THE LOCAL RULES REVOLUTION IN CRIMINAL DISCOVERY

Daniel S. McConkie†

Over the last few decades, federal district court judges throughout the country have used local rules to greatly expand pretrial criminal disclosure obligations, especially for prosecutors. These local criminal discovery rules both incentivize prosecutors to act as ministers of justice and empower judges to manage prosecutorial disclosures. This quiet revolution is now well underway, and the time has come to amend the Federal Rules of Criminal Procedure to bring these innovations to all the districts.

Commentators have long recognized that neither Supreme Court precedent nor the Federal Rules effectively require prosecutors to provide the defense with enough discovery to properly prepare for plea negotiations and trial. Nor do they empower judges to effectively monitor prosecutors' discovery decisions. Reformers have largely failed to revolutionize discovery on a national scale, but individual districts, by passing local discovery rules, have waged small battles to great effect.

These rules require prosecutors to turn over more discovery earlier in the case. They expand the scope of mandatory prosecution discovery beyond Rule 16 and Brady*; they accelerate the timing of discovery; and they require the parties to work together to arrive at discovery stipulations.*

The rules also greatly enhance the role of judges and empower them to monitor the discovery phase of the case. Through specific discovery rules, stipulations, and discovery management orders, the rules greatly expand judges' grounds for ordering discovery and imposing sanctions. They also give judges more opportunities to raise and manage discovery issues at mandatory discovery conferences. Finally, the rules expand (and delimit) discovery motion procedures.

Increasing prosecutorial disclosure obligations and expanding the power of judges over pretrial discovery could improve the quality of criminal justice nationwide. First, although more empirical research needs to be done, there is some evidence that these rules are working as intended. Second, by putting more

† Assistant Professor, Northern Illinois University College of Law, former Assistant United States Attorney (Sacramento), 2008–2013. I am grateful for the assistance of Lisa Bernstein and her students in the University of Chicago Law School's Legal Scholarship Workshop. I also thank the participants in Crimfest July 2015, who gave feedback on a very early version of this piece. I would also like to thank Alan Boudreau, Aliza Cover, Marc Falkoff, Brandon Garrett, Susan Klein, Heidi Kuehl, Jeffrey Parness, and Laurel Rigertas. Finally, I thank my research assistants David White and Whitney Wilkinson. All remaining errors are my own.

information into the hands of the defense, these local rules could help the parties, but especially defendants, to reach more informed plea agreements. Third, these local discovery rules may help rebalance the criminal justice system, which is currently dominated by prosecutors, in favor of trial judges and defense attorneys. Hopefully, the local rules revolution will serve as a model for more districts to follow and ultimately result in amendments to the Federal Rules.

TABLE OF CONTENTS

INTRODUCTION

In most districts, federal judges are regulating and expanding criminal discovery rights beyond the requirements of the Constitution and the Federal Rules of Criminal Procedure. In particular, many judges are requiring prosecutors to turn over more discovery earlier in the case than federal law requires, and they are taking an active role in managing pretrial and pre-plea discovery. They have done so using local rules, general orders, and standing orders.[1] These local discovery regimes promise to improve justice by delivering more discovery to defendants and to enable judges to manage pretrial discovery, but scholars have devoted little attention to them.

Federal criminal discovery is governed largely by *Brady v. Maryland*, which requires prosecutors to disclose exculpatory evidence that is material to guilt or punishment.[2] The *Brady* rule can be hard to obey. It requires the prosecutor to put on a defense attorney's hat, to consider which evidence might help the defense, and then to guess whether that evidence might change the outcome of the trial. Even well-meaning prosecutors can fail to follow *Brady*. Furthermore, even though most cases result in guilty pleas,[3] the application of *Brady* to cases that don't go to trial is unclear. Rule 16 of the Federal Rules of Criminal Procedure, which regulates pretrial discovery,[4] is a little more specific than *Brady* but suffers from many of the same flaws: it probably doesn't require disclosures before a guilty plea, and it still presumes that most prosecutorial disclosures will be made with little defense involvement and little judicial oversight unless there is an appeal. These deficiencies in federal discovery law stymie defendants, especially innocent ones, from effectively preparing for plea bargaining and trial.

Federal discovery also suffers from procedural imbalances. Prosecutors have too much power to withhold or delay needed

1 For simplicity, when I refer to local rules, I also mean standing and general orders.

2 373 U.S. 83, 87 (1963); Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987).

3 About ninety-seven percent of federal convictions are obtained by guilty plea. Missouri v. Frye, 566 U.S. 134, 143 (2012).

4 FED. R. CRIM. P. 16. All rule references are to the Federal Rules of Criminal Procedure unless otherwise noted.

disclosures, and judges have too little power to regulate, manage, and enforce discovery obligations. In separation of powers terms, the judicial branch is unable to keep the executive branch in check.[5] Likewise, the adversarial system is imbalanced. The defense is unable to check the prosecution, which usually possesses far more information about the case. Only an effective discovery regime can redress this inequity.

