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Rule 3.8, the Jencks Act, and How the ABA Created a Conflict Between Ethics and the Law on Prosecutorial Disclosure

Keywords

Appellate procedure, Criminal justice administration, Procedure (Law), Disclosure, Evidence (Law), Discovery (Law)

RULE 3.8, THE JENCKS ACT, AND HOW THE ABA CREATED A CONFLICT BETWEEN ETHICS AND THE LAW ON PROSECUTORIAL DISCLOSURE

KIRSTEN M. SCHIMPF*

A prosecutor's duty to disclose evidence favorable to the defense has proved to be one of the thorniest issues in criminal practice, no doubt in large part due to the complex, overlapping, and, at times, conflicting web of rules and standards governing that obligation: constitutional doctrine, statutory law, criminal procedure rules, and state ethics rules. The Standing Committee on Ethics and Professional Responsibility of the American Bar Association recently issued an expansive interpretation of Rule 3.8(d) of the Model Rules of Professional Conduct, which governs prosecutorial disclosure. As interpreted in Formal Opinion 09-454, Rule 3.8(d) is now in direct conflict with a federal statute governing disclosure of witness statements.

This Article critiques the process by which this conflict was created. In essence, the ABA adopted positions that proponents of broader and earlier disclosure had sought—unsuccessfully—to attain through litigation, legislation, or rulemaking processes. These earlier reform efforts failed largely due to the need to avoid the very conflict with the Jencks Act that the Opinion has now created. The Article examines the implications of this conflict, and charts a path forward. Specifically, the Article argues that reforming federal criminal discovery practice requires going through—not around—one or more of the three institutions legitimately capable of harmonizing the rules regarding

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INTRODUCTION

Prosecutors and defense attorneys have long been at odds over the scope and timing of a prosecutor's obligation to turn over information favorable to the defendant in a criminal matter. A spate of high profile cases has pushed the issue into the public eye recently,¹ but the battle over disclosure has been waged for decades.

1. For example, the W.R. Grace asbestos prosecution, the public corruption trial of the late Senator Ted Stevens, and the Duke lacrosse team rape case—in each of which prosecutors were excoriated for failing to timely disclose exculpatory information to the defense—all received significant media attention. *See generally* Kirk Johnson, *Prosecution in Asbestos Poisoning of Montana Town Is Forced To Go on Defense*, N.Y. TIMES, Apr. 25, 2009, at A9; Neil A. Lewis, *Tables Turned on Prosecution in Stevens Case*, N.Y. TIMES, Apr. 8, 2009, at A1; Duff Wilson, *Hearing Ends in Disbarment for Prosecutor in Duke Case*, N.Y. TIMES, June 17, 2007, at A21.

The consequences in such cases can be far-reaching, not only for the defendants, but also for the prosecutors involved. In the Duke case, several college student-athletes were subjected to national media scrutiny, their reputations were tarnished, and their educations were interrupted, based on what turned out to be unsubstantiated allegations that they sexually assaulted an exotic dancer. *See, e.g.*, Duff Wilson & David Barstow, *Duke Prosecutor Throws Out Case Against Lacrosse Players*, N.Y. TIMES, Apr. 12, 2007, at A1. The prosecutor in the Duke case was eventually disbarred after it came to light that he failed to disclose evidence that cast serious doubt on the allegations in the first place. *See* Wilson, *supra* at A21. In the Ted Stevens case, Senator Stevens's conviction on public corruption charges was set aside,

Ever since the landmark decision in *Brady v. Maryland*,² proponents of broader, and earlier, disclosure have fought on several fronts to move the law in that direction. Most of these efforts have been resisted at the federal level by the United States Department of Justice (DOJ). Proponents of greater disclosure have had the greatest success in the arena of state ethics laws, which now apply to both state and federal prosecutors.³ Specifically, nearly every state has adopted a version of Rule 3.8(d) of the Model Rules of Professional Conduct,⁴ which imposes broader disclosure obligations on prosecutors than what is constitutionally required. Adoption of Rule 3.8(d) has not put the matter to rest, however; efforts to expand prosecutors' disclosure obligations have continued.

The latest development in this ongoing battle over disclosure obligations is Formal Opinion 09-454 ("the Opinion"), issued by the Standing Committee on Ethics and Professional Responsibility of the American Bar Association (ABA) ("ABA Ethics Committee") in July 2009, which interprets Rule 3.8(d).⁵ The Opinion follows on the heels of recent unsuccessful efforts waged by the defense bar to change Rule 16 of the Federal Rules of Criminal Procedure⁶ and other rules and laws governing disclosure. The Opinion is substantially pro-defense, and adopts many of the positions championed by proponents of these failed reform efforts, in ways that are contrary to the prevailing law.

Specifically, Formal Opinion 09-454 states that a prosecutor must disclose *all* known information favorable to the defendant, even if it is only minimally relevant or believed to be highly unreliable.⁷ Under Rule 16 and the prevailing case law, only *material* information must be disclosed.⁸ The Opinion also declares that disclosure must be made "as soon as reasonably practical" once the information is known to

and all charges were dismissed by the Justice Department, after it was revealed that federal prosecutors had withheld notes from an interview with a key government witness. In the meantime, however, Senator Stevens lost his bid for reelection approximately one month after his conviction. Charlie Savage, *Prosecutor Who Pursued Stevens Case Kills Himself*, N.Y. TIMES, Sept. 28, 2010, at A19. During the course of the investigations into the prosecutors' handling of the case, one of the prosecutors involved committed suicide. See *id.*

2. 373 U.S. 83 (1963).

3. See 28 U.S.C. § 530B(a) (2006) (subjecting federal prosecutors to the same laws and rules as all other attorneys).

4. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2009).

5. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009).

6. FED. R. CRIM. P. 16.

7. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454, at 4–5 ("Nothing in the rule suggests a de minimis exception to the prosecutor's disclosure duty . . .").

8. See *infra* Part I.B.

the prosecutor;⁹ however, the prevailing legal standard is that disclosure is timely so long as it is made with enough time for the defense to use it at trial.¹⁰ Furthermore, according to the Opinion, a prosecutor must make the necessary disclosures prior to the defendant entering a guilty plea, and the defendant may not waive her right to the information as part of a plea deal.¹¹ Both of these positions have been explicitly rejected by the United States Supreme Court, at least with respect to information used for impeachment purposes.¹²

Although all of these positions are certain to generate controversy and discussion, this Article focuses in particular on one aspect of Formal Opinion 09-454: its interpretation of the timing requirement. This topic is especially important because the Opinion's interpretation of the timing requirement is so expansive that it creates a direct conflict between the ethics rule governing prosecutorial disclosure and a relevant federal statute.

Specifically, as discussed in more detail below, the Jencks Act¹³ governs the disclosure of witness statements in federal criminal trials, and provides that the government is not required to disclose witness statements until after the witness has testified on direct examination at trial. In many jurisdictions, courts have held that the Jencks Act means that prosecutors cannot be required to disclose witness statements sooner than the statute requires, even when the statements contain the sort of "favorable" information the ethics rule (and other sources of law) require to be disclosed in a "timely" manner. A conflict between the ethics rule and the statute could be avoided by interpreting "timely" to mean at a time consistent with what the law provides. Instead, the ABA Ethics Committee chose to

9. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454, at 6.

10. See *infra* Part I.A (noting that the prevailing standard results in context-specific disparities in the timing of disclosures).

11. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454, at 7 (opining that "[a] defendant's consent does not absolve a prosecutor of the duty imposed by Rule 3.8(d), and therefore a prosecutor may not solicit, accept or rely on the defendant's consent").

12. See *infra* Part II.A. The Opinion also adds an ethical obligation on supervisory attorneys to ensure compliance by trial prosecutors. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454, at 8. In at least one respect, however, the Opinion is *less* pro-defense than the prevailing law. See *id.* at 5-6. According to the Opinion, compliance with Rule 3.8(d) does not require a prosecutor to conduct searches or investigations for favorable information that may possibly exist but of which the prosecutor is unaware, see *id.* at 5-6, whereas as a matter of constitutional law, a prosecutor must actively search out the evidence in the case files and in the files of related agencies reasonably expected to have possession of such information. *Infra* note 30 and accompanying text.

13. Pub. L. No. 85-269, 71 Stat. 595 (1957) (codified as amended at 18 U.S.C. § 3500 (2006)).

interpret “timely” to mean as soon as reasonably practical once the information becomes known, essentially, right away. An obligation to disclose immediately conflicts with the statutory standard of disclosing after the witness has testified at trial.

Much has been written about prosecutorial ethics and the duties of disclosure,¹⁴ and this Article does not attempt to wade into the debate over the appropriate scope of disclosure. The subject of who should regulate the conduct of federal prosecutors has also received a lot of attention from scholars.¹⁵ Whether federal prosecutors could be required to follow state ethics laws in the first place was highly controversial,¹⁶ although this question has, for all practical purposes, been resolved in the affirmative by the passage of the Citizens Protection Act¹⁷ (popularly known as the “McDade Amendment”). What remains, however, is the potential for conflict between these ethical obligations and long-standing federal case and statutory law, common practices, and law enforcement interests.¹⁸

14. See *infra* note 29 (listing articles that discuss disclosure obligations and prosecutorial ethics).

15. See generally, e.g., Frank O. Bowman, III, *A Bludgeon By Any Other Name: The Misuse of “Ethical Rules” Against Prosecutors To Control the Law of the State*, 9 GEO. J. LEGAL ETHICS 665 (1996) (contending that a uniform federal code of ethics would be preferable in many respects to a system where state ethics rules can conflict with federal criminal law); Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 FORDHAM L. REV. 355 (1996) (concluding that while the Attorney General possesses the power to preempt ethical rules and exempt federal prosecutors, exercising that power would damage DOJ’s “good will” and raise significant federalism concerns); Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors, or, Who Should Regulate the Regulators?: Response to Little*, 65 FORDHAM L. REV. 429 (1996) (discussing the “battle” between the ABA and DOJ over which entity is better suited to govern ethical responsibilities).

16. See Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 HARV. L. REV. 2080, 2084–88 (2000) (providing a history of the dispute over whether state ethics rules apply to federal prosecutors).

17. Pub. L. No. 105-277, § 801(a), 112 Stat. 2681, 2681-118 (1998) (codified at 28 U.S.C. § 530B (2006)); *infra* notes 83–85.

18. Other areas of conflict previously identified by commentators include those created by the ethics rules regulating attorney subpoenas (now-repealed version of Model Rule 3.8(f)), contact with represented persons (Model Rule 4.2 and its predecessor Model Code DR 7-104), and grand jury practice (Model Rule 3.3(d) in tandem with now-repealed comment 1 to Model Rule 3.8). See, e.g., Little, *supra* note 15, at 360–64 (discussing attorney subpoena and contacts issues); David G. Trager, *Do Bar Association Ethics Committees Serve the Public or the Profession?: An Argument for Process Change*, 34 HOFSTRA L. REV. 1129, 1152–59 (2006) (discussing contact with represented persons issue); Note, *supra* note 16, at 2083–88 (discussing presentation of exculpatory information to grand jury, attorney subpoena, and contact with represented persons issues); see also Bowman, *supra* note 15 (same). The conflict discussed in this Article, however, appears to be the starkest yet because in none of these other instances had Congress enacted a statute specifically addressing the issue. For example, in the case of the Model Rules that purported to require prosecutors to disclose exculpatory information to the grand jury, such a requirement similarly exceeded what was required, see *United States v. Williams*, 504 U.S. 36, 52–53 (1992), but no federal statute explicitly provided that prosecutors need *not* do so.

This Article is the first to focus on the peculiar impact that Formal Opinion 09-454 has on federal prosecutors, and to undertake an in-depth critique of the process by which this conflict between ethics and federal substantive and procedural law was created. Part I of this Article outlines the overlapping, and sometimes conflicting, sources of federal prosecutors' disclosure obligations. Part II discusses the history of efforts by proponents of more and earlier disclosure, which continue today, to expand prosecutorial disclosure obligations. Part III explores the ethics opinion process, including common criticisms of bar association ethics opinions, and why several of those criticisms seem particularly apt as applied to the Opinion. Finally, Part IV of this Article offers recommendations for resolving the conflict created by this expansive new interpretation of the ethics rules.

I. SOURCES OF PROSECUTORS' DUTIES TO DISCLOSE

Federal prosecutors must abide by a complex web of rules and standards—constitutional doctrine, statutory law, criminal procedure rules, internal guidelines, and state ethics rules—all of which have something to say about the disclosure of exculpatory and impeachment information. As a matter of federal constitutional law, prosecutors must turn over exculpatory evidence,¹⁹ as well as evidence that could be used to impeach a prosecution witness,²⁰ but in both cases, only if such evidence is “material.”²¹ A federal statute, the Jencks Act, requires the government to provide witness statements to the defense, but not until after the witness has testified on direct examination.²² Rule 16 of the Federal Rules of Criminal Procedure also contains disclosure obligations,²³ as does Rule 26.2, which essentially restates the Jencks Act requirements.²⁴ Federal prosecutors also must abide by the U.S. Attorneys' Manual (USAM), which contains DOJ's internal standards of conduct, including

19. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that the prosecution's failure to disclose material, exculpatory evidence violated the Due Process Clause).

20. *Giglio v. United States*, 405 U.S. 150, 152–55 (1972) (holding that the failure to disclose the existence of an agreement between prosecutors and a witness was unconstitutional).

21. *United States v. Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.) (defining evidence as being material “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different”).

22. 18 U.S.C. § 3500(a)–(b) (2006).

23. See FED. R. CRIM. P. 16 (outlining the procedure for disclosure by defendants and prosecutors).

24. See FED. R. CRIM. P. 26.2(a) (mirroring the Jencks Act's requirement of disclosure *after* direct examination of the witness).

disclosure guidelines.²⁵ Finally, state ethics rules governing attorney conduct also specifically address prosecutors' disclosure obligations.²⁶

A. Constitutional and Statutory Disclosure Obligations

Due process requires that the government disclose to the accused any favorable evidence in its possession that is material to guilt or punishment.²⁷ "Favorable" evidence includes not only evidence tending to exculpate the accused, but also any evidence that adversely affects the credibility of the government's witnesses.²⁸ Evidence is "material" if there is a reasonable probability that it would affect the outcome of the proceeding.²⁹ To meet the requirements of *Brady* and its progeny, a prosecutor must actively search out the evidence in

25. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-5.001 (B) (1) (2010) [hereinafter U.S. ATTORNEYS' MANUAL], available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm#9-5.001 (adopting a disclosure policy more expansive than is constitutionally required).

26. *Supra* notes 3–4 and accompanying text.

27. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

28. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150, 154 (1972). Impeachment evidence, often referred to as "*Giglio* evidence" or "*Giglio* material," is governed by the same legal principles that govern the disclosure of *Brady* material. *Giglio*, 405 U.S. at 153–55. *Giglio* material is, in essence, a subset of the universe that comprises *Brady* material. *Id.* The Supreme Court has repeatedly stated that "evidence favorable to an accused," *Brady*, 373 U.S. at 87, consists of both exculpatory evidence and impeachment evidence. See, e.g., *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) ("[T]he Court [has] disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes."); *Bagley*, 473 U.S. at 676 ("Impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule."). Unless otherwise specified, the terms "*Brady* material" or "*Brady* evidence" as used in this Article are meant to encompass both exculpatory evidence and evidence that may be used to impeach a government witness.

29. See *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.) (defining a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome" (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984))). Commentators have criticized this use of a post-verdict materiality standard to define a prosecutor's pretrial disclosure obligation as being both unfair to the defendant and as creating unnecessary uncertainty for prosecutors. See, e.g., Beth Brennan & Andrew King-Ries, *A Fall from Grace: United States v. W.R. Grace and the Need for Criminal Discovery Reform*, 20 CORNELL J.L. & PUB. POL'Y 313, 326 (2010) (noting that because materiality is measured by confidence in the verdict, it is difficult to define the scope of the government's disclosure obligation during trial); see also Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 487–88 (2009) (arguing that even ethical prosecutors may fail to disclose exculpatory evidence because of limitations of the *Brady* doctrine itself—specifically, the anomalous use of a single standard of materiality to determine both whether a conviction should be reversed if the prosecutor fails to disclose evidence and whether the prosecutor is required to disclose the evidence at all); Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENN. ST. L. REV. 1133, 1144 (2005) (arguing that the Supreme Court's decisions on materiality have actually created a disincentive for prosecutors to disclose exculpatory evidence in close cases). The Supreme Court has recognized the anomaly as well, although the Court has concluded that it will lead the "prudent prosecutor" to resolve doubtful questions *in favor* of disclosure. *United States v. Agurs*, 427 U.S. 97, 108 (1976).

the case file and in the files of related agencies reasonably expected to have possession of such information.³⁰ A prosecutor's duty to disclose *Brady* material attaches whether or not a defendant makes a specific request for the evidence.³¹

A prosecutor is not required, however, to disclose the entire contents of the government's case file to defense counsel;³² rather, a prosecutor's constitutional obligations are satisfied by the disclosure of evidence that is favorable to the defense, the suppression of which would deprive the defendant of a fair trial.³³ Moreover, the Supreme Court has never pinpointed the time at which *Brady* disclosures must be made. Rather, the requirements of due process will be satisfied so long as *Brady* material is disclosed to a defendant with enough time for the defense to effectively use it at trial.³⁴ Therefore, what constitutes a "timely" disclosure of *Brady* material varies depending upon the context.³⁵ As a matter of due process, this sometimes—but not always—requires pretrial disclosure.³⁶

The Jencks Act governs the disclosure of statements made by government witnesses.³⁷ The Act specifies both the scope³⁸ and, most

30. See *Kyles*, 514 U.S. at 437.

31. See *Agurs*, 427 U.S. at 110 (noting that in the interest of "elementary fairness," situations involving evidence of "substantial value" to the defendant necessitate disclosure, even absent a request).

32. There is no general constitutional right to "discovery" in a criminal case. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

33. *Bagley*, 473 U.S. at 675 (explaining that disclosure requirements are not designed to undermine the adversarial nature of the American legal system).

34. See *United States v. Coppa*, 267 F.3d 132, 146 (2d Cir. 2001) (explaining that it is not feasible or desirable to specify the timing of disclosure except by reference to the defendant's opportunity to use it under the circumstances and, therefore, courts have declined to hold that due process requires more than that *Brady* material must be disclosed in time for the defense to use it at trial).

35. See *id.* ("[T]he time required for the effective use of a particular item of evidence will depend on the materiality of that evidence . . . as well as the particular circumstances of the case."); *United States v. Higgs*, 713 F.2d 39, 43–44 (3d Cir. 1983) (holding that the timing of disclosure "depends on what information has been requested and how that information will be used by" the defendant); *United States v. Ziperstein*, 601 F.2d 281, 291 (7th Cir. 1979) ("As long as ultimate disclosure is made before it is too late for the defendants to make use of any benefits of the evidence, Due Process is satisfied.").

