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Prosecutors' Disclosure Obligations in the U.S.

Bruce A. Green
Fordham University School of Law, bgreen@law.fordham.edu

Peter A. Joy
Washington University School of Law, joy@wulaw.wustl.edu

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PROSECUTORS' DISCLOSURE OBLIGATIONS IN THE U.S.*

BRUCE A. GREEN** AND PETER A. JOY***

Introduction

Thank you very much for inviting us to this workshop on "Prosecutorial Ethics." It is an honor to speak with you and a special honor to be the guests of the JFBA at this workshop. Professor Green and I are very grateful to Professor Keiichi Muraoka and Hitotsubashi University School of Law for inviting us to Japan and asking us to participate in his project focusing on prosecutorial ethics, which the Ministry of Education is supporting. We are especially grateful to the JFBA for the opportunity to exchange our views with you. Professor Green and I apologize that we are unable to deliver our talks in Japanese, and we thank our translators for helping us to communicate with you.

Professor Green is a former Assistant U.S. Attorney, where he worked as a prosecutor for four years. Since becoming a law professor, Professor Green regularly provides training to prosecutors on their ethical obligations. Before becoming a law professor, I was lawyer in private practice, and I practiced both civil and criminal law. I often provide training to public defenders and other defense lawyers on their ethical obligations. We will provide you with perspectives of prosecutors and defense lawyers concerning discovery in criminal cases and the ethical obligations of prosecutors.

Our talks will proceed in four parts. In Part I, I will provide an overview of the prosecutor's discovery disclosure obligation in the U.S. In Part II, I will discuss defense attorney efforts to reform prosecutors' disclosure obligations. Professor Green will then discuss disclosure obligations from the prosecutor's point of view in Part III. In Part IV, Professor Green will discuss efforts beyond professional discipline and legal enforcement to advance and support a strong ethical approach to prosecutors' disclosure obligations.

I. *Overview of Disclosure Obligation in the United States*

1. Development of Criminal Discovery in United States

In every country, the preparation for any type of litigation, whether it is civil or criminal litigation, involves the collection and examination of material that may be used as evidence. For

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** Visiting scholar invited by the Hitotsubashi University Legal Ethics Education Project. Louis Stein Professor, Director, Louis Stein Center for Law and Ethics, Fordham University School of Law.

*** Visiting scholar invited by the Hitotsubashi University Legal Ethics Education Project. Henry Hitchcock Professor of Law, Washington University School of Law.

most of its history, there were few mechanisms in the United States to require opposing parties in either civil or criminal cases to provide each other with material that may be evidence or that may lead to admissible evidence before trial. Because of this lack of information about the possible evidence in cases in the 1800s and early 1900s, many lawyers referred to both civil and criminal trials as "sporting contests" in which neither side had a right to require the opposing party to produce potential evidence prior to trial. There was no discovery, and some viewed the trial process as a game full of surprises rather than a truth seeking process.

For civil litigation, this approach to trials changed in 1938 when new Federal Rules of Civil Procedure provided for the right of each party to obtain broad discovery from the opposing party of such matters and materials as the names and addresses of potential witnesses, documents, names of expert witnesses, and tests results the opposing party intended to introduce into evidence. While some states had adopted some discovery procedures before the new Federal Rules of Civil Procedure, it was only after the adoption of broad discovery rules at the federal level that most states adopted similar changes for civil cases.

Many prominent lawyers and judges were critical of the lack of pretrial discovery in criminal cases, especially after the implementation of broad discovery obligations for civil cases at both the federal and state levels in the 1930s and 1940s. They maintained that the accused should have access to much of the evidence in the possession of the prosecutor for the trial process to be fair. Otherwise, criminal trials would continue to be "trials by ambush" where the defendant first learned of the government's evidence at trial.

In a typical criminal prosecution, the prosecutor has access to all of the law enforcement investigation and reports, physical evidence, photographs of the scene of the crime or victim, tests that may have been performed on the physical evidence, and statements of witnesses that the prosecutor intends to call at trial as well as those witnesses the prosecutor may not call because the witnesses are not helpful to the prosecution. If the defendant gave a statement, there will be a copy of the statement if it is in writing or electronically recorded. If the statement was not recorded or written, there will be the police notes of the statement. If there are codefendants, there may also be statements of the codefendants. Without an affirmative discovery disclosure obligation, the prosecutor was not required to turn over or permit the defense to view and copy any of this material or evidence.

