# Criminal Procedure

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## The Due Process Protection Act: How Rule 5(f) Came to Be and Where Do We Go from Here?

*Brady* and *Giglio* violations place trial judges in the impossible position of trying to predict how a case will unfold and appellate judges in the equally unenviable position of determining what could have been if the government had lived up to its disclosure obligations. Courts should seize the opportunity presented by Congress' passage of the Due Process Protection Act (DPPA) and create new orders that will make federal criminal trials live up to the constitutional promise of fairness to the accused.

### The Problem

Every defense lawyer wants discovery of exhibits, witness statements, and exculpatory material earlier than it currently is given. The delay and manner of discovery in criminal cases are major concerns. Some even argue that the delay in producing exculpatory evidence and cross-examination material diminishes the government's burden of proof. While no one doubts that the Department of Justice (DOJ) and its prosecutors agree that trials should be fair, the DOJ has resisted any rule requiring earlier production of discovery or imposing personal liability for the failure to produce exculpatory material. This tension explains why the Rules Committee has not adopted a *Brady* rule. The DPPA can be the catalyst for courts and the Rules Committee to embrace *Brady*'s underlying rationale.

### The Backstory

Congressional intervention began with the wrongful conviction of Alaska Senator Ted Stevens in the District of Columbia. U.S. District Judge Emmitt Sullivan was shocked that exculpatory evidence material to the defense was withheld, but he was powerless to hold the prosecutor accountable by contempt. Judge Sullivan made it his mission to get the Rules Committee to amend Federal Rule of Criminal Procedure 16 so that prosecutors would be personally responsible if they did not produce *Brady* material.

The proponents of a new *Brady* rule argued that the Rules Committee should recognize — indeed, enhance — the rights of defendants and reduce the incidence of wrongful convictions. They urged the creation of a national rule of professional responsibility to promote judicial efficiency by regulating the timing and nature of materials to be disclosed. The proposed rule would have defined the discovery obligation to compel production of information that could lead to evidence and the production of qualifying information known to members of the entire prosecution investigative team.

The DOJ strongly opposed any such rule. After the Advisory Committee recommended the proposed *Brady* rule by a split (8-4) vote, the Standing Committee declined to adopt it. According to the 2007 minutes, the DOJ argued that the proposal was controversial, divisive, and without consensus. The DOJ insisted that early production posed too many risks, including compromising ongoing investigations, witness intimidation, document destruction, and other security concerns.

**Editor's Note:** The NACDL Discovery Reform Task Force drafted a Model Standing Order on the Prosecution's *Brady* Obligations and an accompanying Statement. Both are available at **https://www.nacdl.org/Document/ModelOrderPursuanttoDueProcessProtectionsAct2020**.

The Standing Committee accepted a compromise: the DOJ would revise its U.S. Attorneys' Manual and train its prosecutors on their *Brady* obligations in lieu of a rule change.

Things stood there for more than a decade. But the passage of time did not extinguish the smoldering fire that had been stoked by Senator Stevens' wrongful conviction. Judge Sullivan created a *Brady* order for the District of Columbia akin to the failed *Brady* rule. And more recently, political trends have encouraged legislators to embrace criminal justice reforms advocated by both progressive and conservative constituencies.

The confluence of these events led Congress to bypass the deliberative process of the Rules Enabling Act and the Judicial Conference. On Oct. 21, 2020, the Due Process Protection Act was passed and signed by President Donald Trump, with no warning or fanfare. Amended Rule 5(f) became effective immediately.

### Congress Acts

In passing the DPPA, Congress determined that there is a *Brady* prob-

lem the Judicial Conference has not solved. Congress recognized the need to hold individual prosecutors responsible for *Brady* compliance. Yet Congress also chose not to usurp the judiciary's role to interpret what the Due Process clause requires to make trials fair. Instead, Congress placed the onus for implementing Rule 5(f) squarely on the courts.

Congress mandated that all courts issue *Brady* orders at the outset of all federal criminal cases. Rule 5(f) is divided into two parts. Rule 5(f)(1) requires judges to inform prosecutors of their obligations to produce exculpatory information and provides that courts may hold individual prosecutors accountable if they do not comply with a *Brady* order.

It is the seemingly simple language of Rule 5(f)(2) that contains the pitfalls and opportunity that feed the debate on where the courts should go from here. Rule 5(f)(2) requires in the simplest and permissive terms that each circuit council must promulgate a model order that a district court "may use as it determines is appropriate."

On its face the DPPA does not create new law about the meaning of *Brady*. In other words, by enacting Rule 5(f), Congress kicked the can down the road, leaving the courts to (1) craft an appropriate *Brady* order; (2) clarify the scope of *Brady* material; (3) define the standard for determining what is exculpatory; (4) set timetables when *Brady* material should be produced; and (5) carve out exceptions that would permit delayed production.

So far, the circuit councils generally have not complied with the congressional command. Many, if not most, have not published a model order for use by its district judges. Model orders that have been submitted to the Administrative Office include orders submitted by individual judges and magistrate judges that have not been approved by any judicial council.

Among the orders that have been submitted there is a lack of uniformity. Many take *pro forma* shortcuts and merely quote the DPPA. Some deal with timing; one states that the prosecution must produce the *Brady* material sufficiently in advance of trial for the defense to make effective use of it. Several provide that a prosecutor can seek *in camera* relief from the standing order. Most do not. Some recite that favorable information must be "material" to guilt or punishment before disclosure is required. One defines what constitutes materiality. Most recite that contempt is a sanction for noncompliance, and one replaces contempt with "disciplinary action."

