HISTORY OF COMMITTEES' CONSIDERATION OF AMENDMENTS TO RULE 16
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Part I – "*Brady*" Proposal

October 2007 Criminal Rules Committee Minutes – (Reported on action by Standing Committee) (Page 1)[1]

- Advisory Committee Chair reported on the Standing Committee's June 2007 meeting. The proposed amendments to Rule 16 generated the greatest interest.
- Advisory committee's proposed revision had not been approved due to
    - concerns that it would require government disclosure of exculpatory and impeaching evidence without regard to its materiality; and
    - questions as to whether a need for the change had been sufficiently shown.
- Standing Committee suggested that the Advisory Committee consider whether to continue studying the Rule 16 amendment proposal, by asking the Federal Judicial Center to research (a) the effect of the recent change to the U.S. Attorneys' Manual and (b) the experience of courts governed by local rules similar to the Rule 16 amendment proposal.
- Ms. Hooper reported that the FJC could not immediately conduct a substantial survey.
- One member suggested studying the impact of local rules, which would require fewer resources. Department has been carrying out substantial training on the U.S. Attorneys' Manual changes and could already start helping the FJC think of ways to capture the data needed for the Center's study.

June 2007 Standing Committee Minutes – (Deferred consideration of "*Brady*" amendment indefinitely) (Page 5)

- Federal Judicial Center had compiled and analyzed the local district court rules, orders, and policies dealing with Brady v. Maryland requirements.
    - 37 of the 94 federal judicial districts currently have a local rule or district-wide standing order governing disclosure of Brady materials. The Center had not searched beyond local rules and standing orders to identify the orders of individual district judges, which may be numerous. Additionally, most states have statutes or court rules governing disclosure.
- Center would be prepared to conduct further research on how the rules, orders, and policies actually work in practice, if the committee requests it.
- The advisory committee had recommended publishing amendments to Rule 16 requiring the government, on request, to turn over exculpatory and impeaching evidence, or information, favorable to the defendant, "known" to the government – including attorneys and law enforcement agents – regardless of materiality.

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[1] Page numbers refer to page on which the document begins as contained in the 542-page compilation of committee reports and minutes assembled by AO intern Daniele Ressegue in the summer of 2009.

- DOJ amended USAM as an alternative to amending the Rule.
    - Advisory committee ultimately decided for two reasons that the manual changes alone could not take the place of a rule change.
        - First, there was no way to monitor the practical operation of the changes or even to know about problems that might arise in individual cases.
        - Second, the USAM is a purely internal document of the Department of Justice and not judicially enforceable.
        - Reported case law does not provide a true measure of the scope of possible *Brady* problems because defendants and courts generally are not made aware of information improperly withheld.
        - Advisory committee had received a letter from one of its judge members strongly supporting the proposed amendment because in a recent case before him the prosecutor had improperly failed to disclose exculpatory material and, despite the judge's prodding, the DOJ failed to discipline the attorney appropriately for the breach of *Brady* obligations..
        - Local rules and orders of many district courts address disclosure obligations, but they vary in defining disclosure obligations and specifying the timing for turning over materials to the defense.
            - Some rules impose a "due diligence" requirement on prosecutors, while others do not.
            - Sheer number of local rules – together with the lack of consistency among them – support argument for a national rule to provide uniformity.
        - Publishing a proposed rule for comment could produce meaningful information as to the magnitude of the non-disclosure problem. If the public comments were to demonstrate that the problems are not serious, the advisory committee could withdraw the amendment.
        - DOJ concerns:[2]
            - Breadth of proposed rule.
            - Impeaching evidence generally pertains to testimony and early disclosure may increase potential danger to witnesses
                - Limits disclosure of impeaching evidence to no earlier than 14 days before trial.
                - Government has the option of asking for a protective order.
                - Amendment would fundamentally change the way the DOJ does business.
                - Unnecessary because Constitution, SCOTUS and USC have all specified the requirements of fairness and obligations of prosecutors.
                - Goes beyond constitution requirements.

[2] These concerns are described in detail in the letter dated June 5, 2007, from Deputy AG Paul McNulty to Judge David Levi. The letter starts at page 14.1.

            - Would upset “careful balance” of current discovery.
            - Conflict with victims’ rights, disclosure might reveal sensitive information on victims.
        - In federal-state task force cases, it might require state information be turned over to the defense in violation of state law.
        - Inconsistent with Jencks, the rest of Rule 16 and other criminal rules limiting disclosure/timing of disclosure.
        - Rule would generate substantial amount of litigation as to whether exculpatory or impeachment information is “material.”
            - Because it is unclear whether materiality is in fact removed as a disclosure standard.
            - If in fact removed, it is inconsistent with local court rules, very few of which have eliminated materiality.
            - Also inconsistent with rest of Rule 16
        - Rule not thought through or studied adequately.
        - Significant revisions to USAM should be given time to work.
        - Would create “major” instability and insecurity among witnesses, who will be less willing to come forward.
- No inclusion of “material:”
    - Might be read to imply all the familiar constitutional standards.
    - other parts of the rule use it in a different sense
        - Committee member deemed elimination to be “radical”.
        - Would inundate courts with disputes over whether immaterial information must be turned over.
    - Prosecutor’s determination of “material” will likely be subjective, potentially inaccurate.
- Proposed amendment would establish a consistent national procedure, bring the federal rules more in line with local rules and the rules of professional responsibility.
- Introduces a judicial arbiter to make the final decision as to what must be disclosed.
- Concern that Rule would create a new standard of review for failure to disclose.
- Not the intention of the Rule, which is aimed at pretrial disclosure.
    - Comparison with civil pretrial disclosure: vastly less for criminal cases.
    - Court more likely to follow FRCRP than case law.
    - Gather more anecdotal evidence
        - May turn out that disclosure is not handled the same way in different types of cases.