36. Compare *United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir. 1976) ("Disclosure by the government must be made at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pretrial disclosure."), and *United States v. Mariani*, 7 F. Supp. 2d 556, 564 (M.D. Pa. 1998) (requiring the prosecution in an election fraud case to turn over to the defendants all *Brady* material in its possession prior to the trial), with *United States v. Gordon*, 844 F.2d 1397, 1403 (9th Cir. 1988) ("*Brady* does not necessarily require that the prosecution turn over exculpatory material *before* trial."), and *Patler v. Slayton*, 503 F.2d 472, 479 (4th Cir. 1974) (holding that disclosure was timely when prosecutors released the results of scientific tests on physical evidence after that evidence was introduced at trial).

37. 18 U.S.C. § 3500 (2006) (codifying the Supreme Court's decision in *Jencks v.*

importantly for purposes of this Article, the timing of production.³⁹ Specifically, the Act prescribes the time at which production of witness statements must be made by requiring the government to produce a witness's statement only after that witness has testified on direct examination.⁴⁰ A district court may not order the disclosure of Jencks Act material earlier than the statute requires.⁴¹

The disparity between the timing requirements for the disclosure of witness statements under the Jencks Act and other "evidence favorable to an accused" under *Brady* and its progeny has been justified by the courts, at the urging of prosecutors, as necessary in part to protect government witnesses from harassment, intimidation, and tampering.⁴² But although the Jencks Act was enacted in part "to protect government witnesses from threats, bribery and perjury,"⁴³ it applies regardless of whether there is any realistic danger of interference with witnesses.⁴⁴ In either event, courts have strictly enforced the provisions of the Jencks Act.⁴⁵

United States, 353 U.S. 657 (1957), which held that in a criminal action, the defendant is entitled to inspect the government's written and recorded statements of witnesses, and that the criminal action must be dismissed when the government elects not to produce such statements).

38. See *id.* § 3500(b) (stating that prosecutors must produce "any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified"). A "statement" is defined as: (1) a written statement made by the witness and signed or otherwise adopted or approved by him; (2) a substantially verbatim transcription and contemporaneous recording of the oral statement of the witness; or (3) a statement made by the witness to the grand jury. *Id.* § 3500(e).

39. *Id.* § 3500(a).

40. See *id.* ("In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.").

41. See *United States v. Coppa*, 267 F.3d 132, 146 (2d Cir. 2001) ("[A] District Court's power to order pretrial disclosure is constrained by the Jencks Act . . ."); *United States v. Hanna*, 55 F.3d 1456, 1459 (9th Cir. 1995); *United States v. Lewis*, 35 F.3d 148, 151 (4th Cir. 1994) ("The district court may not require the government to produce Jencks Act material relating to one of its witnesses until *after* the witness has testified."); see also *United States v. McKenzie*, 768 F.2d 602, 609 (5th Cir. 1985); *United States v. White*, 750 F.2d 726, 729 (8th Cir. 1984); *United States v. Algie*, 667 F.2d 569, 571 (6th Cir. 1982).

42. See, e.g., *United States v. Roberts*, 811 F.2d 257, 259 (4th Cir. 1987) (en banc) (per curiam) (noting that "[w]hen the statements of persons other than the defendant are sought, questions of witness safety necessarily arise"). The court in *Roberts* explained that the term "witness safety" includes a concern for the safety of those who make inculpatory co-conspirator declarations as well as witnesses who offer testimony regarding such declarations. See *id.* (denying pretrial production because of the risk that such production would "endanger[] government witnesses by circumventing the protections of the Jencks Act").

43. *United States v. Walk*, 533 F.2d 417, 419 (9th Cir. 1975).

44. See *United States v. Bobadilla-Lopez*, 954 F.2d 519, 521 (9th Cir. 1992) ("[T]he [Jencks Act's] legislative history expresses a much greater concern with

There are times when the Jencks Act and the *Brady* doctrine overlap—i.e., *Brady* material may be contained within Jencks Act witness statements.⁴⁶ In such instances, courts disagree as to whether the Jencks Act or the *Brady* line of cases governs the required timing of disclosure. At least three United States Courts of Appeals have directly held that the timing of production under the Jencks Act trumps *Brady*.⁴⁷ Federal prosecutors in these jurisdictions are not required to disclose Jencks Act statements until after the witness testifies on direct, *even if* the Jencks Act statements contain *Brady* material.⁴⁸ Moreover, district courts in these jurisdictions do not have the discretion to order prosecutors to disclose the Jencks Act statements, or the *Brady* material contained within them, any earlier than the Act requires.⁴⁹ However, three other United States Courts of

limiting the application of the Jencks decision so that it would not hamper the workings of law enforcement by forcing wholesale disclosure of government materials and files.”); *Walk*, 533 F.2d at 427–28 (Koehlsch, J., dissenting) (criticizing the majority for holding that the Jencks Act precluded the district court from ordering pretrial disclosure of witness statements when the record was devoid of any justifiable concern about perjury or intimidation of witnesses).

45. See *supra* note 41 (listing cases holding that district courts do not have the authority to order the disclosure of Jencks material earlier than the statute allows). However, as the Fourth Circuit has noted, “nothing in the Jencks Act prevents the government from voluntarily agreeing to disclose witness statements prior to trial,” see *Lewis*, 35 F.3d at 151, which often occurs. See Ellen S. Podgor, *Criminal Discovery of Jencks Witness Statements: Timing Makes a Difference*, 15 GA. ST. U. L. REV. 651, 655 (1999) (reporting on survey results showing that “prosecutors, for the most part, provide Jencks witness statements to the defense in advance of the witness testifying,” but noting a lack of uniformity among jurisdictions regarding the practice). Furthermore, although the court may not mandate pretrial disclosure, the Jencks Act does contain protections for defendants who may be prejudiced by disclosure in accordance with the statutory timetable. See 18 U.S.C. § 3500(c) (“[T]he court in its discretion, upon application of [the] defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by [the] defendant and his preparation for its use in the trial.”); *id.* § 3500(d) (providing that where the government fails to meet its obligations to produce statements in accordance with the Act, the trial court must strike the testimony of the relevant witness and may, in its discretion, declare a mistrial).

46. See, e.g., *United States v. Cerna*, 633 F. Supp. 2d 1053, 1055–56 (N.D. Cal. 2009) (discussing the implications of the presence of *Brady* material in a Jencks Act statement).

47. See *United States v. Presser*, 844 F.2d 1275, 1283 (6th Cir. 1988) (“The clear and consistent rule of this circuit is that the intent of Congress expressed in the Act must be adhered to and, thus, the government may not be compelled to disclose Jencks Act material before trial.”); *United States v. Jones*, 612 F.2d 453, 455 (9th Cir. 1979) (“When the defense seeks evidence which qualifies as both Jencks Act and *Brady* material, the Jencks Act standards control.”); *United States v. Scott*, 524 F.2d 465, 467 (5th Cir. 1975) (per curiam) (“This Court and others have recognized that the rule announced in *Brady* is not a pretrial remedy and was not intended to override the mandate of the Jencks Act.”).

48. See, e.g., *Cerna*, 633 F. Supp. 2d at 1055–56.

49. See, e.g., *id.* at 1056 (“District courts in this circuit have no authority to override strict observance of the Jencks Act.”).

Appeals have reached the opposite conclusion.⁵⁰

B. Criminal Procedure Rules and Internal Guidelines

The *Brady* line of cases only establishes a floor—that is, the minimum extent of a prosecutor’s obligation to disclose favorable evidence.⁵¹ Other sources of law, such as the Federal Rules of Criminal Procedure, the USAM, and state ethics rules can, and sometimes do, impose broader obligations.

Rule 16 of the Federal Rules of Criminal Procedure is the primary rule governing pretrial discovery in federal criminal cases,⁵² and it is, in many respects, broader than the disclosures mandated by the *Brady* line of cases. For example, Rule 16 requires prosecutors to disclose to the defendant the defendant’s own statements (including statements of an organizational defendant’s agents); certain tangible evidence; and expert witnesses’ qualifications, reports, and materials and information relied upon in rendering their opinions.⁵³ Unlike a prosecutor’s constitutional disclosure obligations,⁵⁴ the disclosures required under Rule 16 are triggered only by the defendant’s request.⁵⁵ Also unlike the constitutionally required disclosures, the

50. See *United States v. Copp*, 267 F.3d 132, 145–46 (2d Cir. 2001) (“It is, of course, a fundamental axiom of American law, rooted in our history as a people and requiring no citations to authority, that the requirements of the Constitution prevail over a statute in the event of a conflict.”); *United States v. Tarantino*, 846 F.2d 1384, 1414–15 & n.11 (D.C. Cir. 1988) (per curiam) (stating that Jencks Act limitations on discovery do not lessen the government’s *Brady* obligations to disclose exculpatory material); *United States v. Starusko*, 729 F.2d 256, 263 (3d Cir. 1984) (“[C]ompliance with the statutory requirements of the Jencks Act does not necessarily satisfy the due process concerns of *Brady*.”). The Courts of Appeals for the First, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits have not ruled on the matter, although some district courts within those circuits have also held that *Brady* trumps Jencks. See, e.g., *United States v. Owens*, 933 F. Supp. 76, 84–85 (D. Mass. 1996) (“Given the important nature of the constitutional rights at stake, this Court rules that the *Brady* requirement must effectively trump the Jencks Act where the two are in direct conflict.”); *United States v. McVeigh*, 923 F. Supp. 1310, 1315 (D. Colo. 1996) (same); *United States v. Thevis*, 84 F.R.D. 47, 54 (N.D. Ga. 1979) (same); cf. *United States v. Beckford*, 962 F. Supp. 780, 791 (E.D. Va. 1997) (adopting a “balancing” approach in an attempt to honor the intent behind the Jencks Act by ordering disclosure as close to trial as possible while still allowing defense to make effective use of information contained in statements).

51. See *Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009) (noting that while *Brady* “only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor’s ethical or statutory obligations”).

52. LAURIE L. LEVENSON, *FEDERAL CRIMINAL RULES HANDBOOK* 222 (2009 ed.).

53. FED. R. CRIM. P. 16(a)(1).

54. See *supra* Part I.A (discussing the constitutional disclosure obligations required by *Brady* and its progeny).

55. FED. R. CRIM. P. 16(a)(1)(A)–(G) (starting each of the seven subsections with the phrase “[u]pon a defendant’s request”); LEVENSON, *supra* note 52, at 223. However, many federal courts have adopted local rules that make the disclosures

disclosure obligations under Rule 16 are reciprocal.⁵⁶

Notably, Rule 16 does not impose a blanket obligation on the government to disclose all exculpatory or impeachment evidence;⁵⁷ instead, it only requires the disclosure of documents or tangible items “material to preparing the defense,” if the defendant asks for them.⁵⁸ Witness statements are not covered by Rule 16; in fact, the Rule explicitly exempts Jencks Act witness statements from its coverage.⁵⁹ And, while the Rule contains possible sanctions for violation of its disclosure obligations,⁶⁰ it does not specify the time by which the required disclosures must be made.⁶¹

Another rule governing pretrial disclosure is Rule 26.2 of the Federal Rules of Criminal Procedure, which covers the disclosure of witness statements, and mirrors the Jencks Act in terms of the prosecutor’s duty to disclose.⁶² Specifically, it requires a prosecutor to produce to the defendant any statement⁶³ of a government witness, in the government’s possession, that relates to the subject matter of the witness’s testimony, but only after that witness has testified on direct examination.⁶⁴ Like Rule 16, however, Rule 26.2 is triggered only by the defendant’s request (motion) to obtain such material,⁶⁵

automatic. *See, e.g.*, D. MASS. R. 116.1(a)(1) (mandating disclosure pursuant to Rule 16 in felony and Class A misdemeanor cases regardless of whether the defendant requested such information); D. NEB. R. 16.1 (same).

56. *Compare* FED. R. CRIM. P. 16(a)–(b) (setting forth pretrial disclosure obligations for both prosecutors and defendants), *with* *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (discussing the defendant’s due process rights to receive certain evidence).

57. Brennan & King-Ries, *supra* note 29, at 329.

58. FED. R. CRIM. P. 16(a)(1)(E)(i).

59. *See* FED. R. CRIM. P. 16(a)(2) (“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 [the Jencks Act].”).

60. *See* FED. R. CRIM. P. 16(d)(2) (providing that if a party violates Rule 16, the court may order disclosure, grant a continuance, prohibit introduction of the undisclosed evidence, or “enter any order that is just under the circumstances”).

61. Local rules generally govern the timing of discovery requests, and motions to enforce the timing requirement are made under Rule 12 of the Federal Rules of Criminal Procedure. LEVENSON, *supra* note 52, at 223.

62. *See* FED. R. CRIM. P. 26.2(a) (“After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government or the defendant and the defendant’s attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness’s testimony.”); *see also* FED. R. CRIM. P. 26.2 advisory committee’s note (acknowledging that the substance of the Jencks Act was integrated into the rules because provisions that are purely procedural should appear in the Federal Rules of Criminal Procedure).

63. *See* FED. R. CRIM. P. 26.2(f) (defining “statement” as a written statement signed or otherwise approved by the witness; a verbatim recording of the witness’s oral statement; or a recording or transcript of a witness’s statement to a grand jury).

64. FED. R. CRIM. P. 26.2(a).

65. FED. R. CRIM. P. 26.2(a). However, as with Rule 16 materials, many federal

and it imposes reciprocal obligations on the defendant to disclose to the prosecution similar statements made by witnesses for the defense.⁶⁶

A third source of authority governing a prosecutor's pretrial disclosure obligations is the USAM—an internal guidance and policy manual for DOJ attorneys.⁶⁷ The USAM contains DOJ's policy regarding disclosure of exculpatory and impeachment evidence,⁶⁸ which goes beyond the constitutionally-required disclosure obligations recognized by the Supreme Court.⁶⁹ In terms of the timing of disclosure, the policy provides that exculpatory information "must be disclosed reasonably promptly after it is discovered,"⁷⁰ and states that impeachment information "will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently."⁷¹ The policy recognizes, however, that other significant interests—such

courts have adopted local rules that make the disclosures automatic. *See supra* note 55.

66. *See* FED. R. CRIM. P. 26.2(a) (imposing disclosure requirements on the defendant as well as the government). When Rule 26.2 was proposed, it was vigorously opposed by the ABA and other representatives of criminal defense attorneys precisely because of the reciprocal obligation imposed on defendants to disclose their witnesses' statements. *See Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings on H.R. 7473 and H.R. 7817 Before the Subcomm. on Crim. Justice of the H. Comm. on the Judiciary*, 96th Cong. 17–18 (1980) (statement of William W. Greenhalgh, on behalf of the American Bar Association); *id.* at 31–41 (statement of John J. Cleary, on behalf of the American Bar Association); *id.* at 114–15 (statement of Irwin Schwartz, on behalf of Federal Public and Community Defenders); *id.* at 146–53 (statement of Robert L. Weinberg, Williams & Connolly, on behalf of 170 Lawyers from thirty-two States and the District of Columbia). Ironically, one of the hearing participants testifying against the addition of Rule 26.2 expressed concern that the government would make their Jencks Act witness statement disclosures *prior to trial* and therefore expect the defense to do the same. *See id.* at 140 (statement of Irwin Schwartz, on behalf of Federal Public and Community Defenders).

67. *See generally* U.S. ATTORNEYS' MANUAL, *supra* note 25, § 1-1.100.

68. *Id.* § 9-5.001.

69. In several respects, the USAM either "encourages" or "requires" disclosure that is broader in scope and earlier than constitutionally and statutorily required. *See, e.g., id.* § 9-5.001(B)(1) (noting that while evidence not admissible at trial need not be disclosed, prosecutors should disclose evidence of questionable admissibility); *id.* § 9-5.001(F) ("[T]his policy encourages prosecutors to err on the side of disclosure in close questions of materiality . . ."); *see also id.* § 9-5.001(C) ("Department policy recognizes that a fair trial will often include examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal or, as is often colloquially expressed, make the difference between guilt and innocence. As a result, this policy requires disclosure by prosecutors of information beyond that which is 'material' to guilt as articulated in [relevant Supreme Court precedent]."); *id.* § 9-5.001(C)(1)–(4) (enumerating four additional categories of exculpatory and impeachment information that "must" be disclosed, although not constitutionally required).

70. *Id.* § 9-5.001(D)(1).

71. *Id.* § 9-5.001(D)(2).

as witness security—may cause the prosecutor to conclude that it is not appropriate to provide early disclosure.⁷² In such cases, the USAM simply directs prosecutors to make disclosures “at a time and in a manner consistent with the policy embodied in the Jencks Act.”⁷³ When a prosecutor feels that early disclosure is not appropriate due to security concerns, however, she must obtain a supervisor’s approval to withhold impeachment information before trial and exculpatory information past the “reasonably promptly” time period.⁷⁴ The USAM does not, though, have the force of law or confer any enforceable rights on defendants.⁷⁵

C. Ethics Rules

Rule 3.8 of the ABA Model Rules of Professional Conduct sets forth the “special responsibilities” of a prosecutor in a criminal case.⁷⁶ Rule 3.8(d) requires a prosecutor to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”⁷⁷ Nearly every state has adopted Rule 3.8(d);⁷⁸ at least thirty-one states have adopted the rule

72. *Id.*

73. *Id.*; see *id.* § 9-5.001(D)(2) (stating that the USAM is intended to promote fair trials by requiring timely disclosure of appropriate exculpatory and impeachment information, but recognizing that countervailing interests, such as witness security and national security, may require delayed or restricted disclosure). The policy does not explicitly address Jencks Act witness statements as a category separate and apart from the impeachment information that may be contained therein. Indeed, the oblique reference to the Jencks Act mentioned above—from the section concerning the timing of disclosure of impeachment information—is the only mention of the Jencks Act in the policy.

74. *Id.* § 9-5.001(D)(4).

75. See *id.* § 9-5.001(F) (clarifying that the expanded disclosure policy in the USAM does not provide additional rights or remedies for defendants). Courts have agreed. See, e.g., *United States v. Wilson*, 413 F.3d 382, 389 (3d Cir. 2005); *United States v. Fernandez*, 231 F.3d 1240, 1246 (9th Cir. 2000). A prosecutor who violates the USAM can, however, be investigated by DOJ’s Office of Professional Responsibility, disciplined or dismissed from DOJ, and reported to the relevant licensing bar. Letter from Paul J. McNulty, Deputy Att’y Gen., to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure 2 n.2 (June 5, 2007), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%2016%20Part%201.pdf> [hereinafter McNulty Letter].

76. MODEL RULES OF PROF’L CONDUCT R. 3.8(d) (2009). Rule 3.8 is unique among the Model Rules in that it is the only rule drafted specifically for one segment of the profession. See Hans P. Sinha, *Prosecutorial Ethics: The Duty to Disclose Exculpatory Material*, PROSECUTOR, Jan.–Mar. 2008, 20, at 20 (noting that Rule 3.8 is the only such rule and commenting that “[s]ignificantly, there are no special rules for criminal defense lawyers, tax lawyers or corporate lawyers, or any other type of lawyers”).

