

Proposed Legislation to Codify Federal *Brady* Requirements

The *Brady* standard: The Supreme Court ruled 50 years ago that the accused in a criminal case is entitled to all “evidence favorable to the accused . . . where the evidence is material either to guilt or punishment.” The Supreme Court has applied this standard to cases in which the trial has already occurred and a judicial record has been developed that allows for a determination of whether the suppressed evidence was “material.” Prior to trial, however, the application of this post-trial standard has created extreme confusion about what evidence must be disclosed as an initial matter, when it must be disclosed, and what remedies exist for violations of this rule. The proposed legislation is designed to clarify the law with respect to all of these areas.

Problem: Confusion About What Evidence Must Be Disclosed Prior To Trial

- Some courts and the Department of Justice (DOJ) have adopted a pre-trial rule that allows prosecutors to suppress favorable evidence based on their prediction about whether such evidence will be “material” to a trial that has not yet occurred.
- This standard asks a prosecutor to forecast whether disclosure of a particular piece of evidence would probably cause her to lose the trial; this standard has often been used to justify suppression of extremely favorable evidence on the ground that it is “immaterial” since the prosecutor still believes she can win the trial despite this evidence.
- In addition, prosecutors rely on the standard to withhold inadmissible evidence even though its disclosure may lead to the discovery of admissible favorable evidence.

Solution: The legislation eliminates the subjective materiality standard, requiring the prosecutor to simply disclose materials that “reasonably appear to be favorable to the defendant.” The legislation also requires disclosure of all “information, data, documents, evidence or objects” without regard to admissibility in court.

Problem: Confusion About When Favorable Evidence Must Be Disclosed

- Most courts apply an unclear rule that requires disclosure only “in time for the defense to reasonably use the evidence” and most districts do not have clear rules specifying the timing of disclosure.
- New DOJ guidance provides prosecutors broad discretion to delay disclosure using similar standards.
- Prosecutors often delay disclosure of exculpatory evidence contained in witness statements until after direct examination of the witness at trial, leaving defense counsel little time to review and effectively use the evidence.

Solution: The legislation requires disclosure without delay after arraignment or prior to entry of a guilty plea, or as soon as reasonably practicable upon the evidence becoming known to the Government.

Problem: Confusion About What Remedies Exist For Failure To Disclose Favorable Evidence

- There is no doubt that the suppression of favorable evidence has significant financial costs to the criminal justice system as well as profound personal and financial costs to individuals and companies accused of crimes.
- The few appellate decisions addressing the power of courts to remedy *Brady* violations are conflicting.

Solution: The legislation clarifies the law by expressly providing courts with an array of remedial powers to be used depending upon the facts and circumstances of each case and situation.