

8 GCA CRIMINAL PROCEDURE
CH. 70 DISCOVERY AND DEPOSITIONS

CHAPTER 70
DISCOVERY AND DEPOSITIONS

NOTE: Chapter 70 continues portions of former Rules 15 and 16 and former Chapter IV (§§ 1335, et seq.) of Title 9 of Part 2 of the Penal Code. However, this new chapter substantially expands the scope of discovery for both the prosecution and the defense. This expansion reflects similar changes in Federal Rules, California and other jurisdictions. However, it is based primarily on recommendations and reasons set out in ABA, Project on Standards for Criminal Justice, Discovery & procedure Before Trial (approved Draft 1970).

With respect to discovery by the defense, this statement (of the ABA) echoes that of this California Supreme Court:

Absent some governmental requirement that information to be kept confidential for the purpose of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and in particular it has no interest in convicting on the testimony of witnesses who have not been a rigorously cross-examined and as thoroughly impeached as the evidence permits. *People v. Riser*, 47 C.2d 566; 305 P.2d 1 (1956).

That discovery should not be a "one-way street" was most emphatically stated in the leading case of *Jones v. Superior Court*, 58 C.2d 56, 60; 22 Cal. Rptr. 879; 372P. 2d 919 (1962):

Absent the privilege against self-incrimination or other privileges provided by law, the defendant in a criminal case has no valid interest in denying the prosecution access to evidence that can throw light on issues in the case.

- Article 1. Discovery.
- Article 2. Depositions.

ARTICLE 1
DISCOVERY

- § 70.10. Matters Generally Discoverable; Prosecutors' Obligations.
- § 70.15. Other Matters discoverable Upon Good Cause Showing.
- § 70.20. Matters Not Subject to Discovery by Defendant.
- § 70.25. Matters Defense Must Disclose to prosecutor, Upon Latter's Motion.
- § 70.30. Contents of Court Order.
- § 70.35. In Camera Matters.
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§ 70.10. Matters Generally Discoverable; Prosecutors' Obligations.

(a) Except as otherwise provided by §§ 70.20 and 70.30, at any time after the first appearance upon noticed motion by the defendant, the court shall order the prosecuting attorney to disclose to the defendant's attorney or permit the defendant's attorney to inspect and copy the following material and information within his possession or control, the existence of which is known, or by the exercise of due diligence may become known to the prosecuting attorney:

(1) the name and address of any person whom the prosecuting attorney intends to call as a witness at the trial, together with his relevant written or recorded statement;

(2) any written or recorded statement and the substance of any oral statement made by the defendant or made by a co-defendant if the trial is to be a joint one;

(3) any report or statement of an expert, made in connection with the case, including results of physical or mental examinations and of scientific tests, experiments or comparisons;

(4) any book, paper, document, photograph or tangible object, which the prosecuting attorney intends to use in the trial or which was obtained from or belonged to the defendant;

(5) any record of prior criminal convictions of persons whom the prosecuting attorney intends to call as witnesses at the trial;

(6) whether there has been an electronic surveillance of conversations to which the defendant was party or of his premises;

(7) any material or information which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce his punishment therefor.

(b) The prosecuting attorney's obligations under this Section extend to any material information in the possession or control of members of his staff and any other persons who have participated in the investigation or evaluation of the case and who either regularly report or with reference to this case have reported to his office.

NOTE: Section 70.10 is new. It is based on ABA, Project on Standards for Criminal Justice Discovery and Procedure Before Trial § 2.1 (Approved draft 1970). See also former Rule 16(a), (b). The ABA standard is stated simply as an obligation of the prosecutor. Section 70.10 is more explicit in that it requires disclosure by the

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prosecutor upon motion by the defendant and order of the court. Nothing, of course, precludes the prosecutor from voluntarily making available the materials and information listed. See ABA, supra § 2.2.

§ 70.15. Other Matters Discoverable Upon Good Cause Showing.

(a) Except as otherwise provided by this Section and §§ 70.20 and 70.30, upon noticed motion by the defendant and a showing of materiality to the preparation of his defense and that the request is reasonable, the court in its discretion may order the prosecuting attorney to disclose to the defendant's attorney any relevant material and information not covered by § 70.10.

