Jury Selection and Service Act §§1, 2, 8, 9, 10, 11 (1970)
National District Attorneys Association National Prosecution Standards 73.1, 73.2 (2d ed. 1991)

Commentary

Issues relating to the process of selecting prospective jurors are discussed in detail in the ABA Standards Relating to Juror Use and Management and its commentary. The Trial by Jury Standards do not undertake to set out the mechanics of the process by which prospective jurors are identified or selected to become part of the venire. The thrust of this standard is to reiterate the general policies underpinning the process by which citizens are selected to serve on juries and by which some citizens are excluded from that service. The objectives of this standard are to insure the inclusiveness and representativeness of the pool of potential jurors, to minimize the grounds for exclusion from jury service, and to maintain the random selection of prospective jurors.

This standard, incorporating the philosophy in the Juror Use and Management Standards, permits the fewest possible exclusions from eligibility to serve on juries. This standard rejects automatic excuse from juror service based on occupation. Under these provisions, physical or mental incapacity affects eligibility only if the disability is so severe that, despite reasonable accommodation for the disability, the individual's ability to function as a juror is substantially impaired. Lesser disabilities should not result in automatic exclusion, but should instead be considered by the court in making its individualized determination of capacity to serve, based upon an analysis of the specific disability of the juror in relation to the requirements of service in the particular trial.

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1. The Standards Relating to Juror Use and Management were drafted under the auspices of the Judicial Administration Division of the ABA, and were approved by the Division in August, 1982. They were adopted by the ABA House of Delegates at the 1983 Midyear Meeting.
Selection of Juror Names

Paragraph (a) addresses the primary requisites of the jury selection process: the selection must be random and it must be from source lists that are representative of the community from which the jury is to be selected. Although this paragraph speaks of "a representative cross-section," the comparable standard in the Juror Use and Management Standards makes it clear that the concept of "representativeness" also includes the related notion of "inclusiveness." The distinction is explained in the commentary to those standards:

Representativeness and inclusiveness are conceptually distinct and may even be antagonistic in practice. Inclusiveness has to do with the percentage of the entire adult population in a jurisdiction that is included in the source list. A source list can be representative, yet not very inclusive. For example, in a county of one thousand eligible people of whom 25 percent are black, a source list of one hundred people, twenty-five of whom are black, would be fully representative of blacks but only 10 percent inclusive, because 90 percent of the eligible population is excluded. On the other hand, a quite inclusive source can significantly underrepresent cognizable groups that constitute a small percentage of the adult population.\(^2\)

Accordingly, the ideal selection system should be designed to be as inclusive as possible of all groups of citizens while being, at the same time, as representative as possible of a cross-section of the community.

The Sixth Amendment, providing for the right to trial by jury, has been construed to require that juries be selected from pools which reflect representative cross-sections of the communities in which courts convene.\(^3\) A jury selection system which systematically excludes a distinctive group of persons in a community, whether by intention or in practice, violates not only the individual's right to participate in the process, but also the right of the parties to have a jury chosen from a representative cross-section of the community.

Neither this standard nor its counterpart in the Standards Relating to Juror Use and Management prescribes the specific source lists that must be used. Officials are encouraged to make such lists as inclusive

\(^2\) ABA Standards Relating to Juror Use and Management, Commentary to Standard 2(a).
as possible in the light of available data, statutory requirements, and financial constraints.

With regard to their inclusiveness and representativeness, many lists are inherently imperfect. Tax rolls, for example, will underestimate poorer persons, who may be more likely to rent than to own real property. Voter lists generally will contain the names only of those who desire to be involved in the political process. Such lists will underrepresent those who feel disenfranchised or who intentionally do not register to vote in order to avoid jury duty. In 1986, surveys showed that, nationally, only slightly more than half of the eligible citizens are registered voters.\(^4\) Even drivers’ license lists, although more inclusive than many other lists, will exclude those who, because of economic status, disability, or choice, do not participate in the licensing process.

This standard does not provide that each jury panel or each jury must be both inclusive and representative. It does require, as does the comparable Juror Use and Management Standard, that the source lists from which the prospective jurors are chosen be both inclusive and representative, and that prospective jurors be drawn from the source list at random.

**Juror Screening**

The standard provides for jury officials to perform the function of determining the specified, minimum qualifications of prospective jurors. This may be accomplished by questionnaire or interview. Such advance screening saves time in the later selection of jurors in individual cases. The discretion afforded jury officials is limited, however, to the determination of whether the prospective juror satisfies statutory qualifications, and should not be extended to consideration of excuses for convenience or hardship.

**Juror Eligibility**

Paragraph (c) has been substantially revised from the second edition to reflect a growing awareness of the rights of disabled persons, and

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4. See ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT, Commentary to Standard 2(c) and (d), citing Center for Jury Studies, Voter Registration by State, CENTER FOR JURY STUDIES NEWSLETTER No. 6 (1979) (National Center for State Courts, Center for Jury Studies).
the necessity to provide for all citizens the opportunity to participate in civic affairs, including service on juries. This recognition of the rights of disabled citizens was codified, in the United States, in the Americans with Disabilities Act of 1990 (ADA). The standard was revised to conform to the requirements of the ADA.

Consistent with the ADA, the ABA Standards Relating to Juror Use and Management recognize only five specified requirements for eligibility for jury service. Physical and mental disabilities do not render the citizen ineligible. The requirements are:

1. an age requirement (18 years of age);
2. a citizenship requirement (citizen of the United States);
3. a residency requirement;
4. the ability to communicate in English;
5. civil rights must not have been lost through conviction of a felony.

Under the Second Edition Trial by Jury Standards, mental or physical disability were sufficient to render a citizen ineligible for jury service. Under these standards, neither is a proper basis for exclusion.

Moreover, other factors which would have rendered a citizen ineligible to serve on a jury under prior standards have now been deemed to affect, not the eligibility to serve, but the suitability or appropriateness of service in a particular case. Under this standard, a criminal conviction or term of probation does not per se cause a person to be ineligible for juror service. The basis for exclusion under this standard is loss of civil rights, or some indication of actual bias.

Some states provide automatic exemption from jury service for persons in certain professions or occupations. More recently, however, most states have revised jury selection procedures to provide for universal eligibility for jury service, and have eliminated automatic ex-

6. See United States v. Test, 550 F.2d 577 (10th Cir. 1976).
7. Disqualification for mental and physical disability was also mandated in the Uniform Jury Selection and Service Act, §8. It should be noted that this act has not been revised since the passage of the Americans with Disabilities Act.
emptions based on occupation. Those states that retain automatic exemptions tend to limit them to members of the military on active duty and, occasionally, a highly limited number of occupations. A number of states, clearly in the minority today, retain the traditional exemptions from jury duty for members of certain occupations or professions. A number of other states have similar exemptions. Even in these states, the exemptions are granted only upon request, and are not automatic.

The current approach, providing for few if any automatic exemptions, is based upon the belief that jurors should be selected by random methods which provide for the maximum inclusiveness and representativeness. Elimination or infrequent use of automatic exemptions not only makes juries more representative, but also makes jury duty fairer to those not automatically excused. Moreover, some


11. See, e.g., Wyo. Stat. § 1-11-103 (exempting law enforcement officers and firefighters) and § 33-16-105 (excluding embalmers).


14. See citations in footnote 11, supra.

15. See ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT, Standard 1-4 and Commentary.
citizens are less reluctant to serve when they understand that everyone is subject to jury service.

Excusal from Jury Service

Paragraph (d) concerns the excusal from jury service of those individuals who, under paragraph (c), are eligible to serve but who ought not serve for some other reason. Even where excuse from juror service is appropriate, excuses should not be automatic, but rather should be granted only upon application by the affected person. Excuses should be granted only where jury service would result in undue hardship to the individual or to the community. Such excuses should be granted by a judge or by court personnel acting under the supervision of the judge. A deaf juror may be accommodated if provided with a sign language translator; a physically disabled juror might serve as a juror with minor modifications to the courtroom facilities.

Undue hardship remains one of the more difficult standards to apply, although most states permit the judge to excuse a prospective juror on that basis. Persons owning or operating small businesses and persons in professions often feel they will suffer significant hardship if they are required to serve on a jury for an extended period of time. However, such persons should be able to serve on short trials without suffering undue hardship. Where possible, excuse for undue hardship should be temporary, with the juror being subject to recall at a later time.

16. See COLO. REV. STAT., Colorado Rules of Jury Selection and Service, Rule 9; CONN. GEN. STAT. § 51-217a (1986); DEL. CODE, tit. 1, ch. 45, § 4511. An example of the language of most such statutes is that of the New Hampshire Statutes, Chapter 500-A, which reads: “A person who is not disqualified for jury service may be excused from jury service by the court only upon a showing of undue hardship, extreme inconvenience, public necessity or for any other cause that the court deems appropriate. The person may be excused for the time deemed necessary by the court and shall report again for jury service, as directed by the court.”

17. See Bond v. State, 489 N.E.2d 504 (Ind. 1986), where it was held that excusal of a professional because of the resultant hardship on the professional’s clients was not error.

18. See Jones v. State, 540 N.E.2d 1228 (Ind. 1989), where it was held not to be an abuse of discretion to excuse a student called as a prospective juror so that the student could study for examinations.
Many states have statutes providing for such excusal upon request of the prospective juror based upon some form of community necessity. Under that criterion, law enforcement officers, firefighters, and members of the militia and United States armed forces are sometimes excused from service on juries. Some states have read the "public necessity" standard even more broadly, including teachers, professors, and persons who engage in direct patient care.

Standard 15-2.2. Juror questionnaires

(a) Basic questionnaire

Before voir dire examination begins, the court and counsel should be provided with data pertinent to the qualifications of the prospective jurors and to matters ordinarily raised in voir dire examination.

(1) The questionnaire should include information about the juror's name, sex, age, residence, marital status, education level, occupation and occupation history, employment address, previous service as a juror, and present or past involvement as a party to civil or criminal litigation.

(2) Such data should be obtained from prospective jurors by means of a questionnaire furnished to the prospective jurors with the jury summons, and to be returned by the prospective jurors before the time of jury selection.

(b) Specialized questionnaire

In appropriate cases, the court, with the assistance of counsel, should prepare a specialized questionnaire addressing particular issues that may arise.

(1) The questionnaire should be specific enough to provide appropriate information for utilization by counsel, but not be unnecessarily embarrassing or overly intrusive.

(2) If questionnaires are made available to counsel prior to the day of the voir dire, the identity of the jurors may be pro-


20. See, e.g., ALA. CODE § 16-60-35 and § 16-60-65 (1975); IOWA CODE § 607A.5, providing for excusal for any person solely responsible for the care of a permanently disabled individual; ME. REV. STAT. § 1211, providing that physicians and dentists providing "active patient care" are excused.
ected by removing identifying information from the questionnaires.

(c) All questionnaires should be prepared and supervised by the court.

(1) The jurors should be advised of the purpose of the questionnaire, how it will be used and who will have access to the information.

(2) All questionnaires should be provided to counsel in sufficient time before the start of voir dire to enable counsel to adequately review them before the start of voir dire.

History of Standard

This standard has been significantly expanded from the second edition, which provided only for disclosure to the parties of the jury list and a basic questionnaire. This standard now provides for both basic and more specialized questionnaires. In addition, this standard now governs the time at which the questionnaire should be distributed to counsel and specifies information to be given to prospective jurors at the time they fill out and return questionnaires to the court.

Related Standards

ABA Standards for Criminal Justice 3-5.3, 4-7.2 (3d ed. 1993)
ABA Standards for Criminal Justice 8-3.2 (3d ed. 1992)
ABA Standards Relating to Juror Use and Management 7(a) (1976)
National Conference of Commissioners on Uniform State Laws, Uniform Jury Selection and Service Act § 9(e) (1970)
National District Attorneys Association National Prosecution Standards 73.4 (2d ed. 1991)

Commentary

It is beneficial both to the system as a whole and to the attorneys involved in the particular case to use a questionnaire to obtain information from prospective jurors, and then, prior to voir dire, to furnish counsel with a list of prospective jurors and the jurors’ responses to pretrial questions. Use of a questionnaire shortens the time necessary for juror selection and permits both the court and counsel to make considered decisions about the exercise of challenges during the jury selection process.
This standard provides for two types of questionnaires: a basic questionnaire to be returned by the prospective jurors in all cases and a specialized questionnaire to be returned by prospective jurors when appropriate.

Basic Questionnaire

The purpose of the basic questionnaire is to shorten the time required for the voir dire, and thereby streamline the trial process. This questionnaire should be mailed to all prospective jurors well in advance of trial, to be returned either by mail before the day of trial or when the juror arrives at the courthouse. In any case, it should be returned in sufficient time to permit timely use by counsel. Basic questionnaires currently in use vary significantly as to length and intrusiveness of the questions proposed. Counsel should be able to acquire sufficient information without engaging in overly intrusive questioning. The Federal Judicial Center has recommended an extensive, yet not overly intrusive questionnaire.

Specialized Questionnaires

Specialized questionnaires are designed to obtain information more directly related to the issues in a particular case. They are designed, as are the basic questionnaires, to permit the court and counsel to gain information needed for effective voir dire in an efficient manner. There are several benefits to providing the questionnaire to counsel before trial. First, repetitive voir dire questioning can be minimized. Second, prospective jurors may be more willing to divulge sensitive information on the written form than to discuss the same information in open court. Third, the questionnaires, by providing relevant information early, permit the court and counsel to conduct a more focused voir dire.

Timeliness of Information

In order to maximize the benefit to counsel of the information on the questionnaires, it must be made available well in advance of the

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2. Id.
3. Id.
beginning of the jury selection process. Both subsections (b)(2) and (c)(2) address the issue of early dissemination of the information contained in questionnaires. In some cases, in order to make the questionnaires meaningful, the court may wish to disclose the information contained in the questionnaires some days before the trial is scheduled to begin.

There is, however, some reluctance to permit or encourage the early disclosure of information contained in questionnaires for fear that the information will be used to improperly investigate or intimidate jurors. Additionally, some jurors may also be concerned that, since their names and addresses are on questionnaires, a disgruntled defendant might use that information to retaliate against the juror. In order to protect prospective jurors from invasion of privacy or "improper contact with panel members," the Standards Relating to Juror Use and Management prohibit release of the questionnaires to counsel before the day of trial. This is consistent with the philosophy of those standards that the length of jury service should be for only one day or for one trial, whichever is longer. This standard provides for flexibility, permitting release of the questionnaires prior to trial in those circumstances where same day disclosure will be inadequate. The question of what will constitute "sufficient time" for counsel to review the questionnaires prior to voir dire varies according to the nature of the case, and the complexity of the voir dire.

Subsection (b)(2), addressing the safety and privacy of the jurors, provides a mechanism for protection of prospective jurors whenever there is reason to believe that the integrity of the process might be affected by early disclosure of questionnaire information. This subsection provides for non-disclosure of the identities of the prospective jurors when the questionnaires are furnished to counsel before the day


5. See United States v. Stowell, 947 F.2d 1251 (5th Cir. 1991), where jurors were discussing the possibility that the defendant would know where they lived because their street addresses were listed on the questionnaires.

6. ABA Standards Relating to Juror Use and Management, Commentary to Standard 7(b).

7. ABA Standards Relating to Juror Use and Management, Standard 5: Term of and availability for jury service.
of the trial. The propriety of an anonymous jury during trial is not addressed in this standard.

The court must also consider the issue of public access to the information provided in the questionnaires. Subsection (c)(1) addresses the issue of disclosure of the questionnaire indirectly, providing that the trial judge inform the jurors when the questionnaires are sent out of the purpose of the questionnaire, how it will be used, and who will have access to the information furnished. This standard does not take a position on when or under what circumstances the information furnished by jurors should be released to the public. The trial court must balance the rights of the public, including the media, to access to information with the right of the prospective jurors to privacy and the right of the defendant and the state to a fair trial. The ABA Criminal Justice Fair Trial and Free Press Standards address the factors that apply to the release of questionnaires and the decision whether to hold the entire voir dire in camera. Irrespective of whether the information in the questionnaires is to be made public or whether access is restricted, the jurors should be notified prior to their responses of the intended future use of this information.

**Standard 15-2.3. Challenge to the array**

The prosecuting attorney or the defendant or defendant's attorney may challenge the array on the ground that there has been a material departure from the requirements of the law governing selection of jurors.

**History of Standard**

Stylistic changes only.

**Related Standards**

ABA Standards for Criminal Justice 3-5.3, 4-7.2 (3d ed. 1993)
ABA Standards for Criminal Justice 8-3.5 (3d ed. 1992)

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Commentary

The challenge to the array, which in different jurisdictions may be called a motion to quash or to strike the venire or panel, is a pretrial procedural mechanism by which a party can attack the validity of the process by which the venire is summoned.\(^1\) It is a challenge to the panel as a whole, and not to any single juror. The challenge is addressed to the court, and if the challenging party establishes the grounds, the panel must be discharged. In criminal cases, the challenge may be brought by either the prosecutor or the defendant. It may be based on constitutional objections to the jury composition, or on a failure of the jury selection authority to follow statutory law.\(^2\) Its purpose is to force the convening authority to dismiss the venire which was improperly called and to select a new jury pool which will reflect the appropriate cross-section of the community or follow legislative mandates. “Challenge to the array” may also be the name applied to a party’s motion to strike the jury panel because the panel has become tainted during the voir dire process. Standard 15-2.3 refers only to a challenge of the method by which venirepersons have been selected, however, and not to this latter purpose.

Time Limitations

The challenge to the array is governed, in most jurisdictions, by statute. Although the statutes vary, most address the timing of the challenge and the grounds on which the challenge is to be determined.\(^3\) For example, Pennsylvania provides that the challenge to the array must be made not less than five days before the first day of criminal cases for which the jury panel has been summoned and may

\(^1\) W. LAFAYE & J. ISRAEL, CRIMINAL PROCEDURE 968, 969 (2d ed. 1992).
\(^2\) Id.
\(^3\) See Uniform Jury Selection and Service Act, Section 12, which provides that the challenge must be brought within 7 days after the moving party discovered or could, by the exercise of reasonable diligence have discovered the grounds for the challenge, and that the ground is “substantial failure” to comply with provisions of the act.
be made only on the ground that "the jurors were not selected, drawn or summoned substantially in accordance with law."\(^4\) Colorado statutes provide that the challenge must be filed within seven days after the party "discovered, or by the exercise of diligence could have discovered the grounds therefor," and specifies the grounds as substantial failure to comply with the statute on selection of grand or petit jurors.\(^5\) In the federal system, the challenge to the array is governed by 28 U.S.C. 1867.\(^6\)

Failure to comply with the time limits in the applicable statute or rule is generally considered to be a waiver of the challenge to the array, at least in a case involving a challenge based on the statutory selection process.\(^7\)

**Burden of Proof**

The burden of proof is upon the party challenging the array. When the challenge is on statutory grounds, the party objecting must establish a statutory violation;\(^8\) when the challenge is on constitutional grounds, the party objecting must establish that the jury selected was not a constitutionally requisite cross-section.\(^9\)

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\(^4\) PA. R. CRIM. P. 1104.
\(^5\) Section 13-71-112, 6 C.R.S. (1973)
\(^6\) The statute provides, in pertinent part:
   (a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.
   (b) In criminal cases, before the voir dire examination begins, or within seven days after the Attorney General of the United States discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the Attorney General may move to dismiss the indictment or stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.
\(^7\) See Commonwealth v. Brown, 396 Pa. Super. 171, 578 A.2d 461 (1990); Clark v. State, 255 Ga. 370, 338 S.W.2d 269, 271 (1986). See also People v. Rubanowitz, 688 P.2d 231 (Colo. 1984) in which the court denied a challenge to the array on statutory grounds because the defendant had failed to bring the challenge within the time period provided by statute, but went on to consider the constitutional challenge.
\(^8\) See State v. Pelican, 154 Vt. 496, 580 A.2d 942 (1990), where the defendant failed to meet the burden of proof under either the federal or the state constitution.
\(^9\) See Duren v. Missouri, 439 U.S. 357 (1979). See also United States v. Ross, 468 F.2d 1213 (9th Cir. 1972); Willis v. Zant, 720 F.2d 1212 (11th Cir. 1983).
“Material” Departures

A challenge to the array shall be granted only when there is a material departure from the statutory requirements for juror selection. By implication, therefore, substantial compliance with the statute will satisfy the requirements.

Merely inadvertent or minor deviations from the statutory scheme will not require dismissal of the jury panel and the summoning of a new venire. 10 By use of the word “material,” it is envisioned that, in order to support a challenge to the array, the departures from the statutory scheme must be sufficiently substantial so as not to be merely trivial and inconsequential. The challenging party, however, need not demonstrate prejudice. Demonstration of prejudice rather than materiality is simply too great a burden on a challenging party in this setting. 11

Standard 15-2.4. Conduct of voir dire examination

(a) Questioning of jurors should be conducted initially by the court, and should be sufficient, at a minimum, to determine the jurors’ legal qualifications to serve.

(b) Following initial questioning by the court, counsel for each side should have the opportunity, under the supervision of the court and subject to reasonable time limits, to question jurors directly, both individually and as a panel.

(c) Voir dire examination should be sufficient to disclose grounds for challenges for cause and to facilitate intelligent exercise of peremptory challenges.

(d) Where there is reason to believe the prospective jurors have been previously exposed to information about the case, or for other reason are likely to have preconceptions concerning it, counsel should be given liberal opportunity to question jurors individually

10. See, e.g., State v. Russo, 213 N.J. Super. 219, 516 A.2d 1161 (1986) where the court held that technical deviations from the statutory requirements would not result in dismissal of indictments, the jury commissioners were ordered to strictly comply with the statute in the future. See also State v. Massey, 316 N.C. 558, 342 S.E.2d 811 (1985), where the court concluded that “technical and insubstantial violations of the statutes regulating jury selection” were insufficient to justify a challenge to the array.

about the existence and extent of their knowledge and preconcep­
tions.

(e) Jurors should be examined outside the presence of other
jurors on sensitive matters or prior exposure to potentially preju­
dicial material.

(1) Sensitive matters are those matters which might be poten­
tially embarrassing or intrusive into the juror’s private life, feel­
ings or beliefs, or those matters which, if discussed in the pres­
ence of the jury panel, might prejudice or influence the panel
by exposing other potential jurors to improper information.

(2) Examination of the prospective juror with respect to that
juror’s prior exposure to potentially prejudicial material should
be conducted in accordance with ABA Standards for Criminal
Justice relating to Fair Trial and Free Press.

(f) It is the responsibility of the court to prevent abuse of voir
dire examinations.

History of Standard

This standard incorporates the second edition standards with some
significant modifications. These standards indicate the purpose for
which the voir dire questions are propounded and their extent. They
also reflect the conclusion that the voir dire process is under the su­
pervision and control of the trial judge. In addition, they now provide
for protection of the jurors’ right to privacy and for an in camera voir
dire in specified situations.

Related Standards

ABA Standards for Criminal Justice 3-5.3, 4-7.2 (3d ed. 1993)
ABA Standards for Criminal Justice 8-3.5 (3d ed. 1992)
ABA Standards Relating to Juror Use and Management 7, 8, 9 (1992)
National Conference of Commissioners on Uniform State Laws,
Uniform Rules of Criminal Procedure 512 (1987)
National District Attorneys Association National Prosecution Stan­
dards 73.5, 73.7 (2d ed. 1991)

Commentary

To secure the right to a fair and impartial jury, the parties are per­
mitted to explore the biases of prospective jurors through voir dire
examination, questioning potential jurors to determine their ability to evaluate the facts of the case objectively. The primary purpose of the voir dire examination is to provide information about potential jurors to enable counsel to intelligently exercise challenges.\(^1\) In fact, many experienced lawyers believe that cases can be won or lost at voir dire.\(^2\) Viewed from that perspective, the voir dire process is of great importance to the trial lawyer.\(^3\) Nonetheless, there is no unanimity among courts about the permissible extent to which potential jurors may be questioned concerning their opinions, attitudes and potential biases.\(^4\)

Section (a) addresses the initial questioning of the panel, intended only to establish that the members of the venire have the legal qualifications to serve as jurors in the jurisdiction. This prefatory questioning by the judge is not controversial, and this section reflects the procedure that is followed in most jurisdictions.

