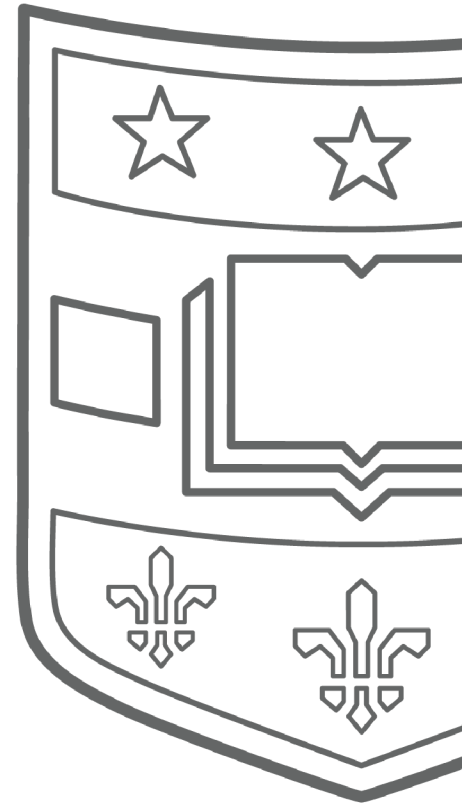


Comparative Ethical Duties of Prosecutors & Defense

United States District Court for the Eastern District of Missouri
&
Federal Public Defender Offices of the ED of MO & SD of IL

May 9, 2024

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DO NO WRONG

ETHICS FOR PROSECUTORS
AND DEFENDERS

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Comparative Ethical Duties



- Rules of Professional Conduct
- Rule 3.8: Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

Rule 3.8 (cont.)



(d) 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;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

- (1) the information sought is not protected from disclosure by any applicable privilege;
- (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
- (3) there is no other feasible alternative to obtain the information;

Prosecutor Disclosure Obligations



- Rule 3.8(d)
- *Brady v. Maryland* line of cases
- U.S. Attorney's Manual
- Jenks Act
- Rules 16 & 26.2 Federal Rules of Criminal Procedure
- Rule 404(b) Federal Rules of Evidence

Ethical Disclosure Obligation, Rule 3.8(d)



(d) 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;

Brady v. Maryland, “We now hold 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.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 09-454

July 8, 2009

Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense

Rule 3.8(d) of the Model Rules of Professional Conduct requires a prosecutor to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, [to] disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor.” This ethical duty is separate from disclosure obligations imposed under the Constitution, statutes, procedural rules, court rules, or court orders. Rule 3.8(d) requires a prosecutor who knows of evidence and information favorable to the defense to disclose it as soon as reasonably practicable so that the defense can make meaningful use of it in making such decisions as whether to plead guilty and how to conduct its investigation. Prosecutors are not further obligated to conduct searches or investigations for favorable evidence and information of which they are unaware. In connection with sentencing proceedings, prosecutors must disclose known evidence and information that might lead to a more lenient sentence unless the evidence or information is privileged. Supervisory personnel in a prosecutor’s office must take reasonable steps under Rule 5.1 to ensure that all lawyers in the office comply with their disclosure obligation.

There are various sources of prosecutors’ obligations to disclose evidence and other information to defendants in a criminal prosecution.¹ Prosecutors are governed by federal constitutional provisions as interpreted by the U.S. Supreme Court and by other courts of competent jurisdiction. Prosecutors also have discovery obligations established by statute, procedure rules, court rules or court orders, and are subject to discipline for violating these obligations.

Brady Line of Cases



- *Giglio v. United States*, impeachment evidence falls under *Brady* disclosure requirements
- *United States v. Agurs*, disclosure required if “evidence creates a reasonable doubt that did not otherwise exist”
- *United States v. Bagley*, evidence is material “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different”
- *Kyles v. Whitley*, stating *Brady* “requires less . . . [than] ABA Model Rule of Professional Conduct 3.8(d)”
- *United States v. Ruiz*, express *Brady* waivers in pleas restricted scope of *Brady* disclosure only to “**material**” information that **establishes** “factual innocence”

U.S. Department of Justice Manual, Policy 9-5.001 Disclosure of Exculpatory and Impeachment Information

<https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings>



B. Constitutional obligation to ensure a fair trial and disclose material exculpatory and impeachment evidence. Government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). The law requires the disclosure of exculpatory and impeachment evidence when such evidence is material to guilt or punishment. *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 154. **Because they are Constitutional obligations, *Brady* and *Giglio* evidence must be disclosed regardless of whether the defendant makes a request for exculpatory or impeachment evidence.** *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995).

Jenks Act, 18 U.S. Code § 3500 – Demands for Production of Statements & Reports of Witnesses



(a) In any criminal prosecution brought by the United States, no [statement](#) or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any [statement](#) (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such [statement](#) relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

“Statement”



(e) The term “statement”, as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, **which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement**; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Fed. R. Crim. Pro. 26.2



(a) Motion to Produce. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony.

(b) Producing the Entire Statement. If the entire statement relates to the subject matter of the witness's testimony, the court must order that the statement be delivered to the moving party.

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United States v. Nobles, 422 U.S. 225 (1975), disclosure of prior relevant statements of defense witnesses in possession of the defense

Fed. R. Evidence 404(b)



(b) Other Crimes, Wrongs, or Acts.

...