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

NOTE: Section 70.15 is new. It is based on ABA, Project on Standards for Criminal Justice Discovery and Procedure Before Trial § 2.5 (Approved draft 1970). While it is believed that the mandatory discovery provided by § 70.10 will be adequate in virtually every case, that section is not intended to preclude other discovery upon a proper showing. See, e.g., § 70.50 (deposition of third person for discovery purposes). Accordingly, this Section makes clear that the court has authority to order additional discovery upon a proper showing by the defendant and subject to appropriate controls for the protection of third persons.

COURT DECISIONS: SUPER.CT. 1981 Section 70.15 imposes a requirement of materiality upon the defendant before discovery will be permitted under this Section. Since the defendant has failed to show why the requested material is material, the motion for discovery is denied. *People v. Yamat*, Cr. #15F-81.

SUPER.CT. 1981. This case lists those items which may be discovered by a defendant from the Government in criminal proceedings. *People v. Castro*, Cr. #52F-81.

§ 70.20. Matters Not Subject to Discovery by Defendant.

Notwithstanding §§ 70.10 and 70.15, the prosecuting attorney shall not be required to disclose:

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

(b) an informant's identity where his identity is a prosecution secret and a failure to disclose will not infringe the constitutional rights of the defendant. However, the identity of an informant may not be kept secret

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where the prosecuting attorney intends to call such person as a witness at the trial.

NOTE: Section 70.20 is new. It is based on ABA, Project on Standards for Criminal Justice Discovery and Procedure Before Trial § 2.6 (Approved draft 1970). As to the general scope of the "work product" and informant exceptions provided here, see *id.*, at 88-92. It should be noted however, that the "work product" exclusion is limited by both the nature and the maker of this material. That is, the exclusion is applicable only if the maker of the material is the prosecuting attorney or a member of his legal staff and then only if the source of the material is the lawyer's own thought processes - opinions, theories, conclusions - not a mere record of what he has seen or heard.

§ 70.25. Matters Defense Must Disclose to Prosecutor, Upon Latter's Motion.

Upon noticed motion by the prosecuting attorney, the court may order:

(a) the defendant to appear at a reasonable time and place and under such conditions as the court may provide to:

- (1) appear in a line-up;
- (2) speak for identification by witnesses to an offense;
- (3) be finger-printed;
- (4) pose for photographs not involving reenactment of a scene;
- (5) try on articles of clothing;
- (6) provide specimens of his handwriting;
- (7) permit the taking of samples of his blood, hair and other materials of his body which involve no unreasonable intrusion thereof; and
- (8) submit to a reasonable physical or medical inspection of his body.

(b) The defendant's attorney to disclose to the prosecuting attorney or permit the prosecuting attorney to inspect and copy any report or statement of an expert, made in connection with the case, including results of physical or mental examinations and of scientific tests, experiments or comparisons which the defense attorney intends to use in the trial.

(c) The defendant's attorney to state the nature of any defense which he intends to use at trial and the name and address of any person whom the defendant's attorney intends to call as a witness in support thereof.

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COURT DECISIONS: DISTRICT COURT, APP. Div., 1978. Under former Rules of Criminal Procedure, a police report does not constitute a "statement" of the officer preparing it. The Prosecutor's failure to provide the police report does not constitute a violation of the discovery order. *People v. Mesa*, D.C. Guam, App. Div., Cr. App. #76-08A. Decided 06/08/78.

SUPERIOR COURT, 1978. Statute does not compel criminal defendant to be a witness against himself by words from his own mouth. *People v. Mesa, et al.*, Sup. Ct. Cr. ##324F-77, 296F-77 and 327F-77. (Order, 01/24/78; Abbate P.J.)

SUPERIOR COURT, 1978. Under statute, Prosecutor is empowered to inspect and comply the following: (1) expert testimony or reports connected with the case; (2) the name and address of any witness for the defense; and (3) the nature of any defense. Such inspection and copying may occur ten (10) days prior to the first scheduled date for the trial. *People v. James, et al.*, Sup. Ct. Cr. ##21F-78, 23-78, 26-78, 44-78 and 93F-78. (Order, 06/08/78; Abbate, P.J.)