        - Expanded defense rights to pretrial discovery a fundamentally bad idea.
        - Potential for damage to Standing Committee's reputation as a body that proceeds with caution and moderation.
            - Publication should only come when the rule has been substantially vetted.
                - Empirical research difficult to obtain because defense does not find out about withheld information.
        - Rules takes a constitutional fairness standard and converts it to a pretrial discovery procedure that gives defense new trial prep rights
        - Would bring federal practice closer to that of state courts.
    - OUTCOME: Chair concluded that advisory committee should proceed slowly and methodically with any study, opposed immediate publication but did not reject amendment entirely.
        - Deferred further consideration indefinitely.
        - Advisory committee free to take such further action as it deems appropriate in the future.

April 2007 Criminal Rules Advisory Committee Minutes – (Forward "*Brady*" amendment to Standing Committee) (Page 15)

- Judge Bucklew noted that the committee had voted in October 2006 to forward to the Standing Committee for publication the proposed amendment to Rule 16 (obligating prosecutors to disclose exculpatory or impeaching evidence without regard to its materiality).
- Mr. Rabiej had advised Federal Judicial Center staff that the committee would like an update of its October 2004 study of local rules and how they treat a prosecutor's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963).
- Judge Bucklew reported that the proposed rule amendment would be presented to the Standing Committee at its June 2007 meeting.

January 2007 Standing Committee Minutes – (Returned "*Brady*" amendments to Advisory Committee for further consideration) (Page 20)

Advisory Committee approved a proposed amendment to Rule 16 codifying *Brady;* USAM modified to accomplish same goals in lieu of rules change.

- Standing Committee:
    - Creation of national uniform rule would be beneficial.
    - Although USAM not judicially enforceable, they are being noticed by the defense bar and prosecutors.
    - Because amendment would be a policy shift, it will be closely monitored
        - Advisory committee might consider giving USAM time to work.
- Advisory committee argued that a rule change still necessary because:
    - USAM not judicially enforceable.
    - USAM only provides internal guidance.
- Advisory committee expected to propose amended rule with recommendation of publication to standing committee at June 2007 meeting.
    - Concerns (from Standing committee chair):

        - Expansive language would impose too great a burden on government to produce relevant impeachment materials.
        - Proposed amendments could lead to uncertainty involving the standards and burdens for setting aside convictions on appeal.
    - Recommendations:
        - Reexamine the proposed amendments.
        - Review the experiences of courts with local rules on the same subject.

October 2006 Criminal Rules Committee Minutes – (Reaffirmed Recommendation to Forward "*Brady*" amendment to Standing Committee) (Page 24)

- Chair recounted the history of the effort to amend Rule 16:
    - **March 2003:** American College of Trial Lawyers first proposed requiring disclosure of exculpatory and impeaching evidence without regard to its materiality. The Department had consistently opposed the proposed rule amendment.
    - **Spring 2004:** committee discussed the proposal and a Brady subcommittee was appointed, chaired by Mr. Goldberg.
    - **October 2004**: At the subcommittee's request, the Federal Judicial Center completed a survey of local rules, administrative orders, and relevant case law.
    - **April 2005:** The committee considered the subcommittee's drafted amendment to Rule 16. By a vote of 8 to 3, the committee endorsed the amendment in principle and asked the subcommittee to continue its drafting efforts.
    - **April 2006 meeting:** the committee had initially voted to table consideration of the proposed amendment until the next meeting in light of the Department's proposal to amend the U.S. Attorneys' Manual to address a prosecutor's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).
    - **September 5, 2006 teleconference:** the committee voted to send the Rule 16 amendment proposal to the Standing Committee with a recommendation that it be published for public comment.
    - **October 19, 2006:** Attorney General Paul J. McNulty had signed the blue sheet approving the Manual amendment and that the amendment had been posted on the internet and sent to all U.S. attorneys, assistant U.S. attorneys, and litigation divisions.

- Judge Wolf stressed that the committee and the Department had a common interest in the fairness and finality of proceedings, and he encouraged the Department to go beyond formally publishing the new policy and to actively help law enforcement agencies internalize the policy and incorporate it into their practices.

- The committee discussed whether the committee note accompanying the proposed Rule 16 amendment should address the provision's effect on direct appeals or collateral motions.

- Judge Bucklew said that it probably would shift the burden in direct appeals in some circuits, but have no effect on collateral motions. The question, though, was whether a statement to this effect should be added to the committee note.
- Professor Beale said that the circuit split made it difficult to sum up the amendment's impact on direct appeals.
- Professor King said that she opposed adding the proposed language on the amendment's impact on collateral proceedings, because § 2255 proceedings do occasionally consider non-constitutional issues such as fundamental statutory provisions.
- Judge Bucklew commented that, unless there was a desire to change the note, it would be sent to the Standing Committee in its current form.
- Judge Trager objected to the reference to "fundamental fairness" in the first line of the committee note, but noted that he had been on the losing side of the vote approving the proposed amendment.
- Judge Wolf asked, as a procedural matter, whether the committee should be revisiting its September 5 decision to approve the proposed Rule 16 amendment, given that Mr. Fiske and Mr. Goldberg were no longer present.
- Judge Bucklew agreed that the only issue pending was whether to add language to the note to clarify the amendment's effect on direct appeals or collateral motions.
- Judge Wolf said that he would consider it a positive development if the amendment made it more difficult at the appellate level for the government to defend inadvertent and intentional prosecutorial violations of their disclosure obligations in district court, because fear of causing a guilty person to go free would foster compliance among prosecutors far more effectively than a provision in the U.S. Attorneys' Manual**.**

September 2006 Criminal Rules Committee Teleconference Minutes – (Forward "*Brady*" amendment to Standing Committee) (Page 29)

- Arguments Against:
  - DOJ – Concern about the pretrial disclosure of the identity of prosecution witnesses.
  - Ms. Fisher: the problem is limited to a few bad actors.
    - Mr. Campbell suggested that bad actors who would violate a Manual provision would also disregard a rule (violation of USAM subjects a prosecutor to an Office of Professional Responsibility (OPR) investigation, possible dismissal, and even, as occurred in Detroit recently, criminal prosecution; Judge Wolf considers OPR investigations dubious).
    - Mr. McNamara: across the board problem.
- Arguments in Support:
  - USAM not enforceable.
  - Revised language pertaining to exculpatory evidence would eliminate any subjective analysis by the prosecutor and require prosecutors to disclose any information — bar none — that was inconsistent with any element of a crime, the proposed inclusion of the qualifier "substantial" and "significant" in the

Manual section on disclosure of impeaching information, creates the same kind of issue as the materiality element by calling for a subjective assessment by the prosecutor (retention of prosecutorial subjectivity).

