

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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February 2011

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Contents

Acknowledgments, v

- I. Introduction, 1
 - A. Overview of the Report, 2
 - B. Background, 3
- II. Summary of Findings, 8
- III. Analysis of District Court Local Rules and Orders with Broader Disclosure Requirements than Rule 16 for Disclosing *Brady* Material, 11
 - A. Scope of Disclosure, 12
 - B. Timing of Disclosure, 14
 - C. Elimination of *Brady* “Materiality” Requirement, 16
 - D. “Defense Request” Disclosure Prerequisite, 17
- IV. Need for an Amendment to Rule 16, 19
 - A. Favored or Supported Amending Rule 16, 19
 - B. Opposed Amending Rule 16, 22
- V. Perceptions Regarding Attorneys’ Comprehension of Disclosure Obligations Pursuant to District Court Local Rules, Orders, and Case Law, 24
- VI. Attorneys’ Compliance with Specific Disclosure Obligations, 27
 - A. Frequency of Cases Over the Past Five Years in Which the Court Concluded Attorneys Failed to Comply with Disclosure Obligations, 27
 - B. Nature of Most Frequently Mentioned Disclosure Violations by Federal Prosecutors, 27
 - C. Nature of Most Frequently Mentioned Disclosure Violations by Defense Attorneys, 28
 - D. Remedies Imposed for Disclosure Violations, 29
 - E. Perceptions Regarding Overall Compliance by Attorneys, 30
- VII. Other Selected Issues in Broader Disclosure Districts, 32
 - A. Elimination of the Materiality Requirement, 32
 - B. Timing of Disclosure Issues, 34
- VIII. Disclosure of Witness Statements, 37
- IX. Impact of the 2007 Advisory Committee Proposal on Cooperating Witnesses and Crime Victims, 38
 - A. Effects on Cooperating Witnesses, 38
 - B. Effects on Crime Victims, 42

- X. Reform Proposals, 46
 - A. Judges' Comments, 46
 - B. Defense Attorneys' Comments, 47
- XI. Summary of General Comments, 48
 - A. Judges' Comments, 48
 - B. Defense Attorneys' Comments, 49
- Appendices, 52

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 Gopinpersad, 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 Act⁵ 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 proposal⁶ 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 districts²⁹ 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 examples³¹ of “*Brady*” material [twenty-one districts³²] 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-

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 examples³³ 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 three³⁵ 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 districts³⁷]. 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 districts⁴³ require disclosure of exculpatory material “within 14 days after arraignment”; three districts⁴⁴ 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

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 provisions⁴⁸ 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 districts⁵⁵ 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 orders⁵⁹ 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 material⁶² 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

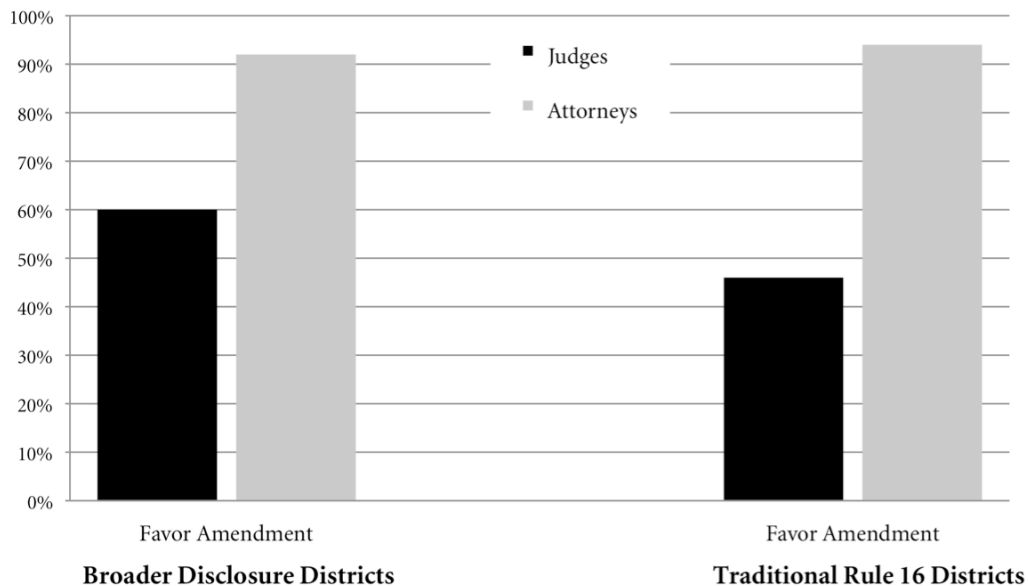
In order to address one of the Advisory Committee’s fundamental questions, we asked respondents whether they favored amending Rule 16 to address pretrial disclosure of exculpatory and *Giglio* information.

