96-02: Revised State Criminal Discovery Rules, Effective 10/1/96

September 24, 1996

Changes Affect Prosecutors' Obligations, Who In Law Enforcement May Be Deposed And How They Are Compelled To Attend Depositions

From October 1, 1996 on, amendments greatly changing Florida's criminal discovery rules will be effective. This Bulletin will summarize the new requirements under the revised rules, and will suggest some strategies for law enforcement agencies as they adapt to the new discovery reality in state prosecutions. The changes affect adult and juvenile prosecutions. The full text of the Supreme Court's Order adopting the changes may be found at 21 FLW S369. The Appendix to this Bulletin is a copy of Rule 3.220 as it will appear from 10/1/96 forward. This Bulletin summarizes the major changes in discovery implemented by the amendments, and offers several suggestions that may assist law enforcement agencies in adapting to the changes.

Under the revised rule, during pretrial conferences the court may set a discovery schedule, including a discovery cut-off date. [Florida Rule of Criminal Procedure (hereafter, RCrP) 3.220(p)]. The philosophy of the new rule is to promote focused discovery and depositions, in order to more quickly resolve whether a case should be plead or tried. It is hoped the faster "plead or go to trial" resolution and more focused approach to depositions promoted by the Rule will effect cost savings throughout the criminal justice system.

The Supreme Court has implemented some restrictions on who can be deposed. The new rule attempts to reduce the number of discovery depositions taken in state criminal prosecutions by requiring the prosecutor to place all state witnesses in one of three categories, with the availability of depositions being different for each category. RCrP 3.220(b)(1)(A), provides that within 15 days of the service of a defendant's "Notice of Discovery," the prosecutor must provide the names and addresses of the state's witnesses, designating their status in one of these **three categories:**

CATEGORY A--Unlimited option to depose. [RCrP 3.220(b)(1)(a)(i)]
These witnesses will be subject to depositions as deemed necessary by the defense, just like depositions prior to the rule change. Category A witnesses include: (1) Eyewitnesses; (2) Alibi witnesses and rebuttal to alibi witnesses; (3) witnesses present when a recorded or unrecorded statement was made by, or taken from a defendant or co-defendant, all of whom must be specially-designated on the witness list; (4) investigating officers (defined in comments to the Rule as "an officer who has directed the collection of evidence, interviewed material witnesses, or who was assigned as the case investigator."); (5) witnesses known to have any material information that tends to negate the guilt of the defendant as to any offense charged; (6) "child hearsay witnesses" (i.e. hearsay witnesses in cases involving a child victim); and (7) expert witnesses who have not provided a written report and a curriculum vitae or who are going to testify test results or give opinions that are subject to the "Frye Test" (intended to mean expert witnesses who are testifying to things that are not generally accepted within the scientific community.)

TIP: Since "witnesses who were present when a recorded or unrecorded statement was taken from or made by a defendant or codefendant" are automatically "Category A" witnesses, subject to deposition with no need for a court order, the lead investigator in cases should limit the number of other officers present during the taking of such statements. Since "investigating officers" are automatically "Category A" witnesses, investigative reports should be carefully written to designate who are, and who are not, the "investigating officers." The number of "investigating officers" in any case should be limited if a reduction in depositions to attend is to be realized.

CATEGORY B--May be deposed only upon court approval. [RCrP 3.220(b)(1)(a)(ii)]
These witnesses will be subject to depositions only upon leave of the court upon a showing of "good cause" to depose. All witnesses not listed as either Category A or Category C witnesses are "B"

witnesses.

