March 15, 2016

John Aldock
Chairman
Advisory Committee on Local Rules for the
U.S. District Court for the District of Columbia
901 New York Avenue, N.W.
Washington, DC  20001

Re:  Proposed Disclosure Rule

Dear Mr. Aldock:

I write on behalf of the American Bar Association (ABA) regarding the Proposed Disclosure Rule for the U.S. District Court for the District of Columbia.

In August 2011, the ABA’s House of Delegates adopted a resolution urging “federal, state, territorial and tribal governments to adopt disclosure rules requiring the prosecution to seek from its agents and to timely disclose to the defense before the commencement of trial all information known to the prosecution that tends to negate the guilt of the accused, mitigate the offense charged or sentence, or impeach the prosecution’s witnesses or evidence, except when relieved of his responsibility by a protective order.” A copy of the resolution along with an accompanying report is attached.

The Proposed Disclosure Rule accomplishes what the ABA has urged governments to do. Accordingly, the ABA supports adoption of the Proposed Disclosure Rule.

Respectfully,

Thomas M. Susman

Attachment
RESOLVED, That the American Bar Association urges federal, state, territorial and tribal governments to adopt disclosure rules requiring the prosecution to seek from its agents and to timely disclose to the defense before the commencement of trial all information known to the prosecution that tends to negate the guilt of the accused, mitigate the offense charged or sentence, or impeach the prosecution's witnesses or evidence, except when relieved of this responsibility by a protective order.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and tribal governments to adopt disclosure rules requiring the prosecution to make timely disclosure to the defense before a guilty plea of all information, which may include impeachment evidence, known to the prosecution that tends to negate the guilt of the accused or mitigate the offense charged or sentence, except when relieved of this responsibility by a protective order.
REPORT

Summary of the Resolution

The Resolution calls upon governments to adopt disclosure rules – by statute or judicial rulemaking – and is divided into two clauses to make clear that the prosecutor's duty to disclose information to the defendant in connection with a trial is different from the duty to disclose information in connection with a guilty plea. Prior to a trial, the disclosure rule would require the prosecutor to (a) seek from law enforcement agencies information in their possession that tends to negate the guilt of the accused, mitigate the offense charged or sentence, or impeach the prosecution's witnesses or evidence, and (b) make timely disclosure of all such evidence which is known by the prosecutor to the defense. The defendant who chooses to go to trial is putting the government to its proof and is entitled to this evidence which often may be within the control of prosecutorial and law enforcement entities. The prosecutor may be relieved of the disclosure obligation only by a protective order.

The disclosure rule in the guilty plea context would (a) require the prosecutor to disclose information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense charged or sentence, but would (b) neither require the prosecutor to seek information from law enforcement agencies nor disclose impeachment evidence unless it tends to negate the guilt of the accused or mitigate the offense charged or sentence. The lesser disclosure requirement reflects the practical realities that surround plea bargaining: namely, prosecutors and defendant often share an interest in a speedy disposition of a matter, often desire to avoid the costs associated with additional investigation of a matter, and recognize that impeachment evidence that would not tend to negate the guilt of the accused or mitigate the offense charged or sentence is of little or no use in the guilty plea context. Again, the prosecutor may be relieved of the disclosure obligation only by a protective order.

The Resolution and the Report use the term “prosecution” and “prosecutor” as synonymous.

The Special Role of the Prosecutor

In the American legal system more than in any other, the prosecutor holds a very particular function, perfectly depicted by Justice Sutherland in Berger v. United States:1

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

1 295 U.S. 78, 88 (1935).
The Discovery Paradox and *Brady v. Maryland*

In our adversary system, the parties are in charge of gathering and submitting the evidence. This raises an interesting paradox. In the criminal justice system—in particular the federal criminal system, the government often has control over the availability of the evidence the defense will require to try its case. Specifically, the government is required to assess whether evidence is exculpatory and to disclose that information to the defense. This disclosure of exculpatory information by the prosecution is vital to notions of due process as guaranteed by the Fifth Amendment and effective assistance of counsel as guaranteed by the Sixth Amendment. The Official Note of the Committee on the Judiciary to Rule 16 of the Federal Rules of Criminal Procedure provides that disclosure rules “contribute to the fair and efficient administration of criminal justice by aiding in informed plea negotiations, by minimizing the undesirable effect of surprise at trial, and by otherwise contributing to an accurate determination of the issue of guilt or innocence.”

