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New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices: External Regulation

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and prosecutors. The possibility of facilitating this type of routine monitoring should be considered by prosecutors' offices in deliberations on whether and how to adopt checklists.⁸⁰

Finally, the group was concerned that very small prosecutors' offices might be prevented from pursuing any effective auditing or oversight not only by general resource constraints but also by an insufficient staff for any independent monitoring of a case. In small offices with, for example, only one or two prosecutors staffing an entire "unit" (e.g., felony prosecutions) there may be no internal staff member who can review a case without the inherent conflict of passing judgment on her own work. In other words, many offices lack the capacity to put a nurse in the room. In such circumstances, offices might consider regional collaborations, or drawing upon the resources of local or state district attorney associations to set up quasi-external auditing on a routine prospective basis, or at a minimum, to have an established mechanism for independent retrospective monitoring.

VI. EXTERNAL REGULATION: REPORTED BY COOKIE RIDOLFI⁸¹

The Working Group on External Regulation addressed the question of whether, how, and to what extent, courts, disciplinary authorities, and other external bodies should regulate *Brady* disclosure obligations and correlative ethics rules. The group was charged with exploring the

⁸⁰ Further reflection and discussion by group members after the Symposium generated the additional insight that checklists may be most useful as internal auditing devices if they reflect a high degree of standardization within an office, because this provides maximum data for comparison of compliance rates across divisions or branch offices.

⁸¹ Discussion Leader: Jane Campbell Moriarty, Professor of Law and Director of Faculty Research and Development, The University of Akron School of Law; Reporter: Kathleen "Cookie" Ridolfi, Professor of Law and Director of the Northern California Innocence Project, Santa Clara University School of Law. Other members of the Working Group on External Regulation included: Robin L. Baker, Executive Deputy Attorney General for Criminal Justice, New York; Hon. Phylis S. Bamberger, retired, New York Court of Claims, Supreme Court, Bronx County, New York; Anthony Barkow, Executive Director, Center on the Administration of Criminal Law, New York University School of Law; Stephanie Batcheller, Staff Attorney, New York State Defenders Association; Hon. Joel L. Blumenfeld, Acting Justice, Supreme Court, Queens County, New York; Mady J. Edelstein, Principle Attorney, Departmental Disciplinary Committee, Appellate Division, First Judicial Department, New York; Brian Gillette, Assistant Prosecutor, Middlesex County, New Jersey; Anthony J. Girese, Counsel to the District Attorney, Bronx County, New York; Tracy L. Kepler, Senior Counsel, Director at Large, National Organization of Bar Counsel; Wendy Lehmann, retired, Chief of Appeals, District Attorney's Office, Monroe County, New York; Donald R. Lundberg, Past President, National Organization of Bar Counsel, Executive Secretary, Indiana Supreme Court Disciplinary Commission; Amanda Masters, civil rights attorney, Giskan Solotaroff Anderson & Stewart LLP; Norman L. Reimer, Executive Director, National Association of Criminal Defense Lawyers; Hon. Michael R. Sonberg, Acting Justice, Supreme Court, New York County, New York; and Peter J. Tomao, New York criminal defense attorney.

effectiveness of existing external systems in ensuring compliance with legal standards imposed by law and disciplinary authorities; to examine the role of state and federal disciplinary committees, judicial oversight, and judicial reporting in the process; and to consider the need for improvement in these systems. The group also considered proposals to improve compliance with disclosure obligations including mandatory disclosure conferences, mandatory reporting to disciplinary committees, and prosecutorial compliance statements.

The discussion leader, Jane Moriarty, opened the meeting by putting questions on the board aimed at identifying areas where there would be broad agreement and the areas, range, and depth of disagreements among the group.⁸² The goal was to generate an open dialogue that could lead to further discourse and reflection to ultimately enhancing the fairness of the system.

A. *Current Disciplinary Standards*

With the exception of ABA Model Rules, the group did not address specific rules and standards. For clarity, the group distinguished the regulation of *Brady* compliance, where the focus is materiality and due process, from the ethical obligations imposed by rules regulating ethics and professional conduct.⁸³ The use of the term “*Brady*” in this Part refers to both. People uniformly agreed that the

⁸² The questions and answers were as follows:

1. What one thing do you believe everyone in this diverse group can agree on?

Answers:

External regulation is necessary.
Disciplinary agencies have a key role to play in regulation.
There is not complete overlap between *Brady* obligations and ethical obligations.
It is essential that police conduct also be externally regulated.
The judiciary has a critical role—both at the trial and appellate level.
The prosecutor’s culture that must be reinforced is “do justice, not just win cases.”
Disclosure of both exculpatory and mitigating evidence is essential.