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]rordinarily, 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

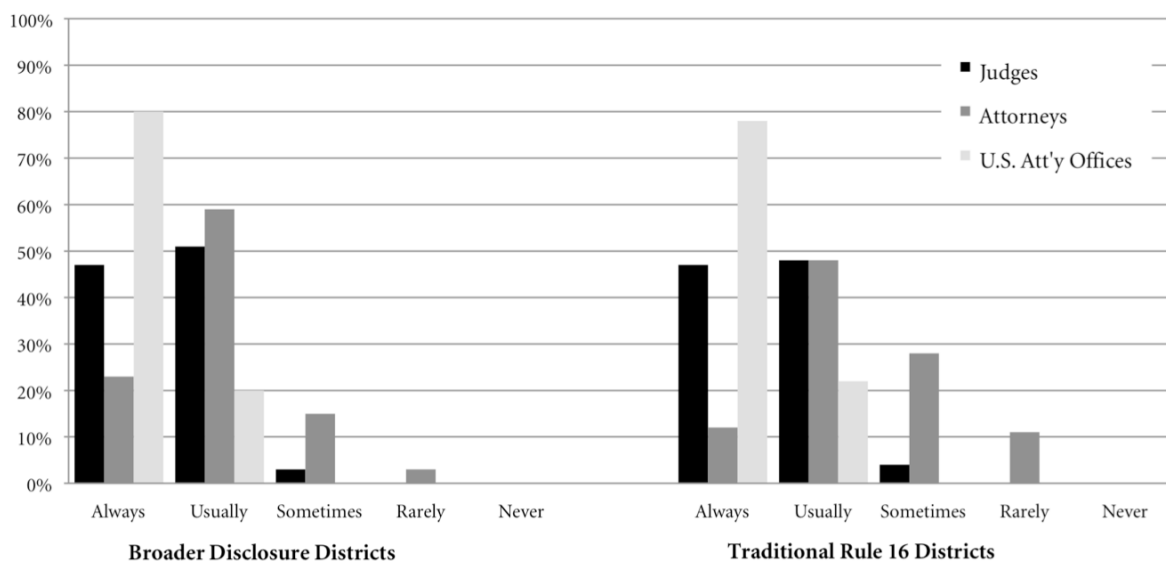
Although individual U.S. Attorney Offices provided responses to other sections of the FJC survey, the DOJ provided one response for the entire agency regarding potential amendments to Rule 16. DOJ reported that it opposes any type of amendment to Rule 16, stating that an amendment is not needed because (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.

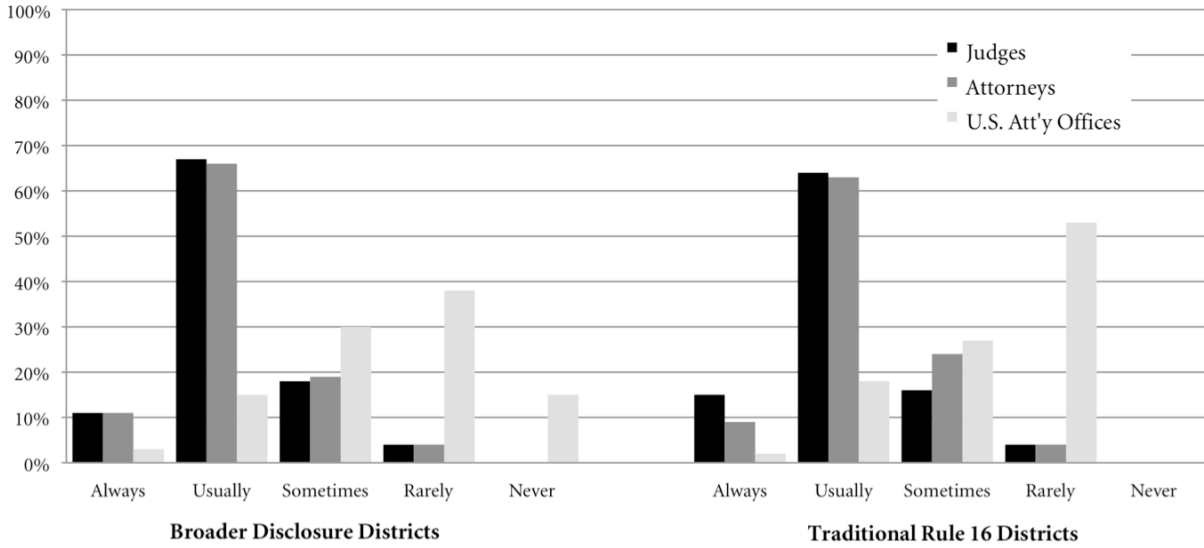
Table 2: Perceptions Regarding Whether Federal Prosecutors Follow a Consistent Approach to Disclosure

