

CHAPTER 40

DISCOVERY AND DEPOSITIONS

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For previous Histories and Commentaries see the editions of the Practice Book corresponding to the years of the previous amendments.

Sec. 40-1. Discovery in General; Regulating Discovery

Except as otherwise provided in these rules, the judicial authority before whom the defendant appears shall fix the times for filing and for responding to discovery motions and requests and, when appropriate, shall fix the hour, place, manner, terms, and conditions of responses to the motions and requests.

(P.B. 1978-1997, Sec. 732.)

Sec. 40-2. —Good Faith Efforts and Subpoenas

When documents or objects are the subject of discovery orders, good faith efforts shall be made by the party to whom any such order is directed to secure their possession. If the efforts of such party are unsuccessful the judicial authority shall, upon written request, issue a subpoena or order directing that such documents or objects be delivered to the clerk of the court within a specified time. The clerk shall give a receipt for them and

be responsible for their safekeeping. Such documents and tangible objects shall be sealed and shall be open to inspection only upon an order of the judicial authority.

(P.B. 1978-1997, Sec. 733.)

Sec. 40-3. —Continuing Obligation to Disclose

If prior to or during trial a party discovers additional material previously ordered to be disclosed or which the party is otherwise obligated to disclose, such party shall promptly notify the other party and the judicial authority of its existence.

(P.B. 1978-1997, Sec. 734.)

Sec. 40-4. —Limitations on Requests or Motions

A party shall file all requests or motions under this chapter within the time specified and shall include in the initial request or motion all information or materials sought. The judicial authority may for good cause shown allow the filing of supplemental requests or motions.

(P.B. 1978-1997, Sec. 735.)

Sec. 40-5. —Failure to Comply with Disclosure

If a party fails to comply with disclosure as required under these rules, the opposing party may move the judicial authority for an appropriate order. The judicial authority hearing such a motion may enter such orders and time limitations as it deems appropriate, including, without limitation, one or more of the following:

- (1) Requiring the noncomplying party to comply;
- (2) Granting the moving party additional time or a continuance;
- (3) Relieving the moving party from making a disclosure required by these rules;
- (4) Prohibiting the noncomplying party from introducing specified evidence;
- (5) Declaring a mistrial;
- (6) Dismissing the charges;
- (7) Imposing appropriate sanctions on the counsel or party, or both, responsible for the noncompliance; or
- (8) Entering such other order as it deems proper.

(P.B. 1978-1997, Sec. 735A.)

Sec. 40-6. —Discovery Performance

Unless otherwise specified by agreement of the parties or judicial order, the parties shall perform their obligations under Sections 40-1 through 40-10 by making available at reasonable times specified information and materials for inspecting, testing, copying and photographing.

(P.B. 1978-1997, Sec. 737.)

Sec. 40-7. —Procedures for Disclosure

(a) All requests for disclosure by any party shall be filed in accordance with Section 41-5 and shall be served in accordance with Sections 10-12 through 10-17 but need not be filed with the court, subject, however, to the provisions of Section 40-40 et seq. The party requesting disclosure or the party responding shall file with the court a notice of service certifying that a request or response was served and the date and manner of service. The party responsible for service of a document shall retain custody of the original.

(b) Except as otherwise provided in Section 40-13, any party may make disclosure by notifying the opposing party that all pertinent material and information may be inspected and, if practicable, copied at specific times and locations and the parties may schedule agreed dates and times to photograph and have reasonable tests made upon any disclosed material.

(P.B. 1978-1997, Sec. 737A.)

Sec. 40-8. —Objection to Disclosure

Notwithstanding the provisions of Sections 40-11 and 40-26, the prosecuting authority or the defendant may object to disclosure of any information or items which are directed to be provided by those sections but which the objecting party believes for good cause should not be disclosed or for which it is reasonably believed that a protective order provided by Section 40-40 et seq. would be warranted. Such objection shall be made in writing and shall set forth the grounds of such belief as fully as possible. The objection shall be served in accordance with Sections 10-12 through 10-17 and a copy shall be filed with the court within twenty days of the request unless the judicial authority, for good cause shown, allows a later filing. After hearing the judicial authority shall determine whether such information or items shall be disclosed.

(P.B. 1978-1997, Sec. 737B.)