(3) Notice in a Criminal Case. In a criminal case, the prosecutor must:

(A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial--or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

Fed. R. Crim. Pro. 16, Government's Disclosure



- Defendant's oral statement, written or recorded statement
- Defendant's prior record

(E) Documents and Objects. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

- (i) the item is material to preparing the defense;
- (ii) the government intends to use the item in its case-in-chief at trial; or
- (iii) the item was obtained from or belongs to the defendant.

(F) Reports of Examinations and Tests. Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

- (i) the item is within the government's possession, custody, or control;
- (ii) the attorney for the government knows--or through due diligence could know--that the item exists; and
- (iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.

(G) Expert Witnesses.

Fed. R. Crim. Pro. 16, Government's Disclosure



(a) (2) Information Not Subject to Disclosure. Except as permitted by Rule 16(a)(1)(A)-(D), (F), and (G), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in [18 U.S.C. § 3500](#).

Work-product exclusion

Fed. R. Crim. Pro. 16, Defendant's Disclosure (reciprocal discovery)



(b) Defendant's Disclosure.

(1) Information Subject to Disclosure.

(A) Documents and Objects. If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if:

- (i) the item is within the defendant's possession, custody, or control; and
- (ii) the defendant intends to use the item in the defendant's case-in-chief at trial.

(B) Reports of Examinations and Tests. If a defendant requests disclosure under Rule 16(a)(1)(F) and the government complies, the defendant must permit the government, upon request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

- (i) the item is within the defendant's possession, custody, or control; and
- (ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

(C) Expert Witnesses.

Fed. R. Crim. Pro. 16, Defendant's Disclosure (reciprocal discovery)



(b)(2) Information Not Subject to Disclosure. Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:

(A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or

(B) a statement made to the defendant, or the defendant's attorney or agent, by:

(i) the defendant;

(ii) a government or defense witness; or

(iii) a prospective government or defense witness.

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Work-product exclusion

2011 Federal Judicial Center Survey



- 43% of judges completed the survey
- 51% favored removing materiality standard in Rule 16
- In districts with no local rule or standing order, 27% of judges concluded the government failed to comply with disclosure obligations in 1 to 10 cases in the past 5 years
- In districts with local rule or standing order requiring broader disclosure, 37% of judges concluded the government failed to comply with disclosure obligations in 1 to 10 cases in the past 5 years

The Due Process Protection Act



- Amended Fed. R. Crim. Pro. 5

(f) Reminder of Prosecutorial Obligation.

(1) In General. In all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present, **the judge shall issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor** under [*Brady v. Maryland*, 373 U.S. 83 \(1963\)](#) and its progeny, and the possible consequences of violating such order under applicable law.

(2) Formation of Order. Each judicial council in which a district court is located shall promulgate a model order for the purpose of paragraph (1) that the court may use as it determines is appropriate.

Disclosure Orders



- District courts have broad discretion, and many courts require:
 - early, specific deadline
 - define the prosecution team broadly to cover all known participants in the investigation
 - require certification of compliance with *Brady*
 - specify potential remedies if order is violated

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
Standing Order on Criminal Discovery Misc. # 534**



It is the court's policy to rely on the standard discovery procedure as set forth in this Order as the sole means of the exchange of discovery in criminal cases except in extraordinary circumstances. This Order is intended to promote the efficient exchange of discovery without altering the rights and obligations of the parties, but at the same time eliminating the practice of routinely filing perfunctory and duplicative discovery motions.

INITIAL DISCLOSURES:

- (1) Disclosure by the Government. **At arraignment, or on a date otherwise set by the court for good cause shown**, the government shall tender to defendant the following:
- (A) Fed. R. Crim. P. 16(a) Information. All discoverable information within the scope of Rule 16(a) of the Federal Rules of Criminal Procedure.
- (B) Brady Material. **All information and material** known to the government which may be favorable to the defendant on the issues of guilt or punishment, **without regard to materiality**, within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963).
- (C) **Giglio Material**. The existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective witnesses, within the scope of *United States v. Giglio*, 405 U.S. 150 (1972).
- (D) Testifying informant's convictions. A record of prior convictions of any alleged informant who will testify for the government at trial.



(E) Defendant's identification. If a line-up, show-up, photo spread or similar, procedure was used in attempting to identify the defendant, the exact procedure and participants shall be described and the results, together with any pictures, and photographs, shall be disclosed.,

(F) Inspection of vehicles, vessels, or aircraft. If any vehicle, vessel, or aircraft, was allegedly utilized in the commission of any offenses charged, the government shall permit the defendant's counsel and any expert selected by the defense to inspect it, if it is in the custody of any governmental authority.

(G) Defendant's latent prints. If latent fingerprints, or prints of any type, have been, identified by a government expert as those of the defendant, copies thereof shall be provided.

(H) Fed. R. Evid.404(b). The government shall advise the defendant of its intention to introduce evidence in its case in chief at trial, pursuant to Rule 404(b) of the Federal Rules of Evidence.

(I) Electronic Surveillance Information. If the defendant was an aggrieved person as defined in 18 U.S.C. ' 2510(11), the government shall so advise the defendant and set forth the detailed circumstances thereof.

. . .

Rule 3.1: Meritorious Claims & Contentions



A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. **A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.**

Cross-Examination & Closing Argument



- 6th Amendment Right to counsel
- Confrontation Clause of the 6th Amendment

United States v. Wade, 388 U.S. 218 (1967) (White, J., dissenting in part, concurring in part)



If he [defense counsel] can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.