First articulated by the Supreme Court almost fifty years ago in its famous case *Brady v. Maryland*, the disclosure obligation has, over the last decade, become the subject of much controversy.

The Source of Disclosure Obligations

Prosecutors’ disclosure obligations derive from a variety of sources including state and federal constitutions, statutes, court rules, case law, and ethics rules and standards. The duty to disclose varies by jurisdiction—between state and federal jurisdictions, among state and federal jurisdictions, and even within state and local offices. For this reason, the scope of the federal and state prosecutors’ disclosure obligations is often unclear and conflicting.

Chronology of Efforts to Amend the Federal Rules of Criminal Procedure

In March 2003, the American College of Trial Lawyers published a report entitled “Proposed Codification of Disclosure of Favorable Information Under Rules of Criminal Procedure 11 and 16.” This report urged the Advisory Committee on Criminal Rules to consider amending Federal Rule of Criminal Procedure 16 to require the government to disclose exculpatory information. Ultimately, in March 2006, the Advisory Committee realized that “[t]he failure of the Federal Rules of Criminal Procedure to provide a duty to disclose exculpatory evidence is an anomaly that should be remedied.” Therefore, despite opposition from the Department of Justice, the Advisory Committee recommended an amendment to Rule 16. The proposed amendment read as follows:

Rule 16(a)(1)(H): *Exculpatory or Impeaching Information.* Upon a defendant’s request, the government must make available all

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3 Notes of the Committee on the Judiciary, House Report no. 94-247; 1975 amendment, citing the Advisory Committee Note.
6 Id. at 2.
information that is known to the attorney for the government or agents of law enforcement involved in the investigation of the case that is either exculpatory or impeaching. The court may not order disclosure of impeachment information earlier than 14 days before trial.

The Committee Note was careful to explain that such information must be disclosed regardless of whether that evidence would be admissible at trial. Indeed, the proposed rule contained no requirement that the information be “material” to guilt in the sense that this term is used in Supreme Court cases such as Kyles v. Whitley. The proposed rule would, instead, have required “prosecutors to disclose to the defense all exculpatory or impeaching information known to any law enforcement agency that participated in the prosecution or investigation of the case without further speculation as to whether this information will ultimately be material to guilt.” The reference to all exculpatory or impeaching “information,” instead of “evidence,” was carefully chosen to make it clear that the discovery obligation was not limited to admissible evidence.

At the time the proposed Rule 16 Amendment was under consideration, the Department of Justice (“DOJ”) revised the United States Attorney Manual (“USAM”), by adding a new disclosure section entitled “Policy Regarding Disclosure of Exculpatory and Impeachment information.” Intended to address many of the proposed Rule 16 Amendment’s concerns, this new disclosure policy in the USAM was announced as a “workable solution” and an adequate response to the Advisory Committee’s concerns. The new policy, which took effect on October 19, 2006, did provide an important innovation: for the first time, the Department’s written policies mandated disclosure of exculpatory and impeachment evidence and information.

While the Advisory Committee “applauded the new DOJ policy,” the Advisory Committee nonetheless ultimately concluded by an 8-4 vote that the new policy did not obviate the need for the proposed Amendment to Rule 16. Although the Advisory Committee welcomed the new DOJ policy as a “major step forward,” the Committee highlighted what it determined were the USAM’s two major flaws: First and foremost, even though the policy may have furthered to some degree compliance with Brady obligations, the USAM is not a judicially enforceable instrument; defendants cannot therefore have its strictures judicially enforced. Second, the new Policy did nothing to eliminate the subjective nature of a prosecutor’s assessment whether information that is otherwise exculpatory or impeaching is nonetheless in the opinion of the prosecutor “not significantly probative of the issues before the court,” such that the prosecutor need not disclose it. The DOJ eventually persuaded the Standing Committee On Practice and Procedure to reject the Amendment to give the USAM revision an opportunity to prove itself.