77. MODEL RULES OF PROF’L CONDUCT R. 3.8(d) (2009).

78. Model ethics rules promulgated by the ABA bind attorneys only when

verbatim,⁷⁹ while a handful of others have adopted modified versions of the rule.⁸⁰ A few other state rules regarding disclosure obligations are based on comparable provisions that were contained in the ABA's Model Code of Professional Responsibility, the predecessor to the Model Rules.⁸¹

Whether, and to what extent, federal prosecutors were even subject to state ethics rules was the subject of considerable debate for years.⁸² The debate was largely resolved, however, with the passage of the so-called McDade Amendment in 1998.⁸³ Pursuant to the McDade Amendment, all U.S. government attorneys, including, and especially, federal prosecutors,⁸⁴ are subject to the ethics rules of "each State where such attorney[s] engage[] in [their] duties, to the same extent and in the same manner as other attorneys in that State."⁸⁵ Accordingly, a federal prosecutor must abide by the version—or versions—of Rule 3.8(d) operating in each state in which she practices.⁸⁶ A federal prosecutor who fails to do so may be

adopted by a jurisdiction's legislature or court. Note, *supra* note 16, at 2082 n.11 (citing JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER 3–4 (2d ed. 1996)).

79. Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427 app. at 482 & n.75 (2009).

80. *Id.* app. at 483 & n.76. For example, a few states have added a requirement that the failure to disclose must be willful or intentional for an ethical violation to occur. See, e.g., ALA. RULES OF PROF'L CONDUCT R. 3.8(d) (2009) (requiring that prosecutors not willfully fail to make timely disclosure); D.C. RULES OF PROF'L CONDUCT R. 3.8(e) (2012) (prohibiting intentional failure to disclose). Some states have also modified the rule to specifically address the timing of disclosure. See, e.g., ALA. RULES OF PROF'L CONDUCT R. 3.8(d) (requiring disclosure "at the earliest practical time"); D.C. RULES OF PROF'L CONDUCT R. 3.8(e) (requiring disclosure "at a time when use by the defense is reasonably feasible").

81. See, e.g., N.Y. RULES OF PROF'L CONDUCT R. 7-103 (B) (2009) (providing that "[a] public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to a defendant who has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment"). For a brief history of the evolution of the model ethics rules, see Note, *supra* note 16, at 2082–83, and authorities cited therein.

82. See Note, *supra* note 16, at 2084–88 (illustrating the history of the dispute as it transpired between DOJ and the courts).

83. Pub. L. No. 105-277, § 801(a), 112 Stat. 2681, 2681-118 (1998) (codified at 28 U.S.C. § 530B (2006)).

84. Note, *supra* note 16, at 2088 (noting that the amendment was introduced "[t]o restrain the perceived overzealousness of federal prosecutors and to prevent DOJ from exempting its prosecutors from ethics rules"). The provision's chief sponsor in the U.S. House of Representatives, Congressman Joseph McDade, was himself the subject of an eight-year federal criminal investigation that ultimately resulted in his acquittal of all charges. *Id.* at 2088 n.70.

85. 28 U.S.C. § 530B (2006).

86. As previously mentioned, although nearly all states have some version of Rule 3.8(d), there are variations among them. This often presents a challenge for DOJ attorneys at "Main Justice," who frequently work on cases in multiple jurisdictions. See, e.g., Little, *supra* note 15, at 370 n.68 (providing the "Unabomber" case as a

subjected to disciplinary sanctions.

A strong argument can be made that, as written, Rule 3.8(d) is not inconsistent with the existing, long-standing constitutional and statutory framework governing a federal prosecutor's disclosure obligations. Under the *Brady* line of cases, a prosecutor must disclose exculpatory and impeachment evidence—unless it is contained within Jencks Act witness statements—in a timely fashion, so that the defense may effectively use it at trial.⁸⁷ Thus, under this view, “timely” equates to “in time for the defense to make effective use of it at trial,” which, as discussed, is determined on a case-by-case basis.⁸⁸ With respect to Jencks Act statements, it has been DOJ's position that the two can be reconciled by reading “timely” to mean “at an appropriate or suitable time,” i.e., at a time provided by law.⁸⁹ In the case of Jencks Act statements and the exculpatory and impeachment information contained therein, this means that disclosure is “timely” so long as it is made within the timeframe established by statute and assented to by the courts; in many jurisdictions, this will mean after the witness testifies on direct at trial.⁹⁰ Thus far, federal courts have agreed with DOJ's interpretation,⁹¹ to the extent they have considered the matter at all,⁹² and research has not revealed any

specific instance in which DOJ attorneys had to work in multiple jurisdictions); see also *The Effect of State Ethics Rules on Federal Law Enforcement: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary*, 106th Cong. 44 (1999) (statement of Eric H. Holder, Jr., Deputy Att'y Gen.) (describing the problems that can arise when DOJ attorneys must comply with a variety of divergent local rules).

87. See *supra* notes 27–36 and accompanying text (detailing prosecutorial responsibility to disclose exculpatory and impeachment evidence pursuant to *Brady* and its progeny).

88. See *supra* notes 34–36 and accompanying text (discussing the appropriate timing for disclosure).

89. See, e.g., Government's Response to Defendants' Motion to Compel Production of Favorable Information at 11–12, *United States v. Colacurcio*, No. CR09-209RAJ (W.D. Wash. Mar. 4, 2010), ECF No. 188.

90. See *supra* Part I.A.

91. See, e.g., *United States v. Colacurcio*, No. CR09-209RAJ, slip op. at 7 (W.D. Wash. Apr. 9, 2010) ECF No. 222 (order denying motion to compel production of favorable information) (“[T]he court sees no conflict between [Washington Rule of Professional Conduct] 3.8(d) and the Jencks Act. The ethical rule requires ‘timely’ disclosure of favorable evidence and information. The Jencks Act decrees that for the statement of a government witness, production is timely so long as it comes after the witness finishes direct examination.”).

92. Federal courts are not, of course, the final arbiters of the state disciplinary rules. Many federal courts have, however, adopted state ethics rules as part of their local federal court rules. See, e.g., W.D. WASH. G.R. 2(e)(2) (stating that attorneys appearing in the district court must comply with state ethics rules). The federal courts are called upon to decide whether these rules have been violated, for example, in the context of sanction motions or contempt proceedings. See Zacharias, *supra* note 15, at 453 n.101. However, “[t]o the extent discipline of a lawyer is the appropriate sanction and cannot easily be accomplished through contempt, the

instance in which a federal prosecutor has been disciplined by a state bar authority for adhering to this interpretation. Thus, an uneasy truce has existed since the passage of the McDade Amendment made Model Rule 3.8(d) clearly and directly applicable to federal prosecutors.

This situation is not likely to survive, however, in the wake of the recent issuance of the Opinion. As will be discussed more fully in Part III.A, among other things, the Opinion interprets Rule 3.8(d) as requiring disclosure of information favorable to the defense “as soon as reasonably practical,” “once known to the prosecutor.”⁹³ The Opinion does not make an exception for such information when contained within Jencks Act statements; indeed, it does not mention the Jencks Act at all. Therefore, the ABA Ethics Committee’s interpretation of “timely” as explained in the Opinion puts Rule 3.8(d) in direct conflict with the Jencks Act. Requiring that a prosecutor disclose information favorable to the defense contained within Jencks Act statements as soon as practical after she learns of it, which is the practical consequence of the Opinion, cannot be squared with a statutory rule that does not require such disclosure until after a witness has testified during trial.

II. THE PUSH FOR MORE DISCLOSURE

The full history of the debate between defense attorneys and prosecutors over the appropriate scope and timing of the disclosure of evidence favorable to the defense is beyond the purview of this Article, as are the merits of the underlying debate. Rather, this Article seeks to analyze the recent history and current status of specific attempts to push the sources of law enumerated above in the direction of requiring prosecutors to make more and earlier disclosures to the defense. These efforts, none of which has been fully successful in the eyes of proponents, should be seen as the backdrop, and perhaps the primary motivation, for the ABA Ethics Committee’s promulgation of Formal Opinion 09-454. Having tried, and largely failed, to change the law in favor of defendants’ interests

federal courts currently have little option but to refer misconduct to the state bar.” *Id.* In addition to referrals by the federal courts, federal prosecutors also may be referred to state bar disciplinary authorities by their adversaries in litigation, i.e., defense counsel, *see* Little, *supra* note 15, at 373–74 (discussing one high-profile example of such a referral), or by DOJ itself, *see* McNulty Letter *supra* note 75, at 2 n.2 (noting that a prosecutor who violates the U.S. Attorney’s Manual can be investigated, disciplined by DOJ, or referred to the bar).

93. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 09-454, at 6 (2009).

in earlier and broader disclosure, the proponents of these failed measures found a more sympathetic audience in the Committee, which has chosen to exercise its historically considerable influence by pushing through, via an ethics opinion, substantive changes to the disclosure rules that have been otherwise unattainable.

A. Efforts to Extend the Brady Doctrine

Critics of the disclosure obligations imposed by federal law are primarily troubled by three things: (1) the materiality standard enshrined in the *Brady* line of cases; (2) the perceived laxity or uncertainty regarding when disclosures are required to be made; and (3) the roadblock posed by the Jencks Act. Formal Opinion 09-454 gets to the heart of all three, whereas decades of litigation over the scope of the *Brady* doctrine did not achieve the desired result.

As a matter of constitutional law, a prosecutor need only disclose material evidence, and evidence is material only if it has a reasonable probability of altering the jury's verdict.⁹⁴ Despite numerous commentators arguing, and the Supreme Court itself acknowledging, that it is somewhat anomalous to use a single standard to govern both pretrial decision-making and post-trial review,⁹⁵ the use of the materiality standard endures. A few district court decisions have held that *Brady* requires the government to disclose *all* favorable evidence before trial (not just material evidence),⁹⁶ but such cases remain the exception.

With respect to the timing issue, the Supreme Court has thus far resisted pinpointing exactly when *Brady* disclosures must be made; there is no bright line rule and, as discussed above, whether particular information was disclosed "in time for the defense to make use of the information at trial" is determined on a case-by-case basis.⁹⁷ The Supreme Court has weighed in, however, on when such

94. Christopher Deal, Note, *Brady Materiality Before Trial: The Scope of the Duty To Disclose and the Right to a Trial by Jury*, 82 N.Y.U. L. REV. 1780, 1783 & n.27 (2007).

95. See sources cited *supra* note 29 (providing a summary of scholarly criticism); see also Deal, *supra* note 94, at 1790–95, 1801–03 (discussing how the Supreme Court has grappled with the definition of materiality as it pertains to pretrial disclosure obligations, and summarizing commentators' arguments that the materiality definition is unworkable as a pretrial standard).

96. See, e.g., *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005) (holding that the government must disclose all favorable evidence); *United States v. Carter*, 313 F. Supp. 2d 921, 925 (E.D. Wisc. 2004) (same); *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1999 (C.D. Cal. 1999) (same); see also *United States v. Phair*, No. CR12-16RAJ, slip. op. at 4 (W.D. Wash. June 19, 2012) (order granting defendant's motion for discovery) (following the pretrial disclosure standard outlined in *Sudikoff*).

97. See *supra* notes 35–36 and accompanying text.

disclosure is *not* required: prior to a defendant pleading guilty. In 2002, the Court decided *United States v. Ruiz*,⁹⁸ a case that raised the issue only indirectly, and held that due process does not require that prosecutors disclose favorable evidence (at least not impeachment evidence) to the defense prior to a guilty plea.⁹⁹ In *Ruiz*, the defendant claimed that the terms of a “fast-track” plea agreement, which would have required her to waive her right to receive *Brady* material, were unconstitutional.¹⁰⁰ The Supreme Court disagreed, holding that the defendant’s right to a fair trial was not violated by the government’s conditioning a fast-track plea offer on the defendant’s waiver of her right to impeachment information.¹⁰¹ The Court then went further and held that under *Brady*, defendants have no constitutional right to disclosure of information relevant to either impeachment or affirmative defenses prior to pleading guilty.¹⁰² The *Ruiz* decision was considered a major set-back by proponents of earlier and broader disclosure, and some have suggested that it was the impetus behind the push to amend Rule 16.¹⁰³

Finally, with respect to the Jencks Act, advocates for criminal defendants have at least succeeded in creating a circuit split as to whether *Brady* trumps the Jencks Act as a matter of constitutional law.¹⁰⁴ Thus, in some jurisdictions, district courts could order pretrial disclosure of *Brady* material contained within Jencks Act statements, if such disclosure would otherwise be necessary to meet the “in time for the defense to make effective use of it at trial” standard.¹⁰⁵ In other jurisdictions—including within the largest circuit, the Ninth—however, the Jencks Act remains an impediment to obtaining such disclosure.¹⁰⁶ Although the government can voluntarily choose to disclose Jencks Act statements or the *Brady* material contained therein before the witness has testified at trial,¹⁰⁷ a defendant has no

98. 536 U.S. 622 (2002).

99. *Id.* at 625.

100. *Id.* at 626.

101. *Id.* at 633.

102. *Id.*

103. See R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1445–46 (2011) (discussing the efforts to amend Rule 16 that began after, and as a result of, *Ruiz*).

104. See *supra* notes 47–50 and accompanying text.

105. See *supra* note 50 (listing courts that have upheld the superiority of *Brady* obligations over the Jencks Act).

106. See *United States v. Alvarez*, 358 F.3d 1194, 1211 (9th Cir. 2004) (“When the defense seeks information which qualifies as both Jencks Act and *Brady* material, the Jencks Act standards control.” (quoting *United States v. Jones*, 612 F.2d 453, 455 (9th Cir. 1979))); see also *supra* note 47 (identifying cases from additional jurisdictions that give primacy to the Jencks Act).

107. See *supra* note 45 (noting that nothing in the Jencks Act prevents prosecutors

pretrial judicial recourse if the government declines to do so.¹⁰⁸

B. Efforts to Amend the Jencks Act

There appears to have been only one serious, but unsuccessful, effort to amend the Jencks Act to broaden a defendant's right to pretrial discovery.¹⁰⁹ In 1985, Representative John Conyers (D-MI) sponsored H.R. 4007, the Jencks Act Amendments Act of 1985.¹¹⁰ The bill's stated purpose was "to provide more useful discovery rights for defendants in criminal cases,"¹¹¹ and it would have required the government, upon request by the defendant, to "promptly . . . make available" the names and addresses of anyone known by the government to have "knowledge of facts relevant to the offense charged,"¹¹² along with a copy of any related witness statements.¹¹³ Under the proposed amendments, the government would have been permitted to file an ex parte motion for a protective order.¹¹⁴ If the court determined that disclosure would "constitute an imminent danger to another person" or "constitute a threat to the integrity of the judicial process," the court could have denied, restricted, or deferred such disclosure until after the witness had testified on direct examination at trial.¹¹⁵ The measure was supported by the ABA,¹¹⁶

from voluntarily disclosing witness statements prior to trial).

108. See *supra* notes 48–49 and accompanying text.

109. H.R. 4007, 99th Cong. (1985). Separately, Congress considered amending the Jencks Act to be more *restrictive* of defendants' rights in 1979–80, in response to the so-called "graymail" problem of defendants in national security-related cases threatening to disclose classified information during trial, thereby discouraging the government from prosecuting such cases. These proposed amendments to the Jencks Act would have allowed the court to order excision of classified information from witness statements, but were never enacted. See Classified Information Procedures Act, S. 1482, 96th Cong. § 8(b) (as reported by the S. Comm. on the Judiciary, June 18, 1980); *Graymail: Hearing on S. 1482 Before the Subcomm. on Criminal Justice of the S. Comm. on the Judiciary*, 96th Cong. 22 (1980). This issue was subsequently addressed with the passage of the Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app. §§ 1–16 (2006)). As discussed below, Congress also considered—and rejected—in 1980 a proposal to require the government to disclose its witness list prior to trial (which H.R. 4007 would also have done), but that discussion centered around proposed changes to Rule 16 of the Federal Rules of Criminal Procedure, not to the Jencks Act itself. See *infra* note 125. See generally *infra* note 123 (discussing Congress's role in the federal criminal rulemaking process).

110. H.R. 4007, 99th Cong. (1985).

111. *Id.*

112. *Id.* § 2(a).

113. *Id.* § 2(a)(2).

114. *Id.* § 2(b)(1).

115. *Id.*

116. *Jencks Act Amendments: Hearing on H.R. 4007 Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 99th Cong. 3 (1986) (statement of Gerard F. Treanor, Jr., on behalf of the American Bar Association); *id.* at 291 (statement of Paul F. Rothstein, on behalf of American Bar Association).

the National Association of Criminal Defense Lawyers (NACDL),¹¹⁷ and various defender groups,¹¹⁸ but was opposed by DOJ.¹¹⁹ The bill never made it out of committee.

C. *Efforts to Amend Rule 16 and DOJ's Recent Changes to USAM*

Rule 16 of the Federal Rules of Criminal Procedure has been amended many times since its adoption in 1944, nearly always to expand the scope of required disclosures.¹²⁰ The “recent” push to amend Rule 16 to make prosecutors’ disclosure obligations more expansive dates back to 2003, when the American College of Trial Lawyers (ACTL) proposed adding a new section to Rule 16,¹²¹ which would require disclosure, within fourteen days of a defense request, of “all information favorable to the defendant”—without regard to materiality—that is known to the prosecutor or any investigating agency.¹²² Acting on ACTL’s proposal in 2007, the Judicial Conference’s Advisory Committee on Criminal Rules (“Advisory

117. *Id.* at 274 (statement of Robert L. Weinberg, on behalf of National Association of Criminal Defense Lawyers).

118. *Id.* at 31 (statement of Thomas W. Hillier, on behalf of Federal Public and Community Defenders); *id.* at 197–98 (statement of Lucien B. Campbell, on behalf of Federal Public and Community Defenders).

119. *Id.* at 166 (statement of James I.K. Knapp, Deputy Assistant Att’y Gen., Criminal Division, United States Department of Justice).

120. See FED. R. CRIM. P. 16 advisory committee’s notes (chronicling the rule’s revisions that have expanded the scope of pretrial discovery).

121. See, e.g., Standing Comm. on Rules of Practice and Procedure, Meeting Minutes 31 (June 11–12, 2007), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06-2007-min.pdf> [hereinafter Standing Comm. June 2007 Minutes].

122. AMER. COLL. OF TRIAL LAWYERS, PROPOSED CODIFICATION OF DISCLOSURE OF FAVORABLE INFORMATION UNDER FEDERAL RULES OF CRIMINAL PROCEDURE 11 AND 16, at 17 (2003), available at http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentFileID=62.

