ADVISORY COMMITTEE
ON
CRIMINAL RULES

Portland, OR
April 11-12, 2011

CHAMBERS OF U.S. CIRCUIT JUDGE
RICHARD C. TALLMAN **MEMORANDUM**

March 21, 2011

TO: Members, Criminal Rules Advisory Committee

FROM: Hon. Richard C. Tallman

RE: Rule 16

Since our fall meeting in Boston, I have held two telephone conference calls with the Rule 16 Subcommittee. In order to stimulate discussion during the most recent call, the reporters and I prepared (1) a draft amendment to Rule 16, and (2) a checklist that might be incorporated into the District Judges' Benchbook. The Subcommittee was unable to reach consensus on whether or not to recommend our draft amendment to the Committee of the Whole. Thus, I have placed the issue on the agenda for the Portland meeting without specific endorsement of any particular change. Indeed, as you will see from the recent March 18, 2011, letter to me from Assistant Attorney General Lanny Breuer, the Department remains opposed to any change in the rule. For purposes of our discussion, however, on pages 10-11 of this letter the Department has provided language that would, in its view, codify the existing *Brady/Giglio* case law.

To facilitate our Portland discussion, I have asked the Reporters to provide the entire Committee with the same material we gave the Subcommittee, supplemented by any comments from the Department and the defense community. This memorandum describes the discussion draft amendment to Rule 16. Both the proposed amendment and the checklist follow at the end of this memorandum.

Following our initial discussion in the teleconference of the Rule 16 Subcommittee, I asked the Department of Justice and Ms. Brill, as a representative of the defender community, to prepare comment materials for inclusion in the Agenda Book responding to the discussion draft and checklist. The submissions we have received follow the discussion draft and checklist.

During the Portland Advisory Committee meeting, I would like to focus the discussion on whether, in light of the Federal Judicial Center survey results, we should even proceed with a proposed change. I remain concerned that with the Department and the defense bar at polar opposites, and the judges in the middle, a consensus resolution by the Judicial Conference will be difficult to achieve. Nonetheless, I offer the attached language to stimulate our discussion.

The discussion draft imposes a new duty on the government to disclose "exculpatory" or "impeachment" information within its possession and known by the attorney for government to exist. Pretrial disclosure of this information is intended to facilitate defense preparation and enhance the fairness and efficiency of federal criminal trials.

The discussion draft provides a critical limitation on this new obligation: adopting a proposal endorsed by the Criminal Rules Committee in 1997, the government would have the unreviewable authority to withhold such disclosure before trial whenever it has a good faith belief that making the disclosure would jeopardize the safety of individuals or the public, or threaten either national security or obstruction of justice. Thus the government can provide assurances to prospective witnesses, foreign governments, and domestic intelligence agencies that it will not be required to make pretrial disclosures that would threaten the safety of any person or our national security interests. It can also unilaterally tailor pretrial disclosure when necessary to prevent obstruction of justice.

The discussion draft does not disturb or modify the existing regime under Rule 26.2 and 18 U.S.C. § 3500, which provides for post-testimony disclosure of prior written or recorded witness statements, but the discussion draft does require pretrial disclosure – subject to the government's unreviewable authority noted above – of a written summary of inconsistent statements by its witnesses.

The discussion draft has the following features:

(1) It separates exculpatory and impeachment information, and provides a definition of each.

Both exculpatory and impeachment information must be "within the government's possession, custody or control and known by the attorney for the government to exist."

- Exculpatory information is further defined as information "that is inconsistent with any element of the crime charged against the defendant or that establishes an affirmative defense, if that information is not defined as impeachment information."

- Impeachment information is then defined as information "that casts substantial doubt upon the accuracy of any witness testimony that the government intends to rely on to prove an element of any crime charged, including a [list further described below]."

The definition of each of these terms is one of the issues for Committee discussion.

(2) This bifurcated structure allows the time for disclosure to vary depending upon whether the information is exculpatory or impeaching.

During discussion of the amendment proposed in 2007 and in the Federal Judicial Center survey, particular concern was expressed regarding pretrial disclosure of the wide variety of information that might be defined as impeaching. The discussion draft allows the Committee to define different time limits for exculpatory and impeachment information. The discussion draft

requires earlier disclosure for exculpatory information (at least 14 days before trial) than for impeachment information (7 days before trial).

The Committee should consider the appropriate time periods to provide sufficient time for defense preparation, and – in light of other features of the discussion draft – also protect the interests the government has identified as ones of special concern, including the protection of witnesses, the prevention of obstruction of justice, and national security interests.

(3) The discussion draft provides an illustrative but non-exhaustive list of the common forms of impeachment information.

The provision of the illustrative list is intended to provide substantial guidance. The following items are included in the discussion draft:

(i) a written summary of any inconsistent oral or written statement by the witness regarding the alleged criminal conduct of the defendant;

(ii) any offer or promise made directly or indirectly to the witness by the government in exchange for cooperation or testimony;

(iii) any prior conviction or specific instance of conduct that could be used to impeach the witness under Federal Rule of Evidence 608 or 609;

(iv) any uncharged criminal conduct by the witness or release of civil liability that may provide an incentive to curry favor with a prosecutor;

(v) any pending criminal charge against the witness; and

(vi) any impairment that could affect the witness's ability to perceive and recall.

In seeking to enumerate the most common forms of impeachment information, the discussion draft follows the format of the Committee's proposed amendment to Rule 12. Discussion of whether to employ this format, which items to include, and the language of each proposed item, would be helpful. Item (i), dealing with prior inconsistent statements, is discussed below.