**Who Questions?**

The second issue addressed by the standards, whether the attorneys should directly question jurors, is however, more controversial. Section (b) provides that the attorneys, as well as the judge, should have the right to question prospective jurors directly, although under the supervision of the trial judge. Voir dire procedures vary in state courts with thirteen states permitting voir dire questions to be asked by the judge alone and twenty states giving counsel the right to primary questioning of the jurors; other states leave examination to the judge and counsel, with the judge beginning the questioning and counsel having the right to question jurors directly at the conclusion of the judge’s examination.\(^5\)

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3. It is interesting, however, to note the number of studies concluding that, although trial lawyers believe that the voir dire is very important, few of them actually do it well. See Mogill, *A Practice Primer on Jury Selection*, 65 Mich. B.J. 52 (1986); Bermant, supra note 1; Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491 (1978).
4. Id.
In the federal system, however, attorneys are not given the right to question jurors directly. Both the federal rule and applicable case law give the judge broad discretion in conducting voir dire. In that system, the trial court may conduct voir dire using its own questions or those suggested by counsel, or it may permit defense counsel and the prosecutor to examine prospective jurors. Generally, a reviewing court will reverse a conviction only if the defendant shows that an improperly conducted voir dire or a juror's misrepresentations resulted in an unfair trial.

Counsel does not have a right to have specific questions propounded to the jury panel unless there are strong community feelings about the case, the case involves potential racial or ethnic prejudice, or other forms of bias exist that have become evident through the judges experience with the jurors. Unless the case falls within these categories, the general rule is that when a party requests specific voir dire questions in addition to those propounded by the judge, that party bears the burden of showing that a "reasonable possibility of prejudice exists," and that the questions will aid in uncovering that prejudice. In practice, the degree to which a party actually has the right to have questions propounded to the jury depends largely upon the philosophy of the particular judge.

Proponents of the federal system believe that judge-conducted voir dire is efficient, protective of the rights of the jurors and the public, and is adequate to develop sufficient information so that counsel may

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6. Fed. R. Crim. P. 24(a) provides:

(a) Examination. The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective juror such additional questions by the parties or their attorneys as it deems proper.


11. Id.

intelligently exercise challenges. The system "affords the tightest control on errant, repetitive, or argumentative questioning," and takes the least amount of time. The most common objection to the attorney-conducted voir dire process is that it consumes an inordinate amount of trial time. Too much time is spent by counsel asking questions that have little relevance to the issues of the case. Another criticism of attorney-conducted voir dire is that attorneys use the process not to uncover bias, but to "sell" the case, to teach the jurors about the case, and to ingratiate counsel to the jurors.

Arguments in favor of attorney-conducted voir dire focus on the fairness of the process. It is imperative that the voir dire expose any existing grounds for a challenge for cause. It must also be sufficiently extensive and probing to expose that latent information on which counsel may base effective peremptory challenges. The trial judge is not in the best position to ferret out existing bias, since the judge does not have the attorney's intimate familiarity with the details of the case, details which may alert the attorney to potential bias. There are points in every case which are unknown to the trial judge but known to the attorneys.

Some observers contend that jurors are more candid in their responses to attorneys than they are in their responses to the judge, suggesting that jurors tend to view the judge as an important authority figure whom they do not wish to displease. In addition, judges sometimes have been criticized for being more concerned with calendar control and finishing the case expeditiously than they are with


14. See, for example, Ginker, Jury Selection in Criminal Trials (Supp. 1977). See also R. Hanley, Getting to Know You, 40 AM. U. L. REV. 865 (1991). Although the author laments the passing of attorney-conducted voir dire, he notes that the voir dire was a combination of "premature closing argument" and "ingratiation exercises."

15. Id.


ferreting out information. They have been said to "conduct voir dire in a superficial and perfunctory manner in an effort to get a jury seated quickly so [they] can get on to the evidence, the instructions, and the verdict."20

These standards reflect the conclusion that voir dire by the judge, augmented by attorney-conducted questioning, is significantly fairer to the parties and more likely to lead to the empaneling of an unbiased jury than is voir dire conducted by the judge alone. A simple, perfunctory examination by a judge does not "reveal preconceptions or unconscious bias," that bias characterized by the "inability to recognize itself."21

This standard also recognizes the potential for abuse of the voir dire process by attorneys. Section (b) provides for judicial control of the process. Judicial oversight, exercised appropriately, should be sufficient to curb voir dire excesses and to ensure that the process is not overly lengthy. In addressing the potential tension between the attorney's need to obtain sufficient information through questioning of potential jurors and the judge's obligation to ensure that the process is not abused and unduly protracted, this standard contains no specific time limitation; neither is there a proposed limitation on the potential subject matter of inquiry.

This standard sets out the principles which should be used by the trial judge in exercising this discretionary oversight. The voir dire should, at a minimum, be sufficient for the attorney to uncover any bases for challenges for cause and to permit the attorney to obtain enough information to facilitate intelligent exercise of peremptory challenges.22 Where the juror has been exposed to information about the case itself, the trial judge should give the attorney "liberal opportunity" to explore the substance of that prior exposure.23 At the same

19. This charge against the judiciary is not a new one. The same comment was made the Roman lawyer Pliny the Younger writing about the judges in ancient Rome. In approximately the year 64 A.D. he wrote:

The truth is, . . . our judges are more bent on concluding [the case], than on deciding it. Such is their negligence, their sloth, nay, disrespect for both the profession and the grave issues of the Law.


time, the questioning should be supervised by the trial judge, who has the responsibility to prevent its abuse.

**Confidential Questioning**

Section (e) addresses the problem of juror contamination when one juror may overhear the responses of other jurors relating to prejudicial or sensitive matters. The court must be concerned with the protection of the right to privacy of the jurors and protection of the jury panel as a whole from exposure to potentially prejudicial and inadmissible information. When the court attempts to accommodate these concerns, there is a potential problem with the right of the media to have full access to judicial proceedings. Issues arising under this section are addressed in the ABA Fair Trial and Free Press Standards, particularly Standards 8-3.2, *Public access to judicial proceedings and related documents and exhibits*, and 8-3.5, *Selecting the jury*. In general, however, the issue of invasion of the juror’s privacy should be examined by the court on a case by case basis, balancing the extent to which the privacy is infringed, the attorneys’ need for information to intelligently exercise challenges, and the possibility of using less intrusive means to obtain the information.

**Standard 15-2.5. Challenges for cause**

(a) Each jurisdiction should develop a list of grounds, establishment of which will sustain a challenge to a particular juror for cause. The list of enumerated grounds should permit a challenge for cause on the ground that the juror has an interest in the outcome of the case, may be biased or prejudiced for or against one of the parties, is serving a criminal sentence, is on parole or supervised probation, has been charged with a criminal offense, or is unable or unwilling to hear the case at issue fairly and impartially.

(b) If, after the voir dire examination of a juror, the court is of the opinion that grounds for challenge for cause have been established, the court, upon either party’s challenge of the juror for cause or upon the court’s own motion after consultation with counsel, should excuse that juror from the trial of the case.

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24. Standard 15-2.4(b) and (f).
History of Standard

This standard has been revised to provide that each jurisdiction should develop a list of grounds for a challenge for cause.

Related Standards

National District Attorneys Association National Prosecution Standards 73.8 (2d ed. 1991)

Commentary

In order to guarantee trial by an impartial jury, this standard provides that a prospective juror should be excused if, after voir dire, the court is of the opinion that the juror is not capable of hearing the case with impartiality. Exclusion is accomplished through the court’s granting of a challenge for cause. Because juror impartiality is required to preserve the integrity of the judicial system, challenges for cause should not be limited in number.¹ Under this standard, a challenge for cause may be initiated by either party “or upon the court’s own motion after consultation with counsel.”

Ordinarily, the grounds to sustain a challenge for cause are enumerated by statute in each jurisdiction. This standard encourages each jurisdiction to develop a list of grounds for which a challenge for cause will be granted. In Section (a), several suggested grounds are listed: (1) the prospective juror has an interest in the outcome of the case; (2) the prospective juror may be biased or prejudiced for or against one of the parties; (3) the prospective juror is currently serving a criminal sentence; (4) the prospective juror is on parole or supervised probation; (5) the prospective juror has been charged with a criminal offense; (6) and the prospective juror is unable or unwilling to hear the case at issue fairly and impartially.

These general grounds are designed to exclude the prospective juror who, consciously or unconsciously, is unable to act impartially as required by the Sixth Amendment. Because prospective jurors may be

unwilling to admit their biases, specific questioning during voir dire should explore these areas.

The fact that a particular jurisdiction has enumerated statutory grounds for exclusions for cause should not preclude the exclusion of potential jurors on other non-enumerated grounds. The trial court has wide discretion in determining whether a particular juror should be excused absent a specifically enumerated ground. Generally, a juror’s response that he or she can render a fair and impartial verdict should be given great weight, and if believed by the court, the juror should not be excused on a challenge for cause. The court is not bound by the juror’s response, however, and may excuse a juror for cause notwithstanding that juror’s claim of an ability to be impartial.

Almost every statute addressing the subject excludes a juror for cause if he or she “has an interest in the outcome of the case.” Even if not enumerated as a basis for exclusion, a potential juror should be excluded where the juror has a cognizable pecuniary interest in the particular case. Such an interest is commonly found where the potential juror has a business relationship with a person associated with the case, examples of which may include stockholders in a corporation somehow associated with the case, acting as surety or posting bail for the accused, customer/salesman relationships, employer relationships, and debtor/creditor relationships.

Similarly, a potential juror with a personal or social relationship with an interested party may be biased, or give the appearance of bias, and should generally be excused from service. These relationships may exist between the potential juror and witnesses, attorneys/prosecutors, the victim, or any other person who has an interest in the case.

2. “In making up the panel to serve in any case the trial court has an extensive and almost unlimited discretion in discharging any person or persons who might in the opinion of the court for any reason not be a suitable person for such service.” Washington v. State, 86 Fla. 533, 98 So. 605, 606 (1923).


9. See, e.g., Harris v. State, 188 Ga. 745, 4 S.E.2d 651 (1939); Mays v. State, 218 Ala. 656, 120 So. 163 (1929).

particular case.\textsuperscript{11} Juror membership in clubs, organizations, and the like should also be probed by the court in order to detect such problems. Mere membership in a club or organization should generally not be deemed conclusive of prejudice or bias in the absence of a showing that the club or organization itself promotes or encourages biased attitudes or behavior.

Any juror incapable of performing the duties of a juror should be excused for cause. As a result of the passage of the Americans with Disabilities Act of 1990, persons with physical and mental disabilities can no longer be declared ineligible for jury service solely because of their disability.\textsuperscript{12} While certain disabilities may still render a particular juror unacceptable for a particular case, the determination of the effect of such a disability on the citizen's right to participate in jury service should be made on a case by case basis. A person should not be considered ineligible to serve in all cases because of disability. Where a particular disability would render that person unable to perform the functions required of a juror, he or she should be excused for cause for that particular case only. In making the determination whether such a challenge for cause should be granted, the court must evaluate the prospective juror's disability in light of the functions to be performed by jurors in the case. In general, "a juror must be able to understand all of the evidence presented, evaluate that evidence in a rational manner, communicate effectively with the other jurors during deliberations, and comprehend the applicable legal principles, as instructed by the court."\textsuperscript{13}

\textbf{Standard 15-2.6. Peremptory challenges}

\textbf{(a)} Peremptory challenges should be allowed in all cases, but in a number no larger than ordinarily necessary to provide reasonable assurance of obtaining an unbiased jury, but the court should be authorized to allow additional peremptory challenges when special circumstances justify doing so.

\textbf{(b)} The procedure for exercise of peremptory challenges should permit challenge to any of the persons who have been passed for cause.

\textsuperscript{11} See, e.g., Eagan v. O'Malley, 45 Wyo. 505, 21 P.2d 821 (1953).

\textsuperscript{12} See Standard 15-2.1 and Commentary.

\textsuperscript{13} People v. Guzman, 76 N.Y.2d 1, 5, 555 N.E.2d 259, 261 (1990).
(c) The number of peremptory challenges should be governed by rule or statute.

(d) In cases involving a single defendant, both the defendant and the prosecution should have the same number of peremptory challenges.

History of Standard

Section (a) has been amended to provide that peremptory challenges should be available to the parties in all cases. Although this was implicit in the prior standard, it is now made explicit. Section (d) was added to these standards to provide that challenges should be allocated equally between prosecution and defense in cases involving a single defendant.

This standard has deleted reference to the procedure for exercising peremptory challenges which is now contained in Standard 15-2.7. However, section (b) provides that persons already passed pursuant to such procedure may be challenged subsequently.

Related Standards

ABA Standards for Criminal Justice 3-5.3, 4-7.2 (3d ed. 1993)
ABA Standards for Criminal Justice 8-3.5 (3d ed. 1992)
ABA Standards Relating to Juror Use and Management 9 (1993)
National District Attorneys Association National Prosecution Standards 73.6 (2d ed. 1991)

Commentary

The Peremptory Challenge: Criticism and Defense

The peremptory challenge is based upon the right of a party to excuse a potential juror "without a stated reason, without inquiry, and without being subject to the court's control." It has existed historically in one form or another for nearly as long as juries have existed.\[1\]

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The purpose of the voir dire process is to ensure that the jury finally sworn to try the case will be fair and impartial, one made up of jurors who, so far as is possible, will not be biased against one party or the other. The challenge for cause is available and appropriate as a mechanism to excuse the clearly biased juror, but applies only when such bias rises to a level that can be objectively demonstrated or is admitted. The unique function of the peremptory challenge in concert with an appropriately extensive voir dire questioning is that it permits a juror to be excused on the basis of bias which does not rise to an articulate level, the bias that is so subtle that even the juror may not recognize that it exists.

Number of Peremptory Challenges

This standard provides that the number of challenges allocated to each party should be sufficient to permit counsel to obtain an unbiased jury. The requirement is set forth in terms of result, rather than in terms of absolute numbers. A corresponding ABA standard, Standard 9(d) of the Standards Relating to Juror Use and Management, establishes more detailed guidelines. After providing that the number of peremptory challenges should be no larger than necessary to ensure an unbiased jury, Standard 9(d) establishes that the number of peremptory challenges should not exceed ten in any case where a sentence of death may be imposed, five when the sentence may be one of incarceration for more than six months, and three when the sentence may be only for six months or less or when no sentence of incarceration may be imposed. The Juror Use and Management Standards also provide that if the jury will consist of fewer than twelve persons, no more than two peremptory challenges should be allotted to each party. Both this standard and the Standards Relating to Juror Use and Management provide that the trial judge should have the authority to permit additional peremptory challenges when the situation justifies such additional challenges.

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6. Id., Standard 9(g).
Allocation of Peremptory Challenges among the Parties

Recognizing that the prosecution and the defense have equally meritorious interests in promoting jury impartiality, section (d) provides that, in single defendant cases, the number of peremptory challenges should be the same for each side. Section (d) does not address cases with multiple defendants.

The ABA Standards Relating to Juror Use and Management are more specific when dealing with multiple defendant cases, providing that “one additional peremptory challenge should be allowed for each defendant in a multi-defendant criminal proceeding.”7 “This is the only exception to the standards’ principle of equality of peremptory challenges between prosecution and defense.”8 This practice was adopted as a compromise between “giving each codefendant the same number of challenges as are allowed a defendant tried alone, to dividing the challenges normally accorded a single defendant among all codefendants.”9 While this standard does not adopt any specific system of allocation of peremptory challenges, it is consistent with the Standards Relating to Juror Use and Management with respect to multiple defendant cases in that those standards reflect a balanced method of allocating challenges among the several defendants themselves, and between the defendants, individually and collectively, and the prosecution.

Standard 15-2.7. Procedure for exercise of challenges; swearing the jury

(a) All challenges, whether for cause or peremptory, should be addressed to the court outside of the presence of the jury, in a manner so that the jury panel is not aware of the nature of the challenge, the party making the challenge, or the basis of the court’s ruling on the challenge.

(b) After completion of the voir dire examination and the hearing and determination of all challenges for cause, counsel should be permitted to exercise their peremptory challenges by alternately striking names from the list of panel members until each side has

9. Id.
exhausted or waived the permitted number of challenges. A party
should be permitted to exercise a peremptory strike against a mem­
ber of the panel who has been passed for cause.
(c) The court should not require the attorney for the defendant
to exercise any challenges until the attorney has had sufficient time
to consult with the defendant, and in cases involving multiple
defendants, with counsel for the codefendants, regarding the ex­
ercise of the challenges.
(d) No juror should be sworn to try the case until all challenges
have been exercised, at which point all jurors should be sworn as
a group.

History of Standard

This standard is new.

Related Standards

ABA Standards for Criminal Justice 3-5.3, 4-7.2 (3d ed. 1993)
ABA Standards for Criminal Justice 8-3.5 (3d ed. 1992)
ABA Standards Relating to Juror Use and Management 7, 9 (1992)
National Conference of Commissioners on Uniform State Laws,
Uniform Rules of Criminal Procedure 512(d) (1987)
National District Attorneys Association National Prosecution Stan­
dards chapter 73 (2d ed. 1991)

Commentary

This standard sets out the principles governing the exercise of chal­
lenges to jurors during the jury selection process. It establishes an
appropriate procedure to exercise challenges, one where the jurors do
not know which attorney exercised the challenge and where the
grounds for the challenge are not stated in open court. When a juror
is challenged, either for cause or peremptorily, the comments of coun­
sel may offend a challenged juror. Should the challenge be denied,
the very fact that the juror heard such remarks from counsel might
tend to bias the juror against that attorney and the attorney’s client.
To avoid the prejudicial effect of exercising challenges in open court,
this standard provides that challenges are to be presented at the
bench, at side-bar. In addition, where a judicial inquiry is made under
Standard 15-2.8, the jurors will not be aware of the basis for the chal­
Criminal Justice Trial by Jury Standards 15-2.7

...challenge and, if the challenge is deemed to be racially motivated, the challenged juror who remains on the panel will not be aware that he or she was challenged, of the alleged basis for the challenge, or of the ruling that the challenge was racially motivated. The side-bar challenge shields the jury from these procedures.

Section (b) adopts the "struck jury system" as the procedure of choice for the exercise of peremptory challenges. This system was also adopted by Standard 9(h) of the ABA Standards Relating to Juror Use and Management.1 One sophisticated statistical study comparing the struck jury system to other group selection methods resulted in a clear showing that the struck jury system was able to better "eliminate the extremes of partiality on both sides."2

Section (c) provides that the defendant must have the opportunity to assist defense counsel before the final strikes are exercised. This standard also permits counsel in multiple defendant cases to consult with each other about the exercise of challenges.

Section (d) rejects the practice used in some courts of individually swearing jurors before the entire jury panel has been selected. This practice forecloses strikes to jurors once passed in the questioning. However, it makes impossible the evaluation of the panel as a whole, and prevents a later challenge of a sworn juror in the event that a problematic relationship between that juror and others later selected should arise.

One additional problem which can arise through the sequential swearing of jurors is that of determining claims of former jeopardy. Since jeopardy attaches at the time that the jury is sworn,3 the se-

1. ABA Standards Relating to Juror Use and Management 9 (1992). Standard 9(h) reads as follows:

Following completion of the voir dire examination counsel should exercise their peremptory challenges by alternately striking names from the list of panel members until each side has exhausted or waived the permitted number of challenges.

See also Bermant & Shapard, Report: The Voir Dire Examination, Juror Challenges, and Adversary Advocacy, Federal Judicial Center, 1978. See also Commentary to ABA Standards Relating to Juror Use and Management 9 (1992), for an explanation of the procedure.


sequent swearing of individual jurors raises a question about the time when jeopardy has attached.4

**Standard 15-2.8. Impermissible peremptory challenges**

Neither party should be permitted to use peremptory challenges to dismiss a prospective juror for constitutionally impermissible reasons.

(a) It should be presumed that each party is utilizing peremptory challenges validly, without basing those challenges on constitutionally impermissible reasons.

(b) A party objecting to the challenge of a prospective juror on the grounds that the challenge has been exercised on a constitutionally impermissible basis, establishes a prima facie case of purposeful discrimination:

(1) by showing that the challenge was exercised against a member of a constitutionally cognizable group, and

(2) by demonstrating that this fact, and any other relevant circumstances, raise an inference that the party challenged the prospective juror because of the jurors' membership in that group.

(c) When a prima facie case of discrimination is established, the burden shifts to the party making the challenge to show a nondiscriminatory basis for the challenge.

(d) The court should evaluate the credibility of the proffered reasons. If the court finds that the reasons stated are constitutionally permissible and are supported by the record, the court should permit the challenge. If the court finds that the reasons for the challenge are constitutionally impermissible, the court should deny the challenge and, after consultation with counsel, determine whether further remedy is appropriate. The court should state the reasons, including whatever factual findings are appropriate, for sustaining or overruling the objection on the record.

**History of Standard**

This standard is new.

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4. See People v. Lawton, 127 Misc. 2d 800, 487 N.Y.S.2d 273 (N.Y. Sup. Ct. 1985), in which the problem was raised, but the defendant was found to have waived the former jeopardy protection.
Related Standards

ABA Standards for Criminal Justice 3-5.3, 4-7.2 (3d ed. 1993)
ABA Standards Relating to Juror Use and Management 7, 9 (1992)
National District Attorneys Association National Prosecution Standards chapter 73 (2d ed. 1991)

Commentary

In recent years, the judicial and political systems have developed an increased sensitivity to discrimination against citizens for constitutionally impermissible reasons. This sensitivity is demonstrated, for example, by the expansion of the definition of constitutionally cognizable groups and by the passage of broad-based civil rights legislation.1 In this same vein, the Supreme Court has invalidated the use of the peremptory challenge for purposeful and impermissible discrimination.

Since 1985, the Court has wrestled with the inherent conflict between the nature of the peremptory challenge itself, a traditionally unreviewable exercise of attorneys' discretion, and the obligation of trial judges to ensure that the courts are not used as a mechanism for discrimination against citizens.2 Moreover, the exercise of a peremptory challenge deprives a citizen of both the right and the obligation to take part in the judicial proceeding. And, while an attorney may be able to pin-point the reason for challenging a particular juror, frequently even the attorney who exercises the challenge cannot articulate an objective explanation for rejection of a particular person as a juror in a particular case. The challenge may be based more on intuition, personal experience and "gut feeling" than on specific objective factors.3 Such subjectivity creates further opportunity for conscious or unconscious, real or merely perceived discrimination.

3. GINGER, JURY SELECTION IN CRIMINAL TRIALS (Supp. 1977). See also Hanley, Getting to Know You, 40 AM. U. L. REV. 865 (1991); Weiner & Bauman, Judge Conducted Voir Dire,
As a result of the discretionary and subjective nature of peremptory challenges, courts have had great difficulty attempting to craft a wholly nondiscriminatory peremptory challenge system. This standard does not purport to provide absolute answers to this problem. It does, however, recommend a procedural structure which retains the benefits of peremptory challenges while protecting the right of each citizen to participate in the judicial process. It retains the benefits of the peremptory challenge system insofar as that system provides a mechanism for the attorney to excuse potential jurors for valid reasons not rising to an articulable "for cause" level, but it also firmly establishes the principle that an attorney may not use the peremptory challenge to discriminate against a citizen for constitutionally impermissible reasons.

The constitutional underpinnings of the prohibition against improper discrimination in the use of peremptory challenges were set forth by the Supreme Court in a series of decisions beginning with Strawder v. West Virginia, decided in 1880, where the Supreme Court held it unconstitutional to bar African-Americans from jury service, and culminating most recently with J.E.B. v. Alabama ex rel. T.B., where the prohibition against discriminatory use of peremptory challenges based on gender was upheld.

