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Prosecutorial Disclosure Obligations

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Prosecutorial disclosure of information to the defense has long been recognized as essential to a fair criminal justice system and yet, the required disclosure is ill defined and the subject of ongoing contention. Prosecutor's obligations are informed by various sources including state and federal constitutional provisions, statutes, court rules and state ethics rules. The ABA Criminal Justice Standards, another source defining that obligation, can and have served as guidance for judges, prosecutors and defense lawyers, notably in areas of ambiguity. Those Standards were recently revised to provide greater clarity as to the scope of what information should be provided to the defense and the timing of the disclosure duty. This Article explores the changes made by the revisions as well as areas—such as e-discovery—that were not included.

* Clinical Professor of Law and Director of the Jacob Burns Center for Ethics in the Practice of Law. Bruce Green, Chair of the ABA Criminal Justice Section, should be applauded for his leadership in envisioning the roundtables around the country. I thank Rory Little and the staff of the *Hastings Law Journal* and the *Hastings Constitutional Law Quarterly* for their work in organizing the Hastings symposium, entitled "Navigating Prosecutorial Ethics: A Roundtable Discussion of the ABA Standards for Criminal Litigation," and this publication. I am grateful to the jurists, prosecutors, defense lawyers, and academics who participated in these roundtables for their thoughtful and invaluable insights. Thanks to Jenny May for her work on the discussion paper and this Article.

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INTRODUCTION

Little is more essential to a fair criminal justice system than prosecutorial disclosure of information to the defense. Disclosure laws, rules, and policies should "contribute[] to the fair and efficient administration of criminal justice by . . . minimizing the undesirable effect of surprise at the trial . . . and . . . contributing to an accurate determination of the issue of guilt or innocence."[1] The subject of seemingly perpetual discussion, debate, scholarly articles, and conferences, prosecutorial disclosure obligations increasingly have become the focus in high publicity cases. Failure to disclose significant evidence to the defense in numerous cases has resulted in reversal, dismissal, and years of incarceration for the wrongfully convicted.[2] Many

1. FED. R. CRIM. P. 16 (1974) advisory committee note ("The amendment making disclosure mandatory under the circumstances prescribed in subdivision (a)(1)(A) resolves such ambiguity as may currently exist, in the direction of more liberal discovery. This is done in the view that broad discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at the trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence." (citations omitted)).

2. *See* Ellen Yaroshefsky, *Foreword: New Perspectives on* Brady *and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943, 1943 n.1 (2010) (citing United States v. Zhenli Ye Gon, 287 F. App'x 113 (D.C. Cir. 2008); United States v. Grace, 526 F.3d 499 (9th Cir.

ask why our legal system provides plenary disclosure policies in procedures in civil cases, where only money is at stake, but provides significantly limited disclosure in criminal cases, where liberty is at stake.[3]

The answer is informed by the various sources that dictate the prosecution's disclosure obligation to the defense. These include federal and state constitutional provisions, as interpreted by courts, federal and state statutes, court rules and orders, and state ethics rules.[4]

Another source that guides prosecutorial disclosure decisions is the ABA Criminal Justice Standards for the Prosecution Function.[5] These nonbinding Standards have been cited by the Supreme Court in numerous cases.[6] As the Court has recognized, "the obligation to disclose evidence favorable to the defense may arise more broadly under a

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2008); United States v. Shaygan, 661 F. Supp. 2d 1289 (S.D. Fla. 2009); Unites States v. Jones, 620 F. Supp. 2d 163 (D. Mass. 2009); United States v. Stevens, No. 08-231(EGS), 2009 U.S. Dist. LEXIS 125267 (D.D.C. Apr. 7, 2009)); *Government Misconduct*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/understand/Government-Misconduct.php (last visited May 23, 2011) ("Common forms of misconduct by prosecutors include . . . [w]ithholding exculpatory evidence from defense . . . .").

3. *See, e.g.*, John J. Capowski, *Establishing Separate Civil and Criminal Evidence Codes*, 61 ARK. L. REV. 217, 237–38 (2008) ("While discovery is limited in criminal cases, the Federal Rules of Civil Procedure provide for a wide range of discovery devices, including depositions, interrogatories, and requests for the production of documents. This gap between civil and criminal discovery became greater with the adoption of the disclosure provisions of Rule 26[,] . . . especially with the requirement of pretrial objections set out in Rule 26(a)(3). The civil trial process is becoming more predictable and choreographed while the criminal trial remains a proceeding where 'witness unreliability, surprise, and discretion' continue to be hallmarks. Recognition of these widening differences through separate evidentiary rules seems appropriate." (footnotes omitted)).

4. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009), *available at* http://www.nacdl.org/public.nsf/whitecollar/ProsecutorialMisconduct/$FILE/09-454.pdf [hereinafter ABA Op. 09-454] (explaining the prosecutor's duty to disclose evidence and information favorable to the defense).

5. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION (3d ed. 1993). This Article began as a background paper for roundtable discussions at law schools around the country. My initial presentation of the issues paper was at U.C. Hastings College of Law during the symposium, entitled "Navigating Prosecutorial Ethics: A Roundtable Discussion on the ABA's Standards for Criminal Litigation," which took place on October 15, 2010. I also presented the paper at roundtable discussions at American University, Washington College of Law (Nov. 5, 2010); Washington and Lee School of Law (Nov. 19, 2010); Benjamin N. Cardozo School of Law, Yeshiva University (Oct. 21, 2010); and Case Western Reserve University School of Law (Oct. 29, 2010). Distinguished jurists, academics, state and federal prosecutors and defense lawyers engaged in thoughtful dialogue, often sharply disagreeing about the issues and questions raised. This Article incorporates many of the comments and suggestions made at various roundtable discussions. The text of the proposed Prosecution Function Standards are printed in this issue as an appendix to Rory K. Little, *Introduction: The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111, app. (2011).

6. Cone v. Bell, 129 S. Ct. 1769, 1783 n.15 (2009) (citing MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2008); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION (3d ed. 1993)); *see also, e.g.*, Rompilla v. Beard, 545 U.S. 374, 387 n.6 (2005) (citing STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-4.1 (3d ed.1993)); Kyles v. Whitley, 514 U.S. 419, 437 (1995) (citing STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.11(a) (3d ed. 1993)).

prosecutor's ethical or statutory obligations" than under the federal constitution.[7]

The ABA first introduced the Standards in 1964 and since then has reviewed and modernized them. The ABA is again considering proposed revisions to the Standards, including the proposed Standard 3-5.5, which discusses disclosure to the defense.[8]

This Article explores the extent to which the proposed revisions to the Standards on disclosure are adequate for and necessary to the fair administration of justice. These revisions clarify the prosecution's disclosure duties and address some of the key issues that are still debated amongst scholars, practitioners, and judges. Part I provides an overview of the prosecution's disclosure duties. Part II reviews the significant changes contained in proposed Standard 3-5.5, which concerns prosecutorial disclosure obligations. Part III examines issues not addressed by the proposed Standard, including e-discovery and judicial supervision of discovery. I conclude that this proposed Standard makes significant improvements to the current Standard; however, the Standards should address other key issues.

I. PROSECUTORIAL 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. It varies both between and amongst federal and state jurisdictions, and even within state and local offices. As a result, the scope of the prosecutor's federal and state disclosure obligations is often unclear.

A. FEDERAL AND STATE LAWS

In 1963, the Supreme Court held in *Brady v. Maryland* 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."[9] *Brady* and its progeny extended the prosecution's duty to disclose evidence that impeaches the credibility of the government's witness, whether or not the defense requests it.[10] The prosecution has a

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7. *Cone*, 129 S. Ct. at 1783 n.15.

8. *See* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.5 (Proposed Revisions 2010).

9. 373 U.S. 83, 87 (1963) (emphasis added). For a comprehensive discussion of the evolution of the *Brady* doctrine, see Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685 (2006).

10. *See* United States v. Bagley, 473 U.S. 667, 676 (1985); United States v. Agurs, 427 U.S. 97, 112–13 (1976); Giglio v. United States, 405 U.S. 150, 153–55 (1972); Harm v. State, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006).

duty to make reasonable efforts to insure that its agents make favorable evidence available to the defense.[11]

United States v. Bagley established that undisclosed evidence is "material" and will result in reversal 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."[12] This materiality standard is the source of significant and ongoing controversy, because in many jurisdictions, this standard for reversal on appeal is also utilized as the standard for defining the duty to provide pretrial disclosure of information.[13]

Application of the *Brady* doctrine varies widely across federal and state jurisdictions, and there remains a lack of clarity about the boundaries of its requirements.[14] Scholars decry disclosure practices and the "dissonance between *Brady*'s grand expectation to civilize the United States criminal justice and the grim reality of its largely unfulfilled promise."[15]

Federal and state court rules and statutes supplement prosecutors' constitutional obligations. For example, Federal Rule of Criminal Procedure 16 compels prosecutors to produce "[u]pon a defendant's request" information "material to preparing the defense."[16] The Jencks Act requires, inter alia, prosecutors to produce prior statements of a government witness after that witness testifies.[17] State court rules and statutes also impose disclosure obligations.[18] These varying rules call for disclosure of specified documents, physical items, and other information.[19]

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11. *See Kyles*, 514 U.S. at 437.

12. 473 U.S. at 682.

13. *See* discussion *infra* Part II.B.

