

New Criminal Rule 5(f) Could Alter Brady Disclosure Timing

By **John Siffert and Brice Jastrow** (November 30, 2020, 5:00 PM EST)

On Oct. 22, Congress and the president took the extraordinary step of circumventing the normal process of amending the Federal Rules of Criminal Procedure and directly amended Rule 5 to require district courts to create standing orders mandating that courts inform prosecutors of their obligation to produce Brady material at the outset of every criminal case.

When implemented by each judicial council, new Rule 5(f) may have the significant impact of changing the timing for when prosecutors produce exculpatory materials to defendants.

This article sets forth the rationale and text of the rule change, and how it is supposed to be implemented.

The article also explains the impact that the rule change will have on how federal criminal cases will be handled. The spoiler alert is that new Rule 5(f) will require courts to remind prosecutors of their obligation to inform defendants of potential weaknesses in the government's case, and Rule 5(f) also may expose the government to additional sanctions if the exculpatory material is not timely produced.

The article also considers the desirability of the Criminal Rules Committee's adopting a national standard governing the disclosures of exculpatory material, to supplement the district council-by-district council approach contained in Rule 5(f).

How Rule 5(f) Was Adopted

On Oct. 22, the president signed the congressional bill called the Due Process Protection Act, or DPPA, which amended Rule 5 of the Federal Rules of Criminal Procedure. Sen. Dan Sullivan, R-Alaska, and Sen. Dick Durbin, D-Ill., proposed the DPPA. According to Sullivan, "Alaskans are well aware of the problem of federal prosecutors violating their constitutional duties and obligations following the reckless prosecution of the late Senator Ted Stevens" in response to the conviction of Stevens.[1]

The procedural step of enacting the DPPA was significant because it bypassed the Judicial Conference of the U.S., which normally originates proposed amendments before Congress acts. The Judicial



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Conference is responsible for, among other things, overseeing proposed amendments to the civil, criminal and bankruptcy rules. It consists of a standing committee that supervises the advisory committees in each of the subject areas. The committee members are composed of judges, prosecutors, federal defenders and representatives from the criminal defense bar.

The advisory committees, in turn, often form subcommittees to make recommendations to the full advisory committee on rule proposals, occasionally holding mini conferences to which learned judges and practitioners are invited to provide their experience and insights. It is a deliberative and earnest endeavor where the goal is to achieve consensus on how to ensure that all federal trials will be fair.

In the case of Rule 5(f), Congress and the president effectively have ordered the courts to adopt rules in each of the districts that will apply to all federal criminal cases respecting the production of exculpatory material to defense counsel.

The Change Made by New Rule 5(f)

The DDPA did not address what material constitutes Brady material that needs to be produced; rather, it shifted responsibility to the courts to remind prosecutors at their first post-indictment appearance of their obligations to produce Brady material.

Rule 5(f) provides:

(1) IN GENERAL. — In all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present, the judge shall issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law.

(2) FORMATION OF ORDER. — Each judicial council in which a district court is located shall promulgate a model order for the purpose of paragraph (1) that the court may use as it determines is appropriate.

The DDPA is careful to defer to the courts the actual order to be adopted by the district judges when implementing the rule. This presents another unusual wrinkle in the rulemaking process. Rather than creating a national standard for newly required orders, the DPPA mandates that "[e]ach judicial council in which a district court is located shall promulgate a model order for the purpose of paragraph (1) that the court may use as it determines is appropriate."²

The fact that Congress did not craft a Brady order, much less legislate its application to all federal criminal prosecutions is a recognition that the Judicial Conference was unsuccessful, in the immediate wake of the prosecution of Stevens, in reaching a consensus to adopt such a rule.

The Rule Change's Impact on Federal Criminal Proceedings

Timing of Disclosure

The amended Rule 5(f) does not require the mandated court order to set a deadline by which Brady material must be disclosed by the government. Under U.S. Supreme Court precedent, such material must be disclosed early enough in the prosecution so as to allow the defendant to make effective use of

the material, though lower courts have diverged widely on precisely how early that is.[3]

At least one district court, the U.S. District Court for the District of Columbia, has adopted a local rule that requires the disclosure of Brady material early in the case: "Beginning at the defendant's arraignment ... the government shall make good-faith efforts to disclose such information to the defense as soon as reasonably possible after its existence is known." [4]

In the DPPA, Congress determined not to impose a similar requirement in all cases, leaving it to the district council to create standing orders and to individual judges to exercise their discretion in how to implement them.

