

**REPORT BY THE CRIMINAL COURTS COMMITTEE AND
CRIMINAL JUSTICE OPERATIONS COMMITTEE RECOMMENDING THE
ADOPTION OF A *BRADY* CHECKLIST**

The Committees on Criminal Courts and Criminal Justice Operations of the New York City Bar Association considered effective methods to improve disclosure practices in criminal cases pursuant to *Brady v. Maryland*, its progeny and ethical standards. As a result of this review, the committees urge the adoption of a law or court rule requiring prosecutors to provide a written checklist to defense counsel that details the information disclosed pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), its progeny and applicable ethical standards. A copy of the committees' recommended checklist is attached as Appendix A.

New York courts, prosecutors and defense lawyers have long wrestled with the question of the required prosecutorial disclosure under *Brady v. Maryland* and its progeny. The parameters of the *Brady* obligation in a particular case - identifying *Brady* material and determining when it should be disclosed - may not always be clear. But there is no question about the nature of the obligation itself and the fundamental role that *Brady* disclosure has in promoting the fairness of the criminal process. Our committees therefore have proposed a way to address the logistics of *Brady* disclosure by helping the parties identify *Brady* material and assure its timely production. To focus the parties and the court on this issue we propose providing them with a disclosure checklist.

Last year, the American Bar Association resolved that written checklists should be adopted by local jurisdictions to assist courts and counsel to address prosecutorial disclosure under *Brady*. The rationale of the resolution is that a checklist's detail and specificity provide guidance and clarity. A copy of the ABA resolution is attached to this report as Appendix B.

As the ABA resolution notes:

A substantial number of verified wrongful convictions have been attributed to the use of testimony or physical evidence that was contradicted or undermined by other evidence in the hands of the prosecution, law enforcement or other government agencies, but was not disclosed to the defense even though it qualified as exculpatory evidence under Brady. The proposed written checklist would help to alert the prosecutor in the case to these disclosure obligations while prompting defense counsel to seek disclosure and, where possible, to make requests of the prosecution for specific, potential Brady evidence rather than an ineffective generic request for all the Brady evidence in the possession of the government.

In 2009, the New York State Bar Association's Task Force on Wrongful Convictions determined, among other things, that because non-disclosed *Brady* materials had contributed to wrongful convictions in this state, ameliorative procedures should be adopted in New York. These include a pre-trial *Brady* conference for the parties and the court to address and resolve issues concerning disclosure of *Brady* information.

We adopt the rationale of the American and New York State Bar Associations concerning these *Brady* issues. The need for complete and timely *Brady* disclosure cannot be overstated, and we believe that providing the parties with a checklist will help frame and facilitate their discussion, particularly if they hold the pre-trial *Brady* conference that the New York State Bar Association recommends.

The utility of a checklist such as the one we propose has been recognized by commentators such as Barry Scheck. Professor Scheck has noted how hospitals' use of a checklist to remind health care workers - including, significantly, physicians - about basic practices that promote hygiene has significantly decreased the incidence of patient infection and death. See Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 *Cardozo L Rev* 2215, 2239-42 [2010]. The reason such checklists work is that they are effective reminders of basic practices that might otherwise be overlooked or carelessly implemented.

Many times, the failure to disclose *Brady* material can be attributed to the type of inadvertence that a simple reminder such as a checklist would address. For example, two of the wrongful conviction cases identified in the Report of the New York State Bar Association's Wrongful Conviction Task Force, concern evidence (a rape kit in one case and a DNA database in the other) that was overlooked by the prosecution because appropriate systems to identify those sources of information were not in place. See Report at 39-40.

Surely the checklist that we propose is more complicated and imprecise than the to-do list of sanitary precautions to which Professor Scheck adverts. Nonetheless, we have attempted to devise a checklist that is as clear as possible and that includes what we think any prosecutor and judge would agree is *Brady* material. While we recognize that the list does not include every item that a defense lawyer might believe belongs on such a checklist, and that certain types of cases might warrant the inclusion of specific items not generally applicable (for example, a review of a DNA database, as in the example above), and while we acknowledge that the checklist must necessarily include terms that are open to interpretation, we think that a checklist is still useful. To the extent that the checklist does not comprehensively anticipate all *Brady* issues, we believe that that shortcoming will be mitigated by the discussion we expect the checklist will prompt regarding what is or believed to be discoverable pursuant to *Brady*. The prosecution should also indicate whether items were disclosed to the court in camera so that such items may be preserved for appellate review.

We anticipate that as a result of the checklist prosecutors will be less likely to overlook an item that they might otherwise have inadvertently failed to identify and disclose, and defense lawyers will be more likely to direct themselves to the task of specifically identifying *Brady* material that they believe may exist, thus promoting the goal of complete and timely disclosure that *Brady* requires.

This report does not address the extent to which the judiciary should be involved in monitoring the checklist and resolving disclosure questions. The Recommendation for Best Practices of the Report of the Working Groups at a 2009 conference on this issue at Cardozo Law School concluded that more judicial oversight of disclosure practices was warranted. *Symposium: New Perspectives on Brady and Other Obligations*, 31 *Cardozo L. Rev.* 1943, 2035 (2010). The involvement of the judiciary is a subject for further exploration.