The commentary to the Rule indicates that "B" witnesses include, but are not limited to, witnesses whose only connection to the case are as owners of property; transporting officers, booking officers, records or evidence custodians, and experts who have filed a report and curriculum vitae who will not offer opinions subject to the Frye test (apparently meaning the scientific technique or tests have become so thoroughly recognized within the scientific and judicial communities as to receive judicial notice or routine judicial acceptance for courtroom usage.) "Category B" witnesses will not normally be deposed since "Category B" witnesses have tangential involvement in the case, or are testifying as to routine scientific tests or analyses. It will be very important for investigative reports to clearly indicate the limited role of witnesses that ought to be considered "Category B" witnesses. Laboratory personnel who will be testifying in a "routine manner" ought to be able to submit their lab reports and, if they clearly indicate the routine nature of their involvement and efforts, such witnesses ought not to be routinely deposed. A complete curriculum vitae must also be submitted by lab personnel.

TIP: In order to limit officers' exposure to the possibility of deposition, investigative reports must clearly identify to the prosecutor the role each potential witness plays in the case. The distinction between "Category A" and "Category B" witnesses will be determined not only by whether they are labeled as such by the investigating agency, but from the actions the witnesses have taken in the case as detailed in the investigative reports.

TIP: Lab personnel should prepare, and keep current, a complete curriculum vitae and should submit it to the prosecutor with each case worked upon. Failure to submit a written report and curriculum vitae will make lab personnel "Category A" witnesses even if they are testifying about "routine" or regularly-accepted conclusions.

TIP: If you believe you are a "Category B" witness in a particular case, and you receive a notice of deposition, you should contact your agency legal advisor or the trial prosecutor and request that the deposition not occur until and unless the court requires the defense to make the necessary demonstration of "good cause" for the deposition.

However, since the demonstration of good cause may occur via an ex parte proceeding as authorized under RCrP 3.220(m), it is possible that neither the prosecutor nor the agency legal advisor will receive prior notice that a "good cause" hearing has been held. If a court finding is made that you must be deposed, you must comply.

When determining whether to allow a deposition of a "Category B" witness, the court "should consider the consequences to the defendant, the complexities of the issues involved, the complexity of the testimony of the witness (e.g. experts), and the other opportunities available to the defendant to discover the information sought by deposition." [RCrP 3.220(h)(B)] If substantial improvement in Florida's discovery approach is to occur, agencies and state attorneys' offices must zealously enforce the prohibition against freely deposing "Category B" witnesses. In addition, trial courts must be held to the criteria for determining "good cause" when "Category B" witnesses are ordered deposed.

CATEGORY C-- Not subject to deposition. [RCrP 3.220(b)(1)(a)(iii)]
These witnesses will not be subject to depositions at all unless the Court finds they should have been listed as an "A" or "B" witness. Category C witnesses are those who performed only ministerial functions, or are those the prosecution does not intend to call at trial and whose involvement with, and knowledge of the case is fully set out in a police report or other statement furnished to the defense.

TIP: Although "Category C" witnesses (those performing only ministerial functions or those the prosecutor does not intend to call at trial) are not subject to deposition, a witness can fall under "Category C" only if the witness's "involvement with and knowledge of the case is fully set out in a police report or other statement furnished to the defense." Make sure any limited involvement is set out fully in the investigative reports. If you are merely a transporting officer, booking officer or records and evidence custodian, make sure the "investigating officer" writing the reports clearly

indicates your limited role in the case.

Existing portions of the Rule giving the court power to restrict or expand discovery options have not been changed. For example, under RCrP 3.220(e), the court may restrict disclosures if it finds there is substantial risk of physical harm, intimidation, or other reprisals that outweighs any usefulness of the disclosure to either party and under RCrP 3.220(f), on a showing of materiality, the court may require "such other discovery to the parties as justice may require." Any attempt by a court to allow carte blanche depositions on the basis that "justice may require" them should be resisted by the prosecutor and the law enforcement agency's legal advisors. To allow unlimited depositions to continue clearly runs afoul of the Rule changes and the Florida Supreme Court's philosophy regarding depositions.

