A Summary of Responses to a National Survey of Rule 16 of the Federal Rules of Criminal Procedure and Disclosure Practices in Criminal Cases

Final Report to the Advisory Committee on Criminal Rules

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Federal Judicial Center
February 2011

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Acknowledgments

The authors gratefully acknowledge the valuable assistance of a number of Center staff members who helped produce this report, including Patricia Breen, Jackie Campbell, Tyeika Crawford, Meghan Dunn, Emery Lee, Angelia Levy, Vashty Gobinpersad, Barry McMillion, Donna Pitts-Taylor, and Margaret Williams. We also acknowledge the indispensable assistance of Judge Richard C. Tallman, chair of the Advisory Committee on Criminal Rules; members of the Rule 16 subcommittee; and the Committee's reporters, Professors Sara Beale and Nancy King, who assisted in developing the survey questions. Finally, we also thank Judge Joseph Bataillon (District of Nebraska), Judge David Carter (Central District of California), and Judge Ivan Lemelle (Eastern District of Louisiana) who provided important feedback on earlier versions of the survey instruments.

I. Introduction

Federal Rule of Criminal Procedure 16 (Rule 16) governs discovery and inspection of evidence in federal criminal cases. Rule 16 entitles the defendant to receive, upon request, the following information:

- statements made by the defendant;
- the defendant's prior criminal record;
- documents and tangible objects within the government's possession that "are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant";
- reports of examinations and tests that are material to the preparation of the defense; and
- written summaries of expert testimony that the government intends to use during its case-in-chief at trial.[1]

Rule 16 also imposes on the government a continuing duty to disclose additional evidence or materials subject to discovery under the rule, if the government discovers such information prior to or during the trial.[2] Finally, Rule 16 grants the court discretion to issue sanctions or other orders "as are just" in the event the government fails to comply with a discovery request made under the rule.[3]

The Advisory Committee on Criminal Rules (Advisory Committee) is considering whether Rule 16 should be amended to incorporate the government's constitutional obligation to provide exculpatory and impeachment evidence to the defense or, instead, to create a broader disclosure obligation. To help inform its deliberations, the Advisory Committee asked the Federal Judicial Center (Center) to study the operation of districts with local rules or standing orders that require more expansive disclosure than required by the current Rule 16, to study those districts without the more expansive rules, and, further, to identify any variation in pretrial disclosure practices in the federal district courts.

In order to address the Committee's questions, the Center conducted a national survey in the summer of 2010, which included an online survey of all federal district and magistrate judges, U.S. Attorneys' Offices, federal defenders, and a sample of defense attorneys in criminal cases that terminated during calendar year 2009.

1. Fed. R. Crim. P. 16(a)(1)(A)–(G).
2. Fed. R. Crim. P. 16(c).
3. Fed. R. Crim. P. 16(d)(2).

This report describes the results of that survey. The principal issues addressed in the survey are:

- Should Rule 16 be amended to address pretrial disclosure of exculpatory and *Giglio*[4] information?
- Do federal prosecutors and defense attorneys understand their pretrial disclosure obligations?
- Do federal prosecutors' concerns about witness intimidation, security, and privacy affect whether information or evidence is disclosed to the defense?
- Are federal prosecutors viewed as fulfilling their pretrial discovery obligations?
- How frequent are reverse-Jencks Act[5] violations committed by defense attorneys?
- How do courts address pretrial disclosure violations by the government and by defense attorneys?
- How might the Committee's 2007 proposal[6] affect cooperating witnesses and crime victims?
- In addition to the Committee's 2007 proposal, are there other reform proposals that should be considered?

A. Overview of the Report

Section I of this report provides a general introduction and background information. Section II presents a summary of the Center's survey findings. Section III describes the local rules and orders of federal district courts that require broader disclosure than that of Rule 16 for *Brady* material. Section IV presents survey respondents' views on whether there is a need to amend Rule 16. Section V describes survey respondents' perceptions as to whether attorneys understand their disclosure obligations. Section VI presents respondents' opinions regarding attorneys' compliance with disclosure obligations. Section VII focuses on selected issues in districts that have specific timing requirements for disclosure or that have eliminated the materiality requirement in assessing relevant information and evidence. Section VIII addresses disclosure of witness statements. Section IX summarizes respondents' views of the impact of the proposed 2007 amendment on cooperat-

4. Giglio v. United States, 405 U.S. 150 (1972).
5. 18 U.S.C. § 3500 (1970).
6. *See* Appendix A, Advisory Committee's Proposed 2007 Rule 16 Amendment and Committee Note.

ing witnesses and crime victims. Section X contains a summary of respondents' suggested alternative language for amending Rule 16 and also addresses other reform proposals. Section XI concludes with a summary of the respondents' general comments.

Appendix A contains the Advisory Committee's 2007 proposed amendment to Rule 16. Appendix B includes a compendium and tables describing the broader disclosure districts' local rules and orders. Appendix C contains tables generated from the survey data. Appendix D describes the methods used for the study. Appendix E includes the survey instruments. The Appendices are available on the federal courts' intranet at http://cwn.fjc.dcn/fjconline/home.nsf/pages/1356.

B. Background

Discussions about amending Rule 16 began in 1968 when the Advisory Committee voted not to codify *Brady v. Maryland*, 373 U.S. 83 (1963), instead leaving it to the development of case law. In 2003, the American College of Trial Lawyers proposed that Federal Rules of Criminal Procedure 11 and 16 be amended to (1) codify the rule of law first propounded in *Brady v. Maryland*; (2) clarify both the nature and scope of favorable information; (3) require the attorney for the government to exercise due diligence in locating information; and (4) establish deadlines by which the United States must disclose favorable information.[7] The Advisory Committee then again discussed whether an amendment to Rule 16 was needed. Specifically, the Committee explored whether Rule 16 should codify and expand the government's disclosure obligations regarding exculpatory and impeachment evidence favorable to the defense.

The Department of Justice (DOJ) has consistently opposed any proposed amendment to Rule 16, generally contending that codification of the *Brady* rule is unwarranted because the government's *Brady* obligations are "clearly defined by existing law that is the product of more than four decades of experience with the *Brady* rule."[8] DOJ has further contended that nondisclosure problems are not widespread and, consequently, a rule change is not needed.

Notwithstanding its opposition to an amendment, DOJ has worked with the Advisory Committee over the past few years to draft language for a proposed amendment while simultaneously making revisions to the *U.S. Attorneys' Manual* (*Manual*) regarding the government's disclosure obligations, revisions that might serve as an alternative to a Rule 16 amendment.

7. Memorandum from American College of Trial Lawyers to the Judicial Conference Advisory Committee on Federal Rules of Criminal Procedure (Oct. 2003), at 2.

8. Memorandum from U.S. Dep't of Justice (Criminal Division) to Hon. Susan C. Bucklew, Chair, Judicial Conference Subcommittee on Rules 11 and 16 (Apr. 26, 2004), at 2.

In September 2006, the Advisory Committee reviewed DOJ's proposed revision to the *Manual* and debated whether, in light of that provision, the Committee should still forward the draft Rule 16 amendment to the Judicial Conference's Standing Committee on Rules of Practice and Procedure (Standing Committee) for publication. After considerable deliberation, the Advisory Committee concluded that an amendment to Rule 16 was necessary because the *Manual* was not judicially enforceable and provided internal DOJ guidance only. Consequently, the Advisory Committee voted to forward the proposed Rule 16 amendment to the Standing Committee for publication. The proposed amendment was based on the principle that fundamental fairness is enhanced when the defense has access before trial to any exculpatory and impeaching information known to the prosecution. Further, the proposed amendment codified the prosecutor's duty to disclose such information in the Federal Rules of Criminal Procedure and therefore would become a standard part of pretrial discovery in federal prosecutions.

On October 19, 2006, DOJ posted a new *Manual* provision clarifying the disclosure of material and exculpatory evidence.[9] Specifically, the *Manual* noted the difficulty in assessing the materiality of evidence before trial, and thus encouraged prosecutors to take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence.[10]

In June 2007, DOJ wrote to then-chair of the Standing Committee, Judge David F. Levi, to express a number of concerns regarding the proposed amendment to Rule 16. DOJ argued that the proposed amendment (1) was inconsistent with forty years of Supreme Court precedent as it would eliminate any materiality requirement for the disclosure of both exculpatory and impeachment material; (2) conflicted with other provisions of the Criminal Rules; (3) was inconsistent with current federal discovery procedures; (4) potentially conflicted with witness protection and crime victim rights statutes; and (5) provided little or no guidance on how the amendment should be applied.[11]

At the Standing Committee meeting in June 2007, DOJ persuaded the Standing Committee to reject the proposed amendment to Rule 16. The Standing Committee's rejection was partially based on the desire to obtain information about the experience with DOJ's revisions to its *U.S. Attorneys' Manual* and allow DOJ an opportunity to implement new training initiatives to increase awareness among prosecutors of their discovery obligations in criminal cases.[12]

9. U.S. Attorneys' Manual § 9-5.001.

10. *Id.*

11. Letter from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to Judge David Levi, Chair, Committee on Rules of Practice and Procedure (June 5, 2007) (on file with author).

12. *See* Memorandum from Nancy King and Sara Beale to Rule 16 Subcommittee (Aug. 31, 2009) (on file with author).

Since 2007, there have been a number of high-profile cases involving the government's failure to comply with disclosure obligations.[13] In one case, the court dismissed the government's public corruption case against the defendant after an internal DOJ review discovered that government material undermining a critical witness's testimony had not been given to the defense.[14] And in another case, the court ordered the attorney involved to show cause why she should not be sanctioned after failing to disclose exculpatory evidence.[15]

In September 2009, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued a formal opinion regarding a prosecutor's duty to disclose all exculpatory information to the defense under Rule 3.8(d) of the ABA Model Rules of Professional Conduct.[16] The opinion noted that Rule 3.8(d) is more demanding than the constitutional case law in that it requires the disclosure of evidence or information favorable to the defense without regard to its anticipated impact on a trial's outcome. Rule 3.8(d) requires prosecutors to go beyond the constitutional line, erring on the side of caution and further indicates that disclosure should occur sufficiently in advance to allow for investigation, affirmative defenses, or determination of defense strategy.[17] Finally, the comment to Rule 3.8(d) indicates that a prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to ensure that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.[18]

In November 2009, the Benjamin N. Cardozo Law School in New York held a symposium titled *New Perspectives on Brady and Other Disclosure Obligations:*

13. *See, e.g.,* United States v. Chapman, 524 F.3d 1073 (9th Cir. 2008) (affirming dismissal of an indictment with prejudice where the trial court found the prosecutor violated *Brady* and *Giglio*); United States v. Shaygan, 661 F. Supp. 2d 1289 (S.D. Fla. 2009) (issuing a public reprimand against U.S. Attorneys Office and three prosecuting attorneys as well as granting monetary sanctions to the defendant); United States v. Quinn, 537 F. Supp. 2d 99 (D.D.C. 2008) (granting a motion for a new trial because of disclosure violations); United States v. W.R. Grace, No. 09:05-cr-00007-DWM (D. Mont. May 6, 2009) (instructing jury to examine a witness's testimony "with great skepticism and with greater caution than that of other witnesses" as a result of the relationship the witness had with the prosecution team).

14. United States v. Stevens, Cr. No. 08-231 (D.D.C. Apr. 7, 2009).

15. United States v. Jones, 620 F. Supp. 2d 163, 185 (D. Mass. 2009). The court also ordered the development of an educational program on criminal discovery that would be administered by the court.

16. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009).

17. *Id.*

18. *Id.*

What Really Works? [hereinafter *Brady* disclosure symposium].[19] The overarching theme of the *Brady* disclosure symposium was to explore and identify the best practices to ensure effective and ethical prosecutor offices. The *Brady* disclosure symposium included approximately seventy-five participants, including "representatives from state and federal prosecutors' offices, defense lawyers, judges, legal academics, cognitive scientists, social psychologists, doctors, as well as members of the medical and corporate risk management fields."[20] The participants were split into six groups to discuss a core issue, such as Prosecutorial Disclosure Obligations and Practices.[21] Each group was responsible for producing a report with recommendations.[22]

On January 4, 2010, DOJ issued three memos from Deputy Attorney General David Ogden that provided direction for prosecutors in pending criminal cases.[23] One of the three memos is a detailed guidance memo for all federal prosecutors that sets forth the steps DOJ has taken and will take to ensure that prosecutors assess and meet their disclosure obligations. The new guidance memo was in response to recommendations from a DOJ working group tasked to review DOJ policies and practices regarding criminal discovery issues.[24] The guidance memo was not intended to establish new disclosure obligations. The guidance memo, however, notes that inconsistent discovery practices among prosecutors within the same office can lead to burdensome litigation over the appropriate scope and timing of disclosures, judicial frustration and confusion, and disparate discovery

19. Symposium, *New Perspectives on* Brady *and Other Disclosure Obligations: What Really Works?*, 31 Cardozo L. Rev. 1961 (2010).

20. *Id.*

21. *Id.* at 1961–62.

22. *See, e.g., id.* at 1971, which sets forth the recommendations and conclusions of the Prosecutorial Disclosure Obligations and Practices Working Group.

23. Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.pdf; Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group (Jan. 4, 2010), *available at* http://www.justice.gov/dag/dag-memo.pdf; Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Department Litigating Components Handling Criminal Matters, All United States Attorneys, Requirement for Office Discovery Policies in Criminal Matters (Jan. 4, 2010), *available at* http://www.justice.gov/dag/dag-to-usas-component-heads.pdf.

24. *Criminal Law—Discovery: DOJ Memo Lays Out Guidelines on Discovery*, 78 U.S.L.W. 2394 (Jan. 10, 2010).

disclosures to a defendant based solely on the identity of the prosecutor who was assigned to the case.[25]

Then-Deputy Attorney General Ogden also directed that each U.S. Attorney's Office develop a discovery policy consistent with the law and local rules and practices, to be in place by March 31, 2010. To assist federal prosecutors in meeting their discovery obligations, DOJ implemented a training curriculum and created an online directory of resources pertaining to discovery issues.[26] Further, a mandatory training program has been developed for paralegals and law enforcement agents.

In February 2010, the Rule 16 Subcommittee of the Advisory Committee held a consultative meeting that brought together judges, prosecutors, defense attorneys, and crime victim advocates to discuss issues related to the disclosure of exculpatory and impeaching information in criminal cases. The invitees had extensive experience involving issues related to Rule 16, ranging from white collar cases to prosecutions involving organized crime and national security.

At the April 2010 Advisory Committee meeting, DOJ briefed the Advisory Committee about the various initiatives undertaken by the Department to ensure federal prosecutors meet their disclosure obligations. DOJ reported that 5,000 prosecutors had completed the newly adopted mandatory training courses on disclosure obligations. Assistant Attorney General Lanny Breuer introduced Andrew Goldsmith, who was appointed to DOJ's newly created position of National Coordinator for Criminal Discovery Initiatives. His responsibilities would include reviewing the discovery plans of every U.S. Attorney's Office, designing training for law enforcement agents and paralegals, creating an online directory of resources on discovery, producing a handbook on discovery and case management, and consulting with judges and members of the defense bar to obtain different points of view on criminal discovery issues.

In June 2010, at the request of the Advisory Committee, the Federal Judicial Center conducted a national survey of all federal district and magistrate judges, U.S. Attorneys' Offices, and federal defenders, and a sample of defense attorneys in criminal cases that terminated in calendar year 2009. The surveys collected empirical data on whether to amend Rule 16 and collected views regarding issues, concerns, or problems surrounding pretrial discovery and disclosure in the federal district courts. Preliminary results were presented at the Advisory Committee meeting in September 2010.

25. Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Department Litigating Components Handling Criminal Matters, All United States Attorneys (Jan. 4, 2010) (on file with author).

26. Att'y Gen. Eric Holder, Remarks at the 70th Judicial Conference of the Sixth Circuit (May 5, 2010).

II. Summary of Findings

In this section, we summarize the Rule 16 survey results. Most of these results are discussed more fully in various sections of this report and in the materials contained in the Appendices.

Overall:

- Forty-three percent (644 of 1,505) of judges completed the survey, including 56% of chief district judges and 48% of active district judges.
- Thirty-one percent (4,547 of 14,726) of private attorneys and 47% (612 of 1,290) of federal defenders completed the survey.
- Ninety-one percent (85 of 93) of U.S. Attorneys' Offices completed the survey.[27]
- Thirty-eight districts have a local rule or standing order that codifies the government's obligations to disclose exculpatory and/or impeachment material in either very general or specific terms, and/or provides timing requirements for the disclosure of exculpatory and/or impeachment material.
- Judges were evenly split regarding whether Rule 16 should be amended; however, judges in districts with local rules and/or orders that require broader disclosure of exculpatory and impeachment material than what is required by Rule 16 (hereinafter called broader disclosure districts) indicated greater support for amending Rule 16 compared to judges in traditional Rule 16 districts (hereinafter called traditional districts).
- More than 90% of defense attorneys favored an amendment to Rule 16, while the Department of Justice opposes any type of amendment.
- Judges reported higher levels of comprehension of disclosure obligations by federal prosecutors than by defense attorneys. Specifically, over 94% of judges expressed the view that federal prosecutors usually or always understand their disclosure obligations. Only 78% of judges thought the same of defense attorneys.
- Eighty-eight percent of judges replied that federal prosecutors usually or always follow a consistent approach to disclosure. Data from the defense bar was mixed. In broader disclosure districts, 70% of private attorneys re-

27. A single U.S. Attorney serves the districts of Guam and the Northern Mariana Islands.

plied that federal prosecutors are consistent compared to 44% of federal defenders. Eighteen percent of federal defenders in broader disclosure districts stated that federal prosecutors are rarely consistent. In traditional districts, 52% of private attorneys thought the government is consistent compared to 25% of federal defenders. Twenty-eight percent of federal defenders in traditional districts indicated that the government is rarely consistent.

- Over 60% of the judges reported having no cases during the past five years in which they had concluded that a federal prosecutor or defense attorney had failed to comply with disclosure obligations.
- Judges reported that the two most frequent disclosure violations *committed by federal prosecutors* were the *failure to disclose on time* and the *scope of their disclosure* (the failure to turn over material or information that should have been turned over to the defense). *Failure to disclose at all* was the most frequent violation identified by defense attorneys.
- Judges reported that the two most frequent disclosure violations *committed by defense attorneys* were the *failure to disclose on time* and *failure to disclose at all*. *Failure to disclose at all* was the most frequent violation identified by U.S. Attorneys' Offices.
- The two most frequently reported remedies imposed for disclosure violations attributed to the government or to the defense were (1) ordering immediate disclosure of the questionable material or information and (2) ordering a continuance to give the requesting party an opportunity to review the material.
- Overall, judges reported rarely holding an attorney in contempt, and they seldom report an attorney's conduct to the Department of Justice's Office of Professional Responsibility (OPR), bar counsel, or some other disciplinary body.
- Judges reported high levels of satisfaction with the overall compliance by federal prosecutors and defense attorneys with their disclosure obligations.
- Fifty-two percent of defense attorneys in broader disclosure districts and 56% of defense attorneys in traditional districts reported that the government had requested no protective orders over the past five years because of witness safety or other security concerns.
- Thirty-eight percent of U.S. Attorneys' Offices in broader disclosure districts and 41% of U.S. Attorneys' Offices in traditional districts reported requesting no protective orders over the past five years.

- Twenty percent of U.S. Attorneys' Offices in broader disclosure districts and 11% in traditional districts reported that requests for protective orders were made in five to ten cases over the past five years.
- The timing of disclosure was the issue most frequently addressed in the judges and attorneys' suggestions for reforming the proposed 2007 amendment.

Other selected issues in broader disclosure districts:

- The most common variations across district local rules, standing orders, and policies occurred in the timing of disclosure of exculpatory and/or impeaching information and the existence of an "open file" policy or practice.
- The most common "significant differences" reported by respondents between their local rule, order, or policy and Rule 16 were: the timing of disclosure; the existence of an "open file" policy or practice; disclosure without regard to materiality; and the production of witness statements prior to trial.
- Judges and U.S. Attorneys' Offices reported that requirements for earlier disclosure do not appear to cause major problems for the prosecution.
- Judges, defense attorneys, and U.S. Attorneys' Offices expressed the view that requirements for earlier disclosure do not greatly impact witness cooperation.
- Defense attorneys reported that the elimination of the materiality requirement has reduced problems and confusion regarding government disclosure in most or some cases. The majority of U.S. Attorneys' Offices report that the elimination made no difference.

III. Analysis of District Court Local Rules and Orders with Broader Disclosure Requirements than Rule 16 for Disclosing *Brady* Material

Rule 16 does not codify the government's obligation to disclose exculpatory and impeachment material as established by the Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963) [*Brady*], *Giglio v. United States*, 405 U.S. 150 (1972) [*Giglio*], and their progeny. Rule 16 does require the government to disclose, upon defendant's request, documents and tangible objects "material to the preparation of his defense." This is interpreted by the Advisory Committee Note to the 1974 Amendments to include "evidence favorable to the defendant."[28] Rule 16 does not, however, establish a time frame for disclosing this material. A review of the ninety-four federal districts' local rules, standing orders, and websites revealed thirty-eight districts[29] with local rules and/or standing orders that impose requirements beyond those of Rule 16 for disclosure of exculpatory and impeachment material [*Brady/Giglio* material].

More specifically, thirty-eight districts have a local rule or standing order that codifies the government's obligations to disclose exculpatory and/or impeachment material in either very general or specific terms, and/or provides timing requirements for the disclosure of exculpatory and/or impeachment material. In addition to requiring "broader" disclosure than Rule 16 provides for, several of these local rules and orders require "broader" disclosure than what is required by *Brady* and its progeny case law by eliminating the *Brady* "materiality" requirement and/or adding a time frame within which exculpatory and/or impeachment evidence must be disclosed.[30]

28. Fed. R. Crim. P. 16(a)(1)(D) & advisory committee's note.

29. Note that our identification of "broader" rules and orders consisted of (1) searching sources available to the public (i.e., published local rules and standing orders posted on districts' websites) and (2) verifying a limited number of orders not found on a district's website but previously identified during our research for the 2007 FJC study of rules and orders. For the fifty-six districts in which we were unable to identify a local rule and/or standing order from our search of publicly available material, we did not contact these districts to verify the nonexistence of a formal or informal district-wide procedure or practice addressing the disclosure of exculpatory or impeachment information. In addition, for the thirty-eight districts in which we did identify "broader" rules and/or orders, we assume that the disclosure practice is followed district-wide. This assumption does not take into account the possibility that variation in disclosure practices may exist between divisions or different judges.

30. In *Brady*, the U.S. Supreme Court defined "exculpatory" evidence as any evidence favorable to a defendant and "material" evidence as being relevant to the question of the defendant's guilt or the determination of a guilty defendant's punishment. 373 U.S. at 87. Most recently, the

A. Scope of Disclosure

1. Defined Approach

Our analysis of the thirty-eight local rules and orders that establish "broader" disclosure requirements shows that thirty-one of these rules and orders adopt a "defined approach" for establishing the scope of the government's obligation to disclose exculpatory and/or impeachment material. With regard to exculpatory information, all thirty-one rules and orders either: (1) specifically define the scope of disclosure by incorporating all or part of the *Brady* description of information that may be "favorable to an accused" and "material either to guilt or punishment" and/or by providing specific examples[31] of "*Brady*" material [twenty-one districts[32]] or (2) generally define the scope of disclosure by requiring the disclosure of "*Brady*" material or exculpatory evidence in general with no definitions or examples [ten districts]. *See* Appendix B, Table 1, Groups 1 and 2, for a list of these districts.

An example of an order that defines disclosure of exculpatory information in more specific terms is the *Pretrial Order for Criminal Cases* in the Eastern District of Arkansas; this order states that "the Government must comply with its Constitutional obligation to disclose any information known to it that is material to the guilt or punishment of the defendant whether or not the defendant requests it. *Brady v. Maryland* . . ." On the other hand, the District of Hawaii's Local Criminal Rule 16.1 defines the scope of disclosable exculpatory material more generally by requiring the government to provide "*Brady* material, as it shall be presumed that defendant has made a general *Brady v. Maryland* . . . request."

Appendix B, Table 1, shows that most, but not all, of the thirty-one rules and orders with a defined scope of disclosure of exculpatory material also have a similar provision defining the scope of disclosure of impeachment material. Twenty-

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Supreme Court has defined evidence as "material" when "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." Cone v. United States, 129 S. Ct. 1769, 1783 (2009) (citing United States v. Bagley, 473 U.S. 667, 682 (1985)). Neither *Brady* nor any of its progeny cases establish timing requirements for disclosure of exculpatory or impeachment evidence.

31. *See* D. Kan. *General Order of Scheduling and Discovery*, and D. Mass. Local Rule 116.2, for the most detailed descriptions and/or examples of exculpatory material among the thirty-one "broader" disclosure rules and orders.

32. Three districts within this group have rules or orders that explicitly require disclosure of exculpatory material "without regard to materiality," while also requiring the disclosure of information "favorable to the defendant on the issues of guilt or punishment" to be "within the scope of *Brady v. Maryland.*" The potential for confusion exists because this language seems to be inconsistent if one interprets "within the scope of *Brady v. Maryland*" to include the *Brady* materiality requirement. *See supra* note 30; *see also* M.D. Ala. *Standing Order on Criminal Discovery*; S.D. Ala. Local Rule 16.13; N.D. Fla. Local Rule 26.3.

three of these rules and orders either: (1) specifically define the scope of disclosure of impeachment material by incorporating all or part of the *Giglio* description of "evidence affecting credibility" and/or by providing specific examples[33] of "*Giglio*" material [fourteen districts]; or (2) generally define the scope of disclosure by requiring the disclosure of "*Giglio*" material or impeachment evidence in general with no definitions or examples [nine districts]. *See* Appendix B, Table 1, Groups 3 and 4, for a list of those districts.

An example of an order listing specific examples of *Giglio* material is the Middle District of Alabama's *Standing Order on Criminal Discovery,* which defines *Giglio* material as "[t]he existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective witnesses, within the scope of *Giglio v. United States* . . ."[34] Other districts' rules or orders define the scope of disclosure for impeachment material in more general terms. For example, Northern District of West Virginia Local Rule of Criminal Procedure 16.06 requires the government to disclose all "*Giglio* material . . . not previously turned over in discovery. *See Giglio v. United States* . . ."

2. Open-Ended Approach

The remaining seven districts identified as having "broader" disclosure rules and orders have adopted a more open-ended approach to establishing the scope of the government's disclosure obligations. Instead of defining the scope of disclosure by incorporating *Brady* and *Giglio* standards, these rules require broad disclosure of exculpatory material with no reference to either "*Brady*" or "*Giglio*" material and

33. For rules and orders with especially detailed descriptions and/or examples of impeachment material, see D. Kan. *General Order of Scheduling and Discovery*; D. Mass. Local Rule 116.2; W.D. Mo. *Discovery Order* and *Stipulations and Orders*; and D. Vt. Rule 16(d).

34. The Western District of Missouri adopted a unique version of this approach. In addition to disclosing "all evidence which may tend to adversely affect the credibility of any person called as a witness by the government pursuant to *Giglio v. United States* and *United States v. Agurs*, including the arrest and/or conviction record of each government witness, any offers of immunity or lenience, whether made directly or indirectly, to any government witness in exchange for testimony and the amount of money or other remuneration given to any witness," the government must also stipulate as to whether or not it has made promises to witness(es) in exchange for money and agree to provide

> (a) the name(s) and address(es) of the witness(es) to whom the government has made a promise, (b) all promises or inducements made to any witness(es), (c) all agreements entered into with any witness(es), and (d) the amount of money or other remuneration given to any witness(es). If the witness is represented by counsel, the government also will provide discovery of the attorney's name, address, and telephone number. As an alternative to providing witness-address information, the government agrees to make the witness(es) available for interview if the witness(es) agree(s) to being interviewed.

W.D. Mo. *Discovery Order and Stipulation and Orders.*

no citations or references to *Brady v. Maryland* and/or *Giglio v. United States.* For example, Southern District of Georgia Local Criminal Rule 16.1(f) requires the government, upon request, to "permit defendant's attorney to inspect and copy or photograph any evidence favorable to the defendant." Eastern District of North Carolina Rule 16.1 provides that, upon request of defendant's counsel, the government must permit defendant's counsel to inspect, copy, or photograph "any exculpatory evidence." The Middle District of North Carolina adopted a unique approach with Local Rule 16.1 by requiring defendant's counsel to include a statement that he/she has "fully reviewed the government's case file" before filing a discovery motion. *See* Appendix B, Table 1, Approach 2, for a listing of these seven districts.

B. Timing of Disclosure

In addition to addressing the scope of the government's disclosure obligations, all but three[35] of the "broader" disclosure rule and orders require that the government disclose at pretrial any *Brady* (exculpatory) material and/or *Giglio* (impeachment) material.[36] *See* Appendix B, Table 2. Fourteen districts apply this time frame to the disclosure of both *Brady* and *Giglio* evidence. *See* Appendix B, Table 2, Group A. The Northern District of Florida's Rule 26.3 provides an example of a rule or order that establishes one time frame for disclosure of both *Brady* and *Giglio* material: "the government's attorney shall provide the following within five (5) days after the defendant's arraignment, or promptly after acquiring knowledge thereof: (1) *Brady* Material . . . (2) *Giglio* Material . . ." Appendix B, Table 2A, shows the diverse range of time periods represented in these provisions, with "within 14 days after arraignment" being the most common [four districts[37]]. Additionally, "at arraignment"[38] and "in time for effective use at trial"[39] were each

35. *See* M.D.N.C. Local Crim. Rule 16.1; D.N.M. Rule 16.1 & *Standard Discovery Order*; D.N.D. *Pretrial Order (Criminal)*. *See also* Appendix B, Table 2, Group D.

36. All of the timing provisions discussed above and included in Table 2 apply to the government's *pretrial* disclosure obligations. Only two "broader" disclosure districts appear to establish discovery deadlines for disclosure prior to events other than the commencement of trial. Criminal Rule 16 in the Western District of Texas requires discovery in connection with pretrial release or detention "not later than the commencement of a hearing" on such; and discovery in connection with any other type of pretrial hearing must be made not later than forty-eight hours before the hearing. District of Massachusetts Rule 116.2's timing schedule for disclosure specifies the exact nature of the exculpatory and/or impeachment material that must be disclosed twenty-eight days after arraignment (Rule 116.2(B)(1)); twenty-one days before trial (Rule 116.2(B)(2)); by the close of defendant's case (Rule 116.2(B)(3)); and before any plea or before defendant submits objections to the Presentence Report (Rule 116.2(B)(4)).

37. D. Conn., S.D. Fla., W.D. Tex., S.D. W. Va.

38. M.D. Ala., S.D. Ala.

adopted by two districts. Within five, seven, twenty-eight, and thirty days after arraignment,[40] "at least 21 days before trial,"[41] and "not less than 7 days before trial"[42] were each chosen by a district.

The "broader" disclosure rules or orders of twenty-one districts establish a time frame that explicitly applies only to the disclosure of *Brady* (exculpatory) material. *See* Appendix B, Table 2, Group B. For example, the Eastern District of Michigan's *Standing Order for Discovery and Inspection and Fixing Motion Cut-Off Date in Criminal Cases* requires that "[w]ithin ten (10) days from the date of arraignment, or such other date as may be set by the Judge to whom the case is assigned . . . [u]pon request of defense counsel the government shall . . . [p]ermit defense counsel to inspect, copy or photograph any exculpatory evidence within the meaning of *Brady v. Maryland* . . ." Appendix B, Table 2B, shows that again there is no clear "dominant time frame" among the rules and orders: four districts[43] require disclosure of exculpatory material "within 14 days after arraignment"; three districts[44] chose "within 10 days after arraignment"; "at arraignment,"[45] "within 7 days after arraignment,"[46] and "in time for effective use at trial"[47] were each adopted by two districts. Only one district each chose "as soon as reasonably possible" (M.D. Ga.); "as soon as practicable upon arraignment and entry of a guilty plea" (D. Neb.); "within 10 days after not guilty plea" (W.D. Okla.); "within 14 days after a not guilty plea" (N.D. Cal.); "within 21 days after arraignment" (W.D. Mich.); "within 21 days after indictment or initial appearance—whichever later" (E.D.N.C.); "within 10 days from discovery order" (D.N.J.); and "at the pretrial conference" (D. N. Mar. I.).

Seven of these twenty-one districts with a time frame applicable only to the disclosure of exculpatory material have also established a distinct and separate time frame for disclosing *Giglio* impeachment material. *See* Appendix B, Table 2, Group C. For example, Northern District of New York Local Rule 14.1 requires the government to provide the defendant *Brady* material "[f]ourteen (14) days after arraignment, or on a date that the Court otherwise sets for good cause shown," and *Giglio* material "[n]o less than fourteen (14) days prior to the start of jury selection, or on a date the Court sets otherwise for good cause shown." These seven districts

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39. E.D. Ark., E.D. Tenn.

40. N.D. Fla. (five days); D. Idaho (seven days); D. Mass. (twenty-eight days); D. Kan. (thirty days).

41. D.N.H.

42. W.D. La.

43. N.D.N.Y., M.D. Tenn., D. Vt., W.D. Wash.

44. E.D. Mich., W.D. Mo., N.D. W. Va.

45. W.D. Pa., E.D. Wis.

46. S.D. Ga., D. Haw.

47. N.D. Ga., W.D. Ky.

have different disclosure timetables for when the government must turn over exculpatory and impeachment material to the defendant. Appendix B, Table 2C, shows that two of these provisions[48] require disclosure of impeachment material "not less than 14 days prior to jury selection." The remaining provisions each chose a different time frame: "the evening before a witness's anticipated testimony,"[49] "no later than production of Jenck's Act statements,"[50] "as ordered by the court,"[51] "no later than 15 days prior to trial,"[52] and "in time for effective use at trial."[53]

C. Elimination of Brady "Materiality" Requirement

Brady does not require the prosecutor to disclose all exculpatory and impeachment information; the prosecutor need only disclose that which is "material either to guilt or to punishment."[54] The majority (twenty-eight) of the thirty-eight districts with expanded disclosure rules and orders requirements appear to incorporate the *Brady* "materiality" requirement by either (1) explicitly including the term "material" in the definition of exculpatory evidence; (2) implicitly citing to *Brady*; or (3) requiring disclosure to be "within the scope of *Brady v. Maryland*."