Many of these weaknesses in federal discovery are addressed by local rule reforms. Part II describes how local criminal rules are expanding the scope of discovery beyond the requirements of Rule 16 and *Brady*. For example, some local rules require prosecutors to turn over all exculpatory evidence, regardless of whether it might change the outcome of the proceedings.

Relatedly, local criminal rules also advance the time by which discovery must generally be provided. For example, many local rules mandate initial disclosures within days of the arraignment, even if the defense doesn't request them, as Rule 16 requires. Other local rules require the parties to meet together early in the case for an informal discovery conference to reach whatever stipulations are possible and to apprise the court of their joint discovery plan. Prosecutors who are required to interact with and seek input in good faith from the defense may better fulfill their discovery duties.

Part III describes local discovery rules that strengthen judges' role as managers of pretrial discovery and diminish the prosecutor's independent discretion to withhold or delay discovery. For example, several local rules require judges to hold pretrial discovery conferences. At those conferences, judges may manage discovery in several ways: by adopting the parties' discovery stipulations as to scope and timing; by setting deadlines, sometimes multi-tiered in complex cases, for discovery to be produced; by setting discovery motion deadlines; by raising their own discovery issues; and by issuing orders regulating discovery throughout the case. These orders in turn provide clear, case-specific grounds for discovery motions and sanctions for noncompliance.

Some local rules also require prosecutors to inform the court of what they have and have not produced to the defense, and when they will produce it or why they do not intend to produce it. This encourages prosecutors to be more open, precise, and timely about producing discovery and allows judges to sanction prosecutors who misrepresent the status of discovery.

The reforms described in Parts II and III, taken together, strengthen the role of judges over discovery, a phenomenon I call "criminal managerial judging." Scholars have only begun to address

---

[5] Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1044–50 (2006).

criminal managerial judging, and this is the first time it has been discussed in the discovery context.[6] That phenomenon transforms criminal discovery from an essentially private exercise of prosecutorial discretion to a distinct and highly regulated stage of the case in which the prosecutor must collaborate with the defense attorney, and the judge more actively oversees the prosecutor's discovery discretion.

Part IV discusses how these local rules are indeed revolutionizing criminal discovery. First, there is some empirical evidence that local discovery rules are achieving their intended effect of delivering more material discovery to the parties earlier in the case. In 2010, the Federal Judicial Center conducted a national survey of judges, prosecutors, and defense attorneys in federal courts about their disclosure practices in districts with local discovery rules versus districts without local discovery rules.[7] The results of that survey suggest that, in districts with such rules, prosecutors know their discovery duties better and are failing less often to turn over exculpatory information. At the same time, those districts seem to be experiencing an increase in discovery violations relating to local rules and court orders, such as the timing of discovery. These violations would largely not exist in absence of local discovery rules and court orders, so their increase seems to be evidence that local discovery regimes are allowing judges to more effectively enforce certain discovery rules. Of course, much empirical work remains to be done to investigate how these rules are playing out in practice, but this Article is the first in the law reviews to analyze the survey and discuss its implications.

Second, increased discovery to criminal defendants can improve case outcomes. Defendants with more discovery have a greater understanding of the strength of the government's case against them, and they can better prepare their own case for jury trials and plea bargaining. This benefits the public because there is no public interest in convicting innocent people, and there is a strong public interest in convicting and sentencing guilty people through a just and effective adversarial proceeding. That adversarial proceeding cannot function effectively unless the defense has sufficient information to prepare its case.

Third, local discovery rules rebalance pretrial procedure by giving defense attorneys more influence over prosecutorial discovery decisions and empowering judges to monitor prosecutors. Under these local

---

6 *See* Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325 (2016) (discussing criminal managerial judging in case resolution).

7 LAURAL HOOPER ET AL., FED. JUDICIAL CTR., A SUMMARY OF RESPONSES TO A NATIONAL SURVEY OF RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND DISCLOSURE PRACTICES IN CRIMINAL CASES (2011) [hereinafter RULE 16 SURVEY].

discovery rules, the defense receives more discovery earlier in the case and informally confers with prosecutors about discovery. These conferences give the defense opportunities to make discovery requests that are tailored to the needs of the case and often result in discovery stipulations. If necessary, the defense can later file motions based on those stipulations or other discovery orders in the case.

These local rules also greatly strengthen the role of judges. They provide for pretrial discovery hearings that give judges opportunities to discuss discovery issues with the parties and issue orders regulating discovery. Those orders can regulate the scope and timing of discovery, specify how it is to be produced, and set a motion schedule. Discovery orders become a clear basis for enforcing these case-specific discovery obligations with a variety of sanctions.

Local discovery rules raise two important legal difficulties. First, as discussed in Section IV.C, they defy national procedural uniformity, which was an important goal of the Federal Rules of Criminal Procedure. Local discovery rules have proliferated, but most districts have not yet adopted provisions regulating the scope and timing of discovery and giving judges better mechanisms to regulate it. Thus, defendants in districts without local discovery rules have less of an opportunity to adequately prepare their cases. This could ultimately result in disparate case outcomes for otherwise similarly situated defendants.