Sec. 40-9. —Presence during Tests and Experiments

If a scientific test or experiment to be performed upon any object which has been the subject of a disclosure order may preclude or impair any further tests or experiments, the opposing party and any other person known to have or believed to have an interest in the matter shall be given reasonable notice and opportunity to be present and to have an expert observe or participate in the test or experiment, unless the judicial authority for good cause shall order otherwise.

(P.B. 1978-1997, Sec. 738.)

Sec. 40-10. —Custody of Materials

(a) Any materials furnished to counsel pursuant to this chapter, including statements, reports and affidavits disclosed pursuant to Section 40-13A, shall be used only for the purposes of conducting such counsel's side of the case or for the performance of his or her official duties, and shall be subject to such other terms and conditions as the judicial authority may provide. Without the prior approval of the prosecuting authority or the court, defense counsel and his or her agents shall not provide copies of materials disclosed pursuant to Section 40-13A to any person except to persons employed by defense counsel in connection with the investigation or defense of the case.

(b) The prosecuting authority is not required to disclose to an unrepresented defendant the names and addresses required by Section 40-13 unless the court orders disclosure upon a finding of need which cannot reasonably be met by other means. Before other materials are disclosed or provided to an unrepresented defendant pursuant to this chapter, the prosecuting authority may request and the court may order that the materials remain in the defendant's exclusive custody to be used only for the purpose of conducting the case, subject to such terms, conditions and restrictions that the court, in its discretion, may impose. The court shall also inform the unrepresented defendant that violation of an order issued under this subsection is punishable as a contempt of court.

(P.B. 1978-1997, Sec. 739.) (Amended June 22, 2009, to take effect Jan. 1, 2010.)

Sec. 40-11. Disclosure by the Prosecuting Authority

(Amended June 22, 2009, to take effect Jan. 1, 2010.)

(a) Upon written request by a defendant filed in accordance with Section 41-5 and without requiring any order of the judicial authority, the prosecuting authority, subject to Section 40-40 et seq., shall promptly, but no later than forty-five days from the filing of the request, unless such time is extended by the judicial authority for good cause shown, disclose in writing the existence of, provide photocopies of, and allow the defendant in accordance with Section 40-7, to inspect, copy, photograph and have reasonable tests made on any of the following items:

- (1) Exculpatory information or materials;
- (2) Any books, tangible objects, papers, photographs, or documents within the possession, custody or control of any governmental agency, which the prosecuting authority intends to offer in evidence in chief at trial or which are material to the preparation of the defense or which were obtained from or purportedly belong to the defendant;

(3) Copies of the defendant's prior criminal record, if any, which are within the possession, custody, or control of the prosecuting authority, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting authority;

(4) Any reports or statements of experts made in connection with the offense charged including results of physical and mental examinations and of scientific tests, experiments or comparisons which are material to the preparation of the defense or are intended for use by the prosecuting authority as evidence in chief at the trial;

(5) Any warrant executed for the arrest of the defendant for the offense charged, and any search and seizure warrants issued in connection with the investigation of the offense charged;

(6) (i) Any written, recorded or oral statements made by the defendant or a codefendant, before or after arrest to any law enforcement officer or to a person acting under the direction of or in cooperation with a law enforcement officer concerning the offense charged; or

(ii) Any relevant statements of coconspirators which the prosecuting authority intends to offer in evidence at any trial or hearing.

(b) In addition to the foregoing, the defendant shall be entitled to disclosure of exculpatory materials in accordance with any applicable constitutional and statutory provisions.

(P.B. 1978-1997, Sec. 741.) (Amended June 22, 2009, to take effect Jan. 1, 2010.)

Sec. 40-12. Discretionary Disclosure Directed to Prosecuting Authority

Upon written request by a defendant filed in accordance with Section 40-7 the judicial authority may direct the prosecuting authority to disclose in writing to the defendant and make available for inspection, photographing, copying and reasonable testing any other relevant material and information not covered by Section 40-11 which the judicial authority determines on good cause shown should be made available.

(P.B. 1978-1997, Sec. 742.)

Sec. 40-13. Names of Witnesses; Prior Record of Witnesses; Statements of Witnesses

(Amended June 22, 2009, to take effect Jan. 1, 2010.)