From this series of cases decided by the United States Supreme Court, the governing principle can be discerned: peremptory challenges may not be exercised in a discriminatory manner based on race or gender by any party to civil or criminal litigation. However, the reach of this substantive doctrine has yet to be fully determined. Significant questions remain. For example, although discrimination on the basis of race or gender is prohibited, the issue of discrimination based on the age of a potential juror has not yet been decided. The question also arises under the Americans with Disabilities Act whether the prohibition against discriminatory use of peremptory


4. 100 U.S. 303 (1880).

challenges also applies to challenges used to discriminate against someone on the basis of physical disability.\(^6\)

This standard does not itemize the kinds of discrimination that are constitutionally impermissible during the jury selection process, leaving those determinations to the courts. However, it does establish a procedure for resolving an allegation that a party is misusing the peremptory challenge. First, it should be presumed that the peremptory challenges were exercised properly, and not in a constitutionally impermissible manner. Therefore, the objecting party must establish a prima facie case that the challenge was used improperly. However, the objecting party should be given wide leeway to establish this case. The party must show, initially, that the challenge was exercised against a group that is constitutionally cognizable. Then he or she should be permitted to use any other relevant facts and circumstances in order to establish a prima facie case.

Once the objecting party has shown sufficient facts and circumstances to raise an inference that the challenge was constitutionally impermissible, the court should require the party exercising the challenge to explain the basis for the challenge, to show a race- or gender-neutral reason for the challenge. It is then up to the court to evaluate the reason given for the challenge in the light of all the facts and circumstances of the jury selection process, keeping in mind “that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.”\(^7\) Thus, the reference to burden in (c) of the standard should be construed to mean the burden of production rather than the burden of persuasion. In the usual case, denial of the peremptory challenge should result in the juror being seated. An additional problem, however, may arise in a situation where the struck jury system is used.\(^8\) This system envisions a process where enough potential jurors are called that, when each attorney has used all peremptory challenges, the correct number of jurors will be empaneled. In that situation, not only is the challenge denied and the challenged juror seated, but the attorney will be required to use up another peremptory challenge.\(^9\) The objecting attorney should be aware of the consequences of a denial of a peremptory challenge under this system.

\(^7\) Purkett v. Elm, 115 S. Ct. at 1771.
\(^8\) This is the system recommended in Standard 15-2.7. It is also recommended by Standard 9(h), ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT.
\(^9\) See, for instance, United States v. Morgan A. Joe, 928 F.2d 99 (4th Cir. 1991).
Standard 15-2.9. Alternate Jurors

The court may impanel one or more alternate jurors whenever, in the court's discretion, the court believes it advisable to have such jurors available to replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties.

(a) Alternate jurors should be selected in the same manner, have the same qualifications, be subject to the same examination and challenges, and take the same oath as the regular jurors. Jurors should not be informed of their status as regular jurors or as alternates until time for jury deliberation.

(b) A juror who becomes incapacitated during trial, in the discretion of the court, may be replaced by an alternate juror, who shall then have the same functions, powers, facilities and privileges as a regular juror.

History of Standard

This standard includes a number of stylistic changes. Paragraph (a) has been amended to provide that alternate jurors should not be informed of their status until time for deliberation. Paragraph (b) has been added to indicate that alternate jurors may replace other jurors at trial in the discretion of the court.

Related Standards

ABA Standards for Criminal Justice 3-5.3, 4-7.2 (3d ed. 1993)
ABA Standards Relating to Juror Use and Management 9(f) (1992)
National Conference of Commissioners on Uniform State Laws, Uniform Rules of Criminal Procedure 511(c) (1987)

Commentary

History

The common law, adhering to the principle of absolute jury integrity, made no provision for substitution of a juror who, after the jury was selected, became unable or disqualified to perform his or her duties. In the event that a member of the jury became incapacitated, the entire jury was discharged. The remaining eligible jurors were im-
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mediately recalled along with an additional juror, and they were again empaneled to hear the entire trial. The alternate juror system was developed to avoid this inefficient use of resources, while maintaining jury integrity.

Framework for Alternate Juror System

This standard provides the general framework for an alternate juror system.¹ It leaves the initial decision to impanel alternate jurors and the number of alternate jurors to be impanelled to the court’s discretion, recognizing that the trial judge is in the best position to balance the factors relevant to reaching a decision on use of alternate jurors in a given case. Further, it eliminates any requirement of counsel’s consent to alternate jurors and reduces abuse of the alternate juror system as a tactic for obtaining a mistrial. By defining incapacitated jurors as those who “become or are found to be unable or disqualified to perform their duties,” this standard permits the court to replace a juror when it is discovered for the first time during trial that the juror should have been disqualified at the time that the juror was sworn, or when the incapacity develops during the course of the trial itself.²

Paragraph (a) counsels that alternate jurors be selected, qualified, examined and sworn in as regular jurors, so that in the event an alternate substitutes for a regular juror, the alternate will have met all of the requirements for selection and qualification as a regular juror.

¹. The substance of the standard is similar to that of FED. R. CRIM. P. 24(c), Alternate Jurors:

The Court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

². The Federal Rules were amended in 1966 to add the language “or are found to be.” The notes of the advisory committee on the 1966 amendments to the Federal Rules of Criminal Procedure explain that the language was added to make it clear that an alternate juror may be substituted where the court first discovers that the juror is incapacitated after the trial has begun.
A juror should not be informed of his or her alternate status until time for jury deliberation, when the alternate will be excused from further service. This proposal is based on the supposition that a juror who is informed that he or she is an alternate juror may pay less attention than a "regular" juror.

Substitution of Alternate Jurors After Deliberations Have Begun

A particularly difficult question is whether a regular juror who must be excused for some reason should be replaced by an alternate juror after the deliberations have begun. Although the goals of efficiency and expediency are served by a system which permits substitution of alternates even after deliberations have begun and although it has been held constitutionally permissible, this approach was rejected in this standard for a number of reasons. The juror who is not part of the deliberative process has not been exposed to the give and take of jury discussion which occurred prior to the substitution. As a result, substitution of an alternate at this point increases the risk of the jury returning a verdict based upon a less than thorough examination and discussion of the evidence. The alternate juror would be ignorant of prior discussions, and would be forced to rely upon the remaining jurors to summarize prior debate. Although it has been suggested that the jury be instructed, after such a substitution, to begin its deliberations as if no prior deliberations had taken place, it is uncertain that, even when so instructed by the court, the jury could truly go back to "square one," discussing the case anew as though no prior deliberations had occurred, and repeating all prior arguments for the sake of the newcomer.

3. See Schwarzer, Reforming Jury Trials, 132 F.R.D. 575 (1991). Judge Schwarzer recommends a system in which a jury of more than the requisite number are seated throughout the trial. At the close of the evidence, either of the parties can stipulate to a jury of more than the requisite number, thus permitting all jurors to deliberate and vote, or the alternates are then determined and excused by drawing lots. This method insures that "when none of the jurors regard themselves as supernumeraries likely to be excused before deliberations begin, they will all be more attentive and responsible."


Some state courts have permitted replacement of jurors by alternates after deliberations have begun. Other jurisdictions have held that the absolute privacy of jury deliberations may not be invaded, and therefore, an alternate juror must be dismissed immediately prior to the commencement of jury deliberations. Those courts which permit substitution after deliberations have begun to employ a number of mechanisms to preserve the integrity of the jury. For example, some jurisdictions isolate the alternate juror until needed for substitution, at which time the alternate becomes a part of the jury. Other jurisdictions permit the alternate juror silently to observe the deliberations of the regular jury so that the alternate may replace another juror who may become incapacitated. In balancing the interests of jury independence, privacy and secrecy against the interests of efficiency, this standard comes down firmly on the side of prohibition of using an alternate juror once deliberations have begun.

Federal decisions have held that the presence of an alternate juror during deliberations was not unconstitutional. Recently, in United States v. Olano, the Supreme Court held that the presence of alternate jurors during jury deliberations was not an error that the Court of Appeals was authorized to correct under Rule 52(b), the provision that authorizes the court of appeals to correct plain errors or defects affecting substantial rights.

**Grounds for Substitution**

Alternate jurors should replace jurors who, in the language of rule 24(c) of the Federal Rules of Criminal Procedure, "become or are found to be unable or disqualified to perform their duties." Some early state statutes provided that an alternate could be substituted for a regular juror only in the event that the latter was ill or had died, but modern statutes have sensibly broadened the test, permitting replacement if the trial court finds that good cause exists for excusing

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a regular juror.11 So long as there is no abuse of judicial discretion, the decision of the trial court has been upheld.12 Even in cases where a judge discharges a regular juror under circumstances not requiring discharge, it has been held that a defendant has not been prejudiced because the defendant was still tried by twelve persons in whose selection the defendant participated.13

Procedure for Substitution

This standard does not prescribe a particular procedure to be followed whenever the court considers excusing a juror and impaneling an alternate. At a minimum, however, the court should hold a hearing, on the record, affording counsel an opportunity to be heard. The record should reflect the reason the court excused the juror. Courts have generally held that such a hearing may be summary in nature and need not have all the formalities of a trial.14

Paragraph (a), providing that alternate jurors should be selected and treated like regular jurors, is similar to Rule 24(c) of the Federal Rules of Criminal Procedure. Comparable state statutes uniformly provide that alternates shall have the same qualifications as regular jurors, shall be subject to the same examination and challenges, and, after taking the same oath, shall be seated near or with the regular jurors, with equal access to the proceedings.15

Whatever procedures are used, relevant rules or statutes should indicate the number of additional peremptory challenges are to be allowed each side when alternate or additional jurors are called. These standards do not specify the number of additional challenges, nor whether the defense should have more than the prosecution. However, the Standards Relating to Juror Use and Management provide that each party should have one additional challenge for every two alternate jurors seated.16 State rules or statutes should also clearly set out the procedure that is to be followed for replacing an excused juror. In general, two methods are preferred in the decisional law: some

13. Id. at 1303.
14. Id. at 1304.
15. Id. at 1291.
16. ABA STANDARDS ON JUROR USE AND MANAGEMENT, Standard 9(f).
jurisdictions follow the approach of Rule 24(c) of the Federal Rules of Criminal Procedure whereby "[a]lternate jurors in the order in which they are called" replace regular jurors; other courts have adopted the position taken by the American Law Institute in 1930 that when more than one alternate is available the one to replace a discharged juror shall be selected by lot.\textsuperscript{17} Either approach is consistent with this standard and with the ABA Standards Relating to Juror Use and Management.

\textsuperscript{17} See Schwarzer, supra note 3.
PART III.
CONDUCT OF THE TRIAL

Standard 15-3.1. Defendant’s presence at proceedings

The defendant should have the right to be present at every stage of the trial proceedings, including selection and impaneling of the jury, all proceedings at which the jury is present, and return of verdict.

(a) If a defendant, with knowledge that the trial is going on, voluntarily absents him or herself from the court, the proceedings may continue to verdict without the defendant’s physical presence, and the defendant should be deemed to have waived the right to be physically present at the trial.

(b) No trial or proceeding on the merits of the case should commence without the physical presence of the defendant, unless the defendant has personally waived physical presence in the courtroom.

History of Standard

This standard is new.

Related Standards

National District Attorneys Association National Prosecution Standards chapter 78.6 (2d ed. 1991)

Commentary

The Right to be Present at Trial

The right to be personally present at every stage of the trial is one of the most basic rights afforded a criminal defendant.1 At common law, it was a procedural requirement that the defendant be present “in the courtroom at every stage of his trial.”2 The right to be present

could not be waived either by the defendant or by counsel. In felony trials, the defendant's presence was not only a right of the defendant, but also an element essential for the validity of the conviction.

In the United States, courts looked to the United States Constitution as a source of the right to be present. In 1892, the Supreme Court recognized the long-standing common law principle that "[a]fter the indictment, nothing shall be done in the absence of the defendant." The Court stated that it is the right of the accused "'to be confronted with the accusers and witnesses; and it is within the scope of this right that he be present, not only when the jury are hearing his case, but at any subsequent stage when anything may be done in the prosecution by which he is to be affected.'" The record must show affirmatively that the defendant was present or the conviction cannot stand.

One of the bases on which the right is predicated is that of the constitutional right to confront witnesses, guaranteed by the Sixth Amendment. The confrontation issue has been addressed in a number of cases, including Coy v. Iowa and Maryland v. Craig. These cases established that there is a right to face-to-face confrontation of witnesses, but that the right is not absolute. It must be balanced against other important government objectives.

It is generally held that a defendant may not be excluded from the jury selection, guilt phase, or sentencing stages of a criminal trial.

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3. Id.


5. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ..." and "to have the assistance of counsel for his defense". U.S. CONST. amend. VI. The right applies to the States through the due process clause of the Fourteenth Amendment to the United States Constitution. See Gideon v. Wainwright, 372 U.S. 335 (1963); Pointer v. Texas, 380 U.S. 400 (1965); Washington v. Texas, 388 U.S. 14 (1967).


7. Id. at 373 (quoting Hooker v. Com., 13 Grat. 763).

8. Id. at 376.

9. The language of the Sixth Amendment is set out supra note 5.


Since these are stages at which the defendant's case may be critically affected, it would be unfair to exclude the defendant at these times. Exclusion of the defendant from other stages of the proceedings may not affect the fundamental case, and exclusion of the defendant may be acceptable. Furthermore, the defendant's presence is required at pre-trial hearings only if testimony relating to issues of guilt or innocence is heard.15

**Waiver of the Right to be Present**

Section (b) addresses the procedure to be employed when a defendant wishes to waive the right to be present at the trial or other relevant proceeding. This standard requires that the waiver be personally expressed by the defendant. At common law, the defendant could not waive the right to be present at a felony trial.16 The Supreme Court first recognized an exception to the common law rule in 1912, when, in *Diaz v. United States*,17 the Court held not only that the defendant could waive the right, but that the defendant's voluntary absence from the trial was an implicit waiver. However, in *Diaz*, the Court held that presence at trial could not be waived by defendants in custody or by those being tried for capital crimes.18 The Court reasoned that a defendant in custody has no control over the decision to be present or absent, and a defendant in a capital case "suffer[ed] the constraint naturally incident to an apprehension of the awful penalty that would follow conviction."19 Federal Rule of Criminal Procedure 43 addresses issues relating to the defendant's presence at trial.20 Rule 43 requires the defendant's presence at enumerated proceedings, including every stage of the trial, and provides for waiver by consent or misconduct.21

17. 223 U.S. 442 (1912).
18. *Id.* at 455.
19. *Id.*
20. *FED. R. CRIM. P. 43*—Presence of the defendant:
   (a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
   The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the
This standard addresses the situation where a defendant voluntarily absents himself or herself after the proceedings have commenced. When this occurs, the proceedings may continue, and the defendant is deemed to have waived the right to be present. The distinction between the defendant who voluntarily absents himself or herself during trial and one who is not present at the beginning of the trial was recognized by the Supreme Court in *Crosby v. United States.* There, the Supreme Court held that Rule 43 expressly prohibits trial in absentia of a defendant who is not present at the beginning of the trial. The Court found that the distinction between flight before trial and flight after a trial has begun is a rational one. The cost of delaying a trial already begun is high; moreover, a defendant who flees after attending the beginning of a trial has made a knowing and voluntary waiver.

Thus, the defendant should also have the right to waive his or her presence at trial after the trial has begun. The right to be present at trial may be waived by a knowing and voluntary waiver or it may be lost by the defendant's attempts to disrupt the proceedings. However, in order to prevent a defendant from gambling on an acquittal knowing that he or she can terminate the trial by fleeing if an adverse verdict seems increasingly likely, a defendant may not defeat the proceedings by voluntary absence after the trial has commenced. Pursuant to paragraph (a), if a criminal defendant deliberately fails to appear in court after a trial has commenced, such absence can be considered a knowing and voluntary waiver of the right to be present.

**Basic Requirements Relating to Presence**

This standard sets out basic concepts relating to the right of the defendant to be present at trial and the defendant's ability to waive

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right to be present whenever a defendant, initially present,

(1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), or

(2) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

22. Crosby, supra note 4.
23. Id. at 753.
24. See Diaz, supra note 17.

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that right. Although it does not specifically address such pretrial proceedings as arraignments or non-substantive pretrial motions, the defendant has the right to be present at all stages of the prosecution involving substantive matters, and especially at any proceeding at which the jury is present. In-chambers and side-bar conferences involving only questions of law or procedure and not finding of fact do not interfere with a defendant’s right to a fair trial. Accordingly, they may occur in the defendant’s absence without denying the defendant’s constitutional right to be present at every stage of the trial.

**Standard 15-3.2. Control, restraint or removal of defendants and witnesses**

(a) During trial the defendant should be seated where he or she can effectively consult with counsel and can see and hear the proceedings.

(b) The court should not permit a defendant or witness to appear at trial in the distinctive attire of a prisoner, unless waived by the defendant.

(c) No defendant should be removed from the courtroom, nor should defendants and witnesses be subjected to physical restraint while in court unless the court has found such restraint necessary to maintain order. Removing a defendant from the courtroom or subjecting an individual to physical restraint in the courtroom should be done only after all other reasonable steps have been taken to insure order. In ordering remedial measures, the court must take all reasonable steps to preserve the defendant’s right to confrontation of witnesses and consultation with counsel.

(d) If the court orders physical restraint or removal of a defendant from the courtroom, the court should enter into the record of the case the reasons therefor. Whenever physical restraint or removal of a defendant or witness occurs in the presence of jurors trying the case, the court should instruct those jurors that such restraint or removal is not to be considered in assessing the proof and determining guilt.

**History of Standard**

Section (c) was revised to provide that the defendant should be restrained or removed from the courtroom only after all other reason-
able steps to maintain order and decorum have failed, and to emphasize that whenever a disruptive defendant is removed from the courtroom, his or her right to confrontation and right to consult with counsel must nonetheless be preserved.

**Related Standards**

ABA Standards for Criminal Justice 6-3.8 (2d ed. 1980)
ABA Standards for Criminal Justice 10-5.12 (2d ed. 1986)

**Commentary**

This standard deals with three discrete but similar concepts, each related to aspects of the defendant’s presence and physical appearance in the courtroom. Section (a) concerns the location where the defendant should be seated during the proceedings. Section (b) concerns the right of the defendant and witnesses not to appear in the courtroom in prison clothing. Sections (c) and (d) describe the mechanisms that may be used to control a dangerous or disruptive defendant or witness.

Initially, it must be noted that it is the duty of the trial judge to control the proceedings and the courtroom to ensure proper procedure, and the fairness, dignity and decorum of the proceedings. It is within the discretion of the trial judge to take reasonable actions to control the courtroom and such rulings are generally not overturned absent an abuse of discretion.\(^1\)

Although the trial judge has discretion to control the proceedings in order to assure adequate decorum, the judge may not violate the defendant’s right to confrontation of witnesses. In general, the right to confrontation includes the right to a face-to-face meeting of accused and accuser. The necessity of this “face-to-face” meeting was addressed by the Supreme Court in the case of *Coy v. Iowa*.\(^2\) The defendant in *Coy* was charged with sexual abuse of a child. At trial, in order to protect the young victim, the court ordered that a screen be placed between the witness/victim and the defendant, obscuring the defendant’s view of the witness. The Court found that the use of the screen

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violated the defendant's "right to face-to-face confrontation."³ Two years later, in Maryland v. Craig, the Court held that the defendant's right to face-to-face confrontation of the witness is not absolute, and that the defendant may be "absent" from certain parts of the trial so long as the central purpose of the Confrontation Clause is maintained.⁴

**Location of Defendant**

In a criminal case, the defendant's right to the effective assistance of counsel necessarily includes the right to confer with counsel. The court should avoid any action which unnecessarily burdens the exercise of this right. The court must take steps to insure that, whatever the physical facilities of the courtroom may be, the defendant has adequate opportunity and ability to confer with counsel. While hardly optimal, in general, so long as the court ensures that the defendant can communicate effectively with counsel during trial, a seating arrangement which requires the defendant to sit at some distance from the attorney may be upheld.⁵ The reviewing courts look to the efficacy of actual attorney-client communication rather than to the seating arrangements themselves. Unless there is evidence that the communication between the defendant and counsel was actually impeded, a conviction will not be reversed.⁶ However, seating arrangements which impede actual communication and consultation between the defendant and counsel constitute prejudicial error and warrant a new trial.⁷

It is also necessary that the defendant be situated so that he or she can see and hear the witnesses and other participants without difficulty.⁸ A defendant need not be seated so close to the witness box that a timid witness is placed in apprehension.⁹ Wherever the defendant is seated, however, the defendant's right to confrontation of witnesses must be preserved. Unless there is some compelling state interest to be served by seating the defendant where the defendant is not in full

³. Id. at 1022.
⁹. See Grabowski v. State, 126 Wis. 447, 105 N.W. 805 (1905).
view of the testifying witness, and unless the purpose of the Confrontation Clause can be assured, the defendant must be seated so that the defendant and the witness are in full view of one another.

**Prison Clothing**

Paragraph (b) provides that the defendant not be required to stand trial in prison clothing. In 1976, in *Estelle v. Williams*, the Supreme Court held that requiring the defendant in a criminal case to appear at a jury trial in prison clothing is a violation of the presumption of innocence, and, consequently a denial of the defendant’s constitutional right to a fair trial.10

**Dangerous or Disruptive Defendants**

Section (c) balances the responsibility of the court to maintain order and decorum in the courtroom with the necessity of protecting the rights of the defendant, particularly the defendant’s right to be tried free of restraints and to confront witnesses.11 It also reflects a moral reluctance to subject a defendant to physical restraints or removal from the courtroom if other less severe mechanisms for maintaining order are available and efficacious.

Physical restraints are to be avoided unless necessary because: (1) the use of physical restraints on the accused may cause the jury to be prejudiced against the accused; (2) the use of such restraints may interfere with the accused’s ability to assist in his or her own defense; and (3) the use of such restraints is an affront to the dignity of judicial proceedings.12 In addition, the use of restraints may confuse or embarrass the restrained defendant.13 In general, the many cases that have addressed the issue hold that, while use of such restraints may be proper under certain extreme circumstances, their use where unnecessary may violate state or federal constitutional provisions and, in some instances, state statutory law.14

Although the defendant has a general right to be free of restraints in the courtroom, restraints may be proper—even necessary—to prevent the escape of the defendant, to prevent violence in the courtroom, or to maintain the decorum of the courtroom in certain circumstances. Remedies available to a trial judge to handle a disruptive defendant were discussed by the Supreme Court in 1970 in the landmark case of Illinois v. Allen.\textsuperscript{15} The Court held that a defendant can forfeit the right to be present in the courtroom if, after being warned that the sanction of removal from the courtroom may be imposed, the defendant continues in a manner "so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom."\textsuperscript{16} The defendant can reclaim the right to be present as soon as he or she agrees to behave appropriately.

Section (c) sets out standards to be used when the trial court, after other measures have failed, finds it absolutely necessary to restrain or to remove a disruptive defendant to maintain order. Whenever remedies less intrusive than those of physical restraint or removal from the courtroom would prove effective they should be used. When it becomes necessary to impose harsher remedies, the court must be sensitive at all times to the need to protect the defendant’s rights.

Section (c) recognizes the benefits of face-to-face confrontation and provides that all reasonable steps be taken in order to preserve that right before a defendant is removed from the courtroom. In some cases, however, removal from the courtroom may be the only effective remedy. If a defendant has become so disruptive that a trial cannot proceed with the defendant in the courtroom, public policy requires that the court take measures to restrain or remove the defendant.

In such a case, although face-to-face confrontation of witnesses and the accused is preferred, it is not absolutely required.\textsuperscript{17} A defendant’s right to confront witnesses may be satisfied without actual face-to-face confrontation if removal of the defendant from the courtroom is absolutely necessary to establish order and if the reliability of the testimony can be otherwise assured.\textsuperscript{18} The reliability of the testimony can be assured by preserving the remaining elements of the confrontation

\textsuperscript{15} 397 U.S. 337 (1970).
\textsuperscript{16} Id. at 343.
\textsuperscript{17} Maryland v. Craig, 497 U.S. 836, 849-50 (1990).
\textsuperscript{18} Id. at 850.
right: oath, cross-examination, and observation of the witness's demeanor by the trier of fact. 19

Whenever the court takes the drastic measure of removing the defendant from the courtroom, the court should provide some means for the defendant to view the trial and to communicate with counsel. The general availability of electronic communication devices like closed circuit television makes it relatively easy for the court to insure that the removed defendant can still view the proceedings and communicate with counsel.