The first step toward requiring prosecutors to provide some discovery to defendants at the federal level occurred in 1946 when Rule 16 of the Federal Rules of Criminal Procedure became effective. Rule 16 is the discovery rule and it "allowed the defendant access . . . to documents obtained by the government."[1] The next step toward broader criminal discovery occurred in 1957, when the United States Supreme Court decided *Jencks v. United States*,[2] which held that a federal defendant is entitled to the prior statement of a government witness if the statement is related to the witness' trial testimony so that the defense counsel may be able to use the statement to impeach the witness if the prior statement conflicts with the trial testimony. In reaction to the *Jenks* decision, the U.S. Congress passed the *Jencks Act*,[3] which prohibited the disclosure of witness statements until after the witness testified on direct examination. Thus, the Jenks Act limited the Supreme Court's decision by delaying the defense

[1] FEDERAL RULES OF CRIMINAL PROCEDURE, Rule 16 (1946).
[2] 353 U.S. 657 (1963).
[3] Pub. L. No. 85-269, 71 Stat. 595 (1957) (codified as amended at 18 U.S.C. § 3500 (2006)).

a written summary of any expert testimony the government intends to use at trial.

In 1972, the Supreme Court decided *Giglio v. United States*,[7] in which the Court held that the prosecutor's disclosure duty extends equally to impeachment evidence.[8] Impeachment evidence consists of materials that could impeach a prosecution's witness, for example incentives the witness has received to testify, such as dismissal of criminal charges or a promise of a lenient sentence. Impeachment evidence also includes prior statements a witness has given the police when the statements are different from the witness' trial testimony or are different from each other. When a defense lawyer has impeachment evidence, the defense lawyer is able to suggest reasons why the witness' trial testimony should not be believed.

These Supreme Court cases define the extent of the disclosure the prosecutor must give to protect the due process rights of the defendant – evidence material either to guilt or to punishment and impeachment evidence. The crux of these cases and the due process rights of the accused rely upon prosecutors correctly determining what is evidence favorable to the accused.

In 1990, twenty-six years after his first lecture about discovery, Justice Brennan delivered a second lecture, *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*.[9] In this lecture, Justice Brennan noted progress toward more open criminal discovery but he pointed out two weaknesses of the *Brady v. Maryland* case that commentators often repeat today. First, the prosecutor is only required to disclose material exculpatory evidence and no other evidence and information the prosecution has collected. Second, it is the prosecutor who decides whether the information in his or her hands is exculpatory and must be disclosed.

Justice Brennan argued for "full and free discovery" that the American Bar Association (ABA) Criminal Justice Standards recommend. He characterized this as open disclosure of the prosecutor's file, and would require the disclosure of all of the material and information within the prosecutor's control, including witness lists, statements, grand jury testimony, codefendant statements, criminal records, expert reports, and whether the prosecutor intended to offer other-offense evidence at trial.[10] Justice Brennan stated that a prosecutor could seek a protective order from the judge to prevent disclosure of the identity of secret informer, or material related to national security.

2. Federal and State Criminal Discovery Today

Brady and cases after *Brady* require prosecutors to disclosure some evidence, but there still remains no constitutional right to discovery in criminal cases in the United States. Prosecutors do not need to disclose a list of prosecution witnesses before trial, and they do not have to disclose the results of police investigations. *Brady* does establish that they must disclose material evidence favorable to the defendant, and Rule 16 provides that upon request the prosecutor must disclose some other types of evidence and information discussed previously.

[7] 405 U.S. 150 (1972).

[8] *Id.* at 154–55; *see alsoBagley*, 473 U.S. at 676.

[9] William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U.L.Q. 1 (1990).

[10] *Id.* at 11. A current version of the ABA Criminal Justice Standards on discovery is available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_discovery_blk.html#2.1.

by the prosecutor, the reciprocal discovery obligation on the defense helps to narrow issues for trial, removes the element of trial by surprise, and helps to ensure that the criminal trial process is more a process of search for truth.