The remaining ten "broader" disclosure districts appear to have eliminated the *Brady* materiality requirement from their disclosure rule or order. Appendix B, Table 3, shows that three districts[55] appear to explicitly eliminate the *Brady* materiality requirement by qualifying the government's obligation to disclose exculpatory information with the phrase "without regard to materiality." For example, Southern District of Alabama Local Rule 16.13 requires the government to turn over to the defendant "[a]ll information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, without regard to materiality, within the scope of *Brady v. Maryland*, 373 U.S 83 (1963)." Although "without regard to materiality" is not ambiguous, these two rules and one order also define the information and material required to be disclosed as that which may be "favorable to the defendant on the issues of guilt or punishment" and "within the scope of *Brady v. Maryland*." If "within the scope of *Brady v. Maryland*" is interpreted to include the *Brady* materiality requirement, these two phrases appear to be inconsistent.

48. N.D.N.Y., D. Vt.
49. M.D. Ga.
50. N.D. Ga.
51. D. Haw.
52. W.D. Mo.
53. W.D. Mich.
54. Brady v. Maryland, 373 U.S. 83, 87 (1963); United States v. Agurs, 427 U.S. 97, 112–13 (1976); United States v. Bagley, 473 U.S. 667, 682 (1985); Kyles v. Whitley, 514 U.S. 419, 434 (1995).
55. M.D. Ala., S.D. Ala., N.D. Fla. *See* Appendix B, Table 3, Group A.

In addition to the three "broader" disclosure districts that explicitly eliminate materiality, we have identified seven local rules or orders that implicitly suggest that materiality is not required. These rules or orders do not mention the need for disclosable evidence to be "material," broadly require disclosure of "any exculpatory evidence" or "any evidence favorable to the defendant," and do not mention or cite to *Brady*, *Giglio*, or any other of the *Brady* progeny cases. *See* Appendix B, Table 3.

Implicitly reading the *Brady* materiality requirement into these rules would seem contradictory to their open-ended approach to defining the scope of disclosure of exculpatory material.[56] For example, Southern District of Georgia Local Criminal Rule 16 requires the government, upon request, to permit the defendant's attorney to inspect and copy or photograph "any evidence favorable to the defendant." Similarly, Western District of Pennsylvania Local Criminal Rule 16 requires the government to notify the defendant of the existence of "exculpatory evidence" and permit its inspection and copying by the defendant.

D. "Defense Request" Disclosure Prerequisite

The Supreme Court has clarified that for *Brady* purposes, a defendant's failure to make a request of the government for favorable evidence does not relieve the government of its obligation to turn over exculpatory evidence.[57] However, under Rule 16 the defendant is only entitled to receive the information listed "upon request," including documents and tangible objects "material to the preparation of his defense."[58]

Although our research did not include an analysis of the scope of the adoption of each of Rule 16(a)'s provisions within the districts, we did examine the thirty-eight "broader" disclosure rules and orders to identify whether the rule or order incorporated Rule 16's requirement for a defense request prior to disclosure. In keeping with Rule 16, seventeen of the twenty-nine "broader" disclosure rules and orders that addressed Rule 16(a) disclosure explicitly require the defendant to make a formal request for Rule 16(a) disclosure material. *See* Appendix B, Table 4, Group 1. However, six of these rules and/or orders[59] also explicitly require the defendant to make a formal request for *Brady* and/or *Giglio* material,[60] which appears contrary to Supreme Court precedent. For example, Western District of Washing-

56. Note that our conclusion that these seven rules and orders appear to implicitly eliminate the *Brady* materiality requirement is based on our interpretation of these rules and orders only and has not been verified by court personnel in the respective districts.

57. United States v. Agurs, 427 U.S. 97 (1976).

58. Fed. R. Crim. P. 16(a)(1)(D).

59. M.D. Ga., N.D. Ga., S.D. Ga., E.D. Mich., E.D.N.C.

60. *See* Appendix B, Table 4, Group A.

ton Local Rule 16 requires the government to provide to the defense attorney "if requested" evidence favorable to the defendant and material to the defendant's guilt or punishment to which he or she is entitled pursuant to *Brady v. Maryland.* Except for these six rules or orders, the remaining thirty-two "broader" rules and orders either (1) explicitly state that the defendant does not have to make a formal request for *Brady* material or (2) implicitly negate the need for a formal request by clearly requiring the government to disclose *Brady* (exculpatory) material within a specified time frame with no mention of whether a defense request is needed.[61]

Not in keeping with Rule 16, twelve of the twenty-nine "broader" disclosure rules and orders that addressed Rule 16(a) disclosure either explicitly state that the defendant does not have to make a formal request for Rule 16(a) discovery material[62] or implicitly negate the need for a formal request from the defendant for Rule 16 material by clearly requiring government disclosure of Rule 16 material within a specified time frame with no mention of whether a defense request is needed.[63] Thus, these twelve districts form a group of districts referred to as "automatic disclosure districts." In these districts, the government must disclose all required Rule 16(a) discovery material, including any exculpatory and impeachment material required to be disclosed pursuant to *Brady* and *Giglio* as defined in the rule or order, to the defendant regardless of whether the defense has requested it. For example, the District of Kansas's *General Order of Scheduling and Discovery* makes it very clear that disclosure should be self-executing: "Unless otherwise specified, a request is not necessary to trigger the operation of this Order, notwithstanding Rule 16's 'upon request' language. Thus, the absence of a request may not be asserted as a reason for noncompliance." Similarly, District of New Hampshire Local Rule 16.1 requires the parties to disclose Rule 16(a) information "without waiting for a demand from the opposing party."

To learn about the differences among the rules and orders that require broader disclosure, we asked the survey respondents to indicate whether there were significant differences between their local rule, order, or policy and Rule 16, and we also asked them to describe these differences. Twenty-five percent of judges, 25% of U.S. Attorneys' Offices, and 34% of defense attorneys reported significant differences between their district's local rule or order and Rule 16. The most frequent "significant differences" reported include: the timing of disclosure, the existence of an "open file" policy or practice, disclosure without regard to materiality, and the production of witness statements prior to trial.

61. *See* Appendix B, Table 4, Group B.
62. D. Haw., D. Kan., D.N.H., D.N.M., W.D. Tex., E.D. Wis. *See* Appendix B, Table 2, Group 2.
63. M.D. Ala., S.D. Ala., N.D. Cal., D. Mass., N.D.N.Y., D. Vt. *See* Appendix B, Table 2, Group 2.

IV. Need for an Amendment to Rule 16

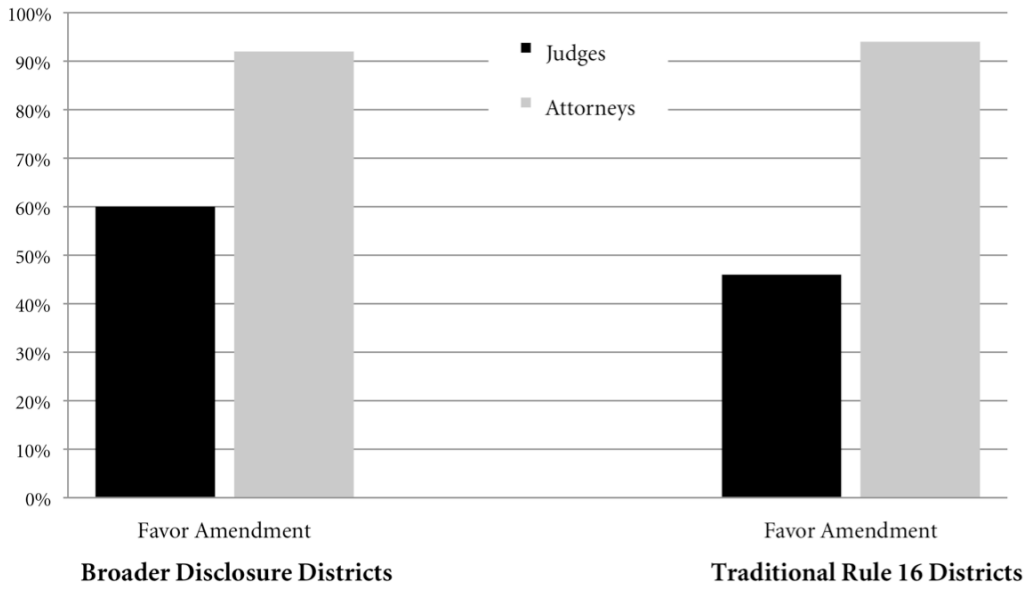
In order to address one of the Advisory Committee's fundamental questions, we asked respondents whether they favored amending Rule 16 to address pretrial disclosure of exculpatory and *Giglio* information.

A. Favored or Supported Amending Rule 16

1. Judges

Overall, judges were evenly split (51% in favor) regarding whether Rule 16 should be amended. Figure 1 shows that judges in the broader disclosure districts indicated greater support for amending Rule 16 than judges in traditional districts.

Figure 1: Judges and Defense Attorneys Favoring an Amendment to Rule 16, by Type of District



We were also interested in examining a judge's status and whether he or she believed that Rule 16 should be amended. As Table 1 shows below, at least 58% of the district judges in broader districts favored amending Rule 16, with only the chief district and magistrate judges expressing that preference in the traditional districts.

Table 1: Judges Favoring an Amendment to Rule 16, by Judge Status

	Broader Disclosure Districts			
	Chief district judges (*n*=19)	Active district judges (*n*=84)	Senior district judges (*n*=32)	Magistrate judges (*n*=83)
Favor Amending Rule 16	58%	60%	63%	60%

	Traditional Rule 16 Districts			
	Chief district judges (*n*=21)	Active district judges (*n*=149)	Senior district judges (*n*=77)	Magistrate judges (*n*=145)
Favor Amending Rule 16	75%	45%	32%	50%

Overall, the two most common reasons expressed by judges as to why an amendment is needed were (1) to eliminate confusion surrounding the use of materiality as a measure of a prosecutor's pretrial disclosure obligations and (2) to reduce variation that currently exists across circuits. Some illustrative comments by judge respondents include:

> "An amendment is needed to protect well-meaning prosecutors from making inadvertent errors concerning materiality and disclosure that can be injurious to their reputations and careers."
>
> •
>
> "The more clarity, the better. Additionally, a move toward a completely open file approach from the prosecution, with appropriate discovery from the defense, is more likely to lead to a fair result, which increases public confidence in the system."
>
> •
>
> "An amendment is needed for basic fairness."
>
> •
>
> "My concerns are based on what is reported from other districts, not what this court is experiencing."
>
> •

> "I would like to see an amendment that helped reduce variations that may exist between circuits, and one that will more specifically identify what items are or are not subject to disclosure."

2. Defense Attorneys

Overall, more than 90% of defense attorneys favor an amendment. Specifically, 92% of private attorneys and 97% of federal defenders in the broader disclosure districts favor an amendment. Similarly, 93% of private attorneys and 99% of federal defenders in traditional districts favor amending the rule.

The reason most commonly given by defense attorneys for favoring an amendment was that it will eliminate the confusion surrounding the use of materiality as a measure of a prosecutor's pretrial disclosure obligations. Some illustrative comments include:

> "There are no downsides to an amendment as district judges can easily remedy any prosecutorial concerns with orders regarding the timing of disclosure in certain cases and/or protective orders."
>
> •
>
> "Whether the Government or CJA Counsel, we are all 'protecting the U.S. Constitution.' Therefore, gamesmanship should never play a part in any criminal case. Amendment of the Discovery Rules to prevent such conduct is essential."
>
> •
>
> "I am concerned about cases where *Brady* and *Giglio* information are not discovered and we never find out about it. There should be a clear rule in place. Sometimes prosecutors, defense attorneys, and judges differ on the definition of materiality."

The timing of disclosure was another common reason offered by defense attorneys regarding the need for an amendment. One attorney from a broader disclosure district commented: "[a]n amendment for early disclosure, like in the state system, is needed so defense will understand all the evidence against his/her client early on and the defendant can then make informed choices how to proceed in the matter." An attorney from a traditional district said: "I believe the real issue is timing. The district judges give the government wide latitude in when to disclose *Brady* and *Giglio* information. Almost 100 percent of the time the discovery is delayed until just before trial starts."

Finally, a considerable number of comments addressed creating a more efficient process and providing effective assistance of counsel through pretrial preparation. Some examples include:

> "An amendment is needed because prompt pretrial disclosure of discovery facilitates settlement and promotes efficient use of resources by the government, the defense, and the courts."
>
> •
>
> "It should limit appellate review of these issues."
>
> •
>
> "Early disclosure facilitates open and meaningful plea negotiations that ultimately will save resources on both sides."

B. Opposed Amending Rule 16

1. Judges

Overall, 49% of judges responded that they oppose amending Rule 16; however, 56% of the district judges in traditional districts oppose an amendment, compared to 40% of the district judges in broader disclosure districts.

The two most common reasons expressed by judges opposed to an amendment were that there has been no demonstrated need for a change and that the current remedies for prosecutorial misconduct are adequate. One judge commented that "[a]n amendment is not needed because it will just cause needless haggling over the meaning of the language of the amendment, when the obligations are already clear." Another judge indicated that "[o]rdinarily, the communications between the prosecutor and defense counsel are constructive enough to prevent the kind of abuses referenced here and the court is drawn into these issues only infrequently, if at all."

2. Defense Attorneys

Approximately 7% of all defense attorneys who responded to the survey oppose amending Rule 16. Breaking out the data by type of district, we found that in the broader disclosure districts, 3% of federal defenders oppose amending Rule 16, compared to 8% of private attorneys. In traditional districts, 1% of federal defenders oppose an amendment, compared to 7% of private attorneys.

Overall, defense attorneys' most commonly given reason for opposing an amendment was that there has been no demonstrated need for a change. Some illustrative comments:

> "The case law establishes the obligation for production. I would not want to change the rule by applying a 'one size fits all' approach."
>
> •
>
> "I believe the current state of the law properly balances defendants' rights with our moral obligation to try to insure witness safety and the integrity of the process. No change is warranted."

3. Department of Justice

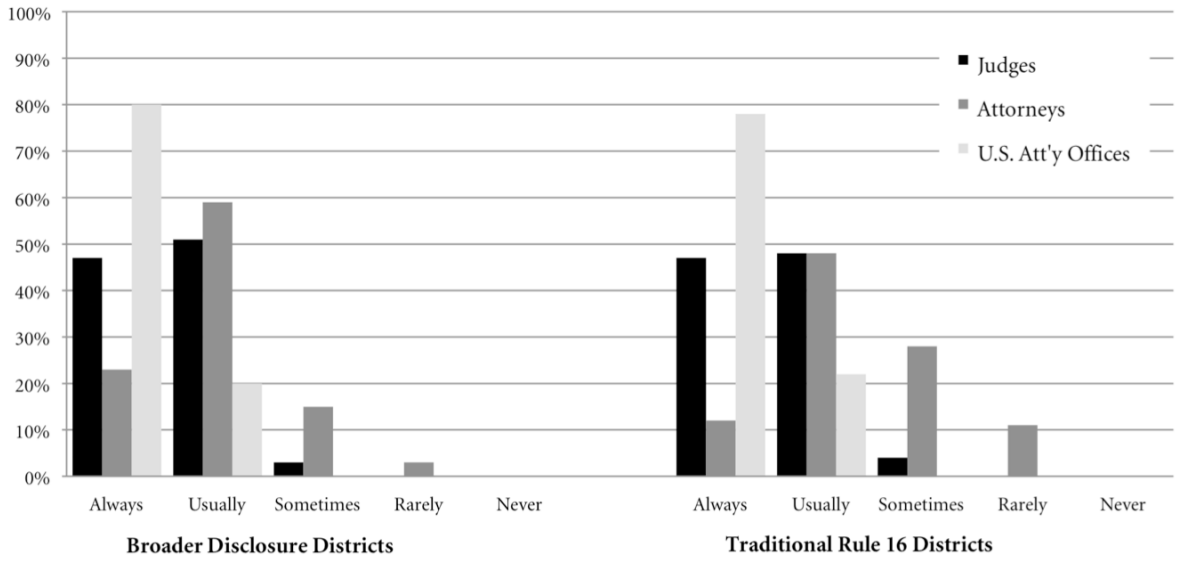
Although individual U.S. Attorney Offices provided responses to other sections of the FJC survey, the DOJ provided one response for the entire agency regarding potential amendments to Rule 16. DOJ reported that it opposes any type of amendment to Rule 16, stating that an amendment is not needed because (1) there has been no demonstrated need for change; (2) the current remedies for prosecutorial misconduct are sufficient; and (3) the recent reforms put into place by the Department of Justice will decrease disclosure violations so that the need for an amendment to Rule 16 is negated.

V. Perceptions Regarding Attorneys' Comprehension of Disclosure Obligations Pursuant to District Court Local Rules, Orders, and Case Law

The two major reasons defense attorneys have argued for an amendment are the variation in disclosure practices, sometimes in the same district, and perceived inconsistencies regarding how federal prosecutors carry out their disclosure obligations.

Overall, judges were overwhelmingly positive about federal prosecutors' understanding of their disclosure obligations. Over 94% of judges expressed the view that federal prosecutors *usually or always* understand their disclosure obligations.

Figure 2: Perceptions Regarding Federal Prosecutors' Comprehension of Disclosure Obligations



Interestingly, the defense bar on the whole concurred with judges and expressed the view that federal prosecutors always or usually understand their disclosure obligations. However, federal defenders expressed less agreement than did private counsel (*see* Appendix C, Table 8).

We also asked respondents to indicate how well they believe the federal prosecutors in their district follow a consistent approach to disclosure. Table 2 below

shows that overall, 88% of judges believed that federal prosecutors *usually or always* follow a consistent approach to disclosure. Responses from the defense bar were mixed. In broader disclosure districts, 70% of private attorneys believed federal prosecutors are *usually or always* consistent. Only 44% of federal defenders expressed this view, and 18% of federal defenders believe federal prosecutors are *rarely* consistent. In traditional districts, 52% of private attorneys responded that the government is *usually or always* consistent, compared to 25% of federal defenders. Twenty-eight percent of federal defenders indicated that the government is *rarely* consistent.

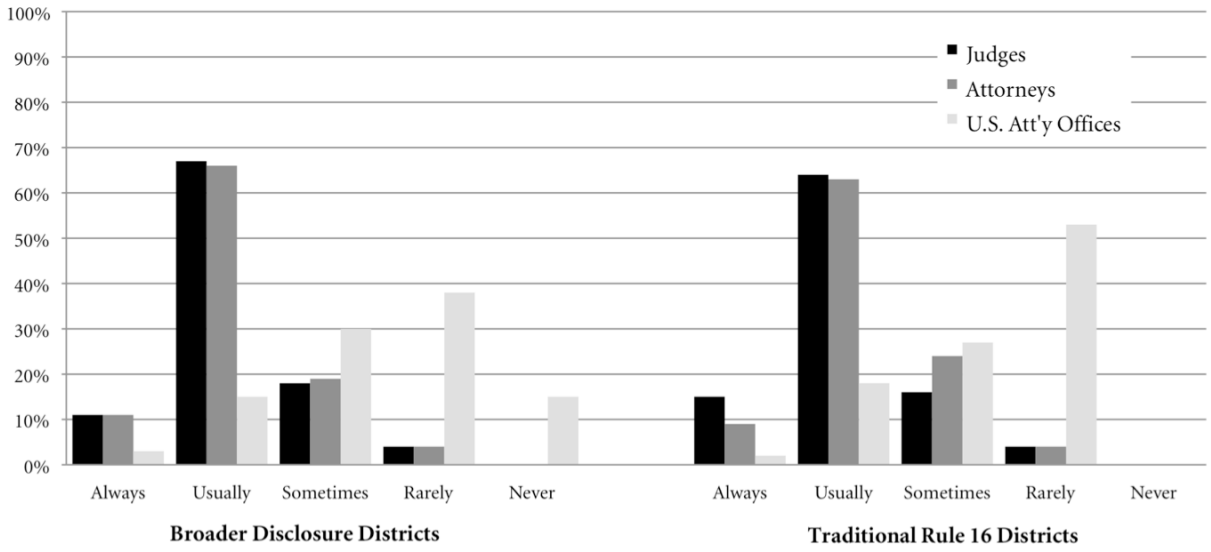
Table 2: Perceptions Regarding Whether Federal Prosecutors Follow a Consistent Approach to Disclosure

	Broader Disclosure Districts			**Traditional Rule 16 Districts**		
	All judges (*n*=225)	District judges (*n*=138)	Magistrate judges (*n*=87)	All judges (*n*=402)	District judges (*n*=257)	Magistrate judges (*n*=145)
Always	32%	37%	25%	35%	35%	34%
Usually	56%	54%	60%	53%	56%	48%
Sometimes	9%	7%	13%	9%	7%	14%
Rarely	2%	1%	2%	2%	2%	3%
Never	-	-	-	-	-	-

	Broader Disclosure Districts			**Traditional Rule 16 Districts**		
	All attorneys (*n*=1,960)	Federal defenders (*n*=207)	Private attorneys (*n*=1,753)	All attorneys (*n*=3,183)	Federal defenders (*n*=403)	Private attorneys (*n*=2,780)
Always	16%	2%	18%	9%	1%	10%
Usually	50%	42%	52%	40%	24%	42%
Sometimes	24%	34%	22%	29%	37%	28%
Rarely	8%	18%	7%	17%	28%	16%
Never	2%	4%	2%	4%	9%	3%

Judges reported slightly lower rates of comprehension by defense attorneys compared to federal prosecutors. Specifically, 78% of judges in broader disclosure districts and 79% of judges in traditional districts reported that defense attorneys *usually or always* understand their disclosure obligations. In contrast, 38% of U.S. Attorneys' Offices in broader disclosure districts and 53% in traditional districts expressed the view that defense attorneys *rarely* understand their disclosure obligations.

Figure 3: Perceptions Regarding Defense Attorneys' Comprehension of Disclosure Obligations



VI. Attorneys' Compliance with Specific Disclosure Obligations

A. Frequency of Cases Over the Past Five Years in Which the Court Concluded Attorneys Failed to Comply with Disclosure Obligations

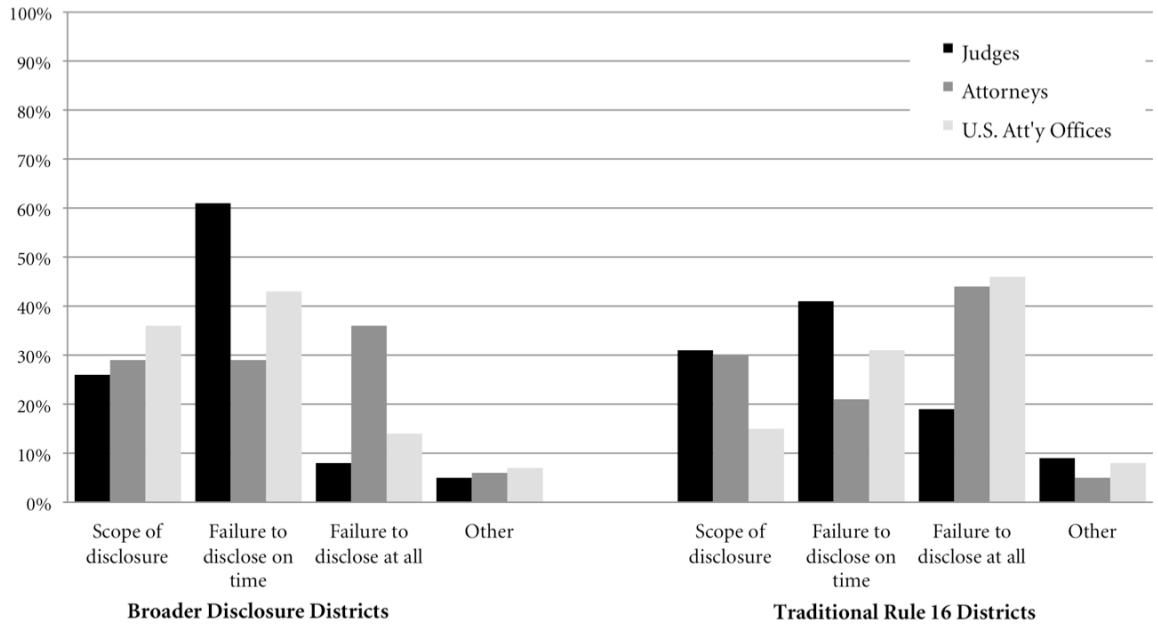
We asked judges to estimate the number of cases over the past five years in which the judges concluded that the attorneys had failed to comply with their disclosure obligations.

Overall, judges do not believe that attorneys are failing to comply with their disclosure obligations. Specifically, the data showed that 61% of all judges from broader disclosure districts and 74% of all judges from traditional districts reported having *no cases* over the past five years in which they believed that federal prosecutors failed to comply. Similarly, 64% of all broader disclosure judges and 68% of all traditional judges reported having *no cases* over the past five years in which defense attorneys failed to comply with their disclosure obligations.

B. Nature of Most Frequently Mentioned Disclosure Violations by Federal Prosecutors

The two most frequently mentioned disclosure violations committed by federal prosecutors, as reported by judges in both broader and traditional disclosure districts, were *failure to disclose on time* and *scope of disclosure*. *Failure to disclose at all* was the most frequent violation identified by defense attorneys in both types of districts. *Failure to disclose on time* was the most frequent violation identified by U.S. Attorneys' Offices in the broader disclosure districts, while *failure to disclose at all* was the most frequent violation identified by prosecutors in the traditional Rule 16 districts.

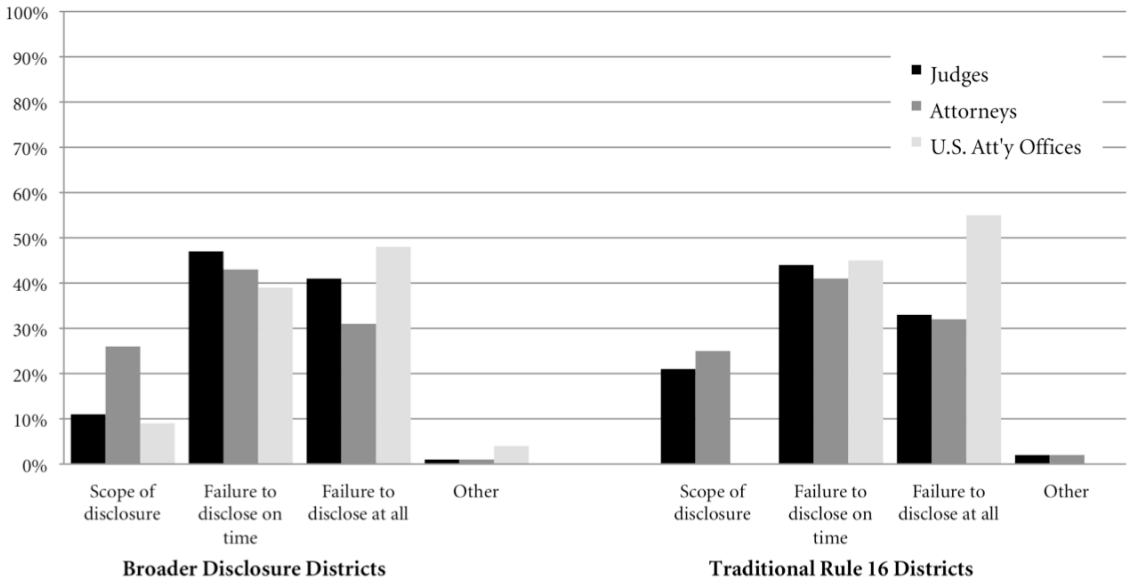
Figure 4: Nature of Most Frequently Mentioned Disclosure Violations by Federal Prosecutors, by Type of District



C. Nature of Most Frequently Mentioned Disclosure Violations by Defense Attorneys

The two most frequently mentioned disclosure violations committed by defense attorneys identified by judges in both broader and traditional districts were *failure to disclose on time* and *failure to disclose at all. Failure to disclose on time* was the most frequent violation identified by defense attorneys, while *failure to disclose at all* was the most frequent violation reported by U.S. Attorneys' Offices.

Figure 5: Nature of Most Frequently Mentioned Disclosure Violations by Defense Attorneys, by Type of District



D. Remedies Imposed for Disclosure Violations

Rule 16 grants the courts discretion to issue sanctions or other orders "as are just" in the event the government fails to comply with a discovery request made under the rule.[64] We asked the survey respondents to indicate the remedial steps taken by the court after concluding a disclosure violation had occurred.

In both types of districts and by all types of respondents, the two most frequently reported remedies imposed by judges for disclosure violations attributed to the government *or* to the defense were ordering immediate disclosure of material or information and ordering a continuance (*see* Appendix C, Table 26). Other remedies imposed, albeit less frequently, included: admonishing attorneys; excluding evidence; issuing a specific jury instruction; dismissing charges; ordering *in camera* review of material; ordering a hearing to suppress the material in question; expanding cross-examination; granting new penalty phase; vacating conviction; and ordering a new trial.

Judges reported that they rarely hold an attorney in contempt, and seldom report an attorney's conduct to the Department of Justice's Office of Professional Responsibility (OPR), bar counsel, or some other disciplinary body.

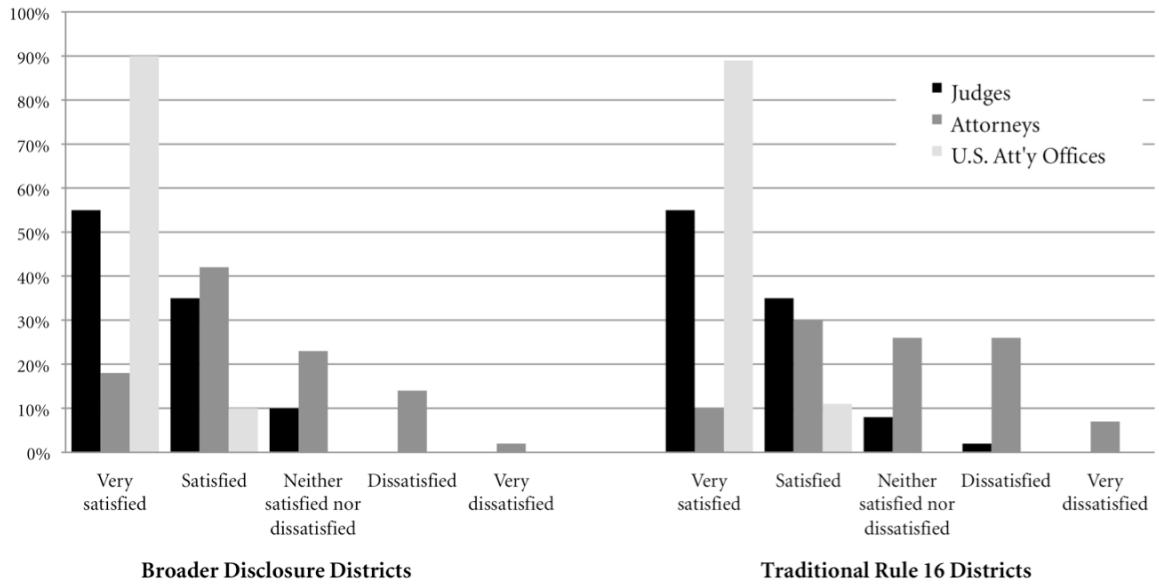
64. Fed. R. Crim. P. 16(d)(2).

E. Perceptions Regarding Overall Compliance by Attorneys

1. Federal Prosecutor Compliance

Overall, 90% of judges were *satisfied or very satisfied* with federal prosecutor compliance with disclosure obligations. The responses from defense attorneys were mixed. Sixty-four percent of private attorneys and 36% percent of federal defenders in broader disclosure districts *were satisfied or very satisfied* with prosecutor compliance, but 33% of federal defenders reported being *dissatisfied or very dissatisfied*. In traditional districts, 43% of private attorneys were either *satisfied or very satisfied* with prosecutor compliance while 51% of the federal defenders reported being either *dissatisfied or very dissatisfied* (*see* Appendix C, Table 27).

