

ETHICS *and* PLEA BARGAINING

What's Discovery Got to Do With It?

BY ELLEN YAROSHEFSKY

The words “ethics” and “plea bargaining” are rarely used in the same sentence. Typically, prosecution and defense conduct in plea bargaining is not perceived as an ethics issue but rather as governed solely by case law, statutes, and rules of procedure.

In many jurisdictions a typical misdemeanor state court case or less serious state felony cases proceeds as follows: The prosecution makes an offer; the defense lawyer after minimal or no investigation discusses the plea with the client who decides to take the offer to ensure a lesser sentence; the court questions the client to meet constitutional requirements of the voluntariness of the guilty plea; the plea is accepted, and the client is sentenced. This process is described as a “middle eastern bazaar” where defense lawyers “shuffle into the prosecutor’s office and, in an matter of two to three minutes, dispose of one or more cases ‘set down’ that day. Generally only a few words have to be exchanged before an agreement is reached.” (MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES AND DEFENSE ATTORNEYS* (Univ. of Chicago Press, 1978).)

By contrast, in most state felony cases and in federal court, the process is an adversarial model with a more formal process and, hopefully, adequate defense investigation and strategic discussion with the prosecution, but the power balance—particularly under mandatory minimum sentences and sentencing guideline regimes—results in a system where the prosecutor “can effectively dictate the terms of the ‘deal.’” (Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, Marq. Univ. L. Sch. Legal Studies Research Paper Series 07-42, 16 (April 2007).)

This raises the most fundamental of ethics issues: Are state and federal plea-bargaining systems fair? Does the “negotiation process,” where the defense wields minimal bargaining power, provide for a system to achieve reliable results?

The system has been vigorously justified and premised on the notion that only guilty people plead guilty. “A counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case.” (Menna v. New York, 423 U.S. 61, 62 n.2 (1975).) Critiques of the plea-bargaining process are at least as old as our criminal justice system, decrying the process as inadequate to ensure that we effectively distinguish the guilty from the innocent. (See, e.g., Albert Alschuler, *The Changing Plea Bargain Debate*, 69 CAL. L. REV. 652 (1981); Stephen Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 992 (1992).)

Despite these critiques, plea bargaining is here to stay and is the essence of the criminal justice system. More than 90 percent of cases nationwide result in guilty pleas. In federal courts, guilty pleas are now upwards of 96 percent, an increase of some percentage in the last decade. (Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea Based Ceilings*, 82 TULANE L. REV. 1237, 1259 (2008).) Reflecting on this reality nearly 20 years ago, current United States District Court Judge Gerard Lynch pointed out that ours is not an adversarial but an administrative model of justice. (Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).) The consequence of this “guilty plea system of justice” should be a renewed focus on the ethical obligations of lawyers in this “bargaining” process; that is, the articulation of the best practices and procedures to ensure informed and voluntary guilty pleas to the appropriate charge rather than the virtually exclusive focus upon trial conduct as the reference point for a lawyer’s ethical obligations.

Innocent People Plead Guilty

This is particularly essential in our system where the underlying premise—that innocent people do not plead guilty—has been demonstrated to be false. Although commentators have long argued and explained why innocents are likely to plead guilty, the notion that an innocent person would plead guilty to a crime he or she did not commit was apocryphal until about 15 years ago—and even where acknowledged, believed to be so rare as to not require a systemic look backward. (John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*. 50 EMORY L.J. 437 (2001).)

A range of cases of the factually innocent now provides proof that the fundamental assumption is wrong. Of the more than 230 DNA-based exonerations documented by the Innocence Project and the additional 110 documented non-DNA exonerations, 20 of those are innocent people who pled guilty. (Samuel R. Gross, *Convicting the Innocent*, ANN. REV. L. & SOC. SCI. (forthcoming 2008).)