    - Materiality qualification makes USAM insufficient substitute for Rule 16 amendment

- Incremental Approach (Judge Tallman): recommended that the committee defer consideration of a Rule 16 amendment until the impact of the Department's proposed revision to the Manual could be assessed. He added that he would not vote for the rule amendment if the Department intended to oppose it at the Standing Committee. Concern re: affect scope of review; and would affect sustainability of convictions
    - Judge Jones: Rule 16 amendment would not lead to an increase in overturned sentences, but only prosecutorial sanctions (Goldberg, King agreed; suggest addition of a note).
    - Mr. Fiske: Even 2 years out, there would be insufficient data to indicate success of USAM changes.
    - Professor King: revising the rule should have no effect on collateral review, and even on direct appeal it would not necessarily shift the burden in all circuits, because it would not change the constitutional standard for reversal.
    - Judge Wolf: commented that the only thing that would ease the job of appellate courts would be to reduce the number of these types of cases by promoting greater fairness and integrity at the trial level in what has proven to be a very problematic area.
- The committee voted 8-4 to forward the proposed Rule 16 amendment to the Standing Committee for publication.

June 2006 Standing Committee Minutes – (Criminal Rules Committee considering "*Brady*" amendment) (Page 39)

- Advisory committee working on a proposed amendment to Rule 16 to expand the government's obligation to disclose exculpatory and impeaching information to the defendant.
    - DOJ strongly opposed to any rule amendment.
    - Offered to draft amendments to the USAM as a substitute.
    - The matter was still in negotiation.

April 2006 Criminal Rules Committee Minutes – (Proposed "*Brady*" amendment is tabled until a special session before Sept. 30, 2006) (Page 43)

- To allow the DOJ additional time to revise proposed USAM change (7-6 vote to table)
    - add a new section on disclosure of exculpatory and impeaching information
    - ensure the wording adequately addressed the main concerns raised by Mr. Fiske and others (eliminating the materiality test and providing notice of which disclosure standard is being used in each case).
- Opposition to Amendment:
    - DOJ: (1) unnecessary; (2) concern for safety of witnesses

        - USAM sufficient – could encourage early disclosure to defense of exculpatory or impeaching evidence, promote prosecutorial uniformity, exceptions necessary for protection of witnesses.
- Support for Amendment: (1) necessity of judicial enforcement; (2) need for having a judge, not a prosecutor, determine what is exculpatory.
    - USAM not sufficient – wording vague, hortatory, subject to exceptions; no mechanism for measuring compliance.
- Support for Tabling Proposed Amendment:
    - Allow USAM time to work.
        - 3 years of work on amendment already completed would be lost.
    - Allow USAM if it removes "materiality" test and provide notice in each case of degree of disclosure.

January 2006 Standing Committee Minutes – (Criminal Rules Committee considering "*Brady*" amendment) (Page 50)

- Advisory committee considering an amendment that would clarify when and what type of exculpatory and impeachment evidence must be disclosed before trial in accordance with *Brady*.
    - DOJ opposed to amendment.
    - Advisory committee has agreed in principle to amendment but has not yet drafted actual language.

October 2005 Criminal Rules Committee Minutes (Approved changes to language, "*Brady*" amendment pending further consideration) (Page 57)

- Gave Standing Committee notice that Advisory Committee would bring a proposed rule for consideration at June 2006 meeting.
- The committee discussed Proposed Amendment Regarding Disclosure of Exculpatory and Impeaching Information.
- Issues:
    - Start of trial is too late in the process for exculpatory material to be meaningful, particularly in complex cases.
    - Advisability of omitting a "materiality" standard for information that must be disclosed.
        - necessary to prevent prosecutors from disclosing exculpatory or impeaching information only when they predict that it might cause reversal of a conviction on appeal.
    - Discussed how omission of a materiality standard would affect review on appeal and habeas corpus.
        - On appeal, the addition of a discovery obligation under Rule 16 would allow the defendant to present the failure to provide exculpatory or impeachment information as a rules violation, rather than solely a constitutional violation.
            - As a rules violation, however, the claim would be subject to Rule 52, and accordingly the impact of the failure to disclose would still be considered.

            - Government would have the burden of demonstrating that the failure had no impact, instead of requiring the defendant to demonstrate materiality. The standard of review on habeas corpus would not be affected.
    - The committee discussed whether the language of the rule should refer to "information" or "evidence."
        - The Brady standard was "evidence and information that might lead to evidence."
        - Rule 16's current language refers to "information subject to discovery."
        - Language of the civil discovery rule, FED. R. CIV. P. 26(b) is "reasonably calculated to lead to discovery of admissible evidence."
            - Standard with which courts and practitioners are familiar, unlike "information" that "tends to be exculpatory," whose application would be less clear.
            - But, too broad unless its scope were limited to "admissible evidence or information that could reasonably lead to such evidence."
            - Rule limits "information" to "exculpatory or impeaching" information.
            - Committee voted to use "information."
- DOJ proposed delivering draft language to the committee before its next meeting for possible inclusion in the U.S. Attorneys' Manual.
- Committee then considered whether the bracketed language "[Except as provided in 18 U.S.C. § 3500]" should be included.
    - Should be left up to judges to wrestle with the inherent tension between Jencks and *Brady*.
    - Department took no position on whether the language should be included.
    - Committee voted to omit the bracketed language, without objection.
- Whether to prohibit a court from requiring disclosure more than 14 days before trial.
    - Problematic in the case of impeaching information.
    - Department felt strongly that such a prohibition was necessary so the government could adequately protect lay witnesses during a fixed window of time under its control.
    - Issue: whether proposed language would conflict with local court rules.
        - Question of whether a defense attorney could properly prepare a case for trial if exculpatory evidence were received less than 14 days before trial.
        - Virtually every court requires disclosure of exculpatory evidence within a certain number of days after arraignment.
        - Since between 93 and 96 percent of federal cases resulted in a plea rather than a trial, it is critical that lay witnesses be exposed only in those cases that actually proceed to trial.
        - Impeaching information that might be used to impeach a witness or to support a suppression motion clearly should be handled differently

from exculpatory evidence, because the latter is critical whether or not the case proceeds to trial.