	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

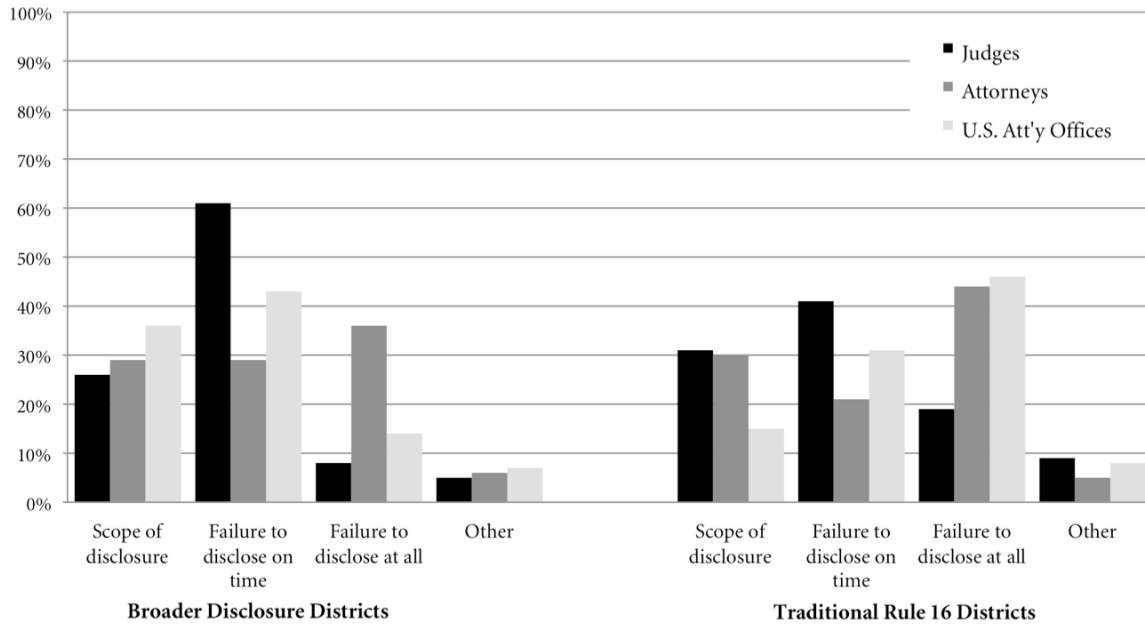
We asked judges to estimate the number of cases over the past five years in which the judges concluded that the attorneys had failed to comply with their disclosure obligations.

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.