Civil discovery in the United States is still more expansive than open-file and reciprocal discovery in criminal cases. For example, only a handful of states permit pretrial discovery depositions of potential witnesses in criminal cases, and every state as well as the federal system permit pretrial discovery depositions in civil cases.

3. Ethical Requirements Versus Constitutional Disclosure Requirements

Ethics rules in nearly every state impose a greater disclosure obligation on the prosecutor than the constitutional due process cases decided by the Supreme Court or the discovery rules adopted at the federal and most state levels. The state ethics rules are based on Rule 3.8(d) of American Bar Association (ABA) Model Rules of Professional Conduct, which 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, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor."[15] The language of Model Rule 3.8(d) does not include a materiality standard, and thus contrasts with a prosecutor's more limited constitutional duty. As a result, the plain language of Model Rule 3.8(d) appears to be in conflict with the legal obligation under *Brady/Giglio* cases.

Because of this conflict, the ABA Standing Committee on Ethics and Professional Responsibility examined the relationship between Model Rule 3.8(d) and the prosecutor's constitutional obligation under the *Brady/Giglio* line of cases and issued Formal Opinion 09-454, an advisory ethics opinion on the subject.[16] The Committee found that the ethical duty of a prosecutor under Model Rule 3.8(d) was separate from and more expansive than the *Brady/Giglio* line of cases.[17]

The opinion further explains that the ethical obligation is more demanding in several ways: (1) There is no materiality standard; (2) A prosecutor must disclose to the accused all known favorable information even if the prosecutor does not believe that the information would affect the outcome of the case at trial; (3) Disclosure must be made early enough so that defense counsel may use the evidence and information effectively, including having it in order to advise a client before entering a guilty plea; and (4) A prosecutor may not seek to use a defendant's waiver of the this ethical obligation to avoid Model Rule 3.8(d).[18]

If the prosecutor seeks to withhold favorable evidence or information for a legitimate purpose, such as to prevent witness tampering, the opinion advises the prosecutor to seek a protective order to limit what must be disclosed, or "seek an agreement from the defense to return[] and maintain the confidentiality of evidence and information it receives."[19]

In 2008, the ABA amended to Model Rule 3.8 to include two new provisions, paragraphs

[15] MODEL RULEA OF PROF'L CONDUCT R. 3.8(d) (1983).

[16] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009), *available at* www.nacdl.org/WorkArea/DownloadAsset.aspx?id=17373.

[17] *Id.* at 1-3.

[18] *Id.* at 4-7.

[19] *Id.* at 7 & n.37.

any guilty plea. In the U.S., approximately 95% of federal defendants plead guilty, so this legislation would have ensured that their guilty pleas would be fully informed pleas. The legislation also gave the trial judge the authority to impose a remedy for violations of the disclosure obligation, which ranged from postponement or adjournment of the proceedings to dismissal with or without prejudice depending on the circumstances of the violation.

The U.S. Department of Justice opposed the legislation, and it never came to a vote in committee. As Professor Green will explain, the Department of Justice argued that it was increasing the training of federal prosecutors and adopting better practices to ensure that federal prosecutors fulfilled their legal disclosure obligations. It is unclear if this federal disclosure legislation will be reintroduced in the future.

Overall, efforts to reform criminal discovery have met with mixed results. At the federal level, there has been no progress in over forty years. In 2003, the American College of Trial Lawyers proposed that Rule 16 be amended to: incorporate the legal ruling in *Brady*; clarify the nature and scope of favorable information; require prosecutors to use due diligence in locating information; and establish deadline by which the prosecutor must disclose favorable information. The Advisory Committee on Criminal Rules studied this request for four years during which time the Department of Justice opposed the amendments. In 2006, the Department of Justice revised the *U.S. Attorneys' Manual* to encourage federal prosecutors to take a broad view about what was exculpatory and impeaching evidence. In 2007, the Advisory Committee rejected the proposed amendments to allow the Department of Justice time to implement the policy change and to study whether there would be more awareness among federal prosecutors concerning their discovery obligations.