(4) The discussion draft requires pretrial disclosure of <u>a summary</u> of prior inconsistent statements by government witnesses

A special regime now exists for the disclosure of prior witness statements, which are provided to the opposing party after the witness has testified, rather than as a part of general pretrial

discovery. See Rule 26.2 and the Jencks Act, 18 U.S.C. § 3500.[1] Rule 16(a)(2) provides that the rule does not "authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500." Our thought was to avoid a direct collision with the statutory timetable Congress established when enacting the Jencks Act for the reasons we have previously discussed in Committee. It is Judicial Conference policy to avoid promulgating rules that directly conflict with existing statutes, thereby triggering an interbranch conflict. We are also attempting to avoid prompting Congress to hold hearings on potential legislation that might modify whatever rule change language is ultimately approved by the Conference and the Supreme Court.

Although Rule 26.2(d) and the Jencks Act, 18 U.S.C. § 3500(c) provide that the court may recess the trial to allow a party to analyze the prior statements, recessing imposes costs on the court, the jurors, witnesses, counsel, and the defendant. Defense participants at the Houston meeting and defense lawyers who responded to the Federal Judicial Center have strongly urged the need for pretrial provision for such information in order to investigate and make the most effective use of it.

The discussion draft seeks to accommodate the defense need for adequate time for pretrial preparation by providing for pretrial disclosure of only "a written summary of any inconsistent oral or written statement by the witness," not the statement itself. It retains the statement in Rule 16(a)(2) that the rule does not "authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500."

The proposed amendment contains a broader definition of prior statements than those found in Rule 26.2 and 18 U.S.C. § 3500, which are limited to written and contemporaneously recorded statements, as well as grand jury testimony. As noted, this definition in the discussion draft triggers the obligation to disclose a summary of any prior statement regarding the alleged criminal conduct of the defendant that is inconsistent with the witness's anticipated testimony, not the witness's full statement.

A key issue for Committee discussion is whether the requirement of pretrial disclosure of a summary of impeaching evidence is consistent with the Jencks Act and Rule 26.2.

(5) The discussion draft provides the government with unreviewable authority not to disclose information before trial.

The discussion draft provides an important escape valve for cases in which the government believes that pretrial disclosure would threaten the safety of witnesses, victims, or the public; jeopardize national security; or lead to obstruction of justice. New subdivision (J) provides the government with the option of filing – ex parte and under seal – an "unreviewable written

[1]See point 6 infra for a discussion of the relationship between Rule 26.2 and the Jencks Act.

explanation" of its good faith belief that the pretrial disclosure would threaten one of these interests. If the government makes this filing, pretrial disclosure "is not required."

The discussion draft thus balances the new obligation to provide pretrial disclosure of exculpatory and impeachment information with the certainty that the government can withhold such disclosure whenever it has a good faith belief that pretrial disclosure would jeopardize the safety of individuals or the public, jeopardize national security, or threaten obstruction of justice.

When disclosure of exculpatory or impeaching information is delayed under (J), the discussion draft provides in (d)(1) that the court shall ensure that the disclosure of the information is made "in sufficient time to permit the defendant to make effective use of that information at trial subject to the limitation in 18 U.S.C. § 3500."

The scope and effectiveness of this escape valve are other important issues for discussion.

(6) The discussion draft refers to the Jencks Act.

Rule 26.2 (which became effective December 1, 1980) and the Jencks Act cover much the same ground, raising the question whether the new provisions in the discussion draft should refer to the rule, the act, or both. As explained in the Committee note that accompanied Rule 26.2, the rule "place[s] in the criminal rules the substance of" the Jencks Act, and also imposes disclosure obligations on the defense that parallel the government's obligations. In 1983 Rule 16(a)(3) (as well as Rule 12) were amended to refer to Rule 26.2, rather than the Act. Without explanation, however, the reference to the Jencks Act was retained in Rule 16(a)(2).

I want to emphasize that the Chair is not committed or endorsing the proposed discussion draft. Instead, it was my belief that it was time to lay something on the table in order to better focus the Committee on the important question whether to amend Rule 16, and, if so, in what form. We have devoted substantial time, study, and resources to this issue. I believe we have done so in a careful, thoughtful, and deliberate manner. It is time to bring the question to a head. We have many other pressing proposals that also require our attention, and which we will also be discussing in Portland. I hope you find these materials useful in stimulating your thinking and our discussion.

I look forward to seeing all of you in April.

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

(1) Information Subject to Disclosure.

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(H) **Exculpatory information.** At least [14] days before trial, the government must disclose any information within the government's possession, custody, or control and known by the attorney for the government to exist that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, if that information is not impeachment information as defined in (I).

(I) **Impeachment information.** Upon a defendant's request and at least [7] days before trial, the government must disclose any information within the government's possession, custody, or control and known by the attorney for the government to exist that casts substantial doubt upon the accuracy of any witness testimony that the government intends to rely on to prove an element of any crime charged, including the following:

(i) a written summary of any inconsistent oral or written statement by the witness regarding the alleged criminal conduct of the defendant;

(ii) any offer or promise made directly or indirectly to the witness by the government in exchange for cooperation or testimony;

(iii) any prior conviction or specific instance of conduct that could be used to

impeach the witness under Federal Rule of Evidence 608 or 609;

(iv) any uncharged criminal conduct by the witness or release of civil liability that may provide an incentive to curry favor with a prosecutor;

(v) any pending criminal charge against the witness; and

(vi) any impairment that could affect the witness's ability to perceive and recall.

(J) Exception to pretrial disclosure of exculpatory or impeachment information. Pretrial disclosure of exculpatory or impeachment information is not required if the government submits to the court, ex parte and under seal, an unreviewable written explanation stating why the government believes in good faith that pretrial disclosure of this information will threaten the safety of any crime victim, other person, or the public; jeopardize national security; or lead to an obstruction of justice.