However, Rule 5(f)'s renewed focus on the central role that Brady material holds as a bellwether of trial fairness makes it reasonable to hope that district courts will become more vigilant in the guidance and deadlines they impose for the production of exculpatory material.

It is also to be hoped that prosecutors will be more willing to disclose problematic materials sooner. Presumably, the coercion of the threat of sanctions for noncompliance with a court order will provide additional motivation.

Sanctions for Nondisclosure

Before the new rule, courts were empowered to order new trials in the case of a Brady violation, regardless of whether a court had ordered or whether a defendant had made a request for Brady material.[5]

Rule 5(f) will give new advantages to the defense in the case of a Brady violation that also fails to comply with a court order. Defendants still will be able to move for a new trial where material evidence was wrongfully suppressed. Suppressed evidence is material, and thus amounts to a Brady violation, where "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." [6]

After the implementation of the DPPA, defendants also will have ammunition to argue that the failure to produce exculpatory evidence was a willful violation of a court order, allowing for dismissal without a retrial. Even without a court order, claims of willful suppression can cause the government to consent to dismissal with prejudice in the event of Brady violations.[7]

If the rules committee amends Rule 16 to account for the new Rule 5(f), a Rule 16 discovery order to produce Brady material may also afford a defendant the right to relief under Rule 16(d)(2) in the event that the government failed to provide Brady material.

The Desirability of a National Standard

The DPPA presents a concern that different district councils may devise orders that differ in terms of the nature and timing of when the prosecution must produce Brady material and the circumstances when it may be withheld. There are obvious benefits to having a uniform, national standard that applies uniformly to all federal criminal cases.

Any attempt to create a national standard will require careful deliberation to avoid possible conflicts with the orders that the district councils are mandated to adopt. Rule 5 mandates each judicial council

to promulgate a model order, but nothing would prevent the judicial councils from promulgating an order that was different from a national standard, were one to be adopted. Indeed, Rule 5 explicitly gives each district court the opportunity to use this model order or not "as it determines is appropriate."

Rule 5(f) and a rule implementing a national standard could thus be in tension should the district court or the judicial council within a particular district adopt a model order inconsistent with the national standard. A district court would then be caught between competing obligations under the rules to issue a model order drafted by the judicial council pursuant to Rule 5 or a different model order that adhered to the national standard.

However, with the foresight of recognizing this potential for a conflict within the rules, the rules committee hopefully will achieve consensus on a new rule that avoids this conflict.

Conclusion

Rule 5(f) is notable both because of the unusual procedure through which it was implemented and because of the bright light that it sheds on the importance of the production of Brady material in order to achieve fair trials. The rules committee should consider adopting an appropriate national standard for orders related to Brady disclosures to avoid a patchwork of local standards enacted pursuant to Rule 5(f).

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[1] Press Release of Dan Sullivan, United States Senator for Alaska, Sullivan-Durbin Due Process Protections Act Signed into Law (October 22, 2020), <https://www.sullivan.senate.gov/newsroom/press-releases/sullivan-durbin-due-process-protections-act-signed-into-law>.

[2] Id.

[3] Jason B. Binimow, Annotation, Constitutional duty of federal prosecutor to disclose Brady evidence favorable to accused, 158 A.L.R. Fed. 401 (Originally published in 1999).

[4] U.S. District Court for the District of Columbia Local Criminal Rule 5.1(d).

[5] 2 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 256 (4th ed. October 2020 Update).

[6] United States v. Bagley, 473 U.S. 667, 682 (1985).

[7] United States v. Sadr, 18 Cr. 224 (AJN), Dkt. 362 (SDNY July 17, 2020) (dismissing indictment with prejudice with consent of the government in response to Brady violations).