Since 2007, there have continued to be a number of cases involving federal prosecutors' failure to comply with their disclosure obligations. In June 2010, the Advisory Committee requested the Federal Judicial Center to conduct a national survey of judges, federal prosecutors, and defense attorneys concerning whether they felt Rule 16 should be amended to remove the materiality standard and to require prosecutors to provide to the defense all information that is either exculpatory or impeaching. Fifty-one percent of the judges favored the proposed amendment, 90% of defense lawyers favored the amendment, and the Department of Justice opposed any type of amendment.[21]

Efforts for a more expanded disclosure obligation have been more successful at the state level, especially after examples of wrongful convictions involving *Brady* disclosure violations. Studies show that *Brady* disclosure violations are the second most frequent cause or contributing cause to wrongful convictions.

In addition to reform efforts at the state level, there are also efforts aimed at bringing change in particular federal courts. For example, some judges interpret *Brady* more broadly and are issuing orders requiring prosecutors to disclosure more information and evidence. These judges are using their supervisory authority to ensure fair trials as the basis for requiring prosecutors to disclose more information and evidence to the defense. Some judges are also using the broader disclosure requirements found in Model Rule 3.8(d), or the state equivalent to

[21] LAURA HOOPER ET AL., 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, FED. JUDICIAL CTR. 11 (Feb. 2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/Rule16Rep.pdf/$file/Rule16Rep.pdf.

III. *U.S. Disclosure Obligations from Prosecutors' Viewpoint*

1. Prosecutors' Public Positions on Disclosure Obligations – Introduction

How do U.S. prosecutors' view their own disclosure obligations? And how do they view the occasional efforts of defense lawyers, judges and legislatures to expand their obligations?

It is not always possible to know exactly what U.S. prosecutors think about their work or even how they do their work. Most of their work takes place inside their offices, hidden from public view. Their visible work in the courtroom takes up only a small part of their time. U.S. prosecutors are very private about some aspects of their work and also about their views. Sometimes, they are afraid that public discussion will compromise their ability to be effective. Sometimes, they simply seek to avoid public scrutiny or criticism. For example, prosecutors make very significant decisions that are entrusted to their discretion. These include decisions about whether to charge a person with a crime, which charges to bring, and the terms and conditions of a plea bargain. Most prosecutors are secretive about how they make these everyday decisions within their offices.

Prosecutors' disclosure obligations are different, however. This is a subject that U.S. prosecutors have discussed frequently in public in recent years. That is because the subject has become very visible and controversial in the past decade.

There have been important cases in which the defendant was convicted, and it was discovered afterward that prosecutors withheld significant information that would have helped establish the defendant's innocence. After the development of DNA testing, hundreds of defendants were exonerated through DNA testing. In many of those cases, it was discovered that the police or prosecutors had exculpatory evidence that they never gave to the defense and that therefore was never used at trial.

Some innocent defendants have been imprisoned for long periods of time. One defendant, John Thompson, spent many years in prison under a death sentence and was almost put to death. Then defense lawyers discovered that the prosecutors never disclosed important evidence: There was a piece of clothing that had the blood of the person who committed one of the crimes in question. The prosecutors possessed a blood test showing that the blood on the clothing was not Thompson's blood type. After he was released, Thompson sued the prosecutor's office to try to obtain compensation for the harm caused by its illegal conduct. But the U.S. Supreme Court decided that the prosecutor's office could not be sued.

Within the past few months, in another well publicized case, a former prosecutor in Texas named Ken Anderson was briefly imprisoned and required to forfeit his law license because he violated his disclosure obligation in a criminal case almost 30 years ago. In that case, a defendant named Michael Morton was convicted of murdering his wife. The prosecutors never disclosed several pieces of very exculpatory information. For example, the police knew that Morton's 3-year-old son told his grandmother that he saw the murder and that his father, the defendant, was not home at the time. Mr. Morton was exonerated by DNA evidence two years ago. Afterward, because of this case, the state of Texas adopted a new law named after Michael Morton. The law went into effect on January 1, 2014. It requires prosecutors to disclose all relevant evidence, whether the evidence is exculpatory or inculpatory.