TIP: Since prosecutors and law enforcement officers will be struggling to implement the new "categorize" method of witness determination, law enforcement agencies should consider submitting to the prosecutor a listing of witnesses with a preliminary suggested categorization. The list should also include the address to which law enforcement "notices of depositions" (discussed below) should be served. The final page of this Bulletin is a worksheet that could serve as a starting point for an agency's disclosure to the prosecutor.

NEW RULES FOR SETTING DEPOSITIONS. SUBPOENAS ARE NO LONGER REQUIRED TO COMPEL LAW ENFORCEMENT OFFICERS' ATTENDANCE.

Another major change in discovery procedures is the elimination of the need to subpoena law enforcement officers for depositions. The Prosecution and Defense are required to make a good faith effort to coordinate a deposition schedule to accommodate the schedules of other parties and witnesses to be deposed. This means the attorney setting the deposition should contact law enforcement officers or other witnesses in order to coordinate the date, time, and location of the deposition to accommodate the schedules of other parties and the officers and witnesses. [RCrP 3.220(h)(1)].

A new section of the Rule indicates that "law enforcement **officers shall appear for deposition without subpoena, upon written notice of taking deposition delivered at the address of the law enforcement agency or department" or at an address designated by the agency or department, five days prior to the date of the deposition**. Apparently, the notice need only be delivered to the agency or department at the address provided, not personally served on the officer. The rules for serving a "notice of deposition" are more relaxed than those for serving a subpoena and a properly served "notice of deposition" can have full force and effect. "Law enforcement officers who fail to appear for deposition after being served with the notice <u>are subject to contempt proceedings</u>." [RCrP 3.220(h)(5)]. This makes witness coordination efforts of each department or agency especially important since "never personally receiving a notice" might not be considered a valid excuse by some courts if delivery to the employing agency can be demonstrated.

Subpoenas may still be used as a means of compelling a witness's attendance at a deposition, but in the case of law enforcement officers, subpoenas are no longer the sole method of requiring attendance. If subpoenas are utilized, the rules regarding service of them will still apply. Any witness who fails to appear after being subpoenaed will be subject to contempt. [RCrP 3.220(h)(1)].

A witness who is a resident of Florida may be required to attend a deposition only in the county where the witness resides, is employed, or where the witness regularly transacts his or her business in person. [RCrP 3.220(h)(1)].

TIP: The "good faith" effort to schedule depositions at convenient times is a two-way street. Officers must respond to defense attempt to schedule depositions at mutually convenient times. What constitutes a "good faith" effort will be a matter of subjective interpretation by the trial court. Failure by law enforcement to provide available dates and times or otherwise participate in the Rule's expected "good faith effort" will not prevent a deposition.

TIP: Make sure your office address is provided to the prosecutor for inclusion on the witness list. If

your agency utilizes a witness coordinator, your address should be listed in care of that coordinator. If an officer's address changes from the time the investigation begins to a time prior to deposition, be sure and notify the prosecutor or witness coordinator so that notices of depositions can be promptly forwarded to your attention.

TIP: The statutory protections against receiving service within vacation dates, etc. found at F.S. 48.031(4)(a) do not specifically refer to the newly implemented "notice of taking deposition" referred to by the Rule. To prevent deposition "scheduling ambush," officers should take advantage of the required "good faith effort" to cooperatively schedule depositions.

TIP: Remember that any "notice of taking deposition" must be delivered at the address of the law enforcement agency or department "five days prior to the date of the deposition." [RCrP 3.220(h)(5)]. Notices delivered with less than the required five days margin will not be valid. In order to establish that a notice was received too close to a deposition date, agencies should stamp the "receipt date" on all delivered notices.

Other Changes:

Under RCrP 3.220(l)(2), the prosecutor has expanded power to terminate abusive depositions and "take the matter to the judge." The court may terminate the deposition, limit the scope and manner of taking the deposition, limit the time of the deposition, continue the deposition until a later time, order the deposition to be taken in open court, and may also impose any sanction authorized by the rule. Among the authorized sanctions for willful violation by attorneys or "a party not represented by counsel" of the discovery rules is the imposition of costs incurred by the opposing party in enforcing the discovery rule as well as contempt penalties.

