The Confusing Timing of Impeachment Evidence Disclosure

BY GRAHAM C. POLANDO

EVEN THE GREENEST LINE PROSECUTOR knows that *Brady* generally requires him or her to disclose exculpatory evidence to the defendant. Indeed, the Supreme Court recently held that "Prosecutors are not only equipped but are also ethically bound to know what *Brady* entails and to perform legal research when they are uncertain."[1] Nevertheless, when a prosecutor questions what *Brady* requires regarding when he must disclose exculpatory *impeachment* evidence, that legal research will often increase, rather than alleviate, the prosecutor's uncertainty.

In *United States v. Ruiz*,[2] a unanimous Supreme Court held that while impeachment material is a critical component of *Brady* disclosure, prosecutors need not provide such material to a defendant pleading guilty. The right to impeach government witnesses is a trial right, the Court reasoned, and therefore one of many such rights given up by a defendant's guilty plea.

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But the American Bar Association's Standing Committee on Ethics and Professional Responsibility (the "Committee") has suggested otherwise. Boston College Law Professor R. Michael Cassidy convincingly states that, in its Formal Opinion 09-454, the Committee has interpreted its Model Rule of Professional Conduct 3.8(d) to require that prosecutors disclose *all* exculpatory evidence to all defendants, even those pleading guilty.[3] Nearly every state has adopted Model Rule 3.8(d), making the ABA's interpretation of its own rule highly persuasive to state courts and ethics commissions. Professor Cassidy predicts a "looming battle" between prosecutors and defense counsel over the timing of impeachment disclosure. Indeed, the conflict between the constitutional and ethical authorities and the unworkable "solution" Formal Opinion

Graham Polando has been a deputy prosecuting attorney in the Office of Elkhart County (Indiana) Prosecutor Curtis T. Hill, Jr. since 2007. He can be contacted at gpolando@elkhartpa.com.

09-454 advocates, should concern every prosecutor.

Formal Opinion 09-454

Formal Opinion 09-454 rests its conclusions on a curious principle: a profound separation between *Brady*'s requirements and those of Model Rule 3.8(d). The Committee observes that the ethical obligation to disclose exculpatory evidence predates *Brady*, and was never intended to codify it, arguing that the prosecutor's responsibility under Model Rule 3.8(d) is "independent" of the constitutional obligation.[4]

This claim of "independence" is a bit curious. When the Supreme Court has expanded *Brady*'s coverage, the Model Rule appears to have duly incorporated it.[5] Yet when the Court *contracts* it, as it has with impeachment evidence for the pleading defendant,[6] or with rigorous application of *Brady*'s requirement of "materiality,"[7] the Formal Opinion disregards the case law in favor of the Rule's strict "independence." That claim of independence, in short, is belied by the Standing Committee's stated desire to make Rule 3.8(d) not a *separate* body of law, but one defined by its greater rigor; one which will be "more demanding than[,] the constitutional case law." The case law is not a separate body, but a contributing ratchet.

What's Wrong with Disclosing?

Perhaps the Formal Opinion's arguments are weak, but how could anyone possibly be *against* greater disclosure? Professor Cassidy answers by pointing out three potential problems with Formal Opinion 09-454's mandate. First, citing Professor Douglass,[8] he argues that impeachment evidence tends to implicate witness privacy and safety. Impeaching material might embarrass a socially prominent witness, or the information impeaching a confidential informant might sufficiently identify him, subjecting him to retaliation.

Professor Cassidy also notes two important timing issues: the prosecutor generally cannot know who among his witnesses will testify and will likely not make that time-consuming strategic decision unless and until trial is imminent. Douglass made a related point: not only can the prosecutor not know who will testify, he does not know what his witnesses will say until they say it; "evidence that impeaches the credibility of a witness is exculpatory only if the witness has something *inculpatory* to say."[9]

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Finally, Cassidy argues, drawing on his own years of experience as a prosecutor, that impeachment evidence itself often does not surface until trial preparation. Indeed, given the resource consumption that uncovering such impeachment evidence would entail, Cassidy contends that requiring impeachment disclosure would simply be unworkable in high-volume state courts. Professor Alafair Burke, another noted former prosecutor, is even less sanguine about the prosecutor's likelihood of discovering impeachment evidence, citing an example in which a witness could easily suppress his long- and deeply-held bias against a defendant.[10]

Despite his insistence that impeachment and substantive exculpatory evidence be treated differently, Cassidy recognized that the line between the two is not always clear, particularly in the common and problematic cases where a witness expresses doubt as to his identification of the defendant. Few witnesses claim absolute certainty in witness identification, but must every slight prevarication at every interview be immediately disclosed to a waiting defendant?

Finally, Cassidy contends that all impeachment material is not created equal: some impeaching material is general, "intended to undermine the witness's credibility as to all aspects of his testimony,"[11] but some is more specific, "used by the defendant to undermine the witness's testimony on a particular point."[12] He does not further analyze this distinction, the significance of which should be the subject of further inquiry. Other commentators seem to suggest that the former is more readily discoverable, available, and clear.[13]

In short, the Formal Opinion's broad and blithely-stated prescriptions rest upon an unstated presumption: the image of a prosecutor with a clearly-marked "impeachment evidence" folder. For the reasons outlined above, that image is an unfamiliar one to practicing prosecutors.