14. *See* LAURAL HOOPER & SHELIA THORPE, FED. JUDICIAL CTR., *BRADY V. MARYLAND* MATERIALS IN THE UNITED STATES DISTRICT COURTS: RULES, ORDERS, AND POLICIES 7–8 (2007).

15. Gershman, *supra* note 9, at 726; Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Task of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 658 (2002) ("*Brady*'s doctrinal limitations as a pre-trial discovery mechanism are magnified by the realities of criminal practice.").

16. FED. R. CRIM. P. 16. Chief among the disclosure requirements imposed is disclosure of the defendant's statement, his prior criminal record, tangible objects, reports of examinations and tests, and the substance of the testimony to be provided by expert witnesses. *See id.* Rule 16 imposes narrower obligations than the Constitution, because it does not apply to information "material to punishment." *See* United States v. Armstrong, 517 U.S. 456, 461–64 (1996).

17. Jencks Act, 18 U.S.C. § 3500(b) (2006).

18. *See, e.g.*, FLA. R. CRIM. P. 3.220(b) (providing a list of items a prosecutor must disclose); MASS. R. CRIM. P. 14(a)(1)(A) (providing a list of mandatory discovery for the defendant); N.J. RULES OF CT. R. 3:13-3 (requiring that statements by all persons known to possess relevant information must be provided within fourteen days of an indictment). *See generally* JOHN SCHOEFFEL, LEGAL AID SOC'Y, CRIMINAL DISCOVERY REFORM IN NEW YORK: A PROPOSAL TO REPEAL C.P.L. ARTICLE 240 AND TO ENACT A NEW C.P.L. ARTICLE 245 (2009) (discussing a 1991 survey of discovery practices in large states with big cities).

19. *See* Symposium, *New Perspectives on* Brady *and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1963 (2010) [hereinafter *New Perspectives on* Brady].

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.[20] Unlike in the federal system, where prosecutors need not list their witnesses prior to trial, prompt and full disclosure of witness statements is the rule in many states.[21] Many states specify time limits within which disclosures must be produced.[22]

B. ETHICS RULES AND STANDARDS

State ethics rules impose obligations upon all lawyers in state and federal court beyond those required by state constitutions, statutes, and court rules.[23] Most state courts have adopted a rule based on ABA Model Rule of Professional Conduct 3.8(d), which requires the prosecution 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, 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.[24]

State ethics rules based on Model Rule 3.8(d) potentially impose obligations beyond the federal constitutional requirements. The U.S. Supreme Court, citing Model Rule 3.8(d) and Prosecution Function Standard 3-3.11(a), acknowledged that a prosecutor's disclosure duty "may arise more broadly under a prosecutor's ethical or statutory obligations."[25]

In 2009, the ABA's ethics committee interpreted Model Rule 3.8(d) in Formal Opinion 09-454.[26] The ABA concluded that the prosecutor's ethical obligation under Model Rule 3.8(d) is separate from, and in many respects more expansive than, disclosure obligations under the

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20. *See id.*

21. *See id.*

22. SCHOEFFEL, *supra* note 18, at 148–50.

23. Federal government lawyers are bound by state ethics rules. *See* 28 C.F.R. § 77.3 (2010) ("[A]ttorneys for the government shall conform their conduct and activities to the state rules and laws, and federal local courts rules, governing attorneys in each State where such attorney engages in that attorney's duties . . . .").

24. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2010). All states, except California, adopted a Code of Professional Conduct modeled on the ABA Model Rules of Professional Conduct. *See ABA Model Rules of Professional Conduct: State Adoption of Model Rules*, CTR. FOR PROF'L RESPONSIBILITY, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited May 23, 2011).

25. Cone v. Bell, 129 S. Ct. 1769, 1783 n.15 (2009) (citing MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2008); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.11(a) (3d ed. 1993)); *see also* Kyles v. Whitley, 514 U.S. 419, 437 (1995).

26. *See* ABA Op. 09-454, *supra* note 4.

Constitution.[27] The opinion took the view that Model Rule 3.8(d) requires disclosure of evidence or information favorable to the defense without regard to the potential impact of the evidence upon the verdict (materiality), and that disclosure must be made early enough so that the defense counsel may use the evidence and information effectively.[28] In the ABA's view, the rule requires disclosure of evidence and information prior to a guilty plea proceeding.[29] In cases where the prosecution believes that early disclosure or disclosure of evidence or information may compromise an ongoing investigation or a prosecution witness's safety, the opinion advises the prosecutor to seek a protective order.[30] Prior to the ABA's opinion, some courts that discussed Model Rule 3.8(d) "incorrectly assume[ed that] it merely mirrored the *Brady* obligation."[31] It remains to be seen to what extent courts will react to the opinion.

C. ABA Criminal Justice Standards

The ABA Criminal Justice Standards set forth the prosecution's disclosure duty.[32] The current 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.[33]

The proposed Standard 3-5.5, to replace Standard 3-3.11, contains greater specificity and addresses a range of issues not contained in the current provision. It provides:

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27. *Id.* at 3–4.

28. *Id.* at 2, 6.

29. *Id.* at 6.

30. *Id.*

31. Theresa A. Newman & James E. Coleman, Jr., *The Prosecutor's Duty of Disclosure Under ABA Model Rule 3.8(d)*, Champion, Mar. 2010, at 20, 20. *But see* Cone v. Bell, 129 S. Ct. 1769, 1783 n.15 (2009) ("[T]he rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1993)...." (alteration in original) (quoting Kyles v. Whitley, 514 U.S. 419, 437 (1995)) (internal quotation marks omitted)); Model Rules of Prof'l Conduct R. 3.8(d) (2010).

32. The ABA House of Delegates approved the Prosecution Function Standards in February of 1992. Standards for Criminal Justice: Prosecution and Defense Function, at iii (3d ed. 1993).

33. Standards for Criminal Justice: Prosecution Function § 3-3.11 (3d ed. 1993).

> (a) A prosecutor should promptly seek to identify all information in the possession of the prosecution or its agents that tends to negate the guilt of the accused, mitigate the offense charged, impeach the government's witnesses or evidence, or reduce the likely punishment of the accused if convicted.
>
> (b) The prosecutor should also promptly advise other governmental agencies involved in the case of their continuing duty to identify, preserve, and disclose to the prosecutor information described in (a) above.
>
> (c) Before trial of a criminal case, a prosecutor should make timely disclosure to the defense of information described in (a) above that is known to the prosecutor, regardless of whether the prosecutor believes it is likely to change the result of the proceeding. Regarding discovery prior to a guilty plea, see Standard 3-5.8 below. The obligations to identify and disclose such information continue throughout the prosecution of a criminal case.
>
> (d) A prosecutor should promptly respond to, and make a diligent effort to comply with, legally proper discovery requests. The prosecutor should ordinarily provide specific responses to individualized defense requests for specific information, not just an acknowledgement of the prosecutor's general discovery obligations.
>
> (e) The prosecutor should also make prompt efforts to identify and disclose to the defense any [relevant?] physical evidence that has been gathered in the investigation, and provide the defense a reasonable opportunity to examine it.
>
> (f) A prosecutor should not avoid pursuit of information or evidence because the prosecutor believes it will damage the prosecution's case or aid the accused. A prosecutor should not intentionally attempt to obscure information identified pursuant to (a) above by disclosing it as part of a large volume of materials.
>
> (g) A prosecutor should determine whether additional statutes, rules or caselaw may govern or restrict the disclosure of information, and comply with them absent court order.[34]

It addresses three significant issues that cause the greatest degree of controversy and disparity in practices across the country. These are: (1) the scope of the disclosure obligation, (2) "materiality," and (3) the timing of disclosure. Each of these issues is addressed below.

II. THE KEY ISSUES

A. SCOPE OF DISCLOSURE

The varied sources defining a prosecutor's disclosure obligations result in confusion and differing interpretations of similar terminology, rather than uniformity as to the standard for the scope of disclosure. Some jurisdictions impose a legal obligation to provide "exculpatory and

34. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.5 (Proposed Revisions 2010) (emphasis omitted).

impeachment evidence," while others impose an obligation to provide "favorable" evidence or favorable "information."[35] At least fifteen states require the prosecution to disclose "favorable" evidence or information regardless of whether the defense has filed a request or motion.[36] Most of these states define "favorable" as some version of evidence that "tends to negate guilt,"—a standard echoed in the rules of professional conduct for prosecutors.[37] Some cases in federal and state jurisdictions have determined that favorable information includes, but is not limited to, promises of immunity, prior criminal records, prior inconsistent statements of government witnesses, information about mental or physical impairment of government witnesses, inconsistent or contradictory scientific tests, pending charges against witnesses, monetary inducements, bias, proffers of witnesses and documents relating to the negotiation process with the government, and the government's failure to institute civil proceedings against key witnesses.[38]

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35. *See* Weatherford v. Bursey, 429 U.S. 545, 559 (1977) (describing the duty to provide "evidence favorable to the accused"); United States v. De Angelis, 490 F.2d 1004, 1010 (2d Cir. 1974) (holding that failing to produce a witness does not violate due process where defendant does not prove the witness's testimony "would have been useful to" her); People v. Jenkins, 360 N.E.2d 1288, 1290 (N.Y. 1977) (holding that in order to compel production of informant, defendant must demonstrate that proposed testimony would be "exculpatory"), *abrogated by* People v. Scarborough, 402 N.E.2d 1127, 1132 n.2 (N.Y. 1980). *But see* United States v. Acosta, 357 F. Supp. 2d 1228, 1246–47 (D. Nev. 2005) (upholding a magistrate judge's ruling requiring prosecutors to disclose to the defense before trial all evidence that "negate[s] guilt of the accused or mitigate[s] the offense," rather than just favorable evidence that is material); People v. Vigil, 729 P.2d 360, 368 (Colo. 1986) (dismissing charges for a prosecutor's failure to disclose an informer's identity where producing the informant "would have been relevant and helpful to [defendant's] defense").