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10 United States Attorney Manual, § 9-5.001.
12 Id.
14 Letter from Deputy Attorney General Paul J. McNulty to the honorable David F. Levi, Chair of the Committee on Rules of Practice and Procedure (June 5, 2007).
Brady Violations and the DOJ Response

The years immediately following the USAM revision were marked by a series of highly publicized federal “Brady” violations as well as some state prosecution disclosure failures. On the state side, the most emblematic example is probably the so-called “Duke lacrosse rape case,” that eventually led to the disbarment of the prosecutor Michael Nifong, who failed to disclose exculpatory DNA evidence.\(^\text{15}\) On the federal side, the cases include the “Latin Kings” gang mistrial\(^\text{16}\) based on the government’s failure to disclose material exculpatory information concerning a cooperative witness, and more recently the setting aside of the late United States Senator Ted Stevens’ conviction\(^\text{17}\) due to the Department of Justice’s withholding of crucial evidence. In the Senator Stevens’ case, District Judge Emmet G. Sullivan observed that in his nearly 25 years on the bench, he had never seen anything approaching the mishandling and misconduct that had occurred in that case.\(^\text{18}\)

Faced with these setbacks, on April 14, 2009, Attorney General Eric Holder announced “comprehensive steps to enhance the Justice Department’s compliance with rules that require the government to turn over certain types of evidence to the defense in criminal cases.”\(^\text{19}\) Attorney General Holder addressed all the Assistant US Attorneys in the following strong terms:

Your job as AUSA is not to convict people. Your job is not to win cases. Your job is to do justice. Your job is in every case, every decision that you make, to do the right thing. Anybody who asks you to do something other than that is to be ignored.\(^\text{20}\)

Attorney General Holder pledged, among other things to: 1) provide supplemental training to federal prosecutors on their discovery obligations in criminal cases and to 2) create a working group of senior prosecutors and Department officials to review the discovery practices in criminal cases.\(^\text{21}\)

Pursuant to Attorney General Holder’s pledge, on January 4, 2010, Deputy Attorney General David W. Ogden issued three memoranda providing “Guidance for Prosecutors Regarding Criminal Discovery.”\(^\text{22}\) The so-called “Ogden Memoranda” are designed to provide prosecutors with a “methodical approach to consideration of discovery obligations that prosecutors should follow in every case to avoid lapses that can result in consequences adverse to the Department’s

\(^{15}\) For a discussion of this incident, see Michael L. Seigel, *Race to Injustice: Lessons Learned From the Duke Lacrosse Rape Case*, (Carolina Academic Press), (M. Seigel, ed. 2009).


\(^{18}\) Id.


\(^{21}\) April 14, 2009 Department of Justice Press Release: Attorney General announces increased training, review of process for providing materials to defense in criminal cases.

\(^{22}\) The Memoranda can be found at http://www.justice.gov/dag/discovery-guidance.html.
pursuit of justice.” While laudable, this approach by the Department of Justice suffers from some of the same infirmities as the revision of the 2006 USAM four years earlier. This “internal” solution still leaves many questions unanswered. Beyond its aspirational goals, the Ogden Memoranda are short on specific guidance. For example, although the Memoranda provide that “generally speaking, witness interviews should be memorialized by the agent” and that “agent and prosecutors notes and original recordings should be preserved,” the scope and timing of disclosure of such materials, if at all, are not specifically addressed. More precise are the provisions that “material variances in a witness’s statements should be memorialized […] and […] be provided to the defense as Giglio information” and another provision that, except if they can be construed as impeachment evidence, “[t]rial preparation meetings with witnesses generally need not be memorialized.”

History with the earlier USAM revision has proven that “[i]t is insufficient to rely on Department of Justice training programs for prosecutors alone to assure that the government’s obligation to produce certain information to defendants is understood and properly discharged. The persistent problems discovered by numerous courts may have occurred, at least in part, because the Department of Justice did not properly instruct its prosecutors or adequately educate them to understand the importance of their discovery obligations.” More importantly, just as with the USAM revision, the Ogden Memoranda, by their very nature as internal administrative documents, create no rights for defendants and do not address the increasingly urgent need for a judicially enforceable instrument.