- Final proposed bracketed sentence (lines 11-12) was limited to apply only to impeaching evidence.
- Concern that the phrase "no later than the start of trial" could be misinterpreted as setting the day of trial as the presumptive disclosure deadline, even for exculpatory evidence, which is considered too late in the process.
  - Local court rules typically require disclosure of exculpatory evidence a certain number of days after indictment or arraignment.
  - Deadline should be earlier for information relating to a motion to suppress, because receiving that information on the day of is also too late.
  - Prosecutors often do not come across such evidence until they are actually preparing a case for trial, often about a month before the trial date.
  - Phrase "no later than the start of trial" deleted and each court allowed to establish a timetable according to its own local culture.
    - Standing Committee members had been emphasizing that the fundamental purpose of the federal rules is to achieve a level of national consistency; would probably have concerns.

- The committee considered the phrase "information that is known to the government—or through due diligence could be known to the government—that the government has reason to believe may be favorable to the defendant."
  - Issue: whether references to "the government" should be changed to "the attorney for the government"; whether the provisions should be expressly limited to apply only to those persons directly involved in the government's investigation of the specific case at issue.
    - It would be unreasonable for the rule to cover information that "through due diligence could be known to the government," - doing so would require federal prosecutors to verify every statement made by one law enforcement officer with every other officer at the scene.
    - DOJ would favor eliminating the "due diligence" language and adhering more closely to the standard articulated in the case law - that which is known to the attorney for the government and to agents of the government involved in investigating the case.
      - Approved in a voice vote without objection.

June 2005 Standing Committee Minutes – (Criminal Rules Committee considering "*Brady*" amendment) (Page 66)

- Notice of ACTL's proposal for Rule 16 amendment
  - Advisory committee had reviewed pertinent local rules and decided to proceed with drafting an amendment.
- DOJ firmly opposed
  - Prosecutorial obligation laid out under *Brady*.
  - Prosecutors err on the side of disclosure.

    - Burden of showing that government has turned over all information that tends to be exculpatory is too massive to bear.
    - System not broken, rule not justified.

April 2005 Criminal Rules Committee Minutes – (Criminal Rules Committee considering "*Brady*" amendment) (Page 71)

- Ms. Rhodes (DOJ): two key concerns about the proposal; **timing** and **materiality**
    - Goldberg: A majority of the Subcommittee supported some sort of amendment to Rule 16. He noted that the Subcommittee had decided not to propose a 14-day requirement in the amendment, and that the Subcommittee had decided to delete the "materiality" requirement from any proposed rule.
- Additional concerns:
    - often difficult to distinguish between inculpatory and exculpatory evidence.
    - Rule 16 already provides adequate discovery in several significant respects.
    - potential impact of the proposed amendment on the Jencks Act requirements
    - issue of protection of prosecution witnesses.
- Mr. Fiske agreed that if there is a conflict between disclosure of favorable information and the Jencks Act that the latter controls.
- Whether an amendment to Rule 16 would require the government to shoulder the burden of proof on appeal if the defendant alleged a violation of the discovery requirement.
- Mr. Goldberg moved that the Committee proceed with the amendment to Rule 16. Mr. Fiske seconded the motion, which carried by a vote of 8 to 3.

October 2004 Criminal Rules Committee Minutes – (Voted to proceed with consideration of "*Brady*" amendment) (Page 77)

- Subcommittee had reviewed the materials included in the agenda book and had reached a consensus that the Committee should proceed with a proposed amendment to the rules that would require the prosecution to disclose to the defense, 14 days prior to trial, information that was favorable to the defense, either because it tended to be exculpatory or because it was impeaching evidence.
    - Judge Carnes: Committee had not recommended other amendments to the Criminal Rules because there was insufficient statistical data to support the need for an amendment. That problem, could also exist with regard to any amendment concerning *Brady* information.
    - Ms. Rhodes: there's no problem to fix, Rule 16 and *Brady* working; no culture of withholding exists at DOJ; issue is re: the timing.
- Judge Battaglia: 30 districts had developed local rules addressing this very issue and those rules had taken various approaches in dealing with the *Brady* issue; might lead to a lack of uniformity and provide more reason for an amendment to Rule 16.
    - Wroblewski: observed that it is a myth that there is a national, uniform, practice in criminal cases and that it is not essential that there be absolute uniformity.
    - Professor Coquillette: § 2071 requires that the local rules be consistent with the national rules.

    - Judge Jones: if there was a national rule on this issue, the Department would ultimately benefit.
- Tallman: issue re: effect on appeals; Congress should address the issue.

May 2004 Criminal Rules Committee Minutes – (Voted to consider ACTL's proposal and form a Rule 16 Subcommittee) (Page 82)

- ACTL proposed amending Rule 16; Judge Carnes appointed Subcommittee to consider.
- Subcommittee previously appointed to review proposal identified issues to be addressed before proceeding:
    - Definition of "favorable" evidence, in light of large amount of case law interpreting *Brady*.
    - Change in the meaning of the term "materiality."
    - DOJ's view that *Brady* is a post-trial rule; amendment would transform a "trial right" into a "discovery right" (confliction with *Jencks*).
    - Focus on developing a bright line rule for timing of disclosure to create uniformity.
    - Ms. Rhodes – no showing that the current law or practice was inadequate
- Subcommittee subsequently appointed to draft amendment following a 9-3 vote to proceed.