The decision to use restraints or to remove the defendant from the courtroom should be made by the judge, and not by law enforcement officers. 20 This decision should be made only after a hearing, on the record and out of the presence of the jury, and upon a finding that such an extreme remedy is necessary. 21 Among the factors that should be considered by the judge are: the seriousness and nature of the charge; the defendant's age, physical attributes, temperament and character, past record, escapes, threats to harm others or to escape or to cause a disturbance; the size and mood of the audience; the physical surroundings; the security of the courtroom; and the adequacy and availability of alternative remedies. 22

In any event, it is clear that, if restraints are to be used or if the defendant is removed from the courtroom, the trial judge must instruct the jury that the defendant's restraints or absence from the courtroom must not affect their consideration of the defendant's guilt or innocence. 23 Such an instruction is also called for when, through inadvertence, some jurors have—even momentarily—viewed the defendant or a witness in restraint. Although even the strongest admonition from the court may be insufficient to dispel all effects of the

19. Id. at 851.
defendant’s appearance in restraints, it is important that the trial judge take all possible steps to minimize the effect of restraints and the possibility of their improper influence on the jurors.

Standard 15-3.3. Substitution of judge

If, by reason of death, sickness, or other disability, the judge before whom a jury trial has commenced is unable to proceed with the trial, another judge, upon certifying that he or she has familiarized himself or herself with the record of the trial, may proceed with and finish the trial.

History of Standard

This standard is unchanged.

Related Standards


Commentary

This standard, initially patterned after Federal Rule of Criminal Procedure 25(a),1 has been followed widely throughout the nation since its initial adoption in 1968. In recent years, situations calling for substitution of the trial judge have arisen more and more frequently, in part because of the greater number, length and complexity of criminal trials.2

Constitutionality

It was once thought that the substitution of judges in a criminal case was constitutionally impermissible, even where both sides con-

1. Rule 25 of the Federal Rules of Criminal Procedure, at the time of its adoption as a standard, read:

   Rule 25. Judge; Disability
   (a) During trial. If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial.

The notion that the right to jury trial is violated by the mid-trial substitution of a judge was recognized as early as 1915 in the federal system in *Freeman v. United States*. The *Freeman* Court held that it was the Sixth Amendment right to a trial by jury which entitled a criminal defendant both to a jury composed of twelve jurors, as well as a judge, "all of whom must remain identical from the beginning [of the trial] to the end." The prohibition against substitution of the trial judge was eroded, however, in 1944, when the Supreme Court authorized substitution for an "absent" judge after the return of a verdict in a criminal case, even without the defendant's consent. It was further discredited some years later when the Court held it permissible for a criminal defendant to waive a jury.

Finally, in 1970, 55 years after the decision in *Freeman*, the Supreme Court, held that the Sixth Amendment did not preserve the common law right to a trial by a jury consisting of twelve persons, rejecting the conclusion that the Constitution retained all aspects of the jury trial as it had existed at common law. Since that time, although Rule 25 has been attacked a number of times, the constitutionality of substitution of the trial judge has been consistently upheld by reviewing courts in the federal system. Similar challenges to rules providing for substitution of the trial judge have been upheld at the state level as well.

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5. Id. at 759.


7. Patton v. United States, 281 U.S. 276 (1930); see Commentary to Standard 15-1.2 (Waiver of trial by jury), supra.


This standard applies only to jury trials. It does not apply to bench trials, where the judge is the finder of fact as well as of law. In a bench trial, mid-trial substitution is inappropriate because the new judge would not have had the opportunity to judge the credibility of the witnesses, nor to have heard the testimony in detail. In a jury trial, in contrast, the new judge does not assess credibility of witnesses or weigh or evaluate the evidence. However, even in a jury trial, the substituted judge will most likely be required to rule on a motion for judgment of acquittal, and therefore must become sufficiently familiar with the record to properly make such a ruling.\textsuperscript{11} Since the ruling on a motion for judgment of acquittal is based on the legal sufficiency of the evidence, the judgment of acquittal is not based upon the judge’s assessment of the quality or weight of the evidence, or upon the judge’s personal impression of the credibility of the witnesses.\textsuperscript{12}

\textbf{Reasons for Substitution}

There are only three recognized reasons for mid-trial substitution of the trial judge: death, sickness or other disability. Hence, the reason for the substitution must be sufficiently serious to result in the inability of the original judge to continue the trial, and not a matter of mere convenience.\textsuperscript{13}

\textbf{Conduct of the Trial by a Substitute Judge}

Generally, those cases permitting substitution of a judge hold that the substitute judge should abide by the rulings previously made by the original judge, and should not engage in de facto appellate review of his or her predecessor’s actions. The substitute judge should be bound by the rulings of the original judge.\textsuperscript{14}

\textsuperscript{11} See Standard 15-3.8 (Motion for judgment of acquittal) and Commentary, infra.


\textsuperscript{13} United States v. Lane, 708 F.2d 1394 (9th Cir. 1983).

\textsuperscript{14} See Williams v. C.I.R., 1 F.3d 502 (7th Cir. 1993). See also Peterson v. Lindner, 765 F.2d 698, 704 (7th Cir. 1985); Diaz v. Indian Head, Inc., 686 F.2d 558 (7th Cir. 1982); United States v. Sisk, 629 F.2d 1174 (6th Cir. 1980), cert. denied, 449 U.S. 1084 (1981); United States v. Desert Gold Mining Co., 433 F.2d 713 (9th Cir. 1970).
Effect of Violation of the Substitution Rules

Appellate courts typically apply a "harmless error" standard to violations of the rules that govern substitution of the trial judge. Rule 52(a) of the Federal Rules of Criminal Procedure provides that, "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Thus, procedures that do not strictly comply with Rule 25(a) have nonetheless been upheld, if the defendant has not suffered any prejudice.

Standard 15-3.4. Opening statement and closing argument

(a) Opening Statement
   (1) Each party should be afforded the opportunity to make an opening statement for the purpose of explaining the issues and the evidence to be adduced at trial. The defense should have the option to present its opening statement either at the outset of the trial or at the beginning of the defense case in chief.
   (2) In the opening statement, counsel should not allude to evidence to be presented unless, in good faith, there is a reasonable basis for believing that such evidence will be tendered and admitted in evidence.

(b) Closing Argument
   (1) Each party should be afforded the opportunity to make a closing argument before the jurors retire to consider the case.
   (2) Procedures should be adopted relating to the timing and the order of the closing arguments.

History of Standard

This standard is new.

Related Standards

ABA Standards for Criminal Justice 3-5.5, 3-5.8, 4-7.4, 4-7.8 (3d ed. 1993)

15. FED. R. CRIM. P. 52(a).

Commentary

The substance of this standard is the same as that contained in Standards 3-5.5 and 3-5.8 of the Prosecution Function Standards and Standards 4-7.4 and 4-7.8 of the Defense Function Standards.

Since evidence may be presented in bits and pieces at trial from numerous witnesses and exhibits, the opportunity to make an opening statement to bring together all this information in a manner that the jurors can comprehend and appreciate its significance is often of the utmost necessity. Although some practitioners may overlook the importance of this aspect of a case, during opening statement, the attorney is given the opportunity to help the jurors to “understand the nature of the dispute, focus on the key evidence, and place witnesses and exhibits in their proper context.”

Right to Make an Opening Statement

Although, in most jurisdictions, counsel for the parties are given the opportunity to make an opening statement, the right to make an opening statement is not a constitutional one. The Second Circuit Court of Appeals addressed this issue in United States v. Salovitz. After reviewing the history of this issue and noting that some states provide the opportunity to make an opening statement as of right, the court concluded that in civil cases “opening is merely a privilege to be granted or withheld depending on the circumstances of the individual case.”

The court further noted that other courts have indicated that “[t]he Constitution requires no more than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected.” Further, the court stated that an “opening statement by the defendant is

2. 701 F.2d 17 (2d Cir. 1982).
3. Id. at 20.
not such a guaranteed right, and that the making and timing of opening statements can be left constitutionally to the informed discretion of the trial judge. 5

Although not constitutionally required, the tradition of attorneys giving opening statements at the start of trial after the jury has been selected and sworn is a well established part of our adversary system. 6 The Ninth Circuit Court of Appeals acknowledged the importance of this tradition in United States v. Stanfield, 7 when it stated that it "strongly believe[d] that the well established and practical custom of permitting opening statements by counsel at jury trials in criminal cases should be continued in the district courts of this circuit." Nonetheless, in some jurisdictions, the judge may, in his or her discretion, dispense with opening statements if the issues are simple and have been clearly covered during the voir dire. 8 In other jurisdictions, the defendant has a right to make an opening statement only if the defendant intends to call witnesses. 9

Despite the fact that there is apparently no constitutional right to make an opening statement, this standard takes the position that the opportunity to make an opening statement should be permitted. The opportunity to address the jury in order to explain the issues in the case and to outline the evidence which will be presented is of sufficient importance that it should be afforded to the defense and the prosecution in every criminal case.

Waiver or Deferral of Opening Statement

Opening statements are generally given after the jury has been selected and sworn and before the presentation of evidence. Usually the first party to present an opening statement is the prosecution, followed by the defense. Although jurisdictions differ on whether the parties may waive the opening statement altogether, most jurisdictions permit a waiver of the opportunity to make opening remarks.

5. Tanford, supra note 1, at 147.
6. Id.
7. 521 F.2d 1122 (9th Cir. 1975).
Whether the prosecution may waive its opening statement appears to depend on the jurisdiction's view of the purpose of the opening statement. When the jurisdiction views the opening statement of the prosecution as presenting a full and fair statement of the evidence which the prosecution intends to use to establish a prima facie case, then the prosecutor is required to give an opening statement. Other jurisdictions take a somewhat different view of the purpose of the opening statement and thus permit the prosecution to waive opening remarks. In some jurisdictions, the defendant is not permitted to make an opening statement when the prosecution waives its opening.

In most jurisdictions, the right of the defendant to defer the opening statement until a particular point in the trial, generally after the prosecution has rested its case, is based upon statute. Even in those jurisdictions, there is a split of authority as to whether it is within the trial judge's discretion to permit a departure from the statute. In those jurisdictions in which the matter is not statutory, it has been held to rest in the sound discretion of the trial court. Indeed, some statutes expressly provide that the timing of the opening statement is a matter within the discretion of the court. If the matter of timing is not addressed by statute or court rule, it is held typically to be a matter within the sound discretion of the trial court, and the court's exercise of such discretion will be reversed only on a clear showing of abuse of discretion.

This standard provides for uniformity in the timing of the opening statement, specifying that the defendant should have the option to make an opening statement either at the close of the opening statement by the prosecution or at the close of the prosecution's case-in-chief. This standard is based on the view that a defendant in a criminal

14. Id. See also State v. Nowlin, 244 N.W.2d 596 (Iowa 1976).
case should not be required to take any action in defense until the prosecution has established at least a prima facie case of guilt.

**Opening Statement Content**

The Supreme Court has indicated that the purpose of the opening statement is to "state what evidence will be represented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument."\(^{17}\) As simple as this prescription might appear at first blush, it sometimes becomes difficult to apply in practice. A number of courts and practitioners have struggled to identify that point at which a supposed statement of fact and explanation of legal issues becomes instead excessive argument. Two commentators have provided the following guidelines:

1. If counsel intends to prove the statement through evidence or the testimony of a witness, it is not argument.
2. If counsel makes a statement that is not susceptible of proof (e.g. the rules of evidence prevent such testimony, or no such witness exists), it is argument.\(^ {18}\)

But when these principles are compared to the case law, they are too narrow. Courts typically permit counsel to make fair inferences from the evidence in order to state the legal claim or defense in basic terms, and to describe the nature of the case or the issues.\(^ {19}\) So long as the opening remarks assist the jury in understanding the evidence, they may be held to be permissible. If the remarks are overly partisan, ask the jury to resolve disputes, interpret facts in favor of the party, or make inferences, they become argumentative.

The extent to which counsel may discuss the law in the opening statement and in the closing argument varies by jurisdiction. The majority of jurisdictions do not permit a detailed discussion of the law in the opening statement,\(^ {20}\) but this does not prohibit a brief mention

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of the legal issues on which the cause of action depends. However, counsel may not argue their partisan interpretation of legal principles. It is a matter of judicial discretion whether counsel should be permitted to read from, or to describe pleadings during an opening statement. Generally, the court will allow it if it assists the jurors by either explaining the procedural posture of the case, clarifying the facts, or identifying the contested issues which have been admitted.

The opening statement is the opportunity for counsel to advise the jury of the issues of the case, and to relate to the jury the facts that will be introduced into evidence to support the theory of the case. It is improper, ethically as well as legally, for counsel to refer to matters which are not admissible or facts which will not be put into evidence. The mention of clearly inadmissible evidence is subject to an objection by opposing counsel and an instruction to the jury to disregard the remarks. Grounds for a mistrial may exist if the inadmissible evidence is severely damaging. In practical application, such severely damaging evidence includes: evidence excluded by pretrial motion; evidence available only from a witness not on the witness list; evidence which is privileged; evidence which violates the best evidence rule, one of the specific exclusionary rules, or is inadmissible hearsay.

A more difficult problem arises in those situations where there has been no pretrial ruling on the admissibility of certain evidence which counsel intends to introduce, but about which there is a potential dispute as to admissibility. Paragraph (a)(2) resolves this problem using a "good faith belief" test: "counsel should not allude to evidence to be presented unless, in good faith, there is a reasonable basis for believing that such evidence will be tendered and admitted in evidence."

Similarly, the Model Rules of Professional Conduct provide that it is

24. ABA MODEL RULES OF PROFESSIONAL CONDUCT 3.4(e)(1) provides that "[a] lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence . . . ."
improper for an attorney to make "false statements of material fact" or to refer to a matter which the lawyer "does not reasonably believe is relevant or that will not be supported by admissible evidence." This test allows the introduction of evidence that counsel has reasonable grounds to believe is admissible and which counsel intends to offer, but keeps from the jury irrelevant or potentially prejudicial material.

Closing Argument

In general, every party in a criminal jury trial has a right to argue its case to the jury at the close of the presentation of evidence by both parties and before jury deliberation.28

Order of Closing Argument

Closing arguments are presented after the close of evidence and before the case is submitted to the jury for deliberation. Under Federal Rule of Criminal Procedure 29.1, the normal practice in two-party trials is to have three arguments.29 The prosecutor goes first. The defense then has the opportunity to present its argument and to rebut the argument of the prosecution. Finally, the prosecution is allowed to make the final argument, generally limited to rebuttal. The order of argument is based on the notion that the party having the burden of proof should have "the right to begin and reply, both in the presentation of evidence and in the argument to the jury."30

The order of argument varies in the different states. Most states follow the federal model, giving opening and closing final argument to the prosecution,31 even in those cases where the defendant presents

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27. See ABA Model Rules of Professional Conduct 3.3(a)(1), providing that a lawyer "shall not knowingly make a false statement of material fact or law to a tribunal," and rule 3.4(e)(1): A lawyer "shall not, in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence."
29. See, e.g., Young v. State, 230 Ark. 737, 324 S.W.2d 524 (1959); State v. Williams, 358 So. 2d 943 (La. 1978).
an affirmative defense. Some jurisdictions have developed their own idiosyncratic procedures, however. In some jurisdictions, only one argument per side is permitted, and in a few of those jurisdictions, the defendant must go first. Other jurisdictions, by statute, change the order of argument when certain circumstances exist. For example, if the defense concedes the prosecution’s prima facie case and proceeds solely on an affirmative defense or if the defense offers no evidence, the defense is entitled to the last closing argument. In that event, the burden is on the defendant to request the court to reverse the normal order of argument prior to closing argument.

In virtually all jurisdictions, however, the order of closing argument is subject to the discretion of the trial court as the interests of justice require. If a trial judge changes the order of argument or permits one side an additional final argument, the decision will not be overturned absent abuse of discretion. The trial judge also has broad discretion to set reasonable time limits on closing argument. The time allocation does not have to be equal between the parties so long as the interest of justice is not compromised and the procedure employed is basically fair.

Generally, a closing argument should: contain a discussion of the facts supported by the evidence and appropriate inferences drawn from the facts; apply the facts and factual inferences to the law of the case; and argue the resultant applicability of both facts and law to the case being tried. Counsel must confine the argument to facts introduced in evidence through testimony of witnesses or other admitted exhibits, facts of common knowledge, and logical inferences based on the evidence. To refer to facts not in the record, to misstate evidence, or to attribute to a witness testimony that was not given is improper.

34. See, e.g., FLA. R. CRIM. P. 3.250.
38. ABA MODEL RULES OF PROFESSIONAL CONDUCT 3.4(e)(1) provides that “[a] lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence. . . .” See also United States v. Santana-Camacho, 833 F.2d 371 (1st Cir. 1987).
Not only is it proper for counsel to discuss the law in closing argument, it is often essential for counsel to explain the law to the jury and to discuss its applicability to the case, although instructions and explanations of the law of the case are to be given by the judge, not by the attorneys. However, it is improper for counsel to misstate the law or its applicability. Counsel should confine comments about the law to the explanation that is included in the jury instructions. It is also generally improper for counsel to cite legal treatises, law reviews, and appellate opinions. Although a conviction will not be reversed because counsel has read the law to the jury, this practice is considered improper by most courts which have considered the issue. This includes the reading of instructions which will later be given by the trial judge, reflecting the belief that, by so doing, counsel invades the province of the trial court, whose responsibility it is to instruct the jurors on the applicable law.

Improper Matters

It is improper for counsel to include remarks in opening or closing argument that are not relevant to the facts and issues of the case. In addition to diverting the jury’s attention from the merits of the case, such remarks can be highly prejudicial. Impermissible comments include:

a. Appeals to nationalism, ethnic, or religious prejudice, etc.
b. Mention of defendant’s exercise of the right to remain silent at the time of arrest,46 or the right to remain silent and not testify at trial.47

c. Mention of prior convictions or bad character of the defendant.48

d. Emotional appeals to the jurors for sympathy or vengeance, to create fear for their personal safety, to make an example of the defendant, or argument about the consequences of a conviction.

e. Personal remarks or opinions about the conduct or ethics of the opposing party or counsel.

f. Personal remarks or opinions regarding the credibility of evidence presented, or what the outcome of the case should be.49

Standard 15-3.5. Note taking by jurors

During the trial of the case, the jurors should be permitted to make notes and keep these notes with them when they retire for their deliberations.

(a) The notes should be used by the juror solely for the juror’s purposes during the jury deliberations, and should be made available to other jurors solely at the discretion of the juror taking the notes. No person, other than the juror taking the notes, should have the right to view the notes.

(b) The jurors should be informed at the beginning of the trial that, at the close of the deliberations, all jurors’ notes will be collected by the court and destroyed.

47. See, e.g., Roberts v. State, 443 So. 2d 192 (Fla. App. 3 Dist., 1983).
49. See ABA Model Rule of Professional Conduct 3.4(e), which provides that a lawyer shall not “assert personal knowledge of facts in issue except when testifying as a witness,” and which provides, further, that a lawyer shall not “state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.” See also United States v. Splain, 545 F.2d 1131 (8th Cir. 1976), where the court stated that a personal expression of the defendant’s culpability “is particularly objectionable and highly improper when made by the prosecutor, whose position of public trust and experience in criminal trials may induce the jury to accord some unwarranted weight to his comment.”
History of Standard

Language has been added to indicate the way in which notes are to be used and how they are to be disposed of after the trial. This standard now clarifies that the juror is to determine who may have access to the notes and that the juror need not disclose them even to other jurors during deliberations.

Related Standards


Commentary

This standard provides that jurors may take notes during the trial proceedings. It further provides that the notes should be used only by the jurors, that they are to be collected at the conclusion of the case, and destroyed.

Generally, in state courts and the federal system, the taking of notes by jurors is permitted.1 In the federal system, the "unanimous view of federal appellate courts [is that w]ether or not to allow note taking by jurors is a matter committed to the sound discretion of trial judges."2 The Second Circuit has recognized that note taking is an aid to juror understanding and fact retention.3 Although in most states, the decision to permit jurors to take notes is discretionary with the court,4 some states explicitly authorize note taking by jurors in court rules or statutes.5 A few states, although a distinct minority, prohibit

5. See, e.g., ARIZ. REV. STAT. §§ 17, 18 (Arizona); ARK. R. CRIM. P. 33.2 (Arkansas); IDAHO R. CRIM. P. 47(o) (Idaho); MD. RULE 4-326 (Maryland); MASS. R. SUPER. CT. Rule 8A (Massachusetts); 51 MINN. STAT. § 7 (Minnesota); N.H. SUP. CT. RULE 64-A (New Hampshire); OR. R. CRIM. P. Rule 59 (Oregon); WASH. R. SUPER. CT., Rule 47 (Washington).
juror note taking. Even in those states, however, if the jurors actually take notes and are not stopped by the judge, any error is generally held to be harmless.

Support for note taking by jurors is based primarily on the belief that it will result in a more accurate factual determination, particularly in highly complex litigation. Studies indicate that there is a high correlation between note taking and the accurate recall of information.

Several arguments have been advanced against juror note taking. It has been contended that note taking may distract a juror and cause him or her to miss important testimony. It has also been argued that a juror may attach greater significance to his or her notes than to the jury's collective memory during deliberations.

Another objection to juror note taking is that a juror who has written notes may dominate the discussion, and that written notes would take precedence over the collective memory of all the jurors. While it has been claimed that note taking may mean that one feature of the case—that part memorialized in notes—may receive emphasis over others, "this is a danger necessarily inherent in the jury system, and is hardly increased by the fact that a juror takes a note."

The advantages of juror note taking, advantages which result in greater juror participation and attention during the trial itself and a more accurate record of the testimony during the jury deliberations, clearly outweigh the perceived disadvantages. Any potential juror misuse of the notes may be forestalled through proper instructions, preliminarily as to the manner of taking notes and to their disposition, and immediately prior to deliberations as to the way in which the notes should be used during deliberations.

6. See, e.g., LA. STAT. ANN., art. 1794, Taking Evidence into the Jury Room.
In any trial in which jurors are permitted to take notes, the court should instruct the jurors on the proper use of the notes. The instructions should advise the jurors that "their notes are only aids to memory . . . are not conclusive and should not be given precedence over their independent recollection of the facts," that they should not be influenced at all by another juror's notes, and that they should not allow their note taking to distract them from the ongoing proceedings.

Juror notes should be personal to the juror. The juror making the notes should be afforded the absolute right to show them to others, or to refuse to show them to others, to refer to them during the deliberations, or not to refer to them at all. The judge should collect the notes at the end of the trial. Notes should be used by the jurors for the purposes of deliberation only, and then they are to be destroyed.

It has been suggested that juror notes should be collected and should be made a part of the court file, so that they may be referred to if necessary on appeal. This view was rejected and not included in this standard. If the jurors were made aware that the notes were to be made a part of the record at the beginning of the trial, it might have a chilling effect on the jurors' note taking.

Standard 15-3.6. Method of making and ruling on motions and objections

(a) During trial, when in the presence of the jury, counsel should raise any motion, or any objection to the introduction of evidence, testimony of witnesses, or orders of the court, by stating only that counsel has a "motion" or an "objection," and by then stating the legal grounds for the motion or the objection.

17. See United States v. Standard Oil Company, 316 F.2d 884 (7th Cir. 1963). The case was reversed, however, because the trial judge insisted that the entire jury keep notes during the trial.
(b) Any further argument or discussion that may be required or permitted by the court should be conducted outside the hearing of the jury.

(c) Rulings on motions and objections should be made by the court in the presence and hearing of the jury, but the reasons therefor should be stated outside the hearing of the jury.

(d) Objections, motions, statements of grounds, argument and discussion, the ruling of the court, and the reasons given by the court for its ruling, should all be made a part of the record.

**History of Standard**

This standard has been revised and renumbered.

