

**AMERICAN BAR ASSOCIATION**  
**ADOPTED BY THE HOUSE OF DELEGATES**  
**FEBRUARY 14, 2011**

**RESOLUTION**

RESOLVED, That the American Bar Association urges federal, state, territorial, tribal, and local courts to adopt a procedure whereby a criminal trial court shall, at a reasonable time prior to a criminal trial, disseminate to the prosecution and defense a written checklist delineating in detail the general disclosure obligations of the prosecution under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny and applicable ethical standards.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial, tribal, and local courts in implementing the above procedure to require a criminal trial court to create a standing committee of local prosecutors and criminal defense attorneys to assist the court in formulating and updating the written checklist delineating in detail the prosecution's general disclosure obligations.

FURTHER RESOLVED, That any omissions or deficiencies in the written checklist provided by the court should not relieve either the prosecutor or defense counsel of their legal and ethical responsibilities with respect to providing and seeking disclosures.

## REPORT

In February 2010, the American Bar Association's House of Delegates passed Report 102D, *Judicial Role in Avoiding Wrongful Convictions*, in which the American Bar Association "urges policy making bodies of federal, state, local, and territorial courts to adopt a procedure whereby a criminal trial court shall conduct at a reasonable time prior to a criminal trial a conference with the parties to ensure that they are fully aware of their respective disclosure obligations under applicable discovery rules, statutes, ethical standards and the federal and state constitutions and to offer the court's assistance in resolving disputes over disclosure obligations."

This written checklist resolution can be a complementary procedure to the pretrial disclosure conference advocated by Report 102D. But, even standing alone, the written disclosure checklist procedure will be beneficial. The creation of a local written checklist on the prosecution's disclosure obligation under Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, and applicable ethical standards would focus both prosecutors and criminal defense attorneys on the importance of this type of information to ensuring a fair trial. There can be no comprehensive model checklist because no one can anticipate every nuance of these disclosure obligations without a specific factual context. However, a comprehensive written checklist will benefit the prosecutors and criminal defense attorneys in the court in question and assist the judge or judges in that court. By creating a standing local committee to prepare and/or update for the court or with the court this written checklist, the court can ensure that prosecutors and the defense bar have a vested interest in the scope and accuracy of the checklist the court adopts for dissemination.

Any omissions or deficiencies in the written checklist provided by the court would not relieve the prosecution from its disclosure obligations nor would those errors free criminal defense counsel from their duties to obtain from the prosecution all disclosure to which the defense is entitled. It would be advisable for the written checklist to contain cautionary words to that effect.

Although the pretrial disclosure conference contained in Report 102D would address the respective disclosure obligations of both the prosecution and defense under applicable discovery rules, statutes, ethical standards and the federal and state constitutions, the written checklist would address only the prosecution's disclosure obligations under Brady and its progeny and the applicable ethical standards. Discovery obligations are routinely codified in rules of procedure or statutes. As a result, there should be no need to replicate those discovery rules in a written checklist. Instead, the written checklist is limited to the prosecution's Brady disclosure obligations as well as those under applicable ethical rules or precepts.

There is no doubt that trial courts across the country wrestle with the question of prosecutorial disclosure under Brady and its progeny. Researchers in 2007 "found references to Brady material in various documents [in federal district courts], including local rules, orders (including standing orders and standard discovery, arraignment, scheduling, and pretrial orders), and supplementary materials such as joint statements of discovery and checklists (including disclosure agreement checklists)." *Brady v. Maryland Materials in the United States District Courts: Rules, Orders and Policies, Report to the Advisory Committee on Criminal Rules of the Judicial Conference of the United States*, Laura Hooper and Sheila Thorpe, Federal Judicial Center, May 31, 2007. The written disclosure

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checklist is a mechanism to assist the court as well as counsel to address the issue of prosecutorial disclosure under Brady that will be more detailed and specific than many of the routine pretrial Brady orders many courts issue.

A substantial number of verified wrongful convictions have been attributed to the use of testimony or physical evidence that was contradicted or undermined by other evidence in the hands of the prosecution, law enforcement or other government agencies, but was not disclosed to the defense even though it qualified as exculpatory evidence under Brady. The proposed written checklist would help to alert the prosecutor in the case to these disclosure obligations while prompting defense counsel to seek disclosure and, where possible, to make requests of the prosecution for specific, potential Brady evidence rather than an ineffective generic request for all the Brady evidence in the possession of the government.

We do not provide a model checklist because each jurisdiction's optimal checklist may vary depending on its understanding of the relevant law and ethics rules, which may themselves vary to some extent among the different jurisdictions, and depending on its preferences regarding the necessary level of detail.

Respectfully submitted,

Bruce Green, Chair, ABA Criminal Justice Section

February 2011

## GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Bruce Green, Section Chair

1. Summary of Recommendation(s).

The recommendation calls for courts' policymaking bodies to require that criminal trial courts: (1) provide to prosecutors and defense attorneys at a reasonable time prior to trial written checklists of the prosecution's disclosure obligations under Brady, its progeny, and applicable ethical standards and (2) create standing committees of prosecutors and defense attorneys to assist the courts in formulating and updating the checklists.

2. Approval by Submitting Entity.

The proposed resolution was approved by the Criminal Justice Section Council during the August 2010 ABA Annual Meeting in San Francisco.

3. Has this or a similar recommendation been submitted to the House or Board previously?

At the 2010 Midyear Meeting, the House approved Report 102D urging federal, state, local and territorial courts to adopt "a procedure whereby a criminal trial court shall conduct at a reasonable time prior to a criminal trial, involving felony or serious misdemeanor charges, a conference with the parties to ensure that they are fully aware of their respective disclosure obligations under applicable discovery rules, statutes, ethical standards and the federal and state constitutions and to offer the court's assistance in resolving disputes over disclosure obligations."