January 2004 Standing Committee Minutes – (Notice of ACTL proposal) (Page 87)

- American College of Trial Lawyers had proposed amendments to Rule 16 that would, in effect, supersede the Supreme Court's 2002 decision in *United States v. Ruiz*, involving application of the rule in *Brady v. Maryland* to guilty pleas.
    - Unusual for the committee to propose an amendment to the Supreme Court that would overrule one of the Court's decisions so soon after it has been issued.

Part II – Amendment Requiring Disclosure of Names of Witnesses

October 2003 Criminal Rules Committee Minutes – (Voted against reviving consideration of amendment to disclose witnesses' names) (Page 89)

- Judge Wilson, a former member of the Standing Committee, had written to Judge Davis, the former chair of the Committee, in 1999 asking the Committee to once again address the issue of government disclosure of the names of its witnesses to the defense (a similar amendment had been proposed by the Criminal Rules Committee, published for comment, and approved by the Standing Committee. The amendment did not receive the support of the Judicial Conference and the issue had not been revisited since then.)
- Judge Friedman recommended that the Committee consider the issue again; failed by a vote of 3 to 8.

October 1995 Criminal Rules Committee Minutes – (Reported that Judicial Conference had rejected amendment to disclose witnesses' names) (Page 143)

- Standing Committee had approved a modified version of the Committee's proposed amendments to Rule 16, which would have required the government to produce the names and statements of its witnesses prior to trial. In order to avoid any conflict with the Jencks Act, the Standing Committee deleted any requirement to produce a witness' statement.
- Judicial Conference rejected altogether the proposed amendments to Rule 16 regarding production of witness names and statements.
    - not clear from the Judicial Conference's action whether they specifically intended to reject the amendment to Rule 16 which addressed disclosure of expert witness testimony, the consensus of the Committee was that that amendment had also been implicitly rejected because the changes to Rule 16 had been treated as single unit by the Conference.

September 1995 Standing Committee Report Submitted to Judicial Conference – (Recommended Judicial Conference approve amendment to disclose witnesses' names) (Page 146)

- Rule 16 Amendments to require:
    - government disclosure of names of its expert witnesses seven days prior to start of trial.
- Discussion of arguments:
    - Variation between ease of discovery in civil matters, difficulty in criminal cases.
    - No national uniform policy on disclosure.
        - Some prosecutors disclose, others do not.
        - Extent of disclosure determined by local rules.
    - Plea bargain process would be expedited by early disclosure because defense would understand strength of prosecution's case.
    - Amendments recognize and account for potential risk to disclosed witnesses
        - Even though most federal criminal cases do not involve such risk.
    - Amendments intend to create fairer trials.
        - Reduce the hardships that defendants face in preparing for trial without adequate discovery.
    - Decreases delay in trials that presently exist because recesses are needed in order for defense to review statements, upon introduction of new government witness.
    - Pretrial disclosure of witnesses is common practice in many federal districts, as well as state criminal justice systems and the military.
    - Less demanding than the 1974 amendments approved by the Supreme Court, rejected by Congress.
        - Conflicted with the Jencks Act by requiring pretrial disclosure of statements.
        - Were consistent with Jencks in recognizing the importance of defense pretrial discovery while allowing safeguards.

    - Current amendments are procedural and similar to other previously approved amendments that require defense and prosecution to disclose certain information before trial.
    - DOJ continues to oppose any amendment requiring pretrial release of witnesses names.
        - Believes that a Rule is unnecessary because most prosecutors disclose anyway.
        - A rule would impose restraints on a prosecutor that believes disclosure would create potential risk for witness but does not want to incur disapproval of trial judge.
        - Would impose risks on witnesses who would otherwise not be identified when a plea bargain was entered immediately before trial.
        - Would create unnecessary satellite litigation on review.
- Standing committee voted to recommend approval of Rule 16 amendments with one member and a DOJ representative in opposition.

July 1995 Standing Committee Minutes – (Recommended transmitting to Judicial Conference amendment requiring disclosure of witnesses) (Page 190)

- Proposed amendments to Rule 16(a)(1)(F) and Rule 16(b)(1)(D) would require the government to disclose 7 days before trial the names and statements of witnesses that it intends to call during its case-in-chief. Disclosure would not be required, however, if the attorney for the government:
    - believes in good faith that pretrial disclosure of this information would threaten the safety of any person or lead to an obstruction of justice, and
    - files under seal an ex parte, unreviewable written statement to that effect.
    - The amendments would apply reciprocal discovery requirements on the defense.
        - Under recommendation from Magistrate Judges, the amendment was limited to felony cases.
        - Amendment was also clarified to state that the government could withhold name or statement.
- Judge Jensen: such pretrial disclosure would further good trial management; would eliminate the need to stop mid-trial.
    - BUT – potential conflict with Jencks
        - Argued it was appropriate to proceed under REA
            - Opposed by Easterbrook
- DOJ: strongly opposed to amendment; disclosure requirements different from/conflicting with Jencks.
    - Department already following the practices to the extent possible, so amendment unnecessary.
        - Complying with judge-ordered pretrial disclosure in cases
        - No existence of a systemic problem; few complaints from judges
    - Certification requirement that witness in danger overly burdensome and impracticable
        - DOJ's inability to research every case before certification could endanger witnesses

    - DOJ planned to fight the amendment in Congress; anticipated Victim Groups to oppose as well.
- Prof. Schleuter: Advisory Committee had already made a number of concessions and delays.
    - Several amendments to FRCRP and Evidence had been made to require similar disclosure.
    - Most state courts and the military routinely provide defendants with the names, addresses, and statements of witnesses before trial.
    - Public comments had been overwhelmingly favorable.
- Motion: to allow judge the discretion to set deadline for disclosure within 7 days of trial.
- Committee voted to amend the rule to limit it to witness names only (to avoid conflict with Jencks).
- Substitute language proposed by Judge Easterbrook (not in text of minutes) was approved.
    - Committee voted 9 – 2 to send amendments to Judicial Conference.