The adoption by statute or judicial rulemaking of provisions requiring certain disclosures by the prosecution should complement the efforts that Deputy Attorney General Ogden has undertaken, as well as those taken by Assistant Attorney General Lanny Breuer, to assure that the federal government meets all of its responsibilities to defendants. Training for prosecutors regarding discovery obligations is to be applauded, and adoption of disclosure rules should give prosecutors a clear idea of what their obligations are.

The Scope and Limit of the Constitutional Obligation
In Weatherford v. Bursey, the Supreme Court held that “there is no general constitutional right to discovery in a criminal case.” However, “the Due Process Clauses of the Fifth and Fourteenth Amendments do provide criminal defendants with the right to certain evidence within the government’s possession.” The Supreme Court has articulated this right over the last half of a century.

23 David W. Ogden, Memorandum for Department Prosecutors, Deputy Attorney General, Guidance for Prosecutors Regarding Criminal Discovery (January 4, 2010).
24 Id.
26 Id. at 171.
27 David W. Ogden, Memorandum for Department Prosecutors, Deputy Attorney General, Guidance for Prosecutors Regarding Criminal Discovery (January 4, 2010). See also United States v. Caceres, 440 U.S. 741 (1979).
In 1963, in *Brady v. Maryland*, the Supreme Court laid out the foundations of a prosecutor's constitutional duty to disclose evidence favorable to an accused. The Court solemnly declared that:

Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. [...] A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice.

Based on that powerful warning, the Supreme Court held that: “The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” A few years later, in *Giglio v. United States*, the Supreme Court made it clear that the prosecutor's duty to disclose is not limited to exculpatory evidence, but also covers “evidence affecting credibility,” in other words, impeachment evidence. In *United States v. Agurs*, the Supreme Court held that the prosecution's constitutional duty to disclose is not limited to situations where the defendant made a specific request for the relevant evidence. On this occasion, the Court also started to shape its “materiality” standard in the context of *Brady* violations. Simply put, evidence is material in the *Agurs* context if it “creates a reasonable doubt that did not otherwise exist.” That standard was further refined in *United States v. Bagley*, where the Supreme Court determined that “[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”

Ten years later, in *Kyles v. Whitley*, the Court refined this standard even further: the materiality standard does not require a defendant to prove that disclosure of the suppressed material would have eventually resulted in his acquittal. The defendant need only demonstrate that the nondisclosure prevented him from a verdict worthy of confidence. In other words, rather than

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31 Indeed, the discovery rules as they currently stand require the prosecutor not only to be the architect of the government’s case. In making the determination whether a piece of evidence is material to the defense, the prosecutor must also be the architect of what he or she believes to be the defense case. It is difficult to envision a scenario more vulnerable to discovery abuse. As things currently stand, the government makes a very public expression of its belief in a defendant’s guilt — via grand jury investigation, argument to a grand jury, indictment, press release — then is asked to make decisions about disclosing evidence that might undermine that public commitment to guilt.
33 405 U.S. 150, 154 (1972).
35 Id. at 112.
37 Id. at 682.
requiring that any individual piece of suppressed evidence be sufficient to change the final outcome of the case, the Court must consider whether the favorable evidence that was withheld "put the whole case in such a different light as to undermine confidence in the verdict."\(^{39}\) Finally, in *Strickler v. Greene*\(^{40}\) the Court eventually detailed the elements of what constitutes a *Brady* violation "there are three components of a true *Brady* violation: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."\(^{41}\)

*Brady* and its progeny establish only a "constitutional minimum"\(^{42}\) and do not preclude jurisdictions from adopting more demanding disclosure obligations by statute, rule of procedure, or rule of professional conduct.

**The Reach and Limit of Statutory sources**

Unlike Constitutional disclosure obligations which are sometimes qualified as "one-way streets,"\(^{43}\) because only defendants have constitutional due process rights, statutory rules of discovery usually are "two-way streets."\(^{44}\) This means that both prosecutors and defense attorneys are statutorily required to disclose to each other certain categories of evidence that they intend to use at trial.\(^ {45}\) Every jurisdiction has its own set of rules governing discovery. Federal criminal cases are governed by the Federal Rules of Criminal Procedure, as detailed in Rule 16.