A significant cause of these wrongful convictions in the pretrial stage is the failure to disclose exculpatory information or a one-sided investigative process where exculpatory proof is simply ignored.” (Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT’L L. REV. 1241 (2002).) Other causes—often intertwined with the failure to disclose exculpatory information—are faulty eyewitness identification, false confes-

sions, faulty laboratory work, and inadequate defense counsel. The universe of non-DNA cases has yet to be explored, but one can extrapolate that at least hundreds if not thousands of the wrongfully convicted languish in prison without DNA to prove their innocence—an unknown number secured by guilty pleas. Accurate numbers are unknown and unknowable. The numbers of exonerations have increased exponentially over the years as more resources are devoted to the problem and the data demonstrate that the current numbers are merely the tip of the iceberg. (Sam Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005).) In how many of those cases was there evidence not produced to the defense that could have prevented a guilty plea by an innocent person?

A classic example of an innocent man who pled guilty is Christopher Ochoa who, under severe police coercion, falsely confessed to a homicide. When a 20-year-old woman was raped and murdered in Austin in the fall of 1988, Ochoa and Richard Danziger were arrested. According to Ochoa, the police threatened him repeatedly with the death penalty while he was in custody—at one point even pointing to the vein in his arm where the lethal injection would be administered. (See generally Diane Jennings, *A Shaken System*, DALLAS MORNING NEWS (24 Feb 2008).) Eventually, Ochoa wrote out a “confession,” entered a guilty plea and received a life sentence, and agreed to testify against Danziger. Danziger then went to trial and was convicted, largely on Ochoa’s supposed coconspirator’s testimony. Eight years later, a third person—already serving a life sentence for other crimes—wrote to state officials confessing to the murder. More than four years afterwards, DNA testing would show that this man, Achem Josef Marino, was the real perpetrator; the two who had been convicted, Chris Ochoa and Richard Danziger, were innocent.

The Ochoa-Danziger cases produced a fair share of hand-wringing among the Texas press, prosecutors, defense attorneys, and elected state officials. One offshoot in this and other Texas exoneration cases was the passage of an “emergency” bill, signed in 2001, granting convicted persons the right to DNA testing, and, crucially, requiring the preservation of biological evidence. Presumably, the thinking was that postconviction DNA testing could be a fail-safe for the innocent—guilty plea or not. But if the Texas legislation (echoed in many other states with postconviction procedures) was meant to protect people like Chris Ochoa, the Harris County district attorney’s office responded by crafting a waiver, more or less implicitly to be signed as a condition of plea bargains, requiring defendants

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to give up their rights to preservation of the evidence. (Lauren Kern, *Waivering Rights: Are Prosecutors Circumventing the New Law Designed to Preserve DNA Evidence?* HOUSTON PRESS (July 12, 2001), available at <http://www.houstonpress.com/2001-07-12/news/waivering-rights/>.) Had Chris Ochoa resided in Harris County and signed such a plea, he and Richard Danziger might still be in prison today. Would a different discovery process have been a significant factor to prevent this and other false guilty pleas? This answer, too, is unknown and likely unknowable. But the demonstrated rise in exonerations since 1989 raises a serious concern that consideration of structural reforms is long overdue.

In the context of guilty pleas, the most significant reform is a change in discovery practices to prevent innocent people from entering guilty pleas and to prevent defendants from being placed in circumstances that give rise to inaccurate and otherwise faulty guilty pleas—such as in the federal system pleading to a higher level of culpability for the role in the offense or a higher level for the amount of loss in a money-laundering case. Mandatory disclosure of the facts in a case—both exculpatory and inculpatory—lies at the heart of both. The defense requires timely access to information to effectively counsel the client and engage in discussion with the prosecution.

The Current State of Disclosure

The current disclosure rules and procedures are inadequate to produce the most reliable results. Rules of discovery are controlled by individual jurisdictions by statutes, rules of procedure, or case law and vary widely. The constitutionalized aspect of discovery is limited to disclosure of exculpatory evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and subsequent cases. Some prosecutor’s offices, defense lawyers, and commentators have adopted and continue to argue for systems of “open file discovery” that includes timely disclosure of inculpatory material (see *infra*) but in general, the parameters of *Brady* are the main focus of discussions of discovery obligations. The obligations set forth in the Rules of Professional Conduct are not properly observed in most jurisdictions. State and federal systems can and should do better.