Similar changes to those discussed in this Bulletin were made to Florida Rule of Juvenile Procedure 8.060(d) as it applies to depositions done in juvenile cases. In addition, the Court has restricted depositions in juvenile cases in which only a misdemeanor or criminal traffic offense has been alleged. These changes bring the juvenile discovery procedures into alignment with the criminal discovery rules.

Officers should consult with their agency's legal advisor to determine how the rule changes will be incorporated into agency procedures. A copy of Rule 3.220 as amended is included with this Bulletin in the Appendix. On the last page of this Bulletin is a "worksheet" that may assist officers in making preliminary indications of which category a witness should be placed. Agencies should, in consultation with their State Attorney, determine whether such a sheet will be useful. The prosecutor is responsible for making the "final call" on witness categorization, but until the changes implemented by the Rule have "settled in," some confusion and differences in categorization choices should be anticipated.

RULE OF CRIMINAL PROCEDURE 3.220. DISCOVERY
(as amended, effective 12:01 am, 10/196)
Note: For full Court order adopting changes to this Rule and Florida Rule of Juvenile Procedure 8.060(d), showing deletions and additions and including commentary, see: 21 FLW S369.

(a) Notice of Discovery. After the filing of the charging document, a defendant may elect to participate in the discovery process provided by these rules, including the taking of discovery depositions, by filing with the court and serving on the prosecuting attorney a "Notice of Discovery" which shall bind both the prosecution and defendant to all discovery procedures contained in these rules. Participation by a defendant in the discovery process, including the taking of any deposition by a defendant, shall be an election to participate in discovery. If any defendant knowingly or purposely shares in discovery obtained by a codefendant, the defendant shall be deemed to have elected to participate in discovery.

(b) Prosecutor's Discovery Obligation.

(1) Within 15 days after service of the Notice of Discovery, the prosecutor shall serve a written Discovery Exhibit which shall disclose to the defendant and permit the defendant to inspect, copy, test, and photograph the following information and material within the state's possession or control:

(A) a list of the names and addresses of all persons known to the prosecutor to have information that may be relevant to any offense charged or any defense thereto, or to any similar fact evidence to be presented at trial under section 90.404(2), Florida Statutes. The names and addresses of persons listed shall be clearly designated in the following categories:

(i) Category A. These witnesses shall include (1) eye witnesses, (2) alibi witnesses and rebuttal to alibi witnesses, (3) witnesses who were present when a recorded or unrecorded statement was taken from or made by a defendant or codefendant, which shall be separately identified within this category, (4) investigating officers, (5) witnesses known by the prosecutor to have any material information that tends to negate the guilt of the defendant as to any offense charged, (6) child hearsay witnesses, and (7) expert witnesses who have not provided a written report and a curriculum vitae or who are going to testify to test results or give opinions that will have to meet the test set forth in Frye v. United States, 293 F. 1013 (D.C.Cir.1923).

(ii) Category B. All witnesses not listed in either Category A or Category C.

(iii) Category C. All witnesses who performed only ministerial functions or whom the prosecutor does not intend to call at trial and whose involvement with and knowledge of the case is fully set out in a police report or other statement furnished to the defense;

(B) the statement of any person whose name is furnished in compliance with the preceding subdivision. The term "statement" as used herein includes a written statement made by the person and signed or otherwise adopted or approved by the person and also includes any statement of any kind or manner made by the person and written or recorded or summarized in any writing or recording. The term "statement" is specifically intended to include all police and investigative reports of any kind prepared for or in connection with the case, but shall not include the notes from which those reports are compiled;

(C) any written or recorded statements and the substance of any oral statements made by the defendant, including a copy of any statements contained in police reports or report summaries, together with the name and address of each witness to the statements;

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

(E) those portions of recorded grand jury minutes that contain testimony of the defendant;

(F) any tangible papers or objects that were obtained from or belonged to the defendant;

(G) whether the state has any material or information that has been provided by a confidential informant;

(H) whether there has been any electronic surveillance, including wiretapping, of the premises of the defendant or of conversations to which the defendant was a party and any documents relating thereto;

(I) whether there has been any search or seizure and any documents relating thereto;

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

(K) any tangible papers or objects that the prosecuting attorney intends to use in the hearing or trial and that were not obtained from or that did not belong to the defendant.