Second, as discussed in Section IV.D, local discovery rules may run afoul of the Rules Enabling Act, which only allows district courts to promulgate local rules that are not "inconsistent with" the Federal Rules. Some local rules plainly conflict with Rule 16. For example, Rule 16 conditions receipt of discovery on a party's request, but many local rules expressly do away with the request requirement. Other local rules seem at odds with the policies behind Rule 16. For example, Rule 16 has no timelines, preferring instead case-by-case adjudication. But several districts establish discovery deadlines for all cases in their local rules. In a larger sense, the local discovery rules in many districts, when considered as a whole, dramatically alter both the substance and procedure of criminal discovery. Simply put, this revolution in criminal discovery cannot reasonably be considered to be consistent with the *ancien régime*.

A national rule amendment (or comparable statutory fix) is the surest way to resolve both of these legal difficulties. Such an amendment would restore uniformity and ensure that local rules do not significantly conflict with federal law. Scholars and policymakers have been calling for this for at least the last decade,[8] and the groundwork being laid by

[8] *See, e.g.*, Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023 (2006); Susan R. Klein, *Monitoring the Plea Process*, 51 DUQ.

local discovery rules nationwide should make the amendment more feasible. In the Conclusion, I list the best local discovery rule provisions, and the Appendix provides some model language for those provisions. I hope that the local rule revolution in criminal discovery will inspire national rule makers to amend Rule 16 with the aim of requiring prosecutors to put more material discovery in the hands of the defense, earlier in the case, and empowering trial judges to effectively enforce these rules.

I. CURRENT DISCOVERY RULES FAIL TO HELP DEFENDANTS TO ADEQUATELY PREPARE THEIR CASES

In this Part, I describe how federal discovery works, exclusive of local rules. I critique that regime, largely because it relies too much on prosecutors and not enough on judges, and it fails to ensure adequate discovery to defendants for jury trials and plea bargains. I then explain the local rulemaking process that federal judges have employed to address these and other deficiencies. Parts II, III and IV describe how local rules are revolutionizing federal criminal discovery.

A. *Background on Federal Criminal Discovery*

Before the passage of the Federal Rules of Criminal Procedure in 1944, discovery was limited.[9] The Federal Rules changed that. Their stated purposes were to achieve "simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay."[10] This began a long trend toward liberalizing federal discovery. The law has come to recognize three main purposes of criminal discovery: (1) aiding the decision makers in finding out the truth; (2) ensuring that criminal procedure satisfies Due Process and is fair; and (3) making case dispositions, whether by jury trial or guilty plea, more efficient.[11]

L. REV. 559 (2013).

9 *See* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 20.1(a) (4th ed. 2017) (summarizing criminal discovery before the Federal Rules of Criminal Procedure); *see also* People *ex rel.* Lemon v. Supreme Court of N.Y., 156 N.E. 84, 84–85 (N.Y. 1927); George H. Dession, *The New Federal Rules of Criminal Procedure: I*, 55 YALE L.J. 694, 700 (1946) [hereinafter Dession, *I*]; George H. Dession, *The New Federal Rules of Criminal Procedure: II*, 56 YALE L.J. 197, 218–19 (1947) [hereinafter Dession, *II*]; James F. Hewitt & Frank O. Bell, Jr., *Beyond Rule 16: The Inherent Power of the Federal Court to Order Pretrial Discovery in Criminal Cases*, 7 U.S.F. L. REV. 233 (1972).

10 FED. R. CRIM. P. 2; *see also* Dession, *I*, *supra* note 9, at 699.

11 *See generally* Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1145–46 (2004); *see, e.g.*, FED. R. CRIM. P. 16 advisory committee's note to 1974 amendment ("[B]road discovery contributes to the fair and efficient administration of criminal justice by

In 1963, the Supreme Court handed down *Brady v. Maryland*,[12] its seminal case regarding criminal discovery. *Brady* held that Due Process required prosecutors to turn over evidence to the defense that was exculpatory and material with respect to guilt or punishment.[13] The Court argued that, without such disclosures, a trial would "bear[] heavily on the defendant."[14] Several subsequent Supreme Court cases interpreted and narrowed this holding. For example, material evidence was later defined as evidence that might affect the outcome of the case.[15] The rule does not require production of evidence that is not admissible at trial.[16] The evidence must be in the prosecutor's possession and not otherwise available to the defense.[17] The Supreme Court later held, in *Giglio v. United States*, that the government violated due process in failing to disclose a promise of immunity to a key witness.[18]

The Federal Rules of Criminal Procedure have mandated far more discovery than *Brady* requires. Rule 16, which was strongly influenced by the civil discovery rules, now requires prosecutors to produce statements of the defendant, documents and objects relevant to the case, the defendant's criminal history, reports of examinations and tests, and expert witness reports. Trial judges have broad discretion to enforce

providing the defendant with enough information to make an informed decision as to plea . . . ."); Herring v. New York, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."); Brady v. Maryland, 373 U.S. 83, 87–88 (1963) (describing fairness and truth-seeking rationales for broader discovery).