**Related Standards**

National District Attorneys Association National Prosecution Standards chapter 83 and 84 (2d ed. 1991)

**Commentary**

This standard reflects, in part, the growing concern with a perceived erosion of professionalism on the part of some trial lawyers.¹ Specifically, this standard seeks to deter the presentation of inadmissible, prejudicial, or distracting material to the jurors. Its primary concern is to prevent prejudice to a party from the jurors' exposure to extraneous material during arguments on either an objection or a motion.² Arguments before the jury which are advanced in support of or in opposition to an objection or a motion should only be arguments of law rather than of fact, and therefore should be directed only to the judge.

Although it may be necessary for the attorney to refer to inadmissible material in argument to the court, the possibility of prejudice exists if the jury overhears these comments. Therefore, the jury should

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² See Commentary to Standards 83 and 84, NATIONAL DISTRICT ATTORNEYS ASSOCIATION NATIONAL PROSECUTION STANDARDS (2d ed. 1991).
be insulated from potential contamination from exposure to such material, and great care should be taken to ensure that jurors do not overhear these arguments.3

An attorney has the duty to demonstrate respect for the court and to exhibit proper decorum. For example, the ABA Model Code of Professional Responsibility provides that a lawyer “should not engage in any conduct that offends the dignity and decorum of the proceedings,” and “should be respectful, courteous, and above-board in his relations with a judge or hearing officer before whom he appears.”4 An attorney’s failure to meet this standard of respect may not only lead to a citation for unethical conduct, but may constitute contempt of court.5

This standard recognizes the duty of an attorney to object to inadmissible evidence and to make an appropriate motion to exclude such evidence. This standard recommends, however, that when counsel objects in the presence of the jury, the only grounds the jury should hear are the legal grounds, and not the factual basis. Any argument beyond the legal grounds should be conducted outside the presence of the jury. If the procedure set out herein is followed, the attorney will have made an appropriate and timely objection and will have been able to protect his or her client’s interest while at the same time protecting the jury from exposure to impermissible matters.

This standard further seeks to eliminate the use of objections and motions by those who seek to improperly use these procedures in a questionable manner, as a mechanism for throwing off the opponent’s concentration at trial or breaking up the presentation of the opponent’s evidence in order to minimize its effect upon the jury. Objections and motions may be expressed in a variety of ways, ranging from a mere “objection” to the “speaking objection.” Speaking objections should not be permitted before the jury.

**Standard 15-3.7. Evidence of prior convictions**

When the defendant’s prior convictions are admissible solely for the purpose of determining an enhancement of an offense or the sentence to be imposed, the jury should not be informed of them.

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5. See Annot., supra note 3.
either through allegations in the charge or by the introduction of evidence, until it has found the defendant guilty of the offense.

**History of Standard**

This standard was revised to apply to the situation where the conviction is to be used for enhancement of an offense as well as for the sentence itself.

**Related Standards**

ABA Standards for Criminal Justice 3-6.1 (3d ed. 1993)
ABA Standards for Criminal Justice 18-3.3, 18-3.5 (3d ed. 1994)

**Commentary**

Under many sentencing systems, whether the offender is called a "repeat offender,"1 "recidivist,"2 "habitual offender,"3 "persistent offender,"4 or by some other designation, prior convictions—often with no direct relationship to the offense for which the defendant is being tried—have an effect on the sentence to be imposed if the defendant is convicted.5 In these systems, the defendant is not being punished a second time for the prior crime, but the prior convictions are considered to be indications of the defendant’s persistence in criminal activity, a valid consideration in imposition of sentence.6 The purposes of

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4. See, e.g., N.Y. PENAL LAW § 70.08 (McKinney 1987).
6. The use of recidivist statutes to increase punishment for repeated criminal activity is certainly not a modern invention. In 1666, for example, during the reign of Louis XIV, recidivist blasphemers were punished with increasing severity for each offense:

[W]hossoever shall be convicted of having sworn by, and blasphemed the holy name of God, of his most holy Mother, or of his Saints, shall, for the first offence, pay a fine; for the second, third, and fourth offence, triple and quadruple fine; for the fifth offence, be put in the stocks; for the sixth, shall stand in the pillory, and have the upper lip cut off; and for the seventh offence have the tongue entirely cut out.

such laws are to deter first offenders from repeating their criminal behavior and to incapacitate recidivists by keeping them in prison for longer periods. Recidivist statutes have been enacted to punish repeated infractions of both serious and petty offenses. For example, enhanced penalties for repeat traffic offenders are common, as are penalties for felony offenders who are "three-time losers." It is estimated that between two-thirds and three-fourths of prisoners in most United States prisons are imprisoned as repeat offenders.

There is considerable variance among the states as to the nature of the conviction that may be introduced in order to enhance a sentence. It is generally required, for example, that the enhancing conviction chronologically precede the offense for which an increased sentence is sought. Some jurisdictions require that the defendant must have been convicted and sentenced for the first offense before commission of the second. States vary not only in the way in which they view the chronology of the offenses but also in the degree of finality required of the prior conviction. Most jurisdictions permit use of a conviction for enhancement even if the case is pending on appeal, although some states require that appellate proceedings be concluded before the prior conviction is final. States are also divided in defining the term "conviction" as it applies to enhancement of penalty. Several states require a judgment of guilt to have been entered, while in others a plea of guilty may be sufficient for enhancement of the sentence. However, a conviction based on a plea of nolo contendere may not generally be used for enhancement. It is also widely accepted that a

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7. See Cross v. State, 96 Fla. 768, 119 So. 380 (Fla. 1928).
conviction later overturned on appeal may not be used for enhancement unless the conviction was reversed for some collateral matter and not on the substantive merits of the case.\(^\text{16}\) Although a number of states and the District of Columbia Circuit have allowed the use of juvenile convictions for enhancement,\(^\text{17}\) some states have expressly held such use of juvenile crimes to be improper.\(^\text{18}\)

This standard addresses the limited issue of the propriety of informing the jury of a prior conviction before the jury has found the defendant guilty of the offense for which he or she is currently on trial. Since knowledge of the fact of a prior conviction may prejudice the jury toward a defendant, it establishes the principle that it is improper to inform jurors of prior convictions before the jury has made a finding of guilt. However, the scope of this standard is limited. It addresses the propriety of informing the jury of prior offenses when those offenses are only admissible for the sole purpose of sentence or sentence enhancement. Evidence of a defendant’s prior offenses may be admissible at trial for a variety of reasons other than to establish recidivist status. It is not uncommon to permit such evidence to go to the jury to show intent, an element of the crime, identity, malice, motive, or a system of criminal activity, or when the defendant has raised the issue of character or has testified and the prosecution seeks to impeach the defendant’s credibility.\(^\text{19}\) This standard is inapplicable whenever evidence of prior convictions is admissible for purposes other than sentence enhancement.

The procedures for establishing prior convictions on which a sentence or sentence enhancement is to be based vary throughout the United States. In general, however, there are two types: (1) a “single-phase” procedure, in which the fact of prior convictions is alleged in the charging instrument and evidence is admissible before a determination of guilt has been made; and (2) a bifurcated procedure, where evidence of prior convictions is admissible only after a determination of guilt. The “single phase” procedure where guilt and status are tried simultaneously is known generally as the common-


\(^{17}\) Annot., 96 A.L.R. 2d 768, at 787, sec. 7(c) (1964).


\(^{19}\) See FED. R. EVID. 409; 1 WIGMORE, EVIDENCE §§ 215-218 (1964); C. McCORMICK, EVIDENCE §§ 157-158 (2d ed. E. McCleary 1972).
law procedure. Under this procedure, when evidence of the prior conviction is introduced, the jury is given a limiting instruction. The jurors are told that they may not consider the evidence of prior convictions in deliberating on and deciding the issue of guilt or innocence on the current charge. The constitutionality of this single phase process, with its limiting jury instruction, was considered by the Supreme Court in *Spencer v. Texas*, where the Court held that it did not violate the Due Process Clause of the Constitution.

Despite the fact that the single phase procedure was held constitutional in *Spencer*, this standard provides that a jury should not be informed of a defendant's prior convictions prior to a verdict of guilt when they are admissible only on the issue of punishment. This conclusion rests upon two beliefs, namely that: (1) notwithstanding a cautionary instruction, there is a significant risk that prior convictions may be considered by the jury in deciding the question of guilt or innocence; (2) a trial judge can consider prior convictions through use of a variety of alternative procedures which do not carry the same risk of undue prejudice.

**Standard 15-3.8. Motion for judgment of acquittal**

(a) After the evidence on either side is closed, the court on motion of a defendant or on its own motion should order the entry of a judgment of acquittal of one or more offenses charged if the evidence is legally insufficient to sustain a conviction of such offense or offenses. Such a motion by the defendant, if not granted, should not be deemed to withdraw the case from the jury or to bar the defendant from offering evidence.

(b) If the defendant's motion is made at the close of the evidence offered by the prosecution, the court may not reserve decision on the motion. If the defendant's motion is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury, and decide the motion either before the jury

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21. Id.
23. Id. at 568.
returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(c) If the jury returns a verdict of guilty or is discharged without having returned a verdict, the defendant’s motion may be made or renewed within a certain time, set by statute or rule, after discharge of the jury or within such further time as the court may fix. Such a motion is not barred by defendant’s failure to make a similar motion prior to the submission of the case to the jury.

**History of Standard**

This standard is unchanged.

**Related Standards**

National District Attorneys Association National Prosecution Standards chapter 87 (2d ed. 1991)

**Commentary**

*Introduction*

This standard is similar to Federal Rule of Criminal Procedure 29 and allows the court to enter what is, in essence, a directed verdict of not guilty. Section (a) reflects fundamental concepts of the allocation of responsibility between judge and jury: the judge determines issues of law, and the jury applies the law to the facts. Only when the evidence is legally insufficient to convict as a matter of law should the judge take the matter from the jury and enter a judgment of acquittal. This standard provides that the judgment of acquittal may be raised by motion of the defense or by the court *sua sponte*. It sets out the times when the motion may be made by the defense and the procedures the court should follow in ruling or deferring ruling on the motion.

*Generally*

Most jurisdictions have rules or statutes setting out the procedure for raising a motion for judgment of acquittal, and establish the stan-
standard to determine when a trial judge should exercise the court's power to acquit a criminal defendant when the prosecutor has failed to present sufficient evidence to convict. These procedures have different titles, and may be known as motions for a directed verdict, motions for judgment of acquittal or motions for judgment notwithstanding the verdict. This standard follows the majority of jurisdictions and allows the court to enter a judgment of acquittal *sua sponte*, or upon motion of the defense, if there is insufficient evidence to convict as a matter of law. A judgment of acquittal may be entered on individual charges or on all offenses charged. The motion, if granted, has the same effect as a jury verdict of acquittal.¹

Section (a) rejects two consequences for the defense which have, in the past and in various jurisdictions, been held to follow from the making of a motion for judgment of acquittal. First, it has been held to bar the defense from presenting evidence. Second, it has been held to be equivalent to a demurrer to the evidence. In those jurisdictions where demurrers to the evidence still exist, the consequence of a motion for judgment of acquittal may be that the case is withdrawn from the jury. A defense motion for judgment of acquittal should not be deemed to take the case away from the jury as the defendant should not be required to relinquish his or her fundamental right to a jury trial simply by questioning the legal sufficiency of the government's case.

**Grounds for Motion**

Section (a) provides that the court may on its own motion or on motion of the defense enter a judgment of acquittal. The court should grant the motion only on the ground that the evidence is insufficient as a matter of law.² Section (a) does not set out a precise definition of the test for determining when evidence should be deemed "legally insufficient," but instead defers to individual jurisdictions to formulate their own appropriate tests.

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Timing and Hearing of Motion

A criminal defendant should have at least three opportunities to make or renew a motion for judgment of acquittal. First, as set out in section (a), the defense should be permitted to make such a motion at the close of the prosecution's case. If this motion is denied, the defense should then be permitted to proceed with the presentation of evidence. The defense should not have to reserve the right to present evidence prior to making the motion. However, if the defense chooses to introduce evidence, the denial may not be appealed, although the defense should be permitted again to move for acquittal at the close of all the evidence. Thus, the defense decision whether or not to introduce evidence is tactical, because any damaging evidence which may have come out during the presentation of the defense case may be considered by the court in determining the second motion, offered at the close of all the evidence.

Second, the defense should also be permitted to move for a judgment of acquittal after the close of all evidence. The court, in ruling on the motion, should then consider all the evidence presented, irrespective of which side presented the evidence. If the motion is granted, the jury is discharged before deliberation and without arriving at a verdict. In some jurisdictions, the court may, however, reserve ruling on this motion until after the verdict of the jury has been returned. If the defense moves for judgment of acquittal following the close of the government's case, the court should not be permitted to defer ruling on the motion. Section (b) provides that the court should rule on the motion before the defense decides to present evidence because the motion "would be a futile thing if the court could reserve its ruling and force the defense to an election between resting and being deprived of the benefit of the motion."3

Third, the defense should be permitted to make or renew a motion for a judgment of acquittal after the jury has returned a verdict of guilty or is discharged without having returned a verdict. Section (c) provides that each jurisdiction should set its own time limit for this motion, either by rule or statute. It is desirable that a judge have the power to so act within a limited time after a case has been heard.

There is also authority in some jurisdictions that the trial judge may enter a judgment of acquittal following the prosecution's opening

statement. The jurisdictions which permit this procedure do so only under "appropriate circumstances." Such circumstances include the prosecuting attorney's failure to state a prima facie case in his or her opening statement, or where a fact is admitted which necessarily prevents a conviction and requires acquittal. The primary justification for allowing an acquittal at this time is the belief that it is a waste of time and money to proceed with a case that is clearly without merit.

Those jurisdictions that do not allow summary disposition of a criminal prosecution following the opening statement take this position for a number of different reasons. Some jurisdictions have held that where there is no requirement that an opening statement be made, it follows that there can be no requirement that such statement spell out all the elements of the crime charged or set out facts sufficient to establish a prima facie case of guilt. Other jurisdictions have concluded that until the evidence is presented, it cannot be determined whether sufficient evidence exists to convict.

**Waiver**

Section (c) expressly provides that a defense failure to move for a judgment of acquittal following the close of the prosecution's case or the close of all evidence should not bar the defense from making the motion following the jury verdict. Prior to revision of Federal Rule of Criminal Procedure 29(c), such a motion by the defense only after the case had been sent to the jury was not permitted in federal practice. The Federal Advisory Committee on Criminal Rules, in revising this rule, reasoned that no legitimate interest of the government is intended to be prejudiced by permitting the court to direct an acquittal on a postverdict motion. Generally, in practice, however, such motions are ordinarily made as a matter of course at the end of the government's case and the close of the evidence.

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Effect on Prosecution Right to Appeal; Double Jeopardy

The timing of the motion for judgment of acquittal has a critical effect on the prosecution's right to appeal. In general, the right of the prosecution to appeal is statutory. Absent statutory authority, ordinarily there is no inherent right on the part of the prosecution to take any appeal.10 In the federal system, authority to appeal is granted to the prosecution by statute in any case in which an appeal is not precluded by the Double Jeopardy Clause of the Constitution.11 It was the intent of Congress, in enacting this statute, to remove all statutory barriers to appeal, and to "allow appeals whenever the Constitution would permit."12

Whether the Double Jeopardy Clause precludes appeal of the granting of a motion for judgment of acquittal in a given case depends on the timing of the motion and of the order granting the motion. The prosecutor may not appeal an order of acquittal entered prior to a jury verdict because of the impact on the defendant's privilege against being twice placed in jeopardy for the same offense.13 However, if the jury returns a guilty verdict and the judge then grants the judgment of acquittal, no retrial would be necessary upon a successful prosecutorial appeal because the jury verdict could be reinstated without further proceedings directed to the determination of guilt or innocence. The double jeopardy rights of the defendant would not be affected. Therefore, prosecution appeal of a judgment of acquittal granted before jury verdict is not permitted by the Constitution, but the prosecutor may appeal a judgment of acquittal granted after jury verdict, because a reversal would not necessitate a new trial.

13. See Jackson, supra note 3.
PART IV.
JUDICIAL RELATIONS WITH JURY; JURY INSTRUCTIONS

Standard 15-4.1. Control over and relations with the jury

(a) The court should take appropriate steps ranging from admonishing the jurors to sequestration of them during trial, to ensure that the jurors will not be exposed to sources of information or opinion, or subject to influences, which might tend to affect their ability to render an impartial verdict on the evidence presented in court.

(b) The court should require a record to be kept of all communications received from a juror or the jury after the jury has been sworn, and he or she should not communicate with a juror or the jury on any aspect of the case itself (as distinguished from matters relating to physical comforts and the like), except after notice to all parties and reasonable opportunity for them to be present.

(c) At the outset of the case, the court should instruct the jury on the relationship between the court, the lawyers and the jury, ensuring that the jury understands that counsel are permitted to communicate with jurors only in open court with the opposing party present.

(d) When scheduling recesses and time for adjournment, the court should keep in mind that it is equally offensive to jurors to subject them to too stringent or too lenient a schedule, and should take all reasonable steps to avoid wasting the jurors' time.

History of Standard

Sections (c) and (d) are new to this edition.

Related Standards

ABA Standards for Criminal Justice 3-5.4, 4-7.3 (3d ed. 1993)
ABA Standards for Criminal Justice 8-3.6 (3d ed. 1992)
ABA Standards Relating to Juror Use and Management 13, 16, 19 (1992)
15-4.1 Criminal Justice Trial by Jury Standards


Commentary

This standard concerns judicial control over contacts with jurors once the jury has been sworn to try the case. Section (a) deals with the steps that should be taken by the trial judge to insulate the jurors from extraneous prejudicial information. Section (b) provides that the court should ensure that a record of judicial contact with jurors is maintained, and provides that contact between judge and jury should occur only in open court. Section (c) calls for the trial judge to instruct the jury on the authority of counsel to address the jury only in open court, and section (d) suggests to the judge that it is the court's responsibility to use jurors' time efficiently.

The Sixth Amendment provides that a defendant has the right to an impartial jury; section (a) addresses the obligation of the trial judge to preserve that impartiality. The trial judge has broad discretion to take steps necessary to insure that the jury is protected from improper prejudicial influences, ranging from mere admonition of the jurors to avoid exposure to prejudicial material to sequestration of the jury. Although sequestration is a mechanism available to the judge, this standard does not address it in detail because the subject is covered in other ABA standards.

In an ordinary case, admonishing jurors to avoid potentially prejudicial material and supplying them with prominent badges identifying them as jurors should be sufficient to insulate them from improper approaches. In addition, the trial judge should use his or her authority, when necessary, to control the conduct of others who may attempt to interfere with the impartiality of the jury. Some state statutes specifically address the issue and regulate conduct of the public or press in the environs of the courthouse. Because of the importance of insulating the jurors during the course of the trial and deliberations,

1. See also Standard 15-4.3(a).
3. See, e.g., United States v. Turkette, 656 F.2d 5 (1st Cir. 1981); Harrell v. Israel, 672 F.2d 632 (7th Cir. 1982); United States v. Shackelford, 777 F.2d 1141 (6th Cir. 1985).
Criminal Justice Trial by Jury Standards 15-4.1

courthouse facilities should be arranged to minimize contact between the jurors and parties, counsel, and the public.⁶

Actual sequestration is burdensome on jurors, but may be justifiable when it reasonably appears to be the only means of guarding against palpable risks of improper contacts.⁷ The trial judge should not order sequestration except under compelling circumstances and only for the purpose of insulating the jury from improper information or influences.⁸ Moreover, when sequestration is ordered, the jury should not be told which party, if any, requested the sequestration.

The vital role the jury plays in the adjudication of criminal cases makes it imperative that all communications to or from the jury regarding the case be put on the record. This is part of the general obligation of the judge concerning the record of the proceedings.⁹ Communication between the judge and jurors, because of the singular position of the judge, must also be particularly guarded. Although this standard requires only that a record of communications be maintained, Standard 15-4.3 provides even greater safeguards, requiring that counsel be informed of any communication between judge and jury and have the opportunity to be heard regarding such communication. The requirement that communications between the judge and jurors be on record is also contained in ABA Standards on Jury Use and Management, Standard 16, which provides that all communications between judge and members of the jury panel be in open court, on the record, with counsel having been given the opportunity to be heard with respect to such communication. The commentary to that standard further specifies that communications from the jurors to the court should be in writing, and delivered to the bailiff for transmission to the court.

Neither section (b) nor Standard 15-4.3 are intended to apply to communications to or from jurors involving only housekeeping matters; nor are they intended to require a judge to refrain from giving a juror a civil greeting when they pass each other in a corridor or elsewhere. However, to the extent practicable, even housekeeping matters

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⁹. See ABA Standards for Criminal Justice 6-1.6 (2d ed. 1980).
should be reduced to writing and communicated on the record in order to eliminate future misunderstandings of any communications.

The responsibility to insure juror impartiality extends to counsel as well as the court. At the very least, the appearance of impartiality is compromised if counsel converses with jurors outside open court, and therefore such contact between counsel and jurors is forbidden. A danger, however, is that a juror who is unaware of the limitation on counsel may regard counsel’s reluctance to speak to him or her as an affront or bad manners, the trial judge should instruct the jurors at the outset of the trial that the attorneys’ reluctance to speak to them is an obligation imposed on them by the court in an effort to protect the system.

The subject of scheduling so as to make best use of the time of those citizens who are summoned for jury service is addressed in Standard 13, ABA Standards Relating to Juror Use and Management.¹⁰ Standard 13 is not specific, however, but states only that “courts should employ the services of prospective jurors so as to achieve optimum use with a minimum of inconvenience to jurors.” Commentary to that standard points out that inefficient use of juror time is a common occurrence.¹¹ The commentary further points out that juror perception that their time is being wasted is a significant cause of jurors’ dissatisfaction with the process.¹²

Section (d) therefore reminds the trial judge of the importance of the time of the citizens called for jury duty, and counsels the judge to take all reasonable steps to avoid imposing unnecessarily on the jurors’ time. Section (d) is concerned both with the undue imposition on jurors’ time where a trial judge sets marathon schedules and the waste of time occasioned by setting too light a working schedule. The trial judge should recognize that, although most citizens called for jury duty consider juror service an important civic duty, they resent inappropriate impositions on their time as a result of the setting of unrealistic schedules and the waste of their time when they are required merely to wait while other proceedings are taking place.

¹². Id.
Standard 15-4.2. Right of judge to give assistance to the jury during trial

(a) The court should not express or otherwise indicate to the jury his or her personal opinion whether the defendant is guilty or express an opinion that certain testimony is worthy or unworthy of belief.

(b) When necessary to the jurors' proper understanding of the proceedings, the court may intervene during the taking of evidence to instruct on a principle of law or the applicability of the evidence to the issues. This should be done only when the jurors cannot be effectively advised by postponing the explanation to the time of giving final instructions.

(c) The development of innovative mechanisms to improve juror comprehension of the issues of the case and the evidence presented should be encouraged consistent with the rules of evidence and the rights of the parties.

History of Standard

Section (c) was added to encourage the judge to use innovative mechanisms to further juror understanding.

Related Standards

ABA Standards Relating to Juror Use and Management 16 (1992)

Commentary

Judge's Opinion

Section (a) specifies a preferred practice from among the existing practices of the states and federal system with respect to the issue of a judge expressing his or her personal opinion to the jury. Even where the federal or state constitution gives the trial judge the right to express an opinion concerning guilt or innocence, the judge is not under an obligation to do so, and the better practice is that the judge not do so.¹

¹. See CAL. CONST., art. 6, §10; CAL. PENAL CODE § 1127 (1970).
In the federal system, a trial judge is permitted to summarize and to comment upon the evidence and to express an opinion as to the facts of the case, provided that the judge makes it clear that the resolution of disputed facts is a matter for the jury alone. A conviction will ordinarily not be reversed on appeal because of such comments unless the appellate court finds that they were prejudicial to the defendant, particularly where the jury is instructed that they are the sole judge of the facts.