In other words, there is significant inconsistency in language, approach, and content among these orders. If anything is certain, it is that the circuits are not in agreement.

As it now stands, a defendant's access to *Brady* material depends on the circuit — let alone which district — in which he or she is tried. That is problematic for the courts. If the courts are to maintain their integrity and high public regard, they should not Balkanize the impact of constitutional obligations. The Rules Enabling Act fosters a single system of rules for all criminal cases. Rule 5(f) explicitly, if not implicitly, requires that.

## Judicial Action

The courts should embrace practices that will ensure fair trials for all defendants. Congress found that *Brady* violations presented such a problem that it mandated trial judges hold prosecutors responsible for any violation. Courts know that noncompliance with *Brady* is the same as noncompliance with Due Process, and reported cases show that noncompliance persists: "There is an epidemic of *Brady* viola-

tions abroad in the land. Only judges can put a stop to it."[1] *Brady* violations persist to this day. Courts should accept that they must do a better job to prevent the miscarriage of justice.

In crafting Rule 5(f) model orders, it makes sense for all courts to require the production of all information favorable to the defense. Rule 5(f) orders should not refer to the post-conviction standard that only "material" evidence needs to be produced, much less define "material" to limit the production obligation. That cannot be what Congress intended or expected as the reminder to prosecutors of their obligations.

It also makes no sense for the courts to adhere to the accepted practice that 18 U.S.C. § 3500 material need be produced only after the witness testifies or immediately before trial. Clearly, not all § 3500 material tends to exonerate a defendant, and early disclosure may only constitute early discovery of the government's case. Still, access to witnesses' prior statements assist the defense in trial preparation, including cross-examination. To the extent that § 3500 material constitutes *Giglio* material, early production is warranted. Rule 5(f) orders can and should require such favorable § 3500 statements to be disclosed up front. Constitutionally mandated documents should not be produced later than Rule 16 materials. Early production of § 3500 material is also consistent with the mandates of Rule 16.1.

Rule 16.1 requires the trial judge to issue orders that ensure that Rule 16 materials are timely provided for effective use. In this respect Rule 16.1 serves as a companion to Rule 5(f). The text of Rule 16.1 states that discovery should be produced at a time and manner that will "facilitate preparation for trial." This admonition on the timing of Rule 16 disclosures also applies to *Brady* material, and Rule 5(f) orders should similarly provide that favorable material must be disclosed up front.

Requiring early production of exculpatory information will have additional beneficial consequences: any defense lawyer will point out that the sooner the hand is dealt, the sooner she can evaluate whether to dispose of the case by plea.

None of these observations run counter to the current constitutional obligation that prosecutors must produce favorable information. In fact, each of these proposals is contained in the U.S. Attorneys' Manual following its earlier revision. According to that Manual, it is the obligation of the line prosecutor "to disclose exculpatory and impeachment information to criminal defendants and to seek a just result in every case. The policy is intended to ensure timely disclosure of an appropriate scope of exculpatory and impeachment information so as to ensure that trials are fair."

This is not to suggest that any Rule 5(f) order should be one-sided. Rule 5(f) orders must take care to address prosecutors' concerns that the production of sensitive information can pose risks to ongoing investigations and to the integrity of evidence. Such orders should provide that the government may seek exceptions to early production upon an *in camera* showing to the court and allow the court discretion to grant appropriate relief from the timing and nature of production.

Just because Congress provided a mechanism to hold prosecutors personally responsible for compliance with *Brady* orders does not mean that courts should ramp up the imposition of contempt citations. Although the desire to hold prosecutors accountable for *Brady* violations animated the DPPA, holding someone in contempt does not help the defendant in question. Trial judges should deploy creative measures to enforce *Brady* orders, beyond the threat of contempt. Among other things, a court can grant continuances, grant midtrial supplemental openings, issue curative instructions, and order new trials or dismissal of all or part of a case.

### Picking Up the Can

The Rules Committee now has before it a proposal to amend Rule 16, akin to Judge Sullivan's proposal nearly two decades ago. The proposal is designed to create a uniform national rule regarding the implementation of Rule 5(f). If adopted, it would require the prosecution to produce exculpatory information immediately without demand, but it would allow the prosecution to seek disclosure exceptions at the court's discretion.

In the meantime, circuit councils are considering and adopting appropriate Rule 5(f) orders.

It is time for the Rules Committee and the courts to adopt *Brady* orders that represent a full-throated endorsement of the *Brady* and *Giglio* cases. The proposed Rule 16 amendment and the language in the U.S. Attorneys' Manual are good examples to follow. In any event, it is not sufficient for courts to do lip service by adopting 5(f) orders that merely recite the language of the DPPA.

The circuit councils should endeavor to ensure uniformity within their circuits. We can do better than a criminal justice system that creates advantages or disadvantages depending on the district in which a defendant is indicted. Likewise, circuit councils and the defense bar should weigh in at the Rules Committee to ensure that a uniform *Brady* rule applies nationwide.

In any event, courts should not leave the proverbial can on the road in the same place where Congress left it.

## Note

1. *United States v. Olsen*, 737 F.3d 625 (9th Cir. 2013) (Kozinski, J., dissenting from denial of rehearing en banc). ■

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