36. A 2004 report of the Judicial Conference of the United States offers a detailed survey of the then-existing differing policies. LAURAL L. HOOPER ET AL., FED. JUDICIAL CTR., TREATMENT OF *BRADY V. MARYLAND* MATERIAL IN UNITED STATES DISTRICT AND STATE COURTS' RULES, ORDERS AND POLICIES 22 (2004). Subsequently, Ohio and North Carolina amended their discovery rules. *See* OHIO RULES OF PROF'L CONDUCT R. 3.8(d) (2010); N.C. RULES OF PROF'L CONDUCT R. 3.8(d) (2010).

37. Alaska, Arizona, Colorado, Florida, Hawaii, Maine, Maryland, Massachusetts, New Hampshire, New Hampshire, North Carolina, Ohio, and Washington have adopted a version of Model Rule 3.8 and borrow the "tends to negate guilt" language. ALASKA RULES OF PROF'L CONDUCT R. 3.8 (2010); A.R.S. SUP. CT. RULES R. 42 (2005); ARIZ. RULES OF PROF'L CONDUCT ER 3.8 (2010); COLO. RULES OF PROF'L CONDUCT R. 3.8 (2010); FLA. RULES OF PROF'L CONDUCT R. 4-3.8 (2009); HAW. RULES OF PROF'L CONDUCT R. 3.8(b) (2010); ME. CODE OF PROF'L RESPONSIBILITY R. 3.7(i)(2) (2010); MD. RULES OF PROF'L CONDUCT R. 16-812 (2010); MASS. RULES OF PROF'L CONDUCT R. 3.8(d) (2010); N.H. RULES OF PROF'L CONDUCT R. 3.8(d) (2010); N.C. RULES OF PROF'L CONDUCT R. 3.8(d) (2010); OHIO RULES OF PROF'L CONDUCT R. 3.8(d) (2010); WASH. RULES OF PROF'L CONDUCT R. 3.8(d) (2010); MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2010). New Mexico also uses the same language. N.M. RULES OF PROF'L CONDUCT R. 16-308 (2010). California, however, phrases its duty as disclosing "any exculpatory evidence." CAL. PENAL CODE § 1054.1(e) (West 2010).

38. *See* Moore v. Illinois, 408 U.S. 786, 795–96 (1972) (prosecution's failure to hand over notes from a witness interview); United States v. Udechukwu, 11 F.3d 1101, 1106 (1st Cir. 1993) (prosecutor's independent corroboration of truthfulness of defendant's story); Ballinger v. Kerby, 3 F.3d 1371, 1376 (10th Cir. 1993) (photograph impeaching key prosecution witness); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993) (informant's prior criminal record); United States v. Brumel-Alvarez, 991 F.2d 1452, 1463 (9th Cir. 1992) (government memorandum highly critical of

As mentioned above, some jurisdictions impose a legal obligation to provide "exculpatory and impeachment evidence" while others require disclosure of "favorable" evidence or "favorable information."[39] However, a prosecutor may sometimes view certain information as not discoverable because it does not "impeach," while the defense attorney, with a different view of the case, may believe that the evidence is "favorable" and therefore subject to disclosure. The Standards should seek to diminish this inevitable "cognitive bias."[40] It is advisable to craft a Standard that diminishes prosecutorial subjectivity in evaluating the impact of information upon the defense. Consequently, a Standard that broadens the disclosure obligation and is specific reduces the likelihood of discovery disputes, misunderstandings between adversaries, and failures to disclose information that may lead to wrongful convictions. Broader discovery standards and practices reduce the tendency toward "game playing" and encourage a fair process.

Some district attorneys across the country have enacted "open file" policies, which require significantly broader disclosure than any of the rules or laws currently in place.[41] While the definition varies, the goal of an expansive open-file policy is to disclose all of the nonprivileged information and evidence gathered in a case to the defense as early as possible (prior to statutory time periods).[42] Rather than determine whether

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informant's credibility); United States v. Spagnoulo, 960 F.2d 990, 993–95 (11th Cir. 1992) (psychiatric report); Untied States v. Martinez-Mercado, 888 F.2d 1484, 1487–88 (5th Cir. 1989) (investigative reports); United States v. Sudikoff, 36 F. Supp. 2d 1196, 1197 (C.D. Cal. 1999) (statements made in proffer session leading to cooperation agreement); Alvarado v. Superior Court, 5 P.3d 203, 205 (Cal. 2000) (identity of key prosecution witness). *But see* Wood v. Bartholomew, 516 U.S. 1, 8 (1995) (per curiam) (polygraph result favorable to defendant not *Brady* evidence); Smith v. Phillips, 455 U.S. 209, 221 (1982) (juror's bias was not *Brady* evidence).

39. State v. Anderson, 56 So. 3d 236, 237 (La. 2011) ("To the extent that 'a showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more,' a prosecutor is accorded 'a degree of discretion,' in making the determination during the pre-trial stages of a case, in which 'the character of a piece of evidence as favorable will often turn on the context of the existing of potential evidentiary record.'" (citations omitted) (quoting Kyles v. Whitley, 514 U.S. 419, 437, 439 (1995))). Often the terms "favorable" and "exculpatory or impeachment" achieve the same result.

40. *See* Yaroshefsky, *supra* note 2, at 1950 (describing Dr. Maria Hartwig's conclusions on cognitive bias and confirmation bias in evaluating exculpatory evidence); Symposium, *Voices from the Field: An Inter-Professional Approach to Managing Critical Information*, 31 CARDOZO L. REV. 2037, 2061–69 (2010) [hereinafter *Voices from the Field*] (presentation by Dr. Maria Hartwig, Assistant Professor, John Jay Coll. of Criminal Justice) (discussing confirmation bias in lie detection and its effect on disclosure). *See generally* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006) (examining cognitive biases that can affect prosecutorial decisionmaking and proposing reforms to mitigate such biases).

41. *See, e.g.*, Yaroshefsky, *supra* note 2, at 1951 (describing remarks made by John Chisholm, Dist. Attorney, Milwaukee Cnty.); *Voices from the Field*, *supra* note 40, at 2071–72 (presentation of Terri Moore, First Assistant, Dallas Cnty. Dist. Attorney).

42. *See* Yaroshefsky, *supra* note 2, at 1951 (describing remarks of John Chisholm, Dist. Attorney, Milwaukee Cnty.).

the information is material or favorable to the defense's case, prosecutors who operate under open-file policies gather and turn over all of the nonprivileged information to the defense.[43] There are notable exceptions to disclosure in such jurisdictions, including information which could place witnesses and informants in danger as well as other information that may create privacy issues.[44]

North Carolina was the first state to enact legislation for full open-file discovery, requiring automatic disclosure of all nonprivileged information in the prosecution's entire file.[45] Recently, Ohio followed suit.[46] Colorado, Florida, Arizona, North Carolina, and New Jersey all have broad discovery laws and rules, often based upon the ABA Criminal Justice Standards for Discovery and Trial by Jury.[47] Similarly, local offices throughout the country—such as in Milwaukee, Wisconsin and Portland, Oregon—have full open-file discovery.[48] Other cities and localities have more limited "open-file" discovery programs.[49]

Proposed Standard 3-5.5 moves beyond these differences in various jurisdictions, and broadens and clarifies the scope of the prosecution's disclosure duties. The Standard requires the prosecution to "promptly seek to identify all *information* in the possession of the prosecution or its agents that *tends* to negate the guilt of the accused, mitigate the offense charged, impeach the government's witnesses or evidence, or *reduce the likely punishment* of the accused if convicted."[50]

First, this revision clarifies that the required disclosure extends to *information*, not only that which is *evidence* or *potential evidence.* Some federal and state court courts hold that information need not be produced unless the information in question would itself be admissible at trial.[51] This, of course, places the prosecutor in the tenuous position of

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43. *See id.*

44. *See id.*; *see also Voices from the Field, supra* note 40, at 2077 (presentation of John Chisholm, Dist. Attorney, Milwaukee Cnty.).

45. N.C. GEN. STAT. § 15A-903 (2010). North Carolina moved to an open-file system in 2004. S.L. 2004-154, S.B. No. 52 (N.C. 2004).

46. *See* OHIO R. OF CRIM. PROC. 16 (2010).

47. *See* JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW 15–17 (2007); *see also* STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed. 1996).

48. *See, e.g., Voices from the Field, supra* note 40, at 2074–75 (presentation of John Chisholm, District Attorney, Milwaukee Cnty.); *see also* OR. REV. STAT. § 135.815 (2010).

49. *See, e.g., Voices from the Field, supra* note 40, at 2071 (presentation of Terri Moore, First Assistant, Dallas Cnty. Dist. Attorney) (describing the system in Dallas County, Texas).

50. *See* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.5(a) (Proposed Revisions 2010) (emphasis added). The current Standard, in relevant part, required the prosecution to timely notify the defense 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." STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.11(a) (3d ed. 1993).