(2) Information Not Subject to Disclosure. Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

(d) Regulating Discovery

(1) Protective and Modifying Orders. At any time the court may, for good cause, deny,

restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal. If pretrial disclosure of information under Rule 16(a)(1)(H) or (I) is delayed, the court shall insure that disclosure of the information is made in sufficient time to permit the defendant to make effective use of that information at trial subject to the limitation in 18 U.S.C. § 3500.

Draft to circulate to Subcommittee

Checklist for disclosure before trial

A. **Exculpatory information.** The government should certify that it has disclosed [or has complied with the procedure for withholding] all information that tends directly to negate the defendant's guilt of any crime charged, including

(1) the failure of any person who participated in an identification procedure to make a positive identification of the defendant, whether or not the government anticipates calling the person as a witness at trial; [adapted from D. Mass]

(2) information that is inconsistent with any element of any crime charged or that establishes a recognized affirmative defense [regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime]; [from USAM 9-5.001]

(3) information that casts a substantial doubt upon the accuracy of any evidence-- other than witness testimony -- that the prosecutor intends to rely on to prove an element of any crime charged, or that might have a significant bearing on the admissibility of that evidence [regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime] [from USAM 9-5.001] [impeachment information considered separately, below]

(4) classified or otherwise sensitive national security material that tends directly to negate the defendant's guilt, which may require certain protective measures that may cause disclosure to be delayed or restricted [from USAM 9-5.001]

B. **Impeachment information.** The government should certify, for each witness it anticipates calling in its case-in-chief, that it has either disclosed [or has complied with the procedure for withholding] the following:

(1) the **name** of the witness

(2) any **statement**, or a description of such a statement, made orally or in writing by the witness, regarding the alleged criminal conduct of the defendant, that is inconsistent with other statements made by the witness, including material variances within the same interview and inconsistent attorney proffers;

(3) **offers or promises** made directly or indirectly to the witness by the government in exchange for cooperation or testimony including:
(a) dropped or reduced charges
(b) immunity
(c) expectations of downward departures or motions for reduction of sentence;
(d) assistance in a state or local criminal proceeding;
(e) considerations regarding forfeiture of assets, including the amount, or forbearance in seeking revocation of professional licenses or public benefits;
(f) stays of deportation or other immigration benefits;
(g) assistance in procuring visas;
(h) monetary benefits, paid or promised;
(i) nonprosecution agreements;
(j) letters to other law enforcement officials (e.g. state prosecutors, parole boards) setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf;

(k) relocation assistance;
(l) consideration or benefits to culpable or at risk third parties;

(4) **Prior convictions** that could be used to impeach the witness under FRE 609;

(5) **Uncharged criminal conduct** by the witness or release of civil liability (e.g., waiver of tax liability or promises not to suspend or debar a government contractor) that may provide an incentive to curry favor with a prosecutor, known to the government;

(6) **Pending criminal charges** against the witness, known to the government;

(7) Prior **specific instances of conduct** by the witness known to the government that could be used to impeach the witness under FRE 608, including any finding of misconduct that reflects upon truthfulness;

(8) Substance abuse, mental health issues, physical or other impairments known to the government that could affect the witness's **ability to perceive and recall** events;

(9) Information known to the government that could affect the witness's **bias** such as:
a) Animosity toward defendant
b) Animosity toward a group of which the defendant is a member or with which the defendant is affiliated
c) Relationship with victim.

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

March 18, 2011

The Honorable Richard C. Tallman
Chair, Advisory Committee on the Criminal Rules
902 William Kenzo Nakamura Courthouse
1010 Fifth Avenue
Seattle, Washington 98104-1195

Dear Judge Tallman:

Per your request, this letter is a follow-up to the Rule 16 Subcommittee conference call held on February 25, 2011. At the outset, let me express our sincere appreciation for the leadership you have shown throughout your chairmanship of the Criminal Rules Committee. On all the issues the Committee has addressed, and especially those surrounding the Committee's consideration of prosecutorial disclosure and the proposed amendments to Rule 16 of the Federal Rules of Criminal Procedure, you have guided our Committee with great skill and with a focus on improving federal criminal justice. Our Committee has been looking into disclosure issues related to the Supreme Court's decisions in *Brady v. Maryland*, 373 U.S. 93 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), for more than seven years now, since the American College of Trial Lawyers first proposed an amendment to Rule 16 in 2003. We agree with you that the Committee has now fully explored the issues and that every effort should be made to resolve them in the coming months.

We also appreciate your memorandum of February 7, 2011, and the various options you set out in an effort to find common ground in the Committee around disclosure issues. We believe there is common ground, and as you requested, we lay out our thoughts on that in this letter. We also provide you our concerns about the proposed amendment set out in the February 7th memorandum. Finally, as you requested, we include here a proposed amendment to Rule 16 that would summarily codify existing constitutional disclosure requirements under *Brady* and *Giglio*. We very much look forward to discussing all of this with you and the other members of the Committee in Portland in April.

Common Ground

The Attorney General and I – and I am certain all the members of the Committee as well – are committed to ensuring that Department of Justice prosecutors are the most professional and ethical lawyers in the country and that they fulfill all of their disclosure obligations. We believe, and we think the experience of Committee members confirms, that

federal prosecutors are the very best at what they do. That is not meant in any way to minimize the reality that mistakes have been made by federal prosecutors from time to time in the past and will be made from time to time in the future; nor is it meant to indicate that Department prosecutors face no challenges in meeting our disclosure obligations. We do.

At the very beginning of his tenure, after discovery violations were uncovered in the *Stevens* case, the Attorney General took the extraordinary step of moving to set aside the guilty verdict in the case and to dismiss the indictment. This was not the easiest, nor the only possible course of action. But it was the right thing to do. Moreover, the Attorney General took another important step at that time. He asked the Deputy Attorney General to convene a working group to fully examine discovery and case management practices in the Department and to make recommendations for improving discovery and minimizing violations of discovery law and ethics. He made a commitment to address any and all challenges facing federal prosecutors – including the many challenges resulting from new and emerging technologies – and to ensure that to the extent humanly possible, every federal prosecutor meets his or her disclosure obligations.