2. What is one issue you believe will generate significant controversy?

Answers:

The stage at which disclosure must occur.
The nature of what should be disclosed.
Publishing the names of errant prosecutors in the appellate opinions.
Time spent by courts. Is all this really worth it?

⁸³ The standards for decisions about *Brady* violations as a matter of criminal procedure are different from the ethical standards. First, the ethics rules do not require defendants to request the material; rather, there is an ethical obligation on prosecutors to disclose with or without a request. Second, the disclosure under the ethical rules has a timeliness requirement. Third, *Brady* has a materiality requirement, unlike the ethics rules. And fourth, the *Brady* duty runs to the State generally, whereas the ethical duty is personal to the prosecutor and is only triggered to the extent the prosecutor knows of information that tends to negate guilt or mitigate the offense. For more on the difference between the two, see ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 454 (2009).

rules and regulations in place now are not doing enough because they are inadequate and sometimes not enforced at all. There was strong consensus that more and better external regulation is needed.

The prosecutors at the table said that a big problem for them is law enforcement. Police officers are not always cooperative and fail to turn over discovery even to them. The group agreed that this is a serious problem and needs to be corrected. The group stressed the need for regulations governing police conduct in the discovery process in the form of specific rules that direct the police to turn everything over to prosecutor in a timely manner.

B. *A Bigger Role for the Courts*

The group spent a lot of time talking about how much more could be achieved if the courts were more directly involved in monitoring the discovery process. Judges should have a central role in ensuring that the attorneys practicing before them are abiding by the rules and ethics of the profession. This should be happening at pretrial, at trial, and through the appellate process. The group talked about ideas for what could be done to make the system better and understood that scarcity of resources was an important consideration in deciding whether to implement any of the proposals.

1. Mandatory Pretrial Conferences

Everyone in the group agreed that at pretrial conferences, judges can do a lot more to force compliance with *Brady* and overall to improve the discovery process. All agreed that pretrial discovery conferences should be mandatory. One of the problems frequently referred to in the session was a culture of nondisclosure among some prosecutors in some offices. A more active role by judges in overseeing the process can help promote a culture of disclosure.⁸⁴

⁸⁴ The ABA Criminal Justice Section has created a Draft Recommendation on the Judicial Role in Avoiding Wrongful Convictions, which provides:

Resolved: That the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by adopting the following practice: Prior to trial, courts should conduct a conference to resolve issues of turnover during which the prosecutor and defense counsel shall certify that they have delivered all required documents to the other party.

STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, ABA CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES NO. 102D (2010), available at <http://www.abanet.org/crimjust/policy/midyear2010/102d.pdf>.

2. Mitigating Evidence

The group agreed it would be a good idea that judges make clear that a prosecutor's duty under *Brady* includes disclosure not only of exculpatory evidence but mitigating evidence too.

3. Judicially Imposed Deadlines and Vertical Case Assignment

Members of the group suggested that the court impose deadlines at the outset of a case for when material had to be turned over. Judges in the group suggested that judges would be better equipped to monitor the discovery process if cases were assigned vertically, with one judge overseeing a case from beginning to end. The judge would also be able to take action to enforce the deadlines if that became necessary.

4. Affirmation and Certification

Most of the group thought that prosecutors should be required to affirm on the record and/or by written certification that they have turned over all *Brady* material.⁸⁵

5. Reminder Rule

Members of the group said that judges should remind prosecutors that obligations under *Brady* are continuous and that discovery must be turned over as soon as they get it. Since prosecutors often get discoverable material after the trial has started, it would be a good idea for judges to periodically remind them of the obligations under *Brady* and have them reaffirm on the record.

6. Maintain Discovery in Court File

It was suggested that when prosecutors turn over discovery, they should be required to file copies with the court. Maintaining a parallel file can alleviate disputes that may arise concerning the question of what was or was not turned over.

⁸⁵ See also *id.*

7. Checklist System and Privilege Log

The group unanimously supported the idea of checklists.⁸⁶ Prosecutors should be asked to submit a checklist that details what is being turned over and a privilege log that lists what is withheld. This can be done without turning over the contents of the privileged document. The reason for withholding should also be stated.

8. Database System

People thought that subject to confidentiality requirements, a court database, where discovery can be uploaded and made accessible to both sides, would be very useful.