SUPERIOR COURT, 1978. Statute does not violate a defendant's privilege against self-incrimination. *People v. Aflague*. Sup. Ct. Cr. #200F-78 (Decision and Order, 12/05/78; Benson, J.)

NOTE: Section 70.25 is new. It is based on ABA, Project on Standards for Criminal Justice Discovery and Procedure Before Trial §§ 3.1-3.3 (Approved draft 1970). See also former Rule 16(c). Subsection (a) deals with matters that will often take place as a part of investigations prior to a formal charge being rendered. However, there is no reason why these investigatory procedures will not take place later and this Section makes clear that the court has the power to order the defendant to cooperate in this regard. Appearances for the purposes listed here may be included in the order providing for the defendant's pretrial release. See §§ 40.15, 40.29. It should be noted in this regard that the ability to order the subsequent appearance of the defendant permits the extended use of a summons or citation in lieu of arrest and detention. See §§ 15.20, 14.40; Chapter 25. No attempt is made here to state standards for the conduct of the investigatory procedures contemplated under this Section; however, Subsection (a) does make clear that the court may prescribe the conditions under which such procedures may be taken.

Subsection (b) is based on § 3.2 of the ABA standards which in turn is adapted from Rule 16(c) of the Federal Rules of Criminal Procedure. Subsection (b) is not, however, conditional upon a reciprocal request by the defendant. Disclosure is limited to material that the defense intends to use at trial - this would seem to obviate any constitutional problems arising out of the privilege against self-incrimination. It might be argued that the defense at the time of motion does not know whether material will be used at the trial; however, § 70.40 provides a continuing duty to disclose and the court may use its contempt power to punish a willful refusal to comply with its order.

Subsection (c) is based on § 3.3 of the ABA standards, see ABA, *supra* § 3.3, at 3-6. See also proposed Fed. R. Crim. P. 12.1 (notice of alibi); 12.2 (defense based upon mental condition).

Reference in the ABA standard to record grand jury testimony has been deleted here. Section 50.38 provides separately that testimony before the grand jury be transcribed and that a copy of the transcript be furnished to the defendant before trial.

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Unlike former Rule 16(b), § 70.10 provides for mandatory disclosure (subject to the restrictions of §§ 70.20 and 70.30) and does not require any special showing of need and reasonableness. As to the general scope of discovery required by this Section, see generally ABA, *supra* at 54-78 (commentary to § 2.1).

§ 70.30. Contents of Court Order.

(a) Where an order requiring disclosure under this Chapter is issued, the order shall state and the court shall determine the time, place and manner of making the disclosure required. The court may impose such terms and conditions as the court determines are just, provided that all material and information to which a party is entitled shall be disclosed in time to permit his beneficial use thereof.

(b) Where a document or other tangible object contains material, part of which is subject to disclosure pursuant to this Chapter and part of which is not subject to disclosure, only the part subject to disclosure need be disclosed but the entire document or other tangible object shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

NOTE: Section 70.30 is based on ABA, Project on Standards for Criminal Justice Discovery and Procedure Before Trial §§ 4.3-4.6 (Approved draft 1970). See also former Rule 16(d), (e). § 70.30 provides the court broad discretion to impose suitable conditions on disclosure. Moreover, in some circumstances a document, photograph or other source will contain extraneous material not subject to disclosure and the section makes clear that the latter may be withheld. However, the section also makes clear that material and information which is required to be disclosed by this Chapter must be eventually and timely provided. The section also provides for preservation of material not disclosed for possible appellate review. See also § 70.35 (in camera proceedings).

§ 70.35. In Camera Matters.

(a) Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or portion of such showing to be made in camera.

(b) A record shall be made of any proceedings held in camera and where the court enters an order granting relief following such proceeding, the entire record shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

NOTE: Section 70.35 is based on ABA, Project on Standards for Criminal Justice Discovery and Procedure Before trial § 4.6 (Approved draft 1970). See also former Rule 16(e). The introductory clause refers to "any person." This may include a non-party as well as a party.

§ 70.40. Continuing Duty to Disclose.