12 373 U.S. 83 (1963).

13 *Id.* at 87–88.

14 *Id.* at 88. Justice Brennan, after noting a systemic interest in evenly-balanced scales in the contest between often indigent defendants and the state, posits discovery as "one tool whereby [defendants] would have a better chance to meet on more equal terms what the state, at its leisure and without real concern for expense, gathers to convict them." Roberts, *supra* note 11, at 1146 (citing William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279, 286 (1963)).

15 *See* Pennsylvania v. Ritchie, 480 U.S. 39, 40, 57 (1987) ("Evidence is material only if there is a reasonable probability that, had the evidence been disclosed [to the defense], the result of the proceeding would have been different. . . . A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." (citing United States v. Bagley, 473 U.S. 667, 682 (1985))).

16 Wood v. Bartholomew, 516 U.S. 1, 8 (1995) (failure to disclose polygraph results would not have led to a different trial outcome, in part because those results would have been inadmissible); *see also* Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 700–03 (2006).

17 United States v. Clark, 928 F.2d 733, 738 (6th Cir. 1991) ("No *Brady* violation exists where a defendant 'knew or should have known the essential facts permitting him to take advantage of any exculpatory information,' or where the evidence is available to defendant from another source." (citing United States v. Grossman, 843 F.2d 78, 85 (2d Cir. 1988))); Gershman, *supra* note 16, at 699 ("A prosecutor is charged with knowledge of evidence held by government agencies investigating the case.").

18 405 U.S. 150, 154–55 (1972).

violations of the rule.[19] Rule 16 does not prescribe any time limits except that disclosures should be made before the trial. Other Federal Rules also regulate discovery.[20]

In 1964, Congress passed the Jencks Act, which, for reasons of witness safety and other law enforcement considerations, prevented courts from compelling the government to provide witness statements until after those witnesses had testified on direct examination.[21] Criminal Rule 26.2 later codified the Jencks Act and extended it to other contexts, like suppression motions.[22] Notwithstanding, the Department of Justice (DOJ) encourages prosecutors in typical cases to make Jencks disclosures "at a reasonable time before trial to allow the trial to proceed efficiently."[23]

Federal discovery is also regulated by local ethical rules, which apply to federal prosecutors through the McDade Amendment.[24] Each state has its own ethical rules, but most states have patterned their rules very closely after the Model Rules of Professional Conduct.[25] Model Rule 3.8(d) requires prosecutors 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 . . . ."[26] The rule does not define "timely." Prosecutors are very rarely disciplined for violating any state version of this rule.[27]

Finally, the Department of Justice has policies to regulate its own

---

19 FED. R. CRIM. P. 16(d). *See generally* JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS (6th ed. 2016) (describing how Rule 16 operates).

20 FED. R. CRIM. P. 12.1, 12.2, 12.3, 12.4, 26.2.

21 18 U.S.C. § 3500 (1964); *see also* FED. R. CRIM. P. 6 (excepts grand jury transcripts from discovery); United States v. Pope, 574 F.2d 320, 324 (6th Cir. 1978) ("It is evident from its legislative history that the Jencks Act was principally designed to make certain that *Jencks v. United States* was not misinterpreted by lower courts to expose government files in criminal prosecutions to blind fishing expeditions."); ROBERT M. CARY ET AL., FEDERAL CRIMINAL DISCOVERY, 192–97 (2011) (background of Jencks Act).

22 FED. R. CRIM. P. 26.2(g).

23 Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, to Department Prosecutors (Jan. 4, 2010) [hereinafter Ogden Memorandum]; *see* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-5.001 (2010).

24 28 U.S.C. § 530B (2012).

25 LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW: CONCISE EDITION FOR THE TWO-CREDIT COURSES 38–39 (2013).

26 MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR. ASS'N 2016) [hereinafter MODEL RULES].

27 Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 720–31 (1987) (concluding that discipline of prosecutors for failing to reveal exculpatory evidence is rare); Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. CRIM. L. & CRIMINOLOGY 881, 890 (2015); *see also In re* J. Kline, 113 A.3d 202, 213 (D.C. 2015) (no sanctions imposed on federal prosecutor who violated D.C.'s Model Rule 3.8 by failing to disclose all potentially exculpatory information); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960-964 (2009) (discussing effective ways to regulate prosecutors).

prosecutors. These policies give more specific guidance about how and when prosecutors should make required disclosures.[28] The policies are written broadly but generally encourage or even require prosecutors to turn over more than *Brady* or Rule 16 require.[29] The Department of Justice provides its prosecutors with more specific legal guidance in discovery but has not made that guidance (called the Federal Criminal Discovery Blue Book) public.[30]

B. *Critique of Federal Discovery*

The current federal discovery regime, exclusive of the local rules discussed herein, is unjust. In this Section, I highlight two critiques. First, defendants don't get enough discovery early in the case to adequately prepare. Second, federal criminal discovery gives prosecutors too much control over disclosures and doesn't sufficiently benefit from the oversight of judges and the participation of defense attorneys. In Parts II, III, and IV, I describe how local discovery rules help to address these critiques.