51. In *Wood v. Bartholomew*, the Supreme Court suggested that admissibility is a precondition to trigger a prosecution's *Brady* disclosure duties. 516 U.S. 1, 6 (1995) (per curiam) (reasoning that because polygraph results that would have impeached a government witness were not admissible, they

assessing the likely admissibility of information. In contrast, other courts have concluded that disclosure is not premised upon admissibility. Rather, the standard is that the information leads to admissible evidence.[52] Some courts hold that the information need only be useful to the defense in building its case in order to be discoverable.[53] The U.S. Department of Justice Attorneys' Manual ("USAM") requires disclosure of exculpatory and impeachment information "regardless of whether the information subject to disclosure would itself constitute admissible evidence."[54] The proposed Standard, like its predecessor and Model Rule 3.8(d), adopts this broader view.[55]

Second, the proposed Standard avoids use of the term "favorable" as a qualifier of the information required to be produced. Instead, it specifies the required categories for disclosure of information. It requires prosecutors to produce information that "*tends* to negate the guilt[,] . . . mitigate the offense[,] . . . impeach the government's witnesses or evidence, or reduce the likely punishment."[56] Arguably, this diminishes subjective judgment by prosecutors, but it still places the prosecution in a position where it may not know whether information actually "impeaches" a government witness. The prosecution is not likely to

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did not constitute *Brady* evidence). For examples of cases holding that admissibility determines disclosure, see *Madsen v. Dormire*, 137 F.3d 602, 604 (8th Cir. 1998); *United States v. Derr*, 990 F.2d 1330, 1335–36 (D.C. Cir. 1993), *overruled on other grounds by* United States v. Bailey, 36 F.3d 106 (D.C. Cir. 1994) (en banc); *United States v. Phillip*, 948 F.2d 241, 249 (6th Cir. 1991); *Zeigler v. Callahan*, 659 F.2d 254, 269 (1st Cir. 1981); *United States v. Atkinson*, 429 F. Supp. 880, 884 (E.D.N.C. 1977); *Thornton v. State*, 231 S.E.2d 729, 733 (Ga. 1977).

52. *E.g.*, United States v. Rodriguez, 496 F.3d 221, 226 n.4 (2d Cir. 2007) ("The objectives of fairness . . . require that the prosecution made the defense aware of material information potentially leading to admissible evidence favorable to the defense."); Ellsworth v. Warden, 333 F.3d 1, 5 (1st Cir. 2003) (holding that hearsay statement of victim may have led to the discovery of witnesses to corroborate information contained in the statement); Paradis v. Arave, 240 F.3d 1169, 1178–79 (9th Cir. 2001) (holding that the prosecutor's notes were not admissible but could have been used to contradict a key medical witness); Williamson v. Moore, 221 F.3d 1177, 1183 (11th Cir. 2000) (holding that non-verbatim, non-adopted witness statements are not admissible as impeachment evidence and could not have led the defense to impeachment or exculpatory evidence); Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999) (holding that inadmissible hearsay may be material if it "would have led to admissible evidence"); United States v. Sudikoff, 36 F. Supp. 2d 1196, 1200 (C.D. Cal. 1999) ("[*Brady* includes all] evidence that may reasonably be considered favorable to the defendant's case and that would likely lead to admissible evidence . . . .").

53. Jones v. Jago, 575 F.2d 1164, 1169 (6th Cir. 1978) ("[T]he threshold of materiality is relatively low where a specific request is involved."); *Sudikoff*, 36 F. Supp. 2d at 1200 ("[T]he government is obligated to disclose all evidence relating to guilt or punishment which might reasonably be considered favorable to the defendant's case."); Smith v. United States, 375 F. Supp. 1244, 1248 (E.D. Va. 1974) ("[I]t may be sufficient that the undisclosed information, thought not admissible into evidence, would have been somehow useful to the defense in structuring its case.").

54. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-5.001(C)(3) (2009) [hereinafter U.S. ATTORNEYS' MANUAL].

55. *See* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.5(a) (Proposed Revisions 2010).

56. *Id.*

know the theory of the defense and how information might be used to impeach.[57] An approach that may diminish this problem is to require the prosecution to provide information that adversely impacts the credibility of the witness or evidence.[58]

It is noteworthy that both prosecutors and defense attorneys maintain that the need for greater specificity of the scope of disclosure. The Department of Justice (DOJ) contended that the failure to define "impeaching" requires "practitioners to contend with multiple interpretations and lead[s] to virtually unlimited disclosure obligations on the government to turn over innuendo, hearsay, and rumor, no matter how remote or speculative."[59] The American College of Trial Lawyers ("ACTL") and the National Association of Criminal Defense Lawyers ("NACDL") proposed specific items for disclosure as a change to the vague nature of the term "favorable information."[60] Various proposals to modify Federal Rules of Criminal Procedure 11 and 16 that provide, inter alia, for greater specificity have been, and remain, under consideration for at least the last nine years.[61] Such proposals to define the legal obligation with specificity are properly before the courts and legislatures. By contrast, the ABA Criminal Justice Standards provide guidance and a framework within which to consider specific items for disclosure. It is unrealistic and perhaps unwise to expect that the Standards should contain such specificity.

Third, the proposed Standard imposes a disclosure obligation only if the information is in *possession* of the prosecutor or its agents.[62] Some federal prosecutors argue that this Standard is too broad and imposes a duty upon the prosecutor to seek out information from a wide range of agencies that are not involved in the case.[63] One key example noted by

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57. Similarly, the prosecutor should not be placed in the position of having to determine whether information tends to "reduce" the likelihood of punishment. It is the defense lawyer who is best positioned to make that determination. Consequently, the Standard ought to be broadened, perhaps to a Standard establishing the duty to produce information that "*affects* punishment."

58. ROBERT W. TARUN ET AL., AM. COLL. OF TRIAL LAWYERS, PROPOSED CODIFICATION OF DISCLOSURE OF FAVORABLE INFORMATION UNDER FEDERAL RULES OF CRIMINAL PROCEDURES 11 AND 16, at 17 (2003).

59. Letter from Paul J. McNulty, Deputy Attorney Gen., to Honorable David F. Levi, Chair, Comm. on Rules of Practice & Procedure 6 (June 5, 2007), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%2016%20Part%201.pdf (discussing proposals to amend Federal Rule of Criminal Procedure 16).

60. Cynthia Hujar Orr, *The State of NACDL*, CHAMPION, July 2010, at 5, 6 ("NACDL has also pushed for measures in DOJ, Congress, and local legislatures to require prosecutors to provide favorable evidence to the defense."); *see also* TARUN ET AL., *supra* note 58, at 10–11.

61. *See, e.g.*, TARUN ET AL., *supra* note 58, at 17–27.

62. *See* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.5(a) (Proposed Revisions 2010).

63. The roundtable discussions around the country involved a wide range of participants from varying jurisdictions, including state and federal prosecutors, defense lawyers, judges, and academics. The views noted herein are of individuals and do not represent official or unofficial policies or

federal prosecutors is a case that involves international terrorism, where many agencies may possess "information" that would impeach a government witness or reduce the likely punishment of the accused. Some federal prosecutors argue that this imposes an undue burden and is a "standard-less standard." Its language is cited as an example of the need to adhere solely to law and to DOJ internal disclosure policies and practices. Federal prosecutors note that the precept of the USAM, and the practices of governing local federal districts, is, "when in doubt, disclose the information."[64] Recent discovery initiatives by the DOJ comport with the language of the proposed Standard. The Ogden Memorandum specifically addresses the need for federal prosecutors to seek out such information from a wide range of agencies and other sources of information.[65] As electronic data systems are enhanced, the obligation to seek out and produce such information should be met more readily.[66]

Finally, legitimate considerations weigh against liberal disclosure in certain types of cases, notably, those raising concerns about witness protection, confidential information, and national security. While these issues may arise in a minority of cases, the Standards should acknowledge and provide for appropriate methods to address limits on disclosure. This may include excision of identifying information of witnesses, or, in unique circumstances, production of information for the attorney's eyes only.[67] Ex parte submissions to the court to seek limitations on disclosure should be permitted in the proposed Standards. Such exceptions to disclosure exist in jurisdictions with open-file discovery and could provide model language.[68]

B. MATERIALITY

Perhaps the most significant source of ongoing debate about disclosure obligations stems from whether "materiality" of the

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practices or any state or federal office.

64. Memorandum from David W. Ogden, Deputy Attorney Gen., to Dep't Prosecutors, Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010), *available at* http://www.justice.gov/dag/discovery-guidance.html.

65. *Id.*

66. ABA Formal Opinion 09-454 and Model Rule 3.8(d) impose a different obligation and require production of requisite information only if "known to the prosecutor[s]" or their agents. *See* ABA Op. 09-454, *supra* note 4, at 1 (citing ABA MODEL RULE OF PROF'L CONDUCT R. 3.8(d) (2009)). This makes plain that the prosecution, unless so required by law, is not mandated to investigate whether such agencies have this information. *Id.* at 5–6.

67. Prohibition on the defense counsel sharing information with her client raises obvious constitutional concerns about the Sixth Amendment right to counsel and presentation of a defense. These issues have been given full consideration elsewhere. *See In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 93, 115–30 (2d Cir. 2008); U.S. v. Moussaoui, 591 F.3d 263, 280–90 (4th Cir. 2010).