The ABA Criminal Justice Standards on *The Prosecution Function*, approved by the House in 1992, specifically state that "[a] prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused." Standard 3-3.11(a), Disclosure of Evidence by the Prosecutor, *The Prosecution Function*. This recommendation would assist prosecutors in understanding and recognizing their disclosure obligations under this standard, which encapsulates the obligations imposed by Brady, its progeny and applicable ethical standards.

Similarly, the ABA Criminal Justice Standards on *The Defense Function*, approved by the House in 1991, state that "[t]he [defense] investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities." Standard 4-4.1(a), Duty to Investigate, *The Defense Function*. These disclosure checklists will facilitate the defense's ability to obtain disclosure of Brady material from the prosecution and law enforcement.

4. What existing Association policies are relevant to this recommendation and how would

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they be affected by its adoption?

This recommendation would facilitate parties' preparation for and participation in the pretrial discovery conferences anticipated by the 2010 Midyear resolution (see #3, above) by providing them advance guidance on the types of disclosure they are entitled to receive and are obliged to provide. The recommendation for trial court-created standing committees of prosecutors and criminal defense attorneys will help ensure that this guidance is up-to-date and addresses situations which may be unique or specific to that particular jurisdiction.

Adoption of the recommendation would underscore the importance of the disclosure obligations of prosecutors set forth in the *ABA Criminal Justice Standards on The Prosecution Function* as well as defense counsel's obligation to obtain that type of disclosure as delineated in the *ABA Criminal Justice Standards on the Defense Function*, which were approved by the ABA House in 1992 and 1991 respectively. The recommendation, if approved, will be referenced in the on-line version of those Standards.

ABA Formal Opinion 09-454, which took effect January 1, 2010, officially clarified that the ethical duty of prosecutorial disclosure under Rule 3.8(d) of the Model Rules of Professional Conduct is broader than the constitutional obligation established by Brady v. Maryland and its progeny. This supports the need for the checklists to address not only disclosure mandated by Brady, but also disclosure required by applicable ethical standards, as the two obligations are not synonymous.

5. What urgency exists which requires action at this meeting of the House?

While there is no particular urgency that this recommendation be approved at the 2011 Midyear Meeting, the sooner it is approved, the sooner it can be disseminated to the policymakers who can implement it, thereby improving the fairness and efficiency of the disclosure process.

6. Status of Legislation. (If applicable.)

Not applicable

7. Cost to the Association. (Both direct and indirect costs.)

No direct costs and only minimal (standard) lobbying costs will be incurred.

8. Disclosure of Interest. (If applicable.)

Not applicable

9. Referrals.

At the time this recommendation is submitted to the Office of Policy Administration, it is also being e-mailed to the chairs and staff directors of the following ABA entities:

Standing Committee on Federal Judicial Improvements

Standing Committee on the Federal Judiciary

Standing Committee on Legal Aid & Indigent Defendants

Standing Committee on Ethics and Professional Responsibility

Death Penalty Representation Project

Commission on Domestic Violence

Commission on Immigration  
General Practice, Solo and Small Firm Division  
Individual Rights and Responsibilities Section  
Judicial Division

- National Conference of Federal Trial Judges
- National Conference of State Trial Judges

Litigation Section  
State and Local Government Law Section

Upon request of Rules and Calendar, it has also been sent to the chairs and staff directors of the following entities:

Young Lawyers Division  
Business Law  
Taxation

10. Contact Person. (Prior to the meeting.)  
J. Vincent Aprile II  
Lynch Cox Gilman & Mahan PSC  
500 W Jefferson Street, Suite 2100  
Louisville KY 40202  
PH: 502/589-4215  
E-mail: [vaprile@lcgandm.com](mailto:vaprile@lcgandm.com)
11. Contact Person. (Who will present the report to the House.)  
Stephen A. Saltzburg  
George Washington University Law School  
2000 H Street NW  
Washington DC 20053  
PH: 202/994-7089; 202/489-7464 (cell)  
E-mail: [ssaltz@law.gwu.edu](mailto:ssaltz@law.gwu.edu)  
  
William Shepherd  
Office of Statewide Prosecution  
1515 N Flagler Drive, Suite 900  
West Palm Beach FL 33401  
PH: 561/837-5000; 561/723-9669  
E-mail: [William.shepherd@myfloridalegal.com](mailto:William.shepherd@myfloridalegal.com)

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## EXECUTIVE SUMMARY

A. Summary of Recommendation.

The recommendation calls for courts' policymaking bodies to require that criminal trial courts: (1) provide to prosecutors and defense attorneys at a reasonable time prior to trial written checklists of their disclosure obligations under Brady, its progeny, and applicable ethical standards and (2) create standing committees of prosecutors and defense attorneys to assist the courts in formulating and updating the checklists.

B. Issue Recommendation Addresses.

The recommendation addresses the need for timely and thorough pretrial disclosure by the prosecution of information that is covered by Brady, its progeny and applicable ethical standards.

C. How Proposed Policy Will Address the Issue.

The recommendation will urge court policymakers to require criminal trial courts to provide detailed checklists of disclosure obligations to prosecutors and defense attorneys at a reasonable time prior to trial and to establish committees of prosecutors and defense attorneys to help the courts keep these checklists updated and specific to the unique situations encountered by the particular jurisdiction.

D. Minority Views or Opposition.

There is no known opposition.