Even federal prosecutors, who are considered the elite U.S. prosecutors, have been caught

in other settings. In the U.S., there is informal interaction because prosecutors are members of the bar. They are part of a unified legal profession that is made up of lawyers in private practice, government lawyers and judges, all of whom are educated and regulated together. Also, there is mobility between prosecutors' offices and the private bar. For example, the Manhattan district attorney, Cy Vance (whose father was the U.S. Secretary of State) became a prosecutor in Manhattan after graduating from law school, then spent many years as a defense lawyer, first in Seattle and then in Manhattan, and was then elected District Attorney in 2010. Prosecutors do not ordinarily talk about their current cases with people outside their offices, but they talk generally about their work with friends and former colleagues.

It is important, however, to acknowledge that there are limitations on what one can learn about prosecutors' point of view. There are thousands of U.S. prosecutors. They work in many different offices - federal, state and local. The offices have different practices, different training, and different policies. Prosecutors in different states are governed by different laws. Nobody in the U.S. speaks for all prosecutors. Their experiences are different, and no single point of view is shared among the thousands of U.S. prosecutors on any issue, including the appropriate scope of their disclosure obligations. For example, in Texas, when lawmakers recently decided to expand prosecutors' disclosure obligations after the Michael Morton case, some prosecutors objected but many did not, because they already voluntarily opened their entire files to the defense. The association representing Texas prosecutors published an article about the new law that was supportive. The article reminded prosecutors that they have a duty "not to convict, but to see that justice is done," and that this means, "They shall not suppress evidence or secrete witnesses capable of establishing the innocence of the accused."

Moreover, it is hard to know everything that prosecutors are concerned about. Prosecutors express some views formally or informally, but some prosecutors undoubtedly hold views that they do not even express privately. So what we say about U.S. prosecutors' point of view is not true of all prosecutors and is not a complete description.

2. Prosecutors' Response to Defense Arguments

Very few U.S. prosecutors disagree with the basic idea behind the famous *Brady* decision and prosecutors' disclosure obligations. In principle, prosecutors recognize that the criminal justice process must be fair. They agree that, for the process to be fair, the defense must receive certain evidence from the police and prosecutors so that defense lawyers can represent their clients competently. For the most part, prosecutors accept their existing disclosure obligations and have learned to live with these obligations. But many prosecutors oppose changes.

Let us begin with how prosecutors respond when defense lawyers argue for the reform of prosecutors' disclosure obligations. In general, U.S. prosecutors disagree with defense lawyers on two important questions: First, *how much* information should prosecutors give to the defense? And, second, *when* should prosecutors give information to the defense.

Defense lawyers' answer is that they should receive more information from prosecutors and that they should receive the information sooner. Some prosecutors disclose favorable evidence only if they believe the evidence is significant, because that is all that the Constitution requires. Some prosecutors try to persuade the defendant to plead guilty before receiving all the evidence to which the defendant would be entitled if the defendant went to trial. Some

incomplete information when they make decisions about plea bargaining; prosecutors also make decisions with limited knowledge.

Second, defense lawyers say that more information is needed sooner so that the defense lawyer can conduct a better investigation and prepare a more effective defense in cases that will go to trial. That seems obvious, because our criminal justice process is an adversarial process. The most basic premise of our process is that the truth will come out if both sides – the prosecution and the defense – present the best evidence and make the best arguments in the courtroom for their positions. But the truth will not come out if one side – the defense – is not able to present the strongest case. That is why the U.S. system requires broad disclosure in civil cases. In criminal cases, resources are less equal, so the defense relies more on the prosecution. The defense cannot obtain much information on its own. The police and prosecutors have much greater access to witnesses and evidence. The defense cannot present the best case unless the police and prosecutors provide helpful evidence and any other information that might lead to the discovery of helpful evidence.

Some prosecutors are skeptical. They believe that the defense needs only what the law already entitles them to. The defense needs helpful evidence that is significant or "material" and that it cannot obtain through its own diligent investigation. But if the evidence is not "material" – if it would not lead to an acquittal – then why does the defense need it?