(a) Upon written request by a defendant filed in accordance with Section 41-5 and without requiring any order of the judicial authority, the prosecuting authority, subject to Section 40-40 et seq., shall promptly, but no later than forty-five days from the filing of the request, unless such time is extended by the judicial authority for good cause shown, disclose to the defendant the

names and, subject to the provisions of subsections (f) and (g) of this section, the addresses of all witnesses that the prosecuting authority intends to call in his or her case-in-chief and shall additionally disclose to the defendant any record of felony convictions of the witnesses known to the prosecuting authority and any record of felony or misdemeanor charges pending against the witnesses known to the prosecuting authority.

(b) Upon written request by the prosecuting authority, filed in accordance with Section 41-5 and without requiring any order of the judicial authority, the defendant, subject to Section 40-40 et seq., shall promptly, but no later than forty-five days from the filing of the request, unless such time is extended by the judicial authority for good cause shown, disclose to the prosecuting authority the names and, subject to the provisions of subsection (g) of this section, the addresses of all witnesses whom the defendant intends to call in the defendant's case-in-chief and shall additionally disclose to the prosecuting authority any statements of the witnesses other than the defendant in the possession of the defendant or his or her agents, which statements relate to the subject matter about which each witness will testify.

(c) No witness shall be precluded from testifying for any party because his or her name or statement or criminal history was not disclosed pursuant to this rule if the party calling such witness did not in good faith intend to call the witness at the time that he or she provided the material required by this rule. In the interests of justice the judicial authority may in its discretion permit any undisclosed individual to testify.

(d) The provisions of this section shall apply to any additional testimony presented by any party as rebuttal evidence pursuant to Section 42-35 (3) and the statements and criminal histories of such witnesses shall be provided to the opposing party before the commencement of any such rebuttal testimony.

(e) The fact that a witness' name or statement is provided under this section shall not be a ground for comment upon a failure to call a witness.

(f) Notwithstanding any provision of this section, the personal residence address of a police officer or correction officer shall not be required to be disclosed except pursuant to an order of the judicial authority after a hearing and a showing that good cause exists for the disclosure of the information.

(g) Upon written request of a party and for good cause shown, the judicial authority may order that

the address of any witness whose name was disclosed pursuant to subsections (a) or (b) of this section not be disclosed to the opposing party.

(P.B. 1978-1997, Sec. 743.) (Amended June 22, 2009, to take effect Jan. 1, 2010.)

Sec. 40-13A. Law Enforcement Reports, Affidavits and Statements

Upon written request by a defendant and without requiring any order of the judicial authority, the prosecuting authority shall, no later than forty-five days from receiving the request, provide photocopies of all statements, law enforcement reports and affidavits within the possession of the prosecuting authority and his or her agents, including state and local law enforcement officers, which statements, reports and affidavits were prepared concerning the offense charged, subject to the provisions of Sections 40-10 and 40-40 et seq.

(Adopted June 22, 2009, to take effect Jan. 1, 2010.)

Sec. 40-14. Information Not Subject to Disclosure by Prosecuting Authority

Subject to Sections 40-13 and 40-13A and except for the substance of any exculpatory material contained herein, Sections 40-11 through 40-14 do not authorize or require disclosure or inspection of:

(1) Reports, memoranda or other internal documents made by a prosecuting authority or by law enforcement officers in connection with the investigation or prosecution of the case;

(2) Legal research;

(3) Records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of a prosecuting authority.

(P.B. 1978-1997, Sec. 746.) (Amended June 22, 2009, to take effect Jan. 1, 2010.)

Sec. 40-15. Disclosure of Statements; Definition of Statement

The term "statement" as used in Sections 40-11, 40-13 and 40-26 means:

(1) A written statement made by a person and signed or otherwise adopted or approved by such person; or

(2) A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by a person and recorded contemporaneously with the making of such oral statement.

(P.B. 1978-1997, Sec. 749.)

Sec. 40-16. Request for Recess by Defendant upon Receipt of Statement

Whenever any statement is delivered to a defendant pursuant to Section 40-13, the judicial authority in its discretion, upon application of the defendant, may recess the proceedings for such

time as it may determine to be reasonably required for the examination of such statement by the defendant and his or her preparation for its use in the trial.

(P.B. 1978-1997, Sec. 754.)