April 1995 Criminal Rules Committee Minutes – (Forward amendment requiring disclosure of witnesses to Standing Committee) (Page 195)

- The Reporter informed the Committee that although several commentators approved of all of the changes in Rule 16, almost all of the comments specifically addressed the proposed amendments in Rule 16(a)(1)(F) and (b)(1)(D) dealing with disclosure of witness names and statements. All of the comments expressed support for the proposed amendments; but some suggested changes to the text.
    - Issue: Timing – Federal Prosecutors don't generally know who all of their witnesses will be by 7 days prior to trial.
        - Aimed at ensuring prosecutors do not intentionally withhold information.
        - At worst, a late disclosure would delay trial.
    - Issue: what was meant by "unreviewable" in the proposed amendment
        - concern that that language placed too much power in the hands of the prosecutor.
    - Issue: whether a judge might see non-disclosed evidence in such non-reviewable statements which might later be considered on sentencing.
        - Judge Jensen responded that if the sentencing judge is considering such factors, he or she must disclose that information to the defense
    - Conflict with the Jencks Act.
    - Protection of witnesses (who do not fall under the exception).
        - Limited to pre-trial protection only; names revealed at trial regardless.

September 1994 Standing Committee Report – (Information item on amendments allowing disclosure of witnesses' names previously approved for publication) (Page 206)

- Proposed amendments to Rule 16 (Discovery and Inspection) would provide limited disclosure by the prosecution of the names and statements of witnesses at least seven days before trial. Government may refuse to disclose the information if it believes in good faith that pretrial disclosure of this information would threaten the safety of a

person or risk the obstruction of justice. In such a case, the government simply would file a non-reviewable, ex parte statement with the court stating why it believes - under the facts of the particular case - that a safety threat or risk of obstruction of justice exists. The amendment also would provide reciprocal discovery by the defense.

- DOJ has opposed because:
    - Many prosecutors already follow open file disclosure, but some follow a more restrictive disclosure policy.
    - DOJ has been working internally to reach a more liberal disclosure policy.
    - Strongly recommended that it should be given more time to resolve the matter by policy directive, rather than by mandatory rules.
- Standing committee delayed publishing the proposed amendments to the rule at its January 1994 meeting to allow the Department to reach a resolution internally.
- Standing committee was concerned with possible Jencks Act inconsistencies.
    - Found that similar amendments to the Criminal Rules - presumably also inconsistent with the Jencks Act - were adopted without objections and put into effect.
- Advisory committee had already delayed consideration of the proposal to publish the amendments at its April 1993 meeting to provide the newly appointed Attorney General with an opportunity to study it.
- Standing committee considered the Department's renewed request for additional delay.
    - Additional delay was unwarranted.
    - Determined that publication of the proposed amendments would be useful in eliciting comment from the bench and bar on the Jencks Act issue and on the overall merits of the proposal.
    - Advisory committee chair accepted the recommendation to revise the Note to the amendments to highlight the Jencks Act issue before publishing it for public comment.

September 1994 Proposed amendment requiring disclosure of names of witnesses is published for comment.

June 1994 Standing Committee Minutes – (Amendment requiring disclosure of witnesses approved for publication) (Page 210)

- Proposed amendments to Rule 16:
    - To require the government to disclose information about government witnesses to the defendant seven days before trial (names and statements only).
        - Conflict with Jencks Act?
            - Act does not bar disclosure, only governs timing.
        - DOJ raises concern over witness safety.

May 1994 Criminal Rules Committee Report – (Forwarding amendment requiring disclosure of witnesses' names to Standing Committee for publication) (Page 216)

- Production of Witnesses Names – Amendment to require production 7 days prior to trial.

    - General support for intent of amendment among Standing Committee.
    - DOJ requested more time to work on a compromise with Advisory Committee.
    - Amendment sent back to Advisory Committee for coordination with DOJ and consideration of conflict with Jencks.
    - Potential separation of powers issue.
    - Exclusion of Witnesses Addresses – supported (8-1) under agreement that DOJ would facilitate access to witnesses.
    - Proposed amendment is too narrow in stating the reasons which could be relied upon by the prosecution to refuse to disclose information about a witness; reasons should include recognition that witnesses often face hardships, intimidation, and economic or social disadvantage by agreeing to testify for the government.
    - Timing of production – DOJ requested 3 days.
- Committee voted 9 to 1 to send the amendment to the Standing Committee for public comment.
- Proposed Amendment presented to Standing Committee
    - Omitted inclusion of witnesses' addresses for protection purposes
        - Permits government to block disclosure where there is a danger to the witness.
    - Reciprocal Discovery
    - Committee note expanded to address concerns:
        - Supercession clause of the REA
        - Circuit split over Jencks' requirement of pretrial disclosure of witness statements.
            - Legislative intent to forbid pretrial witness statement disclosure?
                - Congressional expansion of pretrial discovery
    - Policy arguments in support of amendment:
        - Necessary, strikes balance between witness protection and pretrial discovery; will result in greater efficiency in criminal trials.

January 1994 Standing Committee Minutes – (Deferred consideration of amendment requiring disclosure of witnesses' names upon request from DOJ) (Page 246)

- Advisory committee had approved a proposed amendment to Fed.R.Crim.P. 16 requiring the government, on request of the defendant, to disclose the names, addresses, and statements of witnesses at least seven days before trial.
    - A similar proposed rule change had been approved by the Supreme Court in 1974, but had been rejected by the Congress as a result of vigorous opposition from the Department of Justice.
        - Had contained less protection (including a protective order provision) than the current proposal.
- Recognition of a natural tension between the need for a fair trial and the need to protect government witnesses.
- Draft rule approved by the advisory committee presented a good balance between these two principles; provided a presumption of disclosure, but allowed exceptions

freely in the unreviewable discretion of the United States attorney where there could be danger to witnesses or obstruction of justice.