I co-chaired that working group in 2009, along with Karen Immergut, then-U.S. Attorney in the District of Oregon and Chair of the Attorney General's Advisory Committee. The working group met regularly for several months, reviewed existing law and Department policies, candidly evaluated discovery practices, surveyed the U.S. Attorney community, and developed recommendations for reform and improvement.

I came to the Criminal Rules Committee meeting in the fall of 2009 and later in 2010 and pledged that the Department would take significant steps to improve disclosure policies and practices of federal prosecutors. I can now report that many of those steps have been completed and others are well underway. Under the leadership of Attorney General Holder, the Department of Justice has taken unprecedented measures to train prosecutors, investigators, paralegals, and support staff, develop policies that ensure consistent disclosure practices that meet all legal requirements, address new and emerging technologies that raise significant retention and disclosure issues and challenges, and develop greater cooperative relationships with the courts and defense bar to make disclosure practices work better. Moreover, we have committed ourselves to continuous improvement in our disclosure practice.

These are just some of the steps that we have taken to improve disclosure practice within the Department of Justice over the last few years:

- The Department amended the U.S. Attorneys' Manual and created a ground-breaking and transparent policy that requires our prosecutors to go beyond the legal disclosure requirements recognized by the Supreme Court wherever possible and generally to provide defendants with such discoverable information earlier than required by law.
- Then-Deputy Attorney General David Ogden issued three memoranda to all federal prosecutors that: (1) provided overarching guidance on gathering and reviewing discoverable information and making timely disclosure to defendants; and (2) directed each U.S. Attorney's Office and litigating division to develop more granular discovery

policies that account for controlling precedent, existing local practices, and judicial expectations.

- The Department appointed a full-time national coordinator for criminal discovery initiatives (and later a full-time deputy) to lead and oversee all Department efforts to improve disclosure policies and practices.

- The Attorney General put in place a requirement that all federal prosecutors undertake annual discovery training. This requirement has since been institutionalized through its codification in the U.S. Attorneys' Manual. The Department has held comprehensive "train-the-trainer" programs at the National Advocacy Center to facilitate live training programs in U.S. Attorneys' offices around the country and has also developed video programs available to all federal prosecutors at their desktops. The thousands of federal prosecutors across the country have now undergone the required training and will continue to do so annually.

- The Department initiated "New Prosecutor Boot Camp," the inaugural version of which was held in 2010. The course, designed for newly hired federal prosecutors, includes training on *Brady, Giglio*, electronically stored information (ESI), the scope of the prosecution team, the Jencks Act, and Rule 16. The training includes presentations by faculty; mock oral argument on discovery motions with students playing the roles of both prosecutor and defense attorney; and hands-on review of documents for issue identification.

- The Department has begun a program to train the thousands of federal law enforcement agents across the government in case management and disclosure policies and practices. We have held "train-the-trainer" programs at the National Advocacy Center and district-specific programs in states across the country, and we are now beginning a program of training 26,000 investigative agents employed in the Department's five investigative agencies, the Federal Bureau of Investigation (FBI), Drug Enforcement Administration, Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Marshals Service, and Bureau of Prisons. This training program includes 5,700 FBI agents and support personnel located in the Washington, D.C. area at FBI headquarters, Quantico, and the Washington Field Office. The Washington-based FBI trainings are taking place in 35 different four-hour sessions. The same effort is being executed across the country. When the training of Department agencies is completed, we will begin training thousands of agents employed by the Internal Revenue Service, Immigration and Customs Enforcement, the Postal Inspection Service, and other non-DOJ agencies.

- In September 2010, the Department held the initial Support Staff Criminal Discovery Training Program at the National Advocacy Center. In addition to covering *Brady, Giglio*, ESI, the Jencks Act, and Rule 16, the course placed particular emphasis on the use of software for managing cases and case documents electronically.

- The Department has now completed the drafting of a Discovery Blue Book that will soon be printed and distributed to every federal prosecutor. It comprehensively covers the law, policy and practice of prosecutors' disclosure obligations.

- Pursuant to the instructions of then-Deputy Attorney General Ogden, all U.S. Attorneys' offices and litigating components have created criminal discovery policies with more specific guidance than that issued by the Deputy Attorney General and that account for controlling precedent, existing local practices and local rules of court.

- The Department is in the final stages of developing a national e-communications policy to guide agents and prosecutors in the management, retention, and disclosure of emails, text messages, instant messages, and emerging technologies.

- In September 2010, the Department began collaborating with the Federal Judicial Center (FJC) on training for the courts on ESI in criminal cases. We will be participating in further such training in Portland in April (at the same time as our meeting) and in Atlanta in July, and our national discovery coordinator will provide additional training on historical cell site data at various workshops for United States Magistrate Judges.

- In order to improve disclosure practices, the Department's criminal prosecutors have been collaborating with their DOJ civil e-discovery counterparts, representatives of the Federal Public Defenders, and personnel from the FJC. We have made significant strides on a project with the Federal Public Defenders to create a best practices protocol for exchanging e-discovery in criminal cases. The goal of the project is to eliminate unnecessary discovery disputes and encourage more uniform practices nationwide to benefit prosecutors, defense lawyers, and the courts. Judge Barbara Rothstein, the head of the FJC, is a strong supporter of this project. The Department was invited to speak at the annual Federal Defender Conference in January regarding this project.

- The Department has created a case management pilot project to develop best practices in the collection, cataloguing, and disclosure of case information generally. The project is creating templates for integrating agents' and prosecutors' case information and work product.