Sec. 40-17. Defense of Mental Disease or Defect or Extreme Emotional Disturbance; Notice by Defendant

If a defendant intends to rely upon the affirmative defense of mental disease or defect or of extreme emotional disturbance at the time of the alleged crime, the defendant shall, not later than forty-five days after the first pretrial conference in the court where the case will be tried or at such later time as the judicial authority may direct, notify the prosecuting authority in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this rule, such affirmative defenses may not be raised. The judicial authority may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(P.B. 1978-1997, Sec. 758.)

Sec. 40-18. —Notice by Defendant of Intention to Use Expert Testimony regarding Mental State; Filing Reports of Exam

If a defendant intends to introduce expert testimony relating to the affirmative defenses of mental disease or defect, or of extreme emotional disturbance or another condition bearing upon the issue of whether he or she had the mental state required for the offense charged, the defendant shall, not later than forty-five days after the first pretrial conference in the court where the case will be tried or at such later time as the judicial authority may direct, notify the prosecuting authority in writing of such intention and file a copy of such notice with the clerk. The defendant shall also furnish the prosecuting authority with copies of reports of physical or mental examinations of the defendant prepared by an expert whom the defendant intends to call as a witness in connection with the offense charged, within five days after receipt thereof. The judicial authority may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(P.B. 1978-1997, Sec. 759.)

Sec. 40-19. —Prosecutorial Motion for Psychiatric Examination

In an appropriate case the judicial authority may, upon motion of the prosecuting authority, order the defendant to submit to a psychiatric examination by a psychiatrist designated for this

purpose by the prosecuting authority. No statement made by the defendant in the course of any examination provided for by Sections 40-17 through 40-19, whether the examination shall be with or without the consent of the defendant, shall be admitted in evidence against the defendant on the issue of guilt in any criminal proceeding. A copy of the report of the psychiatric examination shall be furnished to the defendant within five days after the receipt thereof by the prosecuting authority.

(P.B. 1978-1997, Sec. 760.)

Sec. 40-20. —Failure of Expert to Submit Report

If any expert fails to submit any written report of the result of any physical or mental examination conducted pursuant to Sections 40-17 through 40-19 the judicial authority, upon request of the party who engaged the expert, may issue an appropriate subpoena or order pursuant to Section 40-2 or may direct that the expert's deposition be taken pursuant to Sections 40-44 through 40-58.

(P.B. 1978-1997, Sec. 760A.)

Sec. 40-21. Defense of Alibi; Notice by Defendant

Upon written demand filed by the prosecuting authority stating the time, date, and place at which the alleged offense was committed, the defendant shall file within twenty days, or at such other time as the judicial authority may direct, a written notice of the defendant's intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi.

(P.B. 1978-1997, Sec. 763.)

Sec. 40-22. —Notice by Prosecuting Authority concerning Alibi Defense

If the written notice has been filed pursuant to Section 40-21, the prosecuting authority, within twenty days after filing of the notice, but in no event less than ten days before the trial unless the judicial authority otherwise directs, shall file a written notice stating the names and addresses of the witnesses upon whom the state intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied upon to rebut testimony of any of the defendant's alibi witnesses.

(P.B. 1978-1997, Sec. 764.)

Sec. 40-23. —Continuing Duty of Parties to Disclose regarding Alibi Defense

If prior to or during the trial, a party learns of an additional witness whose identity, if known, should have been included in the information furnished under Sections 40-21 or 40-22, the party shall promptly notify the other party or his or her counsel of the existence and identity of such additional witness.

(P.B. 1978-1997, Sec. 765.)

Sec. 40-24. —Exceptions

For good cause shown, the judicial authority may grant an exception to any of the requirements of Sections 40-21 through 40-23.

(P.B. 1978-1997, Sec. 767.)

Sec. 40-25. —Inadmissibility of Withdrawn Alibi

Evidence of an intention to rely upon an alibi defense which intention is later withdrawn, or evidence of statements made in connection with such intention, is not admissible in any criminal proceeding against the person who gave notice of the intention.

(P.B. 1978-1997, Sec. 768.)