1. Defendants Need More Discovery Earlier in the Case

First, under the current regime, defendants don't get enough discovery early in the case to prepare for trial or plea bargaining.[31] Scholars have generally agreed that broad discovery is desirable.[32] Judges and policymakers have also agreed, as evidenced by the historical trend toward broader discovery including open-file discovery, in the state systems, the Federal Rules, and now local rules.[33] (*Brady* is an

---

28 *See, e.g.*, Ogden Memorandum, *supra* note 23.

29 *See id.* ("Prosecutors are encouraged to provide broad and early discovery consistent with any countervailing considerations.").

30 The D.C. Circuit recently held that this guidance is shielded by the attorney work product privilege. Nat'l Ass'n of Criminal Def. Lawyers v. Dep't of Justice Exec. Office for U.S. Attorneys, 844 F.3d 246, 250 (D.C. Cir. 2016).

31 Judges and commentators have long complained about this. *See, e.g.*, Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1622 (2005) ("[F]ederal discovery rules . . . remain quite restrictive."); Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 314 n.24 (2001) ("[I]t is commonly recognized that a defendant's access to information in the prosecution's possession is extremely limited."). The Rule 16 Survey, discussed in Section IV.A, also provides evidence that most federal judges favored amending Rule 16. Peter A. Joy, *The Criminal Discovery Problem: Is Legislation a Solution?*, 52 WASHBURN L.J. 37, 46 (2012).

32 *See, e.g.*, CHARLES ALAN WRIGHT ET AL., 2 FED. PRAC. & PROC. CRIM. § 251 (4th ed. 2017); Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541 (2006); *see also* William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L.Q. 1 (1990).

33 *See supra* Section I.A (describing this trend); *see also* WRIGHT ET AL., *supra* note 32.

important exception: the Supreme Court has narrowed its holding in important ways.)[34] The principle reasons for expanding discovery are fairness to both innocent and guilty defendants, the proper functioning of the adversary system, and efficiency.

Broad discovery is especially helpful to innocent defendants, because those defendants may have very little firsthand knowledge of the charged offense. They face a loss of liberty and even life and need to be able to defend themselves from criminal charges. The criminal process is stacked against them through the "awesome power of indictment and the virtually limitless resources of government investigators."[35] The Bill of Rights is designed to redress these inequities by providing the right to counsel, a jury trial, due process, and other procedural rights for guilty and innocent defendants alike.[36]

A related reason for expanding discovery is rooted in the adversary system's method of arriving at the truth. Liberal discovery enables adversaries, as equals, to prepare and present opposing narratives for the jury to evaluate. The Supreme Court has endorsed this rationale in the context of notice of alibi requirements, which

> are based on the proposition that the ends of justice will best be served by *a system of liberal discovery which gives both parties the maximum possible amount of information* with which to prepare their cases and thereby reduces the possibility of surprise at trial. . . . The growth of such discovery devices is a salutary development which, *by increasing the evidence available to both parties, enhances the fairness of the adversary system.*[37]

Thus, discovery for guilty and innocent defendants alike improves the functioning of the adversary system and promotes fairness.

Finally, broad discovery can promote efficiency in criminal justice, by which I mean that the justice system should expend an optimal amount of resources (relative to other important social objectives) while still achieving just results. This is, of course, in stark contrast to the supposed efficiency of providing minimal discovery to defendants so that they have less fodder for litigation. Efficiency in this context should consider not only the litigation costs to the government but also "whether, from a pre-trial perspective, the undisclosed material at issue is likely to play a significant role in the preparation of the defense for plea bargaining."[38] This, in turn, depends on whether the discovery will

---

34 *See, e.g.*, Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987).

35 Wardius v. Oregon, 412 U.S. 470, 480 (1973) (Douglas, J., concurring).

36 *Id.* (The Bill of Rights "is designed to redress the advantage that inheres in a government prosecution.").

37 *Id.* at 472 (emphasis added) (citations omitted) ("We hold that the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants.").

38 Daniel S. McConkie, *Structuring Pre-Plea Criminal Discovery*, 107 J. CRIM. L. &

help to "accurately sort . . . the innocent from the guilty . . . and promot[e] reasonably informed sentencing that minimizes unwarranted sentencing disparities . . . ."[39] There is relatively little empirical work assessing criminal discovery's efficiency.[40]

Broad discovery can have disadvantages too. Its opponents have long argued that it would "encourage perjury, . . . encourage intimidation of prosecution witnesses; and . . . because of the defendant's privilege against self-incrimination, be a one-way street."[41] These are legitimate concerns, especially outside of the context of exculpatory evidence, and the Supreme Court, Congress and rule makers have clearly taken them into account in formulating federal discovery rules, such as the Jencks Act and Rule 16's lack of a timing requirement.[42]

Another argument against broad discovery is the costs that prosecutors must incur to gather, examine, and produce discovery. Any additional resources that prosecutors devote to discovery might limit their ability to bring additional cases. Both experience and more rigorous empirical work provide some support for this claim.[43] Of course, prosecutors, as "minister[s] of justice,"[44] should not be unduly concerned about these additional costs unless they outweigh any corresponding benefits to justice.