Rule 16 details discovery proceedings in a wide and diverse array of specific situations. However, despite Rule 16's apparent comprehensiveness, it does not provide for a mandatory general disclosure to a defendant of all exculpatory evidence. Local rules in this regard differ considerably from one jurisdiction to another, including with regard to critical issues such as the scope and timing of the disclosure. According to a report issued by the Federal Judicial Center in 2007,\(^ {46}\) only 37 of the 97 federal districts reported having any kind of relevant local rule, order, or procedure specifically governing disclosure of *Brady* material. Even among these 37 districts where a local rule exists, there is virtually no uniformity as to the nature, scope, timing, duration or sanction.\(^ {47}\)

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\(^{39}\) Id. at 435.

\(^{40}\) 527 U.S. 263 (1999).

\(^{41}\) Id. at 281-282.


\(^{44}\) Id. at 93.

\(^{45}\) Id.


State court rules and statutes also impose a varying array of disclosure obligations. These rules call for disclosure of specified documents, physical items and other information. These may include: written and recorded statements of the defendant, reports of the defendant’s prior criminal convictions, physical evidence that the prosecution plans to use at trial, expert reports, witnesses’ criminal records, and prosecution witnesses’ relevant written and recorded statements. Unlike in the federal system where prosecutors often need not list their witnesses prior to trial, prompt and full disclosure of witness statements is the rule in many states. Numerous states specify time limits within which discovery must be produced. Unfortunately, there is no uniformity amongst the state or federal system as to the pre-trial disclosure of Brady information.

The Scope and Limit of Ethical Rules
The ethical and disciplinary rules in effect in the vast majority of U.S. jurisdictions are versions of the Model Rules of Professional Conduct, prepared by the ABA. Just like any other lawyer, the prosecutor is ethically bound by such rules.

Rule 3.8(d) of the Model Rules of Professional Conduct, provides:

The prosecutor in a criminal case shall [. . .] 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, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

State ethics rules impose obligations upon all state and federal prosecutors beyond that required by the constitution, statutes, and court rules. Most states have adopted a rule based on Rule 3.8(d). Courts and commentators unanimously consider this ethical obligation to be more demanding than the constitutional one. In particular, Rule 3.8(d) demands more than the constitutional case law by requiring the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial’s

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48 See e.g., FLA. R. CRIM. PRO. R. 3.220 (b) (providing a list of items a prosecutor must disclose); MASS. R. CRIM. PRO. R. 14(a)(1)(A) (providing a list of mandatory discovery for the defendant); NJ CT R 3:13-3 (statements by all persons known to possess relevant information must be provided within 14 days of an indictment); Report to the New York State Assembly Codes Committee, “Criminal Discovery in New York State: Current Practice and Proposals for Change” (1991), Survey of Discovery Practices in Large States with Big Cities.


51 See e.g., Cone v. Bell, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009). Irwin H. Schwartz, Beyond Brady: Using Model Rule 3.8(d) in Federal Court for Discovery of Exculpatory Information, CHAMPION (March 2010), 34.
outcome. "The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution."52

Further, under Rule 3.8(d), the prosecutor’s ethical duty of disclosure is not limited to admissible "evidence" (i.e. physical and documentary evidence). That duty also requires a prosecutor to disclose favorable "information." Indeed, even "though possibly inadmissible itself, favorable information may lead a defendant’s lawyer to admissible testimony or other evidence, or assist him in other ways, such as in plea negotiations."53 Nondisclosure is only permitted when the tribunal is satisfied that disclosure could result in substantial harm to an individual or the public interest as reflected in a protective order.54 "The absence of a materiality component in these rules of professional conduct eliminates a prosecutor’s ability to ethically justify nondisclosure by claiming that the information at issue is unreliable or only minimally negates guilt."55