- The Department has convened a computer forensics working group to develop best practices on the use of forensics for fast-changing technologies.

As is plain to see, what began with the American College of Trial Lawyers letter in 2003, continued with the thorough examination of disclosure practices by this Committee, and then followed with an historic commitment by this Attorney General and Department of Justice to improvements in practice and policy, has resulted in dramatic and positive change. The changes have taken place across the country both in discovery policies, practice, and perhaps most important, in the culture of discovery within the Department of Justice. Simply put, the last

several years have seen substantial improvements in criminal discovery in federal courts across the country. We think many of the steps ordered by Attorney General Holder were overdue, and while much has been achieved, our work is not done. Our national discovery coordinator and his deputy are hard at work, and their efforts and those of U.S. Attorneys' offices throughout the country and the Department's litigating divisions will continue into the future.

As I indicated when I first spoke with the Committee about this subject in 2009, we think the Department's comprehensive approach to improving discovery practices is the best way to ensure that prosecutors fulfill their disclosure obligations. And we believe this Committee can help to institutionalize the progress that has been made by publicly documenting what has already been done and by periodically asking the Department to report to the Committee about its disclosure training, policies, and practices. We think such a public report and/or public testimony will lay bare what we believe are emerging best practices in prosecutorial disclosure and will help minimize concerns that as administrations and senior Department leadership change over time, the Department's efforts will be abandoned.

Moreover, it is clear that changing technology will continue to expand what has already been an explosion in case-relevant information obtained by law enforcement in recent years. This expansion will require continuous change and improvement in case management practices and, we suspect, disclosure policies and practice. Technology will also likely change the way case information is stored and reviewed for discovery purposes over the coming years. A recent article in The New York Times documented how some of those changes are already taking place. *See*, John Markoff, *Armies of Lawyers Replaced by Software*, The New York Times, March 5, 2011. Discovery is an issue that will need considerable attention for some time to come.

In the meantime, we also believe the Committee might take up the suggestion in your February 7th memorandum and consider providing guidance to federal judges – whether through some sort of checklist or otherwise – of some of the information the FJC and the Committee have gathered along the way in considering these issues. Within the rules and the case law, trial judges have substantial latitude to control their courtrooms and the litigation that takes place within them. We think guidance may be appropriate, and we will gladly work with the Committee on what such guidance might look like. Candidly, we have some concerns about a formal "checklist" and certification, as suggested in your February 7th memorandum, but we do think some guidance to judges may be appropriate.

Our Views on Amendments to Rule 16

We continue to believe that expanding the scope of required prosecutorial disclosure, through an amendment to the Federal Rules of Criminal Procedure, is the wrong approach to ensuring that prosecutors meet their current disclosure obligations under *Brady/Giglio*. We disagree with the view of this issue offered by the American College of Trial Lawyers (ACTL). Their view is that the best way to avoid error is by taking the responsibility for determining what information is "material," and therefore subject to disclosure, out of the hands of prosecutors and instead require far broader disclosure than what is now mandated by law. They suggest this approach might reduce the risk of prosecutorial error, although that is not entirely clear. But we

know with certainty that such an approach would be inconsistent with multiple decisions of the Supreme Court, of this Committee, and of Congress over the last forty years. Those decisions embody a careful and delicate balance between securing a defendant his constitutional rights and, at the same time, safeguarding the equally important public interests in a criminal trial process that protect victims and witnesses from retaliation or intimidation, protect victims' and witnesses' privacy, protect on-going criminal investigations from unwarranted interference, and protect national security interests.

The proposed restructuring of Rule 16 would change this careful and delicate balance to the detriment of the public interests, all without a demonstrable improvement in either the fairness or reliability of criminal judgments. The Supreme Court, in *United States v. Bagley*, 473 U.S. 667 (1985), considered and rejected the expansion of *Brady* to reach nonmaterial, inadmissible information. The Court explained that the purpose of the *Brady* rule is not "to displace the adversary system," but to "ensure that a miscarriage of justice does not occur." *Bagley*, 473 U.S. at 675. For that reason, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial. *Id.*

Many of our concerns over the ACTL approach are set out in the letter from then-Deputy Attorney General Paul McNulty to the Standing Committee, previously distributed to our Committee, and we will not recount those concerns here. But at bottom, we think the ACTL proposal is the wrong approach to the problem of prosecutorial misconduct and error, which is, by all measures, very small given the number of cases prosecuted every day in federal courts across the country.

We also find the results of the Federal Judicial Center survey instructive on the question of whether any amendment to the rules is necessary. The survey's findings include the following:

- 94% of judges expressed the view that federal prosecutors usually or always understand their disclosure obligations (interestingly, only 78% thought the same of defense attorneys);

- 88% of judges replied that federal prosecutors usually or always follow a consistent approach to disclosure;

- Judges reported high levels of satisfaction with the overall compliance by federal prosecutors with their disclosure obligations; and

- Judges were evenly split about whether there should be any amendment to Rule 16.

Our view is that any rule proposal that goes beyond codifying existing law would not measurably improve disclosure practices, but would rather simply impose a new layer of discovery litigation – and with it, substantial litigation costs, create tremendous uncertainty and

upheaval in criminal litigation for little or no benefit, and expose witnesses to greater intrusions into their safety and privacy.

We do not believe any amendment to Rule 16 should be pursued at this time. As we have recounted, we have implemented far-reaching policies and practices that require prosecutors to go beyond the requirements of *Brady/Giglio* and that will bring about greater consistency of practice and compliance with applicable law. We think these policies will accomplish our common goal: to see that prosecutors disclose what the law requires and that justice is done in all criminal cases.

During our conference call, we orally conveyed why the Department believes that the draft amendment to Rule 16 contained in your February 7th memorandum should not be pursued. At your request, we summarize our concerns again here.