In spite of these concerns, the trend toward broader discovery in criminal cases[45] demonstrates a slowly emerging consensus: the benefits of broader discovery outweigh the losses.[46] For example, the state systems vary greatly in their approach to discovery; however, Professors Jenia Turner and Allison Redlich have recently identified ten states as having restrictive ("closed-file") regimes, seventeen states with liberal ("open-file") regimes, and twenty-three states that fall somewhere in the middle of that spectrum.[47] Turner and Redlich considered the federal

---

CRIMINOLOGY 1, 46 (2017) [hereinafter *Structuring*].

39 *Id.*

40 *See infra* Section IV.A.

41 WRIGHT ET AL., *supra* note 32 (providing history).

42 *See supra* Section I.A.

43 *See* Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 CONN. L. REV. 771, 798 (2017); Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285 (2016). When I was an Assistant United States Attorney, our office received training about heightened and complex discovery requirements for electronically stored information. Afterward, a senior prosecutor remarked, only half in jest, that discovery obligations of federal prosecutors were becoming so intensive and complex that at some point, each one of us will have time to prosecute only one case.

44 MODEL RULES, *supra* note 26, at r. 3.8, cmt. 1.

45 *See supra* Section I.A.

46 Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1151–52 (2005) (describing method of evaluating the cumulative impact of several seemingly small criminal procedure rules).

47 Turner & Redlich, *supra* note 43, at 288 n.5, 302–06.

system to be relatively restrictive on that spectrum.[48] Likewise, as I will demonstrate herein, although there is a marked trend toward local discovery rules in the federal districts, the majority of districts still have no such rules. Furthermore, the Department of Justice has consistently opposed enhanced discovery procedures, although some federal prosecutors have at least nominally supported local discovery rules.[49]

The federal discovery regime simply does not require broad enough prosecutorial disclosures to the defense, both in terms of exculpatory evidence and inculpatory evidence. These disclosures are also inadequate in terms of timing, especially in plea bargaining.

Brady's materiality requirement unnecessarily limits the exculpatory evidence disclosed to the defense.[50] Prosecutors generally make *Brady* disclosure decisions in the privacy of their own offices, without the benefit of the judge's or the defense attorney's insights as to whether any nondisclosures are appropriate. Unfortunately, prosecutors seeking to comply with *Brady* may not be able to recognize how certain evidence could be helpful to the defense, nor can anyone accurately predict how evidence might affect a future criminal trial.[51]

True, prosecutors already have a strong incentive to show the defense the strength of the government case in plea bargaining. However, prosecutors frequently possess information that they consider neither necessary to incentivize guilty pleas nor materially[52] exculpatory.[53] (Examples of such information include supporting documentation for laboratory reports and interviews of seemingly immaterial witnesses.) Without that information, defense attorneys may not be able to pursue an independent investigation into alternative theories of the case. The results of that investigation might confirm the government's theory or persuade the government to offer a more lenient plea deal or even to dismiss the case. For example, one scholar has persuasively explained in detail how enhanced discovery in a state murder case would have likely changed the outcome in the defendant's favor.[54]

---

48 *Id.*

49 *See, e.g.*, Lissa Griffin, *Pretrial Procedures for Innocent People: Reforming* Brady, 56 N.Y. L. SCH. L. REV. 969, 987–88 (2011) (describing DOJ's opposition to amending Rule 16 in 2003 and 2006); REPORT OF THE JUDICIAL MEMBERS OF THE COMMITTEE ESTABLISHED TO REVIEW AND RECOMMEND REVISIONS OF THE LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS CONCERNING CRIMINAL CASES 1 (Oct. 28, 1998) (citing agreement of prosecutors in local rule revisions) [hereinafter *Massachusetts Local Rules Report*].

50 Others have made this critique extensively. *See generally* Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533 (2010).

51 *See* United States v. Bagley, 473 U.S. 667, 700–03 (1985) (Marshall, J., dissenting).

52 *Id.* Here, for purposes of Rule 16 and the *Brady* rule, "materiality" has a dual meaning.

53 *Structuring*, *supra* note 38 at 13–16; *see also* Grunwald, *supra* note 43.

54 Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. 1091, 1115–20 (2014).