(2) If the court determines, in camera, that any police or investigative report contains irrelevant, sensitive information or information interrelated with other crimes or criminal activities and the disclosure of the contents of the police report may seriously impair law enforcement or jeopardize the investigation of those other crimes or activities, the court may prohibit or partially restrict the disclosure.

(3) The court may prohibit the state from introducing into evidence any of the foregoing material not disclosed, so as to secure and maintain fairness in the just determination of the cause.

(4) As soon as practicable after the filing of the charging document the prosecutor shall disclose to the defendant any material information within the state's possession or control that tends to negate the guilt of the defendant as to any offense charged, regardless of whether the defendant has incurred reciprocal discovery obligations.

(c) Disclosure to Prosecution.

(1) After the filing of the charging document and subject to constitutional limitations, the court may require a defendant to:

(A) appear in a lineup;

(B) speak for identification by witnesses to an offense;

(C) be fingerprinted;

(D) pose for photographs not involving reenactment of a scene;

(E) try on articles of clothing;

(F) permit the taking of specimens of material under the defendant's fingernails;

(G) permit the taking of samples of the defendant's blood, hair, and other materials of the defendant's body that involves no unreasonable intrusion thereof;

(H) provide specimens of the defendant's handwriting; and

(I) submit to a reasonable physical or medical inspection of the defendant's body.

(2) If the personal appearance of a defendant is required for the foregoing purposes, reasonable notice of the time and location of the appearance shall be given by the prosecuting attorney to the defendant and his or her counsel. Provisions may be made for appearances for such purposes in an order admitting a defendant to bail or providing for pretrial release.

(d) Defendant's Obligation.

(1) If a defendant elects to participate in discovery, either through filing the appropriate notice or by participating in any discovery process, including the taking of a discovery deposition, the following disclosures shall be made:

(A) Within 15 days after receipt by the defendant of the Discovery Exhibit furnished by the prosecutor pursuant to subdivision (b)(1)(A) of this rule, the defendant shall furnish to the prosecutor a written list of the names and addresses of all witnesses whom the defendant expects to call as witnesses at the trial or hearing. When the prosecutor subpoenas a witness whose name has been furnished by the defendant, except for trial subpoenas, the rules applicable to the taking of depositions shall apply.

(B) Within 15 days after receipt of the prosecutor's Discovery Exhibit the defendant shall serve a written Discovery Exhibit which shall disclose to and permit the prosecutor to inspect, copy, test, and photograph the following information and material that is in the defendant's possession or control:

(i) the statement of any person listed in subdivision (d)(1)(A), other than that of the defendant;

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

(iii) any tangible papers or objects that the defendant intends to use in the hearing or trial.

(2) The prosecutor and the defendant shall perform their obligations under this rule in a manner mutually agreeable or as ordered by the court.

(3) The filing of a motion for protective order by the prosecutor will automatically stay the times provided for in this subdivision. If a protective order is granted, the defendant may, within 2 days thereafter, or at any time before the prosecutor furnishes the information or material that is the subject of the motion for protective order, withdraw the defendant's notice of discovery and not be required to furnish reciprocal discovery.

(e) Restricting Disclosure. The court on its own initiative or on motion of counsel shall deny or partially restrict disclosures authorized by this rule if it finds there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from the disclosure, that outweighs any usefulness of the disclosure to either party.