Proposed Amendment to Rule 16 Contained in Your February 7th Memorandum

As indicated above, our overarching concern with the draft Rule 16 amendment contained in your February 7th memorandum is that, if promulgated, it would not measurably improve disclosure practices, but would rather simply superimpose a new framework of discovery law on top of the already existing law covering exculpatory and impeachment information. We believe this new legal framework would carry with it substantial litigation costs, tremendous uncertainty and upheaval in criminal litigation for little or no benefit, and exposure of witnesses to greater intrusions into their privacy and at times personal risk. All of the new standards, terms, and provisions contained in the draft amendment are the components of this new legal framework that would not replace the forty-plus years of *Brady/Giglio* case law, but rather be layered on top of it. Without a substantial benefit to the system for doing so, we think such an approach of layering new legal rules on top of existing legal rules is misguided.

By placing in the rules the new disclosure obligations, the proposal will likely open the floodgates to pretrial and post-conviction discovery motions addressing both what constitutes exculpatory or impeaching information as well as the government's methodology for identifying such information in the course of investigations. This new litigation would occur not just in relation to the new legal principles, but also in relation to the particular facts and investigations of each case. For example, if a prosecutor discloses email as part of discovery, defendants will now have a legal avenue to inquire as to whether the investigation captured – or should have captured – the metadata or other information that might cast doubt on the origins of the email. The new rules will open hundreds of such avenues for attacking the handling of an investigation. Motions will be crafted seeking testimony of agents, computer forensic analysts, paralegals, and litigation support specialists before trial to explain their electronic or other evidence collection and handling procedures with the intent of showing the court that the government is hiding exculpatory or impeaching information buried in the metadata, the computer forensic analysis, or the hard-drive's slack space. We are concerned that vast amounts of court time and government resources will be siphoned away from addressing the merits of cases and redirected to scrutinizing the history of the investigation and the government's management of the information collected. We think, over time, the proposal has the potential to make the practice of criminal

discovery much more like civil discovery, with endless opportunities for mini-trials on how the prosecutor is making discovery determinations.

In addition, if the Committee believes that going beyond the constitutional requirements of *Brady/Giglio* is a good idea, we believe it must follow the Committee's historical practice of imposing reciprocal discovery requirements on all parties. It is axiomatic that "[t]here is no general constitutional right to discovery in a criminal case." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). For decades, when the Committee has gone beyond constitutional disclosure requirements, it has generally done so in a reciprocal fashion for both prosecution and defense. The draft proposed amendment to Rule 16, however, does not do so, and we see no reason why, should the Committee decide that getting at the truth requires disclosure of impeachment information beyond the constitutional mandate of *Brady/Giglio*, such expanded disclosure should not be applied to all parties. Thus, if the Committee believes litigants need additional discovery to thoroughly investigate and cross-examine opposing witnesses, there is no reason not to require such discovery of all litigants. This is no different from the Committee's decision to require disclosure of expert witness reports by all parties. *See* Federal Rules of Criminal Procedure 16(a)(1)(G) and 16(b)(1)(C). There would also be every reason to provide greater enforceability for current discovery requirements of defendants that are often overlooked.

As to the specific provisions of the proposed rule amendment, we have several concerns, which we will briefly spell out here. We would be happy to discuss these further at our meeting in Portland.

1. **Timing of Disclosure of Exculpatory Information.** Under the proposed rule, the government, within "at least 14 days before trial," is required to disclose any exculpatory information. We think this provision is unnecessarily rigid and may at times be inconsistent with existing constitutional law, which requires disclosure of materially exculpatory information in sufficient time for the defense to make effective use of it. We think it will add confusion to the constitutional disclosure requirement. Further, the draft makes no provision for exculpatory information first discovered within the 14-day window.

2. **"Known By the Attorney for the Government to Exist."** The proposed rule requires disclosure of information "known by the attorney for the government to exist." We believe this limitation is at least partially inconsistent with existing constitutional case law. Current law carefully outlines prosecutors' affirmative but limited obligation to seek out exculpatory and impeachment information from law enforcement entities aligned with the prosecution team. Codifying the existing case law standards in this area will be difficult, and on the other hand, using the standard in the proposed rule will cause confusion and unnecessary litigation.

3. **Definition of Impeachment Information.** Proposed Rule 16(a)(1)(I) defines impeachment information as that which "casts substantial doubt upon the accuracy of any witness testimony that the government intends to rely upon to prove an element of the crimes charged." While this language was added to the Department's discovery policy to

encourage disclosure greater than that required by current law, if added to the Rules of Criminal Procedure, it will require decades of litigation to clarify what categories of impeachment information meet the new definition (just as it has taken decades to clarify the meaning of materiality).

4. **Written Summary of Inconsistent Statements.** Under the proposed rule, the government's disclosure obligations would be expanded to include, among other things, "a written summary of any inconsistent oral or written statement by the witness regarding the alleged criminal conduct of the defendant." This provision is extremely problematic for several reasons. First, because it requires prosecutors to summarize all inconsistent oral or written statements – no matter how small or immaterial the inconsistency – investigators and prosecutors will be forced to take detailed notes of every conversation with potential witnesses in order to ensure and document full compliance with the rule. Second, what a prosecutor thinks is an inconsistency and what a defense attorney thinks is an inconsistency will often be different. Under the provision, prosecutors will first provide a summary of inconsistencies to the defense and later the full statements or reports of statements. When it receives the underlying reports, grand jury transcripts, etc., the defense will likely often claim that the prosecutor failed to include certain parts of the statements in the summary that the defense sees as inconsistent. Third, the provision is in tension with the language of the Jencks Act (18 U.S.C. § 3500) and Rule 26.2, because it uses a significantly broader definition of "statement" than that Act or Rule. Moreover, inherent in presenting a summary of inconsistent statements is the disclosure of portions of the underlying statements.[1]