The ACTL is a voluntary professional organization of trial lawyers, and membership (or “fellowship”) is extended by invitation only. See *About Us—Membership*, AM. COLL. OF TRIAL LAWYERS, <http://www.actl.com/Content/NavigationMenu/AboutUs/Membership/default.htm> (last visited July 14, 2012). Its mission is “to maintain[] and improv[e] the standards of trial practice, the administration of justice and the ethics of the profession.” *About Us—Overview*, AM. COLL. OF TRIAL LAWYERS, http://www.actl.com/AM/Template.cfm?Section=About_Us (last visited July 14, 2012). The ACTL purports “to speak with a balanced voice on important issues affecting the administration of justice” because it draws members from all litigation practice areas. *About Us—Membership*, *supra*. A search of its online membership directory, however, turns up only twenty-five attorneys who practice “criminal prosecution” (and of these, nine actually list a private firm as their place of employment), see *Attorney Directory*, AM. COLL. OF TRIAL LAWYERS, http://www.actl.com/Source/Members/actl_Search.cfm?section=Attorney_Directory (search “Practice Area” for “Criminal Prosecution”) (last visited July 14, 2012), and 377 attorneys who practice “criminal defense” (two of whom list a prosecutor’s office as their place of employment), *id.* (search “Practice Area” for “Criminal Defense”) (last visited July 14, 2012).

Committee”) recommended to the Standing Committee on Rules of Practice and Procedure (“Standing Committee”) that Rule 16 be amended.¹²³ The Advisory Committee’s proposal was similar to what ACTL requested: it would have, in essence, eliminated the materiality requirement contained in the Rule and enshrined in the *Brady* line of cases, and allowed a court to set a pretrial disclosure date.¹²⁴ However, the Advisory Committee revised the original ACTL proposal with respect to the timing of disclosure. Specifically, the Advisory Committee changed the requirement that prosecutors disclose *all* information favorable to the defendant (which would include both exculpatory and impeachment information) *within fourteen days of a defendant’s request* to a provision allowing the court to order pretrial disclosure of both exculpatory and impeachment information, but restricting the court from requiring disclosure of *impeachment* information any sooner than *fourteen days prior to trial*.¹²⁵

123. ADVISORY COMM. ON CRIMINAL RULES, REPORT TO STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 250–58 (May 19, 2007) [hereinafter ADVISORY COMM. MAY 2007 REPORT], *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CR05-2007.pdf>. The rulemaking process is described in detail on the U.S. Courts website. *How the Rulemaking Process Works*, U.S. COURTS, <http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/how-rulemaking-process-works.aspx> (last visited Aug. 16, 2012). Briefly, the Judicial Conference of the United States promulgates rules of federal practice, procedure, and evidence under authority delegated by Congress to the federal judiciary pursuant to the Rules Enabling Act. 28 U.S.C. §§ 2071–2077 (2006). The Committee on Rules of Practice and Procedure, commonly referred to as the “Standing Committee,” coordinates the Judicial Conference’s rulemaking responsibilities. *See id.* § 2073(b). Under the Standing Committee are five advisory committees, including the Advisory Committee on Criminal Rules. *See id.* § 2073(a)(2). The Advisory Committee considers proposed rule changes and, if it feels that a particular change in the rules would be appropriate, it prepares a draft amendment and requests approval from the Standing Committee to publish it for public comment. The Standing Committee may decline to approve publication, which, as discussed below, happened here. *See infra* notes 129–131 and accompanying text. Otherwise, following a period of public notice and comment, the Advisory Committee considers the comments and makes a final recommendation to the Standing Committee, which can accept, reject, or modify the proposal. If the Standing Committee approves a proposed rule change, it transmits it to the Judicial Conference for approval. If the Judicial Conference approves the proposed amendment, it transmits it to the Supreme Court along with any other proposed amendments it has approved that year. If the Supreme Court approves, it “prescribes” the amendment and transmits it to Congress. *See* 28 U.S.C. §§ 2072, 2074–2075. Congress then has seven months to act; if Congress does not enact legislation to reject, modify, or defer the rules, they automatically take effect. *See id.* §§ 2074–2075.

124. ADVISORY COMM. MAY 2007 REPORT, *supra* note 123, at 354.

125. *Id.* at 24–25. A similar, but even more modest proposal with respect to witness disclosure (which would have required the government to disclose its witness list three days before trial) was approved by the Supreme Court in 1974, but it was rejected by Congress. *See* FED. R. CRIM. P. 16 advisory committee’s note (documenting that in 1974, the Conference adopted a Senate proposal, which made the names and addresses of a party’s witnesses nondiscoverable before trial).

Nevertheless, DOJ opposed the Advisory Committee's proposed amendment on the grounds that eliminating the materiality requirement would be contrary to prevailing law, upset the carefully considered balance between a defendant's right to a fair trial and the interest in the finality of judgments, and potentially violate the reputational and privacy interests of witnesses and other participants in the criminal justice system. DOJ further objected that the proposal would result in a scope and timing requirement for disclosures that would be inconsistent with the Jencks Act.¹²⁶ Specifically, DOJ contended that the proposed amendment would in effect require pretrial disclosure of all impeachment information, a requirement that would be contrary to the Jencks Act, particularly given how frequently potential impeachment information is found in witness statements.¹²⁷ Even though the proposed amendment would have limited the disclosure period to no more than fourteen days before trial, in a lengthy trial, that could mean disclosing the information several months before a particular witness testifies.¹²⁸

The Standing Committee deferred consideration of the proposal indefinitely in June 2007,¹²⁹ because of disagreement among its members regarding whether a need for change had been demonstrated, the merits of the proposed changes, and whether the committee should defer to DOJ's changes to the USAM and the arguments DOJ made in its opposition to the proposed amendments.¹³⁰ Clearly, concern that the proposed amendment

126. See McNulty Letter, *supra* note 75, at 1–3, 6–11, 14. DOJ further argued that the amendment was unnecessary because DOJ had recently amended the USAM to expand disclosure obligations above and beyond what was constitutionally and statutorily required, and it felt that those changes provided a workable solution that should be given a chance to be proven effective. *Id.* at 2–3, 30–33. For a discussion of the recent amendments to the USAM, see *infra* notes 145–146 and accompanying text, and *supra* notes 68–74.

127. McNulty Letter, *supra* note 75, at 14. Although DOJ focused its objections in this regard on the impeachment evidence provisions of the proposed amendment, Jencks Act statements can contain classic exculpatory information as well. See, e.g., *United States v. Beckford*, 962 F. Supp. 780, 789 (E.D. Va. 1997) (“Jencks Act statements may, but do not always, also constitute exculpatory . . . evidence.”); *United States v. Owens*, 933 F. Supp. 76, 84 (D. Mass. 1996) (discussing exculpatory Jencks Act statements).

128. McNulty Letter, *supra* note 75, at 11.

129. U.S. COURTS, HISTORY OF COMMITTEE'S CONSIDERATION OF AMENDMENTS TO RULE 16: TABLE OF CONTENTS WITH SUMMARY OF ACTION 1, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%2016%20Table%20of%20Contents.pdf> [hereinafter HISTORY OF CONSIDERATION]; Standing Comm. June 2007 Minutes, *supra* note 121, at 39–40.

130. See Standing Comm. June 2007 Minutes, *supra* note 121, at 31–40 (describing various disagreements between committee members); see also Advisory Comm. on Criminal Rules, Meeting Minutes 8 (Sept. 27–28, 2010) [hereinafter Advisory Comm. Sept. 2010 Minutes], available at <http://www.uscourts.gov/uscourts/>

would bring Rule 16 into conflict with the Jencks Act played a role in the Standing Committee's decision to shelve the proposal,¹³¹ as it has throughout the history of attempts to amend the Rule.¹³²

More recently, in 2009, the Advisory Committee reconstituted its subcommittee on Rule 16,¹³³ and continued to consider similar changes to the Rule.¹³⁴ The proposal that emerged was expressly an attempt to minimize the potential for conflict with the Jencks Act.¹³⁵ Specifically, the discussion draft would have required earlier disclosure for exculpatory information (at least fourteen days before trial) than for impeachment information (at least seven days before trial).¹³⁶ The draft retained the separate regime for disclosing witness statements currently embodied in the Jencks Act, Rule 26.2, and Rule 16(a)(2).¹³⁷ Although it did not require disclosure of the statement itself, this draft did, however, require pretrial disclosure of "a written summary of any inconsistent oral or witness statement by the witness."¹³⁸ The discussion draft also provided the government with unreviewable authority not to disclose exculpatory or impeachment

RulesAndPolicies/rules/Minutes/CR09-2010-min.pdf (characterizing DOJ's opposition to amending Rule 16 in 2007 as "a significant factor in the Standing Committee's decision not to approve the proposed amendment and to recommit the matter to the [Advisory] Committee for further study. Essentially, the 2007 process was halted based on [DOJ's] promise to address disclosure problems internally").

131. See Standing Comm. June 2007 Minutes, *supra* note 121, at 36 (discussing the fact that the proposed rule is in conflict with the Jencks Act and with constitutionally sound principles); see also *supra* notes 126–127, 130 and accompanying text (discussing DOJ's opposition to the proposed rule, which relied heavily on the Jencks Act, and its effect on the Standing Committee).

132. See HISTORY OF CONSIDERATION, *supra* note 129, at 12–21 (summarizing discussions between 1986 and 2003 of various proposals to require pretrial disclosure of names and statements of witnesses, and noting that the Advisory Committee ultimately voted in October 2003 against reviving consideration of any such amendment).

133. See ADVISORY COMM. ON CRIMINAL RULES, REPORT TO STANDING COMM. ON RULES OF PRACTICE AND PROCEDURE 2 (Dec. 11, 2009), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CR12-2009.pdf> (reporting creation of a Rule 16 subcommittee in response to concerns raised by Hon. Emmett Sullivan, presiding judge in the *Stevens* case).

134. See, e.g., Memorandum from Hon. Richard C. Tallman, Chair, Advisory Comm. on Criminal Rules, to Members, Advisory Comm. on Criminal Rules, 1 (Mar. 21, 2011), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Criminal/CR2011-04.pdf> [hereinafter Tallman Memo] (summarizing recent activity of the Rule 16 subcommittee and outlining the current proposed amendment to Rule 16 for discussion at the Advisory Committee's upcoming April 2011 meeting).

135. See *id.* at 2–5 (pointing out measures taken to avoid potential conflict with the Jencks Act and suggesting that "a key issue for [Advisory] Committee discussion [at its upcoming meeting] is whether [the proposal] is consistent with the Jencks Act and Rule 26.2").

136. *Id.* at 2–3, 6.

137. *Id.* at 3–4.

138. *Id.* at 4, 6.

information prior to trial if it believed that pretrial disclosure would threaten the safety of witnesses, victims, or the public; jeopardize national security; or lead to an obstruction of justice.¹³⁹

Nevertheless, DOJ objected that the discussion draft did not go far enough to ameliorate conflict with the Jencks Act, arguing that inherent in presenting a summary of inconsistent statements is the disclosure of portions of the underlying statements themselves and the identification of the witness at issue.¹⁴⁰ Ultimately, the Advisory Committee voted in April 2011 not to pursue an amendment to Rule 16,¹⁴¹ and the Rule 16 subcommittee was formally disbanded later that year.¹⁴² Given the Advisory Committee's stated commitment to avoiding conflict with the Jencks Act¹⁴³ and to securing DOJ's support

139. See *id.* at 4–5, 7 (explaining that the draft sought to balance the new disclosure obligations with the government's need to withhold such information when one of the listed interests was threatened).

140. See Letter from Lanny A. Breuer, Assistant Att'y Gen., U.S. Dep't of Justice, to Hon. Richard C. Tallman, Chair, Advisory Comm. on Criminal Rules 7–10 (Mar. 18, 2011), [hereinafter Breuer Letter], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Criminal/CR2011-04.pdf> (setting forth DOJ's objections to the most recent discussion draft).

141. See ADVISORY COMM. ON CRIMINAL RULES, REPORT TO STANDING COMM. ON RULES OF PRACTICE AND PROCEDURE 10–12 (May 12, 2011) [hereinafter ADVISORY COMM. MAY 2011 REPORT], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CR05-2011.pdf> (explaining the reasoning behind the decision, which included seeking to avoid conflict with the Jencks Act). Prior to reaching this decision, the Advisory Committee, among other things, commissioned the largest survey ever conducted by the Federal Judicial Center, which examined disclosure practices around the country and surveyed judges', prosecutors', and defense attorneys' attitudes on disclosure and the need to amend (or not) Rule 16, see LAURAL HOOPER ET AL., FED. JUDICIAL CTR., A SUMMARY OF RESPONSES TO A NATIONAL SURVEY OF RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND DISCLOSURE PRACTICES IN CRIMINAL CASES: FINAL REPORT TO THE ADVISORY COMMITTEE ON CRIMINAL RULES (2011), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publications/Rule16Rep.pdf>, and convened a special mini-conference in Houston, Texas, to discuss the survey results with defense counsel, prosecutors, judges, academics, agency counsel, and crime victims' representatives. ADVISORY COMM. MAY 2011 REPORT, *supra*, at 10. Rather than revising Rule 16, the Advisory Committee has recommended that the Federal Judicial Center create a Best Practices Guide for Criminal Discovery, include a discovery checklist in the *District Judges Benchbook*, and implement more educational programs for district judges on overseeing pretrial criminal discovery. See *id.* at 12.

142. See Advisory Comm. on Criminal Rules, Meeting Minutes 8–9 (Oct. 31, 2011), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CR10-2011-min.pdf> (noting that all subcommittees other than Rule 12, 11, and 6(e) Subcommittees have completed their work and ordering them dissolved).

143. See ADVISORY COMM. MAY 2011 REPORT, *supra* note 141, at 11 (noting the Judicial Conference's policy of avoiding rule changes that would conflict with existing law); Tallman Memo, *supra* note 134, at 4 (explaining the reasoning behind provisions in the draft proposal as avoiding conflict with the Jencks Act); see also Advisory Comm. on Criminal Rules, Meeting Minutes 14 (Apr. 11–12, 2011), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Criminal/CR2011-10.pdf> (summarizing comment by Judge Tallman, the immediate past chair of the Advisory Committee, that “the Jencks Act is almost an insurmountable obstacle” to requiring early disclosure of impeachment information,

for any amendment going forward,¹⁴⁴ it seems highly unlikely that there will be any imminent changes to Rule 16 that would impose disclosure obligations on prosecutors that conflict with the Jencks Act.

In sum, proponents of broader and earlier disclosure have been unable to secure an amendment to Rule 16 that would guarantee full pretrial disclosure of all exculpatory and impeachment information regardless of its source (i.e., regardless of whether it may be contained in a Jencks Act witness statement, as is often the case), and are unlikely to reach this outcome in the foreseeable future.

Undoubtedly, the defense bar is not and will not be satisfied with what comes out of the Rule 16 process. The Rule 16 debate initiated by the ACTL proposal has, however, resulted in significant changes within DOJ. The disclosure obligations in the USAM, which go above and beyond what is otherwise constitutionally and legally required, were added to the USAM in 2006¹⁴⁵ and were a direct result of the ongoing discussions around amending Rule 16.¹⁴⁶

More recently, DOJ has issued additional guidance¹⁴⁷ and implemented a series of initiatives designed to improve disclosure policies and the practices of federal prosecutors.¹⁴⁸ Among other

even if prosecutors were permitted to provide summaries of witness statements rather than the statements themselves); Advisory Comm. Sept. 2010 Minutes, *supra* note 130, at 9 (documenting the Committee's hesitation about overruling Jencks through the supersession clause by amending Rule 16 and noting that resort to the supersession clause is a last resort and that it is Judicial Conference policy that such conflicts should be avoided if at all possible).

144. See Advisory Comm. Sept. 2010 Minutes, *supra* note 130, at 9 (noting Judge Tallman's belief that DOJ's support could help prevent Congress from interfering with the Committee's rulemaking); *id.* at 8 (observing that DOJ's "continued opposition to changing Rule 16 is problematic for the future success of any proposed amendment").

145. DOJ's new Policy Regarding Disclosure of Exculpatory and Impeachment Information, U.S. ATTORNEYS' MANUAL, *supra* note 25, § 9-5.001, took effect on October 19, 2006. McNulty Letter, *supra* note 75, at 3.

146. See McNulty Letter, *supra* note 75, at 2 (contending that the provision was the result of "unprecedented effort" by DOJ to collaborate with Rule 16 subcommittee members while preserving the balanced discovery system Congress envisioned); *id.* at 2 n.1 (noting that during the drafting process, DOJ obtained the approval of Committee members with respect to the USAM's coverage of exculpatory information).

147. Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010) [hereinafter Guidance Memo], available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.pdf.

148. See Breuer Letter, *supra* note 140, at 2-4 (summarizing the various programs DOJ has implemented in order to better train and educate prosecutors on discovery obligations and characterizing these efforts as having changed the culture at DOJ); see also Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from Their Lawyers' Mistakes?*, 31 CARDOZO L. REV. 2161, 2163 & n.8 (2010) (outlining the recent efforts by DOJ to better educate prosecutors

things, DOJ has directed each U.S. Attorney's Office to designate a discovery coordinator, appointed a new national coordinator for criminal discovery initiatives, and instituted new training requirements and programs for federal prosecutors regarding their discovery obligations.¹⁴⁹

Critics of federal prosecutors' disclosure practices are not, however, satisfied with DOJ's reforms.¹⁵⁰ Neither the new provisions of the USAM, nor the recent DOJ guidance document on discovery, create judicially enforceable remedies for defendants.¹⁵¹ Furthermore, DOJ policy has not abandoned the materiality standard as a guiding principle,¹⁵² nor does it guarantee pretrial disclosure, particularly of impeachment information.¹⁵³ Finally, at least one prominent commentator has questioned DOJ's recent emphasis on training, suggesting that policy and culture are the problems, not a lack of education.¹⁵⁴

D. Efforts to Amend Rule 3.8

Beginning in 1997, the ABA undertook "a much anticipated overhaul of its entire body of ethics rules."¹⁵⁵ This initiative was

about their disclosure obligations).

149. See Breuer Letter, *supra* note 140, at 3–4 (detailing new training initiatives that include improving existing instruction and providing courses designed for newly hired prosecutors); Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group (Jan. 4, 2010), *available at* <http://www.justice.gov/dag/dag-memo.html> (indicating that each U.S. Attorney's Office has now named a discovery coordinator); Press Release, U.S. Dep't of Justice, Andrew Goldsmith Appointed as National Coordinator of Criminal Discovery Initiatives (Jan. 15, 2010), *available at* <http://www.justice.gov/opa/pr/2010/January/10-dag-043.html> (announcing appointment of a national coordinator for criminal discovery initiatives).

150. See, e.g., Green, *supra* note 148, at 2162, 2167–69 (describing these changes as merely a response to a series of federal criminal cases—including the Senator Ted Stevens fiasco—where DOJ was embarrassed by discovery failures, and arguing that DOJ's guidance fails to establish new disclosure obligations and errs in leaving disclosure to the discretion of prosecutors).