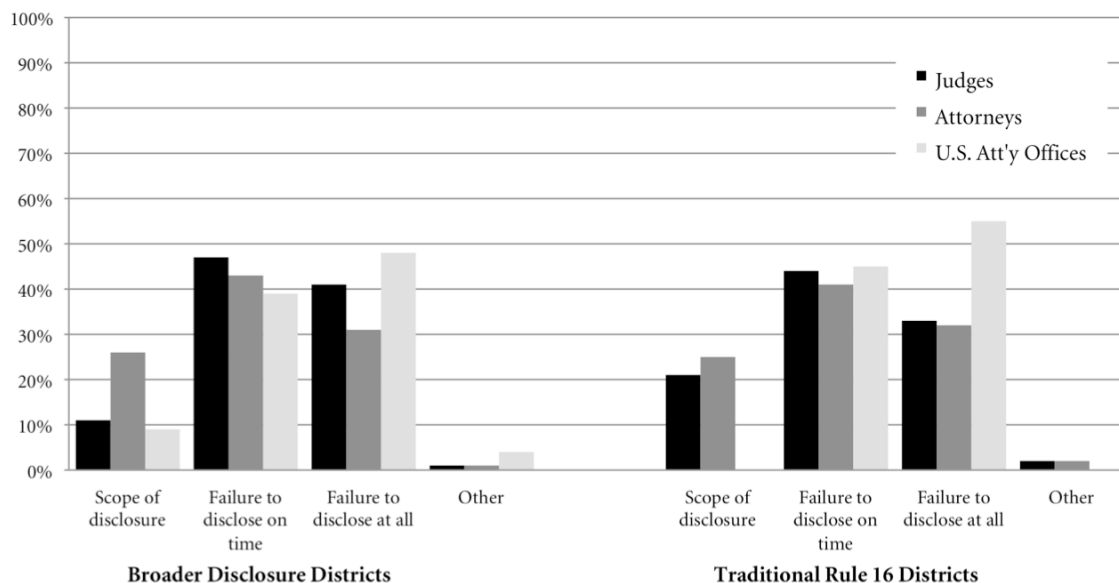
Figure 4: Nature of Most Frequently Mentioned Disclosure Violations by Federal Prosecutors, by Type of District



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.

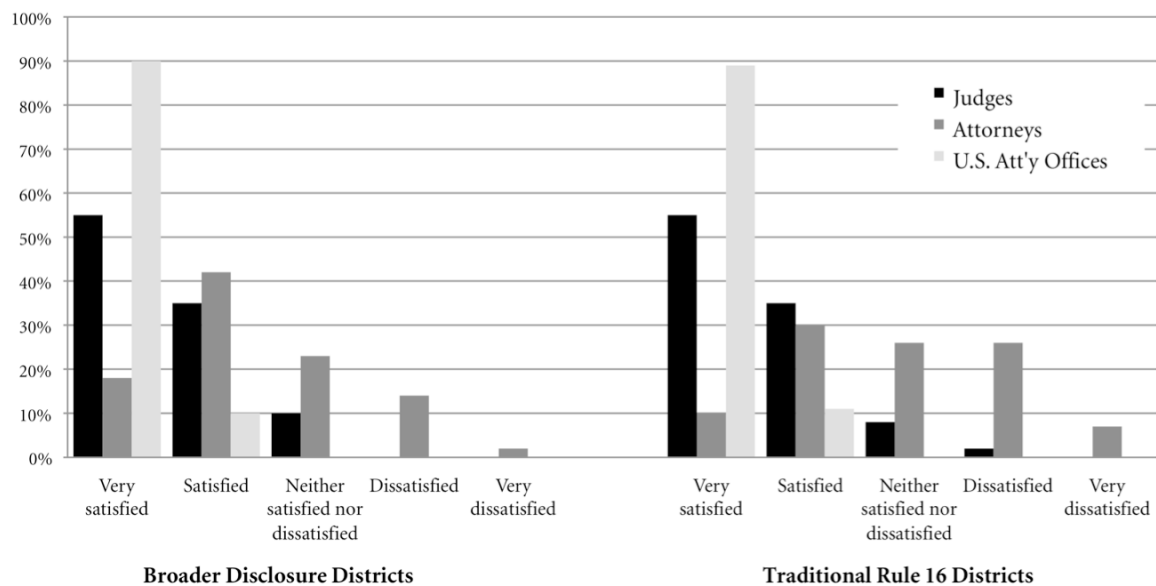
64. Fed. R. Crim. P. 16(d)(2).

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).