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If, prior to or during trial, a party or his attorney discovers additional material or information previously requested or ordered, which is subject to disclosure under this Chapter, he shall promptly notify the other party or his attorney or the court of the existence of the additional material or information.

NOTE: Section 70.40 is substantively the same as a portion of former Rule 16(g). See also ABA, Project on Standards for Criminal Justice Discovery and Procedure Before Trial § 4.2 (Approved draft 1970).

§ 70.45. Failure to Comply; Remedies.

If at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with an order issued pursuant to this Chapter, the court may order such party to comply with the prior order, grant a continuance, or issue such other order as it deems just under the circumstances.

NOTE: Section 70.45 is based on a portion of former Rule 16(g) and ABA, Project on Standards for Criminal Justice Discovery and Procedure Before Trial § 4.7 (Approved draft 1970). Section 70.45 does not specifically authorize the court to “prohibit the party from introducing in evidence the material not disclosed.” Compare former Rule 16(g). This may be permissible in certain situations but there may be constitutional difficulties in applying this sanction against a defendant and it seems better policy for the court “to apply sanctions which affect the evidence at trial and the merits of the case as little as possible.” See ABA, *supra* at 107-108. Similarly, this Section does not deal specifically with willful violations of an order. Compare *id.* § 4.7(b). This omission does not, of course, limit the court's general contempt power.

ARTICLE 2
DEPOSITIONS

- § 70.50. Depositions Allowed Generally; In Special Circumstances.
- § 70.55. Presence of Defendant.
- § 70.60. Costs of Deposition Borne by Government; When.
- § 70.65. Procedure; Filing; Information to be Given to Defendant.
- § 70.70. Use of Deposition.
- § 70.75. *Unavailability* Defined.
- § 70.80. Objections.

§ 70.50. Depositions Allowed Generally; In Special Circumstances.

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Whenever due to special circumstances of the case it is in the interest of justice that any person be ordered to appear at a specified time and place to be examined under oath, the court may, upon noticed motion of any party, order such person to appear so that his testimony may be taken by deposition and further order that any designated book, paper, document, record, recording or other material not privileged, be produced at the same time and place.

COURT DECISIONS: SUPERIOR COURT, 1978. A deposition is warranted in a criminal matter in the instance of a witness who will be out of the jurisdiction and beyond the subpoena power of the court.

The taking of a deposition by the prosecution always raises the danger that the defendant will be denied his right to confront adverse witnesses; therefore, before the court will order such a deposition, the prosecution will first be required to demonstrate that all good faith efforts have been made to procure the attendance of such witness for trial. *People v. Pangelinan*, Sup. Ct. Cr. #101F-78. (Order, 08/24/78; Abbate, P.J.)

NOTE: Section 70.50 is based on former Rule 15(a) and former §§ 1335-1339. However, former Rule 15(a) only permitted a deposition to be taken on the application of the defendant; not the government. Both former Rule 15(a) and former §§ 1335 and 1336 (which did permit the government to take depositions) permitted a deposition to be taken only for the purpose of preserving testimony. Section 70.50 is not so limited. Either party may, upon a proper showing, be permitted to take a deposition and such deposition and such deposition may be taken for general discovery purposes. However, neither party has a right to take a deposition. This procedure is available only where needed. The greatly broadened rights to discovery provided by Article 1 (commencing with § 70.10) would seem to obviate the need for a deposition in most cases. See also § 50.38 (indicted defendant's right to a transcript of grand jury proceedings). However, in some cases a deposition may be needed either to preserve testimony or to obtain further discovery. Section 70.50 permits the taking of a deposition in either case subject to the control of the court and other limitations provided in this article. See §§ 70.55 (right of defendant to be present); 70.65 (defendant may not be compelled to testify). These changes are based on policies reflected in proposed Federal Rule 15 and ABA, Project on Standards for Criminal Justice Discovery and Procedure Before Trial § 2.5, at 86-88 (Approved draft 1970) (depositions). See also 18 U.S.C.A. § 3503(1970). Since the procedure provided here is a simple notice motion procedure much of the detail provided in a simple noticed motion procedure much of the detail provided in former §§ 1337-1339 is now covered by general provisions. See §§ 1.25 (time), 1.27 (motions), 1.29 (service and filing of papers).