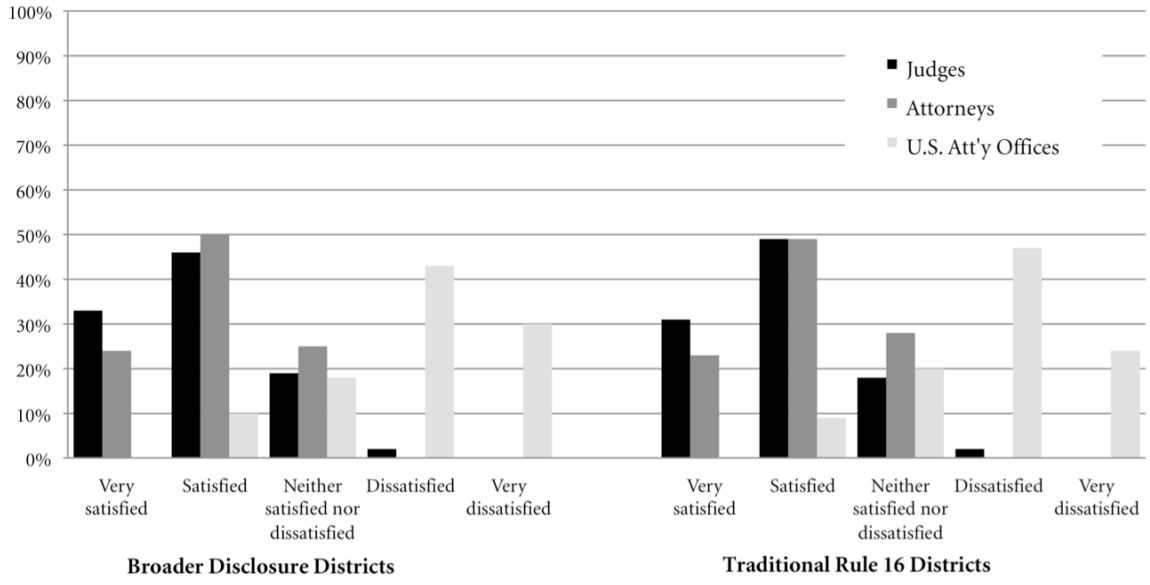
Figure 6: Perceptions Regarding Overall Compliance by Federal Prosecutors



2. Defense Attorney Compliance

Seventy-nine percent of judges in broader disclosure districts and 80% of judges in traditional districts were *satisfied or very satisfied* with defense attorney compliance with disclosure obligations. In contrast, 73% of U.S. Attorneys' Offices in broader disclosure districts and 71% of U.S. Attorneys' Offices in traditional districts were *dissatisfied or very dissatisfied* with defense attorney compliance with their disclosure obligations. Ten percent or less of the U.S. Attorneys' Offices reported that they were *satisfied* with defense attorney compliance.

Figure 7: Perceptions Regarding Overall Compliance by Defense Attorneys



VII. Other Selected Issues in Broader Disclosure Districts

This section takes a closer look at districts whose local rules and orders have broader disclosure requirements than Rule 16. The Advisory Committee was especially interested in districts that have eliminated the materiality requirement as well as districts that have specific timing requirements regarding disclosure.

A. Elimination of the Materiality Requirement

Brady does not require the prosecutor to disclose all exculpatory and impeachment information; the government need only disclose that which is "material either to guilt or to punishment."[65] How the government determines what information and evidence is "material" has been a topic subject to much discussion.

Question 19 of the government survey asked federal prosecutors to describe how they determine whether information is material under the Constitution in their district. Eighty of the eighty-five U.S. Attorneys' Offices (94%) responded. Data revealed that prosecutors use six general approaches to determine whether information is material. The most common disclosure approach reported by the U.S. Attorneys' Offices was providing discovery to the defense without regard to materiality, e.g., "[we] err on the side of disclosure regardless of materiality." In the second most common approach, a number of the U.S. Attorneys' Offices noted their district's formal/informal adoption or encouragement of an "open file" policy or practice. The third most frequent approach reported was that prosecutors consulted with their supervisor, the designated discovery expert, or peers, to determine if questionable material should be disclosed. The next two most frequently reported approaches were that prosecutors analyzed questionable material to determine if such material could potentially affect the outcome of a case, followed by analyzing information pursuant to specific Department of Justice directives and training materials. The final two approaches, mentioned least frequently, were that prosecutors based disclosure of *Brady/Giglio* information on whether the information would be helpful or favorable to the defense, rather than based on materiality; and, where there was a concern about materiality, prosecutors submitted materials to the court for an *in camera* review.

The 2007 proposed amendment to Rule 16 removes the materiality language found in the current version of Rule 16. The proposed amendment was based on

65. Brady v. Maryland, 373 U.S. 83, 87 (1963); United States v. Agurs, 427 U.S. 97, 112–13 (1976); United States v. Bagley, 473 U.S. 667, 682 (1985); Kyles v. Whitley, 514 U.S. 419, 434 (1995).

the principle that fundamental fairness is enhanced when the defense has access before trial to any exculpatory and impeaching information known to the prosecution.

As was earlier reported, we found that three districts (M.D. Ala., S.D. Ala., and N.D. Fla.) appear to explicitly eliminate the *Brady* materiality requirement by qualifying the government's obligation to disclose exculpatory information with the phrase "without regard to materiality." Additionally, seven districts have local rules or orders that implicitly suggest materiality is not required because the rules and orders do not mention the need for disclosable evidence to be "material" and broadly require disclosure of "any exculpatory evidence" or "any evidence favorable to the defendant" and do not mention or cite to *Brady*, *Giglio*, or any of the *Brady* progeny cases.[66]

To learn more about the experiences of these districts, we asked defense attorneys whether elimination of the materiality requirement for exculpatory or impeachment evidence reduced problems or confusion in the prosecution's pretrial discovery analysis. Seventy-one percent of defense attorneys expressed the view that the elimination of the materiality requirement has reduced problems in most or some cases in their districts. Sixty percent of the U.S. Attorneys' Offices reported that the elimination of the materiality requirement has made no difference.

Further, we asked defense attorneys whether eliminating the *Brady* materiality requirement would result in changes in the frequency of defense motions for *Brady* violations. Table 3 below shows that almost half of the defense attorneys in both types of districts reported that they believe motions for *Brady* violations would decrease.

66. N.D. Cal., S.D. Ga., E.D.N.C., M.D.N.C., W.D. Pa., S.D. W. Va., E.D. Wis.

Table 3: Effect of Eliminating the *Brady* Materiality Requirement on Filing of Defense Motions for *Brady* Violations

	Broader Disclosure Districts		
	All attorneys (*n*=1,931)	Federal defenders (*n*=204)	Private attorneys (*n*=1,727)
Motions would increase	18%	9%	19%
Motions would stay the same	28%	30%	28%
Motions would decrease	48%	51%	47%
Other	6%	9%	6%

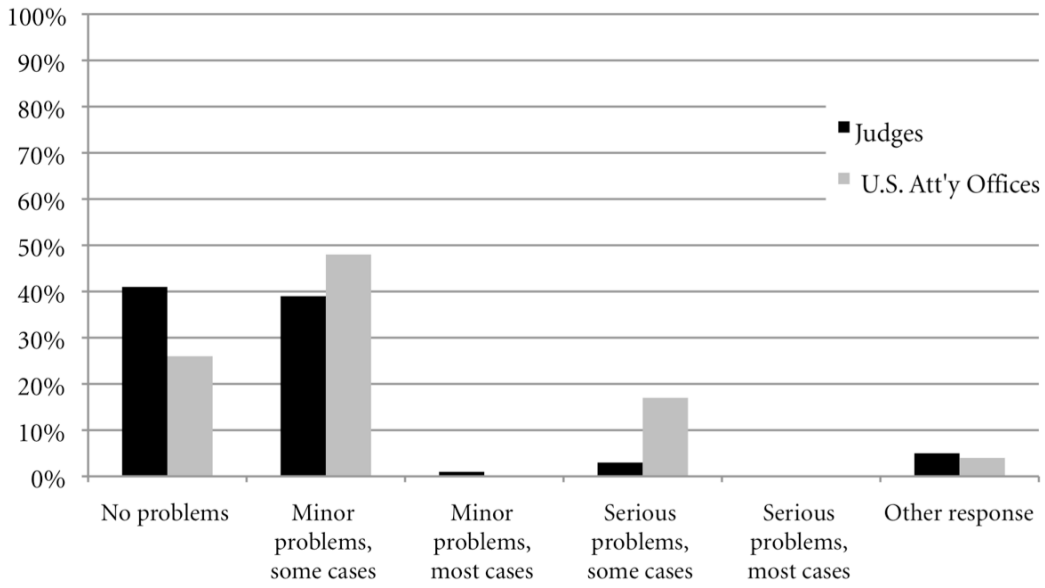
	Traditional Rule 16 Districts		
	All attorneys (*n*=3,122)	Federal defenders (*n*=393)	Private attorneys (*n*=2,729)
Motions would increase	20%	15%	20%
Motions would stay the same	28%	28%	28%
Motions would decrease	46%	46%	46%
Other	7%	11%	6%

B. Timing of Disclosure Issues

1. Perceived Problems for the Prosecution

We asked respondents in districts with local rules that require prosecutors to disclose exculpatory or impeaching information within a fixed time after indictment or arraignment whether the timing requirement had caused problems for the prosecution. Forty-one percent of judges and 26% of U.S. Attorneys' Offices in these districts reported that the timing requirement had caused no problems. Three percent of judges and 17% of U.S. Attorneys' Offices indicated that the timing had caused serious problems in some cases. No judges and no U.S. Attorneys' Offices in these districts reported that the timing of disclosure had caused serious problems in the majority of cases.

Figure 8: Timing of Disclosure and Perceived Problems for the Prosecution



2. Government Witness Cooperation

We asked the U.S. Attorneys' Offices to estimate how often in the past five years they were unable to obtain cooperation from a witness because of a local rule's disclosure timing requirements. Forty-five percent of U.S. Attorneys' Offices reported that they had *rarely* been unable to obtain cooperation from a witness because of the timing requirement, and 40% reported *never* having a problem obtaining cooperation from a witness.

3. Judges' Perceptions Regarding Harm to Prosecution Witnesses

We asked judges to estimate the number of cases in the past five years in which their local rule requirements regarding disclosure of exculpatory and impeachment information had resulted in threats of harm to a prosecution witness. Seventy-three percent of all judges reported no threats or harm to a prosecution witness as a result of the timing requirements of the disclosure of exculpatory material. Eleven percent reported threats or harm to a witness in two to four cases, and 1% reported threats or harm in eleven to twenty cases.

Similarly, in districts with local rules that require early disclosure of impeachment material, 73% of all judges reported no threats or harm to a witness, and 15% reported threats or harm in two to four cases.

4. Government's Request for Protective Orders Prohibiting or Delaying Required Disclosure

We asked attorneys to estimate the number of cases in the past five years in which the government requested a protective order prohibiting or delaying required disclosure based on witness safety or other security concerns (*see* Appendix C, Table 20). Fifty-two percent of all defense attorneys in broader disclosure districts and 56% in traditional districts reported that the government had requested no protective orders in the past five years. A little over 20% had requested protective orders in two to four cases, and less than 3% in more than 20 cases. In contrast, in broader disclosure districts 20% of the U.S. Attorneys' Offices reported requesting protective orders in five to ten cases, and 15% in more than twenty cases. In traditional districts, U.S. Attorneys' Offices requested protective orders in fewer cases: 16% in two to four cases, and 9% in more than twenty cases in the past five years.

VIII. Disclosure of Witness Statements

Variation exists among the district courts' local rules regarding the scope and production of witness statements. At a recent symposium, participants covered the disclosure of witness statements and "agreed that [current] statutes were too narrow insofar as they ordered the production only of statements of witnesses whom the prosecution intended to call as witnesses."[67] In addition, the participants expressed the view "that disclosure should not be limited to recorded and transcribed statements or to formal reports of witnesses' statements, and that in some cases, unrecorded statements should be disclosed."[68] Finally, many participants, but not all, thought that the "prosecution should disclose the statements of all individuals with relevant, and potentially useful information."[69]

To learn more about survey respondents' perceptions regarding the different types of witness information that should be disclosed, we asked respondents: (1) whether information about a victim's or witness's background that would not be admissible in evidence and that does not bear directly on the witness's testimony should be disclosed; (2) whether allegations of misconduct by law enforcement witnesses should be disclosed; and (3) whether all impeachment information concerning defense witnesses should be disclosed. DOJ chose to provide one response to these questions rather than having individual U.S. Attorneys' Offices respond.

Twenty-eight percent of all judges in the broader disclosure districts and 36% of all judges in the traditional districts indicated that victim or witness background information *should be disclosed,* compared to 89% of all defense attorneys in the broader disclosure districts and 87% in the traditional districts.

Approximately 35% of judges in broader and traditional districts thought allegations of misconduct by law enforcement witnesses *should be disclosed*, compared to 88% of defense attorneys.

DOJ expressed the view that both types of information *should not be disclosed*.

Finally, approximately 50% of judges in both types of districts responded that all impeachment evidence concerning defense witnesses *should be disclosed*; however, almost 20% did not know. About 42% of defense attorneys expressed the view that such information *should be disclosed*. DOJ indicated that impeachment information in the possession of the defense should be disclosed at a time and in a manner consistent with the government's obligation regarding the disclosure of impeachment information.

67. *See supra* note 19, at 1967.
68. *Id.*
69. *Id.*

IX. Impact of the 2007 Advisory Committee Proposal on Cooperating Witnesses and Crime Victims

In 2007, the Advisory Committee proposed the following amendment to Rule 16, which was not approved by the Judicial Conference's Standing Committee on Rules of Practice and Procedure:

> **Rule 16. Discovery and Inspection**
>
> (a) GOVERNMENT'S DISCLOSURE.
>
> (1) *INFORMATION SUBJECT TO DISCLOSURE.*
>
> …
>
> (H) *Exculpatory or Impeaching Information*. Upon a defendant's request, the government must make available all information that is known to the attorney for the government or agents of law enforcement involved in the investigation of the case that is either exculpatory or impeaching. The court may not order disclosure of impeachment information earlier than 14 days before trial.

Although the Standing Committee did not approve the amendment as written, the Advisory Committee was interested in learning the possible effects of such an amendment on cooperating witnesses and crime victims.

Toward that end, we asked respondents what effect, if any, they thought the amendment might have on the privacy and security of cooperating witnesses and crime victims. Respondents provided hundreds of pages of comments, which we analyzed for content and then coded. Below is a summary and sample of the comments.

A. Effects on Cooperating Witnesses

1. Views of Judges

We received responses from 497 judges: 315 from traditional districts and 182 from broader disclosure districts. In traditional districts, 15% of the judges expressed the view that the proposed 2007 amendment *would* have a negative impact

on the privacy and safety of cooperating witnesses, and 19% answered that the amendment *could potentially* have a negative effect. The security concerns most frequently cited by judges who reported that the amendment would or could potentially have a negative effect include intimidation, harassment, tampering, and threats of physical harm or danger. Other judges indicated the amendment would have a definite "chilling effect" on cooperating witnesses, making them less likely to cooperate. While privacy concerns were cited less often, several judges felt the amendment would result in the unnecessary disclosure of cooperating witnesses' names in cases that settle prior to trial.

In broader disclosure districts, 9% of the judges responded that the 2007 amendment *would* have a negative impact on cooperating witnesses, and 16% of the judges responded that the amendment *could potentially* have a negative impact. Again, increased security concerns were cited most often, followed by reluctance to cooperate and privacy concerns. In addition, several judges commented that cooperating witnesses would face an even greater threat of harm in certain types of cases, such as drug conspiracy cases.

A total of 45% of judges from traditional districts indicated that the 2007 amendment would have either a *minimal* effect (14%), a *potential negative effect(s) that could be adequately addressed with existing remedies* (6%), or *no* effect (25%) on cooperating witnesses' security or privacy. Judges providing further comment explained that the amendment reflects the current practice in their district, that protective orders or other court-ordered protections could be issued to reduce or eliminate any security or privacy concerns, that these disclosures were already being made under *Brady* constitutional obligations, or that in most cases the identity of the cooperating witness is already known by the defendant.

In broader disclosure districts, a total of 54% of judges reported that the amendment would have a *minimal* effect on cooperating witnesses (22%), *no* effect at all (25%), or any *potential negative effects could be neutralized by court-ordered protective measures and by modifying the timing of disclosure* (7%). Judges commented that the amendment would have *very little* or *no* impact on cooperating witnesses because the amendment reflects the current practice in their district; or represents the status quo under *Brady*; the identity of cooperating witnesses is already known; and/or the court can address security or privacy concerns on a case-by-case basis through protective orders or by delaying disclosure.

Three percent of judges in traditional disclosure districts and 2% of judges in broader disclosure districts reported that the effect the amendment would have on cooperating witnesses' security and/or privacy *depends on the facts of each case*: "It varies with the nature of the case. In organized crime cases, the danger may be very real. In white collar crime cases, not so, if at all." One attorney commented that "in some cases, [there could be] very serious effects; in most, none. That is why it should be left to judicial discretion." In addition, while not addressing the

specific effect the amendment might have on cooperating witnesses, 3% of judges in traditional districts and 5% of judges in broader disclosure districts indicated that the proposed 2007 amendment needs more flexibility to either prevent or address privacy and/or security concerns of cooperating witnesses: "As written, this proposed rule does not make any provision for delayed disclosure of information where there is a substantial good faith reason to believe that early disclosure will jeopardize the safety of a person or undermine the security of the grand jury." And "[Fourteen] days is the appropriate length of time for most cases but not all."

2. Views of Defense Attorneys

The *most frequent* response by defense attorneys in both traditional and broader disclosure districts is that the proposed amendment would have *no* adverse effect or *negative* impact upon the privacy and safety of cooperating witnesses. Initially, this result appears straightforward, as there are a significant number of responses that don't provide any further explanation beyond "no effect," "none," "zero," "absolutely no effect whatsoever," and "negligible" to name a few. However, a closer reading of the explanations shows a distinction between two groups of attorneys. One group believes that the proposed amendment might not result in any harm to a cooperating witnesses' privacy or security. Another group admits that the proposed amendment will or could have a negative or harmful effect on the privacy/security of cooperating witnesses, but that the end result will be "no negative effect" because the courts, prosecutors, and cooperating witnesses have tools to address these concerns adequately on a case-by-case basis. Attorneys in this latter category seem to view the mitigation of negative effects as a case-management issue.

Among attorneys who view this as a case-management issue for the courts and the prosecution, the most frequently identified approach is the use of case-specific protective orders. These orders can delay inappropriate further disclosure by defense or limit disclosure to defense counsel only; they may also prohibit disclosure to a client or other third parties until a reasonable time. Other potential remedial steps identified by respondents included disclosing information to the court or viewing documents *in camera*; redacting addresses, names, and other identifying information from documents; and placing a witness in the witness protection program or other secure location. Finally, these attorneys pointed out that guidelines and statutes with severe criminal penalties already prohibit obstruction of justice, witness tampering and harm to potential witnesses.

More generally, the most frequent explanation as to why the proposed amendment wouldn't cause harm to cooperating witnesses is that almost all defendants and defense counsel are aware of the identity of a cooperating witness long before the proposed rule requires disclosure of impeaching and exculpatory

evidence. Another reason frequently cited by these attorneys is that the identity of the witnesses who will testify must be revealed eventually, thus there is little difference between disclosure close to trial and disclosure during trial.

Among the attorneys, the second largest category of responses was that the amendment would have "*minimal*," "*very little*," "*not significant*," or "*almost no[]*" impact on cooperating witnesses' privacy and security. One of the two most frequent explanations for why the amendment would have very little effect was that if there was reliable information that a witness's privacy or security was at risk, the government could seek protection for that witness. A prosecutor can ask the court for a tailored protective order, seek permission to redact addresses or other information specific to that witness, or submit material *in camera* and seek delayed disclosure. The other most frequent reason given to explain a negligible effect on witness security was that the identity of the cooperating witnesses is often known to defense counsel and to the defendant more than fourteen days before trial or can easily be deduced from other discovery material. Further, the identity of the cooperating witness will be known eventually if the case goes to trial since he or she will testify.

The next largest category of responses from defense attorneys in both traditional and broader disclosure districts was surprisingly consistent in both message and language. These attorneys reported that the proposed amendment *will or could have a negative or harmful effect* on the privacy or security of cooperating witnesses, but this potential impact should be balanced against a defendant's constitutionally guaranteed due process right to a fair trial and the defendant's Sixth Amendment guarantee to cross-examine any witness testifying against him or her at trial. Similarly, a number of attorneys expressed the view that the potentially harmful effects of the amendment on the privacy (and to a lesser extent security) of a cooperating witness should be tolerated because a cooperating witness has a diminished expectation of privacy by virtue of his or her agreeing to testify in a public trial and possibly accepting any benefits provided by the prosecution for this cooperation (e.g., reduced sentence).

Although fewer in number than those who said there would be no effect or a minimal effect, a large number of attorneys in both traditional and broader disclosure districts felt that the amendment *would* or *potentially could* have a negative impact on cooperating witnesses' privacy and security. These attorneys pointed out that cooperating witnesses' identities could be revealed well before trial and that defense attorneys could attempt to interview them and contact their families. These attorneys also noted that divulging impeachment evidence will affect the privacy of cooperating witnesses by possibly revealing any embarrassing misdeeds from the witnesses' past. Other negative impacts of the amendment cited by attorneys include an increased risk of retaliation, increased fear that cooperating witnesses' residences would be compromised, chilled cooperation by codefendants,

and increased risk of intimidation if the cooperating witness is in custody waiting to testify. Attorneys who cited these reasons for responding that the amendment potentially might or may have an adverse effect explain that the amendment could have "dire implications" in cases involving violent crimes, multidefendant conspiracy cases, gang-related cases, or cases against drug cartels or organized crime. The amendment could also affect privacy if disclosed impeachment information dealt with mental health, infidelity or employment-related issues. Lastly, these attorneys felt the amendment could prevent people from becoming informants (who expect their role to remain hidden by law enforcement) if their identity will be disclosed to potentially dangerous defendants.

Attorneys reporting that the amendment would have a *positive* impact on the privacy and security of cooperating witnesses formed the smallest group of respondents in both traditional and broader disclosure districts. They pointed out that requiring the production of exculpatory or impeachment information will help ensure that cooperating witnesses are telling the truth in their statements to federal agents and law enforcement officers because the defense will have more opportunity to review the accuracy of their information. This additional scrutiny will help ensure that witnesses are more reliable and will help ensure their security and the security of others. Other attorneys explained that the courts' inability to compel disclosure of impeachment information earlier than fourteen days before trial will mean more privacy and security for cooperating witnesses because it only leaves defense with two weeks to investigate them based on the newly compelled discovery. In addition, it was stated that the amendment may help end speculation and dispel mistaken assumptions where people are endangered because they are believed to be cooperating when they are not.

B. Effects on Crime Victims

The Crime Victims' Rights Act (CVRA), codified at 18 U.S.C. § 3771, provides that a crime victim has "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy."[70] DOJ has commented that the broad nature of the Advisory Committee's proposed disclosure requirement will "directly conflict with a liberal reading of the CVRA's policy to protect a victim's privacy and with its stated purpose of affording victims' rights comparable to those afforded to the defendant."[71]

Further, DOJ has expressed the view that "[u]nder the proposal, all information (not merely admissible evidence) that might be used to impeach a victim-witness must be provided to the defense, regardless of materiality. This implies

70. 18 U.S.C. § 3771(a)(8) (2004).
71. *See supra* note 11, at 22–23.

that any information that might possibly be used to disparage, discredit, or dispute a victim's testimony will be disclosed to the defense, without any regard to whether such information would increase confidence in the outcome of the trial or even be admissible at trial."[72]

1. Views of Judges

Overall, 471 judges responded to this question: 300 judges from traditional districts and 171 from broader disclosure districts. Eleven percent of the judges from traditional districts expressed the view that the proposed 2007 amendment *would* have a negative impact on crime victims' security and/or privacy, and 18% felt that the amendment *could potentially* have a negative impact. The security concerns most frequently cited by these judges include harassment, victim intimidation, retaliation, and threats of physical harm or violence to victims and their families. Other judges commented that the potential for a "chilling effect" may result in victims refusing to testify because they are too scared. While privacy concerns were raised less often than concerns over the victims' personal safety, several judges noted the increased potential of unnecessary disclosure of the identity and location of crime victims as well as the premature disclosure of medical records that would not be admissible at trial.

In broader disclosure districts, 8% of the judges responded that the proposed 2007 amendment *would* have a negative impact on crime victims, and 14% of the judges responded that the proposed 2007 amendment *could potentially* have a negative impact. Many of these judges raised the same concerns as judges in traditional districts, including increased risk for retaliation, harassment, and physical danger, followed by decreased willingness to assist or seek assistance from the criminal justice system and privacy concerns. In addition, several judges raised the concern over the anxiety and fear of embarrassment resulting from the automatic disclosure of certain types of information, such as the mental health history of a victim.

A total of 51% of judges in traditional districts indicated that the proposed 2007 amendment would have a *minimal* effect (15%) on crime victims' security or privacy, *no* effect (29%), or a *potentially negative* effect(s) that could be adequately addressed with existing remedies (7%).

Some of the judges commented that any potential risk to crime victims from the proposed amendment could be adequately addressed by seeking the court's assistance prior to disclosure. Judges in traditional districts who reported that the proposed 2007 amendment would have *no* significant impact on crime victims' security or privacy explained that the information was already being disclosed

72. *Id.* at 22.

pursuant to the districts' current policy; that the government was already obligated to disclose the information under *Brady*; that the government could adequately protect crime victims by requesting protective orders; and that the identity of crime victims is already known to the defendant in most cases.

A total of 57% of judges from broader disclosure districts believe that the amendment will have a *minimal* effect on crime victims (25%), *no* effect at all (26%), or that any *potential negative* impact can be neutralized by court-ordered protective measures and/or by modifying the timing of disclosure (6%). Similar explanations were provided by respondents from broader disclosure districts as given by those judges in traditional districts as to why they felt the amendment would have *very little* or *no* impact on crime victims: the identity of crime victims is already known in most cases, and/or the court can address security or privacy concerns on a case-by-case basis through protective orders, modifying timing of disclosure, or redaction of personal identifiers.

Two percent of judges in traditional districts and 3% of judges in broader disclosure districts reported that the effect that the proposed amendment would have on crime victims' security and/or privacy *depends on the facts of each case*: "It would depend on the situation. I would prefer the rule to specifically provide that the court has the discretion upon a showing of privacy and/or security issues to take appropriate steps to deal with the problem such as setting the timing of the disclosure, redacting portions of the disclosure where necessary, or adopting other measures." In addition, while not identifying the specific effect the amendment would have on crime victims, 2% of judges in traditional districts and 3% of judges in broader disclosure districts would like the proposed 2007 amendment to include more flexibility to either prevent or address privacy or security concerns of crime victims.

2. Views of Defense Attorneys

Over 4,000 defense attorneys provided comments regarding the impact of the proposed 2007 amendment upon the privacy and security of crime victims. Many of the defense attorney comments mirrored the comments set forth in the preceding section on cooperating witnesses. The most frequent response by defense attorneys in both traditional and broader disclosure districts is that the proposed 2007 amendment would have *no adverse effect* upon the privacy and security of crime victims. The most frequent explanations as to why the proposed amendment wouldn't cause harm to crime victims is that defendants are aware of victims' identities and disclosure of certain victim information is the current practice in a district.

The second largest category of responses in both types of districts was that the proposed amendment would have a *minimal* or *very little* effect on crime victims'

privacy and security because defendants are usually aware of victims' identities, victims come forward without any knowledge of the disclosure laws, and state courts function well with similar laws.

Responses were consistent across both types of district with regard to *negative* or *potentially negative* effects of the proposed 2007 amendment. Privacy concerns constituted the majority of comments, including the possible disclosure of potentially embarrassing impeaching evidence. Some attorneys noted the need for extra protection for sexual assault victims, and the possibility of retaliation from a defendant and security concerns with high profile gang or mafia cases. Many attorneys expressed the view that even if victims are impacted negatively, "[w]hen constitutional rights of accused [are] at issue—victims' privacy rights cannot override." Further, attorneys commented that the government had sufficient resources to protect victims, including protective orders and the ability to redact documents to protect victims. Finally, a number of attorneys commented that crimes tried in federal court are often considered victimless, such as drug and gun offenses.

X. Reform Proposals

We asked respondents if they favored an amendment to Rule 16 that differed from the Advisory Committee's 2007 proposal and, if so, to suggest alternative language. With few exceptions, judges and defense attorneys gave informal or general suggestions for either adding provisions to address issues that in their view the 2007 proposal did not address, or for modifying or eliminating provisions in the proposal. Below is a summary of these responses.

A. Judges' Comments

In both traditional and broader disclosure districts, *timing of disclosure* was the issue most frequently addressed. In *traditional districts*, the alternatives cited most frequently were for *earlier disclosure* (e.g., twenty-eight days before trial, thirty days before trial); elimination of all timing requirements, allowing the court to set the limits for early disclosure on a case-by-case basis; and requiring disclosure of impeachment material closer to the trial date (e.g., a seven-day window). In *broader disclosure districts*, the most frequent suggestions for alternative provisions were: *eliminating timing requirements from the rule* (e.g., "The timing of the disclosures should be left to the discretion of the presiding judges.") and *requiring disclosure of impeachment material near or during trial.* Two comments suggested the rule should include a timing provision for disclosure of exculpatory information, and the final suggestion was for earlier disclosure.

In traditional districts only, some judges suggested that an amended Rule 16 should include a *procedure for protecting witnesses and victims* where disclosure of information puts witnesses'/victims' security and/or privacy at risk.

With regard to impeachment material, some judges suggested *excluding impeachment evidence and limiting disclosure to exculpatory information only*, *defining "all impeachment information"* more specifically, and having the court decide whether disclosure is appropriate when the government has concerns with disclosure of specific impeachment evidence. Further, several judges in traditional districts suggested *eliminating the defense request from the amendment*, and several judges expressed support for a rule change that called for *open and full disclosure from both sides*. One judge indicated that the amendment should include "some standard regarding disclosure" since the *Brady* materiality requirement was not included.

Across both types of districts, judges would provide for using procedures for *in camera* review of doubtful materials.

Finally, in both types of districts, a number of respondents suggested that no changes to the 2007 proposed amendment were needed. Other judges were opposed to the amendment or any amendment to Rule 16. A small number of judges gave no suggestions for alternative language and we make no inferences that these judges are satisfied or not with the proposed 2007 amendment.

B. Defense Attorneys' Comments

Across both types of districts, the *timing of disclosure* was the issue most frequently addressed in the attorneys' suggestions for reforming the proposed 2007 amendment. Within this category, there was considerable variation as to what the timing of disclosure should be. Many of the attorneys used proceedings or events as benchmarks for determining when the prosecution should be required to disclose information and material. Some examples were: "at arraignment," "immediately upon receipt by the prosecution," "20 days from first court appearance," "30 days before trial," and "no more than 60 days before jury selection."

A large number of attorneys said that the current proposed fourteen-day rule would not give the defense sufficient time to investigate or prepare for trial. One attorney noted that the "14-day limit undercuts the practical usefulness of the Rule and would result in numerous late motions for trial delays." There was considerable support by federal defenders for eliminating the fourteen-day requirement altogether.

A significant number of respondents would like the Advisory Committee to *eliminate the wording "upon request of the defendant"* and to instead make production of information and evidence automatic. A number of attorneys made comments such as: "some prosecutors will play games about what constitutes a 'request' or will try to extract waivers of the request in exchange for something else."

Many respondents that they would like to see *an "open file" disclosure policy incorporated in any proposed rule*. Some commented that determining what is or isn't material evidence is highly subjective and that this subjectivity could lead a prosecutor to inadvertently designate evidence as immaterial when it could, in fact, lead to other investigative avenues that could ultimately lead to the discovery of exculpatory evidence. One attorney said:

> "The problem with the proposed amendment is that important information will be withheld on the grounds that it is not exculpatory or impeaching. Moreover, given the volume of evidence collected in most white collar cases today, it is not possible for the prosecutor to review it all or to figure out what is exculpatory. And it is irresponsible."

XI. Summary of General Comments

At the conclusion of the survey, respondents were invited to provide any general comments regarding amending Rule 16 or discovery disclosure in general. The comments below are, in some instances, a variation or an elaboration by a respondent of an answer provided to an earlier survey question. Below are some of the comments.

A. Judges' Comments

In traditional districts, the issue *most frequently* commented on was opposition to amending Rule 16. Illustrative comments include:

> "Do not tinker with the Rule. No need to feed the litigation machine. These issues should not be issues and in any event should be left to the presiding judge to address consistent with the existing rules. Beware of the unintended consequences. One notorious case or lapse does not suggest an epidemic."
>
> •
>
> "Rule 16 is sufficient when enforced appropriately, and 16(d) gives the court adequate authority to do so."

The *next most frequent* topic addressed was "open file" discovery or broader disclosure policies. Some comments include:

> "I feel that there should be for the most part an open file discovery policy except where the government can show that full disclosure would likely cause harm to witnesses. The playing field should be level, understanding that the government has many more investigative resources than do most defendants."
>
> •
>
> "An open file system will hurt law enforcement efforts unnecessarily and pose scheduling problems for busy districts."
>
> •
>
> "Rule 16 issues rarely arise in our district since the U.S. Attorneys' Office has adopted an open file policy."

In broader disclosure districts, amending Rule 16 was the *most frequently* addressed issue. Some illustrative comments include:

> "In any proposed rule, I would treat exculpatory information and impeachment information separately because the doctrines are separate as is their import."

•

> "I think there should be a certification requirement similar to the certification in civil discovery disputes before the attorneys could file motions seeking court intervention on both discovery/disclosure issues."

B. Defense Attorneys' Comments

In traditional and broader disclosure districts, the *timing of disclosure* was the most frequent issue raised by defense attorneys. Some illustrative comments:

> "Disclosure should be earlier than 14 days before trial."

•

> "Full and early disclosure often results in prompt disposition of the case. It optimizes everyone's resources and prompts fairness. When disclosure is late or withheld it usually occurs in close cases and has much more to do with the government's fear of losing than with justice."

•

> "Materiality is not the only issue that prevents *Brady* and *Giglio* from bearing fruit. The timing of disclosure is a huge problem in many cases. The idea of requiring defense counsel to review material the night before a witness appears should be abhorrent to a free society that values the liberty of individuals who are innocent until proven guilty. Too many times, defense counsel finds gold in the information, but cannot process the ore in time to make full use of it at trial."