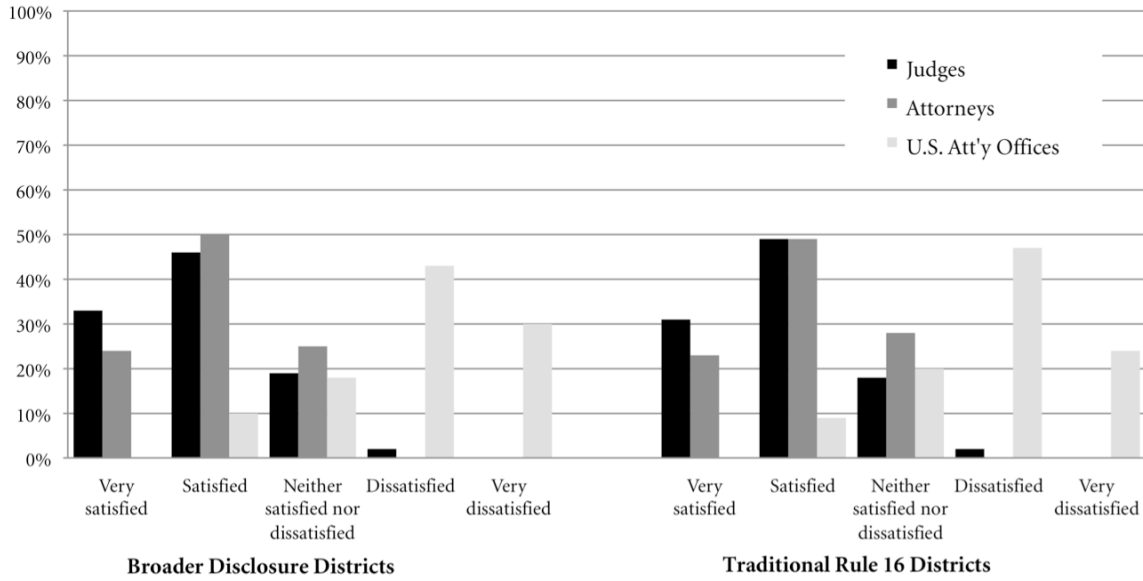
Figure 6: Perceptions Regarding Overall Compliance by Federal Prosecutors



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%

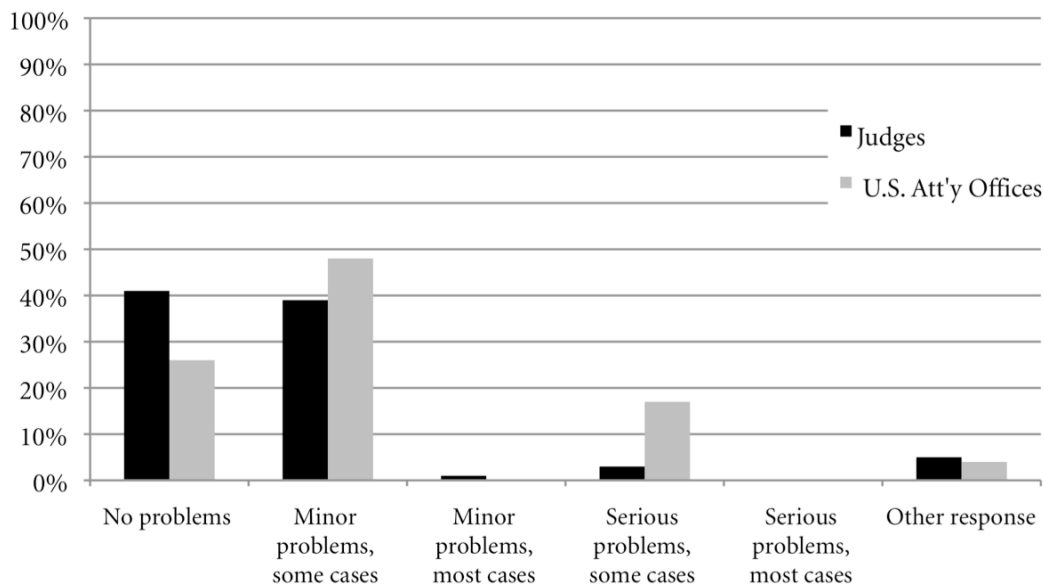
	Traditional Rule 16 Districts		
	All attorneys (n=3,122)	Federal defenders (n=393)	Private attorneys (n=2,729)
Motions would increase	20%	15%	20%
Motions would stay the same	28%	28%	28%
Motions would decrease	46%	46%	46%
Other	7%	11%	6%

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.”

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“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.”

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“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).”

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“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.”

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“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.”

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“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.”

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“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.”

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“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.”

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“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