9. Address Problems in Real Time

Brady violations and instances of prosecutorial misconduct have to be addressed in real time.⁸⁷ Appellate opinions that find prosecutorial misconduct years after the violation has occurred have very little, if any, deterrent effect. Prosecutors may not even be notified that their conduct was found improper; sometimes, those whose conduct is addressed are no longer even prosecutors. The serious lag time between violations and disciplinary action is not a very effective way of providing either guidance or deterrence for active prosecutors. Thus, the group (at the judges' suggestion) thought it was exceptionally important for judges to be involved in regulating disclosure and doing so early in the case, where such involvement could short-circuit problems relating to lack of disclosure and would be helpful for prosecutors in making decisions about whether and what information should be disclosed. Intervention should be as early in the process as possible. In cases in which the defendant is innocent, this will also increase the likelihood that the defendant will benefit from the disclosure and not be convicted.

⁸⁶ The use of discovery checklists garnered considerable support from several of the other Working Groups. See *supra* Part II.A.2 to A.3 (Working Group on the Disclosure Process) (reaching consensus on prosecutors' use of checklists and agreeing on the advantages of police officers' use of investigative checklists); *supra* Part IV.B.3 (Working Group on Systems and Culture) (discussing the use of checklists in written guidance memoranda provided by prosecutors to promote a culture of better disclosure in their offices); *supra* Part V.A.3 (Working Group on Internal Regulation) (supporting the use of discovery checklists as a regulatory device).

⁸⁷ Members objected to the use of the term "prosecutorial misconduct" because it includes negligent and accidental error.

10. *Brady* Oversight Post-Trial

The group considered the question of what could be done to regulate the disclosure of newly discovered evidence after trial. The question was discussed but remained open at the end of the session.

11. Judicial Reporting and Naming Prosecutors

It was suggested that when a judge finds a *Brady* violation, that finding should be put on the record and the prosecutor reported to the state bar's disciplinary committee.

There was much discussion about whether it was helpful and/or appropriate to name prosecutors in judicial decisions. Opinions were decidedly mixed and concerns were raised about allowing those who acted intentionally to be anonymous when they should not be; the potential career-ending damage this could do to a prosecutor who erred unintentionally; and the importance of naming prosecutors so as to encourage greater compliance among other prosecutors who might be debating whether to disclose.

C. *Disciplinary Agencies*

The group recognized the special role and immense power prosecutors have in the criminal justice system and expressed concern that state disciplinary authorities should do more to deter abuse of discretion and *Brady* violations. While the majority of prosecutors abide by their obligations, action by disciplinary authorities is needed to catch the outliers.

D. *Deterring Nondisclosure*

A prosecutorial culture of nondisclosure in some offices was cited as a serious problem. To change this culture, individual prosecutors have to have a stake in the outcome. Some proposed that prosecutors' names be published in the opinions where misconduct is found to have occurred. Some group members disagreed. Others suggested that prosecutors' names be identified only in instances where there has been a *Brady* violation and cases of intentional misconduct. Some group members proposed criminal sanctions for prosecutors who willfully withhold exculpatory evidence. Some warned that more stringent

ethical enforcement may have the opposite effect of causing the most unethical prosecutor to act even more unethically, perhaps even destroying potentially exculpatory evidence.

E. *Promoting a Culture of Disclosure*

Promoting a culture of disclosure was a goal articulated by everyone in the group. This culture has to start in the prosecutor's office and be reinforced through external regulation. Prosecutors need a positive stake in promoting and exercising the highest ethical standards. Prosecutors pointed out that negligent and intentional "misconduct" should not be lumped together.

F. *Recommendations for Best Practices*

- *More judicial oversight:* Make judges active arbiters in resolving disclosure questions.
- *Checklists and privilege logs:* Create and maintain a record of what is turned over and what is not disclosed and the reasons.
- *Plea bargaining:* Discovery must be provided to the defense before a plea is offered.
- *Make pretrial conferences mandatory:* Issues concerning checklists and privilege logs should be resolved at the pretrial conference. Prosecutors should be required to certify that all known discovery has been turned over; although, everyone did not agree to whether an oral assertion can substitute for written certification. One member was hesitant about requiring discovery before any plea bargaining and mandatory pretrial conferencing.
- *Require judicial reporting:* Judicial reporting of attorney violations should be required to reinforce the culture of disclosure and deter noncompliance.
- *Vertical case assignments:* Assign one judge to a case provided resources are available.
- *Data collection is important and more needs to be done:* More data that can reveal how the criminal system is working and not working is needed.