The Inconsistency of Brady Obligations

Brady and its progeny require that the prosecution timely disclose exculpatory and impeachment evidence, relevant to both guilt and punishment, whether or not it has been requested by the defense. (*Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Bagley*, 473 U.S. 667 (1985).) The duty encompasses evidence known to agents of law enforcement and the prosecution has an obligation to learn favorable evidence known to others acting on the government’s behalf. (*Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995).)

Brady obligations, however, are subject to varied and of-

ten erroneous interpretations. In the federal system, where Rule 16 of the Federal Rule of Criminal Procedure sets forth discovery obligations, there is no codification requiring the government to timely disclose to the defendant favorable information material to guilt or sentencing. Although many prosecutors might routinely disclose such information, there is little consistency in the interpretation of the prosecutor's obligations. Some prosecutors believe that the obligation is solely to disclose information that someone other than the defendant confessed to the crime (Am. C. of Trial Law., *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 94, 103-04 (Winter 2003).) Other prosecutors do not view impeachment material as part of the *Brady* obligation. (*Id.*)

In state systems, adoption of the *Brady* doctrine and related discovery rules vary widely across jurisdictions ranging from bare compliance with constitutional minimums to more expansive disclosure requirements, such as in Massachusetts. A report prepared for the Judicial Conference of the United States offers a detailed survey of these differing policies. (Laural L. Hooper, Jennifer E. Marsh, and Brian Yeh, *Treatment of Brady v. Maryland Material in United States District and State Courts' Rules, Orders and Policies*, Report to the Advisory Committee on Criminal Rules of the Judicial Conference of the United States, Federal Judicial Center, October 2004; available at [http://www.fjc.gov/public/pdf.nsf/lookup/BradyMat.pdf/\\$file/BradyMat.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/BradyMat.pdf/$file/BradyMat.pdf).) Thirteen states require the prosecution to disclose "favorable" evidence regardless of whether the defense has filed a request or motion. Most of these states define "favorable" as some version of evidence as "tends to negate guilt"—a standard echoed in the rules of professional conduct for prosecutors. Colorado, Florida, Arizona, and New Jersey all have broad discovery laws and rules, often based upon the American Bar Association Standards for Criminal Justice: Discovery and Trial by Jury Standard (3rd ed. 1996). (See *Expanded Discovery in Criminal Cases, The Justice Project 2007*, at www.thejusticeproject.org.)

A significant problem on both state and federal levels is that pretrial disclosure obligations are often viewed through the narrower lens of the appellate standard governing reversal of a conviction for failure to disclose information. That is, even though information should be disclosed pretrial, the trial prosecutor will judge whether, if not disclosed, an appellate court would decide that there is a "reasonable probability" that the outcome in a case would have been different, had the evidence been disclosed, or, in the context of a guilty plea whether there is "reasonable probability that but for the failure to disclose the *Brady/Giglio* evidence, the defendant would have refused to plead and would have opted for trial." (U.S. v. Bagley, 473 U.S. 667 (1985); Banks v. United States, 920 F. Supp. 688 (E.D. Va. 1996).) Also, the prosecution may not choose to disclose the information because of the prosecutor's judgment that the in-

formation lacks significance or is not relevant. Certainly, the prosecution cannot be an adequate judge of how a defense attorney could utilize the information.

And even where the prosecution is wrong, the appellate process does not reliably identify the innocent nor sufficiently provide consequences for the prosecution's failure to disclose the evidence pretrial.

