

## STATEMENT TO ACCOMPANY NACDL'S MODEL STANDING ORDER

After the federal Judicial Conference's Advisory Committee on Criminal Rules failed for years to address the need to make clear in every criminal case the prosecution's duty to timely disclose information that is favorable to the accused with respect to either the defendant's guilt or punishment, Congress took matters into its own hands. On October 21, 2020, the President signed into law the Due Process Protections Act, which amends Federal Rule of Criminal Procedure 5. The Due Process Protections Act received rare bi-partisan support in both the House and the Senate, reflecting a recognition among the nation's elected officials that reform was necessary to curtail prosecutorial misconduct by putting prosecutors on notice of their disclosure obligations at the outset of every case and providing clear consequences when a prosecutor fails to comply with those obligations.

The amended Federal Rule of Criminal Procedure 5 now requires that in all criminal proceedings, at the first scheduled court date at which both the prosecutor and defense counsel are present, the judge must issue an oral and written order confirming the prosecutor's disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order. The new law also requires each Judicial Council of the Circuit in which a district court is located to promulgate a model order for judges to use for this purpose.

NACDL welcomes this new law and the amendment to Federal Rule of Criminal Procedure 5, which, for the first time, creates a uniform procedure for addressing the government's disclosure obligations. Of critical importance, however, is the content of the written order each court will enter pursuant to the amended rule. For that reason, NACDL is pleased to present NACDL's Model Standing Order on the Prosecution's *Brady* Obligations. This model order articulates key aspects of the prosecutor's disclosure obligations, including timing and scope, establishes a procedure for addressing circumstances in which the government believes that such disclosure poses a risk to witness safety or other public interest and clearly outlines the potential consequences for failure to comply with the order's requirements. NACDL urges each Judicial Council and all U.S. District Courts to adopt the provisions of this model order.

In presenting its Model Standing Order on the Prosecution's *Brady* Obligations, NACDL recognizes the efforts of, and thanks, the members of its Discovery Reform Task Force, including Addy R. Schmitt, Chair, Peter Goldberger, Mark J. Mahoney, Professor Ellen S. Podgor, Gail Shifman and Professor Ellen Yaroshefsky.