(f) Additional Discovery. On a showing of materiality, the court may require such other discovery to the parties as justice may require.

(g) Matters Not Subject to Disclosure.

(1) Work Product. Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney or members of their legal staffs.

(2) Informants. Disclosure of a confidential informant shall not be required unless the confidential informant is to be produced at a hearing or trial or a failure to disclose the informant's identity will infringe the constitutional rights of the defendant.

(h) Discovery Depositions.

(1) Generally. At any time after the filing of the charging document any party may take the deposition upon oral examination of any person authorized by this rule. A party taking a deposition shall give reasonable written notice to each other party and shall make a good faith effort to coordinate the date, time, and location of the deposition to accommodate the schedules of other parties and the witness to be deposed. The notice shall state the time and the location where the deposition is to be taken, the name of each person to be examined, and a certificate of counsel that a good faith effort was made to coordinate the deposition schedule. After notice to the parties the court may, for good cause shown, extend or shorten the time and may change the location of the deposition. Except as provided herein, the procedure for taking the deposition, including the scope of the examination, shall be the same as that provided in the Florida Rules of Civil Procedure. Any deposition taken pursuant to this rule may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. The trial court or the clerk of the court shall, upon application, issue subpoenas for the persons whose depositions are to be taken. In any case, including multiple defendants or consolidated cases, no person shall be deposed more than once except by consent of the parties or by order of the court issued on good cause shown. A witness who is a resident of the state may be required to attend a deposition only in the county where the witness resides, where the witness is employed, or where the witness regularly transacts his or her business in person. A witness who refuses to obey a duly served subpoena may be adjudged in contempt of the court from which the subpoena issued.

(A) The defendant may, without leave of court, take the deposition of any witness listed by the prosecutor as a Category A witness or listed by a co- defendant as a witness to be called at a joint trial or hearing. After receipt by the defendant of the Discovery Exhibit, the defendant may, without

leave of court, take the deposition of any unlisted witness who may have information relevant to the offense charged. The prosecutor may, without leave of court, take the deposition of any witness listed by the defendant to be called at a trial or hearing.

(B) No party may take the deposition of a witness listed by the prosecutor as a Category B witness except upon leave of court with good cause shown. In determining whether to allow a deposition, the court should consider the consequences to the defendant, the complexities of the issues involved, the complexity of the testimony of the witness (e.g., experts), and the other opportunities available to the defendant to discover the information sought by deposition.

(C) A witness listed by the prosecutor as a Category C witness shall not be subject to deposition unless the court determines that the witness should be listed in another category.

(D) No deposition shall be taken in a case in which the defendant is charged only with a misdemeanor or a criminal traffic offense when all other discovery provided by this rule has been complied with unless good cause can be shown to the trial court. In determining whether to allow a deposition, the court should consider the consequences to the defendant, the complexity of the issues involved, the complexity of the witness' testimony (e.g., experts), and the other opportunities available to the defendant to discover the information sought by deposition. However, this prohibition against the taking of depositions shall not be applicable if following the furnishing of discovery by the defendant the state then takes the statement of a listed defense witness

pursuant to section 27.04, Florida Statutes.

(2) Transcripts. No transcript of a deposition for which a county may be obligated to expend funds shall be ordered by a party unless it is:

(A) agreed between the state and any defendant that the deposition should be transcribed and a written agreement certifying that the deposed witness is material or specifying other good cause is filed with the court or

(B) ordered by the court on a showing that the deposed witness is material or on showing of good cause.

This rule shall not apply to applications for reimbursement of costs pursuant to section 939.06, Florida Statutes, and article I, section 9, of the Florida Constitution.

(3) Location of Deposition. The deposition shall be taken in a building where the trial will be held, such other location agreed on by the parties, or such location as the trial judge, administrative judge, or chief judge may designate by special or general order.

(4) Depositions of Sensitive Witnesses. Depositions of children under the age of 16 shall be videotaped unless otherwise ordered by the court. The court may order the videotaping of a deposition or the taking of a deposition of a witness with fragile emotional strength to be in the presence of the trial judge or a special master.