Several notorious exoneree cases starkly demonstrate the inadequacy of the appellate process where the *Brady* claim failed because the defense could not prove the evidence in question was "material" and the court made the subjective judgment that a conviction probably would have occurred regardless. One stark example is the case of Dennis Fritz, whose saga is recounted in John Grisham's nonfiction book, the *Innocent Man*. Fritz was convicted for an Oklahoma murder along with Ron Williamson. Fritz claimed on appeal that the state had committed a *Brady* violation in failing to turn over a tape of his polygraph examination and its forensic samples from another suspect—who, indeed, turned out to be the real perpetrator. The court, however, found that the polygraph tape was "merely cumulative" to his claim of innocence and was therefore not "material." (As to the forensic sample, it found no merit to the claim because the results, at least according to the state, excluded the other suspect.) In another case, an Idaho court upheld a death sentence and used a "balancing approach" to say that the state's loss of key biological material was "harmless beyond a reasonable doubt" because the other evidence against the defendant was so overwhelming. This other evidence was mostly the testimony of a jailhouse snitch, who, it would turn out, had been lying. Pretrial disclosure of these materials may have avoided the wrongful conviction but for prosecutors who view the *Brady* obligation through the appellate lens, the harmless error standard governs their disclosure obligation.

Another critical *Brady* issue is the timing of the disclosure. The American College of Trial Lawyers reports that "across the country federal prosecutors routinely defer *Brady* disclosures unless ordered by the trial court." (41 AM. CRIM. L. REV. at 104.) Timeliness—whether prior to the entry of a guilty plea or pretrial—is the subject of case law but not adequately defined in discovery rules, statutes or ethics codes.

Until 2002, there was a trend in federal and state courts that prosecutors had a duty to disclose *Brady* material prior to a guilty plea. The Second, Third, Sixth, Eighth, and Ninth Circuits and some district courts in the First and Fourth Circuits explicitly adopted this view as did state appellate courts in New Jersey, South Carolina, Tennessee, and Missouri. Circuit courts that considered the issue noted that the Supreme Court had never applied *Brady* to a guilty plea.

Subsequent to a 1995 decision in *Sanchez v. United States*, 50 F.3d 1448 (9th Cir. 1995), that a defendant does not waive his *Brady* rights by the entry of a guilty plea, prosecutors in the Southern District of California incorpo-

rated the requirement of an *express* waiver of *Brady* rights in what they called the “fast track plea agreements.” The waiver was for impeachment information or that relevant to an affirmative defense. The defendant still retained the right to “any known information establishing the factual innocence of the defendant.”

Upon the defense challenge in *United States v. Ruiz*, 241 F.3d 1157 (9th Cir. 2001), the Ninth Circuit held the waiver unconstitutional because a plea “cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution.” The Supreme Court accepted certiorari and Justice Breyer, writing for the Court, upheld the waiver, but went further and held that defendants who plead guilty have no right to *Brady* information relevant to either impeachment or an affirmative defense. The Court did not address the right to exculpatory evidence. (*U.S. v. Ruiz*, 536 U.S. 622 (2002).) *Ruiz* swiftly dampened the trend in state and federal courts for mandated pretrial disclosure of information favorable to the accused in the preguilty plea stage of the criminal justice process.

However, even before the *Ruiz* decision, there was and is widespread inconsistency across federal and state prosecutor’s offices as to timing of disclosure of *Brady* material—whether preplea or pretrial in general.

Although most state discovery rules include an obligation for “timely” disclosure, the definition here varies as well. Some states use the commencement of the trial as the focal point, and require prosecutors to complete whatever disclosure obligations they have seven, 10, or 30 days prior. Other states require disclosure within a certain time frame after the defense has made its requests, usually within 30 days or less. Others use filing of charges or arraignment as a marker, and still others only require discovery *after* the defendant has entered a plea of not guilty. Finally, the remaining states provide looser standards such as “as soon as reasonably possible.” Although the various timing of disclosure obligations may imply that the information must be made available prior to the entry of a guilty plea, this is not necessarily true as guilty pleas, notably in misdemeanor cases, may be entered at or within days of arraignment.