Although broader than the constitutional mandate, this ethical duty of disclosure is not without limits. In particular, Rule 3.8(d) has a "knowledge" requirement that requires disclosure only of evidence and information "known to the prosecutor." "Known" refers to actual knowledge.56 In other words, Rule 3.8(d) does not establish a duty for prosecutors to undertake an investigation for favorable evidence that may possibly exist but of which they are unaware.57

The standard established by Rule 3.8(d) is "only" an ethical requirement, not a rule that trial judges enforce. Rule 3.8(d) was not intended to serve a broad normative purpose, but only a narrow disciplinary one.58 The principles embodied in this disciplinary rule should be codified including the Amendment of Rule 16. This is so because disciplinary authorities only too rarely proceed against prosecutors.59 Indeed, studies have shown that regulation through formal attorney disciplinary proceedings has no significant influence on prosecutorial disclosure decisions.60

Under Rule 3.8(d), prosecutors are already ethically bound to disclose to defense counsel all favorable information of which they are aware, without regard to materiality. There is no rational reason that prosecutors should not be legally bound as well by codifying the disclosure rules. The Federal Rules of Criminal Procedure and various state practices should be brought into compliance with this standard, and the proposed Amendment to Rule 16 is the best way to reach that imperative result in the federal criminal system.

53 Id. at 5.
54 MODEL RULES OF PROF’L CONDUCT R. 3.8(d), Official Comment to Rule 3.8(d), § 3.
57 Id. at 6. Opinion 09-454 of July 8, 2009 makes clear that Rule 3.8(d) was not intended to be a codification of the Brady evolving case law: "unlike other Model Rules that expressly incorporate a legal standard, Rule 3.8(d) establishes an independent one [...] more demanding than the constitutional obligation." Id. at 4.
58 See MODEL RULES OF PROF’L CONDUCT – Preamble § 20.
ABA Standards for Criminal Justice: Prosecution Function

Another important reference to the professional responsibility of prosecutors is the ABA Standards for Criminal Justice: Prosecution Function (the “Standards”). The American Bar Association first introduced the Standards in 1964, which have since then been reviewed and modernized. The Standards set forth the prosecution’s disclosure duty. The existing Standard 3-3.11, Disclosure of Evidence by the Prosecutor, provides:

(a) 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.

(b) A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.

(c) A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution’s case or aid the accused.

The Standards, although non-binding, have been cited many times by courts, including the United States Supreme Court.61 Recently, in *Cone v. Bell*,62 the Supreme Court, citing both the ABA Standards for Criminal Justice and Model Rule 3.8(d), repeated that “[a]lthough the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor’s ethical or statutory obligations.”63

The Need for Clear Rules

One of DOJ’s recurring justifications for opposing any Amendment to Rule 16 is that *Brady* violations are too “anecdotal”64 to justify “such a significant change.”65 66 This argument is flawed, in several respects:

First, the absence of reported *Brady* violations does not prove they are infrequent. The absence of published *Brady* violations has no necessary empirical correlation with the number of *Brady* violations that actually occur. Rather, the absence of published *Brady* violations could just as

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64 Letter from Deputy Attorney General Paul J. McNulty to the honorable David F. Levi, Chair of the Committee on Rules of Practice and Procedure (June 5, 2007), 4.

65 Id.

66 More recently, the “Ogden” Issuance Memorandum stated that “incidents of discovery failures are rare in comparison to the number of cases prosecuted.” David W. Ogden, Deputy Attorney General, Memorandum for Department Prosecutors, *Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group* (January 4, 2010).
easily be cited to prove that most Brady violations remain undiscovered. The government's misuse of statistical "analysis" to divine the rarity of Brady violations was perfectly explained by District Court Judge Wolf, in a recent opinion:

The reported cases are not, however, a true measure of the scope of the problem, which it is impossible to measure precisely. The defense is, by definition, unaware of exculpatory information that has not been provided by the government. Although some information of this nature comes to light by chance from time to time, it is reasonable to assume in other similar cases such information has never come to light. There is, however, no way to determine how frequently this occurs.67

Second, 96 percent of all cases prosecuted result in guilty pleas often without substantial discovery.68 In addition, most of the time, before agreeing to a plea, the prosecutor will require the defendant to waive his right to Brady review.69

