

AMERICAN BAR ASSOCIATION
ADOPTED BY THE HOUSE OF DELEGATES
FEBRUARY 8-9, 2010

RECOMMENDATION

1 RESOLVED, That the American Bar Association urges federal, state, local and territorial courts
2 to adopt a procedure whereby a criminal trial court shall conduct, at a reasonable time prior to a
3 criminal trial involving felony or serious misdemeanor charges, a conference with the parties to
4 ensure that they are fully aware of their respective disclosure obligations under applicable
5 discovery rules, statutes, ethical standards and the federal and state constitutions and to offer the
6 court's assistance in resolving disputes over disclosure obligations.

REPORT

This year the Criminal Justice Section's Judicial Function committee has committed itself to the study of how the judiciary may minimize the danger of wrongful convictions. Many factors have been identified as contributing to this problem. For example, certain law enforcement practices, such as the handling of physical evidence, the conducting of identification procedures and interrogations, and the use of informants, have come under scrutiny for their role in convictions of innocent individuals. Blame has also been attributed to prosecutors who have failed to identify and/or disclose exculpatory evidence, or to do so timely, as well as those who have used perjured testimony. Defense counsel who fail to adequately investigate their clients' cases or otherwise fail to meaningfully represent their clients have also played a part in their clients' wrongful convictions.

Not all these factors may be addressed by the judiciary, and some are better suited to self-scrutiny by law enforcement, prosecutors and the defense bar. Nonetheless, judges strive to see that no innocent person is wrongfully convicted in their courtrooms. In their role as gatekeeper of evidence, judges may have the greatest impact in preventing wrongful convictions by assuring that the evidence they admit at trial is sufficiently subject to adversarial testing to be reliable.

Providing the parties with equal access to discoverable evidence is probably the best way to assist in a trial's search for truth through the adversarial system. Evidence, however, tends to be in the exclusive possession of one party alone until that party recognizes and conforms to his or her disclosure obligations under discovery laws and rules, applicable ethical standards and that basic tenet of the criminal law, embodied in the *Brady* rule, that the prosecution must disclose exculpatory and impeachment evidence to the defense.

Because the parties' disclosure obligations are mostly self-policed, discoverable evidence is sometimes withheld, inadvertently or not. For example, a prosecutor in good faith may not recognize the exculpatory nature of a piece of evidence, if only because he or she does not look at it from the perspective of the defense lawyer. Similarly, evidence that has the potential to impeach a prosecution witness may be withheld because the prosecutor does not anticipate the potential value to the defense. In addition, newly appointed prosecutors may be unaware of the scope of their disclosure obligations.

Moreover, given the adversarial nature of our trial system, parties tend not to disclose evidence in their possession before they have to. Indeed, parties might not even obtain evidence that might be subject to disclosure unless they are specifically ordered to. Thus, a law enforcement officer may possess documents related to the case but does not disclose them to the prosecutor because the prosecutor has never specifically asked for them, perhaps because he or she was unaware they existed or because he or she did not recognize their exculpatory potential. Whether the prosecutor is aware of the information or not, the obligation to disclose still exists. Inasmuch as effective disclosure relies on the parties' understanding and complying with their obligations, the courts' role is limited. Nevertheless, courts can facilitate full disclosure consistent with legal and ethical requirements. Courts may assist the parties in understanding their disclosure obligations and can enforce those obligations by making appropriate rulings at a time when such rulings may be most effective.

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We therefore recommend that courts should, hold a pre-trial conference that focuses on discovery issues and the disclosure of exculpatory information. At such a conference, the parties may be required to identify material that has been disclosed and will address any outstanding disclosure issues. By holding a conference devoted to this issue, courts will help assure that the subject of disclosure is treated with the seriousness that it deserves.

We expect that such a conference will have several positive effects.

First, by holding the conference pre-trial, courts will anticipate issues that might otherwise delay or derail a trial. Mid-trial disclosure of evidence that should have been disclosed earlier will invariably cause a disruption to the proceedings, if not a delay or even a mistrial. In addition, by addressing disclosure issues pre-trial, courts will have an early opportunity to craft an appropriate remedy if they determine that there has been a loss or destruction of material subject to disclosure.

Second, to the extent that the disclosure process assures a fair trial based on all available evidence, by resolving disclosure issues prior to rather than during trial, courts enhance the truth-finding function of the trial. Because evidence may contain leads to other evidence, its use to the opposing party may be compromised by late disclosure. Moreover, because the course of a trial, including attorneys' strategic decisions, may very well change depending on the anticipated evidence, the value of previously undisclosed evidence that comes to light late in the process may be difficult to gauge but not insignificant.

Third, previously undisclosed evidence may have a bearing on pre-trial suppression issues. If such evidence is disclosed at trial, it may require the re-opening of an already concluded hearing.

Fourth, undisclosed evidence negatively impacts plea negotiations. To the extent that full disclosure assists the truth-finding process and the parties' ability to evaluate the merits of their respective positions, a pre-trial effort to identify and locate all discoverable material will facilitate plea bargaining.

Finally, but not least importantly, there is a significant benefit to be gained by bringing the parties together in court for such a conference. The discovery process is mostly conducted off-the-record. In some jurisdictions, the attorneys who try the case do not appear at preliminary calendar calls. By requiring the attorneys who will try the case to appear, courts will assure that they take responsibility for their respective positions, which may previously have been offered, if at all, only by another, or several other, attorneys.