Brady Proposals to Improve Reliability of Guilty Pleas

Commentators have long argued that *Brady* disclosures prior to entry of a guilty plea would improve the reliability and accountability of the criminal justice process. Such disclosure helps to ensure the accuracy and voluntariness of the plea to an appropriate charge. It increases the likelihood of “meaningful consent” by defendants and provides some substance to the notion of engaging in actual “bargaining” in a system where there is unequal access to information. (See, e.g., Eleanor J. Ostrow, *The Case for Preplea Disclosure*, 90 *YALE L.J.* 1581 (1981); Stephen L. Friedman, *Note*,

Preplea Discovery: Guilty Pleas and the Likelihood of Conviction at Trial, 119 *U. PA. L. REV.* 527, 531 (1971).)

Another significant benefit of preplea *Brady* disclosure is that it would require the prosecution to more carefully consider the charges. If the prosecutor knows the details of the case will have to be laid out before he or she can dispose of it, the prosecution is likely to be more careful in assembling and assessing those details than one who expects to “bluff” a quick plea based on limited information. Adequate disclosure could also prevent faulty guilty pleas by some defendants who mistakenly believe themselves to be guilty because they do not have personal knowledge of all of the facts necessary to establish their guilt. (Kevin McMunigal, *Guilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 *CASE W. RES. L. REV.* 651, 659 (2007).)

Although many prosecutors disclose *Brady* and other material to the defense pretrial even where there has been no formal discovery request, the lack of clear guidelines leaves the criminal justice system often subject to the interpretation of law by the individual prosecutor and his or her relationship with defense counsel. No doubt, there is the necessity for prosecutorial discretion, notably in the timing of disclosure where witnesses are in need of protection. But, if the goal of the process is better informed plea bargaining, there needs to be carefully drawn disclosure obligations that include the ability of the prosecutor to seek protective orders from the court where witness protection and other significant concerns exist.

In 2004, the American College of Trial Lawyers proposed such a codification for Rules 11 and 16 of the Federal Rules of Criminal Procedure. (See *Am. C. of Trial Law., supra*, at 111, *et seq.*)

In broad outlines, the proposal is for a rule that:

1. defines favorable information to an accused by reference to enumerated categories of information;
2. requires that, upon a defendant’s request, that the government disclose in writing, within 14 days, all known favorable evidence to the defense;
3. imposes a due diligence obligation on the government that it has consulted with government agents to locate favorable information;
4. requires disclosure of all favorable information to a defendant 14 days before a guilty plea; and
5. requires a written certification from the government that it has complied with the disclosure requirements.

Presented to the Judiciary Conference Advisory Committee on Federal Rules of Criminal Procedure, the Department of Justice opposed the rule contending that the government’s *Brady* obligations are “clearly defined by existing law that is the product of more than four decades of experience with the *Brady* rule.” (Report to the Advisory Committee on Criminal Rules of the Judicial Conference of the United

States, Federal Judicial Center, October 2004.) The proposal did not make it out of the subcommittee. It should be reconsidered, both for the federal system and the states.

Moreover, all jurisdictions should adopt a clear written policy and protocol for the prosecutor's disclosure obligation that includes the prosecutorial adage adopted by some offices: "If there is a question, turn it over." Some offices, such as Seattle's King County prosecutor's office, have a written protocol, notably for disclosure of information concerning recurring government witnesses that includes a *Brady* committee to ensure its implementation. Similar protocols should be established in all jurisdictions, and that policy should include the timeliness of the disclosure. This is essential in the federal system because the *Department of Justice Manual* does not have a written policy about plea bargaining disclosure and the *U.S. Attorney's Manual*, which has plea bargaining provisions, does not address whether a prosecution must fulfill *Brady* disclosure obligations before negotiating a plea. (U.S. Dep't of Justice, U.S. ATTORNEYS' MANUAL, §§ 9-27.330-27-750 (Sept. 1997).) It should be revised to require *Brady* disclosure prior to a plea negotiation.

Brady Obligations in Ethics Standards of Conduct

Beyond obligations imposed by statute, court rules, or case law is that contained within ethics codes. Few prosecutors, courts, or criminal defense lawyers look to the ethical standard of prosecutorial responsibility for disclosure of exculpatory material.