The next most frequent issue discussed was an "*open file*" *disclosure policy or practice*. Some sample comments:

> "If courtrooms are places where the truth is to be found, all information necessary to that search should be revealed, without being filtered by either counsel, government, or defense, for relevance, materiality, or admissibility. Those are issues for the bench, not the bar to decide."

•

> "Full disclosure by both sides prior to trial with enough time to properly use the material is the best policy. No trial by ambush, no surprises, and open discovery favors everyone."

•

> "I believe that an open discovery rule or policy would benefit everyone. The defendant, because it would help ensure that he received a fair trial or help resolve the case by plea; the government, as it would reduce the number and type of motions filed by defense to obtain discovery and

> lessen the need for trial preparation as fruitless cases would settle; and the court, by unclogging much of the docket."
>
> •
>
> "Open discovery saves time, makes cases move faster and is much fairer to the defendant. The government should not be 'hiding the ball' just to get convictions. The likelihood is that if there is true open discovery, more cases will get resolved short of trial, leading to less work in the appellate courts also."

However, one attorney noted the drawbacks of a broader disclosure rule:

> "I have had problems with too much disclosure. One recent tax fraud case had 1,200,000 documents. You can't find the needle in the haystack. I would favor some rule to require disclosure separately of documents which may be used at trial and then all the rest. Too much time spent reviewing useless paperwork seized pursuant to a search warrant."

The third most frequently raised issue was *the government determining whether evidence or information is material*. Some illustrative comments:

> "Any rule which allows the government discretion to determine what is material, what is exculpatory, etc., invites non-disclosure. All information should be turned over to the defense in order to provide the accused with due process."
>
> •
>
> "The government is not in the best position to determine materiality of information. Any information that goes to bias, ability to recall, credibility, etc., should be disclosed ASAP."
>
> •
>
> "Materiality needs to be defined prospectively, rather than retrospectively (i.e., it should not have to change the outcome of the trial on appellate review)."
>
> •
>
> "Too much exculpatory and impeaching material is never provided to the defense under the present system. Unfortunately, the defense hardly ever finds out about it. After all, the prosecutor has been entrusted to make a final determination as to whether critical exculpatory evidence should be produced to the adversary. It is like having the fox guarding the chicken coop."

Finally, two other issues frequently raised were (1) the *lack of sanctions imposed* when prosecutors fail to honor required disclosure obligations and (2) the *need to*

ensure the criminal justice system remains fair to all participants. Some sample comments were:

> "I have yet to see a prosecutor sanctioned for not complying with Rule 16."
>
> •
>
> "It is often difficult to know if or how much *Brady* information is withheld. Egregious cases may not be common, but, over the course of 32 years in practice, I have seen them. While most federal prosecutors are ethical, the occasional unethical one can do a lot of damage by withholding *Brady* information. The truth is that courts are often ineffectual in protecting against *Brady* violations and are far too accommodating in accepting excuses and failing to sanction them when *Brady* violations are uncovered. Rules governing disclosure are long overdue."
>
> •
>
> "As a former prosecutor, I would say the mandatory sanctions for violations by the prosecution is a more effective tool than simply changing the rule that will have no consequences if violated."
>
> •
>
> "There ought to be a statement in the rules that indicate that failure to comply will result in some strict sanctions, including referring the U.S. Attorney to the local bar association for this conduct."
>
> •
>
> "Justice is not being served when defense counsel is left in the dark as to information that could make a difference in the outcome of a criminal proceeding. We need to ensure that trials seek truth and lead to just decisions. Trial by ambush with gamesmanship must be avoided. The proposed rule is a step in that direction."
>
> •
>
> "The judge's job is always to promote justice. The more the parties know about their cases, the more information the parties can write and argue in motions in limine. The better the motions in limine are, the better the judge can research the issues, and draft more consistent rulings. Allowing the prosecution to hold the information until the end of direct hinders a judge's ability to rule on important issues."

Appendices

The appendices, listed below, are available on the federal courts' intranet at http://cwn.fjc.dcn/fjconline/home.nsf/pages/1356.

Appendix A: Advisory Committee's 2007 Proposed Rule 16 Amendment and Committee Note

Appendix B: Compendium of U.S. District Court Local Rules and Standing Orders Addressing *Brady* Material and Tables

Appendix C: Tables

Appendix D: Methods

Appendix E: Survey Instruments

A Summary of Responses to a National Survey of Rule 16 of the Federal Rules of Criminal Procedure and Disclosure Practices in Criminal Cases

Final Report to the Advisory Committee on Criminal Rules

Appendices

Federal Judicial Center

February 2011

Appendix A: Advisory Committee's Proposed 2007 Rule 16 Amendment and Committee Note

Rule 16. Discovery and Inspection

(a) GOVERNMENT'S DISCLOSURE.

(1) *INFORMATION SUBJECT TO DISCLOSURE.*

* * * *

(H) *Exculpatory or Impeaching Information*. Upon a defendant's request, the government must make available all information that is known to the attorney for the government or agents of law enforcement involved in the investigation of the case that is either exculpatory or impeaching. The court may not order disclosure of impeachment information earlier than 14 days before trial.

COMMITTEE NOTE

Subdivision (a)(1)(H). New subdivision (a)(1)(H) is based on the principle that fundamental fairness is enhanced when the defense has access before trial to any exculpatory or impeaching information known to the prosecution. The requirement that exculpatory and impeaching information be provided to the defense also reduces the possibility that innocent persons will be convicted in federal proceedings. *See generally* ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-3.11(a) (3d ed. 1993), and ABA MODEL RULE OF PROFESSIONAL CONDUCT 3.8(d) (2003). The amendment is intended to supplement the prosecutor's obligations to disclose material exculpatory or impeaching information under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), *Kyles v. Whitley*, 514 U.S. 419 (1995), *Strickler v. Greene*, 527 U.S. 263, 280–81 (1999), and *Banks v. Dretke*, 540 U.S. 668, 691 (2004).

The rule contains no requirement that the information be "material" to guilt in the sense that this term is used in cases such as *Kyles v. Whitley*. It requires prosecutors to disclose to the defense all exculpatory or impeaching information known to any law enforcement agency that participated in the prosecution or investigation of the case without further speculation as to whether this information will ultimately be material to guilt.

The amendment distinguishes between exculpatory and impeaching information for purposes of the timing of disclosure. Information is exculpatory under the rule if it tends to cast doubt upon the defendant's guilt as to any essential element in any count in the indictment or information. Because the disclosure of the identity of witnesses raises special concerns, and impeachment information may disclose a witness's identity, the rule provides that the court may not order the disclosure of information that is impeaching but not exculpatory earlier than 14 days before trial. The government may apply to the court for a protective order concerning exculpatory or impeaching information under the already-existing provision of Rule 16(d)(1), so as to defer disclosure to a later time.

Appendix B: Compendium of U.S. District Court Local Rules and Standing Orders Addressing *Brady* Material

Middle District of Alabama

STANDARD ORDER ON CRIMINAL DISCOVERY

. . . (1) Disclosure by the Government. At arraignment, or on a date otherwise set by the court for good cause shown, the government shall tender to defendant the following:

. . . (B) *Brady* Material. All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, without regard to materiality, within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963).

(C) *Giglio* Material. The existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective witnesses, within the scope of *Giglio v. United States*, 405 U.S. 150 (1972).

Southern District of Alabama

LR16.13 CRIMINAL DISCOVERY

. . . (b) Initial Disclosures.

(1) Disclosure by the Government. At arraignment, or on a date otherwise set by the court for good cause shown, the government shall tender to defendant the following:

. . . (B) *Brady* Material. All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, without regard to materiality, within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963).

(C) *Giglio* Material. The existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective witnesses, within the scope of *Giglio v. United States*, 405 U.S. 150 (1972).

Eastern District of Arkansas

PRETRIAL ORDER FOR CRIMINAL CASES

. . . BRADY/GIGLIO

The Government must comply with its Constitutional obligation to disclose any information known to it that is material to the guilt or punishment of the defendant whether or not the defendant requests it. *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v.*

United States, 405 U.S. 150 (1972). *Brady* and *Giglio* information must be disclosed in time for effective use at trial. *In re United States* (*United States v. Coppa),* 267 F.3d 132, 142 (2d Cir. 2001); *United States v. Olson*, 697 F.2d 273 (8th Cir. 1983). *Cf. United States v. Higgs*, 713 F.2d 39, 44 (3d Cir. 1983).

Northern District of California

16-1. PROCEDURES FOR DISCLOSURE AND DISCOVERY IN CRIMINAL ACTIONS.

(a) Meeting of Counsel. Within 14 days after a defendant's plea of not guilty, the attorney for the government and the defendant's attorney shall confer with respect to a schedule for disclosure of the information as required by FRCrimP 16 or any other applicable rule, statute or case authority. The date for holding the conference can be extended to a day within 21 days after entry of plea upon stipulation of the parties. Any further stipulated delay requires the agreement of the assigned Judge pursuant to Civil L.R. 7-12.

17.1-1. PRETRIAL CONFERENCE

. . . (b) Pretrial Conference Statement. Unless otherwise ordered, not less than 4 days prior to the pretrial conference, the parties shall file a pretrial conference statement addressing the matters set forth below, if pertinent to the case:

. . . (3) Disclosure of exculpatory or other evidence favorable to the defendant on the issue of guilt or punishment;

District of Connecticut

APPENDIX STANDING ORDER ON DISCOVERY

In all criminal cases, it is Ordered:

(A) Disclosure by the Government. Within ten (10) days from the date of arraignment, government and defense counsel shall meet, at which time the attorney for the government shall furnish copies, or allow defense counsel to inspect or listen to and record items which are impractical to copy, of the following items in the possession, custody or control of the government, the existence of which is known or by the exercise of due diligence may become known to the attorney for the government or to the agents responsible for the investigation of the case:

> . . . (10) All information concerning the existence and substance of any payments, promises of immunity, leniency, or preferential treatment, made to prospective government witnesses, within the scope of *Giglio v. United States*, 405 U.S. 150 (1972) and *Napue v. Illinois,* 360 U.S. 264 (1959).

(11) All information known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963).

Northern District of Florida

Rule 26.3. DISCOVERY – CRIMINAL

. . . (D) Other Disclosure Obligations of the Government.—The government's attorney shall provide the following within five (5) days after the defendant's arraignment, or promptly after acquiring knowledge thereof:

(1) *Brady* Material.—All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, without regard to materiality, that is within the scope of *Brady v. Maryland,* 373 U.S. 83 (1963) and *United States v. Agurs,* 427 U.S. 97 (1976).

(2) *Giglio* Material. The existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective witnesses, within the scope of *Giglio v. United States*, 405 U.S. 150 (1972) and *Napue v. Illinois*, 360 U.S. 264 (1959).

Southern District of Florida

Rule 88.10. CRIMINAL DISCOVERY

. . . C. The government shall reveal to the defendant and permit inspection and copying of all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland,* 373 U.S. 83 (1963), and *United States v. Agurs,* 427 U.S. 97 (1976).

D. The government shall disclose to the defendant the existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective government witnesses, within the scope of *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 360 U.S. 264 (1959).

. . . Q. Schedule of Discovery.

. . . 2. Discovery which is to be made in connection with trial shall be made not later than fourteen days after the arraignment, or such other time as ordered by the court.

Middle District of Georgia

STANDARD PRETRIAL ORDER

. . . DISCOVERY AND INSPECTION UNDER BRADY AND RULE 16; DISCLOSING IMPEACHING INFORMATION AND EXCULPATORY EVIDENCE

A defendant has a right only to discovery of evidence pursuant to Rule 16 of the Federal Rules of Criminal Procedure or *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Brady prohibits the United States from suppressing evidence favorable to a defendant if that evidence is material either to guilt or to punishment. *Brady*, 373 U.S. at p.87. Because the credibility of a witness may determine guilt or innocence, impeaching evidence is material to guilt and thus falls within the *Brady* rule. See *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Williams v. Dutton*, 400 F.2d 797, 800 (5th Cir. 1968), *cert. denied,* 393 U.S. 1105 (1969).

UPON REQUEST, the United States is directed to disclose Rule 16 evidence and *Brady* evidence other than impeaching information as soon as reasonably possible. In accordance with the usual practice in this court, the United States is directed to disclose impeaching information about a witness no later than the evening before the witness' anticipated testimony. The United States need not furnish defendant with *Brady* information which the defendant has or, with reasonable diligence, the defendant could obtain himself. *United States v. Slocum,* 708 F.2d 587, 599 (11th Cir. 1983).

UPON REQUEST, the United States is also directed to disclose impeaching information about any non-witness declarant no later than the evening before the United States anticipates offering the declarant's statements in evidence.

. . . REVEALING "THE DEAL"

Where the government fails to disclose evidence of any understanding or agreement as to future prosecution of a key government witness, due process may require reversal of the conviction. *Giglio v. United States*, *supra; Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L.Ed.2d 1217 (1959); *Smith v. Kemp*, 715 F.2d 1459, 1463 (11th Cir.), *cert. denied*, 464 U.S. 1003, 104 S. Ct. 510, 78 L.Ed.2d 699 (1983); *Williams v. Brown*, 609 F.2d 216, 221 (5th Cir. 1980). The government has a duty to disclose such understandings for they directly affect the credibility of the witness. This duty of disclosure is even more important where the witness provides the key testimony against the accused. See *Giglio*, 405 U.S. at 154–55, 92 S. Ct. at 766. *Haber v. Wainwright*, 756 F.2d 1520, 1523 (11th Cir. 1985).

. . . Accordingly, UPON REQUEST, the United States is directed to comply fully with *Giglio, supra*, and its progeny by disclosing the existence and substance of any such promises of immunity, leniency or preferential treatment. In accordance with the policy of *Brady v. Maryland, supra*, the United States is directed to furnish to the defendant such requested information within a reasonable period of time from the date of this order.

Northern District of Georgia

STANDARD CRIMINAL ORDER

. . . IV. Standard Rulings

The following rulings are made in this case and are intended to obviate the need for standard, non-particularized motions on these subjects. Any party who disagrees with these standard rulings may file a particularized motion for relief therefrom, including a motion to compel or for a protective order.

. . . B. *Discovery and Disclosure of Evidence Arguably Subject to Suppression and of Evidence Which Is Exculpatory and/or Impeaching:* Upon request of the defendant, the government is directed to comply with FED. R. CRIM. P. 16 and with FED. R. CRIM. P. 12 by providing notice as specified in section II.B, *supra*. The government is also directed to provide all materials and information that are arguably favorable to the defendant in compliance with its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and their progeny. Exculpatory material as defined in *Brady* and *Kyles v. Whitley*, 514 U.S. 419, 434 (1995), must be provided sufficiently in advance of trial to allow a defendant to use it effectively. Impeachment material must be provided no later than production of the *Jencks* Act statements.

Southern District of Georgia

LCrR 16.1. PRETRIAL DISCOVERY AND INSPECTION IN CRIMINAL CASES

Within seven (7) days after arraignment, the United States Attorney and the defendant's attorney shall confer and, upon request, the government shall:

. . . (f) Permit defendant's attorney to inspect and copy or photograph any evidence favorable to the defendant.

District of Hawaii

CrimLR 16.1. STANDING ORDER FOR ROUTINE DISCOVERY IN CRIMINAL CASES

. . . (a) The Government's Duty. A request for discovery set out in this paragraph and in *Fed.R.Crim.P. 16* is entered for the defendant to the government by this rule so that the defendant need not make a further request for such discovery. If the defendant does not request such discovery, he or she shall file a notice to the government that he or she does not request such discovery within five (5) days after arraignment. If such a notice is filed, the government is relieved of any discovery obligations to the defendant imposed by this paragraph or *Fed.R.Crim.P. 16*. If the defendant does not file such a notice, within seven (7) days after arraignment unless otherwise ordered by the court or promptly upon subsequent discovery, the government shall permit the defendant to inspect and copy or

photograph, or, in the case of the defendant's criminal record, shall furnish a copy, and provide the information listed in the subparagraphs enumerated immediately below. Upon providing the information required in the enumerated subparagraphs below, the government shall file and serve notice of compliance with discovery mandated under this paragraph.

> . . . 7. *Brady* material, as it shall be presumed that defendant has made a general *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215, 1963 U.S. LEXIS 1615 (1963) request. Specific requests shall be made in writing to the government or by motion . . .
>
> . . . (g) Impeachment Material.
>
> 1. Order of Production. The production of the following is hereby ordered: cooperation agreements, plea agreements, impeachment material, promises of leniency, under *Giglio v. United States*, 405 U.S. 150 (1972), and its progeny, and records of criminal convictions which may be admissible under Fed. R. Evid. 609.
>
> 2. Time of Production. Impeachment material under this rule shall be provided as ordered by the court.

District of Idaho

PROCEDURAL ORDER

In order to provide for the just determination of every criminal proceeding, the Board of Judges for the District Court for the District of Idaho has adopted a uniform Procedural Order to be used in criminal proceedings. United States Magistrate Judges are authorized to enter the Procedural Order at the time of the arraignment of a defendant pursuant to 28 U.S.C. § 636 (b)(1)(A).

. . . I. DISCOVERY

. . . 5. The Court strongly encourages the government to produce any information currently in its possession and described in the following paragraphs within seven (7) calendar days of the date of the arraignment on the indictment, in conjunction with the material being produced under Part I, paragraph 1 of this Procedural Order. As to any materials not currently in the possession of the government, including information that may not be exculpatory in nature at the time of the arraignment but as the case proceeds towards trial may become exculpatory because of subsequent events, then the government shall, as soon as practicable and at a minimum for the defendant to make effective use of it at trial, disclose the information. If the government has information in its possession at the time of the arraignment, but elects not to disclose this information until a later time in the proceedings, the court can consider this as one factor in determining whether the defendant can make effective use of the information at trial.

A. Disclose all material evidence within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Agurs*, 427 U.S. 97 (1976), and *Kyles v. Whitley*, 514 U.S. 419 (1995), and their progeny.

B. Disclose the existence and substance of any payments, promises of immunity, leniency, preferential treatment or other inducements made to prospective witnesses, within the scope of *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 362 U.S. 264 (1959), and their progeny.

District of Kansas

GENERAL ORDER OF SCHEDULING AND DISCOVERY

In the interests of justice and judicial economy, the Court enters the following general order of discovery and scheduling which will apply to the charges and to any superseding charges in this case. In general, the court will order the parties to comply with Rules 12, 12.1, 12.2, 16 and 26.2 of the Federal Rules of Criminal Procedure, with *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763 (1972) and their progeny, and with Title 18, U.S.C. § 3500, as well as Rule 404(b), Federal Rules of Evidence.

Unless otherwise specified, a request is not necessary to trigger the operation of this Order, notwithstanding Rule 16's "upon request" language. Thus, the absence of a request may not be asserted as a reason for noncompliance. A principal purpose of this order is to make self-executing the disclosure and discovery provisions of the Rules, thereby reducing or eliminating the filing of "boilerplate" discovery motions and motions for extension of time. Counsel are expected to communicate with each other regarding discovery and nothing in this order is intended to deter the voluntary exchange of information between counsel at times sooner than those specified.

Disclosure by the Government

No later than 30 days after arraignment, the government shall comply with Rule 16.

Pursuant to *Brady* and *Giglio* and their progeny, the government shall produce any and all evidence in its possession, custody or control which would tend to exculpate the defendant (that is, evidence which is favorable and material to a defense), or which would constitute impeachment of government witnesses, or which would serve to mitigate punishment, if any, which may be imposed in this case. This includes and is not limited to the following:

1. Any evidence tending to show threats, promises, payments or inducements made by the government or any agent thereof which would bear upon the credibility of any government witness.

2. Any statement of any government witness which is inconsistent with a statement by the witness which led to the indictment in this case.

3. Any statement of any government witness which the attorney for the government knows or reasonably believes will be inconsistent with the witness' testimony at trial.

4. Any prior conviction of any government witness, which involved dishonesty or false statement, or for which the penalty was death or imprisonment in excess of one year under the law under which he was convicted.

5. Any pending felony charges against any government witness.

6. Any specific instances of the conduct of any government witness which would tend to show character for untruthfulness.

Subject to the requirements of *Brady*, *Giglio* and pursuant to 18 U.S.C. Section 3500 and Rule 26.2, the government may decline to disclose pretrial statements of any of its witnesses until each such witness has concluded his or her direct examination at trial. At that time, the government shall produce the witness' prior statement that is in its possession relating to the witness' testimony. The Court nevertheless urges the government to provide the statements at least 48 hours prior to the witness' scheduled appearance . . .

Western District of Kentucky

SCHEDULING ORDER

. . . 4. To the extent required by *Giglio v. United States,* 405 U.S. 150 (1972) and *United States v. Presser*, 844 F.2d 1275 (6th Cir. 1988), the United States is ordered to provide to defendant with *Giglio* material which shall include but not be limited to production of criminal records of government witnesses, deals, promises of leniency, bargains or other impeachment material. To the extent required by *Brady v. Maryland*, 373 U.S. 83 (1963) and *Presser*, the United States shall disclose any *Brady* material of which it has knowledge in the following manner:

(a) pretrial disclosure of any *Brady* material discoverable under Rule 16(a)(1);

(b) disclosure of all other *Brady* material "in time for effective use at trial."

If the United States has knowledge of *Brady* rule evidence and is unsure as to the nature of the evidence and the proper time for disclosure, it may request an in camera hearing for the purpose of resolving this issue. Failure to disclose *Brady* material at a time when it can be used effectively may result in a recess or a continuance so that the defendant may properly utilize such evidence.

5. Grand Jury materials shall not be disclosed except to the extent required by *Brady*, *Giglio* and the Jencks Act.

Western District of Louisiana

CRIMINAL SCHEDULING ORDER

The purpose of this order is to reduce or eliminate the use of boilerplate, formula motions and responses for discovery of matters authorized by the Federal Rules of

Criminal Procedure, federal statutes, or well-settled case law as applied by this court in the vast majority of criminal cases.

The above-named defendant having been arraigned this date in open court, the following orders are entered:

. . . II. DISCOVERY

. . . (c) Not less than 7 days prior to trial:

(1) The government shall reveal to the defendant and permit inspection and copying of all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Agurs*, 427 U.S. 97 (1976), and *Kyles v. Whitley*, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995).

(2) The government shall disclose to the defendant the existence and nature of any payments, promises or immunity, leniency, preferential treatment, or other inducements made to prospective government witnesses, within the scope of *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 362 U.S. 264 (1959) . . .

District of Massachusetts

RULE 116.1 DISCOVERY IN CRIMINAL CASES

(A) Discovery Alternatives.

(1) Automatic Discovery. In all felony cases, unless a defendant waives automatic discovery, all discoverable material and information in the possession, custody, or control of the government and that defendant, the existence of which is known, or by the exercise of due diligence may become known, to the attorneys for those parties, must be disclosed to the opposing party without formal motion practice at the times and under the automatic discovery procedures specified in this Local Rule.

. . . (C) Automatic Discovery Provided By The Government.

(1) Following Arraignment. Unless a defendant has filed the Waiver, within twenty-eight (28) days of arraignment—or within fourteen (14) days of receipt by the government of a written statement by the defendant that no Waiver will be filed—the government must produce to the defendant:

. . . (2) Exculpatory Information. The timing and substance of the disclosure of exculpatory evidence is specifically provided in L.R. 116.2.

RULE 116.2 DISCLOSURE OF EXCULPATORY EVIDENCE

(A) Definition. Exculpatory information includes, but may not be limited to, all information that is material and favorable to the accused because it tends to:

(1) Cast doubt on defendant's guilt as to any essential element in any count in the indictment or information;

(2) Cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable pursuant to *18 U.S.C. § 3731*;

(3) Cast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its case-in-chief; or

(4) Diminish the degree of the defendant's culpability or the defendant's Offense Level under the United States Sentencing Guidelines.

(B) Timing of Disclosure by the Government. Unless the defendant has filed the Waiver or the government invokes the declination procedure under Rule 116.6, the government must produce to that defendant exculpatory information in accordance with the following schedule:

(1) Within the time period designated in L.R. 116.1(C)(1):

(a) Information that would tend directly to negate the defendant's guilt concerning any count in the indictment or information.

(b) Information that would cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief and that could be subject to a motion to suppress or exclude, which would, if allowed, be appealable under *18 U.S.C. § 3731*.

(c) A statement whether any promise, reward, or inducement has been given to any witness whom the government anticipates calling in its case-in-chief, identifying by name each such witness and each promise, reward, or inducement, and a copy of any promise, reward, or inducement reduced to writing.

(d) A copy of any criminal record of any witness identified by name whom the government anticipates calling in its case-in-chief.

(e) A written description of any criminal cases pending against any witness identified by name whom the government anticipates calling in its case-in-chief.

(f) A written description of the failure of any percipient witness identified by name to make a positive identification of a defendant, if any identification procedure has been held with such a witness with respect to the crime at issue.

(2) Not later than twenty-one (21) days before the trial date established by the judge who will preside:

(a) Any information that tends to cast doubt on the credibility or accuracy of any witness whom or evidence that the government anticipates calling or offering in its case-in-chief.

(b) Any inconsistent statement, or a description of such a statement, made orally or in writing by any witness whom the government anticipates calling in its case-in-chief, regarding the alleged criminal conduct of the defendant.

(c) Any statement or a description of such a statement, made orally or in writing by any person, that is inconsistent with any statement made orally or in writing by any witness the government anticipates calling in its case-in-chief, regarding the alleged criminal conduct of the defendant.

(d) Information reflecting bias or prejudice against the defendant by any witness whom the government anticipates calling in its case-in-chief.

(e) A written description of any prosecutable federal offense known by the government to have been committed by any witness whom the government anticipates calling in its case-in-chief.

(f) A written description of any conduct that may be admissible under *Fed. R. Evid. 608(b)* known by the government to have been committed by a witness whom the government anticipates calling in its case-in-chief.

(g) Information known to the government of any mental or physical impairment of any witness whom the government anticipates calling in its case-in-chief, that may cast doubt on the ability of that witness to testify accurately or truthfully at trial as to any relevant event.

(3) No later than the close of the defendant's case: Exculpatory information regarding any witness or evidence that the government intends to offer in rebuttal.

(4) Before any plea or to the submission by the defendant of any objections to the Pre-Sentence Report, whichever first occurs: A written summary of any information in the government's possession that tends to diminish the degree of the defendant's culpability or the defendant's Offense Level under the United States Sentencing Guidelines.

(5) If an item of exculpatory information can reasonably be deemed to fall into more than one of the foregoing categories, it shall be deemed for purposes of determining when it must be produced to fall into the category which requires the earliest production.

RULE 116.6 DECLINATION OF DISCLOSURE AND PROTECTIVE ORDERS

(**A**) **Declination.** If in the judgment of a party it would be detrimental to the interests of justice to make any of the disclosures required by these Local Rules, such disclosures may be declined, before or at the time that disclosure is due, and the opposing party advised in writing, with a copy filed in the Clerk's Office, of the specific matters on which disclosure is declined and the reasons for declining. If the opposing party seeks to challenge the declination, that party shall file a motion to compel that states the reasons

why disclosure is sought. Upon the filing of such motion, except to the extent otherwise provided by law, the burden shall be on the party declining disclosure to demonstrate, by affidavit and supporting memorandum citing legal authority, why such disclosure should not be made. The declining party may file its submissions in support of declination under seal pursuant to L.R. 7.2 for the Court's in camera consideration. Unless otherwise ordered by the Court, a redacted version of each such submission shall be served on the moving party, which may reply.

(B) Ex Parte Motions for Protective Orders. This Local Rule does not preclude any party from moving under L.R. 7.2 and ex parte (i.e. without serving the opposing party) for leave to file an ex parte motion for a protective order with respect to any discovery matter. Nor does this Local Rule limit the Court's power to accept or reject an ex parte motion or to decide such a motion in any manner it deems appropriate.

Adopted September 8, 1998; effective December 1, 1998.

RULE 116.7 DUTY TO SUPPLEMENT

The duties established by these Local Rules are continuing. Each party is under a duty, when it learns that a prior disclosure was in some respect inaccurate or incomplete to supplement promptly any disclosure required by these Local Rules or by the Federal Rules of Criminal Procedure.

Adopted September 8, 1998; effective December 1, 1998.

RULE 116.8 NOTIFICATION TO RELEVANT LAW ENFORCEMENT AGENCIES OF DISCOVERY OBLIGATIONS

The attorney for the government shall inform all federal, state, and local law enforcement agencies formally participating in the criminal investigation that resulted in the case of the discovery obligations set forth in these Local Rules and obtain any information subject to disclosure from each such agency.

Adopted September 8, 1998; effective December 1, 1998.

Eastern District of Michigan

STANDING ORDER FOR DISCOVERY AND INSPECTION AND FIXING MOTION CUT-OFF DATE IN CRIMINAL CASES

. . . To eliminate unnecessary motions for discovery and to expedite the trial and eliminate delays in the presentation of evidence and the examination of witnesses, this order is entered in all criminal cases in this district. Nothing in this order shall be construed to impose any obligation on any party not otherwise provided by law.

. . . 1. Conference and Disclosure. Within ten (10) days from the date of arraignment, or such other date as may be set by the Judge to whom the case is assigned, government and defense counsel shall meet and confer, or government counsel shall file the attached Discovery Notice. Upon request of defense counsel the government shall:

> . . . (b) Permit defense counsel to inspect, copy or photocopy any exculpatory evidence within the meaning of *Brady v. Maryland,* 373 U.S. 83 (1963), and *United States v. Agurs*, 427 U.S. 97 (1976).

A list of the items of evidence so inspected shall be made and such list signed by all counsel and copies of the items so disclosed hall be initialed or otherwise marked. Government counsel is reminded that the government proceeds at its peril if there is a failure to disclose such evidence.

Nothing herein shall be deemed to require the disclosure of Jencks Act material prior to the time that the Jencks Act requires its disclosure, nor shall government counsel be required to automatically disclose the names of government witnesses.

2. Disclosure Declined. If, in the judgment of government counsel, it would be detrimental to the interests of justice to make any disclosure set forth in paragraph 1 and requested by defense counsel, disclosure may be declined, and defense counsel so advised. The declination shall be made or confirmed in writing. If a defendant seeks to challenge the declination, he or she shall move forthwith for relief.

3. Continuing Duty. The duty of disclosure an discovery described in this order is continuing . . .

Western District of Michigan

STANDING ORDER REGARDING DISCOVERY IN CRIMINAL CASES

Unless otherwise ordered in a particular case, the parties in all criminal proceedings in this Court must comply with the following requirements:

. . . D. The government shall reveal to the defendant and permit inspection and copying all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland,* 373 U.S. 83 (1963), and *United States v. Agurs*, 427 U.S. 97 (1976).

E. The government shall obtain and copy impeachment information relating to its witnesses that is within the ambit of the Jencks Act and within the ambit of *Brady*, including any prior criminal record of any alleged informant who will testify for the government at trial, so that the documents are available for effective use at the time of trial. This Court cannot compel the government to disclose Jencks Act statements prior to trial. *United States v. Presser*, 844 F.2d 1275, 1283 (6th Cir. 1988). The Sixth Circuit Court of Appeals has noted, however, the "the better practice . . . is for the government to produce such material well in advance of trial so that defense counsel may have an adequate opportunity to examine that which is not in dispute and the court may examine

the rest in camera, usually in chamber." *United States v. Minsky*, 963 F.2d 870, 876 (6th Cir. 1992). This Court urges the government to follow the recommendation of the Sixth Circuit and produce Jencks Act and other impeachment material in a timely fashion.

. . . This order is designed to exhaust the discovery to which a defendant is ordinarily entitled and to avoid the necessity of counsel for the defendant(s) filing routine motions for routine discovery. Accordingly, counsel for the defendant(s) shall make a request of the government for each item of discovery sought and be declined the same prior to the filing of any motion. . .

. . . Unless otherwise indicated above, the parties must comply with this order within 21 days of the initial arraignment. Failure to abide by this order may result in the imposition of sanctions.

Western District of Missouri

DISCOVERY ORDER

To ensure that commencement of discovery is not delayed following arraignment and that the parties are adequately prepared to discuss pre-trial deadlines at the scheduling conference, the following schedule is established for the commencement of discovery.[1]

. . . III. EVIDENCE FAVORABLE TO THE DEFENSE[2]

A. BRADY EVIDENCE

Within ten days from the date of arraignment, the government is directed to disclose all evidence favorable to the defendant within the meaning of *Brady v. Maryland*.

B. GIGLIO IMPEACHMENT EVIDENCE

No later than fifteen days prior to trial, the government is directed to disclose all evidence which may tend to adversely affect the credibility of any person called as a witness by the government pursuant to *Giglio v. United States* and *United States v. Agurs*, including the arrest and/or conviction record of each

1. During the arraignment, defense counsel requested all discovery to which their client may be entitled pursuant to the Federal Rules of Criminal Procedure, the Federal Rules of Evidence and the United States Constitution. The government requested reciprocal discovery to which it is entitled pursuant to the Federal Rules of Criminal Procedure, the Federal Rules of Evidence and the United States Constitution.

2. The parties are to be prepared to disclose to the Court at the final pretrial conference the method used to determine whether any favorable evidence exists in the government's investigative file. The government is advised that if any portion of the government's investigative file or that of any investigating agency is not made available to the defense for inspection, the Court will expect that trial counsel for the government or an attorney under trial counsel's immediate supervision who is familiar with the *Brady/Giglio* doctrine will have reviewed the applicable files for purposes of ascertaining whether evidence favorable to the defense is contained in the file.

government witness, any offers of immunity or lenience, whether made directly or indirectly, to any government witness in exchange for testimony and the amount of money or other remuneration given to any witness.

STIPULATIONS AND ORDERS

. . .