68. *See supra* note 45–49 and accompanying text.

information should be the standard for evaluating pretrial disclosure obligations. The constitutional limitation of "materiality"—"whether in [the evidence's] absence [the defendant] received a fair trial"—is the appellate standard that governs reversal of a conviction for failure to disclose information.[69]

A substantial question exists as to whether that standard applies to pretrial disclosure decisions—that is, whether prosecutors may withhold evidence that they do not regard as "material." A few federal courts have held that the "materiality" standard is solely an appellate one that does not apply to pretrial disclosure.[70] Many federal courts define the pretrial *Brady* obligation by reference to materiality:

> Although the government's obligations under *Brady* may be thought of as a constitutional duty arising before or during the trial of a defendant, the scope of the government's constitutional duty—and, concomitantly, the scope of a defendant's constitutional right—is ultimately defined retrospectively, by reference to the likely effect that the suppression of particular evidence had on the outcome of the trial.[71]

To make matters more complex, prosecutors and defense lawyers rarely agree as to what constitutes "materiality," and appellate courts produce split opinions.[72] Consequently, in some offices, the prosecution may choose not to disclose information because of the prosecutor's judgment that it lacks significance or is not relevant. In some instances, the

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69. Kyles v. Whitley, 514 U.S. 419, 434 (1995). Materiality is considered in terms of the suppressed evidence collectively, not item by item. *Id.* at 436–37.

70. *See* United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005) ("[T]he government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed—with the benefit of hindsight—as affecting the outcome of the trial."); United States v. Acosta, 357 F. Supp. 2d 1228, 1233 (D. Nev. 2005) ("Simply because 'material' failures to disclose exculpatory evidence violate due process does not mean only 'material' disclosures are required."); United States v. Carter, 313 F. Supp. 2d 921, 925 (E.D. Wis. 2004) ("[I]n the pretrial context, the court should require disclosure of favorable evidence under *Brady* and *Giglio* without attempting to analyze its 'materiality' at trial."); United States v. Sudikoff, 36 F. Supp. 2d 1196, 1199 (C.D. Cal. 1999) ("Because the definitions of materiality as applied to appellate review are not appropriate in the pretrial discovery context, the Court relies on the plain meaning of 'evidence favorable to an accused' as discussed in *Brady*." (quoting Brady v. Maryland, 373 U.S. 83, 87 (1963))); *see also* United States v. Price, 566 F.3d 900, 913 n.14 (9th Cir. 2009) ("For the benefit of trial prosecutors who must regularly decide what material to turn over, we note favorably the thoughtful analysis set forth [by the courts in *Acosta* and *Sudikoff*] . . . .").

71. United States v. Coppa, 267 F.3d 132, 140 (2d Cir. 2001); *see also* United States. v. Causey, 356 F. Supp. 2d 681, 696 (S.D. Tex. 2005) ("Because the *Brady* standard applied in *Sudikoff* conflicts with the Brady standard applied in this circuit, and because defendants fail to cite—and the court has not found—any case in which the Fifth Circuit has adopted or applied the *Sudikoff* standard, the court is not persuaded to apply that standard in this case."). Additionally, "[t]here is no uniform approach in the federal courts to the treatment of inadmissible evidence as the basis for *Brady* claims." Paradis v. Arave, 240 F.3d 1169, 1178 (9th Cir. 2001); *see also* Ellsworth v. Warden, 333 F.3d 1, 5 (1st Cir. 2003) ("The circuits are split on whether a petitioner can have a viable *Brady* claim if the withheld evidence itself is inadmissible.").

72. Irwin H. Schwartz, *Beyond* Brady*: Using Model Rule 3.8(d) in Federal Court for Discovery of Exculpatory Information*, CHAMPION, Mar. 2010, at 34, 34–35.

prosecution may decide that the information is merely cumulative or need not be disclosed because there is overwhelming evidence of guilt.

Model Rule 3.8(d) and the standards and practices in numerous state courts require disclosure of information favorable to the defense regardless of materiality—that is, regardless of any anticipated impact of the information on the potential verdict.[73] The National District Attorneys Association ("NDAA") adopts this position as well. The NDAA developed standards that make clear that the materiality standard for reversal on appeal should not be the standard for production of pretrial information.[74]

On the other hand, the DOJ adheres to the materiality standard. Despite this, the USAM indicates, "Recognizing that it is sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence."[75]

Proposed Standard 3-5.5(c) provides clarity. It requires the prosecution to disclose information whether or not it meets the appellate standard of materiality for reversal of a criminal conviction:

> (c) Before trial of a criminal case, a prosecutor should make timely disclosure to the defense of information described in (a) above that is known to the prosecutor, *regardless of whether the prosecutor believes it is likely to change the result of the proceeding.* Regarding discovery prior to a guilty plea, see Standard 3-5.8 below. The obligations to identify and disclose such information continue throughout the prosecution of a criminal case.[76]

This significant change is positive and likely to guide state prosecutors, but federal prosecutors are likely to continue to adhere to the USAM

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73. *See* ABA Op. 09-454, *supra* note 4, at 4 ("[T]he prosecutor's disclosure of evidence and information favorable to the defense promotes the proper functioning of the adversarial process, thereby reducing the risk of false convictions.").

74. NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS 15 (2009), *available at* http://www.pretrial.org/Docs/Documents/NDAA%202010%20Standards.pdf ("The prosecutor shall make timely disclosure of exculpatory or mitigating evidence, as required by law and/or applicable rules of ethical conduct.").

75. U.S. ATTORNEYS' MANUAL, *supra* note 54, at 9-5.001(B)(1) ("Exculpatory and impeachment evidence is material to a finding of guilt—and thus the Constitution requires disclosure—when there is a reasonable probability that effective use of the evidence will result in an acquittal. Recognizing that it is sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence. While ordinarily, evidence that would not be admissible at trial need not be disclosed, this policy encourages prosecutors to err on the side of disclosure if admissibility is a close question." (citations omitted)). This guideline is undercut, however, by a preceding caution against over-disclosure. *See id.* at 9-5.001(A) ("The policy, however, recognizes that other interests, such as witness security and national security, are also critically important and that if disclosure prior to trial might jeopardize these interests, disclosure may be delayed or restricted . . . ." (citation omitted)).

76. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.5(c) (Proposed Revisions 2010) (emphasis added). There is no comparable provision in the current Standard. *See* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION (3d ed. 1993).

when in conflict with the ABA Criminal Justice Standards until courts decide otherwise.

C. TIMING

A third, but equally important, issue is the *timing* of disclosure. Although most state and federal discovery rules include an obligation for "timely" disclosure, the definition here varies as well. Prosecutors disclose information at varying times.[77] Many courts impose the standard that prosecutors are required to disclose information in time to be useful at trial.[78] This may, however, permit disclosure on the eve of trial.[79]

The timing of disclosure may vary depending upon whether the information is exculpatory or impeachment material. Decisional law varies as to such obligations.[80] Federal law and some state statutes and

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77. Some prosecutors disclose favorable evidence right when they discover it. *See, e.g.*, United States v. Seijo, 514 F.2d 1357, 1363 (2d Cir. 1975) (noting that upon discovery of the FBI investigation criminal identification sheet, the prosecutor "filed an affidavit with the court" reporting his finding); United States v. Sheehan, 442 F. Supp. 1003, 1007 (D. Mass. 1977) ("The government's constitutional obligation to disclose exculpatory evidence to the defendant is a continuing one."); People v. Bennett, 349 N.Y.S.2d 506, 518 (N.Y. Sup. Ct. 1973) ("[The prosecutor] recognized the need for substantial discovery, and acceded to the defendants' demands for the inspection of certain of the material sought on the[] motions."). Other prosecutors respond to pretrial demands by the defense for exculpatory material with less enthusiasm and provide responses stating that they are aware of and will comply with their obligations under *Brady*. *E.g.*, United States v. Deutsch, 373 F. Supp. 289, 290 (S.D.N.Y. 1974).

78. *See* People v. Arthur, 673 N.Y.S.2d 486, 504 (N.Y. Sup. Ct. 1997) ("Trial courts . . . have long recognized that information which is clearly exculpatory should be disclosed at the earliest possible opportunity in advance of trial, in order to permit the defense sufficient time to investigate it and present it at trial."); *see also* People v. Jackson, 637 N.Y.S.2d 158, 161 (N.Y. Sup. Ct. 1995) (requiring, under *Brady*, disclosure of evidence favorable to the accused in advance of trial); People v. Hunter, 480 N.Y.S.2d 1006, 1009 (N.Y. Sup. Ct. 1984) ("[O]bviously exculpatory evidence ought to be disclosed to the defense even in the absence of a demand for it . . . [and] ought to be disclosed at the earliest possible opportunity."); People v. Bottom, 351 N.Y.S.2d 328, 334 (N.Y. Sup. Ct. 1974) ("[T]he rationale behind requiring the disclosure of favorable evidence clearly indicates that it is not adequate compliance with due process when information furnished the defense is either too little or too late for the defendant to make the fullest use of it at the trial.").

79. In *United States v. Coppa*, a federal trial court during the intricate prosecution ordered production of *Brady* material at the outset of the proceedings. 267 F.3d 132, 135 (2d Cir. 2001). The circuit court set aside the order and permitted the government to decide when disclosure was appropriate. *See id.* at 144 ("[A]s long as a defendant possess *Brady* evidence in time for its effective use, the government has not deprived the defendant of due process of law . . . .").

