



March 22, 2016

John Aldock, Esq.
Chairman, Advisory Committee on Local Rules
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Washington, DC 20001

Dear Mr. Aldock:

We write this letter on behalf of the National Association of Criminal Defense Lawyers (NACDL) and the American Civil Liberties Union (ACLU) in order to comment on the *ad hoc* committee's Proposed Disclosure Rule, which was published in the Washington Law Reporter on January 29, 2016. As we discuss below, we applaud the Committee for its efforts, we support the proposed changes as filling a void in the existing rules, and we suggest additional ways in which the Proposed Disclosure Rule could be further improved.

Both NACDL and the ACLU strongly support the constitutional right of criminal defendants to receive favorable information pursuant to the rule of *Brady v. Maryland*, 373 U.S. 83 (1963). We also believe that the enforcement of this right requires the adoption of clear and specific obligations, including rules such as the ones proposed, to ensure that the government fulfills its duty to disclose favorable information to the defense in a timely manner, in *every* case. Bright-line rules such as these bring increased compliance by adding certainty to the discovery process, even for prosecutors who are already adhering in good faith to their perceived discovery obligations.

We note, moreover, that while the government has often responded to reform efforts by promising to follow improved policies and procedures, the continued drum beat of *Brady* violations is ongoing, both in the District of

Columbia and throughout the country.¹ These violations impose a terrible cost on individual defendants and their families, and on society as a whole, sometimes leading to wrongful convictions or permitting actual perpetrators of crime to escape prosecution, and in all cases leading to the unfair treatment of the accused

¹ The comments from the Public Defender Service (PDS) highlight recent local *Brady* violations. See PDS Comment at p. 3. Nationally, the story is the same. “*Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend.” See *United States v. Olsen*, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of rehearing en banc) (citing cases); see also *United States v. Morales*, 746 F.3d 310, 311 (7th Cir. 2014) (“One would think that by now failures to comply with [*Brady*] would be rare. But *Brady* issues continue to arise. Often, non-disclosure comes at no price for prosecutors, because courts find that the withheld evidence would not have created a ‘reasonable probability of a different result.’”) (citations omitted).

A non-exhaustive review confirms that indeed “*Brady* issues continue to arise.” See, e.g., *United States v. Parker*, 2015 U.S. App. LEXIS 10760, (4th Cir. June 25, 2015) (vacating the defendant’s conviction because federal prosecutors failed to disclose that key witness was under investigation by the SEC for fraud); *United States v. Mazzarella*, 784 F.3d 532 (9th Cir. 2015) (finding *Brady* violations (but no prejudice) where federal prosecutors failed to disclose bias information for several government witnesses, including an informal promise of immunity and communications about potential employment with the FBI); *United States v. Tavera*, 719 F.3d 705, 714 (6th Cir. 2013) (vacating conviction based on *Brady* violations where federal prosecutors failed to disclose plainly exculpatory and material statements by government witness); *United States v. Bartko*, 728 F.3d 327, 338 (4th Cir. 2013) (finding *Brady* violation (but no prejudice) where federal prosecutors did not disclose proffer agreements with two government witnesses); *United States v. Sedaghaty*, 728 F.3d 885, 892 (9th Cir. 2013) (concluding “that the government violated its obligations pursuant to *Brady v. Maryland* . . . by withholding significant impeachment evidence relevant to a central government witness” and remanding for a new trial); *United States v. Mahaffy*, 693 F.3d 113, 133 (2d Cir. 2012) (“The government’s failures to comply with *Brady* were entirely preventable. On multiple occasions, the prosecution team either actively decided not to disclose the SEC deposition transcripts or consciously avoided its responsibilities to comply with *Brady*.”).

at trial and at sentencing. All of these adverse consequences undermine public confidence in the fairness of our criminal justice system.