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APPENDIX A

BRADY /GIGLIO CHECKLIST

THIS CHECKLIST IS INTENDED TO AID THE PARTIES. IT IS NOT INTENDED TO BE DISPOSITIVE OF WHETHER THE PROSECUTION HAS MET ITS CONSTITUTIONAL AND/OR ETHICAL DISCLOSURE OBLIGATIONS

- 1. Information that would tend to negate or reduce the defendant's guilt of any count of the accusatory instrument or reduce punishment.
- 2. Information about any promise, reward, or inducement regarding a prospective witness.
- 3. Information regarding criminal convictions or pending cases of a prospective witness and, where available, in circumstances that would not compromise ongoing investigations, information regarding criminal conduct of a prospective witness.
- 4. Information regarding the failure of a prospective witness to make a positive identification at an identification procedure involving the defendant or a co-defendant.
- 5. Any prior inconsistent oral or written statement by a prospective witness regarding the alleged criminal conduct of the defendant.
- 6. Whether a prosecution witness has recanted any testimony or statement and, if so, the substance of that recantation.
- 7. Information that would impeach a prospective witness by showing the witness's bias or prejudice against the defendant, character for lack of truthfulness, or mental or physical impairment that may affect that witness's ability to testify accurately or truthfully.
- 8. [BLANK] *TO BE COMPLETED AS APPROPRIATE IN THE CIRCUMSTANCES OF THE PARTICULAR CASE.*

Date:

Assistant District Attorney

(Received by) Defense Counsel

APPENDIX B

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

RESOLUTION WITH REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges policy making bodies of federal, state, local, and territorial courts to adopt a procedure whereby a criminal trial court shall, at a reasonable time prior to a criminal trial, disseminate to the prosecution and defense a written checklist delineating in detail the general disclosure obligations of the prosecution under Brady v. Maryland, 373 U.S. 83 (1963), and its progeny and applicable ethical standards to ensure all counsel are aware of these disclosure obligations, although the omission of any disclosure obligation from the court's written checklist would not relieve either the prosecutor or defense counsel from any legal or ethical obligations, and

FURTHER RESOLVED, That the American Bar Association urges policy making bodies of federal, state, local, and territorial courts in implementing the above procedure to require a criminal trial court to create a standing committee of local prosecutors and criminal defense attorneys to assist the court in formulating and updating the written checklist delineating in detail the prosecution's general disclosure obligations.

REPORT

In February 2010, the American Bar Association's House of Delegates passed Report 102D, *Judicial Role in Avoiding Wrongful Convictions*, in which the American Bar Association "urges policy making bodies of federal, state, local, and territorial courts to adopt a procedure whereby a criminal trial court shall conduct at a reasonable time prior to a criminal trial a conference with the parties to ensure that they are fully aware of their respective disclosure obligations under applicable discovery rules, statutes, ethical standards and the federal and state constitutions and to offer the court's assistance in resolving disputes over disclosure obligations."

This written checklist resolution can be a complementary procedure to the pretrial disclosure conference advocated by Report 102D. But, even standing alone, the written disclosure checklist procedure will be beneficial. The creation of a local written checklist on the prosecution's disclosure obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, and applicable ethical standards would focus both prosecutors and criminal defense attorneys on the importance of this type of information to ensuring a fair trial. There can be no comprehensive model checklist because no one can anticipate every nuance of these disclosure obligations without a specific factual context. However, a comprehensive written checklist will benefit the prosecutors and criminal defense attorneys in the court in question and assist the judge or judges in that court. By creating a standing local committee to prepare and/or update for the court or with the court this written checklist, the court can ensure that prosecutors and the defense bar have a vested interest in the scope and accuracy of the checklist the court adopts for dissemination.

Any omissions or deficiencies in the written checklist provided by the court would not relieve the prosecution from its disclosure obligations nor would those errors free criminal defense counsel from their duties to obtain from the prosecution all disclosure to which the defense is entitled. It would be advisable for the written checklist to contain cautionary words to that effect.

Although the pretrial disclosure conference contained in Report 102D would address the respective disclosure obligations of both the prosecution and defense under applicable discovery rules, statutes, ethical standards and the federal and state constitutions, the written checklist would address only the prosecution's disclosure obligations under *Brady* and its progeny and the applicable ethical standards. Discovery obligations are routinely codified in rules of procedure or statutes. As a result, there should be no need to replicate those discovery rules in a written checklist. Instead, the written checklist is limited to the prosecution's *Brady* disclosure obligations as well as those under applicable ethical rules or precepts.

There is no doubt that trial courts across the country wrestle with the question of prosecutorial disclosure under *Brady* and its progeny. Researchers in 2007 "found references to *Brady* material in various documents [in federal district courts], including local rules, orders (including standing orders and standard discovery, arraignment, scheduling, and pretrial orders), and supplementary materials such as joint statements of discovery and checklists (including disclosure agreement checklists)." *Brady v. Maryland Materials in the United States District Courts: Rules, Orders and Policies*, Report to the Advisory Committee on Criminal Rules of the Judicial Conference of the United States, Laura Hooper and Sheila Thorpe, Federal Judicial Center, May 31, 2007. The written disclosure checklist is a mechanism to assist the court as well

as counsel to address the issue of prosecutorial disclosure under Brady that will be more detailed and specific than many of the routine pretrial Brady orders many courts issue.

A substantial number of verified wrongful convictions have been attributed to the use of testimony or physical evidence that was contradicted or undermined by other evidence in the hands of the prosecution, law enforcement or other government agencies, but was not disclosed to the defense even though it qualified as exculpatory evidence under Brady. The proposed written checklist would help to alert the prosecutor in the case to these disclosure obligations while prompting defense counsel to seek disclosure and, where possible, to make requests of the prosecution for specific, potential Brady evidence rather than an ineffective generic request for all the Brady evidence in the possession of the government.

We do not provide a model checklist because each jurisdiction's optimal checklist may vary depending on its understanding of the relevant law and ethics rules, which may themselves vary to some extent among the different jurisdictions, and depending on its preferences regarding the necessary level of detail.

Respectfully submitted,

Bruce Green, Chair, ABA Criminal Justice Section

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