80. *See Deutsch*, 373 F. Supp. at 290 ("It should be obvious to anyone involved with criminal trials that exculpatory information may come too late if it is given only at trial, and that the effective implementation of *Brady v. Maryland* must therefore require earlier production in at least some situations."); *see also* Blake v. Kemp, 758 F.2d 523, 532 n.10 (11th Cir. 1985) ("In some instances [disclosure of *Brady* material the day before trial] may be sufficient. However . . . some [*Brady*] material must be disclosed earlier. This is because of the importance of some information to adequate trial preparation." (citations omitted)). For a case that disagrees, see *United States ex rel. Lucas v. Regan*, 503 F.2d 1, 2–3 (2d Cir. 1974), where a prosecutor did not disclose to the defense until the second day of trial that a witness had previously identified another person as the one who robbed her. The court held that "[n]either *Brady* nor any other case we know of requires that disclosure under

rules provide that witness statements that are not *Brady* material generally need not be produced until after that witness testifies.[81] Many defense lawyers and scholars believe that the most significant disclosure issue in the federal criminal justice system is that witness statements are not disclosed early in the process, thereby undermining a fair and effective criminal process.[82] By contrast, federal prosecutors and some state prosecutors adhere to the view that "premature disclosure of witness statements increases the risk of witness intimidation and creates opportunity for the opposing party to script the testimony of their witnesses in response."[83] Consequently, despite discretion to disclose, prosecutors may strictly adhere to the statutory requirements and deny early disclosure.

In state courts, some jurisdictions impose specific time limitations within which to produce information. The focal point may be the commencement of the trial: those jurisdictions require prosecutors to complete whatever disclosure obligations they have seven, ten, or thirty days prior to trial.[84] Other states require disclosure within a certain time frame after the defense has made its requests, usually within thirty days or fewer.[85] Still others use the filing of charges or arraignment as a marker, and still others require discovery only *after* the defendant has entered a plea of "not guilty."[86] Finally, the remaining states provide looser standards such as "as soon as reasonably possible."[87]

Brady must be made before trial." *Id.* at 3 n.1.

81. *See* Jencks Act, 18 U.S.C. § 3500(a) (2006). The USAM requires exculpatory evidence to be disclosed "reasonably promptly after it is discovered," while impeachment information about government witnesses need only be disclosed "at a reasonable time before trial." U.S. ATTORNEYS' MANUAL, *supra* note 54, at 9-5.001(D)(1)–(2). Delayed disclosure requires supervisory approval. *Id.* at 9-5.001(D)(4). *But see* N.Y. CRIM. PROC. § 240.45(1) (McKinney, Westlaw through 2010 legislation) (requiring the state to turn over witnesses' statements to the defense after the jury has been sworn and prior to opening statements).

82. *See* Edward A. Mallett, *Discovery*, CHAMPION, June 2001, at 7, 7 ("We begin with one common sense improvement: There should be a pre-trial disclosure of all witnesses statements and witness agreements."). *See generally* Cynthia Hujar Orr, *I Hate to Tell You This*, CHAMPION, Mar. 2010, at 5.

83. Letter from Paul J. McNulty, *supra* note 59, at 9.

84. SCHOEFFEL, *supra* note 18, at 143, 145; *see also* CAL. PENAL CODE §§ 1054.1 (a), (f) (West 2010).

85. *E.g.*, COLO. R. CRIM. P. 16 II(b)(1), II(c) (requiring disclosure as soon as practicable but no later than twenty days after defendant's first appearance, and adding that in no case may disclosure occur less than thirty days before trial for a felony or seven days for a nonfelony, except for good cause); FLA. R. CRIM. P. 3.220(a) (requiring disclosure within fifteen days of defense's "notice of discovery").

86. E.g., ARIZ. R CRIM. P 15.1 (c) (thirty days after arraignment); MASS. R CRIM. P 14 (a)(1)(A) (at a pretrial conference); N.J. CT. R. 3:13-3 (c)(16) (within fourteen days of an indictment).

87. MICH. CT. R. 6.201(F) ("Unless otherwise ordered by the court, the prosecuting attorney must comply with the requirements of this rule within 21 days of a request under this rule and a defendant must comply with the requirements of this rule within 21 days of a request under this rule."); SCHOEFFEL, *supra* note 18, at 149 ("In Illinois, the prosecution must disclose 'any material or

Rather than choose a specific time frame, Model Rule 3.8(d) and the current edition of the ABA Criminal Justice Standards require timely disclosure. That is, "it must be made early enough that the information can be used effectively."[88] This "appears to mandate that prosecutors disclose exculpatory material during plea negotiations, if not sooner."[89] Despite the ethics rules and varying state statutes and court rules that may imply that the information must be made available prior to the entry of a guilty plea, this is not necessarily the practice. This issue looms large in criminal practice, because more than ninety-five percent of cases result in guilty pleas.[90] Consequently, producing information that mitigates the offense or punishment is key to the fair and effective administration of justice.

Until the Supreme Court's 2002 decision in *United States v. Ruiz*, there was a trend in federal and state courts toward requiring prosecutors to disclose *Brady* material prior to a guilty plea.[91] In *Ruiz*, the Court held that defendants who plead guilty have no pre-plea right to *Brady* information relevant to either impeachment or an affirmative defense.[92] The Court did not address the right to exculpatory evidence, and there is no clear federal authority as to whether the prosecution must disclose material exculpatory evidence before a guilty plea is entered.[93]

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information within its possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce his punishment . . . . as soon as practicable following the filing of a motion by defense counsel.'" (quoting ILL. S. CT. R. 412(c), (d))).

88. *See* ABA Op. 09-454, *supra* note 4, at 6.

89. PETER A. JOY & KEVIN C. MCMUNIGAL, DO NO WRONG: ETHICS FOR PROSECUTORS AND DEFENDERS 145 (2009).

90. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 90 (2005).

91. Ellen Yaroshefsky, *Ethics and Plea Bargaining: What's Discovery Got to Do with It?*, CRIM. JUST., Fall 2008, at 28, 31.

92. *See* United States v. Ruiz, 536 U.S. 622, 629–33 (2002) (holding there was no *Brady* violation where the government required the defendant to waive access to impeachment evidence prior to entering into a plea agreement).

93. *Compare* Orman v. Cain, 228 F.3d 616, 620–21 (5th Cir. 2000) (holding that, absent a clear rule by the Supreme Court, state courts may decline to extend the *Brady* obligation to guilty pleas, because the rule is intended to protect integrity of trials), *with* Ferrara v. United States, 456 F.3d 278, 293 (1st Cir. 2006) (holding that it was a *Brady* violation where government failed to disclose an integral prosecution witness's recantation before the suspect entered a plea), McCann v. Mangialardi, 337 F.3d 782, 788 (7th Cir. 2003) (holding that the voluntariness of guilty plea can be challenged on *Brady* grounds if government withholds evidence of factual innocence), United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998) (holding that a knowing and voluntary guilty plea is subject to challenge if a *Brady* violation occurs, because the government's obligation to disclose *Brady* material is pertinent to the determination of whether or not to plead guilty), United States v. Nagra, 147 F.3d 875, 881–82 (9th Cir. 1998) (finding no *Brady* violation despite the government's nondisclosure of false statements made by government agents to defendant before pleading guilty, because there was no proof that "but for" this information defendant would have gone to trial), United States v. Wright, 43 F.3d 491, 496 (10th Cir. 1994) (holding that under limited circumstances, a *Brady* violation can render defendant's guilty plea involuntary), *and* White v. United States, 858 F.2d 416, 422 (8th Cir. 1988) (holding that voluntariness of a guilty plea can be challenged on *Brady* grounds).

Nevertheless, *Ruiz* swiftly dampened the trend in state and federal courts for mandated pretrial disclosure of information favorable to the accused in the pre-guilty plea stage of the criminal justice process.[94] A few states specify that disclosure must be made prior to the entry of a guilty plea.[95]

Proponents for codifying standards and federal rules to require such production believe that, as a result of the promulgation of the United States Sentencing Guidelines and the importance of even minor facts that can affect punishment by diminishing the degree of a defendant's culpability or offense level, the timely production of *Brady* information in the sentencing context is critical.[96] On the other hand, some prosecutors articulate the view that such a requirement is administratively burdensome and would defeat many of the reasons for offering a plea bargain. Cases involving voluminous documents raise such concerns, as do cases involving the protection of the identity of witnesses or informants. This is primarily a concern of federal prosecutors whose cases are often the product of lengthy investigations, voluminous documents, and other information obtained by numerous agencies and international investigations.

Prosecutors also express the concern that early revelation of impeachment—as opposed to exculpatory—evidence would undermine the ability to obtain a guilty plea or guilty verdict at trial by providing the defense with additional information to undermine a witness's credibility. Other prosecutors disagree that the impact of early disclosure of impeachment information has such a significant impact.[97] Defense lawyers argue that disclosure of impeachment evidence is as significant as, and often constitutes, exculpatory information. Consequently, there should be no distinction in the timing of the disclosure obligation.

Proposed Standard 3-5.5 requires the prosecution to identify promptly the requisite information and to advise promptly the agencies involved in the case about their duties.[98] It then requires the prosecution to make *timely disclosure* to the defense of the requisite information.[99]

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94. Peter A. Joy & Kevin C, McMunigal, *Prosecutorial Disclosure of Exculpatory Information in the Guilty Plea Context: Current Law*, CRIM. JUST., Fall 2007, at 50.