We applaud the *ad hoc* committee for taking steps to address this problem. The rule proposed by the Committee, if adopted by the Court, has the potential to not only improve discovery practice in this District, but to serve as a model to courts around the nation who are seeking to take similar steps to reform their own discovery practices. We are especially pleased that the Proposed Disclosure Rule provides guidance in three areas that, we believe, have produced the great bulk of discovery violations in criminal cases. In particular, we strongly support the manner in which the proposed rule: (1) effectively eliminates any discretion to withhold information from the defense based on a prosecutor's subjective determination that it is not "material"; (2) adds an enforceable, presumptive deadline for disclosure of favorable information; and (3) defines particular areas in which the prosecutor is obliged to search for information, by requiring production of all information "known to the government" and then defining the "government" to include all "federal, state and local law-enforcement officers and other government officials participating in the investigation and prosecution of the offense"

Because of these important provisions, NACDL and the ACLU support the Proposed Rule. This is not to say that this is the rule NACDL or the ACLU would have proposed if we were designing from scratch a system to ensure compliance with *Brady*. In fact, NACDL has drafted model legislation and rules that would take a much broader approach to what has proven an intractable problem, including a full array of remedies that allow courts to address serious violations, and an open file discovery rule modeled on the procedures that have already been adopted in North Carolina.² But as we understand it, this Rule was proposed after a long process, involving many stakeholders, and ultimately was the product of consensus. Because this consensus has achieved important improvements, we support its results. A journey of a thousand miles begins with a first step, and this is a good first step. Our suggested revisions below are made in this spirit; we are trying to improve the work the Committee has already done. We are not attempting to make suggestions as though we were writing on a blank slate or as though it is a viable option to restart the process anew.

² NACDL's approach to discovery reform can be found at <https://www.nacdl.org/discoveryreform/>.

Suggested Revisions

Several additional changes could make the proposed rule even better. We discuss those potential revisions in the sections below.

Elimination of the Modifier “Non-Trivial”

First, the rule could be improved by eliminating the modifier “non-trivial” as a descriptor for the type of information the government should be required to produce. This is not because we are seeking to compel the production of “trivial information.” Rather, it is because, as we have seen in the “materiality” context, requiring the prosecutor to make a qualitative determination about the importance of information that is, by definition, already favorable to the defense, injects an unnecessary level of uncertainty into the process. Far too often, this kind of unilateral prosecutorial determination has resulted in the withholding of information that, by any objective standard, should have been produced. To be sure, the use of the phrase “non-trivial” should lead to far more production than occurs under a materiality standard, but the present changes should seek to eliminate this sort of unilateral discretionary determination altogether. It is hard to imagine many, if any, cases in which a prosecutor could reasonably determine that information “tends to negate the defendant’s guilt, mitigates the offense charged or reduces the potential penalty,” but is somehow too “trivial” to require disclosure. Assuming such cases exist at all, the universe of “favorable but trivial” information is unquestionably negligible. Rather than craft a new standard tailored to such exceedingly rare cases, the Court should simply require production of all information that “tends to negate the defendant’s guilt, mitigates the offense charged or reduces the potential penalty,” thereby eliminating the risk of additional disputes about whether such information is “trivial.” Eliminating any sort of “triviality” analysis would also be consistent with the already-existing ethical obligation of District of Columbia prosecutors, *see In re Kline*, 113 A.3d 202, 213 (D.C. 2015) (interpreting D.C. Rule of Professional Conduct 3.8(e) as requiring disclosure without regard to materiality and without regard to any sort of “triviality” analysis), and with the disclosure practices already adopted by some judges of this Court. *See, e.g., United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005) (“The only question before (and even during) trial is whether the evidence at issue may be ‘favorable to the accused’; if so, it must be disclosed [under *Brady* and its progeny].”).³

³ We actually prefer Judge Friedman’s use of the term “favorable information” to the Committee’s more lengthy description of information that “tends to negate the

Additional Clarification of the Phrase “Known to the Government”

Second, we believe it could be helpful to clarify some aspects of the phrase “known to the government,” which the Proposed Disclosure Rule uses to describe the scope of information that must be produced by the prosecutor. As a matter of law, the scope of the government’s “knowledge” includes information actually known to the prosecutor as well as information constructively known to the government. *Kyles v. Whitley*, 514 U.S.419, 437-38 (1995). Given the existing case law, as well as subsection (e)’s binding “obligation” on the part of the government to search for discoverable information in various locations outside of the prosecutor’s office, we assume that the rule as proposed will be interpreted as including a constructive knowledge standard. Nonetheless, the Court should make explicit in the text of the rule that the production obligation includes information “actually or constructively known to the government” In addition, and for the reasons stated in their comments, we agree with PDS that the terms “agency” and “agencies” should be substituted for the terms law enforcement “officers” and other government “officials.” See PDS Comment at p. 2. We also agree with PDS that the change of tense recommended by PDS – from “participating” to “have participated” – would be helpful in confirming that the government cannot exclude from production information compiled by governmental agencies that have completed their assignments.