(5) *{This section is all new language}* **Depositions of Law Enforcement Officers.** Subject to the general provisions of subdivision (h)(1), law enforcement officers shall appear for deposition, without subpoena, upon written notice of taking deposition delivered at the address of the law enforcement agency or department, or an address designated by the law enforcement agency or department, five days prior to the date of the deposition. Law enforcement officers who fail to appear for deposition after being served notice are subject to contempt proceedings.

(6) Witness Coordinating Office/Notice of Taking Deposition. If a witness coordinating office has been established in the jurisdiction pursuant to applicable Florida Statutes, the deposition of any witness should be coordinated through that office. The witness coordinating office should attempt to schedule the deposition of a witness at a time and location convenient for the witness and acceptable to the parties.

(7) Defendant's Physical Presence. A defendant shall not be physically present at a deposition except on stipulation of the parties or as provided by this rule.

The court may order the physical presence of the defendant on a showing of good cause. The court may consider (A) the need for the physical presence of the defendant to obtain effective discovery, (B) the intimidating effect of the defendant's presence on the witness, if any, (C) any cost or inconvenience which may result, and (D) any alternative electronic or audio/visual means available.

(8) Telephonic Statements. On stipulation of the parties and the consent of the witness, the statement of a law enforcement officer may be taken by telephone in lieu of the deposition of the officer. In such case, the officer need not be under oath. The statement, however, shall be recorded and may be used for impeachment at trial as a prior inconsistent statement pursuant to the Florida Evidence Code.

(i) Investigations Not to Be Impeded. Except as is otherwise provided as to matters not subject to disclosure or restricted by protective orders, neither the counsel for the parties nor other prosecution or defense personnel shall advise persons having relevant material or information (except the defendant) to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.

(j) Continuing Duty to Disclose. If, subsequent to compliance with the rules, a party discovers additional witnesses or material that the party would have been under a duty to disclose or produce at the time of the previous compliance, the party shall promptly disclose or produce the witnesses or material in the same manner as required under these rules for initial discovery.

(k) Court May Alter Times. The court may alter the times for compliance with any discovery under these rules on good cause shown.

(l) Protective Orders.

(1) Motion to Restrict Disclosure of Matters. On a showing of good cause, the court shall at any time order that specified disclosures be restricted, deferred, or exempted from discovery, that certain matters not be inquired into, that the scope of the deposition be limited to certain matters, that a deposition be sealed and after being sealed be opened only by order of the court, or make such other order as is appropriate to protect a witness from harassment, unnecessary inconvenience, or invasion of privacy, including prohibiting the taking of a deposition. All material and information to which a party is entitled, however, must be disclosed in time to permit the party to make beneficial use of it.

(2) Motion to Terminate or Limit Examination. At any time during the taking of a deposition, on motion of a party or of the deponent, and upon a showing that the examination is being conducted in bad faith or in such manner as to unreasonably annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the circuit court where the deposition is being taken may (1) terminate the deposition, (2) limit the scope and manner of the taking of the deposition, (3) limit the time of the deposition, (4) continue the deposition to a later time, (5) order the deposition to be taken in open court, and, in addition, may (6) impose any sanction authorized by this rule. If the order terminates the deposition, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of any party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order.

(m) In Camera and Ex Parte Proceedings.

(1) Any person may move for an order denying or regulating disclosure of sensitive matters. The court may consider the matters contained in the motion in camera.

(2) Upon request, the court shall allow the defendant to make an ex parte showing of good cause for taking the deposition of a Category B witness.

(3) A record shall be made of proceedings authorized under this subdivision. If the court enters an order granting relief after an in camera inspection or ex parte showing, the entire record of the

proceeding shall be sealed and preserved and be made available to the appellate court in the event of an appeal.

(n) Sanctions.