95. *See, e.g.*, N.J. RULES OF CT. R. 3:13-3(a).

96. TARUN ET AL., *supra* note 58, at 10–11.

97. It was notable that federal prosecutors in some U.S. Attorneys' offices disagreed with the views expressed by the DOJ during roundtable discussions.

98. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.5(b) (Proposed Revisions 2010).

99. *Id.* § 3-5.5(c) ("Before trial of a criminal case, a prosecutor should make timely disclosure to the defense of information described in (a) above that is known to the prosecutor, regardless of whether the prosecutor believes it is likely to change the result of the proceeding. Regarding discovery prior to a guilty plea, see Standard 3-5.8 below. The obligations to identify and disclose such information continue throughout the prosecution of a criminal case.").

The only reference in 3-5.5 to the timing of disclosure prior to the entry of a guilty plea is a referral to proposed Standard 3-5.8.[100] Nevertheless, proposed Standard 3-5.8 makes no mention of any disclosure obligations. Instead, proposed Standard 3-5.7(e) states: "Prior to entering into a plea agreement, the prosecutor should disclose to the defense . . . information currently known to the prosecutor that tends to negate guilt, mitigates the offense or is likely to reduce punishment."[101]

The disclosure standard in 3-5.7 is similar to the one in 3-5.5(a). However, there are a few notable differences. First, while 3.5-5(a) requires disclosure of information known to the prosecution *or its agents*, 3-5.7 requires only disclosure of information known to the prosecutor. This may assuage the fears of those who believe a broader standard would burden them with collecting information from a wide range of agencies that are not involved in the case.[102] Second, unlike 3-5.5(a), 3-5.7 does not explicitly require the disclosure of information that tends to impeach the government's witnesses or evidence. This leaves unresolved the debate over whether impeachment evidence should be revealed prior to entry of a guilty plea. It is, of course, possible to imply that the Standard imposes such an obligation, but such an implication is not a substitute for clarity. Nevertheless, it is significant that the Standards acknowledge that disclosure of information as specified by 3-5.7(e) must be made prior to the entry of a guilty plea. How many days or weeks prior to the decision to plead guilty is left unclear.

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100. *Id.* § 3-5.8. That Standard, entitled "Establishing and Fulfilling Conditions of Negotiated Dispositions," provides:

> (a) A prosecutor should not demand terms in a negotiated disposition (such as a plea agreement or deferred prosecution or diversion agreement) that are unlawful or in violation of public policy. The prosecutor should ensure that all promises and conditions that are part of the agreement are memorialized.
>
> (b) The prosecutor may properly promise the defense that the prosecutor will or will not take a particular position concerning sentence and conditions. However, the prosecutor should not imply a greater power to influence the disposition of a case than is actually possessed.
>
> (c) Once an agreement is final and accepted by the court, the prosecutor should comply with, and make good faith efforts to have carried out, the government's obligations in the agreement. The prosecutor should construe agreement conditions and evaluate performance, including any cooperation, in a good-faith and reasonable manner.
>
> (d) If the prosecutor believes that a defendant has breached an agreement accepted by the court, the prosecutor should notify the defense regarding the prosecutor's belief and any intended adverse action. If the defense presents a good-faith disagreement and the parties cannot quickly resolve it, the prosecutor ordinarily should not act before judicial resolution.
>
> (e) If the prosecutor reasonably believes that the court is acting inconsistently with any term of a plea agreement, the prosecutor should raise the matter with the court.

Id.

101. *Id.* § 3-5.7(e).

102. *See supra* notes 63–65 and accompanying text.

In general, precise time periods for disclosure are inadvisable for the Standards. A myriad of factors prevent the adoption of uniform national standards on the precise timing of disclosure: differences between federal and state practice, policy differences between and among state and local jurisdictions, and the overall difficulty of ensuring agreement on particularized time provisions. It would, however, be significant to adopt a standard that specifies that the information must be produced in time to be used effectively in considering whether or not to enter a plea of guilty.

Proposed Standard 3-5.5(b) includes additional modifications that clarify legal and ethical obligations and provide a benchmark for best practices. Proposed Standard 3-5.5(b) requires that the prosecution "advise other governmental agencies *involved in the case* of their continuing duty to identify, preserve and disclose."[103] The current Standard does not have a provision for such notification. This is a useful and important change. Some have suggested that the notification be broadened to include agencies that have information about the case, even though they are not directly involved in the investigation or prosecution. For example, in a case alleging an international terrorism conspiracy, agencies beyond those specifically involved in the case, such as the Immigration and Customs Enforcement, may have information that is important and should be preserved and, in some cases, disclosed to the defense. Mechanisms need to be established to ensure that agencies are on notice of the existence of such interrelated cases. This raises fundamental issues about the need to establish data collection, preservation, and sharing mechanisms and procedures across state and federal jurisdictions.[104]

Proposed Standard 3.5-5(d) also provides a useful modification, because it clarifies the need for specificity in response to a discovery request. It provides:

> (d) A prosecutor should promptly respond to, and make a diligent effort to comply with, legally proper discovery requests. The prosecutor *should ordinarily provide specific responses to individualized defense requests for specific information, not just an acknowledgement of the prosecutor's general discovery obligations.*[105]

There is no comparable provision in the current Standard. Current Standard 3-3.11(b) provides that the prosecutor should make a

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103. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.5(b) (Proposed Revisions 2010) (emphasis added).

104. *See, e.g.*, Yaroshefsky, *supra* note 2, at 1944; *New Perspectives on* Brady, *supra* note 19, at 1972–79 (report by Keith A. Findley, Clinical Professor of Law, Univ. of Wis. Law Sch.).

105. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.5(d) (Proposed Revisions 2010) (emphasis added).

"reasonably diligent effort" to comply with a legally proper discovery request.[106]

D. VOLUMINOUS MATERIAL

Proposed Standard 3-5.5(f) provides:

> (f) A prosecutor should not avoid pursuit of information or evidence because the prosecutor believes it will damage the prosecution's case or aid the accused. A prosecutor should not intentionally attempt to obscure information identified pursuant to (a) above by disclosing it as part of a large volume of materials.[107]

There is no comparable provision in the prior set of Standards.

An increasing number of cases involve voluminous discovery.[108] The production burdens for the government can be significant.[109] In such cases, large production can obscure the critical evidence essential to effective preparation of the defense.[110] The Standards implicitly acknowledge a principle of fundamental fairness in ensuring that there are no "document dumps" or other attempts to obscure information.

III. PROPOSED STANDARDS ON PROSECUTORIAL DISCLOSURE: THE OMISSIONS MEMORALIZING WITNESS STATEMENTS

The proposed Standards make significant modifications. However, issues that are not addressed will require ongoing debate, discussion, and written best practices and standards. One recurring issue is whether the prosecution should be required to memorialize witness statements. Scholars, judges, and lawyers have long commented that prior inconsistent statements of witnesses often are not produced to the defense because these are not in writing.[111] In some jurisdictions, it is acknowledged that prosecutors are trained, either formally or informally, not to put statements in writing.[112] In such jurisdictions, the lawyers

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106. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.11(b) (3d ed. 1993).

107. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.5(f) (Proposed Revisions 2010).

108. *See* Joel E. Cohen & Danielle Alfonzo Walsman, *The 'Brady Dump': Problems with 'Open File' Discovery*, N.Y. L.J. (Sept. 4, 2009), http://www.stroock.com/SiteFiles/Pub829.pdf.

109. *See id.*

110. *See id.*

111. R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice"*, 82 NOTRE DAME L. REV. 635, n.174 (2006) (explaining that many prosecutors discourage investigative agents from taking witness statements); Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 540 (2007); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 961 (1999).

112. *See* Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 49 n.220 (2003) ("Most prosecutors routinely make every effort to minimize the creation of such statements. Even if the mediation were conducted in a way that did not create any written record, oral statements made by the cooperator—particularly those in which the cooperator

acknowledge, but may forget, that *Brady* material must be produced whether it is written or not.[113] "[U]nless prosecutors require agents to take detailed notes, prosecutors may fail to recall inconsistent statements given to the prosecutor at different points in time and may be entirely unaware of inconsistent statements given to the agents outside the prosecutor's presence."[114] The DOJ requires that "[m]aterial variances in a witness's statements should be memorialized, even if they are within the same interview, and they should be provided to the defense as *Giglio* information."[115]

Wrongful convictions cases have demonstrated the need to utilize audio and videotapes for identification procedures, confessions, and witness statements.[116] Prosecutors' offices around the country have considered methods to reduce the likelihood of wrongful convictions.[117] One of the suggestions that needs careful consideration is whether or not to require tape recording—or at least memorializing—the statements of witnesses and potential witnesses, including cooperating defendants.[118] The Standards should not remain silent on this recurring issue.

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admitted his own wrongdoing—could still be discoverable as exculpatory impeachment evidence." (citation omitted)); *see also* John G. Douglass, *Confronting the Reluctant Accomplice*, 101 COLUM. L. REV. 1797, 1863 (2001) ("Prosecutors are trained to avoid creating Jencks material." (internal quotation marks omitted)).