Sec. 40-26. Disclosure by the Defendant; Information and Materials Discoverable by the Prosecuting Authority as of Right

Upon written request by the prosecuting authority filed in accordance with Section 41-5 and without requiring any order of the judicial authority, the defendant, subject to Section 40-40 et seq., shall promptly, but no later than forty-five days from the filing of the request, unless such time is extended by the judicial authority for good cause shown, disclose in writing to the prosecuting authority the existence of and make available for examination and copying in accordance with the procedures of Section 40-7 the following items:

(1) Any books, papers, documents, photographs or tangible objects which the defendant intends to offer in evidence at trial except to the extent that it contains any communication of the defendant; and

(2) Any reports or statements of experts made in connection with the case, including results of physical or mental examinations and of scientific tests, experiments or comparisons, which the defendant intends to offer in evidence at trial or relating to the anticipated testimony of a person whom the defendant intends to call as a witness.

(P.B. 1978-1997, Sec. 769.)

Sec. 40-27. Discretionary Disclosure Directed to Defendant

Upon written request by a prosecuting authority filed in accordance with Section 40-7 the judicial

authority may direct the defendant to disclose in writing to the prosecuting authority and make available for inspection, photographing, copying and reasonable testing any other relevant material and information not covered by Section 40-26 which the judicial authority determines on good cause shown should be made available.

(P.B. 1978-1997, Sec. 769A.)

Sec. 40-28. Derivative Evidence

The defendant shall be supplied with copies of any reports of experts derived from or based upon the examination of materials produced pursuant to Section 40-26.

(P.B. 1978-1997, Sec. 770.)

Sec. 40-29. Protective Orders Requested by Defendant

The defendant may, to the same extent as the prosecuting authority, move for a protective order under the provisions of Sections 40-40 through 40-43.

(P.B. 1978-1997, Sec. 771.)

Sec. 40-30. Admissibility at Time of Trial

The fact that the defendant has indicated an intent to offer a matter in evidence or to call a person as a witness pursuant to Sections 40-17 through 40-31 is not admissible in evidence at the defendant's trial. Information obtained by the prosecuting authority pursuant to Sections 40-17 through 40-31 shall be used only for the cross-examination or rebuttal of defense testimony except with permission of the judicial authority for good cause shown.

(P.B. 1978-1997, Sec. 772.)

Sec. 40-31. Information Not Subject to Disclosure by Defendant

Subject to Section 40-13 and except as to scientific or medical reports, Sections 40-17 through 40-31 do not authorize or require disclosure or inspection of:

(1) Reports, memoranda or other internal defense documents made by the defendant, or counsel for the defendant or any person employed by the defendant in connection with the investigation or defense of the case;

(2) Legal research; or

(3) Records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the defendant, counsel for the defendant, or any other person employed by the defendant in connection with the investigation or defense of the case.

(P.B. 1978-1997, Sec. 773.)

Sec. 40-32. Obtaining Nontestimonial Evidence from Defendant

Upon motion of the prosecuting authority, the judicial authority by order may direct a defendant to participate in a reasonably conducted procedure to obtain nontestimonial evidence, if the judicial authority finds probable cause to believe that:

(1) The evidence sought may be of material aid in determining whether the defendant committed the offense charged; and

(2) The evidence sought cannot practicably be obtained from other sources.

(P.B. 1978-1997, Sec. 776.)

Sec. 40-33. —Emergency Procedure regarding Nontestimonial Evidence

Upon application of the prosecuting authority, the judicial authority by order may direct a law enforcement officer to bring the defendant forthwith before the judicial authority for an immediate hearing on a motion made under Sections 40-32 through 40-39, if an affidavit or testimony shows that there is probable cause to believe that the evidence sought will be altered, dissipated, or lost if not promptly obtained. Upon presentation of the defendant, the judicial authority shall inform the defendant of his or her rights as specified in Sections 37-3 through 37-6 and shall afford the defendant reasonable opportunity to consult with an attorney before hearing the motion.

(P.B. 1978-1997, Sec. 777.)