- Previous changes – mostly to Rule 12 – had been adopted in the past with the goal of eliminating surprise in trial (thrust of current rule amendment).
    - Changes had been promoted by the Department of Justice to prevent surprise to the government at trial.
    - Surprises occurring during a trial lead to interruptions in the process in order to obtain additional information.
- Potential Jencks conflict: Advisory committee saw only as a timing issue.
    - DOJ concerned that it was a direct conflict, and this proposal would amend the law by rule.
    - Additional time will allow for further review to avoid conflict.
- DOJ would oppose if submitted as proposed; having the support of DOJ would give the proposal more weight in Congress.
- State courts were clearly moving towards disclosure.
    - Practice was common in federal courts as well.
    - Rule change would merely codify current practice.
        - Chief Justice Veasey came from open disclosure state and the only issue was re: the inconsistency with Jencks.
            - 28 U.S.C. §2072(b) provided that the amended rule would supersede the Jencks Act.
                - Easterbrook concerned the supercession clause unconstitutional.
- Committee deferred consideration until the DOJ had time to review current practices and problems.
- New DOJ staff reviewing proposed amendments to determine if accommodations can be made without promulgating a new rule.

December 1993 Criminal Rules Committee Report[3] – (Forward amendment requiring disclosure of witnesses' names to Standing Committee) (Page 250)

October 1993 Criminal Rules Committee Minutes – (Forward amendment requiring disclosure of witnesses' names to Standing Committee) (Page 262)

- Proposal to amend Rule 16 to require the government to disclose the identity and statements of its witnesses 7 days before trial.
- Deferred at the request of Attorney General Janet Reno who had requested time to study the issue.
- August 4, 1993, Attorney General Reno wrote to then chair, Judge Hodges, indicating her opposition to any effort to amend Rule 16 to require such disclosure.
    - Detailed memo prepared by Mr. Pauley, raising concerns:
        - Amendment potentially infringes on REA because of Jencks Act in place.
        - Committee should defer to Congress.
        - Current trials not unfair.

[3] This Report reflects actions taken by the Committee at its October 1993 meeting, the minutes of which appear at page 262 and are summarized below.

        - Threat of dampening witnesses' willingness to testify; needlessly invade privacy interests.
        - Amendment has technical drafting problems.
        - Post-trial litigation re: request/decision to not release a name.
            - Real deterrent to abuse is desire to retain credibility.
    - Judge Jensen noted that the Reporter had prepared an alternative draft.
        - Discovery encourages efficient trials; early disclosure has a positive impact on trials.
        - Draft presented a balance between protecting witnesses and the defendant's right to prepare for trial.
        - Current state discovery practices have posed no threat to witnesses
        - Danger to witnesses is a very small part of the federal system.
- Advisory Committee approved a proposed amendment to Rule 16 which requires the government, upon request by the defendant, to disclose the names, addresses, and statements of its witnesses at least seven days before trial.
    - 1974: Congress rejected a similar amendment after a vigorous protest from the Department of Justice.
    - Intervening years, similar amendments were proposed, debated, and rejected by the Advisory Committee.
- The present amendment was approved by an overwhelming vote of the Committee members (9 to 1).
- Creates a presumption that defense is entitled to discovery of government's witnesses
- Committee note expectation of concerns:
        - Supercession clause of the REA
        - Circuit split over Jencks' requirement of pretrial disclosure of witness statements.
            - Legislative intent to forbid pretrial witness statement disclosure?

October 1992 Criminal Rules Committee Minutes – (Tasked Reporter with drafting amendment that provides for disclosure of government witnesses) (Page 300)

- Mr. Wilson proposed that the Committee consider amendments to Rule 16 to expand federal criminal discovery.
    - No meaningful discovery under the rule.
    - In a complex case a defendant cannot get a fair trial.
- Professor Saltzburg indicated that he too was concerned about Rule 16 vis a vis names of government witnesses.
    - in a complex case there cannot be a fair trial without complete discovery.
    - potential danger to witnesses if their identity is revealed to the defense.
- Suggested that the prosecutor disclose the names of its witnesses unless the prosecution submits in writing reasons why doing so would present a danger to the witnesses. The court's decision on whether to disclose those witnesses is not reviewable.
- Judge Hodges noted that in the past most prosecutors had provided an "open file" to the defense but that in some districts that was no longer the policy.

    - If the "open file" system is no longer as commonly in effect, it is probably due to the increase in drug prosecutions where there is often danger to government witnesses.
        - The prosecution is in the best position to decide whether there is a danger to witnesses.
- Marek - permit the court to decide, under all the facts and circumstances, if production of a witness's name was required.
- Tasked with drafting language for Rule 16 which would address the disclosure of government witnesses to the defense.

November 1991 Criminal Rules Committee Minutes – (No motion was made on ABA proposal to codify *Brady*) (Page 342)

- ABA proposed codification of *Brady*.
    - Previously considered and rejected by committee.
        - Question of whether *Brady* applies to sentencing.

May 1989 Criminal Rules Committee Minutes – (Amendments re: witness information failed by vote; both *Brady* and Jencks amendments tabled) (Page 399)

- Committee considered amendment to Rule 16 which would:
    - require the prosecution to furnish to the defense a written list of names and addresses of all government witnesses.
        - DOJ Opposition -
            - Dangers of witness intimidation, loss of life.
            - Trial judges will inevitably err on determining when to disclose witnesses name, creating such dangers.
        - Support:
            - Trials without adequate defense preparation are inherently unfair.
    - provide for reciprocal discovery of names and addresses of defense witnesses.
    - prohibit comment upon the failure to call a witness on either list.
    - impose a continuing duty to disclose the names and addresses of witnesses.
- The proposed changes followed proposals approved by the Supreme Court in 1974.
    - Amendment failed.
    - Motion to have DOJ present position on requiring disclosure OR certification to trial judge that witness information should not be disclosed because doing so would pose risk of injury or loss of life to witness (passed unanimously).
- Marek: Proposed adding a Subsection (H) to Rule 16(a)(1) which would require the Government to provide all exculpatory (*Brady*) material to the defense.
    - Practical problem of moving back the period of disclosing the exculpatory evidence.
- Deferred until the next meeting**.**
- Marek: Proposed adding a Subsection (G) to Rule 16(a)(1) which would require the prosecution to produce, before trial, any prior Jencks Act statements made by any prosecution witness.
    - Rules Enabling Act permits the Committee to initiate discussion on a particular rule by adopting amendments. Judge Weis recommended that the

Committee recommend an amendment and thus give notice to Congress that the area needs some attention. Judge Hodges moved to table the proposal and Judge Huyett seconded the motion which passed.