Although the judge in the federal system is permitted to comment on the evidence, it has also been held to be reversible error for the judge to express an opinion on the ultimate guilt or innocence of the defendant. This practice has been upheld, however, if there is no question of the factual guilt of the defendant and only a question of law remains. Prejudicial remarks of the trial judge disparaging the accused have, however, been held to constitute error requiring a new trial.

In most state courts, the authority of the trial judge to express an opinion on the credibility of the evidence or on the possible guilt of the defendant is more circumscribed than in the federal system. In the state courts, the judge is looked upon as an impartial arbitrator, the "governor" of the trial for the purpose of "assuring its proper conduct and the fair and impartial administration of justice." As in the federal system, however, improper statements of the trial judge will not be generally considered grounds for reversal of a conviction unless they can be shown to have been prejudicial to the defendant. Various factors which are analyzed in considering potential prejudicial effect are the degree of intemperateness of such remarks, the manner in which the remarks are delivered, and the surrounding or receptive circumstances affecting their impact. In addition, it has been held that the error may be cured by the trial judge through the use of subsequent curative instructions.

3. See, e.g., United States v. Diharce-Estrada, 526 F.2d 637 (5th Cir. 1976); United States v. Van Horn, 553 F.2d 1092 (8th Cir. 1977).
4. See, e.g., Gant, supra note 2.
6. Id. at § 3.
7. Id.
As a result of the due regard for the respective roles of judge and jury in a criminal trial and the uniquely influential position of the trial judge, an expression of opinion by the trial judge is disfavored in section (a), whether it be an opinion on the credibility of the evidence or the guilt or innocence of the defendant. The potential for abuse, for misunderstanding, for judicial usurpation of the jury's function as fact-finder, and for improperly influencing the jurors is simply too great.

**Instructions During Trial**

Occasions may arise during the trial when it is appropriate, even necessary, for the trial judge to instruct the jury. Section (b) deals with those occasions in which an instruction, to be most effective, should be given during the trial itself, and should not be delayed until the conclusion of the evidence. For example, when there are multiple defendants and evidence is offered which is admissible only against one of them, the trial judge should give the jury a limiting instruction at that time rather than wait until the end of the trial. The court should advise the jury as to the limited use or admissibility of the evidence.

This approach is not intended to affect the authority of the judge, at the beginning of the trial, to "give preliminary instructions to the jury deemed appropriate for guidance in hearing the case."

**Innovative Mechanisms**

Section (c) encourages trial judges to consider, consistent with the rights of the parties, mechanisms that might be adopted to improve juror understanding of the issues and the efficiency of trial. In recent years, a number of innovative procedures have been used in different courts, with varying degrees of success. One of the methods which has proved to be effective has been to permit jurors to take notes during trial. A separate standard recommends that jurors be permitted to take notes in all cases. Preliminary instruction at the beginning of the trial is another mechanism that has been shown to be successful.

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10. See Standard 15-3.5 and Commentary.
Preinstructions have been shown to enhance the jurors’ ability to remember information presented during the trial and to provide a frame of reference for material presented during trial.\(^{11}\) Also, a preliminary instruction on the manner of assessing witness credibility or evaluating evidence generally educates jurors on the factors to consider at the time of presentation of evidence, rather than only in hindsight at the time of deliberation.

In a recent article, Judge William Schwarzer reports on a number of techniques that may also be used to assist jurors in understanding complex cases:

When the subject matter is technical, a tutorial before the trial for both jurors and the judge can be very helpful. . . . Jurors should have access to exhibits while witnesses are testifying about them. Overhead projectors or juror notebooks can serve this purpose. Loose-leaf notebooks, provided by the court, may include, in addition to copies of key exhibits, fact stipulations, the preliminary instructions, chronologies or time line charts, lists of witnesses, a glossary of technical terms, and other relevant items. Mounting pictures of each witness, as he or she testifies, on a poster board in the courtroom or jury room, will also help jurors remember testimony.\(^{12}\)

Another innovative mechanism that has been tried is furnishing the jurors with a notebook containing basic information that may aid them during the trial of a case.\(^{13}\) Such a notebook might contain a list of names of parties and witnesses, basic facts about the parties and, perhaps, the issues in the case or detailed descriptions of technical matters to be considered.\(^{14}\) By using the notebooks, jurors would be able to keep complex information in perspective, rather than being exposed to large amounts of apparently discrete but unrelated facts.

Considerations as courtroom design and the location of furniture may aid jurors in evaluating cases. For example, the witness box, generally placed at the side of the judge’s bench, might be moved so that

\(^{14}\) See, for example, J. V. Singleton & M. Kass, Helping the Jury Understand Complex Cases, 3 LITIGATION 11 (1986).
the witness is seated in front of and facing the jurors.\textsuperscript{15} And, finally, a procedural mechanism which has been used in complex cases to aid juror understanding is the use of interim summaries or mini-closing arguments by counsel.\textsuperscript{16}

**Standard 15-4.3. Judicial communication with jurors**

While it is appropriate for the court to thank jurors at the conclusion of a trial for their public service, such comments should not include praise or criticism of their verdict.

(a) All communications between the judge and members of the jury panel, from the time of reporting to the courtroom for voir dire until dismissal, should be in writing or on the record in open court. Counsel for each party should be informed of such communication and given the opportunity to be heard.

(b) After the conclusion of the trial and the completion of the jurors' service, the court may engage in discussions with the jurors. Such discussion should occur only on the record and in open court with counsel having the opportunity to be present. This standard does not prohibit incidental contact between the court and jurors after the conclusion of the trial.

(c) At the conclusion of the jurors' service, with the concurrence of all the parties and the court, the judge may conduct a discussion with the jurors who agree to participate for the purpose of educating the court and counsel.

(d) Under no circumstances should the court state or imply an opinion on the merits of the case, or make any other statements that might prejudice a juror in future jury service.

(e) At the conclusion of the trial, the court should instruct the jurors that they have the right either to discuss or to refuse to discuss the case with anyone, including counsel or members of the press.

**History of Standard**

Paragraphs (a) through (d) were added to set out more specifically the duties of the judge when communicating with jurors.

\textsuperscript{15} Schwarzer, supra note 12.
\textsuperscript{16} See Schwarzer, supra note 12, citing Leval, From the Bench: Westmoreland v. CBS, 12 Litigation 7, 7-8 (Fall 1985).
15-4.3 Criminal Justice Trial by Jury Standards

Related Standards

ABA Standards Relating to Juror Use and Management 16 (1992)

Commentary

This standard addresses a number of issues relating to the subject of judicial communication with jurors both during and at the close of trial. In so doing, it overlaps, to some extent, with the subject matter in Standards 15-4.1 and 15-4.2. This standard, however, addresses primarily the communication between judge and jury that takes place at the conclusion of the jurors' service, after a verdict has been rendered or the jurors' service has otherwise ended.

All communications between judge and jury, from the time the jurors arrive in the courthouse until the jurors are dismissed, should be in open court and in writing. Furthermore, the judge should not communicate with jurors until counsel have been notified of the intended communication and have had the opportunity to be heard with respect to the communication. This standard is identical to the Standards Relating to Juror Use and Management on this score.

The Supreme Court has addressed the issue of private communications between trial judge and jurors, holding that communications with jurors should be in open court, on the record, with counsel given the opportunity to be heard prior to the communication. Failure to follow this procedure deprives the defendant of the right to be present at each important stage of the proceedings.

State courts considering the issue have espoused the same principle, that private judicial contact with jurors is disapproved. The prohibition against such ex parte communication has been held to be based upon the federal and state constitutional right of the defendant to be present at all stages of the trial or his or her right to an impartial jury. In addition, the rules or statutes of some states specifically preclude

1. Both Standards 15-4.3 and 15-4.1 address the requirement that communications between the judge and the jurors should be in writing.
2. Standard 15-4.2 deals with the prohibition against the judge's expression of an opinion on the credibility of witnesses or the guilt or innocence of the defendant.
3. ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT 16(e) (1992).
judicial contact with jurors outside open court. Although the holdings differ in various states as to the effect of such communication on the rights of the defendant, the states are unanimous in their disapproval of the practice. Some states hold that improper communication is reversible error if it was potentially prejudicial and that actual prejudice need not be shown, others hold that it is reversible error if there is a reasonable possibility that the communication affected the verdict. In virtually all states, however, the harmless error test may be used to determine whether a conviction following the communication between judge and jury must be reversed.

It is, of course, appropriate and desirable for a trial judge to express appreciation at the close of a case to the jurors for their public service. Nothing in this standard casts any doubt upon that practice. In addition, since the jurors may be uncertain about their remaining obligations, it is the responsibility of the judge to release the jurors from prior admonitions to refrain from reading about the case or discussing the case with others. The jurors should also be released from their obligation of confidentiality, their rights explained regarding questions from the press or counsel, and they should be advised about their obligations, if any, of further jury service. The jurors should ordinarily be instructed that they may discuss the case with counsel or with members of the public, including the press, or that they may refuse to do so. Commentary to the Standards on Jury Use and Management explains:

Following the trial, jurors should not be left in a state of confusion about their rights and responsibilities. Accordingly, the standard recommends that before dismissing the members of a jury, the trial judge should release them from the admi-

7. See, e.g., State v. Griffin, 323 N.W.2d 198 (Iowa 1982).
tions that have been imposed; indicate that in talking about the case with others they should respect the privacy and feelings of their fellow jurors; should indicate to what extent, if any, they are required to respond to inquiries from counsel or the press regarding the case; and inform them whether they have fulfilled their obligation or must report back to the juror lounge.13

Commentary to that standard also recommends the following charge be given to the jurors:

Ladies and Gentlemen:

Now that the case has been concluded, some of you may have questions about the confidentiality of the proceedings. Many times jurors ask if they are now at liberty to discuss the case with anyone. Now that the case is over, you are of course free to discuss it with any person you choose. You are, however, advised that you are under no obligation whatsoever to discuss this case with any person. If you do decide to discuss the case it is suggested that you treat such discussion with a degree of solemnity such that whatever you do decide to say you would be willing to say in the presence of your fellow jurors or under oath here in open court in the presence of all the parties. Also always bear in mind if you do decide to discuss this case, that your fellow jurors fully and freely stated their opinions with the understanding they were being expressed in confidence. Please respect the privacy of the views of your fellow jurors.14

It is also permissible for the judge to converse with jurors about aspects of their jury service which did not bear upon the merits of the case, such as their comfort during the proceedings.15 However, it has been the unfortunate practice of some judges, at least on occasion, to

15. The Federal Judicial Center recommends that such information be obtained from the jurors by the use of an exit questionnaire. Such a questionnaire shows the jurors the court's interest in their concerns and well-being, and also gives the court information as to how the jury process can be improved. Handbook, supra note 13, at 7. See also Federal Judicial Center, Manual for Litigation Management and Cost and Delay Reduction, 1992 WL 494973 (F.J.C.) at 79.
go further and to make comments which reflect upon the jurors' service, the verdict rendered, or the trial strategies used by the attorneys in the case. For example, a judge might indicate that the jurors did the right thing in convicting the defendant or that they brought about a miscarriage of justice by acquitting the defendant.\textsuperscript{16} Such comments are inappropriate and should be avoided. They are particularly offensive if these same jurors have not completed their jury service and may be selected to serve on future panels to decide other cases, since the comments might influence their decisions in these other cases.

**Standard 15-4.4. Jury instructions**

(a) Instructions to the jury should be not only technically correct but also expressed as simply as possible and delivered in such a way that they can be clearly understood by the jury. The instructions should not contain comments by the court reflecting the court's personal belief regarding credibility of certain witnesses, evidentiary value of specific items of evidence, or the guilt or innocence of the defendant. A written copy or audio version of the instructions should be given to the jury when it retires to deliberate.

(b) At the beginning of the trial, the court should give preliminary instructions to the jury deemed appropriate for their guidance in hearing the case, which may include instructions on the law of the case. Instructions on the law of the case should be given only after consultation with counsel.

(c) A collection of accurate, impartial, and understandable pattern jury instructions should be available for use in criminal cases in each jurisdiction. Whenever necessary, the pattern instructions should be modified or supplemented.

(d) At the close of the evidence or at such earlier time as the court reasonably directs, the court should allow any party to tender written instructions and may direct counsel to prepare designated instructions in writing. Copies of tendered instructions and instructions prepared at the direction of the court should be furnished the other parties.

(e) At a conference on instructions, which should be held out of the hearing of the jury, and, on request of any party, out of the

presence of the jury, the court should advise counsel what instruc-
tions will be given by providing the instructions in writing prior
to their delivery and before the arguments to the jury. Counsel
should be afforded an opportunity to object to any instruction. The
grounds of any objection should be stated on the record. No party
should be permitted to raise on appeal the failure to give an in-
struction unless such party shall have tendered it or made timely
objection to its omission. No party should be permitted to raise on
appeal the giving of an instruction unless such party objected
thereto. In either instance, the party should state, distinctly the
matter to which the party objects and the grounds of the objection.
However, if the interests of justice so require, substantial defects
or omissions should not be deemed waived by failure to object to
or tender an instruction.

(f) At the conclusion of the evidence, and before closing argu-
ments in the case, the court may instruct the jury on the law of the
case. At the conclusion of the closing arguments of counsel, the
court should give the jury its final instructions on the law of the
case, if not given earlier, and other appropriate closing instruc-
tions.

(g) All instructions, whether given or refused, should become a
part of the record. All objections made to instructions and the
rulings thereon should be included in the record.

History of Standard

This standard has been renumbered. Changes in the third edition
include a provision in section (a) stating that the court should not
interject comments into the jury instructions which reflect the court’s
personal opinion on matters of credibility, evidentiary value, or guilt
or innocence. Section (a) has also been modified by adding a provision
that a written or audio version of the instructions should be given to
the jury for use during deliberations. Section (f) has been revised to
recognize and approve the process of instructing the jury on the law
to be applied to the case before, as well as after, closing arguments.

Related Standards

ABA Standards for Criminal Justice 8-3.6 (3d ed. 1992)
ABA Standards Relating to Trial Courts 2.13 (1992)
National District Attorneys Association National Prosecution Standards chapter 86 (2d ed. 1991)

Commentary

Instructions Generally

The first sentence of section (a) reflects the concern that jury instructions which are technically accurate statements of the law may nonetheless be incomprehensible to a jury of lay persons. Because jury instructions are the principal medium for communicating to the jury the legal bases upon which its verdict is to rest, they should not only accurately reflect the law, but must also be stated in a manner which can be easily understood by a lay juror. In other words, they should be written in plain English.

Section (a) also provides that instructions should be delivered "in such a way that they can be clearly understood by the jury." As one judge has observed:

The manner in which instructions are read is fully as important as the text of the instructions. The trial judge is in the position of a teacher. His business is to educate jurors in an effective way to enable them, of their own will and judgment, to arrive at a just verdict. Since the law requires a high degree of technical accuracy and, of necessity, certain words must be used which are not generally familiar to laymen, instructions are not as easily understood as we are inclined to believe. The monotonous reading aloud, especially that droning, lifeless reading that all trial lawyers have heard, cannot be expected to instruct or interest the jurors in the law. Proper instruction depends upon diction, inflection, enunciation, and meaningful expression.¹

But, as the same judge cautions:

The simplicity of accurate but conversational language is attainable by few judges. Spontaneous oral delivery may accomplish understanding more readily but it is fraught with the danger of reversal by the appellate court which considers the

printed word out of its environment of the trial. A judge who instructs conversationally without a prepared script tends to ramble, to weaken his statements and to become obscure. Occasional use of conversational language maintains attention: its continued use is dangerous and not always convincing.²

This standard does not address the question whether all instructions should be read verbatim by the court to the jury. It has been suggested that the practice of reading written instructions, together with the use of pattern jury instructions and written submissions by the parties, is more likely to result in accurate instructions free from reversible error. The use of written instructions "results in a charge which will be better considered and more clearly expressed than an oral charge would ordinarily be."³

The practice of judges reading written instructions verbatim without extemporaneous explanation, however, has been criticized by some commentators who suggest that the mere oral recitation of instructions does not provide adequate opportunity for jurors to understand or remember details of the instructions.⁴ Section (a) is responsive to this concern, recommending that jurors be given a written copy or audio version of the instructions when they retire to deliberate.

Finally, jury instructions should not only be technically accurate and expressed in a manner which can be clearly understood by jurors, but should also be free from comments by the court which reflect the court's personal belief regarding credibility, evidentiary value, or guilt or innocence. Such expansive statements by the court are an impermissible usurpation of the fact-finding role of the judiciary.

Preliminary Instructions

In accordance with section (b), a court should give preliminary instructions at the beginning of the trial. The purpose of this recommendation is to provide the jurors with the basic information necessary to understand the evidence they are about to hear. The propriety of preliminary instructions has been upheld in a number of appellate

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². Id. at 191.
decisions. In addition, a number of commentators have recommended the practice. For example, Judge Prettyman states:

I submit it makes no sense to have a juror listen to days of testimony only then to be told that he and his confreres are the sole judges of the facts, that the accused is presumed to be innocent, that the government must prove guilt beyond a reasonable doubt, etc. What manner of mind can go back over a stream of conflicting statements of alleged facts, recall the intonations, the demeanor, or even the existence of the witnesses, and retrospectively fit all these recollections into a pattern of evaluation and judgment given him for the first time after the events? The human mind cannot do so. It is not a magnetized tape from which recorded speech can be repeated at chosen speed and volume. The fact of the matter is that this order of procedure makes much of the trial of a lawsuit mere mumbo jumbo. It sounds all right to the professional technicians who are the judge and the lawyers. It reads all right to the professional technicians who are the court of appeals. But to the laymen sitting in the box, restricted to listening, the whole thing is a fog.

Why should not the judge, when the jury is sworn, then and there tell them the rules of the game: (a) the function of the indictment, (b) the function of the jury as sole judges of the facts, (c) the restriction of their consideration to the evidence, (d) the presumption of the innocence of the accused, (e) the burden of reasonable doubt, (f) matters concerning credibility, (g) the functions of court and counsel, (h) the elements of the crimes charged, (i) a glossary of some of the terms to be used, (j) admonition as to outside conversation, newspaper accounts, etc., (k) explanation of the verdict and how it is reached—all the explanatory data which will put jurymen in the best possible position to perform the responsible task assigned to them.

Thus, the judge would instruct only as to the facets of function and procedure which are general in application. And, of course, before the taking of the proof, he would not discuss any of the facts in the particular controversy about to be tried. The court should also instruct the jury at the end of the trial just before they retire. At that time should come his discussion

of the case at hand, and he should recall then such parts of his
initial instructions as need repeating.

I know we now have printed handbooks for jurors given
them in advance, but these are no substitute for the live, face­
to-face, instruction and explanation from the judge on the
bench. Some judges do instruct at the beginning of a trial. I
submit to my brethren of the Bench and Bar it is a sensible
course to follow.7

In addition to general instructions on the function of jurors during
the trial, section (b) provides that the preliminary instructions may in­
clude instructions on the law applicable to the particular case. Such
instructions permit the jurors to better evaluate the evidence presented
at trial and to do so with more precise focus and direction.8 Of course,
evidence presented during the course of the trial may require a cau­
tionary instruction or a curative instruction at the time the evidence is
introduced. In such an event, the court should give additional explana­
tory instructions, after consultation with counsel, as the need arises.

Pattern Instructions

The quality and consistency of instructions will be improved if each
jurisdiction develops—as many have already—a set of pattern or
model instructions prepared after thorough research and careful draft­
ing by leading members of the bench and bar.9 Generally, the adoption
of pattern jury instructions results in accuracy, time savings for the
bench and bar, impartiality, intelligibility, and uniformity.10 The chair­
person of an Illinois jury instructions committee noted some supposed
virtues of pattern instructions. Of particular benefit noted was the
reduced time both court and counsel needed to prepare and discuss
instructions.11 Other commentators have made similar observations.12

7. Prettyman, supra note 6, at 46.
8. See, e.g., Erickson, supra note 4.
10. Note, Pattern Jury Instructions, 40 N.D. L. Rev. 164, 165 (1964). See also J. Alfini,
Pattern Jury Instructions (AMERICAN JUDICATURE SOCIETY, REPORT No. 6, 1972) at 7, which
adds the “proposition” that pattern instructions “reduce the rate of appeal and of re­
versal on appeal.” This proposition is buttressed in White, Standardized Instructions, 23
The use of pattern jury instructions has been criticized by some on the grounds that pattern instructions tend to be more abstract and general than individually prepared instructions since they are prepared for general use without the facts of any particular case in mind.\(^{13}\) However, the fact that pattern jury instructions are available should not preclude a judge from modifying or supplementing a pattern instruction to suit the particular needs of an individual case. As observed by the Third Circuit,

> [w]hile such resources may be useful for the purpose of supplying guidelines to the trial courts, we believe that instructions to the jury must be molded to fit the factual complex of each case. An instruction approved in one case, or indeed in many similar cases, may not be sufficient for the particular case at bar if the comparative circumstances are not identical or substantially similar.

Consequently, while we endorse the wide latitude to be accorded the trial courts in the area of jury instructions, we recognize a compelling need for guidelines which will obviate skeletal, pattern instructions and assure the essential particularity demanded by the facts surrounding each identification.\(^{14}\)

The thrust of such objection goes not to the use of pattern instructions themselves, but rather to a practice of rote reliance upon such instructions without modification, a practice that may develop simply by virtue of their existence. There is also an apprehension that the existence of pattern instructions may make it "more and more difficult to convince the trial judge to accept even the slightest modification of the instructions... as well as to convince [judges] to give any instruction that is not included" in the collection of pattern instructions.\(^{15}\) Section (c) responds to this concern, recommending that pattern instructions should be modified or supplemented by the court when necessary to fit the particular facts of a case.

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\(^{13}\) Note, supra note 10, at 168.


Proposed Instructions

Section (d) reflects the position taken in Rule 30 of the Federal Rules of Criminal Procedure and Rule 523 of the Uniform Rules of Criminal Procedure, namely that requests for instructions be in writing. "This makes for a good record and safeguards an objection on appeal."16 Section (d) also provides that a court may direct the preparation of certain instructions. This provision is particularly appropriate in criminal cases because of the responsibility of a trial judge to ensure that certain essential instructions are given whether requested or not.

The provision in section (d) requiring the parties to serve copies of proposed instructions on all counsel is similar to that found in Rule 30 of the Federal Rules of Criminal Procedure and Rule 523(b) of the Uniform Rules of Criminal Procedure. It seeks to ensure that there will be an adequate opportunity for examination of the proposed instructions by all counsel, thereby providing an adequate opportunity for them to object or concur in the content. While the federal rule refers to furnishing copies to "adverse parties," the use in section (d) of the phrase "other parties" is intended to make it clear that where there are multiple defendants represented by different counsel, each attorney should receive copies of proposed instructions.

Establishing Which Instructions to be Given

Section (e) deals primarily with matters typically covered in statutes or rules on jury instructions: the general requirement that a timely objection to a particular instruction be noted on the record, and the grounds of the objection be specifically noted.17 Counsel should have an opportunity to raise objections to proposed instructions outside the hearing of the jury, and counsel should be informed before arguments to the jury precisely what instructions will be given. Where, as contemplated in section (d), a court directs counsel to prepare instructions, it is necessary to recognize the right of any party to review and object to these proposed instructions as well.

Section (e) also deals with the consequences of counsel's acquiescence in or objection to proposed instructions. Generally, a party may not appeal instructions unless counsel took adequate action at trial—

either by tender of instructions or by objection to proposed instructions—to apprise the trial judge of counsel’s view as to what the instructions should have been in order to permit the trial judge to take timely corrective action. For example, Rule 30 of the Federal Rules of Criminal Procedure provides in pertinent part: “No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection.”

Notwithstanding the existence of this provision and similar language in other jurisdictions, federal courts and most state courts have held that, in a criminal case, because a trial judge must ensure that certain essential instructions are given (e.g., burden of proof and elements of the offense charged), appellate review will not be held to be waived if a defendant has been convicted in the absence of these critical instructions. The last sentence of section (e) therefore qualifies earlier provisions which require the tender of a proper instruction or a timely objection, with directions to the appellate court to consider allegations of error “in the interests of justice” where substantial instructional errors or omissions are present.