§ 70.55. Presence of Defendant.

(a) Any officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce him at the examination and keep him in the presence of the witness during the examination.

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(b) A defendant not in custody shall have the right to be present at the examination, but his failure, absent good cause shown, to appear after notice and tender of expenses in accordance with § 70.60 shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

NOTE: Section 70.55 continues the substance of former § 1340. The defendant is, of course, entitled to be represented by counsel at the deposition taking but this matter is now covered generally by § 1.11 (defendant's right to counsel). Compare former § 1340 and former Rule 15(c).

§ 70.60. Costs of Deposition Borne By Government; When.

Whenever a deposition is taken at the instance of the government, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expense of the taking of the deposition, the court may direct that the expenses of travel and subsistence of the defendant and his attorney for attendance at the examination be tendered or paid by the government prior to the taking of the deposition.

NOTE: Section 70.60 continues a portion of former Rule 15(c). Because a deposition may now also be taken at the request of the government, § 70.60 makes clear that in these cases also, the defendant is entitled to the expenses he incurs in attending the deposition.

§ 70.65. Procedure; Filing Information to be Given to Defendant.

(a) Subject to such additional conditions as the court may provide, a deposition shall be taken and filed in the manner provided in civil actions. However, in no event may a deposition be taken of a party defendant without his consent, and the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself.

(b) The government shall make available to the defendant or his counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and which the defendant is entitled to obtain pursuant to Article 1 (commencing with § 70.10).

NOTE: Section 70.65 is based in part on former Rule 15(d) but covers several additional matters. Although this Section does not specifically refer to a deposition on written interrogatories (compare former Rule 15(d), the introductory clause recognized the court's power to impose suitable conditions including such a procedure. Compare former § 1344 (deposition to be taken before magistrate, sealed and transmitted to the court; court can now require such procedure by its order). Former Rule 15 did not allow the government to request the taking of a deposition. This has been changed, but Subsection (a) of this Section makes clear that the change does not permit the taking of

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the defendant's deposition without his consent. Subsection (b) makes clear that the defendant should be furnished the statements required by §§ 70.10 and 70.15 prior to the deposition. Subsection (b) does not, however, broaden the scope of disclosure, *i.e.*, the prosecuting attorney is not required to furnish statements of a person whom he does not intend to call as a witness. But see § 70.15.

§ 70.70. Use of Deposition.

At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used a substantive evidence if the witness is unavailable, as defined in § 70.75, or the witness gives testimony at the trial or hearing inconsistent with his deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

NOTE: Section 70.70 is based on former Rule 15(e) and former § 1345. There are, however, certain differences. First, "unavailability" is now defined by § 70.75 as including situations where the witness is physically present but is exempted from testifying, refuses to testify or testifies to a lack of memory. None of these grounds was stated under former law, but have been used. Section 70.75 also makes clear that a witness's disability may be either physical or mental. See former § 1345 (insanity). Also, Subsection (b) of ¶70.75 qualifies the grounds of unavailability by providing that a deponent is not available where "his exemption, refusal, claim or lack of memory, inability or absence is due to the procurement of wrongdoing of the proponent of his deposition ... No such qualification was stated in former § 1345 and that stated in former Rule 15(e) was arguably not so encompassing.

Finally, § 70.70 provides that a deposition may be used as substantive evidence both where the deponent is unavailable and where his testimony at trial is inconsistent with his deposition.

§ 70.75. Unavailability Defined.

(a) *Unavailable as a witness* includes situations in which the deponent:

(1) persists in refusing to testify concerning the subject matter of his deposition despite an order of the judge to do so;

(2) testifies to a lack of memory of the subject matter of his deposition;

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

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(4) is absent from the hearing and the proponent of his deposition has been unable to procure his attendance by process or other reasonable means.

(b) A deponent is not unavailable as a witness if his exemption, refusal, claim or lack of memory, inability or absence is due to the procurement or wrongdoing of the proponent of his deposition for the purpose of preventing the witness from attending or testifying.

§ 70.80. Objections.

Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.