Finally, even rare violations of Brady are intolerable. The Department of Justice does not have a uniform practice as to the timing or scope of Brady and Giglio disclosures. There are wildly different policies in the local United States Attorney Offices and, on occasion, amongst Assistant United States Attorneys in a particular office. For example, some United States Attorney Offices routinely provide FBI 302's and interview memoranda of witnesses to comply with Brady and Giglio, while other United States Attorney Offices virtually never produce witness interview memoranda or agent or prosecutor notes regarding interviews. There is no reason why the DOJ should have 96 different policies rather than one uniform policy. According to Deputy Attorney General Ogden himself, "some local variation in discovery practices is inevitable. Inconsistent discovery practices among prosecutors within the same office, however, can lead to burdensome litigation over the appropriate scope and timing of disclosures, judicial frustration and confusion, and disparate discovery disclosures to a defendant based solely on the identity of the prosecutor who happens to have been assigned a case."70 The same inconsistencies can be found in state prosecutors' offices, which usually receive less attention than DOJ even though they handle the vast bulk of criminal cases in the United States.

Over the years, scholars71 have identified three major areas of disparities in disclosure policies: (1) the timing of disclosure, (2) the scope of disclosure and (3) the understanding of the materiality requirement. These disparities exist in both the federal and various states criminal justice systems.

70 David W. Ogden, Deputy Attorney General, Memorandum for Heads of Department Litigating Components Handling Criminal Matters, Requirement for Office Discovery Policies in Criminal Matters, (January 4, 2010).
Some state jurisdictions impose specific time limitations within which to produce information. In other states, the focal point may be the commencement of the trial; those jurisdictions require prosecutors to complete their disclosure obligations within a fixed period of days prior to trial. Other states require disclosure within a certain time frame after the defense has made its requests.\textsuperscript{72} 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."\textsuperscript{73} Only a few states specify that disclosure must be made prior to the entry of a guilty plea.\textsuperscript{74}

The disparity in disclosure practices regarding the scope of necessary disclosures is greater than the disparity in timing practices. Indeed, the absence of a clear and unique rule has led, as noted above, to countless inconsistent variations as to what information should or should not be disclosed. Nearly fifteen states require the prosecution to disclose "favorable" evidence or information regardless of whether the defense has filed a request or motion.\textsuperscript{75} Most of these states define "favorable" as some form of evidence that "tends to negate guilt" — a standard echoed in the rules of professional conduct for prosecutors.\textsuperscript{76} Some local and state jurisdictions interpret "favorable" more broadly than exculpatory or impeaching evidence, leaving the disclosure decision to individual prosecutors.\textsuperscript{77}

Additionally, it is noteworthy that several states\textsuperscript{78} have enacted "open file" policies, which require significantly broader disclosure than any of the rules or laws currently in place. Rather than determine whether the information is material or favorable to the defense, prosecutors who operate under open file policies gather and turn over to the defense all of the non-privileged information contained in the entire file.

Under Rule 3.8(d), prosecutors are already ethically bound to disclose to defense counsel all favorable information of which they are aware, without regard to materiality. There is no rational reason that prosecutors should not be legally bound as well by codifying the disclosure rules. The Federal Rules of Criminal Procedure and various state practices should be brought into compliance with this standard.

\textsuperscript{72} Usually within thirty days or less.
\textsuperscript{73} See, Report to the New York State Assembly Codes Committee, Survey of Discovery Practices in Large States with Big Cities (1991).
\textsuperscript{74} See, e.g., N.J. CT. R. 3:13-3(a).
\textsuperscript{76} MODEL RULES OF PROF'L CONDUCT R. 3.8(d).
\textsuperscript{77} Often the terms "favorable" and "exculpatory or impeachment" achieve the same result.
\textsuperscript{78} At least two states, North Carolina (N.C. GEN. STAT. § 15A-903) and Ohio (Ohio R. Crim. P. 16), have "pure" open file policies; i.e., providing automatic disclosure of all non-privileged information in the prosecution's entire file. Other states like Colorado, Florida, Arizona, Massachusetts and New Jersey also have broad discovery laws and rules, often based upon the American Bar Association Standards for Criminal Justice: Discovery and Trial by Jury Standard.
The Realities Underlying the Resolution

The resolution is based on the following realities of the way in which criminal cases are investigated and prosecuted:

1. Prosecutors generally do not investigate cases, except through grand jury proceedings, and rely upon law enforcement to gather evidence and conduct many interviews of witnesses. Prosecutors have a responsibility to request Brady (used hereafter in its broadest sense) material from investigators, but cannot compel compliance or assure that compliance is full and complete. Thus, the resolution calls for rules that require prosecutors to seek the information.