151. See U.S. ATTORNEYS' MANUAL, *supra* note 25, § 9-5.001(F) (clarifying that the new policy neither creates a "general right of discovery" nor "provide[s] defendants with any additional rights or remedies"); Guidance Memo, *supra* note 147, at 1 (same); see also *supra* note 75 and accompanying text.

152. U.S. ATTORNEYS' MANUAL, *supra* note 25, § 9-5.001(B)(1).

153. *Id.* §9-5.001(D); Guidance Memo, *supra* note 147, at 6.

154. See Green, *supra* note 148, at 2172–73 (suggesting that prosecutors view their goal as obtaining convictions, and discovery obligations are not fundamental to that mission).

155. Kuckes, *supra*, note 79, at 429; see also Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 441 (2002).

popularly known as “Ethics 2000.”¹⁵⁶ Although the ABA adopted numerous changes to the Model Rules as a result of Ethics 2000,¹⁵⁷ it made no substantive changes to the text of Rule 3.8,¹⁵⁸ much less to Rule 3.8(d)’s disclosure provisions. Notably, the ABA expressly “decided against attempting to explicate the relationship between paragraph (d) . . . and the prosecutor’s constitutional obligations under *Brady* and its progeny.”¹⁵⁹ Instead, the ABA reissued Rule 3.8 with no substantive revisions, having made only one change to the accompanying commentary that “arguably watered down its effect.”¹⁶⁰

The ABA’s “failure” to amend Rule 3.8 has subsequently been widely lamented by commentators who contend that the current version is inadequate.¹⁶¹ But at the time, however, while the Ethics 2000 Commission received many submissions from lawyers and representative organizations proposing amendments to various model rules, few pertained to Rule 3.8.¹⁶² Bruce Green, a law professor at Fordham University and past chair of the ABA Criminal Justice Section, was one of the few who did raise concerns about Rule 3.8 during the Ethics 2000 process;¹⁶³ notably, he was also, in his former capacity as a member of the ABA Ethics Committee, one of

156. Kuckes, *supra*, note 79, at 429. The Ethics 2000 Commission was formally known as the American Bar Association Commission on Evaluation of the Model Rules of Professional Conduct, and the amendments decided upon by the Commission were actually adopted by the ABA in February 2002. Love, *supra* note 155, at 441, 44.

157. See Love, *supra* note 155, at 443 (noting that during the course of its work, the Ethics 2000 Commission determined that “almost every rule required some improvement, if not a complete overhaul”). See generally *id.* at 444–74 (summarizing significant revisions to the Model Rules that resulted from the Ethics 2000 process).

158. *Id.* at 469.

159. *Id.*

160. Kuckes, *supra* note 79, at 430. The deleted commentary reference pertained to whether a prosecutor has a duty to disclose exculpatory information to the *grand jury*, a controversy beyond the scope of this Article. Specifically, Model Rule 3.3(d) requires lawyers in *ex parte* proceedings to disclose adverse facts to the tribunal. MODEL RULES OF PROF’L CONDUCT R. 3.3(d) (2009). A comment to Rule 3.8 previously stated that this obligation applied to grand jury proceedings, and it was this comment that was deleted by the Ethics 2000 Commission. Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1581; Love, *supra* note 155, at 449.

161. See, e.g., Kuckes, *supra* note 79, at 429–31 & n.9 (describing how Rule 3.8 fails to adequately address major ethical challenges facing prosecutors, characterizing the Rule as “incomplete and vague,” and summarizing other criticisms of failure to amend the rule).

162. Green, *supra* note 160, at 1581; see also *id.* at 1583 (“No ABA entity or major organization representing prosecutors or criminal defense lawyers sought changes to Rule 3.8.”).

163. See *id.* at 1583 (Green identifying himself as one of the handful of private attorneys who raised concerns about the rule).

the authors of Formal Opinion 09-454.¹⁶⁴

How can the curious lack of interest in strengthening the rule regarding prosecutors' disclosure obligations be explained, particularly now that the McDade Amendment had made state ethics rules, which take their cue from the Model Rules, clearly and unambiguously applicable to federal prosecutors? One possible explanation is that proponents of more expansive disclosure did not feel that the relatively open, transparent, and public revision process of Ethics 2000¹⁶⁵ was likely to achieve the desired result.¹⁶⁶ For whatever reason,¹⁶⁷ proponents of more disclosure chose to sit out the last major overhaul of the model ethics rules themselves, and Rule 3.8(d) remained unchanged.¹⁶⁸

164. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454, at 8 (2009) (identifying signatories, including Bruce A. Green).

165. Compare Love, *supra* note 155, at 443 (describing Ethics 2000 as involving nearly a five year process, during which time the Commission was in regular communication with its advisory council, reaching out to special interest groups, posting its discussion drafts and meeting minutes on the Internet, and receiving hundreds of comments, which would require fifty-one full day meetings that were open to the public, as well as more than a dozen public hearings to sort out), *with infra* Part III (delineating a widely held perception that in the normal course, ethics rulemaking and rule-interpreting bodies, including the ABA, are dominated by one side of the debate—the defense side—and lack the transparency and public participation of Ethics 2000).

166. See Green, *supra* note 160, at 1586 (suggesting that “political” reasons explain the Commission’s failure to amend Rule 3.8(d), and citing as an example a consultant’s recommendation to the Commission that “to best ensure acceptance [of amendments] among prosecutors, defense counsel and the courts, Rule 3.8 should be reviewed comprehensively over a period of time with participation from the ground up from all of the groups involved” (internal quotation marks omitted)).

167. See Kuckes, *supra* note 79, at 437 (highlighting the lack of legislative history or explanation for the Commission’s decision not to recommend changes to Rule 3.8 or address prosecutorial ethics at all).

168. A new commission, the ABA Commission on Ethics 20/20, is currently working on revisions to the Model Rules to address “advances in technology and global legal practice developments.” *About Us—ABA Board of Governors/Commission on Ethics 20/20*, AM. BAR ASS’N, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/about_us.html (last visited Aug. 13, 2012). It does not appear that this Commission is considering changes to Rule 3.8. See generally *Summary of Ethics 20/20 Commission Actions—Items Released for Comment by Ethics 20/20 Commission*, AM. BAR ASS’N, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/work_product.html (last visited Aug. 16, 2012) (identifying topics the Commission has been working on as Inbound Foreign Lawyers, Technology, Outsourcing, Uniformity/Choice of Law, Alternative Law Practice Structures, and Alternative Litigation Financing). Separately, a different section of the ABA, the Criminal Justice Section, is working on revisions to the ABA Criminal Standards for Prosecution and Defense Functions (a guidance document that is separate from the Model Rules, non-binding, and not intended to serve as the basis for professional discipline). Rory K. Little, *The ABA’s Project To Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111, 1113–17 (2011). The proposed draft provides that prosecutors should disclose all favorable information (regardless of materiality) to the defense prior to trial; it does not, however, include the “as soon as reasonably practical” language found in Formal Opinion 09-454. *Id.*

In sum, none of the efforts at reforming a prosecutor's disclosure obligations had proven fully successful, and this history provides the context in which Formal Opinion 09-454 was promulgated. As of 2009, efforts to expand the *Brady* line of cases and to curtail the protections of the Jencks Act had long failed; the Ethics 2000 changes to the Model Rules went into effect in 2002 with no change to Rule 3.8(d); proposed amendments to Rule 16 had been tabled in 2007 and interest in reviving the discussions had just barely gotten underway; and the USAM had been amended in 2006, but the changes were largely unsatisfactory to critics of DOJ's disclosure practices. The ABA Ethics Committee could not have been unaware of all of this when it issued its decision in Formal Opinion 09-454.

III. THE ROLE OF ETHICS OPINIONS

A. *The ABA Formal Ethics Opinion Process and Formal Opinion 09-454*

Rulemaking bodies that promulgate ethics rules generally also issue opinions that interpret those rules.¹⁶⁹ For the ABA, that function is carried out by its Standing Committee on Ethics and Professional Responsibility (which has been referred to in this Article as the ABA Ethics Committee).¹⁷⁰ The ABA Ethics Committee periodically issues interpretations of provisions of the Model Rules and its predecessors,¹⁷¹ which are published as "formal opinions."¹⁷² ABA ethics opinions do not have the force of law and are not binding upon the states in interpreting their own ethics rules.¹⁷³ Nevertheless, they are generally regarded as being highly influential; they are frequently cited by courts and relied upon by state ethics authorities in construing their own versions of the rules.¹⁷⁴

app. at 1147 (proposed draft of Standard 3-5.5(a) & (c)).

169. Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 *FORDHAM L. REV.* 247, 254 (1996) ("Both the ABA and most state bar associations have established committees to render advisory opinions on the meaning of code sections and the proscription of certain proposed actions.").

170. For a brief history of the ABA Ethics Committee, see *id.* at 255 n.29.

171. See *supra* note 81 and accompanying text.

172. AM. BAR ASS'N, CONSTITUTION AND BYLAWS: RULES OF PROCEDURE HOUSE OF DELEGATES § 31.7 (2011) [hereinafter ABA CONSTITUTION], available at http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/aba_constitution_and_bylaws.authcheckdam.pdf; Lawrence K. Hellman, *When "Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions*, 10 *GEO. J. LEGAL ETHICS* 317, 324 n.22 (1997) (noting that the ABA Ethics Committee may also provide "informal opinions" in response to ethics inquiries from attorneys, but in practice no longer does so).

173. Hellman, *supra* note 172, at 326–29.

174. See *id.* at 328 (explaining that formal opinions are very influential and frequently cited by a host of authorities, including state ethics authorities, which frequently rely on the Committee's construction of the rules because most states'

The ABA Ethics Committee operates with little openness or transparency.¹⁷⁵ There is no publicly available “legislative history” of its opinions; the Committee does not publish its meeting minutes, nor are there transcripts of its deliberations.¹⁷⁶ The ABA Ethics Committee may consider a particular issue and write an opinion upon request from an individual lawyer or a state or local bar association, or “on its own initiative.”¹⁷⁷ The opinions themselves do not specify the origin of the issue.¹⁷⁸ In the case of Formal Opinion

ethics rules are derived from ABA documents and, even where there are material variations, the reasoning of an ABA opinion can be substantially persuasive and command attention); *see also* Jorge L. Carro, *The Ethics Opinions of the Bar: A Valuable Contribution or an Exercise in Futility?*, 26 IND. L. REV. 1, 17–20, 23, 35 (1992) (concluding, after empirical study of both state bar association and ABA ethics opinions, that “[i]n spite of their nonbinding character, the bar’s ethics opinions are frequently referred to by the courts” and that “[t]he courts treat these opinions with great deference and, in fact, attribute to them a degree of attention similar to that usually found in the treatment of judicial opinions”); Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67, 82–83 (1981) (describing the influence of ABA ethics opinions); Susan P. Koniak, *Principled Opinions: A Response to Brickman*, 65 FORDHAM L. REV. 337, 348 (1996) (“[T]here are numerous court opinions that adopt the reasoning of ABA ethics opinions as official law.”); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 501 n.146 (1990) (stating that ABA ethics opinions are by far “the most important” advisory opinions). *But see* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 67 (1986) (“Bar ethics opinions have not played a large role in the discipline of lawyers or in judicial rulings on such matters as the disqualification of a lawyer for a conflict of interest. . . . Courts obviously do not feel bound to follow advice issued by ethics committees, whose members are largely if not exclusively practicing lawyers.”); Bruce A. Green, *Bar Association Ethics Committees: Are They Broken?*, 30 HOFSTRA L. REV. 731, 731–32, 742 (2002) (summarizing the literature criticizing bar ethics opinions on the ground that they are largely ignored).

175. *See generally* MODEL RULES OF PROF’L CONDUCT app. C, Rules of Procedure 5–6 (2009) (outlining procedures for the Committee’s deliberative process).

176. E-mail from Eileen B. Libby, Assoc. Ethics Counsel, Am. Bar Ass’n, to Barbara Swatt Engstrom, Reference Librarian & Adjunct Professor, Seattle Univ. Sch. of Law (June 22, 2011, 2:09 PST) [hereinafter Libby E-mail] (on file with Law Review). This stands in contrast to the relatively open deliberations of the Ethics 2000 Commission, constituted to consider and recommend changes to the Model Rules, *see supra* notes 155–60 and accompanying text, which conducted public meetings and published its meeting minutes and comments received from the public. Libby E-mail, *supra* (“Special groups that are constituted for a particular purpose, such as the Ethics 20/20 Commission or the Ethics 2000 Commission, publish minutes and transcripts on the Center for [P]rofessional Responsibility’s website.”). The various Judicial Conference Committees that considered amending Rule 16 likewise publish their meeting minutes and reports online. *See sources cited supra* notes 122–144 (providing examples of publicly available meeting minutes and committee reports).

177. ABA CONSTITUTION, *supra* note 172, § 31.7.

178. *See* MODEL RULES OF PROF’L CONDUCT app. C, Rules of Procedure 4 (2009) (establishing that when a request is made, the Committee’s policy is that its published opinions will not identify the requestor or the conduct that is the subject of the opinion); *see also* MODEL RULES OF PROF’L CONDUCT app. C, Rules of Procedure 15 (establishing that the ABA will not voluntarily disclose information contained in Committee files relating to requests for opinions that would disclose the identity of the inquirer or the person whose conduct is the subject of the opinion without consent). There have been occasions, however, when the Committee has publicly

09-454, however, the ABA has confirmed that the Committee undertook the matter at the suggestion of one of the Committee members.¹⁷⁹

In the Opinion, the ABA Ethics Committee set out to address what was, in its view, a widely-held misperception that a prosecutor's disclosure obligations under Rule 3.8(d) were coextensive with her obligations under the *Brady* line of cases.¹⁸⁰ Thus, the Committee decided to do what the Ethics 2000 Committee explicitly did not: to explicate the relationship between Rule 3.8(d) and a prosecutor's constitutional obligations under *Brady* and its progeny.¹⁸¹ In so doing, the Committee adopted several of the pro-defense viewpoints that had been rejected both by the courts as well as during the various reform processes outlined above.

The Committee first concluded that, unlike the constitutional standard, Rule 3.8(d) contains no materiality limitation—that is, a prosecutor must inform the accused of all known information favorable to the defendant, even if the prosecutor does not believe that the information would affect the outcome of the case at trial.¹⁸² The Committee further interpreted the rule to require that a prosecutor consider not just defenses that the defendant intends to raise, but also any other legally cognizable defenses that may exist when determining whether evidence or information may be favorable to the defendant.¹⁸³ Finally, the Committee concluded that the rule contains no de minimis threshold, meaning that a prosecutor must disclose information even if “the prosecutor believes that the information has only a minimal tendency to negate the defendant's guilt, or that the favorable evidence is highly unreliable.”¹⁸⁴

disclosed the identity of at least an institutional requestor. See Brickman, *supra* note 169, at 264 (discussing the news release accompanying Formal Opinion 94-389, in which the Committee attributed the request for ethical guidance to the Manhattan Institute).

179. See E-mail from Kathryn A. Thompson, ETHICSearch Counsel, Am. Bar Ass'n, to Barbara Swatt Engstrom, Reference Librarian & Adjunct Professor, Seattle Univ. Sch. of Law (Sept. 8, 2011 11:54 PST) (on file with Law Review).

180. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454, at 3 (2009).

181. See *supra* note 159 and accompanying text; see also Peter A. Joy & Kevin McMunigal, *ABA Explains Prosecutor's Ethical Disclosure Duty*, CRIM. JUST., Winter 2010, at 41, 41 (noting that in interpreting Rule 3.8(d) in Formal Opinion 09-454, the ABA Ethics Committee “addressed an issue that the Ethics 2000 Commission sidestepped”).

182. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454, at 4–5.

183. *Id.* at 5.

184. *Id.*

Although the Committee's interpretation of the scope of disclosure under Rule 3.8(d) will no doubt provoke debate,¹⁸⁵ more significant for purposes of this Article is its interpretation of the timing requirement. The Committee began with the general premise that for the disclosure of information to be "timely" as required by Rule 3.8(d), it must be made early enough that the information can be used effectively by the defense.¹⁸⁶ This is all the prevailing case law requires.¹⁸⁷ The Committee then went a step further and reasoned that "[b]ecause the defense can use favorable evidence and information most fully and effectively the sooner it is received, such evidence or information, once known to the prosecutor, must be disclosed under Rule 3.8(d) as soon as reasonably practical."¹⁸⁸ The Committee did not further define what "as soon as reasonably practical" means from the perspective of the prosecutor, and instead focused on when favorable evidence would be useful to the defense.¹⁸⁹ The Committee thus concluded that the obligation of timely disclosure requires that prosecutors disclose useful information before the defense undertakes investigations, makes decisions about affirmative defenses, or "determine[s] defense strategy in general."¹⁹⁰ In so doing, the ABA Ethics Committee interpreted Rule 3.8(d) as conflicting with the Jencks Act, rather than avoiding the conflict in the way that the Rule 16 committees sought to do.¹⁹¹

In sum, Formal Opinion 09-454 eliminates the materiality requirement (a requirement defense advocates have opposed in court ever since *Brady*, and which they unsuccessfully tried to persuade the Rule 16 committees to eliminate); pushes up the timeline for disclosure in general (which defense advocates had also

185. See *infra* Part II.C, (suggesting that from the discussion surrounding possible amendments to Rule 16, DOJ continues to believe that materiality should be the touchstone of any disclosure requirement); see also, e.g., Breuer Letter, *supra* note 140, at 5–6, (setting forth DOJ's argument in favor of retaining Rule 16's materiality requirement); McNulty Letter, *supra* note 75, at 16 (same).

186. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454, at 6.

187. See *supra* Part I.A.

188. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454, at 6.

189. Joy & McMunigal, *supra* note 181, at 42.

190. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454, at 6. The one concrete example provided by the Committee is that a prosecutor must disclose evidence and information covered by Rule 3.8(d) "prior to a guilty plea proceeding, which may occur concurrently with the defendant's arraignment." *Id.* This example is another way in which the Committee's interpretation of Rule 3.8(d) departs from what is required as a matter of due process. See *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (holding that the Constitution does not require the government to disclose impeachment information prior to a defendant pleading guilty).