III. EVIDENCE FAVORABLE TO THE DEFENSE

1. Brady/Giglio Evidence

[] The government states that it does not have evidence in its possession favorable to defendant(s):

_____

[and/or]

[] The government states that it has evidence in its possession favorable to defendant(s):

_____

STIPULATION: The government agrees to provide discovery within 10 days of all evidence in its possession which is favorable to a defendant. If favorable evidence comes into the government's possession in the future, the government agrees to disclose it promptly. Although most instances of favorable evidence to the defense will be immediately apparent to the government (e.g., exculpatory evidence and impeachment evidence), this stipulation recognizes that at times the government will not necessarily be aware of the nature of a particular defense. Therefore, defense counsel has a responsibility to alert the government as to the nature and type of evidence that it believes may prove to be favorable to the defense which might not otherwise be apparent to the government.

. . .

3. Witness Inducements

[ ] The government has not made promises to witness(es) in exchange for testimony.

[or]

[ ] The government has made promises to witness(es) in exchange for testimony.

STIPULATION: The government agrees to provide discovery **at least 10 days before trial** of (a) the name(s) and address(es) of the witness(es) to whom the government has made a promise, (b) all promises or inducements made to

any witness(es), (c) all agreements entered into with any witness(es), and (d) the amount of money or other remuneration given to any witness(es). If the witness is represented by counsel, the government also will provide discovery of the attorney's name, address, and telephone number. As an alternative to providing witness-address information, the government agrees to make the witness(es) available for interview if the witness(es) agree(s) to being interviewed. If such evidence is not immediately available, the government will promptly disclose it upon receipt.

. . .

XII. CONCLUSION

ORDERED that all requests for discovery and inspection agreed to or ordered above are continuing requests and orders, and any such information and/or material coming into the knowledge or possession of any party before or during trial shall be promptly made available to opposing counsel.

NOTE: The parties acknowledge that the above-executed stipulations are intended to eliminate the need for pretrial discovery motions and responses. They are not intended to be used to exclude the introduction of evidence by either side at trial unless a complaining party can show bad faith on the part of the offending party, real prejudice to the complaining party, or both.

District of Nebraska

ORDER FOR PROGRESSION OF A CRIMINAL CASE

Upon arraignment of Defendant this date and the entry of plea of not guilty,

IT IS ORDERED:

. . . 3. If after compliance with Rule 16 there is necessity for the filing of pretrial motions, they shall be filed by (date), and that time limit will not be extended by the court except for good cause shown. In this connection, the United States Attorney shall disclose *Brady v. Maryland* (and its progeny) material as soon as practicable. Should the Defendant nonetheless file a motion for such disclosure, such motion shall state with specificity the material sought. In the event that any motions are filed seeking bills of particulars or discovery of facts, documents, or evidence, as part of the motion the moving party shall recite that counsel for the movant has conferred with opposing counsel regarding the subject of the motion in an attempt to reach agreement on the contested matters without the involvement of the court and that such attempts have been unsuccessful. The motion shall further state the dates and times of such conferences.

District of New Hampshire

Rule 16.1. ROUTINE DISCOVERY

The parties shall disclose the following information without waiting for a demand from the opposing party.

. . . (d) Exculpatory and Impeachment Material. The government shall disclose any evidence material to issues of guilt or punishment within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963), and related cases, and any impeachment material as defined in *Giglio v. United States,* 405 U.S. 150 (1972), and related cases, at least twenty-one (21) days before trial. For good cause shown, the government may seek approval to disclose said material at a later time.

District of New Jersey

ORDER FOR DISCOVERY AND INSPECTION

. . . 1. *CONFERENCE.* Within ten (10) days from the date hereof, the United States Attorney or one of his assistants and the defendant's attorney shall meet and confer, and the government shall:

. . . (f) Permit defendant's attorney to inspect, copy or photograph any exculpatory evidence within the purview of *Brady v. Maryland*.

District of New Mexico

RULE 16.1 DISCOVERY OF EVIDENCE

The Parties will comply with the Standard Discovery Order. A copy of the Order is attached to these Rules.

STANDARD DISCOVERY ORDER

. . . 6. DISCLOSURE OF *BRADY, GIGLIO* AND JENCKS ACT MATERIALS. The government shall make available to the Defendant by the time required by applicable law all material for which discovery is mandated by *Brady v. Maryland,* 373 U.S. 83 (1963), by *Giglio v. United States*, 405 U.S. 150 (1972), and by the Jencks Act, 18 U.S.C. § 3500, and Rules 12(i) and 26.2.

Northern District of New York

14.1 DISCOVERY

. . . (b) Fourteen (14) days after arraignment, or on a date that the Court otherwise sets for good cause shown, the government shall make available for inspection and copying to the defendant the following:

. . . 2. *Brady* Material. All information and material that the government knows may be favorable to the defendant on the issues of guilt or punishment, within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963).

. . . (d) No less than fourteen (14) days prior to the start of jury selection, or on a date the Court sets otherwise for good cause shown, the government shall tender to the defendant the following:

1. *Giglio* Material. The existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective witnesses, within the scope of *Giglio v. United States*, 405 U.S. 150 (1972).

2. Testifying Informant's Convictions. A record of prior convictions of any alleged informant who will testify for the government at trial.

. . . (f) It shall be the duty of counsel for all parties immediately to reveal to opposing counsel all newly discovered information, evidence, or other material within the scope of this Rule, and there is a continuing duty upon each attorney to disclose expeditiously. The government shall advise all government agents and officers involved in the action to preserve all rough notes.

Eastern District of North Carolina

Rule 16.1. MOTIONS RELATING TO DISCOVERY AND INSPECTION

. . . (b) Criminal Pre-Trial Conference. Within twenty-one (21) days after indictment or initial appearance, whichever comes later, the United States Attorney shall arrange and conduct a pre-trial conference with counsel for the defendant. At the pre-trial conference and upon the request of counsel for the defendant, the Government shall permit counsel for the defendant:

. . . (7) to inspect, copy or photograph any exculpatory evidence.

Middle District of North Carolina

LOCAL CRIMINAL RULE 16.1 DISCOVERY MOTIONS

Discovery motions filed by a defendant who is represented by counsel must include a statement that counsel has fully reviewed the government's case file before bringing the motion or a statement that such file is not available for counsel's review. The filing of a discovery motion which does not include such certification may cause the court to deny the motion, to disapprove payment to court-appointed counsel in regard to a motion made unnecessary by examination of the file, or to impose other sanctions under LCrR57.3 in the discretion of the court.

District of North Dakota

PRETRIAL ORDER (CRIMINAL)

. . . II. DISCOVERY: The following discovery rules shall apply:

. . . d) The Government shall disclose to the Defendant any exculpatory material discoverable under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny.

District of the Northern Mariana Islands

LCrR 17.1.1—PRETRIAL CONFERENCE

On request of any party or on the court's motion, one or more pretrial conferences may be held. The agenda shall consist of the following items, so far as applicable:

. . . c. Production of evidence favorable to the defendant on the issue of guilt or punishment as required by *Brady v. Maryland*, 373 U.S. 83 (1963), and related authorities;

Western District of Oklahoma

LCrR16.1 DISCOVERY CONFERENCE

(a) Time for Discovery Conference. Counsel for the parties shall meet and confer at a discovery conference within ten (10) days after a plea of not guilty is entered.

(b) Joint Statement. Within three (3) days following completion of the required discovery conference, the parties shall file with the Court Clerk a joint statement memorializing the discovery conference. (The Joint Statement of Discovery Conference shall conform to the form provided herein as Appendix V.) . . .

APPENDIX V. JOINT STATEMENT OF DISCOVERY CONFERENCE

. . . Counsel met for purposes of exchanging discovery materials in accordance with the Federal Rules of Criminal Procedure as supplemented by the Local Criminal Court Rules and any orders of this Court and, as a result of the conference, the undersigned counsel report the following:

. . . 5. The fact of disclosure of all materials favorable to the defendant or the absence thereof within the meaning of *Brady v. Maryland* and related cases: Counsel for plaintiff expressly acknowledges continuing responsibility to disclose any material favorable to defendant within the meaning of *Brady* that becomes known to the Government during the course of these proceedings.

Western District of Pennsylvania

Rule 16.1. DISCOVERY AND INSPECTION

B. Timing. Upon a defendant's request, the government shall make available the Rule 16 material at the time of the arraignment. If discovery is not requested by the defendant at the time of the arraignment, the government shall disclose such material within seven (7) days of a defendant's request. The government shall file a receipt with the Court which sets forth the general categories of information subject to disclosure under Rule 16, as well as any exculpatory evidence, and the items provided under each category.

C. Exculpatory Evidence. At the time of arraignment, and subject to a continuing duty of disclosure thereafter, the government shall notify the defendant of the existence of exculpatory evidence, and permit its inspection and copying by the defendant.

Eastern District of Tennessee

DISCOVERY AND SCHEDULING ORDER

. . . The government shall reveal to the defendant and permit inspection and copying of all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Agurs*, 427 U.S. 97 (1976) (exculpatory evidence), and *United States v. Bagley*, 473 U.S. 667 (1985) (impeachment evidence). Timing of such disclosure is governed by *United States v. Presser*, 844 F.2d 1275 (6th Cir. 1988).

It shall be the continuing duty of counsel for both sides to immediately reveal to opposing counsel all newly discovered information or other material within the scope of this order.

Upon a sufficient showing, the Court may at any time, upon motion properly filed, order that the discovery or inspection provided for by this order be denied, restricted or deferred, or make such other order as is appropriate. It is expected by the Court, however, that counsel for both sides shall make every good faith effort to comply with the letter and spirit of this order.

Middle District of Tennessee

LcrR16.01. DISCOVERY AND INSPECTION

(a) Discovery in Criminal Cases.

. . . (2) Standing Discovery Rule. On or before fourteen (14) days from the date of the arraignment of a defendant, the parties shall confer and the following shall be accomplished:

. . . d. The government shall reveal to the defendant and permit inspection and copying of all information and material known to the government

which may be favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), and *United States v. Agurs,* 427 U.S. 97, 96 S. Ct. 2392, 49 L.Ed.2d 342 (1976).

Western District of Texas

Rule CR-16 DISCOVERY AND INSPECTION

(a) Discovery Conference and Agreement.

(1) The parties need not make standard discovery requests, motions, or responses if, not later than the deadline for filing pretrial motions (or as otherwise authorized by the court), they confer, attempt to agree on procedures for pretrial discovery, and sign and file a copy of the Disclosure Agreement Checklist appended to this rule.

. . . (b) Timing of Discovery.

(1) Discovery deadlines. Unless otherwise ordered by the court, or agreed to by the parties in writing:

(A) The parties must provide discovery in connection with pretrial release or detention not later than the commencement of a hearing on pretrial release or detention;

(B) The parties must provide discovery in connection with a pretrial hearing, other than a pretrial release or detention hearing, not later than 48 hours before the hearing; and

(C) The parties must provide discovery in connection with trial, whether agreed to by the parties or otherwise required, not later than: The parties must provide discovery in connection with trial, whether agreed to by the parties or otherwise required, not later than:

(i) 14 days after arraignment; or

(ii) if the defendant has waived arraignment, within 14 days after the latest scheduled arraignment date.

(2) Earlier disclosure. The court encourages prompt disclosure, including disclosure before the deadlines set out in this rule.

(3) Disclosure after motions deadline. The disclosure of information after the expiration of a motions deadline usually provides good cause for an extension of time to file motions based on that information.

(4) Continuing duty to disclose. The parties have a continuing duty to disclose promptly to opposing counsel all newly discovered information the party is required to disclose, or has agreed to disclose in the Disclosure Agreement Checklist.

PARTIES' DISCLOSURE AGREEMENT CHECKLIST

Disclosed Will Disclose/Refuse to Not Comments

. . . Rule 16 material:

. . . Exculpatory material . . .

(*Brady*)

Impeachment material

(*Giglio*. . .)

District of Vermont

Rule 16. DISCOVERY

At the time of arraignment, the court will issue to all parties a standard Criminal Pretrial Order, which sets forth this court's criminal discovery procedures.

(a) Discovery from the Government. Unless the court orders otherwise, the government must make the following materials available to the defendant for inspection and copying within 14 days of arraignment:

> . . . (2) *Brady Material.* All information and material known to the government that may be favorable to the defendant on the issues of guilt or punishment, as provided by *Brady v. Maryland*, 373 U.S. 83 (1963);
>
> (3) *Names and Addresses of Witnesses.* A list of the names and addresses of witnesses the government intends to call in its case in chief. The government may withhold the names and/or addresses of those witnesses about whom it has substantial concerns. If names and/or addresses are withheld, the government must notify the defense of the number that have been withheld . . .

(d) Government Pretrial Disclosures. Unless the court orders otherwise for good cause, the government must provide to the defendant not less than 14 days prior to the start of jury selection:

> (1) *Giglio* Material. All material within the scope of *Giglio v. United States*, 405 U.S. 150 (1972), including but not limited to information relating to:
>
> (A) the existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to a testifying witness;
>
> (B) the content of substantially inconsistent statements that a witness has made concerning issues material to guilt or punishment; and

(C) any criminal conviction of a witness or other instance of misconduct, of which the government has knowledge, and which may be used to impeach a witness pursuant to Fed. R. Evid. 608 and 609.

Western District of Washington

Rule 16. DISCOVERY AND INSPECTION

. . . (a) Discovery Conference

At every arraignment at which the defendant enters a plea of not guilty, or other time set by the court, the attorney for the defendant shall notify the court and the attorney for the United States, on the record, or thereafter in writing, whether discovery by the defendant is requested. If so requested, within fourteen days after said attorney for the defendant and the attorney for the government shall confer in order to comply with Rule 16 Fed.R.Crim.P., and make available to the opposing party the items in their custody or control or which by due diligence may become known to them. This conference shall be in person. If, however, it is impractical to meet in person, the conference may be conducted via telephone.

(1) Discovery from the government. At the discovery conference the attorney for the government shall comply with the government's obligations under Rule 16 including, but not limited to, the following:

. . . (K) Advise the attorney for the defendant and provide, if requested, evidence favorable to the defendant and material to the defendant's guilt or punishment to which he is entitled pursuant to *Brady v. Maryland* and *United States v. Agurs* . . .

Northern District of West Virginia

LR Cr P 16.01. PRETRIAL DISCOVERY AND INSPECTION.

. . . (b) Standard Discovery Request Form: At arraignment or upon filing of an information or indictment, counsel for the defendant may file standard requests for discovery. An Arraignment Order and Standard Discovery Request form is available on the Court's website. Counsel for the government and counsel for the defendant shall sign the form for entry by the magistrate judge.

. . . (d) Time for Government Response: Unless the parties agree otherwise, or the Court so orders, within 10 days of the Standard Discovery Request, the government must provide the requested material to counsel for the defendant and file with the clerk a written response to each of defendant's requests.

LR Cr P 16.05. EXCULPATORY EVIDENCE

Exculpatory evidence as defined in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), as amplified by *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985), shall be disclosed at the time the disclosures described in LR Cr P 16.01 are made. Additional *Brady* material not known to the government at the time of disclosure of other discovery material, as described above, shall be disclosed immediately in writing setting forth the material in detail.

LR Cr P 16.06. RULE 404(b), GIGLIO AND ROVIARO EVIDENCE

No later than fourteen days before trial, the government shall disclose all Notice of Federal Rule of Evidence 404(b) evidence, *Giglio* material and any *Roviaro* witness not previously turned over in discovery. See *Giglio v. United States,* 405 U.S. 150, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972); *Roviaro v. United States*, 353 U.S. 53, 77 S. Ct. 623, 1 L.Ed.2d 639 (1957).

Southern District of West Virginia

LR Cr P 16.1. ARRAIGNMENT AND STANDARD DISCOVERY REQUESTS

(a) Standard Discovery Request Form

At arraignment on an indictment, or on an information or complaint in a misdemeanor case, counsel for the defendant and the government may make standard requests for discovery as contained in the Arraignment Order and Standard Discovery Request form available from the clerk and on the court's website. The form shall be signed by counsel for the defendant and the government and entered by the magistrate judge.

. . . (c) Time for government response

Unless the parties agree otherwise, or the court so orders, within 10 days of the Standard Discovery Request, the government must provide the requested material to counsel for the defendant and file with the clerk a written response to each of defendant's requests.

ARRAIGNMENT ORDER AND STANDARD DISCOVERY REQUESTS

. . . 1. On Behalf of the Defendant, the Government Is Requested to: (defense counsel must initial all applicable sections)

. . . h. Disclose to defendant all evidence favorable to defendant, including impeachment evidence, and allow defendant to inspect, copy or photograph such evidence.

Eastern District of Wisconsin

Criminal L. R. 16. DISCOVERY AND INSPECTION.

(a) Open File Policy.

(1) At arraignment, the government must state on the record to the presiding judge whether it is following the open file policy as defined in Criminal L. R. 16(a)(2). If the government states that it is following the open file policy and the defense accepts such discovery materials, then the defense's discovery obligations under Fed. R. Crim. P. 16(b) arise without further government motion or request and both parties must be treated for all purposes in the trial court and on appeal as if each had filed timely written motions requesting all materials required to be produced under Fed. R. Crim. P. 16(a)(1)(A), (B), (C), (D), (E), (F), and (G), and 16 (b)(1)(A), (B), and (C), and invoking Fed. R. Crim. P. 16(c). If the government is following the open file policy, the government need not respond to and the Court must not hear any motion for discovery under Fed. R. Crim. P. 16(a) or 16(b) unless the motion complies with subsection (b) of this rule.

(2) As defined by the United States Attorney's Office, the "open file policy" means disclosure without defense motion of all information and materials listed in Fed. R. Crim. P. 16(a)(1)(A), (B), (C), (D), and (F); upon defense request, material listed in Fed. R. Crim. P. 16(a)(1)(E); material disclosable under 18 U.S.C. § 3500, other than grand jury transcripts; reports of interviews with witnesses the government intends to call in its case-in-chief relating to the subject matter of the testimony of the witness; relevant substantive investigative reports; and all exculpatory material. The government retains the authority to redact from open file material anything (i) that is not exculpatory and (ii) that the government reasonably believes is not relevant to the prosecution, or would jeopardize the safety of a person other than the defendant, or would jeopardize an ongoing criminal investigation. The defense retains the right to challenge such redactions by motion to the Court.

(3) Unless these items contain exculpatory material, "open file materials" do not ordinarily include material under Fed. R. Crim. P. 16(a)(1)(G), government attorney work product and opinions, materials subject to a claim of privilege, material identifying confidential informants, any Special Agent's Report (SAR) or similar investigative summary, reports of interviews with witnesses who will not be called in the government's case-in-chief, rebuttal evidence, documents and tangible objects that will not be introduced in the government's case-in-chief, rough notes used to construct formal written reports, and transcripts of the grand jury testimony of witnesses who will be called in the government's case-in-chief.

. . . (6) If the government elects not to follow the open file policy described in Criminal L. R. 16(a)(2), discovery must proceed pursuant to Fed. R. Crim. P. 16 and Criminal L. R. 12(a)(3).

Appendix B

Table 1: Scope of Disclosure in District Court Local Rules and Orders Requiring Disclosure of Exculpatory and Impeachment Information[1]

	Approach 1 Defined Scope of Disclosure[2] (within the scope of *Brady v. Maryland*)				**Approach 2** Open-Ended Scope of Disclosure[3]
District	**Group 1** Exculpatory material: specific definition[4]	**Group 2** Exculpatory material: general definition[5]	**Group 3** Impeachment material: specific definition[6]	**Group 4** Impeachment material: general definition[7]	
Alabama Middle[8]	X		X		
Alabama Southern[9]	X		X		
Arkansas Eastern	X			X	
California Northern					X Four days prior to the pretrial conference, parties must file a pretrial conference statement addressing the "disclosure of exculpatory or other evidence favorable to the defendant on the issue of guilt or punishment." N.D. Cal., Crim. L. R. 16-1 and 17.1-1.
Connecticut	X		X		
Florida Northern[10]	X		X		

	Approach 1 Defined Scope of Disclosure[2] (within the scope of *Brady v. Maryland*)				**Approach 2** Open-Ended Scope of Disclosure[3]
District	**Group 1** Exculpatory material: specific definition[4]	**Group 2** Exculpatory material: general definition[5]	**Group 3** Impeachment material: specific definition[6]	**Group 4** Impeachment material: general definition[7]	
Florida Southern	X		X		
Georgia Middle	X			X	
Georgia Northern	X			X	
Georgia Southern					X Upon request, the government shall permit defendant's attorney to inspect and copy or photograph "any evidence favorable to the defendant." S.D. Ga., L. Crim. R. 16.
Hawaii		X	X		
Idaho		X	X		
Kansas	X		X		
Kentucky Western		X	X		
Louisiana Western	X		X		
Massachusetts[11]	X		X		

	Approach 1 Defined Scope of Disclosure[2] (within the scope of *Brady v. Maryland*)				**Approach 2** Open-Ended Scope of Disclosure[3]
District	**Group 1** Exculpatory material: specific definition[4]	**Group 2** Exculpatory material: general definition[5]	**Group 3** Impeachment material: specific definition[6]	**Group 4** Impeachment material: general definition[7]	
Michigan Eastern		X			
Michigan Western	X		X		
Missouri Western	X		X		
Nebraska		X		X	
New Hampshire	X			X	
New Jersey		X			
New Mexico		X		X	
New York Northern	X		X		
North Carolina Eastern					X Upon request of counsel for defendant, the Government shall permit the counsel for defendant to inspect, copy or photograph "any exculpatory evidence." E.D.N.C., Rule 16.1.

	Approach 1 Defined Scope of Disclosure[2] (within the scope of *Brady v. Maryland*)				**Approach 2** Open-Ended Scope of Disclosure[3]
District	**Group 1** Exculpatory material: specific definition[4]	**Group 2** Exculpatory material: general definition[5]	**Group 3** Impeachment material: specific definition[6]	**Group 4** Impeachment material: general definition[7]	
North Carolina Middle					X Discovery motions filed by a defendant who is represented by counsel must include a statement that counsel has "fully reviewed the government's case file" before bringing the motion or a statement that such file is not available for counsel's review. M.D.N.C., L. Crim. R. 16.1.
North Dakota		X			
Northern Mariana Islands	X				
Oklahoma Western	X				
Pennsylvania Western					X The government shall notify the defendant of the existence of "exculpatory evidence", and permit its inspection and copying by the defendant. W.D. Pa., L. Crim. R. 16.
Tennessee Eastern	X			X	

	Approach 1 Defined Scope of Disclosure[2] (within the scope of *Brady v. Maryland*)				**Approach 2** Open-Ended Scope of Disclosure[3]
District	**Group 1** Exculpatory material: specific definition[4]	**Group 2** Exculpatory material: general definition[5]	**Group 3** Impeachment material: specific definition[6]	**Group 4** Impeachment material: general definition[7]	
Tennessee Middle	X				
Texas Western		X		X	
Vermont	X		X		
Washington Western	X				
West Virginia Northern		X		X	
West Virginia Southern					X On behalf of the defendant, the government is requested to disclose to defendant "all evidence favorable to defendant, including impeachment evidence", and to allow defendant to inspect, copy or photograph such evidence. S.D. W. Va., L. R. Crim. P. 16.1 and Arraignment Order and Standard Discovery Requests.
Wisconsin Eastern					X If the government is following the "open file policy" it must disclose . . . "all exculpatory material." E.D. Wis., Crim. L. R. 16.

1. This table compares approaches used to establish the scope of the government's obligations to disclose exculpatory information and/or impeachment material in the thirty-eight districts with a local rule and/or order adopting language either codifying, altering or supplementing one or more of the constitutional tenets established by *Brady v. Maryland* and its progeny cases (e.g., *Giglio*).

2. Thirty-one local rules or orders establish the scope of the government's obligation to disclose exculpatory and/or impeachment information by incorporating the parameters established by *Brady v. Maryland* and its progeny case law, either explicitly requiring the disclosure to be within the scope of *Brady,* citing *Brady* alone or with other relevant case law, or including definitional language incorporating the basic scope parameters established by *Brady* and *Giglio* and their progeny cases.

3. Seven local rules or orders have established an open-ended scope of disclosure by requiring broad disclosure of any exculpatory material and no reference to "*Brady*" or "*Giglio*" material and/or no citation to *Brady v. Maryland*, *United States v. Giglio*, or other relevant cases.

4. Twenty-one districts have rules and/or orders that specifically define the scope of disclosure of exculpatory material by incorporating all or part of the *Brady* description of information or material that may be "favorable to an accused" and "material either to guilt or punishment" and/or by providing examples of "*Brady* " material. Except for the District of Massachusetts, these rules or orders explicitly require the disclosure to be within the scope of *Brady v. Maryland*, or provide citations to *Brady* alone or with other relevant cases.

5. Ten districts have rules and/or orders that very generally define the scope of the government's disclosure obligations for exculpatory material by requiring the disclosure of "*Brady*" material or exculpatory material in general. These rules or orders explicitly require the disclosure to be within the scope of *Brady v. Maryland*, or provide citations to *Brady* alone or with other relevant cases.

6. Fourteen districts have rules and/or orders that specifically define the scope of disclosure of impeachment material by incorporating all or part of the *Giglio* description of "evidence affecting credibility" that is potentially useful in impeaching government witnesses and/or by providing examples of "*Giglio*" material or information. Except for the District of Massachusetts, these rules or orders explicitly require the disclosure to be within the scope of *United States v. Giglio,* or provide citations to *Giglio* alone or with other relevant cases.

7. Nine districts have rules and/or orders that very generally define the scope of the government's disclosure obligations for impeachment material by requiring the disclosure of "*Giglio*" material or exculpatory material in general. These rules or orders explicitly require the disclosure to be within the scope of *United States v. Giglio,* or provide citations to *Giglio* alone or with other relevant cases.

8. In addition to requiring the government to disclose all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment with the scope of *Brady v. Maryland*, M.D. Ala. *Standard Order on Criminal Discovery* requires disclosure of exculpatory material "without regard to materiality."

9. In addition to requiring the government to disclose all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment with the scope of *Brady v. Maryland*, S.D. Ala. Local Rule 16.13 Criminal Discovery explicitly requires disclosure of exculpatory material "without regard to materiality."

10. In addition to requiring the government to disclose all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment with the scope of *Brady v. Maryland*, N.D. Fla. Rule 26.3 Discovery-Criminal explicitly requires disclosure of exculpatory material "without regard to materiality."

11. Although the District of Massachusetts' local rules regarding discovery in criminal cases do not explicitly reference *Brady* or other relevant case law, Local Rule 116.2 provides a definition of exculpatory information which incorporates the basic scope parameters established by *Brady* and *Giglio*: "Exculpatory information includes, but may not be limited to, all information that is material and favorable to the accused because it tends to cast doubt on defendant's guilt as to any essential element . . . cast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its case-in-chief . . ." D. Mass. Local Rule 116.2(A).

Appendix B

Table 2: Time frame for Disclosure in District Court Local Rules and Orders Requiring Disclosure of Exculpatory and Impeachment Material[1]

District	**Group A**[2] Time frame applies to both disclosure of *Brady* (exculpatory) and *Giglio* (impeachment) material	**Group B**[3] Time frame applies only to disclosure of *Brady* (exculpatory) material	**Group C**[4] Time frame applies only to disclosure of *Giglio* (impeachment) material	**Group D**[5] No time frame specified in the rule
Alabama Middle	X (at arraignment, or on a date otherwise set by the court for good cause shown)			
Alabama Southern	X (at arraignment, or on a date otherwise set by the court for good cause shown)			
Arkansas Eastern	X (in time for effective use at trial)			
California Northern		X (within 14 days after a defendant's plea of not guilty, or if the parties stipulate within 21 days after entry of plea they shall stipulate to a disclosure schedule)		
Connecticut	X (within 14 days from the date of arraignment)			

District	**Group A**[2] Time frame applies to both disclosure of *Brady* (exculpatory) and *Giglio* (impeachment) material	**Group B**[3] Time frame applies only to disclosure of *Brady* (exculpatory) material	**Group C**[4] Time frame applies only to disclosure of *Giglio* (impeachment) material	**Group D**[5] No time frame specified in the rule
Florida Northern	X (within 5 days after the defendant's arraignment, or promptly after acquiring knowledge thereof)			
Florida Southern	X (not later than 14 days after the arraignment, or such other time as ordered by the court)			
Georgia Middle		X (as soon as reasonably possible)	X (the evening before the witness's anticipated testimony)	
Georgia Northern		X (sufficiently in advance of trial to allow a defendant to use it effectively)	X (no later than production of the Jenck's Act statements (i.e., after direct examination of the government witness at issue))	
Georgia Southern		X (within 7 days after arraignment)		

District	**Group A**[2] Time frame applies to both disclosure of *Brady* (exculpatory) and *Giglio* (impeachment) material	**Group B**[3] Time frame applies only to disclosure of *Brady* (exculpatory) material	**Group C**[4] Time frame applies only to disclosure of *Giglio* (impeachment) material	**Group D**[5] No time frame specified in the rule
Hawaii		X (within 7 days after arraignment unless otherwise ordered by the court)	X (as ordered by the court)	
Idaho	X (within 7 calendar days of the date of the arraignment on the indictment)			
Kansas	X (no later than 30 days after arraignment)			
Kentucky Western		X (in time for effective use at trial)		
Louisiana Western	X (not less than 7 days prior to trial)			
Massachusetts[6]	X (within 28 days of arraignment or within 14 days of receipt by the government of a written statement by the defendant that no waiver will be filed)			

District	**Group A**[2] Time frame applies to both disclosure of *Brady* (exculpatory) and *Giglio* (impeachment) material	**Group B**[3] Time frame applies only to disclosure of *Brady* (exculpatory) material	**Group C**[4] Time frame applies only to disclosure of *Giglio* (impeachment) material	**Group D**[5] No time frame specified in the rule
Michigan Eastern		X (within 10 days from the date of arraignment or such other date as may be set by the judge to whom the case is assigned)		
Michigan Western		X (within 21 days of the initial arraignment)	X (documents should be available for effective use at the time of trial)	
Missouri Western		X (within 10 days from the date of arraignment)	X (no later than 15 days prior to trial)	
Nebraska		X (as soon as practicable upon arraignment of defendant and entry of a plea of not guilty)		
New Hampshire	X (at least 21 days before trial)			
New Jersey		X (within 10 days from the date hereof—the order of discovery and inspection)		

District	**Group A**[2] Time frame applies to both disclosure of *Brady* (exculpatory) and *Giglio* (impeachment) material	**Group B**[3] Time frame applies only to disclosure of *Brady* (exculpatory) material	**Group C**[4] Time frame applies only to disclosure of *Giglio* (impeachment) material	**Group D**[5] No time frame specified in the rule
New Mexico				X (rule refers to case law—"by the time required by the applicable law")
New York Northern		X (14 days after arraignment or on a date the court otherwise sets for good cause shown)	X (not less than 14 days prior to the start of jury selection, or on a date the court sets otherwise for good cause shown.)	
North Carolina Eastern		X (at the pretrial conference which shall take place within 21 days after indictment or initial appearance, whichever comes later)		
North Carolina Middle				X
North Dakota				X
Northern Mariana Islands		X (at pretrial conference held on request of any party or on court's motion)		

District	**Group A**[2] Time frame applies to both disclosure of *Brady* (exculpatory) and *Giglio* (impeachment) material	**Group B**[3] Time frame applies only to disclosure of *Brady* (exculpatory) material	**Group C**[4] Time frame applies only to disclosure of *Giglio* (impeachment) material	**Group D**[5] No time frame specified in the rule
Oklahoma Western		X (at discovery conference to be held within 10 days of the appearance before Magistrate Judge where a plea of not guilty was entered)		
Pennsylvania Western		X (at time of arraignment)		
Tennessee Eastern	X (in time for use at trial[7])			
Tennessee Middle		X (on or before 14 days from the date of the arraignment of a defendant)		
Texas Western	X (14 days after arraignment; or if the defendant has waived arraignment, within 14 days after the latest scheduled arraignment date[8])			
Vermont		X (within 14 days of arraignment)	X (not less than 14 days prior to the start of jury selection)	

District	**Group A**[2] Time frame applies to both disclosure of *Brady* (exculpatory) and *Giglio* (impeachment) material	**Group B**[3] Time frame applies only to disclosure of *Brady* (exculpatory) material	**Group C**[4] Time frame applies only to disclosure of *Giglio* (impeachment) material	**Group D**[5] No time frame specified in the rule
Washington Western		X (at discovery conference to be held within 14 days of every arraignment at which defendant enters a plea of not guilty)		
West Virginia Northern		X (within 10 days of arraignment or filing of an information and indictment)		
West Virginia Southern	X (within 14 days from the date of the "Arraignment Order and Standard Discovery Request Form" required to be entered at arraignment on an indictment, or on an information or complaint in a misdemeanor case)			
Wisconsin Eastern		X (at arraignment)		

1. This table identifies and categories the time frame for pretrial disclosure of *Brady* and/or *Giglio* evidence (if any) in the thirty-eight local rules or orders adopting language either codifying, altering or supplementing one or more of the constitutional tenets established by *Brady v. Maryland* and its progeny cases (e.g., *Giglio*).

2. Fourteen districts have a local rule and/or order that establishes a time frame that applies to the pretrial disclosure of both *Brady* (exculpatory) material and/or *Giglio* (impeachment) evidence. For identification of the specific time frames applied in these fourteen rules or orders, *see* Table 2A.

3. Twenty-one districts have a local rule and/or order that establishes a time frame that only applies to the pretrial disclosure of *Brady* (exculpatory) material/evidence. For identification of the specific time frames applied in these twenty-one rules or orders, *see* Table 2B.

4. Seven of the twenty-one districts that have a local rule or order with a timing provision for disclosing exculpatory material have a separate time frame that only governs the pretrial disclosure of *Giglio* (impeachment) evidence/material. For identification of the specific time frames applied in these seven rules or orders, *see* Table 2C.