Rule 3.8(d) of the Model Rules of Professional Conduct, a version of which has been adopted in nearly all jurisdictions, requires a prosecutor "to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." This ethical obligation encompasses disclosure of more than exculpatory evidence that, in hindsight, will be deemed "material."

Broader than interpretations of existing requirements for disclosure in federal and state jurisdictions, neither the rule, commentary, nor existing ethics opinions discuss the scope of the prosecutor's obligation nor specifically address this obligation in the plea bargaining stage.

Similarly, the American Bar Association (ABA) Standards for Criminal Justice Prosecution Function and Defense Function 3-3.11(a) provide: "A prosecutor shall not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence 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." It too does not define "timely" nor specifically refer to the plea bargaining stage. The ABA and state ethics committees should clarify existing rules.

Beyond Brady: Open File Discovery

Beyond inconsistent *Brady* requirements, pretrial discovery rules and practices vary widely. In the federal system, Federal Rule 16 provides for limited discovery of information. By contrast, the ABA Standards for Criminal Justice: Discovery and Trial by Jury (3rd ed.) provides for more expansive disclosure, including witness lists and witness statements that must be disclosed so that these may be utilized in the plea bargaining process. (Available at <http://www.abanet.org/crimjust/standards/discovery.pdf>.)

State discovery practices vary significantly. The court rules or statutes that govern discovery in most jurisdictions define the categories of evidence subject to discovery and the time lines for disclosure. Some jurisdictions without codification of the prosecutor's disclosure obligations are dependent upon the judiciary's inherent right to grant discovery. About a third of the states have implemented versions of the ABA Standards on discovery rules.

Some states and individual county offices have adopted their own policies that go beyond statutory requirements or court rules and provide what that office terms "open file discovery," but the definition of the term and the practices vary widely. It is apparent that effective open discovery laws can produce meaningful results as was demonstrated in North Carolina. Its open discovery law, passed in the wake of several exoneration scandals in 2004, was instrumental to the exposure of District Attorney Mike Nifong's egregious misconduct, and the vindication of the three defendants, in the Duke University lacrosse scandal. The DNA evidence found on the accuser, which included semen samples from various men but none from the defendants (or other members of the lacrosse team), had been withheld by Nifong in the early phases of the case. It was only through making motions for compliance with open discovery laws that defense lawyers were able to obtain the test results that definitively exculpated their clients and led to the indictment's dismissal. (See, e.g., Guy Loranger, *Defense Lawyers Discuss Lessons from Duke Lacrosse Case*, N.C. LAW. WKLY. (Dec. 10, 2007).)

Other jurisdictions have informal "open file" policies that permit defense attorneys to inspect and copy the "entire file" of information produced by the police, including the defendant's oral, written, and recorded statements; the defendant's criminal record; examination and test reports; documents and objects; and the content of expert testimony. These "open file" policies do not provide information much beyond that mandated by Rule 16 of the Federal Rules of Criminal Procedure.

An example of broader discovery is in Tarrant County, Texas, where the district attorney's office has instituted an "open file discovery matrix," requiring the entire prosecution file to be made available within 10 days after filing of charges (for minor cases) or 10 days following indict-

ment. In Harris County, Texas, the Houston police chief has called for a similar policy. (*Chief: Texas Justice Unfair; Bradford Urges Crime Lab Inquiry*, HOUSTON CHRON. (June 24, 2003).) The information subject to disclosure is all unprivileged information known to the prosecution and law enforcement agencies.

In a few offices, the prosecution provides an inventory of materials produced. In others, including offices in Dade County, Florida, defense attorneys are provided, at minimal cost, a CD-ROM containing these materials. A few but growing number of prosecutors provide the information via e-mail through PDF files. This provides a record of the items produced. By contrast, Travis County, Texas, has an “open file” policy that permits the defense attorney to examine but not copy the file, and the attorney is restricted from taking verbatim notes of items in the file.