191. See *supra* Part II.C.

recently tried and failed to do with Rule 16); and adds, specifically, a non-waivable requirement that all favorable information be disclosed prior to a guilty plea (which the Supreme Court had rejected just seven years prior).¹⁹²

B. Criticism of Bar Association Ethics Opinions

The literature on bar association ethics opinions, including those of the ABA, is largely critical.¹⁹³ According to critics, ethics opinions are, among other things, tainted by the actuality, or at least the perception, of self-interest;¹⁹⁴ they are of generally poor quality substantively and are sources of confusion and inconsistency;¹⁹⁵ they

192. Having done so, the ABA is now explicitly attempting to leverage the Opinion to drive changes to the substantive law. The ABA House of Delegates in August 2011 adopted a Resolution urging all federal, state, territorial, and tribal governments to, in essence, codify Formal Opinion 09-454. See AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 105D, at 1 (2011), available at http://www.abanow.org/wordpress/wpcontent/files_flutter/13105754842011_hod_annual_meeting_summary_of_resolutions.authcheckdam.pdf. The Resolution calls on all governments to adopt disclosure rules, by statute or judicial rulemaking, requiring the prosecution to disclose all favorable information, without regard to materiality, prior to trial or a guilty plea. *Id.* at 1, 2, 14–15. The Report accompanying the Resolution argues that prosecutors are already ethically bound to do so—citing Formal Opinion 09-454 as support for its broad interpretation of the ethical rule—so, therefore, “there is no rational reason that prosecutors should not be *legally* bound as well.” *Id.* at 10, 13.

193. See, e.g., Lawrence K. Hellman, *A Better Way to Make State Legal Ethics Opinions*, 22 OKLA. CITY U. L. REV. 973, 985–86, 1004–05 (1997) (questioning the utility of state regimes that produce non-authoritative ethics opinions, and advocating adoption of systems where the process is controlled by state supreme courts and resulting opinions are binding, at least for disciplinary purposes); Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, 349–62 (2002) (summarizing critiques of ABA ethics opinions, which include contentions that they are of poor quality with little reasoning or analysis, often delayed, and lacking a review process). For a defense of the activities of the ABA and other bar association ethics committees, see generally Green, *supra* note 174, arguing that bar committee ethics opinions are undervalued and not inherently flawed; Koniak, *supra* note 174, at 348, pointing out that courts often adopt the reasoning of ABA ethics opinions as law, which indicates that such opinions are persuasive; and Richard H. Underwood, *Confessions of an Ethics Chairman*, 16 J. LEGAL PROF. 125 (1991), summarizing critiques of ethics opinions and arguing that they are based on misunderstanding and exaggeration.

194. See, e.g., Brickman, *supra* note 169, at 250 (critiquing the Committee's process for being self-regulating and blatantly self-serving of lawyers' interests); Joy, *supra* note 193, at 354–58 (summarizing anecdotal evidence supporting self-interest critique, and noting the lack of procedural safeguards against self-interest affecting the ethics opinion process); Trager, *supra* note 18, at 1130–31 (concluding based on experiences with state bar ethics committees that in too many instances, the interpretation of ethics rules is guided by professional interests and not the public interest).

195. See generally Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67 (1981) (summarizing an examination of ABA ethics opinions, and noting pervasive, serious flaws in reasoning); Hellman, *supra* note 172 (explaining how the applicability of ABA

issue from bodies that serve a dual legislative and interpretive function, which invites role confusion;¹⁹⁶ and they, like the rules they interpret, are subject to tactical use (or misuse) by opponents in litigation.¹⁹⁷ Several of these criticisms seem particularly apt as applied to Formal Opinion 09-454, which underscores the problem with effecting this sort of policy change via an ethics opinion, especially when proponents of the change have previously tried and failed through more conventional and appropriate means to accomplish their goal.

1. *Self-Interest*

Bar association ethics opinions have been criticized on the ground that they are influenced by the association's members' self-interest. As Professor Lester Brickman has noted, professional organizations exist to advance the interests of their members; this is especially true of organizations, such as the ABA, which seek to maintain self-regulatory status.¹⁹⁸ And because the ethics committees that issue opinions are integral parts of the associations themselves, the implication is that the committees are likewise working to advance, or cannot help but be influenced by, the interests of the associations' members.¹⁹⁹ Some commentators have focused on the composition of the ethics committees themselves—specifically, the predominance of civil practitioners, criminal defense lawyers, and “elite” lawyers—as a source of actual or perceived bias.²⁰⁰

The result is that, as Professor Bruce Green observed, “[b]ar

opinions is often questionable and frequently creates uncertainty among lawyers).

196. See, e.g., Finman & Schneyer, *supra* note 195, at 145 (arguing that combining legislative and interpretive functions in the Committee blurs the distinction between the separate responsibilities); Hellman, *supra* note 172, at 362–63 (positing that strained opinions arise out of the Committee impatiently intervening in issues that should have been handled legislatively by the House of Delegates).

197. See, e.g., Trager, *supra* note 18, at 1161 (describing how the defense bar made tactical use of the “no contact” rule as an example of one side’s strategic use of an ethics rule—and ethics committees’ interpretations of that rule—in litigation).

198. Brickman, *supra* note 169, at 250.

199. See *id.* at 255–56 (noting that the Ethics Committee has previously “been responsive to the financial interests of lawyers when those interests were threatened by ethical concerns”); see also Joy, *supra* note 193, at 355–56 (explaining ways in which membership interests could influence or be perceived to influence ethics opinions).

200. See, e.g., Finman & Schneyer, *supra* note 195, at 150–55 (considering the ABA Ethics Committee’s composition, consisting exclusively of lawyers, and nearly all of whom are from the “most prestigious level of the profession,” as potentially problematic, but concluding that it is unclear whether mandating changes in composition would be likely to improve quality of opinions); Trager, *supra* note 18, at 1159 (noting that most bar association ethics committees are heavily weighted with civil practitioners and have far more representation from the defense side in criminal practice).

association rules are perceived to privilege the interests of lawyers over non-lawyers, of private lawyers and their clients over the government, and of corporate law firms and their clients over small firms, solo practitioners, and individual clients.”²⁰¹ Although Professor Green was writing specifically of bar association ethics rules as opposed to the *opinions* interpreting those rules, the same observations should apply with equal force to the latter, given that the ethics committees writing the opinions are part of the larger organizations, and particularly given that, as discussed below, those same committees are often responsible for drafting and suggesting changes to the rules themselves.²⁰²

As Professor Peter Joy has noted, the self-interest critique of bar association ethics opinions relies largely on anecdotal evidence and has not been proven empirically.²⁰³ Nevertheless, just the perception that ethics opinions may be influenced by, or slanted more heavily in favor of, the interests of certain segments of the bar is deeply problematic for the perceived legitimacy of ethics opinions.²⁰⁴ Certainly, there is a perception among prosecutors, and various other observers, that the bar associations are dominated by criminal defense lawyers, and that the resulting ethics rules and interpretations are shaped by that influence.²⁰⁵

201. Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 518–19 (1996) (footnotes omitted).

202. See *infra* Part III.B.3; see also Finman & Schneyer, *supra* note 195, at 145 (“In addition to its interpretive duties, [the Committee] also recommends ‘appropriate amendments to or clarifications of the Code’ to the ABA House of Delegates.” (footnote omitted)).

203. Joy, *supra* note 193, at 356.

204. See Green, *supra* note 201, at 518 (asserting that when ethics rules appear to be fairer, they command more respect from the lawyers to whom they apply).

205. See, e.g., Bowman, *supra* note 15, at 770 (arguing that the structure of the ABA and the process by which the organization adopts rules of professional conduct “makes a mockery of any claim that these rules represent a consensus among the regulated population,” and that the Model Rules related specifically to criminal practice are a clear instance in which one side, the defense, has dominated the rule-making process); Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Code To Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. LAW REV. 923, 966 (1996) (noting that “[t]he prevailing prosecutorial perspective is that the ABA often adopts rules that create ‘a litigation advantage’”); Trager, *supra* note 18, at 1159–60 (noting that most bar association ethics committees are heavily weighted with civil practitioners who “at best, may have little knowledge of the concerns and needs of law enforcement,” and have far more representation from the defense side in criminal practice, whose members “may take a less than disinterested stance” on ethical rules related to criminal practice); Zacharias, *supra* note 15, at 451 (“The ABA traditionally has emphasized the importance of safeguarding the relationship between criminal defendants and counsel, for both systemic reasons and to protect the financial interests of the bar.”); *id.* at 457–58 (“Inevitably, the DOJ (the prosecution’s regulatory representative) and the ABA (the defense bar’s regulatory representative) will emphasize personal concerns of its constituents, to the detriment

The reaction to Formal Opinion 09-454 will no doubt be clouded by that perception. While the ABA's first stated goal is to "Serve Our Members," by "[p]rovid[ing] benefits, programs and services which promote members' professional growth and quality of life,"²⁰⁶ the vast majority of its members are not prosecutors; rather, they are predominantly civil practitioners and criminal defense lawyers.²⁰⁷ The ABA Ethics Committee is drawn from this membership.²⁰⁸ Committee members are appointed by the president of the ABA for three-year terms and may be reappointed for successive terms.²⁰⁹ Thus, the Committee members are accountable only to the ABA president who, in turn, is accountable only to the ABA membership.²¹⁰

of other regulatory functions."); *id.* at 459 (describing two instances in which DOJ objected to ethics rules adopted by the ABA, but was "outnumbered by the defense bar," and "[i]n essence . . . had no way of influencing the outcome"); Note, *supra* note 16, at 2089 n.76 ("A . . . fundamental question is whether the state bar associations that adopt ethics rules ever seriously consider prosecutors' interests. As prosecutors have noted, at the level of the rulemaking committees . . . there is no one who is representing the prosecutorial point of view." (internal quotation marks omitted)). Again, while several of these commentators were speaking of the rule adoption process rather than the rule interpretation process, the rule interpretation process cannot help but be painted with the same brush when the committees issuing ethics opinions are situated within the larger organizations and when, as with the ABA, the same committees are responsible for both recommending changes to the rules and interpreting the rules. See *infra* Part III.B.3.

206. ABA *Mission and Goals*, AM. BAR ASS'N, http://www.americanbar.org/utility/about_the_aba/aba-mission-goals.html (last visited July 15, 2012) (Goal I). Its other stated goals are to improve the profession (Goal II), to eliminate bias and enhance diversity (Goal III), and to advance the rule of law (Goal IV). *Id.*

207. See Ryan E. Mick, Note, *The Federal Prosecutors Ethics Act: Solution or Revolution?*, 86 IOWA L. REV. 1251, 1285 n.197 (2001) (calculating that less than one percent of the ABA's members are prosecutors). The ABA does not itself release statistical data on its membership. See E-mail from Annette Cade, Reference Librarian, Am. Bar Ass'n, to author (July 31, 2012, 7:54 PST) (on file with Law Review) (confirming ABA policy of non-disclosure of membership statistical data, and declining request for current membership statistics by practice area on that basis).

Anecdotally, federal prosecutors as a group do seem to be less involved in bar associations than many other groups of lawyers. This phenomenon may stem partly from the fact that federal prosecutors need only be an active member of one state's bar, and it need not be the state in which they perform their work on behalf of the federal government, leaving many with little connection with their licensing bar beyond paying their yearly dues. It may also be that with good job security and no need to attract clients, they see less need to engage in the "networking" opportunity that being active in a bar association provides. Finally, unlike many attorneys in private practice who have their bar association dues reimbursed by their employer, government attorneys must pay their own professional association dues. But it is a fair question why, if they feel underrepresented in the ABA and state bar associations, they do not get more involved.

208. ABA CONSTITUTION, *supra* note 172, § 31.3 (establishing that membership of Standing Committees is comprised of members of the Association).

209. *Id.* § 31.3.

210. See Finman & Schneyer, *supra* note 195, at 148 (explaining how Committee members are accountable to no one other than the ABA president); see also ABA CONSTITUTION, *supra* note 172, § 8.2(a) (providing details on the president's election

Although the Committee that authored Formal Opinion 09-454 included a former federal prosecutor,²¹¹ it is hard to escape the appearance that the Opinion serves the interests of those that are more heavily represented within the ABA. The Opinion is substantively pro-defense, broadening the scope of the current law and, in terms of the timing requirement, it clearly benefits not just criminal defendants, but also criminal defense lawyers themselves. As a general matter, earlier disclosure benefits criminal defendants for the reasons identified by the Committee in its Opinion,²¹² although the extent to which they are benefitted will vary widely depending on the circumstances. Still, it cannot be doubted that earlier disclosure is more convenient for defense attorneys in terms of managing their work and trial preparation schedules. It is difficult to know whether the views of individual Committee members were affected by their own experiences or internal pressure from ABA members, and it certainly is not the intent of this Article to question the integrity of any of the individuals who give their time to serve in this capacity. But regardless, there is an issue of the perceived legitimacy of ABA ethics opinions to the extent that such influences appear to be operating.

2. *Quality and uncertainty*

Another major criticism of bar association ethics opinions is that they are of poor quality substantively, meaning that they often reach an “incorrect” conclusion or are poorly reasoned,²¹³ and that while their purpose is to lend clarity, they frequently become sources of confusion and inconsistency.²¹⁴ The pioneering critics of the quality

by the ABA House of Delegates).

211. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454, at 8 (2009) (identifying signatories, including Bruce A. Green). Professor Bruce Green was an Assistant United States Attorney in the Southern District of New York in the mid-1980s. See Faculty Profile for Bruce Green, FORDHAM UNIV. SCH. OF LAW, <http://law.fordham.edu/faculty/1100.htm> (last visited July 15, 2012). Professor Green is also, however, a frequent critic of prosecutorial ethics, and one of the few who called for Rule 3.8 to be amended during Ethics 2000. See, e.g., Green, *supra* note 149; Green *supra* note 160.

212. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454, at 6 (positing that information disclosed early by prosecutors may assist defense counsel in conducting defense investigations, evaluating defense strategies, and determining applicable affirmative defenses and pleas).

213. See, e.g., Finman & Schneyer, *supra* note 195, at 104 (finding only twenty-one out of forty-eight Ethics Committee holdings to be “correct,” and of these, only seven to be “influential” (meaning likely to affect the behavior of the lawyers and code enforcers who consult them)); Hellman, *supra* note 172, at 334–35 (describing how the ABA Ethics Committee interprets the rules according to what they believe the rules should mean or were intended to mean as opposed to employing any accepted method of statutory construction).

214. See Hellman, *supra* note 172, at 317, 332 (noting the uncertain effect of subsequent ABA ethics opinions on state law adoptions of ABA guidelines).

of ABA ethics opinions are Professors Ted Finman and Theodore Schneyer, who undertook a comprehensive review of a decade's worth of ABA formal opinions in 1981.²¹⁵ The professors concluded that as a body of work, the opinions are "seriously flawed, so much so that their overall influence may well be unfortunate."²¹⁶

More recently, Professor Lawrence Hellman evaluated several formal opinions and concluded that the ABA Ethics Committee continues to issue "strained" opinions that "flout the language of the rules they purport to interpret."²¹⁷ Specifically, "rather than engaging in a straightforward exercise of interpretation according to accepted canons of statutory construction," some opinions "set forth the Committee's view of what the rules *should* say or were *meant* to say."²¹⁸ Professor Hellman notes that ABA opinions have the potential to be sources of uncertainty and inconsistency because first, while most states' ethics rules are based on the ABA's Model Rules or Model Code, the versions adopted by the states may differ either slightly or materially, and second, because the states may or may not adopt the ABA's interpretation even of rules that they adopted verbatim from the ABA models.²¹⁹ Thus, every issuance of a new ABA formal opinion leaves lawyers with the unavoidable question of whether or not to follow the opinion, due to uncertainty as to whether it will be followed in their particular jurisdiction.²²⁰ Professor Hellman concludes that by continuing to issue strained interpretations of the rules, the ABA Ethics Committee will, over time, undercut the legitimacy of the ethics rules as binding constraints on the practice of law.²²¹

A full critique of the quality and "correctness" of Formal Opinion 09-454 is beyond the scope of this Article. What does bear examining, however, is the potential applicability of Professor Hellman's argument that the Committee writes opinions about what

215. Finman & Schneyer, *supra* note 195. Specifically, Professors Finman and Schneyer evaluated twenty-one formal opinions based upon their holdings (judged by both the correctness or incorrectness of the holdings and their likely influence) and their reasoning (judged by identification of a tenable rationale, identification of relevant authority, identification of problems of interpretive choice, careful analysis of problems of choice, and clarity). *Id.* at 92–144.

216. *Id.* at 72.

217. Hellman, *supra* note 172, at 317.

218. *Id.* at 334.

219. *Id.* at 326–29.

220. *Id.* at 332.

221. *Id.* at 317; *see also id.* at 335 (fearing that lawyers will begin to view the rules of legal ethics as malleable tools for adversarial argumentation rather than as standards of good faith compliance due to uncertainty over the proper interpretation).

the rules should say or were meant to say.²²² As previously discussed, during the Ethics 2000 process, the full ABA explicitly did *not* amend Rule 3.8(d) in a manner that would explicate the relationship between the ethics rule and the *Brady* doctrine.²²³ Yet that is what the ABA Ethics Committee explicitly set out to do when, on its own initiative, it authored the Opinion.²²⁴ More specifically, the ABA could have amended the language of Rule 3.8(d) to say what the Committee now says it means: that a prosecutor must disclose any information favorable to the defense, whether exculpatory or impeachment, and regardless of whether it is contained in a witness statement, as soon as reasonably practical upon learning of the information. Instead, the ABA chose to have the Rule continue to require nothing more than “timely” disclosure.²²⁵

Neither the text of the Rule nor the Comment to the Rule explains what is meant by “timely.” A fair reading of Rule 3.8(d) might interpret “timely” consistent with the standard used in the relevant, well-established legal precedent, the *Brady* line of cases, i.e., disclosure at a time sufficient to allow the defense to use the information effectively at trial. On the other hand, the Committee’s contention that “timely” as used in the Rule means “as soon as reasonably practical” (which seems to suggest doing something as soon as it can be accomplished),²²⁶ is contrary to the common understanding of the word “timely,” and is also at odds with the distinction made throughout the Model Rules themselves between actions that are required to be accomplished “timely” and those that are required to be accomplished “promptly.”²²⁷

222. *Id.* at 334.

223. *See supra* note 159 and accompanying text.

224. *See supra* notes 179–81 and accompanying text.

225. *See supra* notes 157–160 and accompanying text (noting that during the Ethics 2000 overhaul of the ABA Model Rules, no substantive changes were made to Rule 3.8(d)).

226. Admittedly, beyond reference to the specific scenarios cited in Formal Opinion 09-454 (all of which are framed from the defense perspective), *see supra* notes 189–190 and accompanying text, it is unclear exactly what the Committee means by “as soon as reasonably practical.” Part of the difficulty is that none of the standard dictionary definitions of “practical” seems particularly apt. Indeed, “practicable,” which the explanatory note preceding the Opinion for some reason uses (whereas the body of the Opinion itself uses “practical”), *compare* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 09-454, at 1 (2009), *with id.* at 6, may have been the word the Committee was actually searching for. “Practicable” means “capable of being done, effected, or put into practice; feasible.” AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1377 (3th ed. 2000). Presumably, therefore, what the Committee intends is that disclosure must be made right away, or as soon as the logistics or practicalities of gathering, copying, and sending or making the evidence available for inspection can be accomplished.