(1) 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 applicable discovery rule or with an order issued pursuant to an applicable discovery rule, the court may order the party to comply with the discovery or inspection of materials not previously disclosed or produced, grant a continuance, grant a mistrial, prohibit the party from calling a witness not disclosed or introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances.

(2) Willful violation by counsel or a party not represented by counsel of an applicable discovery rule, or an order issued pursuant thereto, shall subject counsel or the unrepresented party to appropriate sanctions by the court. The sanctions may include, but are not limited to, contempt proceedings against the attorney or unrepresented party, as well as the assessment of costs incurred by the opposing party, when appropriate.

(3) Every request for discovery or response or objection, including a notice of deposition made by a party represented by an attorney, shall be signed by at least 1 attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and list his or her address. The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection and that to the best of the signer's knowledge, information, or belief formed after a reasonable inquiry it is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of this rule, the court, on motion or on its own initiative, shall impose on the person who made the certification, the firm or agency with which the person is affiliated, the party on whose behalf the request, response, or objection is made, or any or all of the above an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

(o) Costs of Indigents. After a defendant is adjudged insolvent, the reasonable costs incurred in the operation of these rules shall be taxed as costs against the county.

(p) Pretrial Conference.

(1) The trial court may hold 1 or more pretrial conferences, with trial counsel present, to consider such matters as will promote a fair and expeditious trial. The defendant shall be present unless the defendant waives this in writing.

(2) The court may set, and upon the request of any party shall set, a discovery schedule, including a discovery cut-off date, at the pretrial conference.

(3) In capital cases, if the prosecutor intends to seek the death penalty, the court shall order the disclosure of aggravating and mitigating circumstances to be relied upon in good faith at trial.

--(end of Rule)--

{SAMPLE FORMAT FOR SUGGESTED "POSSIBLE CATEGORIZATION" MEMO. This is NOT part of Rule 3.220, and is offered only as a suggested means of assisting prosecutors in witness categorization.)}

DATE: _____

MEMO TO: Trial Prosecutor
_____

FROM:
_____

RE: State vs. _____
Case #_____

SUBJECT: Preliminary Discovery Categorization Of Known Possible State Witnesses

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The following listing is a suggestion of how witnesses could be categorized for purposes of your discovery response, offered solely to assist you in making your determination.

NAMES/NOTICE ADDRESSES OF CATEGORY A WITNESSES (Category A witnesses include: (1) Eyewitnesses; (2) Alibi witnesses and rebuttal to alibi witnesses; (3) witnesses present when a recorded or unrecorded statement was made by, or taken from a defendant or co-defendant, all of whom must be specially-designated on the witness list; (4) investigating officers (defined in comments to the Rule as "an officer who has directed the collection of evidence, interviewed material witnesses, or who was assigned as the case investigator."); (5) witnesses known to have any material information that tends to negate the guilt of the defendant as to any offense charged; (6) child hearsay witnesses; and (7) expert witnesses who have not provided a written report and a curriculum vitae or who are going to testify test results or give opinions that are subject to the "Frye Test"): If checked, list continued on back or by attachment.

NAMES/ADDRESSES OF CATEGORY B WITNESSES (All witnesses not listed as either Category A or Category C witnesses are "B" witnesses. "B" witnesses include, but are not limited to, witnesses whose only connection to the case are as owners of property; transporting officers, booking officers, records or evidence custodians, and experts who have filed a report and curriculum vitae who will not offer opinions subject to the Frye test.): If checked, list continued on back or by attachment.

NAMES/ADDRESSES OF CATEGORY C WITNESSES (Those who performed only ministerial functions, or

are those you may have no need to call at trial and whose involvement with, and knowledge of the case is fully set out in a police report or other statement provided to you in this discovery packet.):

If checked, list continued on back or by attachment.

For Further Information Contact:

Michael Ramage, General Counsel
Florida Department of Law Enforcement
(850) 410-7676