

Philadelphia DAO Policies on: (1) Disclosure of Exculpatory, Impeachment, or Mitigating Information, (2) Open-File Discovery



Effective Date: 10/1/2020

Subject to any future changes in the law, this sets forth the office's policies regarding: (1) the disclosure of exculpatory, impeachment, or mitigating information, pursuant to Brady v. Maryland, 373 U.S. 83 (1963) and its progeny; Rule 573 of the Pennsylvania Rules of Criminal Procedures; Rule 3.8 of the Pennsylvania Rules of Professional Conduct; and Rule 3.8(g) & (h) of the American Bar Association Model Rules of Professional Responsibility, as well as (2) open-file discovery.

I. The Disclosure of Exculpatory, Impeachment, or Mitigating Information

A. The Law and Ethics

- In Brady, the Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution.” Brady v. Maryland, 373 U.S. 83, 87 (1963).
- Pa.R.Crim.P. 573(B)(1)(a) requires that a prosecutor disclose “[a]ny evidence favorable to the accused that is material either to guilt or to punishment, and is within the possession or control of the attorney for the Commonwealth.”
- Pa.R.P.C. 3.8(d), in turn, requires a prosecutor in a criminal case 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, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”
- ABA Model R.P.C. 3.8 (g) addresses a prosecutor's post-conviction obligation to disclose Brady evidence by specifically stating that “[w]hen a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall: (1) promptly disclose that evidence to an appropriate court or authority,

and (2) if the conviction was obtained in the prosecutor's jurisdiction, (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

- ABA Model R.P.C. 3.8 (h) also requires a prosecutor to seek to remedy a conviction when he or she is aware of clear and convincing evidence which establishes that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit.

B. Guidance

Information is *exculpatory* if it tends to excuse, justify, or absolve the guilt of a defendant. *Impeachment* information refers to a subcategory of exculpatory information that can be used to attack the credibility of a Commonwealth witness. Although it may sometimes be more difficult to identify, courts have treated impeachment information as significant because the truthfulness and reliability of a given witness may ultimately be determinative of a defendant's guilt or innocence. Information is *mitigating* if it tends to reduce the moral blameworthiness of the defendant.

While such definitions are facially simple, any application of these definitions to a given case requires a fact-specific analysis with the understanding that disclosure compliance is contextual.

It is important to understand, however, that questions of evidentiary materiality should *not* factor into a prosecutor's determination of which pieces of information qualify as exculpatory, impeaching, or mitigating. A prosecutor has the obligation to disclose exculpatory, impeaching, or mitigating evidence—full stop.

For purposes of these Policies, this office considers the court-determined constitutional obligations laid down in Brady and its progeny to be co-extensive with the rules-based obligations observed by the Commonwealth set out in the rules of criminal procedure and professional conduct as well as the ABA Model Rules' extension of prosecutorial disclosure obligations in the post-conviction realm.

C. Policy

Assistant district attorneys must understand and comply with their constitutional, statutory, and ethical duties to disclose exculpatory, impeaching, and mitigating information to the defense. These duties exist regardless of the particular form of the information (i.e., written v. oral, recorded v. unrecorded) and regardless of whether the criminal case is resolved via plea or trial.

In the event that an assistant district attorney is uncertain about disclosure or concludes that disclosure is in fact not required, that attorney shall consult with his or her supervisor regarding the matter. In cases where an assistant district attorney decides to withhold information, he or she must document and be prepared to articulate a basis for that decision. If additional guidance is needed regarding whether information falls within an assistant district attorney's

constitutional, statutory, or ethical disclosure obligations, the Conviction Integrity Unit should be consulted.

Any disclosure of exculpatory, impeaching, and mitigating evidence shall be recorded in an approved office disclosure form and shall occur as soon as practicable. Because a prosecutor's statutory and ethical duty to disclose such information is a continuing obligation, if new information becomes known to or comes into the possession of an assistant district attorney, the existence of that information shall be promptly disclosed to the defendant or the court.

A prosecutor's Brady obligation is based on due process and exists to ensure a defendant a fair trial as it unfolds. However, in light of the ABA Model R.P.C.'s extension of Brady obligations to the post-conviction stage, if an assistant district attorney acquires information which casts doubt upon the correctness of a conviction, he or she shall adhere to Rule 3.8(g) and (h) by promptly disclosing to the defense any new Brady information that is acquired or learned post-trial.

Intentional failures to disclose exculpatory, impeaching, or mitigating information will not be tolerated and will be subject to discipline.

II. Open-File Discovery

A. Overview

Open-file discovery ("OFD") refers broadly to a concept of prosecutorial transparency, wherein the prosecution provides the defense with everything in its file, irrespective of evidentiary materiality. Proponents of OFD emphasize the ways in which the practice coheres with arguably the most elemental tenet of our legal system, the pursuit of truth.

More pointedly, OFD has several significant advantages:

- *Fairness*: Since defendants in criminal trials typically wield less resources, OFD gives them the opportunity to level the legal playing field by accessing information that would otherwise be cost-prohibitive.
- *Informed Decision-Making*: Informed defendants can make more deliberate decisions about whether to accept a plea or proceed to trial when they know the full weight of the evidence against them.
- *Efficiency*: OFD conserves prosecutorial and judicial resources by encouraging defendants who fully understand the weight of the evidence against them to plead guilty.
- *Error reduction*: Because OFD requires full disclosure without regard to materiality, prosecutors are not faced with the kind of discretionary disclosure decisions that can result in inadvertent or erroneous evidentiary suppression.

B. Current Legal Terrain

Presently, there is no national model for OFD, with states falling along a continuum with respect to how much information prosecutors must disclose to the defense. Although this policy draws from the precepts of OFD insofar as it seeks to excise the question of materiality from

evidentiary analysis, the OFD policy is not assuming any position on the logistical issues associated with implementing OFD office wide. With that said, this office is actively working with IT and the Executive Team to create an electronic infrastructure and case management system capable of maintaining case files in such a way as to allow for efficient identification of information disclosable pursuant to OFD while also ensuring privileged information exempt from OFD is maintained separately so as to protect the confidentiality of that information (i.e., witness safety, grand jury and work product).

III. Goal

All criminal defendants deserve a fair trial and reasonable access to justice thereafter. Whether intentional or negligent, prosecutorial suppression of exculpatory, impeaching, and/or mitigating information at the plea, trial, or post-trial stage can result in flawed adjudications and unwarranted convictions, which directly undermines perhaps the most basic tenet of our legal system, the pursuit of truth.

In enacting these policies and committing to adopting OFD as soon as practicable, this office demonstrates an ongoing commitment to the kind of fair criminal law practice that will invariably reinforce its legitimacy in the eyes of the community it serves.