227. DOJ successfully advanced this argument in resisting the application of Formal Opinion 09-454 to a discovery dispute in *United States v. Colacurcio*. *See infra*

A standard dictionary definition of “timely” is “[o]ccurring at a suitable or opportune time; well-timed.”²²⁸ This definition necessarily implies that the determination of whether a disclosure is “timely” must be made by reference to criteria outside of the Rule itself (such as, for example, other laws or rules governing prosecutors’ disclosure obligations).²²⁹ On the other hand, “promptly,” which is used elsewhere in the Model Rules, including in other subsections of Rule 3.8 itself,²³⁰ is defined as “[c]arried out or performed without delay.”²³¹ Had the drafters of Rule 3.8(d) intended to require disclosure of favorable information as soon as reasonably practical once the information is known, it seems reasonable that they would have used the more apt “promptly.”²³²

notes 251–259 and accompanying text; *see also In re Auerhahn*, MBD No. 09-10206-RWZ-WGY-GAO, 2011 WL 4352350, at *14–15 (D. Mass. Sept. 15, 2011) (per curiam) (drawing a distinction between “timely” disclosure as used in disciplinary rule and “disclosure at the earliest feasible opportunity” as used in precatory prosecution function standard, and declining to discipline a federal prosecutor who made a “timely” disclosure as judged by prevailing legal standards although he clearly could have disclosed earlier and thus failed to disclose at the earliest feasible opportunity).

228. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 226, at 1810; *see also* 18 OXFORD ENGLISH DICTIONARY 111 (2d ed. 1989) (defining “timely” as “at the right or a fortunate time”).

229. *See, e.g., Auerhahn*, 2011 WL 4352350, at *15 (referring to Jencks Act and First Circuit law on disclosure of exculpatory evidence to determine timeliness of disclosure under predecessor to Rule 3.8(d)); *United States v. Colacurcio*, No. CR09-209RAJ, slip op. at 7 (W.D. Wash. Apr. 9, 2010) ECF No. 222 (order denying motion to compel production of favorable information) (referring to Jencks Act to determine timeliness of disclosure under Rule 3.8(d)).

230. *See* MODEL RULES OF PROF’L CONDUCT R. 3.8(g) (2009) (requiring prompt disclosure to the court and the defendant of new, credible, and material evidence that demonstrates a reasonable likelihood that a convicted defendant did not commit the charged offense).

231. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 226, at 1403; *see also* OXFORD ENGLISH DICTIONARY, *supra* note 228, at 620 (defining “promptly” as “quickly” and “without a moment’s delay”).

232. Given the many instances in which the Model Rules contain the word “promptly,” it stands to reason that when the term “timely” occurs in a Model Rule, it is intended to convey a different meaning. Indeed, the terms appear to be used in the Model Rules in a manner consistent with their dictionary definitions.

For example, “timely” is used in Model Rules 1.0(k), 1.10(a)(2)(i), 1.11(b)(1), 1.12(c)(1), and 1.18(d)(2)(i), all in provisions relating to the screening of disqualified lawyers, indicating that screening must be initiated at the appropriate or suitable time in order to be effective. Model Rule 1.13(c)(1) permits a lawyer to reveal confidential information relating to the representation of an organization in certain circumstances where the highest authority of the organization has failed to address the matter of concern “in a timely and appropriate manner.” In each of these provisions, the use of the term “timely” conveys that the action in question should occur at the appropriate time or after the appropriate interval, with appropriateness determined, at least in part, by fact-driven considerations external to the Rule.

On the other hand, for example, Model Rule 1.4(a)(1) (“Communication”) requires a lawyer to “promptly inform the client of any decision or circumstance with respect to which the client’s informed consent” is required, and Model Rule 1.4(a)(4) requires a lawyer to “promptly comply with reasonable requests for

3. *Dual functions of ABA Ethics Committee*

The ABA Ethics Committee has dual authority both to render opinions interpreting the existing rules and to propose “amendments to, or clarifications of” those rules.²³³ Professors Finman and Schneyer first postulated the potential for role confusion inherent in this combination of responsibilities as a possible explanation for the poor quality of the Committee’s formal opinions.²³⁴ Specifically, Finman and Schneyer hypothesized that one entity controlling both legislative and interpretative functions could cause that entity to use its opinions as a vehicle for changing the rules.²³⁵ Moreover, because “the amendment process is more cumbersome and has less predictable results than writing an opinion, the Committee has some incentive to exceed the proper limits of interpretation in its opinions.”²³⁶ Ultimately, Finman and Schneyer found insufficient evidence to support their hypothesis that role confusion was a contributing factor to the poor substantive reasoning of ABA ethics opinions, and thus concluded that the Committee’s dual authority likely was not the predominant cause of the perceived deficiencies in its interpretive opinions.²³⁷

Professor Hellman revisited the question fifteen years later, however, and reached the opposite conclusion. In Professor Hellman’s view, Professors Finman and Schneyer’s hypothesis could explain the strained results reached by the ABA Ethics Committee in each of the opinions he examined.²³⁸ Hellman found that in each instance where the Committee was struggling with an issue that was naturally suited for a legislative solution through the ABA House of

information.” Model Rule 4.4(b) (“Respect for Rights of Third Persons”) requires a lawyer who has received a document inadvertently sent to promptly notify the sender. In each of these Rules, the use of “promptly” seems clearly intended to require the action at issue to be accomplished without delay.

Some Rules, including Rule 3.8, *see supra* note 230, use both “timely” and “promptly.” For example, both terms occur in Model Rules 1.10, 1.11 and 1.12, regarding the disqualification of lawyers. These provisions require that the disqualified lawyer be “timely” screened from participation in a prohibited matter, suggesting that the screening must be done at a time when it will be effective, but that written notice of the lawyer’s disqualification be made “promptly,” conveying that notice should be given without delay.

233. ABA CONSTITUTION, *supra* note 172, § 31.7.

234. Finman & Schneyer, *supra* note 195, at 145.

235. *Id.*

236. *Id.*

237. *See id.* at 146 (noting that they could find “no firm evidence that role confusion had anything to do with [the Committee’s] lawlessness,” and thus concluding that the dangers associated with the combination of legislative and interpretive functions were “too insubstantial to explain much of the inadequacy” in the opinions they examined).

238. Hellman, *supra* note 172, at 363.

Delegates, rather than lobbying for a legislative solution, the Committee plunged ahead and sought to implement its desired change by writing an ethics opinion.²³⁹

The historical context, along with the Committee's strained interpretation of "timely," lends credence to Professors Finman and Schneyer's original hypothesis as an explanation for Formal Opinion 09-454. Even more telling is that, unlike the situations observed by Professor Hellman, in which "House of Delegates action was either forthcoming or easily obtainable,"²⁴⁰ no such possibility existed here. A requirement that prosecutors make earlier disclosures of more information was neither forthcoming nor easily obtainable—through the ABA House of Delegates or other venues—as demonstrated by the history of failed attempts to achieve earlier and broader disclosure obligations described in Part II. Not only did the ABA House of Delegates fail to amend Rule 3.8(d) during Ethics 2000,²⁴¹ but the Rule 16 amendment process had also stalled at the time the opinion was issued.²⁴² All of this explains why the ABA Ethics Committee, when it decided on its own initiative to issue a formal opinion interpreting Rule 3.8(d), may be viewed as improperly using the opinion process as an expedient vehicle for changing a rule (and, through application, a related body of law) that could not otherwise be changed.

4. *Use as a tactical weapon*

The ABA has asserted that its ethics rules are not to be used as tactical weapons in litigation.²⁴³ Nevertheless, the Model Rules, and the ethics opinions interpreting those rules, are sometimes used in this manner. The potential for abuse in the courtroom renders the opinion-writing process not merely an academic exercise, but rather a vehicle for implementing otherwise controversial policy changes that can have real-world consequences.

Indeed, this tactical deployment is already beginning to occur in the wake of Formal Opinion 09-454. Irwin Schwartz, a Seattle criminal defense attorney and past president of NACDL, published

239. *Id.*

240. *Id.*

241. *See supra* notes 155–161 and accompanying text.

242. *See supra* Part II.C.

243. *See* MODEL RULES OF PROF'L CONDUCT scope (2009) ("[T]he purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.").

an article urging defense lawyers to use Rule 3.8(d) as a “tool” to “secure discovery of exculpatory and mitigating information.”²⁴⁴ The Opinion, which Schwartz calls a “powerful means to assure fairness in criminal proceedings,”²⁴⁵ features prominently in his proposed three-part strategy. First, Schwartz recommends that defense attorneys argue that the ethics rule is broader than the *Brady* doctrine and requires an earlier and broader disclosure of information to the defense.²⁴⁶ Second, defense attorneys should argue that the courts have a statutory and ethical obligation to require prosecutors to comply with Rule 3.8(d).²⁴⁷ Third, the argument goes, the Jencks Act no longer permits the government to delay production of *Brady* material within witness statements until disclosure is due under the Act and Rule 26.2—i.e., after direct examination of the witness.²⁴⁸ According to Schwartz, now that Formal Opinion 09-454 has declared that disclosure must be made “as soon as reasonably practical,”²⁴⁹ Rule 3.8(d) requires a result different from what is currently the accepted law in those jurisdictions where the Jencks Act trumps *Brady* in terms of the timing of disclosure.²⁵⁰

Around the time the article was published, Schwartz was putting his theory into practice as counsel for strip-club magnate and reputed organized crime figure Frank Colacurcio, Sr. The late Colacurcio Sr. was being prosecuted, along with his son and several associates, for conspiracy under the Racketeer Influenced and Corrupt Organizations Act²⁵¹ (RICO) by allegedly encouraging or permitting prostitution at their clubs.²⁵² The prosecution agreed to produce

244. Irwin H. Schwartz, *Beyond Brady: Using Model Rule 3.8(d) in Federal Court for Discovery of Exculpatory Information*, CHAMPION, Mar. 2010, at 35, 35; see also Norman L. Reimer, *Federal Discovery Reform: DOJ's Baby Steps Are Inadequate*, CHAMPION, Mar. 2010, at 7, 7 (arguing that DOJ's new policy pronouncements are unlikely to produce tangible change, and that “the defense bar should look beyond the narrow contours of *Brady* and pursue the ethics route to obtain discovery”).

245. Schwartz, *supra* note 244, at 35.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* at 36. The Schwartz article actually uses the word “practicable,” but the confusion is understandable. See *supra* note 226 (discussing the ABA Ethics Committee's use of both “practical” and “practicable” in Formal Opinion 09-454).

250. See Schwartz, *supra* note 244, at 34–35 (arguing that if a jurisdiction has codified Rule 3.8(d) then that should allow disclosure of information even if the Jencks Act trumps *Brady* in that jurisdiction); see also *supra* notes 47–50 and accompanying text (discussing various jurisdictions' decisions on whether the Jencks Act trumps *Brady*).

251. Pub. L. No. 91-452, § 901(a), 84 Stat. 922, 941 (1970) (codified as amended at 18 U.S.C. §§ 1961–1968 (2006)).

252. United States v. Colacurcio, No. CR09-209RAJ, slip op. at 1 (W.D. Wash. Apr. 9, 2010) ECF No. 222 (order denying motion to compel production of favorable information); see Ian Ith & Lewis Kamb, *Strip-Club Magnate Indicted*, SEATTLE TIMES,

Jencks Act witness statements eight weeks prior to trial,²⁵³ but declined the defendants' request to turn over the statements—or the “favorable information” some of them contained—any sooner, citing the potential for witness tampering or intimidation where many of its witnesses were dancers employed at the defendants' clubs.²⁵⁴ The defendants moved to compel earlier disclosure, essentially making the same arguments outlined in the Schwartz article.²⁵⁵ The court rejected the defendants' arguments and declined to order earlier production of the witness statements or any favorable information contained therein.²⁵⁶ The court held that the Citizens Protection Act and Rule 3.8(d) did not impliedly repeal the Jencks Act and that, in any event, there was no conflict between the two because the Jencks Act's requirement that witness statements be disclosed after direct examination satisfied Rule 3.8(d)'s requirement of “timely” disclosure.²⁵⁷ Thus, the court expressly declined to rely on Formal Opinion 09-454.²⁵⁸ The court recognized that “[w]here binding authority is silent as to a particular ethics issue, courts can consider ABA [ethics] opinions as persuasive authority,” but noted that within the Ninth Circuit, the Jencks Act overrides *Brady* and, thus, binding Ninth Circuit authority strongly suggests that the Jencks Act determines the timeliness of disclosing witness statements.²⁵⁹ Defendants in other cases have similarly tried to use the as a procedural weapon to compel earlier disclosure,²⁶⁰ seemingly with little success thus far.²⁶¹

July 1, 2009, at A1 (listing the charges against Colacurcio Sr.).

253. *Colacurcio*, No. CR09-209RAJ, slip op. at 3.

254. Government's Response to Defendants' Motion to Compel Production of Favorable Information, *supra* note 89, at 6–7.

255. Defendants' Motion to Compel Production of Favorable Information at 5–11, *United States v. Colacurcio*, No. CR09-209RAJ (W.D. Wash. Jan. 28, 2010), ECF No. 157.

256. *Colacurcio*, No. CR09-209RAJ, slip op. at 11.

257. *Id.* at 6–7.

258. *Id.* at 7 (holding that “the ABA Opinion's interpretation of ‘timely’ in Model Rule 3.8(d) does not govern the interpretation” of Washington state's version of the Rule).

259. *Id.* at 8.

260. *See, e.g.*, Defendant Stephanie Prickett's Motion to Compel at 3, 8, *United States v. Prickett*, No. 1:10-CR-211-RJJ (W.D. Mich. Dec. 10, 2010), ECF No. 60 (arguing for production of *Brady*, *Giglio*, and Jencks Act material based on Formal Opinion 09-454 immediately rather than “at the time of trial”); Reply to United States' Response to Defendants' Joint Motion to Compel Discovery, Identify Witnesses and Memorandum in Support at 2–3, *United States v. Padilla*, No. 1:09-CR-3598-JB (D.N.M. July 26, 2010), ECF No. 54 (using Model Rule 3.8(d) and Formal Opinion 09-454 in support of motion to compel earlier disclosure of material the prosecution contends is subject to the Jencks Act timetable); Memorandum of Law in Support of Defendant Eldridge's Non-Dispositive Motions at 19, 28–30, *United States v. Eldridge*, No. 1:09-CR-329-RJA-HBS (W.D.N.Y. May 24, 2010), ECF No. 44

IV. RESOLVING THE CONFLICT

It remains to be seen how broadly Formal Opinion 09-454's interpretation of Rule 3.8(d) will be adopted by state disciplinary authorities, or how successful criminal defense attorneys will be in implementing their new "beyond *Brady*" strategy using the Opinion as part of their tactical arsenal, but the situation as it stands now is untenable. Prosecutors face uncertainty as to how to proceed in the face of the conflict between the Jencks Act and the Opinion's interpretation of the timing requirement embodied in their ethical obligation, with at least the threat of disciplinary sanctions.

(advocating for, among other things, "early disclosure of Jencks Act material" in a motion supported by Model Rule 3.8(d) and Formal Opinion 09-454); *cf.* Brief in Support of the Motion to Compel Discovery Pursuant to *Brady v. Maryland* by Defendants Nagle and Fink at 11, *United States v. Nagle*, No. 1:09-CR-384-SHR (M.D. Pa. Apr. 4, 2010), ECF No. 44 (relying in part on Pennsylvania Rule of Professional Conduct 3.8(d) in seeking to compel immediate disclosure of information the prosecution did not intend to disclose until date in court's scheduling order for disclosure of *Giglio* material).

Some defendants have even cited the Schwartz article directly. *See, e.g.*, Motion for Discovery with Accompanying Citation of Authority at 3 n.1, 10–11 *United States v. Piper*, No. 1:09-CR-218-JHS (M.D. Pa. May 3, 2010), ECF No. 37 (citing the Schwartz article when asserting that neither the Jencks Act nor Rule 26.2 of the Federal Rules of Criminal Procedure, which otherwise allows for the late disclosure of information, trump the ethical obligations of the prosecutor under Rule 3.8(d)). Others have used the phrase "beyond *Brady*," an apparent reference to the title of the Schwartz article. *See, e.g.*, Motion for Discovery at 10, *United States v. Korbe*, No. 2:09-CR-5-TFM (W.D. Pa. Feb. 10, 2010), ECF No. 94 (referencing the "new" Model Rule 3.8(d) as another justification for "the [defendant's] 'beyond *Brady*' discovery request," and asserting that, in light of Formal Opinion 09-454, Rule 3.8(d) "now requires" prosecutors to inform defendants of all known information favorable to the accused "as soon as reasonably practicable").

261. In *Nagle*, it appears that the court granted the defendant's motion, at least in part, but it is unclear from the court's order, which refers to specific pages and paragraphs of documents filed under seal, *see United States v. Nagle*, No. 09-CR-384-SHR, slip op. at 2–3 (M.D. Pa. June 9, 2010), ECF No. 65, exactly what the government was required to produce. In the other cases mentioned above, it appears that the courts either denied or did not rule specifically on the defense motions. In *Korbe*, the court specifically denied the defendant's request for a "beyond-*Brady*" discovery order, *United States v. Korbe*, No. 09-CR-5-TFM, slip op. at 15 (W.D. Pa. June 10, 2010), ECF No. 205, or for disclosure that goes beyond what is required under *Brady/Giglio*, the Federal Rules of Criminal Procedure, and the Jencks Act, *id.* at 11. The court also acknowledged that it could not compel the government to produce Jencks Act material prior to trial, although the government agreed in that case to produce such material seven days prior to trial. *See id.* at 8–9. The court appears, however, to have ordered the government to produce any "*Brady* impeachment-type material" in its witness files fourteen days, rather than seven days, prior to trial. *See id.* at 5–6. Although the defendants may have succeeded in part in getting earlier discovery in these two cases, both *Nagle* and *Korbe* were decided by district courts within the Third Circuit, in which the Court of Appeals has determined that *Brady* must take precedence over the Jencks Act on the question of timing. *See supra* note 50. Research has not identified any court order in a Jencks-trumps-*Brady* jurisdiction in which a court has ordered early disclosure of Jencks Act statements or favorable information contained therein in reliance on either Rule 3.8(d) or Formal Opinion 09-454.

Meanwhile, the “appearance problem” created by the Opinion’s incorporation of a defense-side wish list of changes to the law that had been repeatedly pressed, unsuccessfully, in other fora, threatens to undermine respect for the ethics rules and the ABA Ethics Committee’s interpretation of those rules.

This Article does not purport to have a complete answer to the many difficult questions raised by the events outlined herein and the situation as it now stands. It does, however, hope to advance the conversation about them by offering the following observations and suggestions for moving beyond the current impasse.