The defense might answer that prosecutors are not very good at deciding before trial whether evidence is or is not significant: Prosecutors believe strongly that the defendant is guilty and prosecutors want to win their cases. So they have a natural tendency to look at evidence that might help the defendant and say, "it is not significant." And the defense might say that after a trial, judges are not very good at evaluating whether evidence that is withheld by the prosecutor was or was not significant: Judges do not want to have to set aside convictions and order new trials, so they tend to look at the same evidence and also say, "it is not significant." Therefore, prosecutors who are acting honestly and trying to meet their obligations cannot be confident that the evidence hidden in their files is as unimportant as they believe. Defense lawyers can point to cases in which innocent defendants were wrongly convicted, in part, because the prosecution withheld evidence in the honest but mistaken belief that the evidence was not material.

But prosecutors think this is a very rare occurrence. The Supreme Court's advice is that if the prosecutor is not sure whether the evidence is significant, a wise and careful prosecutor will disclose the evidence. The Department of Justice policy supports this cautious approach. Prosecutors say that following this advice will solve the problem. It should be noted, however, that not all prosecutors have been taught to disclose more than the law allows. In the Supreme Court case involving John Thompson, mentioned earlier, the New Orleans prosecutor admitted that prosecutors in his office were trained to disclose only what the law requires and nothing more. Similarly, the ethics training manual for New York State prosecutors tells prosecutors that they must obey the disclosure laws. But it says nothing about avoiding mistakes by disclosing more than the law requires.

Third, defense lawyers say that prosecutors are not reliable about fulfilling their responsibilities under the current law. Occasionally, that is because prosecutors are lawless. But often it is because the current laws are complicated. Again, the problem is the requirement that favorable evidence must be provided to the defense only if it is "material." It is sometimes hard for a prosecutor to decide whether or not information is "material" and must therefore be

those cases, or is it necessary to limit disclosures in all cases? Does the risk of harm in a small number of cases outweigh the interest of criminal defendants in receiving a fair process? Defense lawyers point out that in states and counties where prosecutors open their files, there is no evidence that the public is harmed as a result. They also observe that there are already procedures in place to protect against the disclosure of secret information relating to national security and procedures to prevent other harms that might result from disclosures.

Second, prosecutors argue that more and earlier disclosures may undermine the truth-seeking process rather than enhancing it. That is because some defendants and defense witnesses testify falsely. If they know the prosecution's evidence in advance, they can more easily create a false story that is consistent with the prosecution's proof. This concern helps explain why federal prosecutors are not required to disclose witnesses' names and statements before a trial starts.

Third, broader and earlier disclosures may be costly and burdensome for prosecutors and police or other investigators with whom prosecutors work. Under discovery laws, if the defendant goes to trial, prosecutors must gather evidence from the police. Prosecutors must then review the evidence to determine what must be given to the defense. This takes time and often involves a struggle with the police, who do not want to be bothered. The burden is avoided in most cases, because most cases end in a guilty plea before the prosecutor makes disclosures. If prosecutors had to make disclosures before defendants pleaded guilty, prosecutors' work would multiply.

Prosecutors also identify a second kind of burden: the time and expense of having to litigate in individual cases over whether the prosecutors met their obligations. There are some prosecutors, particularly state prosecutors, who agree in principle that the defense should receive more information than they receive under the current law. Some of these prosecutors open up their files to the defense even though the law does not require them to do so. But these prosecutors still oppose changing the law to require them to open their files. Even now, there are frequent arguments before, during and after a trial about whether prosecutors have met their disclosure obligations. Prosecutors worry that more demanding disclosure laws will lead to more of these fights in court.

An important question is how to balance the benefits of broader disclosures against the possible harms. Defense lawyers point out that in civil lawsuits, there is a similar risk that parties with more information will create false testimony, or that there will be unnecessary arguments in court over whether the parties and lawyers complied with their obligations. But procedural fairness, which is achieved through broader disclosure, is thought to justify broad disclosure nonetheless in civil cases. Defense lawyers say the same should be true in criminal cases. Some prosecutors disagree.