This is problematic because most defendants plead guilty without a trial, and many defendants do not plea bargain with an adequate understanding of the facts of the case.[55] Innocent defendants clearly need early and broad discovery to mount an effective defense.[56] Even guilty defendants need a strong understanding of the government's case against them so that they can know the strength of that case in deciding whether to plead guilty and so they can bargain for a sentence appropriate to the facts of the case.[57]

Even if defendants were getting enough discovery, the timing of federal discovery would still be problematic. When defendants are better informed earlier in the case, they can better prepare for trial so that the jury can make an informed decision based on the adversaries' strong presentation of their respective cases. Likewise, plea bargaining becomes more "accurate" when defendants are better informed. In other words, those defendants have broader and quicker access to information that sheds light on the strength of their own and the prosecution's case. These defendants should be able to prepare their case better and get results at the bargaining table commensurate with their actual criminal conduct. In contrast, less-informed defendants, who plead guilty without a good understanding of the strengths and weaknesses of the government's case, may be waiving valuable constitutional rights in exchange for a less valuable benefit than they realize.[58] These defendants could receive longer sentences than similarly situated but better-informed defendants. Furthermore, less-informed defendants may plead guilty to charges for which they would not have been convicted by a jury, simply because defendants who go to trial typically receive much more discovery than defendants who plead guilty.

There are gaps in the law regulating the timing of discovery. Overall, prosecutors benefit from early discovery, because most defendants plead guilty, and the earlier they do so, the less time and effort prosecutors need to put into those cases. But sometimes prosecutors possess information that they sincerely believe does not need to be turned over, even though that information might be useful to

---

55 *See Structuring*, *supra* note 38, at 12–17.

56 *Id.*

57 *Id.*

58 It might be argued that, as long as late-disclosed discovery is included in the presentence report, the judge can consider it at sentencing and thus, the late disclosure does no harm. That is true in theory, but in practice, the parties have already struck a deal that may set certain sentencing parameters in stone and the court is usually reluctant to upset that deal. Furthermore, prosecutors who have already struck a deal with the defense have a stronger incentive not to make further disclosures than do prosecutors who make full disclosures at the outset of the case. For a fuller discussion of this, see Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL'Y REV. 61, 71–72 (2015). *See also* Corinna Barrett Lain, *Accuracy Where It Matters:* Brady v. Maryland *in the Plea Bargaining Context*, 80 WASH. U. L.Q. 1, 29–31 (2002) (discussing the meaning of "accuracy" in plea bargaining).

the defense. In other words, prosecutors' incentives to turn over information that will hasten a guilty plea are not perfectly aligned with defendants' desires to mount an effective defense as soon as possible and in time to be of use in plea negotiations.[59] Thus, the standards described above governing the timing of discovery are inadequate: *Brady* isn't typically enforced in plea bargaining; Rule 16 applies to disclosures before trial, not guilty pleas; and Model Rule 3.8 requires "timely" disclosure but doesn't specify whether disclosures need to be turned over before a guilty plea.

Another problem with federal discovery is that prosecutors' decisions about what to disclose are often unreviewable, because judges and defense attorneys are simply not aware of what prosecutors have chosen not to disclose. Defense attorneys can file motions to compel, but those motions are not as effective if the defense cannot specify the disclosures to which they are arguably entitled. True, as the case goes on and the defense attorney does more case preparation, that attorney may be able to guess what was withheld and request it, but there are two problems with that. First, as the case goes on, prosecutors' incentives to not turn over *Brady* material increase.[60] Second, the proceedings will have dragged on longer than necessary solely because the prosecutor made a discovery decision that neither the judge nor the defense attorney could independently evaluate.

The Federal Rules also fail to encourage or require the parties to confer about discovery. Prosecutors generally do their best to comply with discovery rules, but they cannot always correctly guess whether information in their possession will be "material to preparing the defense,"[61] or materially exculpatory. Because prosecutors and defense attorneys do not always confer about their discovery needs, an opportunity to understand the other side's case is lost (assuming the defense attorney believes that giving the prosecutor some insight into the defense for discovery purposes is strategically sound). A related problem is that parties that fail to confer about discovery may fail to anticipate the scheduling issues that often arise relating to discovery, such as how the discovery motions schedule might affect the trial date; whether and when an informant's statement will be revealed; when and how the government will disclose voluminous documents, electronic evidence or wiretap recordings; and how long any additional expert reports or lab work might take to complete. Sometimes the court may be left to resolve discovery disputes that the parties could have easily anticipated and resolved by stipulation.

---

59 *See supra* note 58.

60 *See* Miriam H. Baer, *Timing* Brady, 115 COLUM. L. REV. 1, 7 (2015).

61 FED. R. CRIM. P. 16(a).

2. The Rules Ask Too Much of Prosecutors and Not Enough of Judges

A second critique of federal discovery is that it accords too much discretion to prosecutors and not enough oversight ability to judges and defense attorneys. This is a structural imbalance that is particularly bad in plea bargaining, where the prosecutor effectively wields the powers of not just the executive, but also the judicial branch and jury.[62] She brings charges as an executive, but in an important sense she cuts the judge and jury out of the process by negotiating the terms of the agreement, including the sentence, directly with the defense.

Even for those few cases that go to trial, the judge and defense attorney are hampered in their roles if the prosecution does not make timely, sufficient disclosures. The adversary system suffers where the defense is unable to prepare and present an informed case to the jury that tests the prosecutor's ability to prove the charges beyond a reasonable doubt. And judges without a full picture of the facts cannot make correct rulings or sentencing decisions.