First, nowhere in the Opinion does the ABA Ethics Committee acknowledge the conflict it creates with the Jencks Act, nor does it mention the Jencks Act at all.²⁶² If the ABA Ethics Committee did not mean for its interpretation of Rule 3.8(d) to apply to federal prosecutors, which seems unlikely, or if it meant for Rule 3.8(d) to be read consistently with the Jencks Act in federal jurisdictions where the Jencks Act trumps the *Brady* doctrine on the question of timing, then it should clarify its Opinion.²⁶³

Second, assuming the ABA Ethics Committee did intend for its Opinion to fully cover situations arising in federal prosecutions in which *Brady* information is contained within witness statements, the Opinion should be rejected by courts and state ethics bodies because it is in direct conflict with binding federal law—i.e., the Jencks Act.²⁶⁴

262. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 09-454 (2009) (omitting any mentioning of the Jencks Act in the body of the Opinion).

263. The Opinion does contain the following boilerplate disclaimer: “This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2009. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.” *Id.* at 1 n.1. It is doubtful the Committee meant by this generic disclaimer, which appears on all of its opinions, that the Jencks Act takes precedence over its interpretation of a prosecutor’s ethical obligation with respect to the timing of disclosure. And, clearly, this perfunctory language has not discouraged defense attorneys from reading the Opinion as contradicting the Jencks Act. See *supra* note 261 and accompanying text.

264. Two states already have declined to follow the Opinion in other respects. Specifically, the Ohio Supreme Court held that Ohio’s analogue to Rule 3.8(d), DR 7-103, is not broader than prosecutors’ legal obligations and does not require disclosure of impeachment information prior to a guilty plea (contrary to the conclusions contained in the Opinion. *Disciplinary Counsel v. Kellogg-Martin*, 923 N.E.2d 125, 130 (Ohio 2010) (per curiam). *Kellogg-Martin* was decided after Formal Opinion 09-454 was issued, but the court made no mention of the Opinion. Furthermore, when the California Bar Board of Governors proposed updates to its professional conduct rules, it decided against including the language of Model Rule 3.8(d), opting instead to make prosecutors’ obligations co-extensive with “all constitutional obligations, as interpreted by relevant case law.” Joan C. Rogers, *In Its Final Look at Full Set of Updates, California Bar Endorses Last Seven Rules*, 26 LAW. MANUAL PROF. CONDUCT 619, 620–21 (2010). Compare COMM’N FOR THE REVISION OF THE RULES OF PROF’L CONDUCT, STATE BAR OF CAL., DISCUSSION DRAFT: PROPOSED

These two solutions would be the most readily attainable fixes. The first would quickly and clearly solve the problem, but it seems unlikely that the ABA Ethics Committee will undertake to revise its Opinion. The second solution is more likely, but is unsatisfactory on several levels, especially because relying on state ethics bodies one-by-one to reject extensions of their state's version of Rule 3.8(d) to situations in which federal prosecutors acted in accordance with the Jencks Act would leave prosecutors in a state of uncertainty in the meantime.²⁶⁵ Moreover, it remains to be seen how willing the states will be to discipline federal prosecutors who have complied with the constitutional (i.e., *Brady* and its progeny), statutory (i.e., the Jencks Act), and rule-based (i.e., Rules 16 and 26.2 of the Federal Rules of Criminal Procedure) requirements governing their conduct. To the extent that states choose to confront the issue directly, Opinion may, ironically, have the effect opposite that which its drafters intended. More states may begin to explicitly align their ethics rules with the standards dictated by constitutional doctrine, which Ohio and California have already done in the aftermath of the Opinion,²⁶⁶ and thus close off any possible expansion of a prosecutor's disclosure obligations, in direct contrast to the intent of the Opinion.

More likely though, state ethics bodies will avoid this problem altogether by declining to pursue cases involving disclosure issues and federal prosecutors, a practice that some believe is already too

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA 78–79, 92 (2010), *available at* <http://calbar.ca.gov/LinkClick.aspx?fileticket=WBiabhKgb9s%3d&tabid=2653> (version circulated for public comment), *with* Bd. of GOVERNORS, STATE BAR OF CAL., PROPOSED RULES OF PROFESSIONAL CONDUCT 72 (2010), *available at* <http://ethics.calbar.ca.gov/Portals/9/documents/CRRPC/Proposed%20Rules%20of%20Professional%20Conduct.pdf> (version adopted by the Board of Governors on July 24, 2010). The decision was reportedly motivated by California prosecutors' concerns about the language and reasoning of the Opinion. *See* Rogers, *supra*, at 620–21.

265. *See* Hellman, *supra* note 172, at 332 (“[G]iven that the states are free to depart from ABA interpretations, and frequently do so, the publication of each new ABA opinion presents lawyers everywhere with an unavoidable question: Will this opinion be followed by enforcement authorities in my jurisdiction?”). This is one of the primary criticisms of the ethics opinion process in the first place. *See supra* notes 219–221 and accompanying text.

266. *See supra* note 264 (citing Ohio and California as two states that have decided to align their state codified analogue of Rule 3.8(d) with constitutional standards in the wake of Formal Opinion 09-454). Prior to the Opinion, a couple of other jurisdictions had already explicitly aligned their ethics rules on prosecutorial disclosure with federal constitutional standards. *See* D.C. RULES PROF'L CONDUCT R. 3.8 cmt. 1 (2012) (clarifying that the rule “is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure”); N.C. RULES PROF'L CONDUCT 3.8(d) (2012) (requiring timely disclosure of “all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions”).

prevalent.²⁶⁷ While this may be the “right” outcome substantively in that it is the functional equivalent of a declaration that a prosecutor will not be disciplined for conforming her behavior to the federal law in her jurisdiction, it undermines the legitimacy and fairness of the ethics rules. Ultimately, the vacuum left by the uncertainty and likely inaction by the state bar authorities just invites the sort of tactical gamesmanship in litigation outlined in Part III.C(4) above.²⁶⁸

This leads to the larger, longer-term question of how to harmonize the disparate disclosure rules governing federal prosecutors on the question of timing. If proponents of earlier disclosure are serious about policy change, the way forward runs through at least one, or some combination of, the three institutions legitimately capable of resolving the conflict posed by the juxtaposition of the *Brady* doctrine and the Jencks Act: the Judicial Conference of the United States, the Congress, and the Supreme Court. The picture that emerges from the events described in this Article—which suggests that proponents of a certain viewpoint tried to work within these channels, were unsuccessful, and then essentially attempted to bypass them—should be troubling in any scenario. But because of the confluence of factors at play here—a federal statute in tension with a constitutional doctrine and, on top of that, a circuit split—the Opinion is not an acceptable or adequate solution.

The institution best suited to deal with this issue is the Judicial Conference, through its Advisory Committee on Criminal Rules and Standing Committee on Rules of Practice and Procedure.²⁶⁹ The Judicial Conference is, after all, responsible for promulgating federal

267. See, e.g., Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 722–23 (2006) (pointing out the significant absence of discipline on prosecutors who suppressed evidence favorable to defendants); Green, *supra* note 149, at 2180 (noting that “state disciplinary authorities rarely sanction prosecutors publicly for wrongdoing in general or for wrongdoing in connection with their disclosure obligations in particular”); Kevin C. McMunigal, *The (Lack of) Enforcement of Prosecutor Disclosure Rules*, 38 HOFSTRA L. REV. 847, 848–50 (2010) (summarizing criticisms and empirical evidence regarding perceived lack of enforcement of disclosure rules); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987) (surveying the fifty states and the District of Columbia and discovering that disciplinary charges against prosecutors are only infrequently brought and meaningful sanctions rarely ever applied).

268. See *supra* notes 244–261 and accompanying text (discussing cases where defense attorneys used Rule 3.8(d) and Formal Opinion 09-454 as tactical weapons in an attempt to obtain information favorable to the defense earlier than constitutional and statutory standards require).

269. See *supra* Part II.C. See generally Thomas F. Hogan, *The Federal Rules of Practice and Procedure*, U.S. COURTS (Oct. 2011), <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RuleMakingProcess/SummaryBenchBar.aspx> (describing the process for amending rules of practice and procedure through the Judicial Conference).

criminal discovery rules.²⁷⁰ And, while prosecutorial disclosure has a constitutional dimension and has been shoehorned into the ethics rules, the specific question at the heart of this Article—whether favorable information in a witness statement must be turned over to the defense immediately, at some later time but prior to trial, or at trial—seems most genuinely categorized as one of discovery. It is all about who gets to see what and when, what is fair, and what is practical. These are the sort of issues the Advisory Committee grapples with all the time as it considers changes to the criminal discovery rules. Furthermore, the Advisory Committee is compositionally well-suited for this task: its members include federal judges and representatives from both the prosecution (DOJ) and the criminal defense community.²⁷¹

As set forth in Part II.C above, after careful consideration of the issue, the Advisory Committee ultimately was not convinced that there was any pressing need to change Rule 16 to require earlier disclosure, concluding that it would be very difficult to amend the current rule in such a manner without running afoul of the Jencks Act.²⁷² That is not to say, however, that the Judicial Conference *cannot* so amend the rules. Indeed, as the Advisory Committee has repeatedly acknowledged, in connection with past consideration of amendments to Rule 16, the Judicial Conference *can* propose to amend the criminal procedure rules in a way that conflicts with a federal statute.²⁷³ The procedural rule—if approved by the Supreme Court and Congress²⁷⁴—would take precedence over the conflicting

270. See 28 U.S.C. §§ 2071–2077 (2006) (providing authority, as well as rules and procedures, for rulemaking process).

271. See generally *Committee on Rules of Practice and Procedure: Chairs and Reporters*, U.S. COURTS (June 12, 2012), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Members_List_Oct_2011.pdf (providing a list of the Judicial Conference's Standing Committee and Advisory Committee on Criminal Rules' members, which includes both prosecutors and defense attorneys); sources cited *supra* 122–144 (demonstrating the diverse membership of the Judicial Conference through the various reports, letters, memos, and meeting minutes cited).

272. See *supra* notes 122–144 and accompanying text (explaining the Advisory Committee's decision and reasoning not to amend Rule 16 in a way that would conflict with the Jencks Act).

273. See, e.g., ADVISORY COMM. MAY 2011 REPORT, *supra* note 141, at 11–12 (noting conflict between proposed amendment to Rule 16 and the Jencks Act, and explaining the practical and policy reasons for wanting to avoid making rule changes that create conflict with existing law even though within Judicial Conference's authority to do so); Advisory Comm. Sept. 2010 Minutes, *supra* note 130, at 9 (summarizing Judge Tallman's explanation to the Committee that in the event of a conflict between an amended rule and a statute, the supersession clause of the Rules Enabling Act, 28 U.S.C. § 2072, could resolve the conflict in favor of the rule, but noting that resort to the supersession clause should be considered a last resort and that conflicts should be avoided when possible).

274. See 28 U.S.C. § 2074 (providing that the Judicial Conference's amended rules

statute pursuant to the supersession clause of the Rules Enabling Act.²⁷⁵ Thus, proponents of earlier disclosure do have a legitimate, albeit indirect, way around the impediment posed federally by the Jencks Act: they can either work with the Advisory Committee on crafting a proposal that does not directly conflict with the Jencks Act, or they can try to convince the Advisory Committee (and after that, the Standing Committee) that it is worth invoking the supersession clause to resolve the issue.

Alternatively, Congress can amend or repeal the Jencks Act, which would resolve the issue once and for all. While Congress may not be as adept as the Judicial Conference at fine-tuning the rules that govern the day-to-day workings of our federal courts, it undoubtedly has the authority to act in this arena. And institutionally, Congress is capable of balancing the concerns of defendants' rights against witness safety and the integrity of the proceedings, which were the competing factors that motivated the passage of the Jencks Act in the first place. But much has changed in federal criminal practice since the Jencks Act was first passed in 1957 and, given that modern prosecutors generally do provide witness statements to the defense in advance,²⁷⁶ sometimes far in advance, of a witness's testimony, perhaps the Jencks Act has outlived its usefulness. That determination should be made by Congress, however, and not by the ABA Ethics Committee.²⁷⁷

do not have the effect of law unless approved by the Supreme Court and Congress).

275. See *id.* § 2072(b) (providing that when existing laws conflict with new rules of procedure, the laws shall be of "no further force or effect").

276. See Podgor, *supra* note 45, at 655 (reporting on survey results showing prosecutors providing, for the most part, Jencks Act witness statements to the defense in advance of the witness testifying).

277. A discovery reform bill, proposed by NACDL and supported by the ABA, was recently introduced in the Senate by Senator Lisa Murkowski (who, as did the late Senator Ted Stevens, represents Alaska). Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. (2012); see Press Release, Nat'l Ass'n of Criminal Def. Lawyers, NACDL Applauds Sensible, Bipartisan Discovery Reform Legislation Introduced Today in the United States Senate (Mar. 15, 2012), <http://www.nacdl.org/NewsReleases.aspx?id=23792&libID=23761> (announcing introduction of the bill). Although the bill is not specifically aimed primarily at amending or repealing the Jencks Act, it would substantially modify it by requiring early disclosure of all favorable information, "notwithstanding the Jencks Act." S. 2197 § 2. The bill is, on the question of timing, remarkably similar in substance and wording to Formal Opinion 09-454, except that, unlike the Opinion, the bill addresses head on the conflict with the Jencks Act. Compare *id.* (proposing to require the government to disclose favorable information to the defendant in a federal criminal prosecution "without delay after arraignment and before the entry of any guilty plea," or, if the information is discovered later, "as soon as is reasonably practicable upon the existence of the . . . information becoming known . . . [.] notwithstanding [the Jencks Act] or any other provision of law"), with ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454, at 6 (2009) (interpreting Model Rule 3.8(d) to require disclosure of favorable evidence and information "as soon as

Finally, at the heart of this conflict is a circuit split over which takes precedence when it comes to the timing of disclosure of favorable evidence in witness statements: the Jencks Act or *Brady*.²⁷⁸ In those jurisdictions where courts have held that *Brady* controls the timing of disclosure of all favorable evidence, even if contained in a witness statement and notwithstanding the Jencks Act, district courts already *can* order early disclosure of the evidence, and the new interpretation of the ethics rule does not directly conflict with the prevailing law. On the other hand, in jurisdictions where courts have acknowledged the primacy of the Jencks Act, district courts *cannot* order disclosure of evidence any sooner than what the Jencks Act provides;²⁷⁹ The Opinion's interpretation of the ethics rule does directly conflict with the prevailing law in these jurisdictions. Although it is clearly within the province of the Supreme Court to resolve circuit splits, it has never ruled on this question that has divided the courts for decades: whether the Jencks Act or *Brady* takes precedence when the two are in conflict.

Perhaps it is time for the Court to do so. If the Court were to rule that *Brady* takes precedence over the Jencks Act, it would resolve the circuit split and remove the legal impediment to interpreting Rule 3.8(d) in the manner advocated by the Opinion (not to mention making it much easier for defendants to get earlier disclosure in the first place without resorting to the tactical ruse of invoking the ethics rule and this new interpretation of it in litigation). Of course, the Supreme Court could rule the opposite, which would mean that defendants in every jurisdiction would be stuck with a rule allowing prosecutors to decline to disclose favorable information in Jencks Act witness statements until after the witness has testified at trial. That is a risk the proponents of earlier disclosure run, but the fact remains that trying to convince the Supreme Court to grant certiorari in a Jencks/*Brady* conflict case remains a viable and legitimate option for attempting to change the law in their favor.

Many prosecutors will no doubt take issue with the assertion that the Opinion's interpretation of the timing requirement would no longer run counter to the law if the Jencks Act were neutralized by

reasonably practical" "once known to the prosecutor"). The Senate Judiciary Committee held a hearing on the bill on June 6, 2012, see *Ensuring That Federal Prosecutors Meet Discovery Obligations: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2012), but it remains to be seen whether any further action will be taken.

278. See *supra* notes 47–50 and accompanying text (contrasting the Second, Third, and D.C. Circuits' holding that Jencks does not override *Brady* requirements with the Fifth, Sixth, and Ninth Circuits' holding that the Jencks Act trumps *Brady* when the two are in conflict).

279. See *supra* notes 48–49 and accompanying text.

one of the means described above. They may correctly point out that even *Brady* does not require disclosure “as soon as reasonably practical,”²⁸⁰ but instead requires disclosure only in time for the defense to make effective use of the information at trial.²⁸¹ While that may be true, there is a difference between having an ethics rule that goes beyond the minimum required by law, which the Supreme Court has suggested is permissible,²⁸² and having an ethics rule that is in direct conflict with the law.

It is because of this conflict that amending the underlying ethics rule itself is not included as a viable solution, although that would be preferable in some respects to changing the rule indirectly by fiat via an ethics opinion, as the ABA Ethics Committee did in this case.²⁸³ When an ethics rule is basically consistent with what the law requires but holds prosecutors to a higher standard, there is still a question as to whether issues like the details of the timing and scope of prosecutorial disclosure ought to be regulated by the ethics rule at all. The better answer appears to be “no,”²⁸⁴ although there is room for debate. But it seems much clearer that the ethics rules for prosecutors ought not venture into territory where they directly conflict with federal law. Whether such rules are enforceable if they do conflict is a question best left for another day.

Conclusion

The scope and timing of the disclosure of evidence favorable to the defense in federal criminal trials has long been debated. This is due to the tension between the many sources of law that govern the issue: a constitutional doctrine that in its practical application is more backward-looking than forward-looking; a federal statute whose status vis-à-vis the constitutional doctrine has never been definitively explicated; and state ethics rules whose wording and enforcement can vary from jurisdiction to jurisdiction. With the issuance of Formal Opinion 09-454, the ABA Ethics Committee has now made a

280. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454, at 6.

281. See *supra* notes 34–35 and accompanying text.

282. See *Cone v. Bell*, 556 U.S. 449, 479 n.15 (2009) (noting that while *Brady* only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations).

283. See *supra* note 165 and accompanying text (contrasting the relative openness and transparency of major rules revisions to the secretive nature of the ethics opinion process).

284. See, e.g., Cassidy, *supra* note 103, at 1460–65 (making the case that the lack of enforcement of ethics rules coupled with courts' ability to better enforce discovery through the rules of criminal procedure makes Rule 3.8(d) an ineffectual and inappropriate vehicle to establish disclosure timetables).

bad situation worse. By interpreting the model ethics rule so broadly, it has placed the rule in direct conflict with federal law, at least as it is interpreted in many jurisdictions. The time has come to harmonize all of the rules governing disclosure in federal criminal practice, but the solution should lie in confronting the root of the problem, the Jencks/*Brady* conflict, directly.

This Article has outlined at least three ways this can be accomplished: by amending Rule 16 and invoking the supersession clause, by amending or repealing the Jencks Act, or by holding that due process sometimes requires that the Jencks Act not be enforced. Unfortunately for proponents of broader and earlier disclosure, every one of these solutions would require working with institutions—the Judicial Conference committees, Congress, and the Supreme Court—that have not been particularly receptive to their point of view. As a matter of fairness, legitimacy, and enforceability, however, any one of these solutions is preferable to threatening to discipline prosecutors for acting in accordance with the law.