Some “open file” discovery policies are restricted. For example, Brooklyn District Attorney Charles Hynes established an open file discovery policy that includes most nonwork product material for criminal cases, but not for homicide cases. Disclosure of grand jury testimony, however, is often dependent upon the individual assistant district attorney. And in homicide cases, defense lawyers often object to the lack of timely disclosure to provide an adequate defense.

Other DA offices, such as in Jefferson County, Louisiana, have made claims to “open discovery” to the press that have been disputed in the defense community because critical material is not produced. (Richard Webster, *Burden of Proof: How La. Prosecutors Can Withhold Evidence with Little Fear of Punishment*, NEW ORLEANS CITY-BUSINESS (June 11, 2007).) In Arkansas, the open file policy does not include some information from the police file. And in Bexar County, Texas, open file discovery is conditioned upon the defense counsel signing an agreement that includes an acknowledgment that the “DA’s office has no duty and will not supplement the discovery that has been granted by this agreement, including with any documents that are missing or that may be placed in the State’s file at a later time.”

These varied “open file” discovery policies and practices should be expanded and standardized by the courts or legislatures at least across states, if not the federal system. An adequate open file policy should include all information that is known or, with due diligence, should be known to the prosecution and law enforcement and other agencies acting on behalf of the prosecution. At the very least, the ABA Standards for criminal discovery should be adopted. These provide for timely disclosure of critical information. Disclosure should be both mandatory and automatic. (*See Expanded Discovery in Criminal Cases*, The Justice Project, 2007.)

Additionally, any effective open file discovery policy or law requires that the prosecution provide defense counsel with an inventory of the items produced. Merely claiming to “open up the file” leads to unnecessary disputes as to whether certain information was disclosed. In civil litigation, information is “Bates

stamped” thereby providing a clear record of items disclosed. Such a process could be adopted in criminal cases. Certainly, technology provides a relatively simple process to document disclosure. Scanning documents and sending them as PDF files or copying them onto CD-ROMs is an efficient and inexpensive method that should be systematized in prosecutors’ offices. To the extent that budgetary or other staffing constraints make such a requirement overly burdensome for the prosecution, the defense lawyer should inventory the items produced and send that inventory with a letter to the prosecution stating that if any items have been omitted, the prosecution should file and serve notice of the omission within 14 days.

Finally, in addition to enhanced disclosure obligations, the entry of a guilty plea should require not only the litany of constitutional rights that the defendant relinquishes, but an inquiry of the prosecution as to whether it has complied with its obligation to investigate and disclose all evidence or information known to the prosecutor that “tends to negate the guilt of the accused or mitigates the offense.”

No doubt imposing additional disclosure obligations has its costs. It may require substantial additional time prior to prosecuting cases, notably in misdemeanor cases where such information may not be readily available. It may require differing calculations by prosecutors as to negotiation or trial strategy. It may result in the dismissal of weak cases where the prosecutor believes but cannot readily prove that the defendant is guilty of a crime. It may also result in time and cost savings because guilty pleas may be entered earlier if defendants have an opportunity to view the government’s evidence. Commentators have explored a range of consequences that merit consideration in the implementation of systems of discovery. The bottom line, however, is that a legal system cannot be driven primarily by pressure upon prosecutors to resolve cases quickly or without requisite transparency and accountability. It must be premised upon accurate and reliable outcomes.

Codification and expansion of the prosecutors’ obligations will not only provide crucial information essential to ensure that guilty pleas are premised on knowing and intelligent waivers of the right to trial—therefore insuring greater respect for the criminal justice system—but they will also clarify for prosecutors the exercise of their discretion. Rather than leave the prosecution conflicted in its decision of what information should be disclosed and the timing of such disclosure, rules and procedures would provide essential guidance and some measure of uniformity. Accountability and transparency of the criminal justice system commands such movement toward greater disclosure and towards uniformity.

There is no paucity of persuasive argument to expand disclosure requirements particularly to reduce wrongful convictions. Commentators often pointedly refer to the much more expansive discovery in civil cases where money, not freedom, is at stake. Certainly there are no guarantees that defense lawyers will zealously utilize the information, but requiring disclosure is at least an essential step toward an effective justice system. ■