Sec. 40-34. —Scope of Order for Nontestimonial Evidence

An order under Sections 40-32 through 40-39 may direct the defendant to participate in one or more of the following procedures:

(1) Appearing, moving, or speaking for identification in a lineup, but if a lineup is not practicable, then in some other reasonable procedure;

(2) Wearing clothing or other articles of personal use or adornment;

(3) Providing handwriting and voice exemplars;

(4) Submitting to the taking of photographs;

(5) Submitting to the taking of fingerprints, palm prints, footprints, and other body impressions;

(6) Submitting to the taking of specimens of saliva, breath, hair, and nails;

(7) Submitting to body measurements or other reasonable body surface examinations;

(8) Submitting to the removal of foreign substances or objects from the surface of the body, if the removal does not involve an unreasonable intrusion of the body or an unreasonable affront to the dignity of the individual;

(9) Submitting to the taking of specimens of blood and urine, if the taking does not involve an

unreasonable intrusion of the body or an unreasonable affront to the dignity of the individual;

(10) Submitting to physical examinations, including X-rays under medical supervision; or

(11) Submitting to chemical or physical tests of the surface of the body which do not involve an unreasonable intrusion of the body or an unreasonable affront to the dignity of the individual or a significant risk of injury.

(P.B. 1978-1997, Sec. 778.)

Sec. 40-35. —Contents of Order

An order under Sections 40-32 through 40-39 shall specify with particularity the authorized procedure, the scope of the defendant's participation, the time, duration, place, and other conditions of the procedure, and the person or persons who may conduct it. It shall inform the defendant that he or she may not be subjected to investigative interrogation while participating in or being present for the procedure, and that he or she may be held in contempt of court by failing to appear and participate in the procedure as directed. It may also direct the defendant not to alter substantially any identifying physical characteristics to be examined or to destroy any evidence sought.

(P.B. 1978-1997, Sec. 779.)

Sec. 40-36. —Service of Order

An order under Sections 40-32 through 40-39 shall be served by delivering a copy of the order to the defendant personally and to his or her counsel, if represented by counsel.

(P.B. 1978-1997, Sec. 780.)

Sec. 40-37. —Implementation of Order

An order directing the defendant to participate shall be implemented in the following manner:

(1) While participating in or being present for an authorized procedure, the defendant may be accompanied by counsel and by an observer of choice. The presence of other persons at the procedure may be limited as the judicial authority deems appropriate under the circumstances.

(2) The procedure shall be conducted with dispatch. If the taking of a specimen or the removal of a foreign substance involves an intrusion of the body, medical or other qualified supervision is required. Upon timely request of the defendant and approval by the judicial authority, the defendant may have a qualified physician designated by the defendant in attendance.

(3) The defendant may not be subjected to investigative interrogation while participating in or being present for the procedure.

(4) Any evidence obtained from the defendant may be used only with respect to the offense charged or any related offense.

(5) The defendant shall be furnished with a report of the results of the procedure within fifteen days of its completion.

(P.B. 1978-1997, Sec. 781.)

Sec. 40-38. —Obtaining Nontestimonial Evidence from Defendant upon Motion of Defendant

Upon motion of a defendant who has been arrested, summoned, or charged in a complaint or information, the judicial authority by order may direct the prosecuting authority to arrange for the defendant's participation in one or more of the procedures specified in Sections 40-32 through 40-39, if the judicial authority finds that the evidence sought could contribute to an adequate defense. The order shall specify with particularity the authorized procedure, the scope of the defendant's permitted participation, the designation of representatives of the prosecution who may be present, the time, duration, place and other conditions of the procedure, and the person or persons who may conduct the procedure. Sections 40-32 through 40-37 apply to procedures ordered under this section.

(P.B. 1978-1997, Sec. 782.)

Sec. 40-39. —Comparing Nontestimonial Evidence

Upon motion of the defendant, the judicial authority by order may direct a prosecuting authority to have a scientific comparison made between a specified sample or specimen of nontestimonial evidence in the prosecuting authority's possession or control and other nontestimonial evidence of a similar character in the prosecuting authority's possession or control, if the judicial authority finds that the results of the comparison could contribute to an adequate defense. The order shall specify the comparison authorized, the person or persons who may make it, and the appropriate conditions under which it is to be made.

(P.B. 1978-1997, Sec. 783.)

Sec. 40-40. Protective Orders; Relief

Upon the filing of a motion for a protective order by either party and after a hearing thereon, the judicial authority may at any time order that disclosure or inspection be denied, restricted or deferred, or that reasonable conditions be imposed as to the manner of inspection, photographing, copying or testing, to the extent necessary to protect the evidentiary values of any information or material.

(P.B. 1978-1997, Sec. 785.)