On this last point, and in light of the increasing degree to which intelligence agencies contribute to criminal investigations, we read the phrase “known to the government” to include information known to government intelligence agencies that have contributed to the criminal investigation. Thus, the Proposed Rule recognizes that an intelligence agency may not contribute inculpatory information to a criminal investigation while avoiding its obligation to locate and disclose exculpatory information that also resides in its files and data bases. In this instance as well, however, the Court should make this understanding explicit, in order to prevent disputes about whether, in cases where an intelligence agency has participated to a criminal investigation, a prosecutor has an obligation under subsection (e) “to seek from these sources all information subject to disclosure

defendant’s guilt, mitigates the offense charged or reduces the potential penalty.” But because we believe the two terms have the same meaning, and we use them interchangeably in our discussion, our only reason for the preference is brevity, not substance.

under this rule.” (We recognize that there may be countervailing national security concerns in such cases, but believe that such concerns can be fully addressed by subsection (d), as we discuss below).

Additional Examples of Favorable Information in Subsection (b)

The Court should consider adding to the illustrative examples contained in subsection (b) of the Proposed Disclosure Rule. While those examples are excellent, the Rule should also include examples of favorable information relevant to pre-trial motions practice. In doing so, the Court could cite *James v. United States*, 580 A.2d 636 (D.C. 1990), in which the Court of Appeals found a discovery violation because the government did not disclose information that would have undermined the admissibility of a key piece of trial evidence until after the pre-trial admissibility hearing had taken place. Similar examples should be added with regard to the need to disclose information that would be favorable to the defense in the suppression context, particularly in light of the fact that disclosure is often critical to a defendant’s ability to seek suppression where surreptitious electronic surveillance has been used by the government. In short, we recommend the addition of an example or examples illustrating that the duty of disclosure applies to information that is favorable to the defense in the pre-trial motions context.

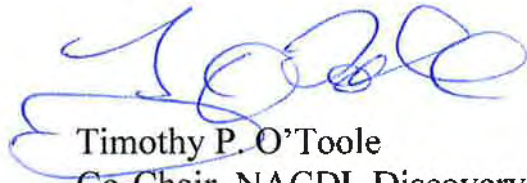
Additional Guidance as to the Presumption of an Adversarial Proceeding When Subsection (d)’s Countervailing Substantial Government Interest Provision Is Invoked

Finally, the Rule should make explicit that any determination under subsection (d) will be made through the adversarial process, absent a compelling showing by the government of the need to proceed ex parte. As we have already noted, we recognize the government’s legitimate interest in having a procedure through which it may apply for a modification of its disclosure obligations when it can show that a disclosure “would compromise witness safety, national security, a sensitive law enforcement technique or any other substantial government interest” Subsection (d) properly places the burden on the government to make such a showing, since it is almost always in the best position to do so. Of course, in our adversarial system, the government’s presentations are properly subject to challenge, and any application to the Court under subsection (d) should occur through the adversarial process to the greatest extent possible, and not through an ex parte proceeding. In other words, we read the current proposal as requiring that the defense will receive notice and the opportunity to be heard with respect to the government’s application to modify its discovery obligations, and that these

proceedings will not occur ex parte absent a compelling showing of need by the government. Nonetheless, because the Proposed Disclosure Rule is currently silent on the point, we suggest it be modified to make this requirement explicit.

In sum, we applaud the Committee for proposing a Rule that sets forth concrete, enforceable discovery obligations as to what prosecutors must provide to criminal defendants, when they must provide it, and where they must search for discoverable information. If adopted, the Rule will improve our criminal justice system and the public's confidence in that system. We urge the Court to adopt the Proposed Disclosure Rule, with modifications we have suggested.

Respectfully submitted,



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