5. Three of the thirty-eight local rules or orders requiring pretrial disclosure of exculpatory and/or impeachment material do not establish a disclosure time frame for either type of evidence.

6. D. Mass. L. R. 116.2(B) establishes different disclosure time frames for different categories of exculpatory material. Although pretrial disclosure of exculpatory and/or impeachment information could potentially fall within time frames requiring disclosure within twenty-eight days of arraignment or no later than twenty-one days before trial, the time frame requiring disclosure within twenty-eight days of arraignment was listed in this table because the rule specifically provides that "[i]f an item of exculpatory information can reasonably be deemed to fall into more than one of the foregoing categories, it shall be deemed for purposes of determining when it must be produced to fall into the category which requires the earliest production." L.R. 116.2(B)(1)(2) & (5).

7. E.D. Tenn. Discovery and Scheduling Order references *United States v. Presser*, 844 F.2d 1275 (6th Cir. 1988), for the timing of disclosure of exculpatory and impeachment evidence.

8. W.D. Tex. Rule CR-16 is the only rule or order, except for D. Mass. L. R. 116.2(b), that addresses disclosure of exculpatory and impeachment material prior to other court proceedings other than trial (i.e., pretrial release or detention hearing—no later than commencement of the hearing; any other pretrial hearing—not later than forty-eight hours before the hearing). Rule CR-16(b)(1)(A) & (B).

Appendix B

Tables 2A–2C: Comparison of Time Frames for Disclosure in the District Court Local Rules and Orders Requiring Disclosure of Exculpatory and Impeachment Material[1]

	TABLE 2A: Time frame for disclosure of *Brady* and *Giglio* evidence/material								
District	At arraignment	Within 5 days after arraignment	Within 7 days after arraignment	Within 14 days after arraignment	Within 28 days after arraignment	Within 30 days after arraignment	At least 21 days before trial	Not less than 7 days prior to trial	In time for effective use at trial
Alabama Middle	X								
Alabama Southern	X								
Arkansas Eastern									X
Connecticut				X					
Florida Northern		X							
Florida Southern				X					
Idaho			X						
Kansas						X			
Louisiana Western								X	
Massachusetts[2]					X				
New Hampshire							X		
Tennessee Eastern									X
Texas Western				X					
West Virginia Southern				X					

		TABLE 2B: Time frame for disclosure of only *Brady* (exculpatory) material[3]											
District	At arraignment	As soon as reasonably possible	As soon as practicable upon arraignment and entry of guilty plea	Within 7 days after arraignment	Within 10 days after arraignment	Within 10 days after not guilty plea entered	Within 14 days after arraignment	Within 14 days after not guilty plea	Within 21 days after arraignment	Within 21 days after indictment or initial appearance, whichever comes later	Within 10 days from order of discovery and inspection	At pretrial conference held on any party's request or court's motion	In time for effective use at trial
California Northern								X					
Georgia Middle		X											
Georgia Northern													X
Georgia Southern				X									
Hawaii				X									
Kentucky Western													X
Michigan Eastern					X								
Michigan Western									X				
Missouri Western					X								
Nebraska			X										
New Jersey											X		
New York Northern							X						
North Carolina Eastern[4]										X			

		TABLE 2B: Time frame for disclosure of <u>only</u> *Brady* (exculpatory) material[3]											
District	At arraignment	As soon as reasonably possible	As soon as practicable upon arraignment and entry of guilty plea	Within 7 days after arraignment	Within 10 days after arraignment	Within 10 days after not guilty plea entered	Within 14 days after arraignment	Within 14 days after not guilty plea	Within 21 days after arraignment	Within 21 days after indictment or initial appearance, whichever comes later	Within 10 days from order of discovery and inspection	At pretrial conference held on any party's request or court's motion	In time for effective use at trial
Northern Mariana Islands												X	
Oklahoma Western						X							
Pennsylvania Western	X												
Tennessee Middle							X						
Vermont							X						
Washington Western							X						
West Virginia Northern					X								
Wisconsin Eastern	X												

	TABLE 2C: Time frame for disclosure of only *Giglio* (impeachment) material					
District	Evening before witness's anticipated testimony	No later than production of Jenck's Act statements	As ordered by the court	No later than 15 days prior to trial	Not less than 14 days prior to jury selection	In time for effective use at trial
Georgia Middle	X					
Georgia Northern		X				
Hawaii			X			
Michigan Western						X
Missouri Western				X		
New York Northern					X	
Vermont					X	

1. As shown in Table 2 *infra*, except for three districts (D.N.M., M.D.N.C., D.N.D.), all of the "broader" disclosure rules and orders in the remaining thirty-five districts establish a specific pretrial time frame in which the government must disclose to the defendant *Brady* (exculpatory) material and/or *Giglio* (impeachment) material. Based upon explicit language in these rules and orders, a disclosure time frame was applied to both exculpatory and impeachment material in fourteen districts, and only to disclosure of exculpatory material in twenty-one districts. In seven of the twenty-one districts with a timing requirement for disclosing only exculpatory material, the districts' rule and/or order also has a separate time frame that applies only to the disclosure of impeachment material. Tables 2A, 2B, and 2C identify the different time frames imposed by the rules and orders in each of these three categories of districts.

2. D. Mass. L. R. 116.2(B) establishes different disclosure time frames for different categories of exculpatory material. Although pretrial disclosure of exculpatory and/or impeachment information could potentially fall within time frames requiring disclosure within twenty-eight days of arraignment or no later than twenty-one days before trial, the time frame requiring disclosure within twenty-eight days of arraignment was listed in this table because the rule specifically provides that "[i]f an item of exculpatory information can reasonably be deemed to fall into more than one of the foregoing categories, it shall be deemed for purposes of determining when it must be produced to fall into the category which requires the earliest production." L.R. 116.2(B)(1)(2) & (5).

3. Seven of the twenty-one districts with time frames for disclosure of exculpatory material only also have a separate timing provision that establishes a different time frame for disclosure of impeachment material. *See* Table 2C, which identifies the specific time frames that apply only to disclosure of impeachment material.

Appendix B

Table 3: Elimination of the *Brady* Materiality Requirement in Local Rules and Orders Requiring Disclosure of Exculpatory and Impeachment Information[1]

District	Group A Explicit elimination of *Brady* materiality requirement[2]	Group B Implicit elimination of *Brady* materiality requirement[3]
Alabama Middle	**X** At arraignment, or on a date otherwise set by the court for good cause shown, the government shall tender to defendant . . . All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, **without regard to materiality**, within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963). M.D. Ala., Standing Order on Criminal Discovery.	
Alabama Southern	**X** At arraignment, or on a date otherwise set by the court for good cause shown, the government shall tender to defendant. . . All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, **without regard to materiality**, within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963). S.D. Ala., L. R. 16.13.	
Arkansas Eastern		
California Northern		**X** Four days prior to the pretrial conference, parties must file a pretrial conference statement addressing the "disclosure of exculpatory or other evidence favorable to the defendant on the issue of guilt or punishment." N.D. Cal., Crim. L. R. 16-1 and 17.1-1.
Connecticut		
Florida Northern	**X** The government's attorney shall provide . . . within five days after the defendant's arraignment, or promptly after acquiring knowledge thereof . . . All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, **without regard to materiality**, that is within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Agurs,* 427 U.S. 97 (1976). N.D. Fla., Rule 26.3.	

District	**Group A** Explicit elimination of *Brady* materiality requirement[2]	**Group B** Implicit elimination of *Brady* materiality requirement[3]
Florida Southern		
Georgia Middle		
Georgia Northern		
Georgia Southern		**X** Upon request, the government shall permit defendant's attorney to inspect and copy or photograph "any evidence favorable to the defendant." S.D. Ga., L. Crim. R. 16.
Hawaii		
Idaho		
Kansas		
Kentucky Western		
Louisiana Western		
Massachusetts		
Michigan Eastern		
Michigan Western		
Missouri Western		
Nebraska		
New Hampshire		
New Jersey		
New Mexico		
New York Northern		
North Carolina Eastern		**X** Upon request of counsel for defendant, the Government shall permit the counsel for defendant to inspect, copy or photograph "any exculpatory evidence." E.D.N.C., Rule 16.1.
North Carolina Middle		**X** Discovery motions filed by a defendant who is represented by counsel must include a statement that counsel has "fully reviewed the government's case file" before bringing the motion or a statement that such file is not available for counsel's review. M.D.N.C., L. Crim. R. 16.1.
North Dakota		

District	**Group A** Explicit elimination of *Brady* materiality requirement[2]	**Group B** Implicit elimination of *Brady* materiality requirement[3]
Northern Mariana Islands		
Oklahoma Western		
Pennsylvania Western		**X** The government shall notify the defendant of the existence of "exculpatory evidence," and permit its inspection and copying by the defendant. W.D. Pa., L. Crim. R. 16.
Tennessee Eastern		
Tennessee Middle		
Texas Western		
Vermont		
Washington Western		
West Virginia Northern		
West Virginia Southern		**X** On behalf of the defendant, the government is requested to disclose to defendant "all evidence favorable to defendant, including impeachment evidence," and to allow defendant to inspect, copy or photograph such evidence. S.D. W. Va., L. R. Crim. P. 16.1 and Arraignment Order and Standard Discovery Requests.
Wisconsin Eastern		**X** If the government is following the "open file policy" it must disclose . . . "all exculpatory material." E.D. Wis., Crim. L. R. 16.

1. This table identifies the local rules and orders that explicitly or implicitly require the disclosure of exculpatory or impeachment material *without regard to materiality* in the thirty-eight districts with a local rule and/or order adopting language either codifying, altering or supplementing one or more of the constitutional tenets established by *Brady v. Maryland* and its progeny cases (e.g., *Giglio*).

2. Three districts (M.D. Ala., S.D. Ala., N.D. Fla.) have rules or orders that explicitly require disclosure of exculpatory material "without regard to materiality," while also requiring the disclosure of information "favorable to the defendant on the issues of guilt or punishment" to be "within the scope of *Brady v. Maryland.*" The potential for confusion exists because this language seems to be inconsistent if one interprets "within the scope of *Brady v. Maryland*" to include the *Brady* materiality requirement.

3. Seven local rules or orders implicitly suggest that *Brady* materiality is not required because the rule establishes an open-ended scope of disclosure by broadly requiring disclosure of "any exculpatory evidence" or "any evidence favorable to the defendant," with no mention of materiality, *Brady v. Maryland*, or any of the *Brady* progeny cases.

Appendix B

Table 4: "Defense Request" Disclosure Prerequisite in District Court Rules and Orders Requiring Disclosure of Exculpatory and Impeachment Information[1]

	Formal request by defendant for *Brady* or *Giglio* material		**Formal request by defendant for Fed. R. Crim. P. 16 discovery material**		
District	**Group A** Required[2]	**Group B** Not required[3]	**Group 1** Required[4]	**Group 2** Not required[5]	**Group 3** Unable to determine[6]
Alabama Middle		X (implicit)		X (implicit)	
Alabama Southern		X (implicit)		X (implicit)	
Arkansas Eastern		X (explicit)	X		
California Northern		X (implicit)		X (implicit)	
Connecticut		X (implicit)			X
Florida Northern		X (implicit)	X		
Florida Southern		X (implicit)			X
Georgia Middle	X		X		
Georgia Northern	X		X		
Georgia Southern	X		X		
Hawaii		X (explicit)		X (explicit)	
Idaho		X (implicit)	X		
Kansas		X (implicit)		X (explicit)	
Kentucky Western		X (implicit)	X		

District	Formal request by defendant for *Brady* or *Giglio* material		Formal request by defendant for Fed. R. Crim. P. 16 discovery material		
	Group A Required[2]	**Group B** Not required[3]	**Group 1** Required[4]	**Group 2** Not required[5]	**Group 3** Unable to determine[6]
Louisiana Western		X (implicit)			X
Massachusetts		X (explicit)		X (implicit)	
Michigan Eastern	X		X		
Michigan Western		X (implicit)	X		
Missouri Western		X (implicit)	X		
Nebraska		X (implicit)	X		
New Hampshire		X (explicit)		X (explicit)	
New Jersey		X (implicit)			X
New Mexico		X (implicit)		X (explicit)	
New York Northern		X (implicit)		X (implicit)	
North Carolina Eastern	X		X		
North Carolina Middle		X (implicit)			X
North Dakota		X (implicit)	X		
Northern Mariana Islands		X (implicit)			X
Oklahoma Western		X (implicit)			X
Pennsylvania Western		X (implicit)	X		
Tennessee Eastern		X (implicit)			X

	Formal request by defendant for *Brady* or *Giglio* material		**Formal request by defendant for Fed. R. Crim. P. 16 discovery material**		
District	**Group A** Required[2]	**Group B** Not required[3]	**Group 1** Required[4]	**Group 2** Not required[5]	**Group 3** Unable to determine[6]
Tennessee Middle		X (implicit)			X
Texas Western		X (explicit)		X (explicit)	
Vermont		X (implicit)		X (implicit)	
Washington Western	X		X		
West Virginia Northern		X (implicit)	X		
West Virginia Southern		X (implicit)			
Wisconsin Eastern		X (implicit)	X[7]	X (explicit)[8]	

1. This table identifies whether the thirty-eight local rules or orders adopting language either codifying, altering or supplementing one or more of the constitutional tenets established by *Brady v. Maryland* and its progeny cases (e.g., *Giglio*) explicitly require the defendant to make a formal request for *Brady* and/or *Giglio* material (contrary to Supreme Court case law interpreting *Brady*) and/or whether the local rules or orders explicitly state that defendant does not have to make a formal request to receive Fed. R. Crim. P. 16(a) disclosures from the government (contrary to the defense request prerequisite required by Fed. R. Crim. P. 16). First, each district's local rule and/or order is placed in either Group A or B depending on whether the local rule or order addresses whether or not the defendant is required to make a formal request for *Brady/Giglio* material or "exculpatory" and/or "impeachment" material. Next, each local rule or order is also placed into either Group 1, 2, or 3, depending on whether the local rule addresses whether or not the defendant is required to make a formal request for Fed. R. Crim. P. 16(a) discovery material.

2. Six districts have a rule and/or order that explicitly requires the defendant to make a formal request for *Brady* and/or *Giglio* material or "exculpatory" and/or "impeachment" material.

3. Rule and/or order explicitly states that the defendant does not have to make a formal request for *Brady* and/or *Giglio* material [identified as "(explicit)"—five districts]; or the rule and/or order implicitly negates the need for a formal request from defendant for *Brady* and/or *Giglio* material by specifically requiring disclosure by the government of *Brady* and/or *Giglio* information or "exculpatory" or "impeachment" material within a specified time frame with no mention of whether a defense request is needed [identified as "(implicit)"—twenty-seven districts].

4. Seventeen districts have a rule and/or order that explicitly requires the defendant to make a formal request for Fed. R. Crim. P. 16(a) material.

5. Rule and/or order explicitly states that defendant does not have to make a formal request for Fed. R. Crim. P. 16(a) discovery material [identified as "(explicit)"—six districts)]; or the rule and/or order implicitly negates the need for a formal request from defendant for Rule 16(a) material by specifically requiring disclosure by the government of Rule 16(a) material within a specified time frame with no mention of whether a defense request is needed [identified as "(implicit)"—six districts]. These twelve districts can be considered part of a grouping of districts referred to as "automatic disclosure districts"—the government must disclose all required Rule 16(a) discovery material to the defendant regardless of whether the defense has requested it, including any exculpatory and impeachment material required to be disclosed pursuant to *Brady* and *Giglio* as defined in the rule or order.

6. Unable to determine because the rule or order does not specifically address Fed. R. Crim. P. 16(a) disclosure by the government.

7. Defense request needed for disclosure of materials listed in Fed. R. Crim. P. 16(a)(1)(E)—documents and objects. E.D. Wis. Crim. L.R. 16(a)(2).

8. Defense request not needed for disclosure of all information and material listed in Fed. R. Crim. P. 16(a)(1)(A), (B), (C), (D), and (F). E.D. Wis. Crim. L.R. 16(a)(2).

Appendix C: Tables

Appendix C: Contents

Table 1
Response Rates to the Survey

	All Judges[1]	Chief District Judges	Active District Judges	Senior District Judges	Magistrate Judges	All Attorneys	Federal Defenders	Private Attorneys	U.S. Attorneys Offices
Surveys Sent	1,505	91	493	338	583	16,016	1,290	14,726	93
Surveys Received	644	51	238	115	240	5,159	612	4,547	85
Response Rate[1]	43%	56%	48%	34%	41%	32%	47%	31%	91%

[1] Three of the surveys received from judges each represented the responses of an entire district or a group of judges within a district. These surveys and the judges they represent are excluded from the table and the calculation of the response rate.

Table 2
Judges' Status

Judge Status	
Chief District Judge (*n*=47)	7%
Active District Judge (*n*=236)	37%
Senior District Judge (*n*=114)	18%
Magistrate Judge (*n*=236)	37%

Table 3
Judges' Years on the Bench

District Judges (*n*=397)

	Less Than 5 Years	5 – 10 Years	11 – 15 Years	More Than 15 Years
Years	10%	25%	17%	48%

Magistrate Judges (*n*=235)

	Less Than 5 Years	5 – 10 Years	11 – 15 Years	More Than 15 Years
Years	27%	23%	17%	33%

Table 4
Attorney Status

Attorney Status	
Private Attorney (*n*=4,547)	88%
Federal Defender (*n*=612)	12%

Table 5
Attorneys' Years of Experience

	Mean	Median
Private Attorney (*n*=4,531)	23.7 years	24 years
Federal Defender (*n*=611)	19.5 years	19 years

Table 6
Does your district have a local rule, standing order, or other policy requiring disclosure by the prosecution to the defense?

	All Judges (*n*=633)	District Judges (*n*=397)	Magistrate Judges (*n*=236)	All Attorneys (*n*=5,519)	Federal Defenders (*n*=612)	Private Attorneys (*n*=4,547)	U.S. Attorney Offices (*n*=85)
Yes: Rule, Order, or Policy	36%	35%	37%	38%	34%	39%	47%

Table 7
Are there significant differences between your local rule, order, or policy and Rule 16?

	All Judges (*n*=220)	District Judges (*n*=135)	Magistrate Judges (*n*=85)	All Attorneys (*n*=1,935)	Federal Defenders (*n*=204)	Private Attorneys (*n*=1,731)	U.S. Attorney Offices (*n*=40)
Yes: Significant Differences	25%	25%	24%	34%	38%	33%	25%

Table 8

Do the federal prosecutors in your district understand their pretrial discovery and disclosure obligations pursuant to local rule or, if no local rule, their constitutional disclosure obligations?

Judges	**Local Rule**			**No Local Rule**		
	All Judges (*n*=225)	District Judges (*n*=138)	Magistrate Judges (*n*=87)	All Judges (*n*=403)	District Judges (*n*=256)	Magistrate Judges (*n*=147)
Always	47%	50%	41%	47%	51%	40%
Usually	51%	48%	55%	48%	45%	53%
Sometimes	3%	2%	3%	4%	4%	5%
Rarely	-	-	-	<1%	<1%	1%
Never	-	-	-	-	-	-

Defense Attorneys	**Local Rule**			**No Local Rule**		
	All Attorneys (*n*=1,959)	Federal Defenders (*n*=207)	Private Attorneys (*n*=1,752)	All Attorneys (*n*=3,184)	Federal Defenders (*n*=403)	Private Attorneys (*n*=2,781)
Always	23%	3%	26%	12%	2%	13%
Usually	59%	59%	59%	48%	33%	50%
Sometimes	15%	28%	13%	28%	41%	26%
Rarely	3%	9%	3%	11%	22%	10%
Never	<1%	-	<1%	<1%	1%	<1%

U.S. Attorneys	**Local Rule**	**No Local Rule**
	U.S. Attorney Offices (*n*=40)	U.S. Attorney Offices (*n*=45)
Always	80%	78%
Usually	20%	22%
Sometimes	-	-
Rarely	-	-
Never	-	-

Table 9
Do federal prosecutors in your district follow a consistent approach to disclosure?

	Local Rule			No Local Rule		
	All Judges (*n*=225)	District Judges (*n*=138)	Magistrate Judges (*n*=87)	All Judges (*n*=402)	District Judges (*n*=257)	Magistrate Judges (*n*=145)
Always	32%	37%	25%	35%	35%	34%
Usually	56%	54%	60%	53%	56%	48%
Sometimes	9%	7%	13%	9%	7%	14%
Rarely	2%	1%	2%	2%	2%	3%
Never	-	-	-	-	-	-

	Local Rule			No Local Rule		
	All Attorneys (*n*=1,960)	Federal Defenders (*n*=207)	Private Attorneys (*n*=1,753)	All Attorneys (*n*=3,183)	Federal Defenders (*n*=403)	Private Attorneys (*n*=2,780)
Always	16%	2%	18%	9%	1%	10%
Usually	50%	42%	52%	40%	24%	42%
Sometimes	24%	34%	22%	29%	37%	28%
Rarely	8%	18%	7%	17%	28%	16%
Never	2%	4%	2%	4%	9%	3%

Table 10
Does your district's local rule require federal prosecutors to disclose exculpatory or impeaching information without regard to materiality?

	All Attorneys (*n*=1,936)	Federal Defenders (*n*=205)	Private Attorneys (*n*=1,721)	U.S. Attorney Offices (*n*=40)
Yes: Disclosure Required	46%	23%	49%	28%

Table 11
Has elimination of the materiality requirement in your district reduced problems or confusion?

	All Attorneys (*n*=881)	Federal Defenders (*n*=48)	Private Attorneys (*n*=833)	U.S. Attorney Offices (*n*=10)
Reduced Problems in Most Cases	39%	38%	40%	10%
Reduced Problems in Some Cases	32%	27%	32%	20%
Has Not Made a Difference	23%	25%	23%	60%
Other Response	6%	10%	6%	10%

Table 12
Does your district require federal prosecutors to disclose within a fixed time after indictment or arraignment?

	All Judges (*n*=222)	District Judges (*n*=136)	Magistrate Judges (*n*=86)	All Attorneys (*n*=1,936)	Federal Defenders (*n*=206)	Private Attorneys (*n*=1,730)	U.S. Attorney Offices (*n*=40)
Yes: Fixed Time Requirement	64%	64%	64%	60%	54%	61%	58%

Table 13
Has the timing requirement in your district caused problems for federal prosecutors?

	All Judges (*n*=142)	District Judges (*n*=87)	Magistrate Judges (*n*=55)	U.S. Attorney Offices (*n*=23)
No Problems	41%	41%	40%	26%
Caused Minor Problems in Some Cases	39%	40%	38%	48%
Caused Minor Problems in Most Cases	1%	2%	-	-
Caused Serious Problems in Some Cases	3%	3%	2%	17%
Caused Serious Problems in Most Cases	-	-	-	-
No Opinion	11%	7%	16%	4%
Other Response	5%	6%	4%	4%

Table 14
Is the timing requirement in your district important to the defense?

	All Attorneys (*n*=1,160)	Federal Defenders (*n*=112)	Private Attorneys (*n*=1,048)
Timing is Very Important in Most Cases	62%	62%	62%
Timing is Very Important in Some Cases	33%	28%	33%
Timing is Not Very Important	3%	4%	3%
Other Response	3%	6%	2%

Table 15
How often in the past 5 years have you been unable to obtain cooperation from a witness because of the your district's timing requirement?

	U.S. Attorney Offices (*n*=40)
Always	-
Usually	-
Sometimes	15%
Rarely	45%
Never	40%

Table 16
Does your district require federal prosecutors to disclose before trial government witness statements that could be used to impeach?

	All Judges (*n*=217)	District Judges (*n*=134)	Magistrate Judges (*n*=83)
Yes: Disclosure is Required	61%	60%	61%

Table 17
Does your district require defense counsel to disclose before trial anticipated defense witness statements that could be used to impeach?

	All Judges (*n*=220)	District Judges (*n*=136)	Magistrate Judges (*n*=84)
Yes: Disclosure is Required	30%	26%	37%

Table 18
Number of cases in the past 5 years in which you believe your district's local rule requirements of disclosure of exculpatory information resulted in threats or harm to a prosecution witness.

	All Judges (*n*=209)	District Judges (*n*=131)	Magistrate Judges (*n*=78)
None	73%	76%	67%
1	7%	8%	6%
2 – 4	11%	10%	13%
5 – 10	7%	5%	12%
11 – 20	1%	2%	1%
More than 20	<1%	-	1%

Table 19
Number of cases in the past 5 years in which you believe your district's requirements of disclosure of *Giglio* information resulted in threats or harm to a prosecution witness.

	All Judges (*n*=211)	District Judges (*n*=134)	Magistrate Judges (*n*=77)
None	73%	73%	74%
1	5%	6%	3%
2 – 4	15%	16%	13%
5 – 10	5%	4%	8%
11 – 20	1%	1%	1%
More than 20	<1%	-	1%

Table 20
Number of cases in the past 5 years in which the prosecution requested a protective order prohibiting or delaying required disclosure based on witness safety or other security concerns.

	Local Rule			No Local Rule		
	All Attorneys (*n*=1,960)	Federal Defenders (*n*=209)	Private Attorneys (*n*=1,751)	All Attorneys (*n*=3,181)	Federal Defenders (*n*=402)	Private Attorneys (*n*=2,779)
None	52%	42%	53%	56%	49%	57%
1	15%	17%	15%	14%	14%	14%
2 – 4	24%	27%	23%	21%	27%	20%
5 – 10	6%	7%	6%	6%	7%	6%
11 – 20	2%	4%	2%	2%	1%	2%
More than 20	2%	3%	1%	1%	3%	1%

	Local Rule	No Local Rule
	U.S. Attorney Offices (*n*=40)	U.S. Attorney Offices (*n*=44)
None	38%	41%
1	3%	11%
2 – 4	18%	16%
5 – 10	20%	11%
11 – 20	8%	11%
More than 20	15%	9%

Table 21
Number of cases in the past 5 years in which you believe the government failed to provide exculpatory or *Giglio* information in compliance with the local rule.

	Local Rule			No Local Rule		
	All Attorneys (*n*=1,946)	Federal Defenders (*n*=203)	Private Attorneys (*n*=1,743)	All Attorneys (*n*=3,159)	Federal Defenders (*n*=397)	Private Attorneys (*n*=2,762)
None	52%	26%	55%	40%	16%	43%
1	15%	7%	16%	16%	11%	17%
2 – 4	22%	37%	20%	28%	35%	27%
5 – 10	7%	17%	6%	11%	26%	9%
11 – 20	1%	4%	1%	3%	7%	2%
More than 20	2%	7%	1%	2%	6%	2%

Table 22
Number of cases in the past 5 years in which you believe the suspected violation was due to materiality concerns.

	Local Rule			No Local Rule		
	All Attorneys (*n*=924)	Federal Defenders (*n*=150)	Private Attorneys (*n*=774)	All Attorneys (*n*=1,889)	Federal Defenders (*n*=332)	Private Attorneys (*n*=1,557)
None	30%	26%	31%	22%	16%	24%
1	27%	15%	29%	24%	14%	26%
2 – 4	32%	42%	30%	38%	41%	37%
5 – 10	8%	10%	7%	12%	20%	10%
11 – 20	2%	2%	1%	3%	5%	3%
More than 20	2%	5%	1%	1%	4%	<1%

Table 23
Number of cases in the past 5 years in which the defense alleged that the government failed to comply with disclosure obligations.

	Local Rule	No Local Rule
	U.S. Attorney Offices (*n*=40)	U.S. Attorney Offices (*n*=45)
None	25%	33%
1	5%	9%
2 – 4	30%	22%
5 – 10	10%	7%
11 – 20	5%	4%
More than 20	25%	24%

Table 24
Number of cases in the past 5 years in which the court concluded that the government failed to comply with disclosure obligations.

Judges	Local Rule			No Local Rule		
	All Judges (*n*=217)	District Judges (*n*=136)	Magistrate Judges (*n*=81)	All Judges (*n*=400)	District Judges (*n*=257)	Magistrate Judges (*n*=143)
None	61%	59%	65%	74%	67%	87%
1	10%	12%	6%	10%	12%	5%
2 – 4	22%	23%	21%	14%	18%	6%
5 – 10	5%	4%	7%	3%	3%	2%
11 – 20	<1%	1%	-	-	-	-
More than 20	<1%	1%	-	-	-	-

Table 24 (cont'd)

Defense Attorneys	**Local Rule**			**No Local Rule**		
	All Attorneys (*n*=1,946)	Federal Defenders (*n*=202)	Private Attorneys (*n*=1,744)	All Attorneys (*n*=3,164)	Federal Defenders (*n*=398)	Private Attorneys (*n*=2,766)
None	79%	64%	80%	78%	65%	80%
1	11%	16%	11%	12%	14%	11%
2 – 4	8%	15%	7%	8%	13%	7%
5 – 10	1%	3%	1%	2%	5%	2%
11 – 20	<1%	<1%	<1%	<1%	2%	<1%
More than 20	<1%	<1%	<1%	<1%	<1%	<1%

U.S. Attorneys	**Local Rule**	**No Local Rule**
	U.S. Attorney Offices (*n*=40)	U.S. Attorney Offices (*n*=44)
None	65%	70%
1	10%	18%
2 – 4	8%	7%
5 – 10	7%	5%
11 – 20	-	-
More than 20	-	-

Table 25
What was the nature of the most frequent violation by the government?

Judges	**Local Rule**			**No Local Rule**		
	All Judges (*n*=80)	District Judges (*n*=52)	Magistrate Judges (*n*=28)	All Judges (*n*=103)	District Judges (*n*=85)	Magistrate Judges (*n*=18)
Scope of Disclosure	26%	25%	29%	31%	32%	28%
Failure to Disclose on Time	61%	65%	54%	41%	40%	44%
Failure to Disclose at All	8%	8%	7%	19%	19%	22%
Other	5%	2%	11%	9%	9%	6%

Defense Attorneys	**Local Rule**			**No Local Rule**		
	All Attorneys (*n*=425)	Federal Defenders (*n*=76)	Private Attorneys (*n*=349)	All Attorneys (*n*=696)	Federal Defenders (*n*=138)	Private Attorneys (*n*=558)
Scope of Disclosure	29%	28%	29%	30%	25%	32%
Failure to Disclose on Time	29%	36%	28%	21%	19%	21%
Failure to Disclose at All	36%	30%	38%	44%	49%	42%
Other	6%	7%	5%	5%	7%	5%

U.S. Attorneys	**Local Rule**	**No Local Rule**
	U.S. Attorney Offices (*n*=14)	U.S. Attorney Offices (*n*=13)
Scope of Disclosure	36%	15%
Failure to Disclose on Time	43%	31%
Failure to Disclose at All	14%	46%
Other	7%	8%

Table 26
What remedial steps were taken by the court?

Judges	**Local Rule**			**No Local Rule**		
	All Judges (*n*=84)	District Judges (*n*=56)	Magistrate Judges (*n*=28)	All Judges (*n*=104)	District Judges (*n*=86)	Magistrate Judges (*n*=18)
No Action Taken	13%	9%	21%	4%	2%	11%
Ordered Immediate Disclosure	76%	80%	68%	71%	71%	72%
Ordered a Continuance	43%	43%	43%	39%	42%	28%
Excluded Evidence	12%	13%	11%	18%	21%	6%
Gave Jury Instruction	4%	5%	-	7%	8%	-
Admonished Prosecutor	21%	20%	25%	17%	17%	17%
Held Prosecutor in Contempt	-	-	-	<1%	1%	-
Reported Prosecutor to DOJ Office of Professional Responsibility	2%	4%	-	2%	1%	6%
Reported Prosecutor to the State Bar	2%	4%	-	-	-	-
Other Steps Taken	13%	13%	14%	13%	16%	-

Defense Attorneys	**Local Rule**			**No Local Rule**		
	All Attorneys (*n*=415)	Federal Defenders (*n*=73)	Private Attorneys (*n*=342)	All Attorneys (*n*=699)	Federal Defenders (*n*=138)	Private Attorneys (*n*=561)
No Action Taken	23%	32%	21%	34%	36%	34%
Ordered Immediate Disclosure	65%	55%	67%	58%	53%	60%
Ordered a Continuance	26%	33%	24%	24%	33%	22%
Excluded Evidence	9%	12%	9%	8%	11%	7%
Gave Jury Instruction	2%	1%	2%	5%	7%	5%
Admonished Prosecutor	17%	21%	16%	13%	13%	13%
Held Prosecutor in Contempt	<1%	-	<1%	<1%	-	<1%
Reported Prosecutor to DOJ Office of Professional Responsibility	<1%	-	<1%	<1%	-	<1%
Reported Prosecutor to the State Bar	<1%	-	<1%	<1%	-	<1%
Other Steps Taken	12%	14%	11%	11%	12%	10%

Table 26 (cont'd)

U.S. Attorneys	**Local Rule** U.S. Attorney Offices (n=14)	**No Local Rule** U.S. Attorney Offices (n=13)
No Action Taken	29%	23%
Ordered Immediate Disclosure	64%	54%
Ordered a Continuance	57%	23%
Excluded Evidence	50%	15%
Gave Jury Instruction	14%	8%
Admonished Prosecutor	57%	46%
Held Prosecutor in Contempt	-	-
Reported Prosecutor to DOJ Office of Professional Responsibility	7%	8%
Reported Prosecutor to the State Bar	7%	-
Other	7%	62%

Table 27
Overall satisfaction with prosecutor compliance with discovery obligations.