**Final Instructions**

Even if instructions are given at the beginning of the trial as recommended in section (b), this does not obviate the need for instructions at the close of all the evidence, before the jury retires to deliberate. The instructions given at this time should include at least some of the instructions given when the trial opened. These instructions may be given before or after closing arguments. The court should give the jury its final instructions on the law of the case after closing arguments, if they have not been given before.

Giving final instructions before closing argument has been criticized on the ground that

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by the time the jury has sat through the biased and possibly heated comments of opposing counsel, what little law the jury may have comprehended from the charge will have entirely escaped them. It is said that this procedure leaves little chance for the court's words to make any impression upon the jurors.¹⁹

On the other hand, it has also been contended that this practice gives counsel the opportunity to explain the instructions, argue their application to the facts and thereby give the jury the maximum assistance in determining the issues and arriving at a good verdict on the law and the evidence. As an ancillary benefit, this approach aids counsel by supplying him with a natural outline, that is, his arguments may be directed to the essential fact issues which the jury must decide.²⁰

Similarly, it has been pointed out that it is preferable if in argument counsel can argue the facts as they apply to the law as already given to the jury in instructions, rather than forcing counsel to advise the jury that certain instructions will be forthcoming.²¹ A compromise position is taken in Rule 523(c) of the Uniform Rules of Criminal Procedure which provides for instructions after closing arguments, but permits some or all of the instructions to be read before closing arguments if all parties consent.

Instructions on the Record

Section (g) provides that all proposed instructions, whether given or refused, should become a part of the record and that the record should include objections to and rulings on instructions. It is absolutely necessary for an accurate record of the jury instructions to be maintained. Such a record is necessary to enable the appellate court fairly to consider alleged errors in instructions. The record should also identify the sponsor of each instruction, whether or not the instruction was actually given or denied.

²¹. Wormwood, supra note 6, at 5. See also Blatt, Judge's Charge to Jury Should Precede Arguments of Counsel, 33 J. AM. JUD. SOC’Y. 56 (1949).
PART V.
JURY DELIBERATIONS; RETURN OF VERDICT

Standard 15-5.1. Materials to jury room

(a) The court in its discretion may permit the jury, upon retiring for deliberation, to take to the jury room a copy of the charges against the defendant; the court should permit the jury to take exhibits and writings that have been received in evidence, except depositions, and copies of instructions previously given.

(b) The court may refrain from sending certain material to the jury room if the court determines:

(1) that the material may be subjected to improper use by the jury; or

(2) that the material might be dangerous to jurors or to others.

(c) In sending any exhibits to the jury, the court should ensure that the evidentiary integrity of the exhibit is preserved.

History of Standard

This standard has been modified to provide that the court should send to the jury room exhibits and other materials that have been received in evidence, except for depositions, and to specify the conditions under which the court may refuse to send such material.

Related Standards


Commentary

Although the practice at common law was to permit only certain documents to be taken into the jury room, it is now provided by statute, rule of court, or appellate decision in nearly every jurisdiction that papers and exhibits in evidence are permitted to go with the jury upon its retirement. The general rule is that books of account, x-ray plates and pictures, photographs, maps and plats, writings, and phys-
ical objects, if admitted into evidence, may be taken by the jury when they retire to deliberate. Generally, the charging document may also go into the jury room.

**Material Admitted into Evidence**

As a general rule, with some safeguards, material admitted into evidence should accompany the jurors to the jury room for their review during deliberations. This recommendation is a departure from the prior standard, which left this decision to the judge’s discretion. The issue is one of significant importance because materials taken into the jury room may be examined and evaluated without judicial supervision. Almost all jurisdictions currently permit those items admitted into evidence to go into the jury room during deliberation, reserving to the judge the discretion to refuse, for good cause, to send the items into the jury room.

**Charges Against the Defendant**

Whether to send the charging document to the jury room when the jury retires for deliberation should be left to the discretion of the trial judge. The federal system and most state systems permit a copy of the charges to go to the jury room, providing an appropriate cautionary instruction is given to the jury by the trial judge. On this point, section (a) is in conformity with the decisional law, but does not address the issue of cautionary instructions. Nonetheless, that is the favored practice and should be followed.

A problem may arise, however, when the indictment or information contains counts that are no longer pending against the defendant, because of a plea, because they have been dismissed, or for some other reason. In this situation, the jurors reviewing the charging instrument may see not only the charges on which they are deliberating, but also the irrelevant charging paragraphs, which may contain highly preju-

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dicial material. The trial judge must take care to insure that those portions of an indictment or information no longer pending are not included in the charging document sent into the jury room.

**Jury Instructions**

The recommendation in section (a) that written instructions be furnished to the jurors and taken to the jury room is new. Proponents maintain that it is simply impossible for jurors to remember instructions in any detail, having heard them only once. Research has shown that providing written instructions to the jury has a number of advantages. Primary among these is that it improves the "quality of deliberations by increasing juror understanding of the law and factual issues and by aiding jurors' memories." Other research has shown that jurors who have the opportunity to view written instructions "spent more than twice as much deliberation time specifically applying the rules of law as did the juries that only heard oral instructions." Having the instructions in the jury room leads to greater efficiency as well, since the jurors do not have to come back to the courtroom to be re-instructed when they have a question about the instructions.

Additionally, some jurors may not be able to absorb and synthesize information adequately by aural acquisition alone, but may need to read a document a number of times to comprehend its meaning. By denying such jurors the opportunity to read and fully understand the jury instructions, courts increase the danger that an erroneous conviction or acquittal will result from a juror's patent lack of understanding of the instructions.

Confessions and Statements of the Defendant

Courts generally treat confessions by the accused, once admitted into evidence in any tangible form, as proper evidentiary material to go back to the jury room during deliberations.

Depositions

Depositions should not ordinarily be sent back to the jury room. Instead, since depositions are considered the equivalent of other live testimony, they should be read to the jury during the trial and should not be given greater emphasis that any other testimony. In excluding depositions from the material that is to be taken to the jury room, this standard is unchanged from its predecessors. This appears to be the prevailing view in most jurisdictions.\(^\text{10}\) Taking written depositions into the jury room would permit the jurors to reread and examine them, which could result in the jurors either giving them greater emphasis than is appropriate or subjecting them to closer scrutiny than the testimony of witnesses who appeared in court.

Items Not Admitted Into Evidence

Items not received into evidence should not be shown or given to the jury. Although this standard does not expressly prohibit the introduction into the jury room of material not admitted into evidence, it is self evident that such items should be excluded. Some state courts hold that error is presumed when an item that has not been properly admitted into evidence is introduced into the jury room during deliberations, and that the burden is on the prosecution to overcome this presumption.\(^\text{11}\)

In a number of cases, convictions have been reversed because jurors consulted sources for definitions of terms other than the judge’s instructions, such as dictionaries, law books, or encyclopedias.\(^\text{12}\) The me-

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\(^{10}\) See, e.g., Royals v. State, 208 Ga. 78, 65 S.E.2d 158 (1951); People v. White, 365 Ill. 499, 6 N.E.2d 1015 (1937).


\(^{12}\) See generally Annot., 35 A.L.R. 4th 626 (1985); Marino v. Vasquez, 812 F.2d 499 (9th Cir. 1987); Jones v. Kemp, 706 F. Supp. 1534 (N.D. Ga. 1989); Jones v. Francis, 312
lange of items which have found their way into jury rooms during jury deliberations is extensive. The list includes: guns which have been excluded from evidence;\textsuperscript{13} bottles of alcoholic beverages;\textsuperscript{14} the official court file, including such prejudicial information as a record of prior convictions of the defendant;\textsuperscript{15} books on the subjects of drug trafficking and drug problems;\textsuperscript{16} a device used to measure the purity of heroin;\textsuperscript{17} checks;\textsuperscript{18} newspapers;\textsuperscript{19} the Bible;\textsuperscript{20} dictionaries and encyclopedias;\textsuperscript{21} and even law books.\textsuperscript{22}

Sections (b) and (c) note various conditions under which evidentiary material should not be supplied to the jurors. The court should not send back to the jury room material which might be subject to improper use by the jurors,\textsuperscript{23} or material that might be dangerous to jurors or others. It is the judge's obligation to preserve the evidentiary integrity of the exhibits.

**Standard 15-5.2. Jury request to review testimony**

(a) If the jury, after retiring for deliberation, requests a review of certain testimony the court should notify the prosecutor and counsel for the defense, and allow all parties to be heard on the jury's request. Unless the court decides that a review of requested testimony is inappropriate, the court should have the requested parts of the testimony submitted to the jury in the courtroom. The court may permit testimony to be reread outside the presence of

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\textsuperscript{14} North Dakota v. Lindeman, 254 N.W. 276 (N.D. 1934).
\textsuperscript{15} United States v. Vasquez, 597 F.2d 192 (9th Cir. 1979).
\textsuperscript{16} Paz v. United States, 462 F.2d 740 (5th Cir. 1972).
\textsuperscript{17} United States v. Tebba, 770 F.2d 1454 (9th Cir. 1985).
\textsuperscript{18} United States v. Greene, 34 F.2d 86 (4th Cir. 1987). It was noted that the checks were for "enormous sums of money."
\textsuperscript{20} See Jones, \textit{supra} note 12.
\textsuperscript{21} See Annot., \textit{supra} note 12.
\textsuperscript{22} United States v. Hill, 688 F.2d 18 (6th Cir. 1982), cert. denied, 459 U.S. 1074.
\textsuperscript{23} See Lindeman, \textit{supra} note 14, where alcoholic beverages were found in the jury room. Post-verdict affidavits from some jurors included the facts that "the exhibits ... remained with them during the entire deliberation ... they were in full view of the jury and were examined by them and some of the jury smelled the liquor and some of them drank some of it."
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counsel, with the personal waiver of the defendant and the stipulation of the parties.

(b) The court need not submit testimony to the jury for review beyond that specifically requested by the jury, but in its discretion the court may also have the jury review other testimony relating to the same factual issue so as not to give undue prominence to the testimony requested.

History of Standard

There are minor stylistic changes only.

Related Standards


Commentary

Review of Testimony

A jury, after retiring for deliberations, may find itself in disagreement about certain testimony or may simply be unable to recall the testimony. When this occurs, jurors often seek the assistance of the court in refreshing their memory. There are at least three methods by which this has been accomplished. Most jurisdictions have the testimony read to the jury. This is the approach adopted in this standard, as well as in Rule 533 of the Uniform Rules of Criminal Procedure.1 Another approach is to have the witness recalled to repeat the disputed testimony. Finally, the court might state its recollection of the testimony on the disputed point.2 The two latter methods are not approved by this standard, for both present an unacceptable risk that jurors will not receive an accurate report of the testimony originally given.3

2. See Pinckney v. United States, 352 F.2d 69 (5th Cir. 1965); State v. Riggle, 76 Wyo. 1, 298 P.2d 349 (1956), cert. denied, 352 U.S. 981 (1957); State v. Jennings, 131 Or. 455, 282 P. 560 (1929).
Although it occurs less frequently, a jury's disagreement or uncertainty sometimes goes to items admitted into evidence rather than to testimony. Generally, these situations have been dealt with by the courts in much the same way as requests for review of testimony.

Some disagreement exists as to whether a trial judge has any discretion once a jury has requested an opportunity to review certain evidence. In jurisdictions without statutes on the subject, and in the federal system, courts have generally held that judges do have discretion in determining whether or not to allow a reading of all or any of the testimony requested. Courts interpreting existing statutes and rules have, in contrast, disagreed on whether they are mandatory or discretionary.

Although section (a) is couched in terms of "appropriateness," the intention behind it is that, while a court need not grant every request from the jury, judicial discretion to deny jury review of evidence should be strictly limited. The justification for this approach is well expressed in a New Jersey decision:

When a jury retires to consider their verdict, their discussion may produce disagreement or doubt or failure of definite recollection as to what a particular witness said in the course of his testimony. If they request enlightenment on the subject through reading of his testimony, in the absence of some unusual circumstance, the request should be granted. The true administration of justice calls for such action. Where there is a


doubt in the minds of jurors as to what a witness said, it cannot be prejudicial to anyone to have that doubt removed by a re-hearing of his testimony. There is no need to be chary for fear of giving undue prominence to the testimony of the witness. If ... a jury is to be considered intelligent enough to be entrusted with powers of decision, it must be assumed they have sense enough to ask to have their memories stimulated or refreshed only as to those portions of the testimony about which they are in doubt or disagreement.9

A trial judge should have limited discretion to determine "whether there are reasonable grounds for the jury's request for evidence" and "whether certain parts of the testimony may be read without too great an inconvenience or loss of time."10 Under section (a), a court must determine whether a jury's request is reasonable. This gives a trial judge some leeway to bar review of specific matters that may somehow have been received into evidence, but that in fact do not bear on any issues the jury must decide. But a court should always grant any reasonable request to review evidence directly relating to an issue before the jury. Failure to do so has been held to be an abuse of discretion in several cases.11

Most courts have taken the view that a jury request for review of evidence should not be refused solely on the ground that it would take too much time.12 Section (a) is consistent with this view, although, again, it should be read to permit a trial judge to exercise some reasonable discretion even in this regard. In the event that a jury requests a reading of a substantial portion of the trial testimony, a court should feel no absolute obligation to grant the request.

Scope of Review

Denial of a jury request to review testimony has been held proper if such reading would lend that portion of the testimony undue prom-

However, granting a jury's request has not been held to be an abuse of discretion for this reason. This contention was raised in one federal case, but was rejected by the court, which observed that when a jury requests that certain testimony be read, emphasis on that testimony is already present in the jurors' minds and thus a mere reading of it would not add to it. For this reason, the risk of undue prominence has not been included in section (a) as a basis for denying a jury's request.

Particular problems are raised by the admission into evidence of electronically recorded testimony. The test for actual admissibility of the tape appears to be whether the taped testimony is a substitute for live testimony of a witness or is "real" evidence in its own right. In one federal case, an appellate court reversed the trial court's actions in replaying taped testimony of a sexually-abused child during jury deliberations, agreeing with the defendant's claim that the court's actions had unduly emphasized the testimony. The appellate court held that the videotape was the functional equivalent of live testimony. Since a live witness would not have been permitted in the jury room, the court reasoned, neither should the witness's videotaped testimony. The distinction appears to rest upon whether the electronically-recorded testimony is merely a record of the proceedings, or is the equivalent of live testimony. Where the taped testimony is a substitute for a witness appearing live at trial, the testimony should be repeated from the official trial record, not from the substitute testimony itself.

The cases establish that a trial judge may direct additional unrequested testimony to be read to the jury with the requested portion. This is a matter within the judge's discretion; when the judge directs testimony to be read in response to a jury request, the defendant has no right to have other unrequested testimony read with it.

15. United States v. Binder, 769 F.2d 595 (9th Cir. 1985).
Rule 533 of the Uniform Rules of Criminal Procedure also provides that if the jury cannot otherwise adequately review requested evidence, the jury should be permitted to take that evidence, including any part of a deposition, prepared transcript, or recording of testimony, to the jury room, unless it appears that a party will be unduly prejudiced or that the jury will improperly use the evidence.

Standard 15-5.3. Additional instructions

(a) After the jury has retired to deliberate, the court should have no communication of any kind with the jurors, until counsel have been notified of the proposed communication, and have had an opportunity to be heard on any issues arising.

(b) If the jury, after retiring for deliberation, desires to be informed on any point of law, the court should give appropriate additional instructions in response to the jury’s request unless:

(1) the jurors may be adequately informed by directing their attention to some portion of the original instructions;

(2) the request concerns matters not in evidence or questions which do not pertain to the law of the case; or

(3) the request would call upon the court to express an opinion upon factual matters that the jury should determine.

(c) The court should give additional instructions to the jurors, or re-read instructions initially given, only when the jury has been returned to the courtroom, with the defendant and counsel for the parties present, after notice to counsel and opportunity to be heard.

(d) The court need not give additional instructions beyond those specifically requested by the jury, but in its discretion the court may also give or repeat other instructions to avoid giving undue prominence to the requested instructions.

(e) The court may recall the jury after it has retired and give additional instructions in order:

(1) to correct or withdraw an erroneous instruction;

(2) to clarify an ambiguous instruction; or

(3) to inform the jury on a point of law which should have been covered in the original instructions.

335 (1963); State v. Strable, 228 Iowa 886, 293 N.W. 441 (1940); People v. Chivas, 322 Mich. 384, 34 N.W.2d 22 (1948); State v. Richter, 21 N.J. 421, 122 A.2d 502 (1956).
(f) The provisions of standard 15-4.4(e) and (g) also apply to the giving of all additional instructions, except that the court in its discretion should decide whether additional argument will be permitted.

**History of Standard**

New section (a) provides that the trial judge should consult with counsel before having any communication with jurors once the jury has retired to deliberate unless counsel have been notified and have had the opportunity for input before the communication takes place. Newly-revised section (c) provides that additional instructions should be given in open court with the defendant and counsel present.

**Related Standards**


**Commentary**

*Communications During Deliberations*

This standard addresses situations where additional jury instructions are needed or requested after the jury has retired to deliberate. Additional instructions provide great concern for counsel because such instructions are often requested when the jury is having difficulty with a particular issue or is deadlocked. At this sensitive time, additional instructions may have the effect, intended or not, of coercing a juror into abandoning his or her original position.\(^1\) Section (a) provides that the court should not communicate with the jury after it has retired until counsel has been notified of the proposed communication and has been given an opportunity to object to or to comment upon any proposed additional instructions.

*When to Give Additional Instructions*

A court should give additional instructions whenever such action is needed to answer a proper question from the jury. Such instruction

may be unnecessary, as recognized in subsection (b)(1), when the jurors’ question may be answered by directing their attention to a portion of the original instructions. This does not mean that it is always sufficient to reread an original instruction that is confusing or otherwise insufficient. If the jury inquiry is unclear, it is the duty of the judge to clarify the situation. If the jury is unclear on a relevant point of law, it is also incumbent upon the court to respond in some appropriate fashion to the jury’s request for clarification.

Subsections (b)(2) and (3) are intended to make it clear that a judge need not respond to improper requests. A judge need not answer questions relating to matters not in evidence, or respond to questions that do not pertain to the law of the case. It is not uncommon, for example, for the jury to request information related to the defendant’s opportunity for pardon or parole; this is generally deemed not to be a proper subject for jury consideration. Moreover, a judge may refuse a request for instructions that would invade the province of the jury. Illustrative is the situation in which an answer to the jury’s question would require the judge to draw factual or legal conclusions from the testimony.

Where to Give Additional Instructions

Section (c) provides that the court should not provide additional instructions or re-read instructions initially given unless and until the jury has been brought back to the courtroom and the defendant and counsel for the parties are present. Section (c) further provides that such instructions should be given only after notice has been given to counsel for the parties and counsel has been afforded an opportunity to be heard. This is necessary so that jurors may be instructed in the

2. Powell v. United States, 347 F.2d 156 (9th Cir. 1965).
5. State v. Rutledge, 267 S.W.2d 625 (Mo. 1954).
proper atmosphere, counsel may have an adequate opportunity to object to any proposed instructions, and so that the objections and instructions given or refused may be made a part of the record.

What Instructions to be Given

Concern has sometimes been expressed that additional instructions may result in "undue prominence" being given to particular instructions which favor one side. The risk of undue prominence is accounted for in section (d), which permits a trial judge, in his or her discretion, to give other instructions or to repeat some of the instructions given originally so as not to give undue prominence to the instructions requested.

It is generally agreed that, when giving instructions in response to a jury request, the judge may confine the additional instructions to the particular questions asked by the jury and need not give even more instructions, although requested to do so by the defendant. However, a judge may, again exercising his or her discretion, also give instructions not requested, but which serve to clarify the issues.

Recall for Instructions

A court should have the power to call the jury back to remedy defects of misstatement, ambiguity, or omission in the original instructions when these defects are discovered by the court or brought to its attention during jury deliberation. In a few jurisdictions, the court’s discretion in this regard has been codified in a statute or rule of court. Elsewhere, the practice is generally upheld as an inherent discretionary power of the court. Additional instructions on the court’s

10. See Standard 15-4.3(d).
own motion have been approved: to correct or withdraw an erroneous instruction;\textsuperscript{17} to explain a legal principle raised in argument but not covered in the original instructions;\textsuperscript{18} to include some relevant matter omitted in the original instructions;\textsuperscript{19} or simply to clarify a proposition of law that the judge is convinced the jury does not fully understand.\textsuperscript{20}

All of these situations are covered in section (e). Giving additional instructions is a discretionary power of the court rather than a right of any party.\textsuperscript{21}

Section (f) expressly applies the provisions of Standard 15-4.4(e) and (g) to all additional instructions, whether or not requested by the jury. This means that counsel should be given the same opportunity as with final instructions to object to proposed instructions. In addition, in order to preserve the issue for appellate review, the same rules apply.\textsuperscript{22} And here, as well, instructions given or refused and objections thereto and the rulings thereon should be included in the record.

Standard 15-4.4 provides that instructions should be reduced to writing and given to the jury for its use during deliberations. For the same reasons which dictate that the original instructions should be reduced to writing and given to the jury for deliberations, additional instructions should also be subject to these provisions whenever possible.\textsuperscript{23}

Section (e) provides that the court should have the discretion to decide whether additional instructions call for further argument to the jury. Although there are few cases that deal with the issue, the general approach seems to be that a defendant has a right upon timely request to additional argument to the jury on any new or different principles of law contained in proposed additional instructions.\textsuperscript{24} Most decisions have held that it is prejudicial error to deny the defendant an oppor-

\textsuperscript{17} State v. Benton, 38 Del. 1, 187 A. 609 (1936).
\textsuperscript{19} People v. Perry, 65 Cal. 568, 4 P. 572 (1884).
\textsuperscript{20} Id.
\textsuperscript{22} See Standard 15-4.4(e).
\textsuperscript{23} See Commentary to Standard 15-4.4.
\textsuperscript{24} See Commentary to Standard 15-4.4(e).
tunity to make additional argument, although at least one court has held that this is a matter of judicial discretion.25

Standard 15-5.4. Length of deliberations; deadlocked jury

(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

(1) that in order to return a verdict, each juror must agree thereto;

(2) that 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) that each juror must decide the case for himself or herself but only after an impartial consideration of the evidence with the other jurors;

(4) that in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change an opinion if the juror is convinced it is erroneous; and

(5) that no juror should surrender his or her honest belief as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in section (a). The court should not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

History of Standard

This standard has been renumbered and changed in style only.

Related Standards


Commentary

Jury Charge Relating to Duties

A court should instruct the jury initially on the nature of its duties in the course of deliberations. No particular language need be used, but section (a) sets out five points on which a jury might properly be advised.

The following is illustrative of an instruction consistent with Standard 15-5.4(a):

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.1

Because the instruction contemplated in section (a) is to be given before the jury has retired and thus before a minority exists, and because it makes no reference to a minority but instead charges all jurors to consult with one another, the proposed instruction does not have the coercive impact of the Allen charge.2

Length of the Deliberations

A trial judge should be able to send the jury back for further deliberations notwithstanding its indication that it has been unable to

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agree. The general view is that a court may send the jury back for additional deliberations even though the jury has indicated once, twice, or several times that it cannot agree or even after jurors have requested that they be discharged.\(^3\) Statutes in a few states limit the number of times a court can order a disagreeing jury to continue deliberations.\(^4\) That view has not been adopted in section (b), however, as it is believed that a jury should not be permitted to avoid a reasonable period of deliberation merely by repeated indications that it is unhappy over its inability to agree.