November 1988 Criminal Rules Committee Minutes – (Proposal to require disclosure of witnesses' names tabled until subsequent meeting) (Page 405)

- Proposed Amendments to Rule 16 to include provisions for witness names, witness statements, reciprocal discovery, discovery for sentencing purposes, and disclosure by the prosecution of other acts of uncharged misconduct which might be introduced at trial under Fed. R. Evid. 4(b).
    - The Department stated its objection to any potential amendments based on their consideration that any amendments would constitute an interference with Congressional prerogatives to amend the Jencks Act and noted that it would continue to reject strongly any attempts to require prosecutors to reveal in every case witness names and statements.
    - Issue: whether the Committee was the most appropriate body to initiate changes in criminal discovery practice.
    - Move to adopt proposed revision which would track with the ABA Criminal Justice Standards, Discovery and Procedure Before Trial, Chapter 11, approved August 9, 1978 ; passed by a 5 to 4 vote, reconsidered, failed, tabled until next meeting.
        - Support: in light of developments in State discovery practices and the trend to avoid trial by ambush, more discovery of information in the hands of the prosecution was appropriate.
        - Opposition: (1) disclosure of information such as the names of prosecution witnesses would present substantial danger to those individuals; (2) Congress was the appropriate body for proposing any changes in criminal discovery.

June 1986 Criminal Rules Committee Minutes – (Notice of Jencks-related legislation) (Page 410)

- Proposed Amendment of Jencks Act--Discovery Reform
    - Representative Conyers' Subcommittee held hearings on a proposal to amend the Jencks Act to provide discovery of witness names and statements prior to trial. Tom Hutchison noted that the hearings were over and that the bill would be marked up, but said that the Criminal Rules Committee had not been asked to take a position on the proposed change.
    - No member of the Committee expressed a desire to indicate views on the bill, and the matter was dropped.

March 1986 Standing Committee Report – (Notice of Jencks-related legislation) (Page 412)

- Notice of introduction of HR 4007, 99th Congress, to amend 18 USC 3500 (The Jencks Act) to provide for increase defense discovery in criminal cases
    - Would require government to disclose, prior to trial, the names of its witnesses

    - Protective order provision
- Public hearings to be scheduled
    - Never got out of committee

Part III – Amendment Requiring Reciprocal Discovery

December 1975 Reciprocal Discovery Amendments Take Effect[4]

October 1972 Judicial Conference Approves Proposed Reciprocal Discovery Amendments

April 1972 Standing Committee Report – (Recommended that Conference approve amendment requiring reciprocal discovery) (Page 421)

- Proposed Amendment to Rule 16 to give greater discovery rights to both prosecution and defense.
    - Both parties are related, and expanding the rights of one requires expanding the rights of the other.
- Prosecution's right of discovery independent of defense discovery request.
- Discovery should be completed by the parties themselves, without an order of the court, unless there is a dispute.
- Intended to prescribe the minimum amount of discovery.
    - Argument: broad discovery contributes to fair and efficient administration of criminal justice.
        - Provides defendant enough information to make an informed decision as to a plea.
        - Minimizes the undesirable effects of surprises at trial.
        - Contributes to an accurate determination of guilt or innocence.
- Requires pretrial disclosure, raising issues of --
    - Timing of when defendant determines plea;
    - Admissibility objections made at this time.
- Requires request from defendant.

- Recommendation: that the Conference approve and submit to the Supreme Court for approval

January 1972 Criminal Rules Committee Minutes – (Forward amendment requiring reciprocal discovery to Standing Committee) (Page 447)

- Agreed that Rule 16 prescribes a minimum level of discovery that judges may permit.
    - Should be indicated in the notes, inclusive of grand jury minutes.

September 1971 Criminal Rules Committee Minutes – (Some portions of amendment requiring reciprocal discovery approved, some deferred) (Page 450)

- Issue: Independent government discovery (16(b)).
    - Concern: violation of defendant's rights?

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[4] Consideration of the amendments was delayed by congressional deliberations and thus the amendments did not take effect until 1975.

        - Unanimously agreed that Rule 16 would not violate 4th and 5th Amendment rights.
    - Members of the committee felt that the government as well as the defendant should have independent discovery rights.
        - The alternative draft of Rule 16 was rejected.
- Discovery under Rule 16(a) should proceed on request rather than under court order.
    - Language of the rule was changed in Rule 16(a)(i),(iii),(iv) and (v) to read, "Upon request of a defendant, the government shall permit the defendant . . . "
    - This is in contrast to 16(a)(vi) where discretion was left with the court.

Part IV – Early Consideration of *Brady* Issues and Rule 16

September 1968 Criminal Rules Committee Minutes – (Moved to keep *Brady* obligations out of proposed amendment) (Page 458.1)

- Suggestion that the rule of Brady v. Maryland should be left to the development of the case law and should not be in the rule. A note should be added to the effect the committee is not attempting to codify Brady v. Maryland at present.

May 1966 Criminal Rules Committee Minutes – (Received notice from Committee Staff re: Rule 16 related legislation) (Page 461)

- Congress: Proposed legislation dealing with issues in new Rule 16.
    - Variation between civil and criminal rules with respect to discovery.
    - Concern re: uniformly meaningful use of the Rule.
- Legislation includes broader discovery than granted in Rule 16
    - Indication from staff the Court may want broader discovery but be reluctant to buck the Advisory Committee's proposal.
- Issues with Rule 16:
    - Permissive rather than directive ("may" as opposed to "shall").
    - Doesn't allow for discovery of issues not actually in the government's possession.
- Issue re: disclosure of witnesses where protection might be necessary.

June 1965 Standing Committee Minutes (Approved amendment requiring limited discovery) (page 476)

January 1964 Criminal Rules Committee (Approved amendment requiring limited discovery) (Page 489)

October 1963 Criminal Rules Committee (Deferred consideration of amendment until next meeting) (Page 499)