2. Prosecutors cannot always know what material would actually be useful to a defense. Thus, the resolution calls for prosecutors to turn over material that they know meets the standards set forth in the resolution, unless relieved of that duty by a protective order.

3. The reality is that many guilty pleas take place—to the advantage of both an accused seeking to avoid pretrial confinement and a prosecutor seeking to avoid delay and burden on witnesses—before a prosecutor has time to request full disclosure from law enforcement.

The resolution recognizes that one “official” explanation for non disclosure or late disclosure is “protecting the safety and integrity of witnesses.” According to the Ogden Memoranda, excessive disclosure “may risk harm to victims or witnesses, obstruction of justice, or other ramifications contrary to our mission of justice.”

As the Federal Advisory Committee demonstrated, the government has two alternatives when it believes disclosure will create an undue risk of harm to the witness: “It can ask for a protective order under subdivision (d)(1). […] It can also move the court to allow the perpetuation of a particular witness’s testimony for use at trial if the witness is unavailable or later changes his testimony.” The resolution recognizes that a protective order can trump the ordinary discovery obligations imposed upon the prosecutor.

No Materiality Limitation

In Brady, the Supreme Court held that prosecutors must disclose exculpatory evidence only when it is “material either to guilt or to punishment.” Over the years, this materiality requirement has been increasingly criticized by scholars and practitioners as having contributed

79 See, e.g., Letter from Deputy Attorney General Paul J. McNulty to the Honorable David F. Levi, Chair of the Committee on Rules of Practice and Procedure (June 5, 2007), 5.
80 David W. Ogden, Deputy Attorney General, Memorandum for Department Prosecutors, Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010).
81 FED. R. CRIM. P. 16 advisory committee’s note - 1974 amendment.
82 373 U.S. 83, 87.
to blur the exact scope of the pre-trial disclosure obligation, hence limiting its range. As one author recently put it, “[t]he definition of ‘material’ exculpatory evidence is so restrictive that it is probably best articulated not as a duty of the prosecutor to disclose, but as a narrow exception to a prosecutor’s general right to withhold evidence from the defense. Under Brady’s progeny, a prosecutor can constitutionally withhold all evidence, except for exculpatory evidence that ‘creates a reasonable doubt that did not otherwise exist.’”84 As a result, “[w]hile the [Brady] doctrine has been expanded over the years to apply to a broader range of types of evidence, it has simultaneously and significantly been narrowed through an increasingly restrictive interpretation of the ‘materiality’ component.”85 More importantly, given that the materiality standard is a standard articulated in the post-conviction context for appellate review, “it is not the appropriate one for prosecutors to apply during the pretrial discovery phase.”86

When examining the evidence post-conviction, it is practicable for the standard of review to provide for reversal only upon a showing that the suppressed information was material to the defendant’s case. Determinations of materiality can and should be made in light of all the evidence adduced at trial. But it defies logic to allow a partisan prosecutor to withhold admittedly favorable evidence by speculating before the trial starts that, even if his suppression of evidence is later discovered, he will be able to defend it by stating his belief that the evidence would not make a difference to the trial’s outcome. […] A prosecutor cannot possibly predict the likelihood that the verdict would be no different if favorable evidence is withheld.87

Respectfully submitted,

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August 2011

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87 Donald J. Goldberg & Amy Shellhammer, To Disclose or Not to Disclose? Eliminating Materiality from Government’s Pre-trial Analysis, Washington Legal Foundation - Critical Legal Issues Working Paper Series, No. 170, (February 2010), 4-5.