Sec. 40-41. —Grounds for Protective Order

In deciding the motion for a protective order the judicial authority may consider the following:

(1) The timeliness of the motion;

(2) The protection of witnesses and others from physical harm, threats of harm, bribes, economic reprisals and other intimidation;

(3) The maintenance of secrecy regarding informants as required for effective investigation of criminal activity;

(4) The protection of confidential relationships, privileges and communications recognized by law; and

(5) Any other relevant considerations.

(P.B. 1978-1997, Sec. 786.)

Sec. 40-42. —In Camera Proceedings

Upon the hearing of any motion under Sections 40-40 through 40-43, the judicial authority may permit all or part of any showing of cause for denial or deferral of access to be made in camera and out of the presence of the opposing party. Any in camera proceedings shall be recorded verbatim. If the judicial authority allows any access to be denied or deferred, the entire record of the in camera proceedings shall be sealed and preserved in the court's records, to be made available to the appellate court in the event of an appeal.

(P.B. 1978-1997, Sec. 787.)

Sec. 40-43. —Excision as Protective Order

If the moving party claims in a motion for a protective order that a portion of any information or materials requested or required to be disclosed is not subject to disclosure or inspection or contains irrelevant material, that party shall deliver such information or materials to the judicial authority for inspection in camera out of the presence of the other party. If the judicial authority excises any portion of such information or materials, a record of the in camera proceedings shall be made and sealed and preserved in the court's records, to be made available to the appellate court in the event of an appeal. That portion of the information or materials made available to the other party shall show that an excision has been made.

(P.B. 1978-1997, Sec. 788.)

Sec. 40-44. Depositions; Grounds

In any case involving an offense for which the punishment may be imprisonment for more than one year the judicial authority, upon request of any party, may issue a subpoena for the appearance of any person at a designated time and place to give his or her deposition if such person's testimony may be required at trial and it appears to the judicial authority that such person:

(1) Will, because of physical or mental illness or infirmity, be unable to be present to testify at any trial or hearing; or

(2) Resides outside of this state, and his or her presence cannot be compelled under the provisions of General Statutes § 54-82i; or

(3) Will otherwise be unable to be present to testify at any trial or hearing; or

(4) Is an expert who has examined a defendant pursuant to Sections 40-17 through 40-19 and has failed to file a written report as provided by such sections.

(P.B. 1978-1997, Sec. 791.)

Sec. 40-45. —Failure to Appear for Deposition

If, after proper service within this state of a subpoena, the person subpoenaed fails to appear at the designated place and time, the judicial authority may issue a *capias* directed to a proper officer to arrest and bring such person before the judicial authority.

(P.B. 1978-1997, Sec. 792.)

Sec. 40-46. —Use of Deposition

So far as otherwise admissible under the rules of evidence, a deposition may be used as evidence at the trial or at any hearing if the deponent is unavailable, as defined in Section 40-56. 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 such party to offer, or may himself or herself offer, all of it which is relevant to the part offered.

(P.B. 1978-1997, Sec. 793.)

Sec. 40-47. —Notice and Person Taking Deposition

The party at whose request the deposition is to be taken shall give the other parties reasonable written notice of the name and address of each person to be examined, the time and place for the deposition, and the manner of recording. The deposition may be taken before any officer authorized to administer oaths and agreed to by the parties or, absent such agreement, designated by the judicial authority. Such notice shall be served upon each party or each party's attorney by personal or abode service or by registered or certified mail.

(P.B. 1978-1997, Sec. 794.)

Sec. 40-48. —Protective Order Prior to Deposition

After a deposition is ordered, upon written motion seasonably made and served on all

affected persons by a party or by the deponent, the judicial authority may for good cause shown change the time, place, or manner of recording the deposition, or order that it shall not be taken or that the scope of the examination shall be limited to certain matters, or make any other order which justice requires. Upon written demand of the objecting party or the deponent, the taking of the deposition shall be suspended for the time required to act upon the motion. In no event shall the deposition of the defendant be taken without the defendant's consent.

(P.B. 1978-1997, Sec. 795.)

Sec. 40-49. —Manner of Taking Deposition

The witness shall be put on oath and a verbatim record of his or her testimony shall be made. The testimony shall be taken stenographically and transcribed, unless the judicial authority orders otherwise. In the event that the judicial authority orders that the testimony at a deposition be recorded by other than stenographic means, the order shall designate the manner of recording, (such as by videotape) preserving, and filing the deposition, and it may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If such an order is made, a party may nevertheless arrange to have a stenographic transcription made at his or her own expense.