Judges	**Local Rule**			**No Local Rule**		
	All Judges (*n*=223)	District Judges (*n*=138)	Magistrate Judges (*n*=85)	All Judges (*n*=402)	District Judges (*n*=257)	Magistrate Judges (*n*=145)
Very Satisfied	55%	59%	48%	55%	56%	54%
Satisfied	35%	33%	39%	35%	35%	35%
Neither Satisfied nor Dissatisfied	10%	8%	13%	8%	7%	10%
Dissatisfied	<1%	<1%	-	2%	2%	2%
Very Dissatisfied	-	-	-	-	-	-

Defense Attorneys	**Local Rule**			**No Local Rule**		
	All Attorneys (*n*=1,955)	Federal Defenders (*n*=205)	Private Attorneys (*n*=1,750)	All Attorneys (*n*=3,183)	Federal Defenders (*n*=402)	Private Attorneys (*n*=2,781)
Very Satisfied	18%	5%	20%	10%	3%	11%
Satisfied	42%	31%	44%	30%	19%	32%
Neither Satisfied nor Dissatisfied	23%	31%	22%	26%	27%	26%
Dissatisfied	14%	27%	12%	26%	38%	24%
Very Dissatisfied	2%	6%	2%	7%	13%	7%

U.S. Attorneys	**Local Rule**	**No Local Rule**
	U.S. Attorney Offices (*n*=40)	U.S. Attorney Offices (*n*=45)
Very Satisfied	90%	89%
Satisfied	10%	11%
Neither Satisfied nor Dissatisfied		-
Dissatisfied		-
Very Dissatisfied		-

Table 28
Do the defense attorneys in your district understand their pretrial discovery and disclosure obligations?

Judges	**Local Rule**			**No Local Rule**		
	All Judges (*n*=224)	District Judges (*n*=138)	Magistrate Judges (*n*=86)	All Judges (*n*=399)	District Judges (*n*=257)	Magistrate Judges (*n*=142)
Always	11%	12%	9%	15%	12%	22%
Usually	67%	70%	62%	64%	67%	57%
Sometimes	18%	14%	24%	16%	16%	18%
Rarely	4%	4%	5%	4%	5%	3%
Never	-	-	-	<1%	<1%	<1%

Defense Attorneys	**Local Rule**			**No Local Rule**		
	All Attorneys (*n*=1,946)	Federal Defenders (*n*=205)	Private Attorneys (*n*=1,741)	All Attorneys (*n*=3,180)	Federal Defenders (*n*=403)	Private Attorneys (*n*=2,777)
Always	11%	8%	12%	9%	10%	9%
Usually	66%	67%	66%	63%	68%	62%
Sometimes	19%	22%	19%	24%	20%	24%
Rarely	4%	3%	4%	4%	2%	5%
Never	-	-	-	<1%	-	<1%

U.S. Attorneys	**Local Rule**	**No Local Rule**
	U.S. Attorney Offices (*n*=40)	U.S. Attorney Offices (*n*=45)
Always	3%	2%
Usually	15%	18%
Sometimes	30%	27%
Rarely	38%	53%
Never	15%	-

Table 29
Number of cases in the past 5 years in which the court concluded that defense counsel failed to comply with disclosure obligations.

Judges	**Local Rule**			**No Local Rule**		
	All Judges (*n*=214)	District Judges (*n*=136)	Magistrate Judges (*n*=78)	All Judges (*n*=399)	District Judges (*n*=255)	Magistrate Judges (*n*=144)
None	64%	57%	77%	68%	57%	88%
1	7%	8%	4%	8%	10%	4%
2 – 4	20%	25%	12%	19%	26%	6%
5 – 10	7%	7%	6%	5%	6%	2%
11 – 20	<1%	1%	-	-	-	-
More than 20	<1%	<1%	1%	<1%	1%	-

Defense Attorneys	**Local Rule**			**No Local Rule**		
	All Attorneys (*n*=1,948)	Federal Defenders (*n*=206)	Private Attorneys (*n*=1,742)	All Attorneys (*n*=3,176)	Federal Defenders (*n*=401)	Private Attorneys (*n*=2,775)
None	95%	94%	95%	97%	95%	97%
1	3%	5%	3%	3%	4%	2%
2 – 4	2%	2%	2%	<1%	<1%	<1%
5 – 10	<1%	-	<1%	<1%	-	<1%
11 – 20	<1%	-	<1%	-	-	-
More than 20	<1%	-	<1%	-	-	-

Table 29 (cont'd)

U.S. Attorneys	**Local Rule** U.S. Attorney Offices (*n*=40)	**No Local Rule** U.S. Attorney Offices (*n*=44)
None	43%	50%
1	8%	9%
2 – 4	28%	18%
5 – 10	13%	14%
11 – 20	8%	7%
More than 20	3%	2%

Table 30
What was the nature of the most frequent violation by the defense?

Judges	**Local Rule**			**No Local Rule**		
	All Judges (*n*=75)	District Judges (*n*=57)	Magistrate Judges (*n*=18)	All Judges (*n*=126)	District Judges (*n*=109)	Magistrate Judges (*n*=17)
Scope of Disclosure	11%	11%	11%	21%	21%	24%
Failure to Disclose on Time	47%	47%	44%	44%	45%	35%
Failure to Disclose at All	41%	40%	44%	33%	31%	41%
Other	1%	2%	-	2%	3%	-

Table 30 (cont'd)

Defense Attorneys	**Local Rule**			**No Local Rule**		
	All Attorneys (*n*=98)	Federal Defenders (*n*=13)	Private Attorneys (*n*=85)	All Attorneys (*n*=110)	Federal Defenders (*n*=19)	Private Attorneys (*n*=91)
Scope of Disclosure	26%	31%	25%	25%	26%	25%
Failure to Disclose on Time	43%	62%	40%	41%	37%	42%
Failure to Disclose at All	31%	8%	34%	32%	37%	31%
Other	1%	-	1%	2%	-	2%

U.S. Attorneys	**Local Rule**	**No Local Rule**
	U.S. Attorney Offices (*n*=23)	U.S. Attorney Offices (*n*=22)
Scope of Disclosure	9%	-
Failure to Disclose on Time	39%	45%
Failure to Disclose at All	48%	55%
Other	4%	-

Table 31
What remedial steps were taken by the court?

Judges	**Local Rule**			**No Local Rule**		
	All Judges (*n*=76)	District Judges (*n*=58)	Magistrate Judges (*n*=18)	All Judges (*n*=127)	District Judges (*n*=110)	Magistrate Judges (*n*=17)
No Action Taken	20%	17%	28%	14%	14%	18%
Ordered Immediate Disclosure	78%	83%	61%	76%	80%	53%
Ordered a Continuance	21%	21%	22%	18%	19%	12%
Excluded Evidence	9%	10%	6%	12%	14%	-
Gave Jury Instruction	1%	2%	-	2%	3%	-
Admonished Defense Counsel	14%	14%	17%	9%	9%	12%
Held Defense Counsel in Contempt	1%	2%	-	-	-	-
Reported Defense Counsel to the State Bar	-	-	-	-	-	-
Other	3%	-	11%	4%	4%	6%

Defense Attorneys	**Local Rule**			**No Local Rule**		
	All Attorneys (*n*=100)	Federal Defenders (*n*=14)	Private Attorneys (*n*=86)	All Attorneys (*n*=110)	Federal Defenders (*n*=19)	Private Attorneys (*n*=91)
No Action Taken	20%	21%	20%	15%	16%	14%
Ordered Immediate Disclosure	55%	57%	55%	57%	42%	60%
Ordered a Continuance	15%	14%	15%	8%	11%	8%
Excluded Evidence	28%	29%	28%	23%	26%	22%
Gave Jury Instruction	3%	-	3%	-	-	-
Admonished Defense Counsel	10%	14%	9%	8%	5%	9%
Held Defense Counsel in Contempt	-	-	-	-	-	-
Reported Defense Counsel to the State Bar	-	-	-	<1%	-	1%
Other	2%	-	2%	5%	11%	3%

Table 31 (cont'd)

U.S. Attorneys	**Local Rule** U.S. Attorney Offices (*n*=23)	**No Local Rule** U.S. Attorney Offices (*n*=22)
No Action Taken	65%	45%
Ordered Immediate Disclosure	70%	59%
Ordered a Continuance	4%	14%
Excluded Evidence	35%	41%
Gave Jury Instruction	-	-
Admonished Defense Counsel	17%	27%
Held Defense Counsel in Contempt	-	-
Reported Defense Counsel to the State Bar	-	-
Other	-	-

Table 32
Overall satisfaction with defense counsel compliance with discovery obligations.

Judges	**Local Rule**			**No Local Rule**		
	All Judges (*n*=222)	District Judges (*n*=138)	Magistrate Judges (*n*=84)	All Judges (*n*=401)	District Judges (*n*=257)	Magistrate Judges (*n*=144)
Very Satisfied	33%	36%	30%	31%	28%	37%
Satisfied	46%	48%	42%	49%	54%	39%
Neither Satisfied nor Dissatisfied	19%	15%	26%	18%	14%	24%
Dissatisfied	2%	1%	2%	2%	3%	<1%
Very Dissatisfied	-	-	-	-	-	-

Defense Attorneys	**Local Rule**			**No Local Rule**		
	All Attorneys (*n*=1,934)	Federal Defenders (*n*=206)	Private Attorneys (*n*=1,728)	All Attorneys (*n*=3,162)	Federal Defenders (*n*=402)	Private Attorneys (*n*=2,760)
Very Satisfied	24%	25%	24%	23%	27%	22%
Satisfied	50%	53%	50%	49%	52%	48%
Neither Satisfied nor Dissatisfied	25%	20%	25%	28%	21%	29%
Dissatisfied	<1%	<1%	<1%	<1%	-	<1%
Very Dissatisfied	<1%	<1%	-	<1%	-	<1%

U.S. Attorneys	**Local Rule**	**No Local Rule**
	U.S. Attorney Offices (*n*=40)	U.S. Attorney Offices (*n*=45)
Very Satisfied	-	-
Satisfied	10%	9%
Neither Satisfied nor Dissatisfied	18%	20%
Dissatisfied	43%	47%
Very Dissatisfied	30%	24%

Table 33
Do you favor amending Rule 16?

	All Judges (*n*=617)	District Judges (*n*=389)	Magistrate Judges (*n*=228)	All Attorneys (*n*=5,133)	Federal Defenders (*n*=611)	Private Attorneys (*n*=4,522)
Favor Amending Rule 16	51%	50%	54%	93%	98%	93%

Table 34
Do you favor amending Rule 16?

Judges	**Local Rule**			**No Local Rule**		
	All Judges (*n*=218)	District Judges (*n*=135)	Magistrate Judges (*n*=83)	All Judges (*n*=399)	District Judges (*n*=254)	Magistrate Judges (*n*=145)
Favor Amending Rule 16	60%	60%	60%	46%	44%	50%

Defense Attorneys	**Local Rule**			**No Local Rule**		
	All Attorneys (*n*=1,955)	Federal Defenders (*n*=209)	Private Attorneys (*n*=1,746)	All Attorneys (*n*=3,178)	Federal Defenders (*n*=402)	Private Attorneys (*n*=2,776)
Favor Amending Rule 16	92%	97%	92%	94%	99%	93%

Table 35
Do you favor amending Rule 16?

Judges	**Local Rule**				**No Local Rule**			
Status	Chief District Judge (*n*=19)	Active District Judge (*n*=84)	Senior District Judge (*n*=32)	Magistrate Judge (*n*=83)	Chief District Judge (*n*=21)	Active District Judge (*n*=149)	Senior District Judge (*n*=77)	Magistrate Judge (*n*=145)
Favor Amending Rule 16	58%	60%	63%	60%	75%	45%	32%	50%

Table 36
Do you favor amending Rule 16?

District Judges	**Local Rule**				**No Local Rule**			
Years on the Bench	Less Than 5 Years (*n*=14)	5 – 10 Years (*n*=38)	11 – 15 Years (*n*=18)	More Than 15 Years (*n*=65)	Less Than 5 Years (*n*=27)	5 – 10 Years (*n*=60)	11 – 15 Years (*n*=47)	More Than 15 Years (*n*=120)
Favor Amending Rule 16	64%	53%	67%	62%	52%	47%	62%	35%

Magistrate Judges	**Local Rule**				**No Local Rule**			
Years on the Bench	Less Than 5 Years (*n*=28)	5 – 10 Years (*n*=19)	11 – 15 Years (*n*=13)	More Than 15 Years (*n*=23)	Less Than 5 Years (*n*=34)	5 – 10 Years (*n*=33)	11 – 15 Years (*n*=26)	More Than 15 Years (*n*=51)
Favor Amending Rule 16	61%	63%	69%	52%	56%	61%	54%	35%

Table 37
Why an amendment to Rule 16 is needed.

Judges	**Local Rule**			**No Local Rule**		
	All Judges (*n*=131)	District Judges (*n*=81)	Magistrate Judges (*n*=50)	All Judges (*n*=185)	District Judges (*n*=113)	Magistrate Judges (*n*=72)
It will reduce the possibility that innocent persons will be convicted	42%	46%	36%	34%	35%	32%
Many disclosure violations pass undiscovered or without remedy	38%	37%	42%	43%	40%	47%
It will eliminate the confusion surrounding the use of materiality as a disclosure obligation	74%	75%	72%	77%	78%	76%
Current remedies for prosecutorial misconduct are rarely employed	25%	22%	30%	21%	18%	25%
It will reduce variations that currently exist in the circuits	44%	46%	40%	45%	46%	44%
Other Reasons	9%	6%	14%	8%	4%	13%

Defense Attorneys	**Local Rule**			**No Local Rule**		
	All Attorneys (*n*=1,801)	Federal Defenders (*n*=202)	Private Attorneys (*n*=1,599)	All Attorneys (*n*=2,986)	Federal Defenders (*n*=396)	Private Attorneys (*n*=2,590)
It will reduce the possibility that innocent persons will be convicted	65%	73%	64%	68%	76%	67%
Many disclosure violations pass undiscovered or without remedy	63%	77%	62%	72%	84%	70%
It will eliminate the confusion surrounding the use of materiality as a disclosure obligation	76%	86%	75%	77%	83%	76%
Current remedies for prosecutorial misconduct are rarely employed	48%	69%	46%	56%	69%	54%
It will reduce variations that currently exist in the circuits	45%	37%	46%	45%	44%	45%
Other Reasons	9%	10%	8%	11%	12%	11%

Table 38
Why an amendment to Rule 16 is *not* needed.

Judges	**Local Rule**			**No Local Rule**		
	All Judges (*n*=87)	District Judges (*n*=54)	Magistrate Judges (*n*=33)	All Judges (*n*=214)	District Judges (*n*=141)	Magistrate Judges (*n*=73)
There is no demonstrated need for change	75%	76%	73%	75%	69%	88%
The current remedies for prosecutorial misconduct are adequate	55%	52%	61%	50%	55%	38%
Recent reforms by the Department of Justice will significantly decrease disclosure violations	14%	9%	21%	15%	17%	11%
It will not address the real need for increasing the frequency and severity of sanctions for violations	5%	4%	6%	4%	3%	5%
It will not reduce the possibility that innocent persons will be convicted	8%	11%	3%	7%	9%	4%
Other Reasons	7%	9%	3%	7%	11%	1%

Defense Attorneys	**Local Rule**			**No Local Rule**		
	All Attorneys (*n*=154)	Federal Defenders (*n*=7)	Private Attorneys (*n*=147)	All Attorneys (*n*=192)	Federal Defenders (*n*=6)	Private Attorneys (*n*=186)
There is no demonstrated need for change	55%	57%	55%	52%	17%	53%
The current remedies for prosecutorial misconduct are adequate	31%	29%	31%	39%	50%	38%
Recent reforms by the Department of Justice will significantly decrease disclosure violations	11%	14%	11%	6%	-	6%
It will not address the real need for increasing the frequency and severity of sanctions for violations	12%	29%	11%	15%	17%	15%
It will not reduce the possibility that innocent persons will be convicted	6%	-	6%	5%	17%	5%
Other Reasons	6%	-	7%	8%	17%	8%

Table 39
Would eliminating the *Brady* materiality requirement result in changes in the frequency of defense motions for *Brady* violations?

	Local Rule			No Local Rule		
	All Attorneys (*n*=1,931)	Federal Defenders (*n*=204)	Private Attorneys (*n*=1,727)	All Attorneys (*n*=3,122)	Federal Defenders (*n*=393)	Private Attorneys (*n*=2,729)
Motions would increase	18%	9%	19%	20%	15%	20%
Motions would stay the same	28%	30%	28%	28%	28%	28%
Motions would decrease	48%	51%	47%	46%	46%	46%
Other	6%	9%	6%	7%	11%	6%

Table 40
Should victim or witness information be disclosed?

	All Judges (*n*=619)	District Judges (*n*=390)	Magistrate Judges (*n*=229)	All Attorneys (*n*=5,134)	Federal Defenders (*n*=609)	Private Attorneys (*n*=4,525)
Disclose this information	33%	33%	33%	88%	90%	88%
Don't Know	24%	23%	26%	6%	6%	6%

Table 41
Should victim or witness information be disclosed?

Judges	**Local Rule**			**No Local Rule**		
	All Judges (*n*=220)	District Judges (*n*=135)	Magistrate Judges (*n*=85)	All Judges (*n*=399)	District Judges (*n*=255)	Magistrate Judges (*n*=144)
Disclose this information	28%	27%	28%	36%	35%	36%
Don't Know	27%	25%	29%	12%	22%	24%

Defense Attorneys	**Local Rule**			**No Local Rule**		
	All Attorneys (*n*=1,960)	Federal Defenders (*n*=208)	Private Attorneys (*n*=1,752)	All Attorneys (*n*=3,174)	Federal Defenders (*n*=401)	Private Attorneys (*n*=2,773)
Disclose this information	89%	92%	89%	87%	89%	87%
Don't Know	5%	5%	5%	6%	6%	6%

Table 42
Should allegations of misconduct by law enforcement witnesses be disclosed?

	All Judges (*n*=621)	District Judges (*n*=391)	Magistrate Judges (*n*=230)	All Attorneys (*n*=5,124)	Federal Defenders (*n*=609)	Private Attorneys (*n*=4,515)
Disclose this information	36%	36%	36%	88%	93%	88%
Don't Know	13%	12%	15%	3%	2%	3%

Table 43
Should allegations of misconduct by law enforcement witnesses be disclosed?

Judges	**Local Rule**			**No Local Rule**		
	All Judges (*n*=220)	District Judges (*n*=135)	Magistrate Judges (*n*=85)	All Judges (*n*=401)	District Judges (*n*=256)	Magistrate Judges (*n*=145)
Disclose this information	35%	37%	33%	36%	35%	37%
Don't Know	14%	11%	19%	12%	12%	12%

Defense Attorneys	**Local Rule**			**No Local Rule**		
	All Attorneys (*n*=1,953)	Federal Defenders (*n*=208)	Private Attorneys (*n*=1,745)	All Attorneys (*n*=3,171)	Federal Defenders (*n*=401)	Private Attorneys (*n*=2,770)
Disclose this information	88%	93%	88%	88%	94%	87%
Don't Know	3%	3%	3%	3%	2%	3%

Table 44
Should all impeachment information concerning defense witnesses be disclosed?

	All Judges (*n*=617)	District Judges (*n*=387)	Magistrate Judges (*n*=230)	All Attorneys (*n*=5,112)	Federal Defenders (*n*=606)	Private Attorneys (*n*=4,506)
Disclose this information	52%	54%	48%	42%	32%	44%
Don't Know	19%	16%	24%	11%	13%	10%

Table 45
Should all impeachment information concerning defense witnesses be disclosed?

Judges	**Local Rule**			**No Local Rule**		
	All Judges (*n*=219)	District Judges (*n*=134)	Magistrate Judges (*n*=85)	All Judges (*n*=398)	District Judges (*n*=253)	Magistrate Judges (*n*=145)
Disclose this information	50%	51%	47%	53%	55%	49%
Don't Know	22%	16%	32%	17%	15%	20%

Defense Attorneys	**Local Rule**			**No Local Rule**		
	All Attorneys (*n*=1,943)	Federal Defenders (*n*=206)	Private Attorneys (*n*=1,737)	All Attorneys (*n*=3,169)	Federal Defenders (*n*=400)	Private Attorneys (*n*=2,769)
Disclose this information	44%	31%	45%	42%	33%	43%
Don't Know	11%	13%	11%	11%	14%	10%

Appendix D: Methods

Sample Identification and Selection

Judges

We selected to receive the survey all district and magistrate judges on the Administrative Office's email list available to court users on the Administrative Office's JNET. The list of district judges includes chief district judges, active district judges, and senior district judges. We selected all district and magistrate judges in order to gather as much information as possible on judicial experience with Rule 16 and with the various local rules, standing orders, and policies governing disclosure.

Attorneys

We selected a sample of private defense attorneys and Federal Defenders (including Community Defenders) through this sequence of steps. We first selected from data available to the Center all criminal cases with retained defense counsel (i.e., no pro se cases) terminated in calendar year 2009 in all districts. From this set of cases, we selected the lead counsel or, in several districts that do not identify a lead counsel, the "Attorney to Be Noticed." If there were multiple defendants, we selected all lead counsel for all defendants. We next separated the private attorneys from the Federal Defenders so that each set of attorneys could be processed individually. From the set of private attorneys, we eliminated duplicate entries (i.e., attorneys associated with more than one case) and eliminated attorneys who did not have an email address or an individual email address. Attorneys in the latter category typically had an email address that went to a firm's general mailbox and did not identify the attorney specifically. In some cases, however, where it was clear that the firm was an attorney in solo practice, we kept the attorney in the sample. We processed the Federal Defenders in a different fashion. Except for duplicate entries, we did not eliminate any Federal Defenders from the sample. If a Federal Defender did not have an email address in the database, or the email address went to a group mailbox, we searched databases on the Administrative Office's JNET to find their individual email addresses. In a very few cases, where these databases did not produce a result, we fashioned an email address based on the rules used to construct Federal Defender email addresses generally. The end result was a sample of 14,726 private attorneys with individual email addresses and 1,290 Federal Defenders with individual email addresses.

We considered sampling from among these two groups of attorneys, but decided against further sampling for several reasons. First, we could not be sure of the response from the private attorneys. Past experience at the Center has shown

that response rates among private attorneys can be as low as 10 percent. Smaller districts, with fewer attorneys, might not be represented in sufficient numbers and we might lose the experiences of attorneys practicing in smaller districts. Second, with respect to Federal Defenders, our search of the JNET databases showed that there is some level of turnover in the Federal Defender offices. Since we could not be sure how many Federal Defenders in our sample were still Federal Defenders, we decided that the prudent course was to survey all. Again, we were not sure what response rate to expect and, by including all, we helped ensure that smaller districts would be represented among the survey responses.

United States Attorneys

At the request of the Department of Justice, we sent the online survey link to a contact person in the Department who forwarded the link to each U.S. Attorney's office. According to this agreement, an official in that office would complete the first two sections of the survey, to represent the collective experiences of the attorneys in the office. Consequently, we would have one survey from each U.S. Attorney's office that responded. The Department of Justice completed the third section of the survey, dealing with possible amendments to Rule 16, as a means of expressing the policy views of the Department.

Survey Administration and Data Preparation

Online Survey

Each prospective respondent received an email that explained the purpose of the survey and a link to the online survey designed for their group. The surveys were designed to be completed online and survey responses were accumulated in a database for later analysis. The survey software also kept track of who had responded to the survey, so that a reminder could be sent to those who had not responded. We sent the initial email to prospective respondents during the week of June 1, 2010, and a reminder several weeks later.

Data Preparation

Our preparation of the three data sets for analysis began in mid-July. In addition to the usual data processing that must be performed on any set of raw data, we had to resolve several issues about which surveys to use in the final analysis. First, each of the three data sets contained duplicate entries that resulted from one or more unsuccessful attempts by a respondent to complete the survey online before a final, successful completion of the survey. We identified these respondents and removed the earlier, incomplete attempts from the final data set. Another type of duplicate entry was unique to the attorney data set and occurred when survey re-

cipients forwarded the email to other attorneys who also completed the survey. Since these latter attorneys were not in our sample, we identified and eliminated their responses from the final dataset.

Second, we received emails from two chief district judges that a representative judge would respond for all district and magistrate judges in their respective districts. We received an email from a third chief district judge that a representative magistrate judge would respond for all magistrate judges in that district. Many of the questions in the judge survey deal with the respondent's experiences on the bench and, because we did not know if district representatives would report their experiences, an amalgam of judges' experiences, or something in between, we eliminated these three surveys from the results presented here.

After resolving these data issues, we had responses from 644 district and magistrate judges, 5,159 attorneys, and 85 U.S. Attorney offices. Appendix C, Table 1, contains a breakdown of the response rates for these three groups.

Appendix E: Survey Instruments

E1: A National Survey of District and Magistrate Judges
E2: A National Survey of Criminal Defense Attorneys
E3: A National Survey of Federal Prosecutors

RULE 16 PRETRIAL DISCLOSURE PROCEDURES AND PRACTICES

A NATIONAL SURVEY OF DISTRICT AND MAGISTRATE JUDGES

For the Advisory Committee on Criminal Rules of the
Judicial Conference of the United States

Administered by the Federal Judicial Center

Demographic Information

The information in this section will help us to analyze survey responses in terms of which respondents are from large or small districts; those who have been on the bench for a long or relatively short time; as well as by judge type: active, senior, or magistrate judge. No individual judge will be identified in any of the analyses or reports we produce.

Your District: _____

1) What is your current status?

   a) Chief district judge
   b) Active district judge
   c) Magistrate judge
   d) Senior judge

2) How long have you been on the federal bench?

   a) Less than 5 years
   b) 5-10 years
   c) 11-15 years
   d) More than 15 years

3) Does a local rule, standing order or other policy in your district require disclosure by the prosecution to the defense that extends beyond the requirements of *Brady v. Maryland*, *Giglio v. United States,* Rule 16 (Discovery and Inspection), or Rule 26.2 (Producing a Witness's Statement)? For example, your district may have specific time requirements for disclosure or mandate automatic disclosure.

   a) If yes, [**Go to Part I**]
   b) If no, [**Go to PART II**]

I. DISTRICT SPECIFIC LOCAL COURT RULES, STANDING ORDERS OR OTHER POLICIES REGARDING PRETRIAL DISCLOSURE

This section seeks your views on pretrial disclosure procedures and practices by federal prosecutors and defense counsel in your district, including questions addressing your district's local rule or standing order regarding disclosure in criminal cases.

4) In your opinion, do federal prosecutors who appear before you understand their pretrial discovery and disclosure obligations pursuant to your district's local rule or standing order?

   a) Always
   b) Usually
   c) Sometimes
   d) Rarely
   e) Never

5) In your opinion, do federal prosecutors who appear before you follow a consistent policy or approach with respect to their pretrial discovery and disclosure obligations pursuant to your district's local rule or standing order?

   a) Always
   b) Usually
   c) Sometimes
   d) Rarely
   e) Never

6) In your opinion, do federal prosecutors who appear before you understand their federal constitutional disclosure obligations, i.e., *Brady v. Maryland*, *Giglio v. United States*, and their progeny?

   a) Always
   b) Usually
   c) Sometimes
   d) Rarely
   e) Never

7) In your opinion, in practice, are the differences between your local rule or standing order and the requirements of the United States Constitution and Rule 16 significant or not significant?

   a) Significant

   b) Not Significant

   Please explain:

8) Does your district require federal prosecutors to disclose to the defense exculpatory or *Giglio* information within a fixed time after indictment or arraignment?

   a) Yes [**Go to Question 9**]
   b) No [**Go to Question 10**]

9) Do you believe that this timing requirement has caused problems for the prosecution? Please choose the response that best represents your views.

   a) The timing of disclosure has caused minor problems in some cases.
   b) The timing of disclosure has caused minor problems in most cases.
   c) The timing of disclosure has caused serious problems in some cases.
   d) The timing of disclosure has caused serious problems in most cases.
   e) The timing has caused no problems.
   f) No opinion.
   g) Other: Please explain.

10) Does your district require federal prosecutors to disclose to the defense before trial government witness statements that could be used to impeach?

   a) Yes
   b) No

11) Does your district require the defense to disclose to prosecutors before trial statements by anticipated defense witnesses that could be used to impeach?

   a) Yes
   b) No

12) Please estimate the number of cases in the past five years in which you believe that your district's requirements regarding the disclosure of exculpatory information by the government resulted in threats or harm to a prosecution witness.

a) 0 (None)
b) 1
c) 2-4
d) 5-10
e) 11-20
f) More than 20

13) Please estimate the number of cases in the past five years in which you believe that your district's requirements regarding pretrial disclosure of *Giglio* information by the government resulted in threats or harm to a prosecution witness.

a) 0 (None)
b) 1
c) 2-4
d) 5-10
e) 11-20
f) More than 20

14) If your district currently has a local rule or standing order that eliminates the *Brady* materiality requirement for disclosure of exculpatory information by prosecutors, did the rule change affect the frequency of defense motions filed to challenge the scope of disclosure? Please select one answer:

a) Motions challenging the scope of disclosure increased.
b) Motions challenging the scope of disclosure stayed the same.
c) Motions challenging the scope of disclosure decreased.
d) I was not on the bench before the rule was adopted.
e) In my district no such rule has been adopted.

15) Please estimate the number of cases in the past five years in which you concluded that the prosecution failed to comply with its disclosure obligations pursuant to your district's local rule or standing order.

a) 0 (None) [**Go to Question 18**]
b) 1
c) 2-4
d) 5-10
e) 11-20
f) More than 20

16) What was the nature of the most frequent violation?

a) Matter concerned the scope of disclosure.
b) Matter concerned the failure to disclose on time.
c) Matter concerned the failure to disclose at all.
d) Other: _____

17) Please indicate the remedial steps, if any, that you took upon concluding that the prosecution had violated its disclosure obligations under your district's local rule or standing order. Check all that apply.

a) No action taken
b) Ordered immediate disclosure
c) Ordered a continuance
d) Excluded evidence
e) Gave jury instruction
f) Admonished federal prosecutor in open court and/or in a written opinion
g) Held federal prosecutor in contempt
h) Reported federal prosecutor to the Department of Justice Office of Professional Responsibility
i) Reported federal prosecutor to the state's Bar Counsel or other disciplinary body
j) Other: Please explain

18) Overall, how satisfied are you with **federal prosecutor compliance with their discovery obligations in your district?**

a) Very satisfied
b) Satisfied
c) Neither Satisfied nor Dissatisfied
d) Dissatisfied
e) Very Dissatisfied

19) In your opinion, do defense counsel who appear before you understand their discovery and disclosure obligations, including their obligation to provide reciprocal pretrial discovery under Rule 16(b) and reverse-*Jencks Act* material pursuant to Rule 26.2?

a) Always
b) Usually
c) Sometimes
d) Rarely
e) Never

20) Please estimate the number of cases in the past five years in which you concluded that defense counsel failed to disclose reverse-*Jencks Act* material or other reciprocal discovery to the prosecution.

a) 0 (None) [**Go to Question 23**]
b) 1
c) 2-4
d) 5-10
e) 11-20
f) More than 20

21) What was the nature of the most frequent violation?

a) Matter concerned the scope of disclosure.
b) Matter concerned the failure to disclose in a timely manner.
c) Matter concerned the failure to disclose at all.
d) Other: _____

22) Please indicate the remedial steps, if any that you took upon concluding that defense counsel had violated their disclosure obligations under your district's local rule or standing order. Check all that apply.

a) No action taken
b) Ordered immediate disclosure
c) Ordered a continuance
d) Excluded evidence
e) Gave jury instruction
f) Admonished defense counsel in open court and/or in a written opinion
g) Held defense counsel in contempt
h) Reported defense counsel to the state's Bar Counsel or other disciplinary body
i) Other: Please explain

23) Overall, how satisfied are you with **defense counsel compliance with their disclosure obligations under the Federal Rules?**

a) Very satisfied
b) Satisfied
c) Neither Satisfied nor Dissatisfied
d) Dissatisfied
e) Very Dissatisfied

[GO TO PART III]

II. DISCLOSURE PROCEDURES AND PRACTICES PURSUANT TO THE *UNITED STATES CONSTITUTION* and RULES 16 AND 26.2.

This section seeks your views on specific pretrial disclosure procedures and practices by federal prosecutors and defense counsel in your district pursuant to the Constitution and Rules 16 and 26.2.