A judge should not require a jury to deliberate for an unreasonable length of time or for unreasonable intervals, or threaten a jury with the prospect of such unreasonably lengthy deliberations. The length of time a jury may be kept deliberating is a matter within the discretion of the trial judge; abuse of that discretion requires reversal. The reasonableness of the deliberation period should not be fixed by an arbitrary period of time, but should depend upon such factors as: the length of the trial; the nature or complexity of the case; the volume and nature of the evidence; the presence of multiple counts or multiple defendants; and the jurors' statements to the court concerning the probability of agreement.\(^5\)

No coercion exists simply because a court has required jurors to deliberate a reasonable length of time. The reasonableness of allegedly prolonged jury deliberations has been upheld in these situations: (1) nineteen hours of deliberation after a four-week trial;\(^6\) (2) deliberations ordered to continue after four hours during which time the jury twice reported its inability to agree;\(^7\) and (3) four days of deliberation after forty-four days of trial.\(^8\)

The conditions under which a jury is forced to deliberate, rather than the total length of time it deliberates, is often the key factor in assessing reasonableness. Thus, in one case, a court reversed a defendant's conviction following a verdict returned after the jury had been

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required to deliberate twenty-seven hours without sleep.\(^9\) In another case, a court reversed a conviction following a verdict returned at 5:25 A.M. after the jurors had displayed impatience, fatigue, and confusion but had been ordered to continue deliberations after ten and a half hours.\(^{10}\) Similarly, it has been held to be an abuse of discretion to threaten to keep a jury together for an unreasonable period of time, as where, for example, a judge told jurors that they would be kept together for four days unless they agreed sooner.\(^{11}\) It is also clear that a trial judge may not tell disagreeing jurors that they will be kept together indefinitely or until they agree upon a verdict.\(^{12}\)

Section (b) does not, however, recommend an absolute bar on a trial judge telling a jury how much longer it will be required to deliberate. There is a split of authority on the question of whether such action is proper.\(^{13}\) The argument against permitting such a communication is that minority jurors may surrender to the majority simply to avoid having to remain the announced time or that a contrary or disagreeable juror may be encouraged to "stick it out" to the indicated deadline.\(^{14}\) However, if the time announced is not unduly long, these do not seem to be great risks.\(^{15}\)

**The Allen Charge**

The issue of how to instruct a jury which has reported itself deadlocked has had a long and somewhat controversial history. That history began with *Allen v. United States*,\(^{16}\) a decision in which the Supreme Court approved a strong, compelling instruction to a deadlocked jury. This history was also affected, in no small part, by the ABA's adoption of Standard 15-4.4 in 1968. This standard rejected

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12. Boyett v. United States, 48 F.2d 482 (5th Cir. 1931); State v. Rodman, 208 La. 523, 23 So. 2d 204 (1945); Character v. State, 212 Miss. 30, 53 So. 2d 41 (1951).
15. See, e.g., Butler v. State, 185 Tenn. 686, 207 S.W.2d 584 (1948), in which the court told the jury that it would let them consider the case a little longer but that it did not want to keep them overnight.
the historically-accepted *Allen* charge as being too coercive on minority jurors, and proposed a substitute, less coercive instruction.

In 1896, the Supreme Court decided *Allen v. United States*,\(^\text{17}\) approving what has come to be known as the "*Allen charge*" or the "*dynamite charge*." In *Allen*, a criminal defendant had been convicted of murder and sentenced to death. The defendant appealed the conviction on eighteen separate grounds, one of which was the court's instructions to the jury. After the instructions at the close of the case, the jury began its deliberations. After some time, the jurors returned to the courtroom, reporting that they were unable to arrive at a unanimous verdict and requesting additional instructions from the judge.\(^\text{18}\) The judge instructed the jury, in substance,

> that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgement which was not concurred in by the majority.\(^\text{19}\)

The Court affirmed the defendant's conviction, and specifically approved the charge given to the jury in order to break the deadlock.\(^\text{20}\)

The *Allen* decision was generally followed until publication of Standard 15-4.4 in 1968. Since that time, the clear trend has been for various jurisdictions to substitute the less coercive charge recommended by these standards for the more coercive *Allen* charge.\(^\text{21}\) The primary

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17. *Id.*
18. *Id.* at 501.
19. *Id.*
20. *Id.* at 501, 502.
difference between the ABA standard and the *Allen* charge is that the former does not instruct a juror in the minority to consider the majority position in determining how to vote, but instructs all jurors to consider the opinions of the others, regardless of which way the vote is leaning.

The decision to provide for an instruction of the sort described in section (b) is based upon the opinion that the effect of the *Allen* charge and its variations is unduly coercive and may now be viewed as an unconstitutional invasion of the province of the jury. The difficulty with the *Allen* charge is that it does not merely request conscientious collective deliberations, but instead is an "unbalanced" charge which tends to coerce only the jurors in the minority to reconsider their positions. 22 This standard, less coercive than the *Allen* charge, is more likely to result in an impartial jury verdict.

It is appropriate, however, for a court to give or repeat to the jury an instruction on its responsibilities in the course of deliberations. This may be done when the jury has indicated its inability to reach an agreement or has deliberated for some time without reaching an agreement.

In the federal system, the various circuits have taken differing positions on whether or not to accept the *Allen* charge, the ABA standard, or some other form of instruction. Only two circuits have retained the pure *Allen* charge. 23 Three circuits have adopted a modified form of the *Allen* charge. 24 The Fifth Circuit has adopted a modified *Allen* charge which eliminates the language instructing the majority and minority jurors to consider their majority and minority status in

22. The *Allen* charge directed that "a dissenting juror should consider whether his doubt was a reasonable one ..." and "the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment ...". *Allen v. United States*, 164 U.S. 492 (1896). See also Note, *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge*, 53 V.A. L. REV. 123, 143 (1967). For similar evaluations of the coercive effect of the *Allen* charge, see *Burrup v. United States*, 371 F.2d 556, 559 (10th Cir. 1967) (Phillips, J., concurring); Thaggard v. United States, 354 F.2d at 739-41 (Coleman, J., concurring); *Huffman v. United States*, 297 F.2d 754, 759 (Brown, J., dissenting); State v. Randall, 137 Mont. 534, 353 P.2d 1054 (1960).


arriving at a decision. The Eighth and Ninth Circuit Courts of Appeals use a modified *Allen* charge, using a four-prong test to determine whether the charge was unduly coercive, considering the content of the instruction, the length of the period of deliberation, the total time of deliberation, and any indicia of pressure or coercion on the jurors.

A number of circuits have adopted the ABA standard or some variation of the standard. The Third Circuit has rejected a pure *Allen* charge in favor of an ABA-like standard in *United States v. Fioravanti*, where the court upheld an ABA-type charge to a deadlocked jury. The Seventh Circuit adopted the ABA standard in *United States v. Sanders*, while in *United States v. Smith*, the Tenth Circuit approved the use of a modified form of the ABA standard which adds to the original language of the standard. The Eleventh Circuit has also disapproved the Allen charge in *United States v. Rey*, labelling it "coercive" and "offensive."

In the various states, the *Allen* charge has been generally rejected and, although the trend is toward adopting the language of the ABA standard, there is still substantial variation in acceptable language. A number of states have disapproved the *Allen* charge, but have held that giving the charge is not reversible error. Most of the states which still accept the *Allen* charge have modified its language to ameliorate its coercive effect.

**Discharge Without Verdict**

Although the common law rule was to the contrary, the modern rule is that a trial judge has discretionary power to discharge a jury

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28. 962 F.2d 660, 665 (7th Cir. 1992).
29. 857 F.2d 682 (10th Cir. 1988).
31. For examples of states which have adopted the language of the ABA standard, see Annot., *supra* note 21, at § 5.
in any criminal trial without the consent of either party when, after sufficient and reasonable time for deliberation, it cannot agree on a verdict.\textsuperscript{34} Section (c) permits discharge when "it appears that there is no reasonable probability of agreement."

The language of this standard—or similar language—is common in statutes and rules of court.\textsuperscript{35} Court decisions likewise take the view that a trial judge should not discharge a jury merely because it reports that it has not been able to agree, but instead should determine whether there is a reasonable prospect of its being able to agree.\textsuperscript{36} One way of making this determination is through questioning of jurors. The particular circumstances of the case should also be considered. Relevant factors include: the length of deliberation,\textsuperscript{37} the length of the trial,\textsuperscript{38} and the nature or complexity of the case.\textsuperscript{39}

\textbf{Standard 15-5.5. Entry of plea during deliberations}

If the defendant should elect to enter a plea at any time after the jury has been sworn but before the jury has returned a verdict, the jury should be dismissed immediately upon acceptance of the plea by the court and should not be permitted to return a verdict.

\textbf{History of Standard}

This standard is new.

\textbf{Related Standards}

None.

\textbf{Commentary}

This standard addresses the situation that may arise if, during the jury deliberations, the defendant should decide to change his or her


\textsuperscript{35} See, e.g., AZ. R. CRIM. P. 22.4; ARK. STAT. ANN. § 43-2140 (1977); CAL. PENAL CODE § 1140 (West 1970); OHIO REV. CODE ANN. § 2945.36 (Baldwin 1974); TEX. CODE CRIM. P. art. 36.31 (Vernon 1966).


\textsuperscript{37} People v. Caradine, 235 Cal. App. 2d 45, 44 Cal. Rptr. 875 (1965).

\textsuperscript{38} United States v. FitzGerald, 205 F. Supp. 515 (N.D. Ill. 1962).

\textsuperscript{39} People v. Mays, 23 Ill. 2d 520, 179 N.E.2d 654 (1962).
plea and to plead guilty to the charges. If a guilty plea is accepted, the judge should immediately recall the jury, dismiss the jurors without requiring them to arrive at a verdict, and should not accept a verdict if the jurors have arrived at one. It is generally not the role of courts or juries to give advisory opinions or to return verdicts on matters that have been resolved.

Standard 15-5.6. Polling the jury

When a verdict has been returned and before the jury has dispersed, the jury should be polled at the request of any party or upon the court's own motion. The poll should be conducted by the court or clerk of court asking each juror individually whether the verdict announced is his or her verdict. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

History of Standard

This standard was renumbered and changed for stylistic reasons only.

Related Standards


Commentary

Polling the jury is a procedure of common law origin whereby after verdict each juror is separately asked whether he or she concurs in it. The purpose of the poll is to determine, "before it is too late, whether the jury's verdict reflects the conscience of each of the jurors or whether it was brought about through the coercion or domination of one of them by some of his fellow jurors or resulted from sheer mental or physical exhaustion of a juror."1

This standard provides that the jury should be polled upon the timely request of any party and also acknowledges the court's au-

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authority to have the jury polled on its own motion, the view generally taken around the country. The right to poll the jury is not a constitutional right and is not required unless requested by one of the parties. Nor is the trial court required to advise a defendant of his or her right to have the jury polled. Nevertheless, in pro se cases, a court would be well advised to do so.

This standard also provides that the polling of the jury should take place "[w]hen a verdict has been returned." It is inappropriate to do so before a verdict has been returned; this is so even when the jury indicates that it has been unable to reach a verdict.

Although a jury should be polled at the request of either party, the right to a poll is waived under this standard if not requested "before the jury has dispersed." The more common view is that a poll must be requested before the verdict is recorded by the clerk, but this has proved to be an unduly severe limitation, particularly when the practice is to record a verdict immediately.

The right to a poll can be waived by failure to make a request within the specified time. It does not follow, however, that every such failure will be found on appellate review to constitute an effective waiver. The prevailing view is not to find waiver, for example, if the defendant or defense counsel was unintentionally absent at the time the verdict was returned. One troublesome problem has been the case in which a defendant consents to allow the jury to return a sealed verdict and disperse. Some courts have viewed this as a waiver of the right to poll the jury by consenting to the sealed verdict, while others take

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2. See, e.g., Slocum v. United States, 325 F.2d 465 (8th Cir. 1963); Harris v. State, 31 Ark. 196 (1876).


4. Hernandez v. Delgado, 375 F.2d 584 (1st Cir. 1967) (due process not violated to infer waiver from silence).


the contrary position. In light of this uncertainty, it is probably a better practice to have the defendant expressly waive the jury poll for the record at the time of consent to a sealed verdict.

The polling procedures set out in this standard are consistent with current practice in most, but not all jurisdictions. A poll may be conducted by the trial judge or the clerk of court. The prevailing practice is for the clerk to take the poll, although some judges prefer to conduct the poll themselves. Relevant statutes seldom deal with this question, and there is little case law on the subject. This standard does not permit counsel for the prosecution or the defense to conduct the poll. Although it is sometimes said that a court may permit the prosecutor or defense counsel to take the poll, this is not good practice, as counsel may attempt to cross-examine the jurors or may intimidate them, however inadvertently. The only related language on this point, Rule 535(e) of the Uniform Rules of Criminal Procedure, is in accord.

Jurors should be questioned individually. In a few jurisdictions, however, it is sufficient if the jurors are asked collectively whether they assent to the announced verdict. This procedure is not recommended under this standard, for it saves very little time while creating a risk that a juror who has been coerced to go along with the majority will not speak up. "A shy or non-aggressive juror might well be silent as to his verdict until specifically asked about it." Each juror should be asked whether the announced verdict is his or her verdict. This standard does not prescribe the specific form of the question; the precise procedures are within the discretion of the trial judge, and any procedure that makes clear each juror's position is sufficient. However, it should be noted that some courts have

11. Nomaque v. People, 1 Ill. 145 (1825); State v. Callahan, 55 Iowa 364, 7 N.W. 603 (1880).
12. See, however, LA. CODE CRIM. P. art. 812 (West Cum. Supp. 1978), which requires the clerk to make the poll.
17. Compare LA. CODE CRIM. P. art. 812 (West Cum. Supp. 1978), which specifically states that the clerk is to ask, "Is this your verdict?"
found no reversible error to exist where a party fails to object to an unconventional or informal procedure.20

The poll should be conducted so as to obtain an unequivocal expression from each juror. If this is obtained, then any volunteered statements by a juror in explanation of the juror's verdict may be disregarded.21 A juror should not be asked to give reasons for the verdict,22 nor queried about his or her agreement on specific elements of the offense charged.23

The last sentence in this standard provides that if there is "not unanimous concurrence," the court may either direct the jury to retire for further deliberations or may discharge the jury. This provision is taken from Rule 31(d) of the Federal Rules of Criminal Procedure, and contrasts with most state statutes and court rules on the subject. A typical state provision states that if there is not concurrence by all of the jurors, then "the jury must be sent out for further deliberation."24 This approach has been rejected in this standard in favor of leaving the choice to the discretion of the trial judge. An absolute requirement of further deliberations is unwise, as a trial judge may reasonably conclude that, in view of the length of the prior deliberations and the present disagreement, unanimity is unlikely. Or, more important, if one juror was coerced into joining the verdict and then announced his or her dissent only in response to specific questioning, the trial judge may reasonably conclude that there might have been coercion. On the other hand, it may sometimes appear that further deliberations could be fairly conducted with the possibility of reaching unanimity. No

20. See United States v. Dotson, 817 F.2d 1127, 1130 n.1 (5th Cir. 1987), holding that court's jury poll by nodding heads did not constitute reversible error because defendants did not object to this unconventional procedure, modified in part on other grounds, 821 F.2d 1034 (5th Cir. 1987) (per curiam).
24. CAL. PENAL CODE § 1163 (West 1970). Statutes and court rules from Alabama, Arizona, California, Florida, Idaho, Iowa, Kentucky, Louisiana, Minnesota, New York, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, and Utah require that the jury be sent back for further deliberations; those from Colorado, Delaware, Missouri, and New Jersey follow the federal approach; while those from Arkansas, Indiana, Nebraska, and Wyoming are silent on this question.
case has been found holding that a defendant has a right to demand a mistrial when the poll uncovers a dissenting juror.25

**Standard 15-5.7. Impeachment of the verdict**

(a) Upon an inquiry into the validity of a verdict, no evidence should be received to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined.

(b) The limitations in section (a) should not bar evidence concerning whether the verdict was reached by lot.

(c) Subject to the limitations in section (a), a juror’s testimony or affidavit should be received when it concerns:

1. whether matters not in evidence came to the attention of one or more jurors, under circumstances which would violate the defendant’s constitutional right to be confronted with the witnesses against him or her; or

2. any other misconduct for which the jurisdiction permits jurors to impeach their verdict.

**History of Standard**

There are stylistic changes only.

**Related Standards**

ABA Standards for Criminal Justice 4-7.3 (3d ed. 1993)
ABA Standards for Criminal Justice 8-3.7 (3d ed. 1992)
National District Attorneys Association National Prosecution Standards chapter 87.3 (2d ed. 1991)

**Commentary**

Trial judges are often confronted with request to question former jurors about statements, conduct, events, or conditions affecting the validity of a verdict. This standard addresses the issue of whether a

25. In State v. Gullette, 3 Conn. Cir. Ct. 153, 209 A.2d 529 (1964), there is dictum to the effect that a mistrial must be declared, but the cases cited, e.g., Commonwealth v. Shrodes, 158 Pa. Super. 135, 44 A.2d 319 (1945), deal with sealed-verdict situations in which the jury dispersed overnight and was polled after being reassembled.
court should receive evidence from a juror to impeach the verdict. The general rule is that "a juror's testimony or affidavit is not receivable to impeach his own verdict." This rule reflects the policy decision that to intrude into the sanctity of the jury process would create a chilling effect on deliberations, as well as undermine the finality of jury determinations.

In criminal cases, however, inquiry into the circumstances surrounding a jury's deliberations and verdict may be necessary to adequately protect a defendant's constitutional right of confrontation. This raises the question of whether, after the jury has been discharged, it is improper for counsel to interview jurors and how counsel should treat such information that might be used to impeach a verdict. Some courts have held that it is improper to interview the jurors in an attempt at impeachment.

This standard should not be read as attempting to resolve all of the issues in this area, but as addressing the fundamental policy issues affecting all jurisdictions. A jurisdiction adhering to this standard would have considerable leeway also to develop unique solutions as appropriate.

Evidence Pertaining to Impeachment

At early English common law, the testimony or affidavits of jurors attesting to misconduct in the jury room were admissible as evidence to support a motion for a new trial. This became the practice in this country as well. However, in the landmark English case, Vaise v. Derval, Lord Mansfield refused to consider affidavits affirming that jurors had reached a verdict by lot on the ground that "nemo turpitudinem suam allegans audiendus est," i.e. "a witness shall not be heard to allege his own turpitude." The rule against impeachment was soon thereafter adopted in this country.

During the nineteenth century, in response to discontent over the perceived harshness and injustice of the strict common law view, a number of jurisdictions adopted what is commonly referred to as the "Iowa rule." This rule, first announced in 1866, was later adopted in

1. 8 Wigmore, Evidence § 2345 (McNaughton rev. 1961).
2. See Bradley v. Bradley, 4 Dall. 112 (Pa. 1792); Cochran v. Street, 1 Va. (1 Wash.) 79 (1791).
about a dozen states and some federal courts. Under the Iowa rule, exclusion applies only as to matters that "essentially inhere in the verdict itself." Another rule, the so-called "aliunde rule," permits impeachment of the verdict by a member of the jury, but only if a foundation for the introduction of such evidence is first laid by competent evidence from another source. Other variations permit impeachment when the misconduct is that of a third party rather than a juror, or when the misconduct occurred outside the jury room. Wigmore expressed dissatisfaction with the common law rule, noting "that curious doctrine of evidence once and temporarily in vogue, long ago discarded in every other relation," can hardly serve as justification for the rule.

Section (a) does not impose a blanket no-impeachment rule as a standard; it only recommends against receipt of evidence "to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined" upon an inquiry into the validity of a verdict in a criminal case.

There are, of course, sound reasons for limiting posttrial inquiries into the basis for jury verdicts. These reasons apply even when an individual juror is willing to discuss his or her own misconduct. First, there is concern that relaxation of the restriction would create a danger of fraud and jury tampering. In addition, it could lead to widespread harassment of jurors and elimination of the confidentiality of jury deliberation. As one court pointed out in discussing the dangers:

jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the con-

5. For extensive case citations, see ABA STANDARDS RELATING TO TRIAL BY JURY 167 n.19 (1968).
6. Wright, supra note 4, at 210.
7. Farrer v. State, 2 Ohio St. 54 (1853).
10. WIGMORE, supra note 1, at § 2352.
In addition, certain dangers are inherent in the attempt to delve into the very thought processes of individual jurors in order to explain how the individual came to his or her decision:

Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because being personal it is not accessible to other testimony; it gives to the secret thought of one the power to disturb the expressed conclusions of twelve; its tendency is to induce bad faith on the part of a minority, to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict.13

Section (a) rejects as unwise extension of the Iowa rule to include testimony other than that of specific misconduct, whether the testimony is open to corroboration by other jurors or not.14

Section (a) also bars evidence of "the effect of any statement, conduct, event, or condition upon the mind of a juror" even when the inquiry is for the purpose of showing that a potentially prejudicial occurrence did not influence the verdict. For example, after a coin has been flipped to determine the verdict, a juror involved should not be permitted to testify that his or her subsequent concurrence in the verdict flowed from personal conviction rather than the outcome of the toss. While some court decisions and statutes permit such evidence for purposes of upholding the verdict,15 that view has been rejected in Rule 606(b) of the Federal Rules of Evidence and in this standard. Inquiry into the thought process of individual jurors carries the same risks and uncertainties whether the attempt is to invalidate or to save the verdict.16 Rather than engage in speculation as to the thought proc-

14. Such prohibited testimony would include, for example, an expression showing that a juror misunderstood the instructions. See, e.g., cases cited in Trousdale v. Texas & N.O.R. Co., 264 S.W.2d 489, 493-95 (Tex. Civ. App. 1953).
16. See, e.g., Widemann v. Galiano, 722 F.2d 335 (7th Cir. 1983), where the juror's testimony was excluded whether introduced to support or to impeach the verdict.

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esses of each individual juror, it is better to determine whether the "capacity for adverse prejudice inheres in the condition or event itself."17

Finally, it should be emphasized that the restrictions in section (a) apply to attempts to impeach a verdict and do not preclude a trial judge from making necessary and appropriate inquiries when an ambiguous or inconsistent verdict has been returned. This is simply not impeaching the verdict.

A verdict may not be reached by lot. Section (b) therefore provides for the receipt of evidence when this circumstance is alleged to have occurred in the jury room. A verdict reached by lot should simply not be permitted to stand:

Chance verdicts might result from the fact that most of the jurors, after some deliberation, have no strong preference for either party. Or they might result from a sharp and close division of opinion. In either event, it seems doubtful that a chance verdict is more likely than not to coincide with what would be the result of a lengthier, more regular deliberation by the same jury. And the toss of a coin in no sense approximates the deliberation process. Impeachment of chance verdicts would probably not put a heavy burden of added litigation on the courts, and in any case, judicial economy is a weak justification for a completely arbitrary disposition of parties' rights.18

If a verdict by lot is not permitted, then evidence, including testimony from jurors acting in that case, should be received on the question of whether the verdict was arrived at in that fashion. "[S]ince a determination by lot can hardly ever be established by other than jurors' testimony, it becomes a mere pretense to declare a certain irregularity fatal and yet to exclude all practical means of proving it."19

When Jurors' Testimony may be Received

Subsection (c) provides a flexible approach to verdict impeachment, taking into account the law of each state on the issue and the defendant's constitutional right of confrontation. No attempt is made in this

19. WIGMORE, supra note 1, at § 2354.
standard, however, to define the circumstances attending a verdict that would constitute a violation of a defendant's right of confrontation.

The Supreme Court in *Tanner v. United States*,20 addressed this issue in light of the Sixth Amendment right to trial by a fair and impartial jury. The Court determined that evidence regarding the use of alcohol and drugs by jurors during deliberations was inadmissible under Rule 606(b) of the Federal Rules of Evidence as an "outside influence." Further, the Court held that the Constitution does not require the Court to hold an additional evidentiary hearing to permit the defendant to adduce evidence in support of a claim that his or her Sixth Amendment rights have been violated. The Court stated:

[T]he defendant's sixth amendment interest in an unimpaired jury was adequately protected by other aspects of the trial process, such as voir dire, observations made by the court, court personnel, and counsel during the proceedings, the possibility of reports of misconduct by jurors before the verdict is read, and the availability of nonjuror evidence.21

Although the Supreme Court's most recent decision in this area seems to suggest support for the policies of confidentiality of the jury process and finality of jury verdicts, this standard, addressing aspirational goals rather than minimally acceptable procedures, is less restrictive than the constitutional minimum.

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