These conferences may also have the prophylactic effect of preventing non-disclosure of discoverable evidence because they require the parties to focus precisely on the question of whether they have disclosed everything they are required to disclose. Certainly it will be difficult for a party either before, or particularly after, such a conference, to claim that he or she did not realize that his or her disclosure obligations called for the production of discoverable material.

Further, the conference may serve as an opportunity for a court to rule on whether certain evidence is discoverable. A common problem with *Brady* material is that judges and prosecutors may not recognize the exculpatory significance of a piece of evidence because they do not understand the use the defense may make of it. This problem can be alleviated by the conference. In the first place, the court can invite the parties to show it undisclosed evidence that was withheld on the ground that it was deemed not to be discoverable. A judge may be in a better position to recognize the exculpatory nature of the evidence or its value as impeachment material than a prosecutor. If not, the defense attorney may be able to articulate a reason why certain evidence is discoverable. In addition, such a conference will amplify the appellate record with matters that, if they occurred at all, would otherwise likely have occurred off-the-record.

Not only will the conference encourage candor, but it will also encourage effective advocacy, because it serves as an invitation to the parties to consider what discovery demands an effective advocate in their position would make. To the extent that effective advocacy enhances the truth-finding function of the trial, the conference encourages it. Moreover, if the defense makes specific requests for material that the prosecution did not think to seek from law enforcement – not knowing its existence or recognizing its relevance - such requests may lead to the discovery of evidence that might otherwise have been inadvertently non-disclosed.

We anticipate that attorneys for both sides, but particularly prosecutors, because they have more disclosure obligations than defense counsel, may object to this proposal on the ground that it implicitly disparages their understanding of their ethical duties. Although the pre-trial conference requirement is not intended to disparage anyone, and although all attorneys are presumed to understand and fulfill their duties, the conference has the benefit of causing the parties to think twice about this important subject and make doubly sure that they have in fact complied with all applicable disclosure obligations.

This subject is of no small concern, given the large number of documented wrongful convictions that can be attributed to prosecutorial error, including the use of false testimony that was contradicted by undisclosed evidence and the non-production of exculpatory evidence that was not disclosed until trial or later. To the extent that these errors are attributable to well-intentioned prosecutors, as the vast majority are, the requirement of a conference in which the judge will ensure that the parties are aware of their discovery obligations and invites the parties to address their discovery concerns on the record will add an additional safeguard against non-disclosure that currently may not exist.

For these reasons, we think that a pre-trial conference to address and resolve issues of disclosure will reduce the risk of wrongful convictions based on failures to disclose.

Respectfully submitted,

Charles Joseph Hynes
Chair, Criminal Justice Section
February 2010

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GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Criminal Justice Section

Submitted By: Joseph Charles Hynes, Chair

1. Summary of Recommendation(s).

That 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.

2. Approval by Submitting Entity.

The recommendation was approved by the Criminal Justice Section Council on November 7, 2009.

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

NO.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

None that we are aware of at this time.

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

Many factors have been identified as contributing to this problem; judges must ensure that no innocent person is wrongfully convicted in their courtrooms. In their role as gatekeeper of evidence, judges may have the greatest impact in preventing wrongful convictions by assuring that the evidence they admit at trial is sufficiently subject to adversarial testing to be reliable. Finally, there is an ongoing risk of wrongful convictions and this resolution will take steps in addressing this problematic issue.

6. Status of Legislation. (If applicable.)

Not applicable

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

None

8. Disclosure of Interest. (If applicable.)

No known conflict of interest.

9. Referrals. (List entities to which the recommendation has been referred, the date of referral and the response of each entity if known.)
Concurrently with the submission of this report to the ABA Policy Administration Office for calendaring on the February 2010 House of Delegates agenda it is being circulated to the following:

Standing Committee on Legal Aid and Indigent Defendants
Judicial Division
Litigation Section
Individual Rights and Responsibilities Section
Family Law Section
Coalition for Justice
Council on Ethnic and Racial Justice
Commission on Youth at Risk
Young Lawyers Division
Government and Public Sector Lawyers Division
Standing Committee on Ethics and Responsibility
Standing Committee on Lawyers' Professional Responsibility
Death Penalty Representation Project
Death Penalty Moratorium Project

10. Contact Person. (Prior to the meeting. Please include name, address, telephone number and email address.)

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11. Contact Person. (Who will present the report to the House)

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EXECUTIVE SUMMARY

A. Summary of Recommendation.

That the American Bar Association urges federal, state, local and territorial governments to adopt at a reasonable time prior to trial, a trial court shall conduct 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.

B. Issue Recommendation Addresses.

How the judiciary may minimize the danger of wrongful convictions.

C. How Proposed Policy Will Address the Issue.

Courts should, in addition to their powers in overseeing the discovery process, hold a pre-trial conference that specifically focuses on discovery issues and the disclosure of exculpatory information. At such a conference, the parties may be required to identify material that has been disclosed and will address any outstanding disclosure issues. By holding a conference devoted to this issue, courts will help assure that the subject of disclosure is treated with the seriousness that it deserves.

D. Minority Views or Opposition.

No opposition to this recommendation is known to exist at this time.