24) In your opinion, do federal prosecutors who appear before you understand their federal constitutional disclosure obligations (i.e., *Brady v. Maryland, Giglio v. United States,* and their progeny)?

a) Always
b) Usually
c) Sometimes
d) Rarely
e) Never

25) In your opinion, do federal prosecutors who appear before you follow a consistent policy or approach with respect to the disclosure of exculpatory and *Giglio* information?

a) Always
b) Usually
c) Sometimes
d) Rarely
e) Never

26) Please estimate the number of cases in the past five years in which you concluded that the prosecutor failed to comply with the Constitution's requirements regarding the disclosure of exculpatory or *Giglio* information.

a) 0 (None) [**Go to Question 29**]
b) 1
c) 2-4
d) 5-10
e) 11-20
f) More than 20

27) What was the nature of the most frequent violation?

a) Matter concerned the scope of disclosure.
b) Mater concerned the failure to disclose in a timely manner.
c) Matter concerned the failure to disclose at all.
d) Other: _____

28) Please indicate the remedial steps, if any that you took upon concluding that the prosecution had failed to comply with the Constitution's requirements regarding the disclosure of exculpatory or *Giglio* information. Check all that apply.

a) No action taken
b) Ordered immediate disclosure
c) Ordered a continuance
d) Excluded evidence
e) Gave jury instruction
f) Admonished federal prosecutor in open court and/or in a written opinion
g) Held federal prosecutor in contempt
h) Reported federal prosecutor to the Department of Justice Office of Professional Responsibility
i) Reported federal prosecutor to the state's Bar Counsel or other disciplinary body
j) Other: Please explain

29) Overall, how satisfied are you with **federal prosecutor compliance with their discovery obligations in your district?**

a) Very satisfied
b) Satisfied
c) Neither Satisfied nor Dissatisfied
d) Dissatisfied
e) Very Dissatisfied

30) In your opinion, do defense counsel who appear before you understand their discovery and disclosure obligations, including their obligation to provide reciprocal pretrial discovery under Rule 16(b) and reverse-*Jencks Act* material pursuant to Rule 26.2?

a) Always
b) Usually
c) Sometimes
d) Rarely
e) Never

31) Please estimate the number of cases in the past five years in which you concluded that defense counsel failed to disclose reverse-*Jencks Act* material or other reciprocal discovery to the prosecution?

a) 0 (None) [**Go to Question 34**]
b) 1
c) 2-4
d) 5-10
e) 11-20
f) More than 20

31) What was the nature of the most frequent violation?

a) Matter concerned the scope of disclosure.
b) Matter concerned the failure to disclose in a timely manner.
c) Matter concerned the failure to disclose at all.
d) Other: _____

32) Please indicate the remedial steps, if any, that you took upon concluding that the defense counsel failed to disclose reverse-*Jencks Act* material or other reciprocal discovery to the prosecution. Check all that apply.

a) No action taken
b) Ordered immediate disclosure
c) Ordered a continuance
d) Excluded evidence
e) Gave jury instruction
e) Admonished defense counsel in open court and/or in a written opinion
f) Held defense counsel in contempt
h) Reported defense counsel to the state's Bar Counsel or other disciplinary body
Other: Please explain:

33) Overall, how satisfied are you with **defense counsel compliance with their disclosure obligations under the Federal Rules?**

a) Very Satisfied
b) Satisfied
c) Neither Satisfied nor Dissatisfied
d) Dissatisfied
e) Very Dissatisfied

[GO TO PART III]

III. POTENTIAL AMENDMENTS TO RULE 16

34) Do you favor amending Rule 16 to address pretrial disclosure of exculpatory and *Giglio* information?

a) Yes [**Go to Question 36**]
b) No [**Go to Question 37**]

35) Which of the following statements describes your view? Please check all that apply and if desired, provide any other comments in the box below.

a) An amendment **is needed** because it will reduce the possibility that innocent persons will be convicted in federal proceedings.
b) An amendment **is needed** because many disclosure violations pass undiscovered or without remedy.
c) An amendment **is needed** because it will eliminate the confusion surrounding the use of materiality as a measure of a prosecutor's pretrial disclosure obligations.
d) An amendment **is needed** because the current remedies for prosecutorial misconduct are rarely employed.
e) An amendment **is needed** because it will reduce the variations that currently exist in the circuits.
f) Other:_____

36) Which of the following statements describes your view? Please check all that apply and if desired, provide any other comments in the box below.

a) An amendment **is not needed** because there is no demonstrated needed for change.
b) An amendment **is not needed** because the current remedies for prosecutorial misconduct are adequate.
c) An amendment is not needed because the recent reforms put into place by the Department of Justice will significantly decrease disclosure violations so that an amendment to Rule 16 is no longer needed to increase compliance.
d) An amendment **is not needed** because it does not address what is really needed to stop abuse of disclosure obligations by prosecutors—increasing the frequency and severity of sanctions against prosecutors for failure to disclose such evidence.
e) An amendment is not needed because it will not reduce the possibility that innocent persons will be convicted in federal proceedings.
f) Other:_____

In 2007, the Advisory Committee on Criminal Rules proposed the following amendment to Rule 16, which was not approved by the Judicial Conference's Standing Committee on Rules of Practice and Procedure. Although the amendment as written was not approved by the Standing Committee, the Advisory Committee is continuing to study this issue. The remaining questions of the survey address potential amendments to Rule 16.

> **Rule 16. Discovery and Inspection**
>
> (a) GOVERNMENT'S DISCLOSURE.
>
> (1) *INFORMATION SUBJECT TO DISCLOSURE.*
>
> …
>
> (H) *Exculpatory or Impeaching Information*. Upon a defendant's request, the government must make available all information that is known to the attorney for the government or agents of law enforcement involved in the investigation of the case that is either exculpatory or impeaching. The court may not order disclosure of impeachment information earlier than 14 days before trial.

37) What effect, if any, do you think this amendment might have on the privacy and security of cooperating witnesses?

Please explain:

38) What effect, if any, do you think this amendment might have on the privacy and security of crime victims?

Please explain:

39) In your opinion, should information about a victim's or witness's background that would not be admissible in evidence (e.g., mental health treatment information)—and that the prosecutor believes does not bear directly on the witness' testimony—be disclosed?

a) Yes
b) No
c) Don't Know

40) In your opinion, should all allegations of misconduct against law enforcement witnesses, —including those found not to be substantiated by an internal investigation—be disclosed?

a) Yes
b) No
c) Don't Know

41) With respect to defense witnesses, should all impeachment information in the possession of the defense be disclosed to the prosecution prior to trial?

a) Yes
b) No
c) Don't Know

42) If you favor an amendment to Rule 16 different from that proposed in 2007, what language would you suggest?

Please explain:

If you have any other comments or suggestions regarding the previously proposed amendment to Rule 16 or discovery disclosure in general that have not been covered in this survey, please provide them here:

Thank you for completing this survey. If you have any questions about the survey, please contact Laural Hooper (lhooper@fjc.gov; 202-502-4093) or Marie Leary (mleary@fjc.gov; 202-502-4069).

RULE 16 PRETRIAL DISCLOSURE PROCEDURES AND PRACTICES

A NATIONAL SURVEY OF CRIMINAL DEFENSE ATTORNEYS

For the Advisory Committee on Criminal Rules of the
Judicial Conference of the United States

Administered by the Federal Judicial Center

Demographic Information

The information in this section will help us analyze survey responses based on type of attorney, years of practice, and district. No individual attorney will be identified in any of the analyses or reports we produce.

1) How many years have you practiced law?

   _____ years

2) In which federal district do you primarily practice? If you practice in more than one, please indicate the one in which you spend the most time.

   _____

3) Which of the following best describes you? (Please check all that apply)

   a) Federal Public Defender/Community Defender
   b) CJA Panel Attorney
   c) Retained Criminal Defense Attorney

4) Does a local rule, standing order or other policy in your district require disclosure by the prosecution to the defense that extends beyond the requirements of *Brady v. Maryland*, *Giglio v. United States*, Rule 16 (Discovery and Inspection), or Rule 26.2 (Producing a Witness's Statement)?)? For example, your district may have specific time requirements for disclosure or mandate automatic disclosure.

   a) If yes, [**Go to Part I**]
   b) If no, [**Go to PART II**]

I. DISTRICT-SPECIFIC LOCAL COURT RULES, STANDING ORDERS OR OTHER POLICIES REGARDING PRETRIAL DISCLOSURE

This section seeks your views on pretrial disclosure procedures and practices by federal prosecutors and defense counsel in your district, including questions addressing your districts local rule or standing order regarding disclosure in criminal cases.

5) In your opinion, do the federal prosecutors in your district understand their pretrial discovery and disclosure obligations pursuant to your district's local rule or standing order?

   a) Always
   b) Usually
   c) Sometimes
   d) Rarely
   e) Never

6) In your opinion, do the federal prosecutors in your district follow a consistent policy or approach with respect to pretrial disclosure to the defense of exculpatory and *Giglio* information?

   a) Always
   b) Usually
   c) Sometimes
   d) Rarely
   e) Never

7) Does your district's local rule or standing order require federal prosecutors to disclose exculpatory or impeaching information to the defense **without regard to materiality** as defined by *Brady v. Maryland* and its progeny?

   a) Yes [**Go to Question 8**]
   b) No [**Go to Question 10**]

8) Do you believe that the elimination of the materiality requirement has reduced problems in obtaining disclosure of exculpatory and impeaching information from the prosecution? Please select one answer.

   a) Eliminating materiality has reduced problems in some cases.
   b) Eliminating materiality has reduced problems in most cases.
   c) Eliminating materiality has not made a difference.
   d) Other: Please explain:

9) In your opinion, has the elimination of the materiality requirement affected how often you challenge the scope of disclosure in any of your cases?

   a) Motions challenging the scope of disclosure have increased.
   b) Motions challenging the scope of disclosure have stayed the same.
   c) Motions challenging the scope of disclosure have decreased.
   d) Other: Please explain:

10) Does your district require federal prosecutors to disclose to the defense exculpatory or *Giglio* information within **a fixed time** after indictment or arraignment?

   a) Yes [**Go to Question** [11]
   b) No [**Go to Question** [12]

11) Do you believe that the requirement of disclosure within a fixed time after indictment or arraignment is important to the defense? Please select one response.

   a) The timing requirement is very important in some cases.
   b) The timing requirement is very important in most cases.
   c) The timing requirement is not very important.
   d) Other: Please explain:

12) Please estimate the number of your cases in the past five years in which the government has requested a protective order prohibiting or delaying disclosure based on witness safety or other security considerations.

a) 0 (None)
b) 1
c) 2-4
d) 5-10
e) 11-20
f) More than 20

13) Please estimate the number of your cases in the past five years in which you believe the government has failed to provide exculpatory or *Giglio* information in compliance with your local rule or standing order.

a) 0 (None) [**Go to Question 15**]
b) 1
c) 2-4
d) 5-10
e) 11-20
f) More than 20

14) Please estimate the number of these cases in which you believe the suspected violation was attributable to materiality concerns (e.g., the prosecutor believed that the information at issue was unreliable or only minimally negated guilt).

a) 0 (None)
b) 1
c) 2-4
d) 5-10
e) 11-20
f) More than 20

15) Please estimate the number of your cases in the past five years in which the court concluded that the government failed to comply with its disclosure obligations pursuant to your district's local rule or standing order.

a) 0 (None) [**Go to Question 18**]
b) 1
c) 2-4
d) 5-10
e) 11-20
f) More than 20

16) What was the nature of the most frequent violation?
    a) Matter concerned the scope of disclosure.
    b) Matter concerned the failure to disclose on time.
    c) Matter concerned the failure to disclose at all.
    d) Other:_____

17) Please indicate the remedial steps, if any, the court took in these cases upon concluding that the prosecution had violated its disclosure obligations under your district's local rule or standing order. Check all that apply.

    a) No action taken
    b) Court ordered immediate disclosure
    c) Court ordered a continuance
    d) Court excluded evidence
    e) Court gave jury instruction
    f) Court admonished federal prosecutor in open court and/or in a written opinion
    g) Court held federal prosecutor in contempt
    h) Court reported federal prosecutor to the Department of Justice Office of Professional Responsibility
    i) Court reported federal prosecutor to the state's bar counsel or other disciplinary body
    j) Other: Please explain

18) Overall, how satisfied are you with **federal prosecutor compliance** with your district's disclosure rules?

    a) Very Satisfied
    b) Satisfied
    c) Neither Satisfied nor Dissatisfied
    d) Dissatisfied
    e) Very Dissatisfied

19) In your opinion, in practice, are the differences between your local rule or standing order and the requirements of the United States Constitution and Rule 16 significant or not significant?

    a) Significant
    b) Not Significant

    Please explain:

20) In your opinion, do defense counsel in your district understand their discovery and disclosure obligations, including their obligation to provide reciprocal discovery under Rule 16(b) and reverse-*Jencks Act* material pursuant to Rule 26.2?

a) Always
b) Usually
c) Sometimes
d) Rarely
e) Never

21) Please estimate the number of your cases in the past five years in which the court concluded that defense counsel failed to disclose reverse-*Jencks Act* material or other reciprocal discovery to the prosecution.

a) 0 (None) [**Go to Question 24**]
b) 1
c) 2-4
d) 5-10
e) 11-20
f) More than 20

22) What was the nature of the most frequent violation?

a) Matter concerned the scope of disclosure.
b) Matter concerned the failure to disclose on time.
c) Matter concerned the failure to disclose at all.
d) Other: _____

23) Please indicate the remedial steps, if any, the court took in these cases upon concluding that defense counsel had violated their disclosure obligations under your district's local rule or standing order. Check all that apply.

a) No action taken
b) Court ordered immediate disclosure
c) Court ordered a continuance
d) Court excluded evidence
e) Court gave jury instruction
f) Court admonished defense counsel in open court and/or in a written opinion
g) Court held defense counsel in contempt
h) Court reported defense counsel to the state's Bar Counsel or other disciplinary body
i) Other: Please explain

24) Overall, how satisfied are you with **defense counsel compliance** with their disclosure obligations under the Federal Rules?

a) Very satisfied
b) Satisfied
c) Neither Satisfied nor Dissatisfied
d) Dissatisfied
e) Very Dissatisfied

II. DISCLOSURE PROCEDURES AND PRACTICES PURSUANT TO THE *UNITED STATES CONSTITUTION* AND RULES 16 AND 26.2

This section seeks your views on specific pretrial disclosure procedures and practices by federal prosecutors and defense counsel pursuant to the Constitution, Rule 16, and Rule 26.2.

25) In your opinion, do federal prosecutors in your district understand their federal constitutional disclosure obligations (i.e., *Brady v. Maryland, Giglio v. United States,* and their progeny)?

a) Always
b) Usually
c) Sometimes
d) Rarely
e) Never

26) In your opinion, do federal prosecutors in your district follow a consistent policy or approach with respect to pretrial disclosure to the defense of exculpatory and *Giglio* information?

a) Always
b) Usually
c) Sometimes
d) Rarely
e) Never

27) Please estimate the number of your cases in the past five years in which the government requested the court enter a protective order prohibiting or delaying disclosure of exculpatory or *Giglio* information based on witness safety or other security considerations.

a) 0 (None).
b) 1
c) 2-4
d) 5-10
e) 11-20
f) More than 20

28) Please estimate the number of your cases in the past five years in which you believe the government failed to comply with its obligations to disclose exculpatory or *Giglio* information.

a) 0 (None) [**Go to Question 30**]
b) 1
c) 2-4
d) 5-10
e) 11-20
f) More than 20

29) Please estimate the number of these cases in which you believe the suspected violation was attributable to *Brady* materiality concerns (e.g., the prosecutor believed that the information at issue was unreliable or only minimally negated guilt).

a) 0 (None)
b) 1
g) 2-4
h) 5-10
i) 11-20
j) More than 20

30) Please estimate the number of your cases in the past five years in which the court concluded that the government failed to comply with its obligations to disclose exculpatory and *Giglio* information.

a) 0 (None) [**Go to Question 33**]
b) 1
c) 2-4
d) 5-10
e) 11-20
f) More than 20

31) What was the nature of the most frequent violation?

a) Matter concerned the scope of disclosure.
b) Matter concerned the failure to disclose on time.
c) Matter concerned the failure to disclose at all.
d) Other

32) Please indicate the remedial steps, if any, the court took in these cases upon concluding that the prosecution had violated its disclosure obligations. Check all that apply.

a) No action taken
b) Court ordered immediate disclosure
c) Court ordered a continuance
d) Court excluded evidence
e) Court gave jury instruction
f) Court admonished federal prosecutor in open court and/or in a written opinion
g) Court held federal prosecutor in contempt
h) Court reported federal prosecutor to Department of Justice Office of Professional Responsibility
i) Court reported federal prosecutor to the state's bar counsel or other disciplinary body
j) Other: Please explain

33) Overall, how satisfied are you with **federal prosecutor compliance** with the government's disclosure obligations under the Constitution?

a) Very Satisfied
b) Satisfied
c) Neither Satisfied nor Dissatisfied
d) Dissatisfied
e) Very Dissatisfied

34) In your opinion, do defense counsel understand their discovery and disclosure obligations, including their obligation to provide reciprocal discovery under Rule 16(b) and reverse-*Jencks Act* material pursuant to Rule 26.2?

a) Always
b) Usually
c) Sometimes
d) Rarely
e) Never

35) Please estimate the number of your cases in the past five years in which the court concluded that defense counsel failed to disclose reverse-*Jencks Act* material or other reciprocal discovery to the prosecution.

a) 0 (None) [**Go to Question 38**]
b) 1
c) 2-4
d) 5-10
e) 11-20
f) More than 20

36) What was the nature of the most frequent violation?

a) Matter concerned the scope of disclosure.
b) Matter concerned the failure to disclose on time.
c) Matter concerned the failure to disclose at all.
d) Other: _____

37) Please indicate the remedial steps, if any, the court took in these cases upon concluding that defense counsel had violated their disclosure obligations. Check all that apply.

a) No action taken
b) Court ordered immediate disclosure
c) Court ordered a continuance
d) Court excluded evidence
e) Court gave jury instruction
f) Court admonished defense counsel in open court and/or in a written opinion
g) Court held defense counsel in contempt
h) Court reported defense counsel to the state's Bar Counsel or other disciplinary body
i) Other: Please explain

38) Overall, how satisfied are you with **defense counsel compliance** with their disclosure obligations under the Federal Rules?

a) Very satisfied
b) Satisfied
c) Neither Satisfied nor Dissatisfied
d) Dissatisfied
e) Very Dissatisfied

III. POTENTIAL AMENDMENTS TO RULE 16

39) Do you favor amending Rule 16 to address pretrial disclosure of exculpatory and *Giglio* information?

a) Yes [**Go to Question 40**]
b) No [**Go to Question 41**]

40) Which of the following statements describes your view? Please check all that apply and if desired, provide any other comments in the box below.

a. An amendment **is needed** because it will reduce the possibility that innocent persons will be convicted in federal proceedings.
b. An amendment **is needed** because many disclosure violations pass undiscovered or without remedy.
c. An amendment **is needed** because it will eliminate the confusion surrounding use of materiality as a measure of a prosecutor's pretrial disclosure obligations.
d. An amendment **is needed** because the current remedies for prosecutorial misconduct are rarely employed.
e. An amendment **is needed** because it will reduce the variations that currently exist in the circuits.
f. Other:_____

41) Which of the following statements describes your view? Please check all that apply and if desired, provide any other comments in the box below.

a. An amendment **is not needed** because there is no demonstrated need for change.
b. An amendment **is not needed** because the current remedies for prosecutorial misconduct are adequate.
c. An amendment **is not needed** because the recent reforms put into place by the Department of Justice will significantly decrease disclosure violations so that an amendment to Rule 16 is no longer needed to increase compliance.
d. An amendment **is not needed** because it does not address what is really needed to stop abuse of disclosure obligations by prosecutors—increasing the frequency and severity of sanctions against prosecutors for failure to disclose such evidence.
e. An amendment **is not needed** because it will not reduce the possibility that innocent persons will be convicted in federal proceedings.
f. Other:_____

In 2007, the Advisory Committee on Criminal Rules proposed the following amendment to Rule 16, which was not approved by the Judicial Conference's Standing Committee on Rules of Practice and Procedure. Although the amendment as written was not approved by the Standing Committee, the Advisory Committee is continuing to study this issue. The remaining questions of the survey address potential amendments to Rule 16.

> **Rule 16. Discovery and Inspection**
>
> (a) GOVERNMENT'S DISCLOSURE.
>
> (1) *INFORMATION SUBJECT TO DISCLOSURE.*
>
> …
>
> (H) *Exculpatory or Impeaching Information*. Upon a defendant's request, the government must make available all information that is known to the attorney for the government or agents of law enforcement involved in the investigation of the case that is either exculpatory or impeaching. The court may not order disclosure of impeachment information earlier than 14 days before trial.

42) What effect, if any, do you think this amendment might have on the privacy and security of cooperating witnesses?

Please explain:

43) What effect, if any, do you think this amendment might have on the privacy and security of crime victims?

Please explain:

44) Do you believe that a rule change eliminating the *Brady* materiality requirement would result in any change to the frequency of motions by defense counsel for *Brady* violations?

a) Motions challenging the scope of disclosure would increase.
b) Motions challenging the scope of disclosure would stay the same.
c) Motions challenging the scope of disclosure would decrease.
d) Other:

45) In your opinion, should information about a victim's or witness's background that would not be admissible in evidence (e.g., mental health treatment information)—and that the prosecutor believes does not bear directly on the witness's testimony—be disclosed?

a) Yes
b) No
c) Don't Know

46) In your opinion, should all allegations of misconduct against law enforcement witnesses—including those found not to be substantiated by an internal investigation—be disclosed?

a) Yes
b) No
c) Don't Know

47) With respect to defense witnesses, should all impeachment information in the possession of the defense be disclosed to the prosecution prior to trial?

a) Yes
b) No
c) Don't Know

48) If you favor an amendment to Rule 16 different from that proposed in 2007, what language would you suggest?

Please explain:

49) If you have any other comments or suggestions regarding the previously proposed amendment to Rule 16 or discovery disclosure in general that have not been covered in this survey, please provide them here.

Thank you for completing this survey. If you have any questions about the survey, please contact Laural Hooper (lhooper@fjc.gov; 202-502-4093) or Marie Leary (mleary@fjc.gov; 202-502-4069).

RULE 16 PRETRIAL DISCLOSURE PROCEDURES AND PRACTICES

A NATIONAL SURVEY OF FEDERAL PROSECUTORS

For the Advisory Committee on Criminal Rules of the
Judicial Conference of the United States

Administered by the Federal Judicial Center

Demographic Information

No individual attorney will be identified in any of the analyses or reports we produce.

1) How many years have you been a federal prosecutor?

   _____ years

2) In which federal district do you primarily practice?

   _____

3) Does a local rule, standing order or other policy in your district require disclosure by the prosecution to the defense that extends beyond the requirements of *Brady v. Maryland*, *Giglio v. United States,* Rule 16 (Discovery and Inspection), or Rule 26.2 (Producing a Witness's Statement)? For example, your district may have specific time requirements for disclosure or mandate automatic disclosure.

   a) If yes, [**Go to Part I**]
   b) If no, [**Go to PART II**]

I. DISTRICT SPECIFIC LOCAL COURT RULES, STANDING ORDERS OR OTHER POLICIES REGARDING PRETRIAL DISCLOSURE

This section seeks your views on pretrial disclosure procedures and practices by federal prosecutors and defense counsel in your district, including questions addressing your district's local rule or standing order regarding disclosure in criminal cases.

4) In your opinion, do the federal prosecutors in your district understand their pretrial disclosure obligations pursuant to your district's local rule or standing order?

   a) Always
   b) Usually
   c) Sometimes
   d) Rarely
   e) Never

5) Does your district's local rule or standing order require federal prosecutors to disclose exculpatory or impeaching information to the defense **without regard to materiality** as defined in *Brady v. Maryland* and its progeny?

   a) Yes [**Go to Question 6**]
   b) No [**Go to Question 7**]

6) Do you believe that elimination of the materiality requirement has reduced problems or confusion in the prosecution's pre-trial discovery analysis? Please select one answer.

   a) Eliminating materiality has reduced problems in some cases.
   b) Eliminating materiality has reduced problems in most cases.
   c) Eliminating materiality has not made a difference.
   d) Other: Please explain:

7) Does your district require federal prosecutors to disclose to the defense exculpatory or *Giglio* information within **a fixed time** after indictment or arraignment?

   a) Yes [**Go to Question 8**]
   b)

8) Do you believe that this timing requirement has caused problems for the prosecution?

   a) The timing of disclosure has caused minor problems in some cases.
   b) The timing of disclosure has caused minor problems in most cases.
   c) The timing of disclosure has caused serious problems in some cases.
   d) The timing of disclosure has caused serious problems in most cases.
   e) The timing of disclosure has caused no problems.
   f) No opinion.
   g) Other: Please explain:

9) In the past five years, how often have you been unable to obtain cooperation from a witness because of the **timing** of disclosure to the defense required by local rule or standing order?

   a) Always
   b) Usually
   c) Sometimes
   d) Rarely
   e) Never

10) Please estimate the number of your cases in the past five years in which you have requested a protective order prohibiting or delaying the disclosure otherwise required by your local rule or standing order based on witness safety or other security considerations.

   a) 0 (None)
   b) 1
   c) 2-4
   d) 5-10
   e) 11-20
   f) More than 20

11) Please estimate the number of your cases in the past five years in which the defense has alleged that the government failed to provide exculpatory or *Giglio* information in compliance with your local rule or standing order.

   a) 0 (None)
   b) 1
   c) 2-4
   d) 5-10
   e) 11-20
   f) More than 20

12) Please estimate the number of your cases in the past five years in which the court concluded that the government failed to comply with its disclosure obligations pursuant to your district's local rule or standing order.

a) 0 (None) [**Go to Question 15**]
b) 1
c) 2-4
d) 5-10
e) 11-20
f) More than 20

13) What was the nature of the most frequent violation of your district's local rule or standing order?

a) Matter concerned the scope of disclosure.
b) Matter concerned the failure to disclose on time.
c) Matter concerned the failure to disclose at all.
d) Other: _____

14) Please indicate the remedial steps, if any, the court took in these cases upon concluding that the prosecution had violated its disclosure obligations under your district's local rule or standing order. Check all that apply.

a) No action taken
b) Court ordered immediate disclosure
c) Court ordered a continuance
d) Court excluded evidence
e) Court gave jury instruction
f) Court admonished federal prosecutor in open court and/or in a written opinion
g) Court held federal prosecutor in contempt
h) Court reported federal prosecutor to Department of Justice Office of Professional Responsibility (OPR)
i) Court reported federal prosecutor to the state's bar counsel or other disciplinary body
j) Other: Please explain

15) Overall, how satisfied are you with **federal prosecutor compliance** with your district's disclosure rules?

a) Very Satisfied
b) Satisfied
c) Neither Satisfied nor Dissatisfied
d) Dissatisfied
e) Very Dissatisfied

16) In your opinion, in practice, are the differences between your local rule or standing order and the requirements of the United States Constitution and Rule 16 significant or not significant?

a) Significant
b) Not Significant

Please explain:

[**GO To Part II**]

II. PRETRIAL DISCLOSURE PROCEDURES AND PRACTICES PURSUANT TO THE *UNITED STATES CONSTITUTION* AND RULES 16 AND 26.2

This section seeks your views on specific disclosure procedures and practices by federal prosecutors and defense counsel pursuant to the Constitution, Rule 16, and Rule 26.2.

17) In your opinion, do federal prosecutors in your district understand their federal constitutional disclosure obligations (i.e., *Brady v. Maryland, Giglio v. United States,* and their progeny)?

a) Always
b) Usually
c) Sometimes
d) Rarely
e) Never

18) In your opinion, do federal prosecutors in your district follow a consistent policy or approach with respect to disclosure of exculpatory and *Giglio* information?

a) Always
b) Usually
c) Sometimes
d) Rarely
e) Never

19) Please describe how federal prosecutors in your district determine whether information is material under the Constitution?

20) Please estimate the number of cases in the past five years in which you requested the court enter a protective order prohibiting or delaying disclosure otherwise required by the Constitution based on witness safety or other security considerations.

a) 0 (None)
b) 1
c) 2-4
d) 5-10
e) 11-20
f) More than 20

21) Please estimate the number of your cases in the past five years in which the defense has alleged that the government failed to provide exculpatory or *Giglio* information (including cases in which the defense also alleged a violation of a local discovery rule).

a) 0 (None)
b) 1
c) 2-4
d) 5-10
e) 11-20
f) More than 20

22) Please estimate the number of your cases in the past five years in which the court concluded that the government failed to comply with its disclosure obligations under the Constitution.

a) 0 (None) [**Go to Question 25**]
b) 1
c) 2-4
d) 5-10
e) 11-20
f) More than 20

23) What was the nature of the most frequent violation of the constitutional disclosure obligations?

a) Matter concerned the scope of disclosure.
b) Matter concerned the failure to disclose on time.
c) Matter concerned the failure to disclose at all.
d) Other: _____

24) Please indicate the remedial steps, if any, the court took in these cases upon concluding that the prosecution had violated its disclosure obligations under the Constitution. Check all that apply.

a) No action taken
b) Court ordered immediate disclosure
c) Court ordered a continuance
d) Court excluded evidence
e) Court gave jury instruction
f) Court admonished federal prosecutor in open court and/or in a written opinion
g) Court held federal prosecutor in contempt
h) Court reported federal prosecutor to the Department of Justice Office of Professional Responsibility (OPR)
i) Court reported federal prosecutor to the state's bar counsel or other disciplinary body
j) Other: Please explain

19) Overall, how satisfied are you with **federal prosecutor compliance** with the government's disclosure obligations under the Constitution?

a) Very Satisfied
b) Satisfied
c) Neither Satisfied nor Dissatisfied
d) Dissatisfied
e) Very Dissatisfied

20) In your opinion, do defense counsel in your district understand their discovery and disclosure obligations, including their obligation to provide reciprocal pretrial discovery under Rule 16(b) and reverse-*Jencks Act* material pursuant to Rule 26.2?

a) Always
b) Usually
c) Sometimes
d) Rarely
e) Never

21) Please estimate the number of your cases in the past five years in which the court concluded that defense counsel failed to disclose reverse-*Jencks Act* material or other reciprocal discovery to the prosecution.

a) 0 (None) [**Go to Question 30**]
b) 1
c) 2-4
d) 5-10
e) 11-20

22) What was the nature of the most frequent violation?

a) Matter concerned the scope of disclosure.
b) Matter concerned the failure to disclose on time.
c) Matter concerned the failure to disclose at all.
d) Other: _____

23) Please indicate the remedial steps, if any, the court took in these cases upon concluding that defense counsel had violated its disclosure obligations. Check all that apply.

a) No action taken
b) Court ordered immediate disclosure
c) Court ordered a continuance
d) Court excluded evidence
e) Court gave jury instruction
f) Court admonished defense counsel in open court and/or in a written opinion
g) Court held defense counsel in contempt
h) Court reported defense counsel to the state's Bar Counsel or other disciplinary body
i) Other: Please explain

24) Overall, how satisfied are you with **defense counsel compliance** with their disclosure obligations under the Federal Rules?

a) Very satisfied
b) Satisfied
c) Neither Satisfied nor Dissatisfied
d) Dissatisfied
e) Very Dissatisfied

III. POTENTIAL AMENDMENTS TO RULE 16

25) Do you favor amending Rule 16 to address pretrial disclosure of exculpatory and *Giglio* information?

a) Yes [Go to Question 32]
b) No [Go to Question 33]

26) Which of the following statements describes your view? Please check all that apply and if desired, provide any other comments in the box below.

a. An amendment **is needed** because it will reduce the possibility that innocent persons will be convicted in federal proceedings.
b. An amendment **is needed** because many disclosure violations pass undiscovered or without remedy.
c. An amendment **is needed** because it will eliminate the confusion surrounding use of materiality as a measure of a prosecutor's pretrial disclosure obligations.
d. An amendment **is needed** because the current remedies for prosecutorial misconduct are rarely employed.
e. An amendment **is needed** because it will reduce the variations that currently exist in the circuits.
f. Other:_____

27) Which of the following statements describes your view? Please check all that apply and if desired, provide any other comments in the box below.

a. An amendment **is not needed** because there is no demonstrated need for change.
b. An amendment **is not needed** because the current remedies for prosecutorial misconduct are adequate.
c. An amendment **is not needed** because the recent reforms put into place by the Department of Justice will significantly decrease disclosure violations so that an amendment to Rule 16 is no longer needed to increase compliance.
d. An amendment **is not needed** because it does not address what is really needed to stop abuse of disclosure obligations by prosecutors—increasing the frequency and severity of sanctions against prosecutors for failure to disclose such evidence.
e. An amendment **is not needed** because it will not reduce the possibility that innocent persons will be convicted in federal proceedings.
f. Other:_____

In 2007, the Advisory Committee on Criminal Rules proposed the following amendment to Rule 16, which was not approved by the Judicial Conference's Standing Committee on Rules of Practice and Procedure. Although the amendment as written was not approved by the Standing Committee, the Advisory Committee is continuing to study this issue. The remaining questions of the survey address potential amendments to Rule 16.

> **Rule 16. Discovery and Inspection**
>
> (a) GOVERNMENT'S DISCLOSURE.
>
> (1) *INFORMATION SUBJECT TO DISCLOSURE.*
>
> …
>
> (H) *Exculpatory or Impeaching Information*. Upon a defendant's request, the government must make available all information that is known to the attorney for the government or agents of law enforcement involved in the investigation of the case that is either exculpatory or impeaching. The court may not order disclosure of impeachment information earlier than 14 days before trial.

28) What effect, if any, do you think this amendment might have on the privacy and security of cooperating witnesses?

Please explain:

29) What effect, if any, do you think this amendment might have on the privacy and security of crime victims?

Please explain:

30) Do you believe that a rule change eliminating the *Brady* materiality requirement would result in any change to the frequency of motions by defense counsel for *Brady* violations?

a) Motions challenging the scope of disclosure would increase.
b) Motions challenging the scope of disclosure would stay the same.
c) Motions challenging the scope of disclosure would decrease.
d) Other:

31) In your opinion, should information about a victim's or witness's background that would not be admissible in evidence (e.g., mental health treatment information)—and that the prosecutor believes does not bear directly on the witness's testimony—be disclosed?

a) Yes
b) No
c) Don't Know

32) In your opinion, should all allegations of misconduct against law enforcement witnesses—including those found not to be substantiated by an internal investigation—be disclosed?

a) Yes
b) No
c) Don't Know

33) With respect to defense witnesses, should all impeachment information in the possession of the defense be disclosed to the prosecution prior to trial?

a) Yes
b) No
c) Don't Know

34) If you favor an amendment to Rule 16 different from that proposed in 2007, what language would you suggest?

Please explain:

35) If you have any other comments or suggestions regarding the previously proposed amendment to Rule 16 or discovery disclosure in general that have not been covered in this survey, please provide them here.

Thank you for completing this survey. If you have any questions about the survey, please contact Laural Hooper (lhooper@fjc.gov; 202-502-4093) or Marie Leary (mleary@fjc.gov; 202-502-4069).