(P.B. 1978-1997, Sec. 796.)

Sec. 40-50. —Scope of Examination at Deposition

The scope and manner of examination and cross-examination shall be the same as that allowed at trial. Each party having possession of a statement of the deponent shall make the statement available to the other party for examination and use at the taking of a deposition if such other party would be entitled to the statement at trial.

(P.B. 1978-1997, Sec. 797.)

Sec. 40-51. —Objections at Depositions

All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the questions or evidence presented, or to the conduct of any party, and any other objection to the proceedings shall be recorded by the person before whom the deposition is taken.

(P.B. 1978-1997, Sec. 798.)

Sec. 40-52. —Protective Order during Deposition

(a) At any time during the taking of the deposition, upon 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 annoy, embarrass, or oppress the deponent or a party, or to elicit privileged testimony, the judicial authority who ordered the deposition taken may order the person conducting the examination immediately to cease taking the deposition, or it may limit the scope and manner of taking the deposition by ordering:

(1) That certain matters not be inquired into, or that the scope of the examination be limited to certain matters; or

(2) That the examination be conducted with no one present except those persons designated by the judicial authority.

(b) Upon demand of the objecting party or the deponent, the taking of the deposition shall be suspended for the time necessary to act upon the motion.

(P.B. 1978-1997, Sec. 799.)

Sec. 40-53. —Return of Deposition

Except as otherwise provided in these rules, or as ordered by the judicial authority, depositions shall be sealed by the authority taking them and returned to the clerk of the court in which the prosecution is pending, who shall file such depositions. Any deposition returned unsealed or with the seal broken may be rejected by the judicial authority who ordered its taking.

(P.B. 1978-1997, Sec. 800.)

Sec. 40-54. —Right of Defendant to Be Present and Represented at Deposition

A defendant shall have the right to be present in person at any deposition subject to such terms and conditions as may be established by the judicial authority. Upon the application for the taking of a deposition, the judicial authority shall advise any defendant who is without counsel of the right thereto and assign counsel to represent such defendant unless he or she elects to proceed without counsel or is able to obtain counsel.

(P.B. 1978-1997, Sec. 801.)

Sec. 40-55. —Waiver of Presence and Failure to Appear at Deposition

A defendant may waive, in writing, the right to be present in person. Failure of a defendant not in custody, absent good cause shown, to appear after notice, shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right. The deposition

shall not be admissible in evidence if the defendant has not appeared in person and has not validly waived his or her right to appear. When a deposition is taken in the absence of the defendant, the prosecuting authority shall file a copy of the deposition within thirty days for inspection by the defendant, unless before that time he or she has delivered the deposition or a copy thereof to the defendant. If this section is not complied with, such deposition shall not be admissible in evidence.

(P.B. 1978-1997, Sec. 802.)

Sec. 40-56. —Definition of Unavailable

(a) "Unavailable" as used in Section 40-46 includes situations in which the deponent:

(1) Is exempted by a ruling of the judicial authority on the ground of privilege from testifying concerning the subject matter of his or her deposition;

(2) Persists in refusing to testify concerning the subject matter of his or her deposition despite an order of the judicial authority to do so;

(3) Testifies to a lack of memory of the subject matter of his or her deposition;

(4) Is unable to be present or to testify at a trial or hearing because of his or her death or physical or mental illness or infirmity; or

(5) Is absent from the trial or hearing and the proponent of his or her deposition has been unable to procure his or her attendance by subpoena or by other reasonable means.

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

(P.B. 1978-1997, Sec. 803.)

Sec. 40-57. —Taking and Use in Court of Deposition by Agreement

Nothing in Sections 40-44 through 40-58 precludes the taking of a deposition, orally or upon written interrogatories, or the use of a deposition by agreement of the parties with the consent of the judicial authority.

(P.B. 1978-1997, Sec. 804.)

Sec. 40-58. —Expenses of Deposition and Copies

All expenses incurred in the taking of a deposition, including a copy for each adverse party, but excluding counsel's fees, shall be paid by the party taking the deposition.

(P.B. 1978-1997, Sec. 805.)