5. **The Illustrative List of Impeachment Information Set Out in Section (a)(1)(I).** The proposed rule includes an illustrative list of information that supposedly would meet the new definition of impeachment information. The list includes any offer or promise to the witness by the government in exchange for cooperation or testimony; any prior conviction "or specific instance of conduct" that

[1] We heard from many prosecutors about this provision. The comments of the lawyers from the Civil Rights Division were typical. These lawyers, who handle human trafficking and color-of-law cases, feel they will be especially vulnerable to disciplinary complaints based on this provision of the rule. Their cases typically require several interviews of key witnesses. In trafficking cases, for example, interviews cover victims' life history, educational background, employment history, and the culture of where they were raised, all of which bear on whether their wills were overborne by traffickers. These victims often cannot remember all such information during the first interview, but their memories are usually refreshed as interviews go on. Such inconsistencies, particularly about the details of life before they met the traffickers, no matter how immaterial, would have to be catalogued and summarized under this new rule, in addition to the interview report prepared by the case agent. Likewise, in color-of-law cases, multiple interviews (frequently involving polygraphers) typically are necessary before a police officer ultimately acknowledges witnessing another officer's wrongdoing. Certainly, false claims of ignorance must be, and are, disclosed. But the need for multiple interviews of each witness in Civil Rights Division cases increases the burden on its attorneys of cataloguing each inconsistency among all of the interviews, whether material or not, and whether or not a full report of the interviews will later be forthcoming as part of Jencks discovery.

could be used to impeach the witness under Rules 608 or 609 of the Federal Rules of Evidence; uncharged criminal conduct by the witness or release of civil liability "that may provide an incentive to curry favor with a prosecutor"; any pending criminal charges against the witness; and any impairment that could affect the witness's ability to perceive and recall." We note that the there is an inconsistency between the impeachment standard ("casts substantial doubt upon the accuracy of any witness testimony") and the illustrations. For example, the illustrative list calls for disclosure of "any inconsistent oral or written statement," but certainly there are some witness statement inconsistencies that do not cast "substantial doubt" on the witness' testimony. The same holds true for the example of "any . . . instance of conduct that could be used to impeach [under Rules 608 or 609]." There are no doubt instances of technically impeachable conduct (that the government may well disclose out of an abundance of caution) that do not rise to the level of creating "substantial doubt."

6. **Unreviewable Exception to the Disclosure Requirements of the Rule.** Proposed Rule 16(a)(1)(J) provides an exception to the government's pretrial disclosure obligations under the rules for both exculpatory and impeachment information. Disclosure is not required if the government submits to the court a sealed *ex parte* written explanation which states that it is the government's good faith belief that disclosure of information "will threaten the safety of any crime victim, other person, or the public; jeopardize national security; or lead to an obstruction of justice." The government's written explanation is by rule "unreviewable." The inclusion of a "good faith" requirement is inconsistent with the unreviewability of the exception. As we suggested on the conference call, we think the Committee should follow other examples in law that provide for unreviewable prosecutorial decision by requiring higher level approval of use of the exception but without the good faith provision. Finally, we believe the exception is too narrow and covers only extreme situations; it leaves no room for important reasons to change the timing of disclosure such as: protecting vulnerable witnesses (such as children); preventing harassment of witnesses that does not rise to the level of obstruction of justice; protecting ongoing investigations; and protecting the privacy interests of third parties.

Proposed Amendment to Rule 16 Codifying Existing Brady/Giglio Law

You also asked us to draft a proposed amendment to Rule 16 that would codify existing *Brady/Giglio* law. What follows is our best attempt to summarily codify an extensive and well-developed body of law. We continue to believe that the rules of constitutional disclosure under *Brady/Giglio* are better left to the case law developed in the various circuit courts and the Supreme Court.

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RULE 16. DISCOVERY AND INSPECTION.

(a) Government's Disclosure.

(1) Information Subject to Disclosure.

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(H) Exculpatory and Impeachment Information. The government must disclose to the defendant the substance of any information known to the attorney for the government or agents of law enforcement involved in the investigation or prosecution of the case that is materially exculpatory or materially impeaching as defined in *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1970), and their progeny.

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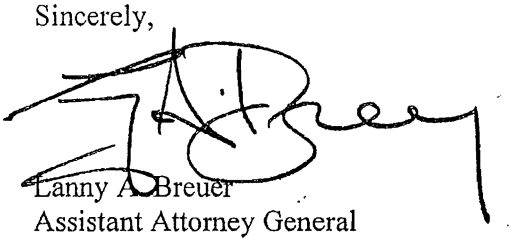
Conclusion

We think the Committee should know, without any hesitation, that this Attorney General is committed to fairness and justice; that he has taken the steps necessary to ensure that prosecutors comply with their ethical and legal obligations; that the changes he has brought about have become institutionalized discovery practices and not just temporary fixes; and that in all of this, we are doing what we believe is right for defendants, victims, witnesses, and the pursuit of justice.

We have said from the outset that we do not believe there is a widespread problem of federal prosecutors failing to meet discovery obligations. Indeed, as indicated above, when the Federal Judicial Center asked members of the judiciary about discovery practices, judges reported high levels of satisfaction with the overall compliance of federal prosecutors with their disclosure obligations. At the same time, we are clearly and directly facing the challenges of new technology, the staggering increasing scale of case information, and the accompanying complexity of its management. We are taking unprecedented steps to ensure that prosecutors meet their disclosure obligations. This approach, and not the creation of new legal rules layered on top of *Brady/Giglio* requirements, is the way to improve the delivery of justice.

We look forward to seeing you and the other Committee members in a few weeks. Please let us know if there is anything more we can do between now and then.