What to Do?

If state courts and ethics committees adopt the reasoning of the Formal Opinion, prosecutors are likely in trouble. The solution, however, is not simple condemnation of the opinion.

Prosecutors should—indeed must—recognize the political implications of taking what outside observers might see as an "anti-disclosure" stance. With the Innocence Project and similar efforts gaining ascendance and widespread praise, now is not the time to advocate for less-rigorous disclosure requirements.

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And in fact, the vast majority of prosecutors want to disclose all exculpatory evidence, for both pragmatic and ethical reasons. Prosecutors who publicly adopt a policy emphasizing their evenhandedness, like the widely- and justly-admired Craig Watkins in Dallas, gain instant credibility with their prospective jurors.

Nevertheless, Professor Cassidy's concerns are legitimate. I therefore recommend that prosecutors take the following steps to ensure that, when the time comes for their state supreme court or ethics committee to interpret the issues presented in the Formal Opinion, they are ready to advocate for a satisfactory solution.

First, we should question the desirability of concurrent authorities governing similar conduct. As it stands, the prosecutor is subjected to two different interpretations of the law governing exculpatory evidence—and the ABA has expressly stated and demonstrated that the two authorities can, should, and will differ in fundamental ways. Moreover, this dual authority runs counter to the incentive structure normally seen in criminal justice. The well-

known exclusionary rule from *Mapp v. Ohio*[14] rests on the assumption that discipline is an insufficient deterrent for wayward law enforcement—the case itself must be compromised. Now the Committee has claimed that, when it comes to prosecutors, the opposite is true.

Second, we must end our professional isolation. Our state bar association's ethics committee has one deputy prosecutor—me—and many of my prosecutorial colleagues react with surprise that there is even one. Yet these committees draft the state analogues to the ABA's formal opinions; if we want a voice, we have to speak. Our voluntary absence leaves those who misunderstand (deliberately or no) the burdens on prosecutors free to recklessly impose new obligations, by, in the words of now-U.S. Attorney Steven Dettelbach, "forcing a series of what will be viewed as pro-defense rules down the mouth"[15] of prosecutors.

I will add that my colleagues on our ethics committee have been remarkably and touchingly solicitous of my views and that working with such intelligent and like-minded people has been richly rewarding. We deprive ourselves of both voice and opportunity when we isolate ourselves from the rest of our profession.

Third, we should disclose whenever we are able. Freely disclosing the "easy" impeachment material—offers in exchange for cooperation, payments to confidential informants, and prior convictions of potential witnesses—will go far in establishing credibility at minimal cost, as such information can be easily stored electronically. Likewise, we should actively seek protective orders when appropriate, to demonstrate both our own good faith and the compelling, profound, and frequent ethical dilemmas under which we labor.

We should both announce and, more importantly, demonstrate our commitment to ethical prosecution.

Finally, we must make our ethics our best public relations. We must adopt a pro-disclosure attitude wherever possible. We should both announce and, more importantly, demonstrate our commitment to ethical prosecution. We should be prepared to give a little. I am convinced that if we mandate disclosure where we can, we can avoid having it imposed where we cannot.

[1] *Connick v. Thompson*, ____ U.S. ____ (2011), slip op. at 14.

[2] 536 U.S. 622 (2002).

[3] R. Michael Cassidy, *Plea Bargaining, Discovery, and the Looming Battle Over Impeachment Evidence*, 64 VANDERBILT L. REV. No. 5 (2011)[forthcoming; manuscript currently available at http://ssrn.com/abstract=1764407] (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009) [hereafter "Formal Opinion 09-454"].

[4] Formal Opinion 09-454 at 4.

[5] *Compare Giglio v. U.S.*, 405 U.S. 150 (1972), *with* Formal Opinion 09-454 at 7, n. 33 (implying that the Supreme Court's extension of *Brady* to impeachment evidence applies to Model Rule 3.8(d)).

[6] *Ruiz,* supra note 2.

[7] *Compare Kyles v. Whitley*, 515 U.S. 419 (1995) with Formal Opinion 09-454 at 2 ("Rule 3.8(d) does not implicitly include the materiality limitation…The rule requires prosecutors to disclose favorable evidence so that the defense can decide on its utility.")

[8] John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L. J. 437 (2002).

[9] 50 EMORY L. J at 495 (emphasis supplied).

[10] Alafair Burke, *Revisiting Prosecutorial Disclosure*, 84 INDIANA L. J. 391 at 514 (2009).

[11] 64 VANDERBILT L. REV. No. 5 at 9.

[12] *Id.*

[13] Bruce A. Green, *Beyond Training Prosecutors about their Disclosure Obligations: Can Prosecutors' Offices Learn from their Lawyers' Mistakes?*, 31 CARDOZO LAW REVIEW 2161 at 2176-77 (2010).

[14] 367 U.S. 43 (1961).

[15] Steven Dettelbach, *Commentary:* Brady *from the Prosecutor's Perspective*, 57 CASE WESTERN RESERVE L. REV. 615 at 618 (2007).