113. United States v. Rodriguez, 496 F.3d 221, 222 (2d Cir. 2007) ("When the Government is in possession of material information that impeaches its witness or exculpates the defendant, it does not avoid the obligation under *Brady/Giglio* to disclose the information by not writing it down."); Sara Gurwitch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Evidence to the Defense*, 50 SANTA CLARA L. REV. 303, 316 (2010) ("If, for example, in the context of exculpatory evidence that has not been reduced to writing, a witness provided information, via an oral account, that cast doubt on the defendant's guilt, the witness's statement would be *Brady* material."); Simons, *supra* note 112, at 47 n.220.

114. Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from Their Mistakes?*, 31 CARDOZO L. REV. 2161, 2168 n.37 (2010).

115. Memorandum from David W. Ogden, *supra* note 64.

116. *See Eyewitness Identification*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/fix/Eyewitness-Identification.php (last visited May 23, 2011) ("Identification procedures should be videotaped whenever possible—this protects innocent suspects from any misconduct by the lineup administrator, and it helps the prosecution by showing a jury that the procedure was legitimate."); *False Confessions & Mandatory Recording of Interrogations*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/fix/False-Confessions.php (last visited May 23, 2011) (outlining the benefits of recording interrogations and confessions).

117. *See, e.g.*, *Conviction Integrity Unit*, DALLAS CNTY. DIST. ATTORNEY'S OFFICE, http://www.dallasda.com/conviction-integrity.html (last visited May 23, 2011); *Conviction Integrity Program*, N.Y. CNTY. DIST. ATTORNEY'S OFFICE, http://www.manhattanda.org/organization/integrity/ (last visited May 23, 2011); *see also Voices from the Field*, *supra* note 40, at 2074–77 (presentation of John Chisholm, Dist. Attorney, Milwaukee Cnty.) (discussing how individuals are processed through the criminal justice system).

118. *See* Editorial, *True and Untrue Confessions*, N.Y. TIMES, Jan. 12, 2008, at A14; *see also* INNOCENCE PROJECT, LESSONS NOT LEARNED: NEW YORK STATE LEADS IN THE NUMBER OF WRONGFUL CONVICTIONS BUT LAGS IN POLICY REFORMS THAT CAN PREVENT THEM 28–29 (2007) (supporting generally the practice of recording interrogations and witness interviews); NORTHAMPTON POLICE DEP'T, ADMINISTRATION & OPERATIONS MANUAL ch. O-408, at 8-9; Memorandum from the State of N.J. Dep't

Even if not required by law, best practices should dictate that prosecutors or their agents memorialize the details of all witness statements. Many prosecutors currently engage in such practices.[119] Prosecutors disagree, sometimes even in the same office, as to the potential effect of such a practice on their cases. Some prosecutors believe that providing additional statements to the defense will undermine the ability to achieve a just result and that defense attorneys will take undue advantage of prior inconsistencies. Others believe that this concern is quite overstated. On balance, the fair practice is to memorialize such statements. It would certainly reduce risk of error of wrongful convictions.[120]

A. WRITTEN DISCLOSURE, CERTIFICATION, COURT CONFERENCES, AND CHECKLISTS

The proposed Standards do not include provisions requiring the prosecution to make written disclosure of the discovery in sufficient detail to permit the defense to investigate the information. Nor do they require the prosecution to certify to the trial court that it has exercised due diligence in locating and attempting to locate all requisite information and has provided what is required to the defendant. Such procedures were recommended by the ACTL in their 2003 proposal to amend the Federal Rules.[121] A number of jurisdictions have adopted such provisions.[122] The rationale is that such a requirement encourages due diligence in the production of information.[123] Any lawyer is likely to exercise greater care when required to certify that he has done so to a court.

At the very least, the Standards should reflect the ABA resolution that all jurisdictions adopt procedures that at a "reasonable time prior to [a criminal] trial," the court conduct a conference to ensure that the parties are "fully aware of the their respective disclosure obligations

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of Law & Public Safety to All County Prosecutors, at § II.E (Apr. 18, 2001), *available at* http://www.innocenceproject.org/docs/NJ_eyewitness.pdf; *Line-up Protocol for Law Enforcement*, POLICE CHIEFS' ASS'N OF SANTA CLARA CNTY., http://www.ccfaj.org/documents/reports/eyewitness/expert/Santa%20Clara%20County%20Eyewitness%20Identification%20Protocols.pdf (last visited May 23, 2011) ("Record both positive identification and non-identification results in writing, including the witness' own words regarding how sure he/she is.").

119. *New Perspectives on* Brady, *supra* note 19, at 1981–82 (report by Keith A. Findley, Clinical Professor of Law, Univ. of Wis. Law Sch.).

120. *See Voices from the Field*, *supra* note 40, at 2052–56 (presentation of Dr. Gordon Schiff, Assoc. Dir., Ctr. for Patient Safety Research & Practice, Brigham & Women's Hospital) (discussing lessons from diagnosis errors and disclosure in medicine).

121. TARUN ET AL., *supra* note 58, at 23–24.

122. *See New Perspectives on* Brady, *supra* note 19, at 1979–80 (report by Keith A. Findley, Clinical Professor of Law, Univ. of Wis. Law Sch.); *see also* MASS. R. CRIM. P. 14(a)(3).

123. *New Perspectives on* Brady, *supra* note 19, at 1979–80 (report by Keith A. Findley, Clinical Professor of Law, Univ. of Wis. Law Sch.).

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."[124]

Part and parcel of the court conference is a suggested checklist system whereby the trial court disseminates to the prosecution and the defense a detailed checklist of the disclosure obligations under *Brady* and its progeny and applicable ethical standards.[125]

B. E-Discovery

The proposed Standards do not address a critical aspect of discovery: Should there be specific Standards for electronically stored information akin to civil discovery rules? If so, should the rules require the prosecution to specifically identify exculpatory, impeachment, and other discoverable information?

Federal Rule of Civil Procedure 26(f) was amended to address electronic discovery.[126] As a result, a system exists in the civil context where parties convene, discuss, and work together in the production of electronically stored information ("ESI") in civil cases.[127] In the criminal context, however, no parallel system exists.

Criminal e-discovery is rapidly evolving, especially in the areas of subpoena compliance, search warrants, and post-indictment discovery.[128] Electronic discovery in the criminal context can present a number of challenges. Servers and hard drives can contain hundreds of gigabytes, even a few terabytes, of ESI.[129] Defendants can incur high costs in time and expense in obtaining and reviewing the materials.[130] Criminal subpoenas can request ESI, and it is critical that defendants adequately respond: failure to comply can result in a wide range of consequences,

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124. ABA Standing Comm. on Legal Aid & Indigent Defendants, Report to the House of Delegates 102D, at 5 (2010).

125. *See* ABA Criminal Justice Section, Report to the House of Delegates 104A, at 4 (2011); *cf. Voices from the Field*, *supra* note 40, at 2046 (presentation of Dr. Gordon Schiff, Assoc. Dir., Ctr. for Patient Safety Research & Practice, Brigham & Women's Hospital) (explaining how checklists can reduce medical error rates).

126. Fed. R. Civ. P. 26(f). Rule 26(f) expands the list of issues that must be discussed as a part of the meet and confer process and includes a requirement that parties develop a discovery plan that addresses issues relating to discovery of ESI, including the form or forms in which it will be produced. *Id.* It also requires parties to discuss any issues relating to the preservation of discoverable information and to address issues relating to claims of privilege or work product protection. *Id.*

127. Fed. R. Civ. P. 26(f); Justin P. Murphy & Stephen M. Byers, *E-Discovery in the Criminal Context: Considerations for Company Counsel*, 9 Digital Discovery & e-Evidence Rep. (BNA) No. 10, at 1 (Oct. 1, 2009).

128. Murphy & Byers, *supra* note 127.

129. *Id.*

130. *Id.*

from a motion to compel compliance to charges of obstruction of justice.[131]

Perhaps such an intricate area is better left to the Federal Rules committees, legislation, or case law, but it is incumbent upon the criminal justice system at least to promote the development of systems, protocols, and practices for data collection, gathering, and dissemination that is somewhat akin to the manner in which the civil litigation system has undertaken the task. The Standards should acknowledge the need for the development of such systems.

CONCLUSION

The ABA's proposed Standards make important modifications that provide a uniform approach to defining the prosecutors' disclosure duties. These modifications clarify key issues that are repeatedly the subject of confusion, disagreement, and doctrinal difference across state and federal jurisdictions. It is commendable that the ABA Criminal Justice Standards waded into these waters and suggest what, at the very least, are best practices.

Many question the extent to which prosecutors look beyond their own interpretation of legal obligations and the local practices in their offices to ethics rules or standards as the actual guideposts for disclosure practices. One can only be optimistic that the continuing discussion about the role of ethics rules and ABA Criminal Justice Standards will have a developing impact on the implementation of discovery practices. These Standards "beyond the law" are of particular significance in a climate where increased attention is paid to remedying the causes of wrongful convictions. Some prosecutors' offices are broadening their disclosure practices for a host of reasons, including the reduction of potential wrongful convictions.

The roundtable discussions that occurred at law schools throughout the country provided a unique opportunity for many judges, prosecutors, defense lawyers, and academics to gather and consider whether and to what extent these Standards are useful or necessary and what role they should assume in the criminal justice process. These discussions were the beginning of a careful assessment of the interplay between constitutional and statutory law, courts rules, ethics rules, and standards for good practice. One hopes that the discussions continue, that prosecutors' and defense lawyers' organizations utilize the ABA Criminal Justice Standards in training their lawyers, and that courts continue to rely on the Standards in their opinions. These Standards are deserving of critical attention.

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131. *Id.*

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