Sincerely,



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cc: Professor Sara Sun Beale
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March 23, 2011

The Honorable Richard C. Tallman
Chair, Advisory Committee on the Criminal Rules
902 Wiliam Kenzo Nakamura Courthouse
1010 Fifth Avenue
Seattle, Washington 98104-1195

Dear Judge Tallman:

I write to set forth the defense position in support of a change to Rule 16, even one that codifies existing caselaw. After setting forth the several considerations that compel a change, I attach proposed language that should be considered by the Rule 16 Subcommittee and the Committee as a whole.

There is agreement in principle on a rule that codifies existing caselaw

In his March 18, 2011 letter to the Subcommittee, Assistant Attorney General Lanny Breuer echoed his statements during the February 25, 2011 telephone conference agreeing in principle to a rule change that codified existing caselaw. In fact, the Department drafted a version of such and amendment to Rule 16, found on page 11 of the March 18 letter.

Keeping in mind that no one defense attorney can speak for thousands of others, but also remembering that this proposal has been disclosed and discussed with several Federal Defenders, practicing attorneys, and law professors, it is submitted that a rule change codifying existing caselaw would be beneficial. The existence of this common ground should lay the groundwork for the less monumental task of solidifying such a rule.

The results of the FJC survey highlight the need for an amendment to Rule 16

Defense attorneys around the country are overwhelmingly and passionately in favor of amending Rule 16. Judges – as the Department aptly characterizes on page 6 of the March 18 letter – are "evenly split." That stunning amount of support from the judiciary is even more impressive considering that a much larger number – 94% – believe that prosecutors usually or always understand their disclosure obligations. This means that a significant number of judges who are satisfied with the performance of prosecutors in their district are nevertheless in favor of amending the rule to incorporate *Brady* and *Giglio* obligations.

However defined, an "even split" should not be seen as a mandate for the *status quo,* since taking no action would completely favor the faction that prefers no change. Instead, identifying and working with the common ground would be much a much more reflective and productive use of the survey responses.

The changes to the U.S. Attorney's Manual ("USAM") and the other measures undertaken by the Department are not sufficient.

Although *Brady* was decided in 1963, the Department did not amend the USAM to add a policy for disclosure of exculpatory information until more than 40 years later. Even with the additions to the manual, there have been numerous, recent, violations – some in high-profile matters like the *Stevens* case, and the *W.R. Grace* prosecution, and some less well-known, like the recent cases from the District of Columbia documented in a letter from the District of Colombia Public Defender Service to Judge Tallman as chair of the Subcommittee, or the host of others anecdotally mentioned by those who responded to the FJC survey. Everyone agrees that more than a manual change is needed.

The additional measures mentioned by the DOJ in the letter to the Subcommittee, while commendable, are also insufficient, mostly because they fail to carry the weight that a Rule change would. Administrations change, and priorities change within and between administrations. Codification in a rule would undoubtedly increase and enhance adherence to important constitutional principles. Those principles, by definition, are not subject to prosecutorial discretion, and deserve to be part of Rule 16.

The attached proposed amendment, while modest in its own right, is nevertheless intended to spark further discussion, debate, and, ultimately, agreement. The defense understands that it should impose no additional and unnecessary burden on those prosecutors already in compliance with their *Brady* and *Giglio* obligations, and that, because the suggested amendment sets out to define what should be disclosed a bit more clearly and with some more detail than the Department's version, it will ultimately generate less, not more, litigation.

I look forward to the response from the Subcommittee and the Committee to these thoughts and proposals.

Very truly yours,

Rachel Brill

Rachel Brill

c (with Attachment): Professor Sara Sun Beale
Professor Nancy J. King

3-21-11 Proposed Rule 16(a)(1)(H) - Annotated

Rule 16. Discovery and Inspection

(a) Government's Disclosure

(1) Information Subject to Disclosure

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(H) Exculpatory information.[1] The government must [timely] identify any exculpatory information within the possession, custody or control of the government [**or** government, including but not limited to all federal, state and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case][2] and, promptly upon discovery[3], disclose all exculpatory information to the defense. Exculpatory information includes, but is not limited to, all information that is [material and] favorable to the defense because it tends to:

(I) Cast doubt on or mitigate defendant's guilt as to any essential element in any count in the indictment, information or establish a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant;[4]

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[1]This introductory language is generally drawn from USAM 9-5.001(C)(1) and D.Mass. Local Rule 116.2(A).

[2]This is the definition of "prosecution team" at USAM 9-5.001(B)(2).

[3]The USAM requires exculpatory information to be disclosed "reasonably promptly after it is discovered." USAM 9-5.001(D)(1). The word "reasonably" is awkward, unnecessary and would lead to needless litigation.

[4]This language merges both USAM 9-5.001(C)(1) and D.Mass. Local Rule 116.1(A)(1). The D. Mass. rule does not include a reference to affirmative defenses or the last clause starting with "regardless."

(ii) Cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, or that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable pursuant to 18 U.S.C. § 3731;[5]

(iii) Cast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its case-in-chief, regardless of whether it is likely to make the difference between conviction and acquittal of the defendant; or[6]

(iv) Diminish the degree of the defendant's culpability or decrease the defendant's sentencing exposure under either the United States Sentencing Guidelines or 18 U.S.C. § 3553(a).[7]

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[5]This language is verbatim D.Mass. Local Rule 116.1(A)(2) but paraphrases USAM 9-5.001(C)(2).

[6]This language merges D.Mass. Local Rule 116.1(A)(2) and USAM 9-5.001(C)(2). The USAM says "casts substantial doubt" and the D.Mass. rule drops "substantial." Note, the last clause starting with "regardless" differs slightly from the last clause of (i).

[7]This is based on D.Mass. Local Rule 116.1(A)(4). It is recognized as discoverable in USAM 9-5.001(D)(3).