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NEW YORK  
CITY BAR

COMMITTEE ON CRIMINAL LAW

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By Email

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**RE: Comment by the Criminal Law Committee of the New York City Bar Association  
on the Proposed Model Orders Regarding Disclosure in Criminal Matters**

Dear Mr. McConnell:

The New York City Bar Association's Criminal Law Committee (the "Committee") recognizes and applauds the Administration's effort to create uniform minimum obligations and standards with respect to pre-trial disclosure. However, upon review, one provision in particular is troubling and the Committee urges modification.

Proposed Rule VII (9), while recognizing the statutory and constitutional obligation of a prosecutor to "timely disclose" favorable information (emphasis in the original), proceeds to declare that "disclosure is presumptively timely if the prosecutor shall have completed it no later than 30 days before commencement of a trial in a felony case and 15 days before commencement of a trial in a misdemeanor case."

It is the opinion of practitioners in the Criminal Law Committee that this provision will have the unfortunate and unintended consequence of delaying disclosure of important favorable information beyond a time when it would be useful. (*Compare People v. Goins*, 73 NY2d 989 (1989), in discussing Rosario disclosures: "[A] witness's prior statement must be furnished to the defendant at a time when it can be useful to the defense.") See also *Leka v. Portuoudo*, 257 F.3d 89 (2d Cir. 2001)(noting the importance of disclosure when "the defense [is] in a reasonable pre-trial position to evaluate carefully all the implications of that information" quoting *Grant v. Alldredge*, 498 F.2d 376 (2d Cir. 1974)).

Further, there is no authority for the proposition that a court must find delayed Brady disclosures "presumptively timely" when withheld until some days before commencement of trial. A trial court, and a reviewing court, can and should be permitted to assess whether a

Brady disclosure is timely based upon the individual factors in the case before it. The determination of timeliness cannot be stripped of judicial scrutiny by an administrative rule.

Rule 3.8 of the Rules of Professional Conduct requires timely disclosure. Nothing in that Rule authorizes delay to 30 days before trial and, more importantly, nothing in the Rule presumptively blesses such a delay.

To the contrary, the discovery statute, CPL 240.20 (1)(h); 240.20.80 (3), requires Brady disclosures within 15 days of demand...far in advance of trial. *See, People v. DeGata*, 86 NY2d 40 (1995) (describing the timeline for demanded materials under the statute).

Finally, as a practical matter, delay may well result in harsh and unjust results. As just one example, why should a defendant languish in jail for a year while the prosecutor is in knowing possession of exculpatory information only to be told that delayed disclosure was presumptively timely when given just 30 days before commencement of trial?

For all of the above reasons, the Committee recommends that proposed Rule VII (9) be modified to eliminate any reference to presumptiveness.

Respectfully submitted,

Monica Hickey-Martin  
Chair, Criminal Law Committee