4. Prosecutors' Unofficial Views

Prosecutors have many concerns and beliefs that are not necessarily stated publicly and officially in their testimony and publications. Some of these concerns are implicit in prosecutors' statements and writings. Some come out in private and informal conversation.

First, some prosecutors believe that their disclosure obligation is unfair even the way it is, because defendants do not have a similar obligation. Defendants do not have to disclose in advance whether or how they will testify at trial. Their disclosure obligations are minimal. For

confident in their own ability to tell which defendants are guilty and that these prosecutors do not think the trial has a very important role in this determination.

IV. *Alternatives to Expanding and Enforcing Disclosure Obligations*

Much of the discussion about U.S. prosecutors' disclosure obligations focuses on reforming the law. For example, in Texas, as noted, the state legislature recently expanded prosecutors' obligations. Much of the discussion also focuses on enforcing the existing law. It is generally agreed that most prosecutors are conscientious and that when they violate their obligations, they do so negligently, not intentionally. But there have also been some "rogue prosecutors" who know that they are violating their obligations. They might be punished by the courts in which they commit misconduct. Or they might be punished by the authorities that regulate lawyers, since all U.S. prosecutors are lawyers who are subject to regulation by the courts of the states in which they are licensed to practice law. Defense lawyers generally believe that, at least until recently, courts have not done a good job of regulating and disciplining prosecutors. The recent Texas case suggests that this may change.

Not all of the discussion has been about expanding and enforcing the law, however. There has also been much discussion about other ways to make sure that defendants receive the evidence and information they need in order to make informed decisions and receive a fair trial. The discussion has focused on two basic questions. First, what should be done, other than changing the laws, to make sure that defendants receive necessary information in addition to what the law requires prosecutors to give them? Second, what should be done, other than having courts punish rogue prosecutors, to make sure that prosecutors comply with their existing legal obligations? Two themes emerge from these discussions.

1. Prosecutors' Discretion

When U.S. prosecutors resist changes in the law that would require them to disclose more information to the defense, prosecutors argue that decisions about what more to disclose should be left to their discretion or good judgment. Prosecutors' offices might be more generous in certain types of cases. For example, one prosecutor's office in New York City has an open file policy in most cases, but not in cases involving crimes of violence. Individual prosecutors might also decide on a case-by-case basis whether to provide more evidence than the law requires. The U.S. Department of Justice strongly supports the idea that federal prosecutors may choose to give more information than the law demands.

This approach has advantages, if one is confident that prosecutors are making fair decisions. It allows prosecutors to disclose different amounts of information depending on whether broad disclosures pose a risk, such as a risk of harm to witnesses and victims or other possible harms. Leaving part of the decision to prosecutors' discretion also reduces litigation over this issue.

The idea that additional disclosures should be left to prosecutors' discretion is highly controversial. Defense lawyers argue that many prosecutors cannot be trusted to comply with existing laws. Therefore it is unrealistic to expect them to give more than the law requires.

The problem, of course, is that there are so many U.S. prosecutors with different attitudes

3. The Judicial Role

Finally, there has been discussion about judges' role in promoting prosecutors' compliance with their disclosure obligations, aside from the possibility of punishing prosecutors who engage in misconduct. In the U.S., judges have significant responsibility for overseeing criminal cases to ensure that the process is fair. They have the ability, if they choose, to oversee the discovery process. Traditionally, judges have simply trusted prosecutors to know their disclosure obligations and to meet their obligations. But some judges conduct a hearing before trial to ensure that discovery obligations have been met. After the Ted Stevens case, some defense lawyers have suggested that trial judges should specifically direct prosecutors to comply with disclosure laws. A prosecutor who intentionally violates the judge's direction can later be prosecuted for the crime of contempt of court.

Conclusion

There is much more that could be said about prosecutors' disclosure obligations in the U.S., where this has been the subject of spirited discussion and debate in recent years. We hope there is something to be learned from the challenges faced by the U.S. criminal justice process and the ways in which those challenges are being addressed. We believe that in the U.S. system, the discussions have been leading to improvements in the law and in prosecutors' practices. We are confident that more improvements will be made in the coming years and hope that future U.S. developments will be of continuing interest.