Unfortunately, a significant weakness of materiality under *Brady* and Rule 16 is that prosecutors determine what to turn over and when, with little effective oversight. (Of course, federal prosecutors must comply with DOJ discovery policies too, but those policies are general and allow for maximum prosecutorial discretion in discovery.) In particular, *Brady* itself is an appellate remedy and its materiality standard requires a post-trial perspective.[63] Trial judges who want to ensure fair proceedings need a different standard. While Rule 16 has its own pretrial materiality standard, the procedures effectuating that standard are deficient.

In fact, the procedural mechanisms for enforcing federal discovery rules are weak generally, because they do not give judges effective oversight over prosecutors. It starts with the rules' failure to require the parties, as in civil cases, to create a joint discovery plan.[64] Without that conference between the parties, they are less likely to enter into stipulations. Rule 17.1 permits but does not require the court to hold a pretrial conference about discovery. That conference would give the judge an opportunity to become educated about discovery issues and to enter case-specific orders that could become a strong basis for later rulings. The rules do not require the parties to make a record of their disclosures, intended disclosures, and withheld disclosures.

In fact, the Federal Rules generally do not contemplate that

---

62 *Structuring*, *supra* note 38, at 8–12, 20–22; *see also* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1012–20 (2006).

63 Brady v. Maryland, 373 U.S. 83, 87–88 (1963).

64 FED. R. CIV. P. 26(f).

discovery will be at issue in the case unless the parties file discovery motions. But because the parties may often lack specific bases for discovery motions, they may file boilerplate motions.[65] Judges in civil and criminal cases alike know that discovery motions can gum up the docket and require judges to wade into a time-consuming thicket.[66] Such issues might more efficiently be solved if the parties were required to meet and confer before filing discovery motions, as in civil practice.[67]

In sum, the federal discovery regime does not give sufficient discovery to defendants and does not empower judges to effectively manage and oversee pretrial discovery. The next subpart addresses how district judges have responded to these problems.

C. *Legal Authority for the Revolution*

Expanding the rights of the accused is usually unpopular, and reforming federal discovery has proved difficult. In 2012, a bill in Congress died in committee that would have required federal prosecutors to disclose information "that may reasonably appear to be favorable to the defendant . . . without delay after arraignment and before the entry of any guilty plea."[68] The Department of Justice has adopted somewhat liberal internal discovery policies but has fought attempts to amend Rule 16 along those lines.[69]

In the face of legislative and rulemaking inaction, district judges nationwide have chosen to reform federal discovery one district at a time through local discovery procedures.[70] Nearly half of the districts have reformed discovery by local rules.[71] They have done so under the

---

65 *See, e.g.*, M.D. ALA. LOCAL R. CRIM. P. 16.1 ("This rule is intended to . . . eliminate the practice of routinely filing perfunctory and duplicative discovery motions."); N.D. FLA. LOCAL R. 26.2(a) (same); N.D.N.Y. LOCAL R. CRIM. P. 14.1(a) (same).

66 *See Massachusetts Local Rules Report*, *supra* note 49, at 6 (describing boilerplate discovery motions and responses: "[a]s a result, word processors tend to respond to each other").

67 FED. R. CIV. P. 37(a).

68 *See* Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. § 3014 (2012).

69 *See* Ogden Memorandum, *supra* note 23; *see also* RULE 16 SURVEY, *supra* note 7, at 3.

70 Most districts do not make public a history of their local rules, but it appears that the local discovery rules discussed herein were promulgated starting in the 1990s to the present. *See, e.g.*, S.D. FLA. LOCAL R. 88.10 (Local Rule 88.10, "Criminal Discovery," was made effective on December 1, 1994); D. MASS. LOCAL R. 116.1–116.6 (local discovery rules adopted in 1990, major revisions in 1998); Standing Order regarding Discovery in Criminal Cases, No. 06-085 (W.D. Mich. 2006) [hereinafter W.D. Mich. Standing Order]; D. MINN. LOCAL R. 12.1 (adopted effective October 13, 2014); E.D. PA. LOCAL R. CRIM. P. 16.1 (Local Rule 16.1, "Pretrial Discovery and Inspection," was made effective on January 1, 1998).

71 *See, e.g.*, M.D. ALA. LOCAL R. CRIM. P. 16.1; S.D. ALA. LOCAL R. CRIM. P. 16; D. ALASKA LOCAL R. CRIM. P. 16.1; D. ARIZ. LOCAL R. CRIM. P. 16.1–16.2; E.D. CAL. LOCAL R. 440; N.D. CAL. LOCAL R. CRIM. P. 16.1; D. CONN. LOCAL R. CRIM. P. 16(a); D.D.C. LOCAL R. CRIM. P. 16.1; N.D. FLA. LOCAL R. 26.2; S.D. FLA. LOCAL R. 88.10; N.D. GA. LOCAL R. CRIM. P. 16.1; S.D. GA. LOCAL R. CRIM. P. 16.1; D. HAW. LOCAL R. CRIM. P. 16.1; C.D. ILL. LOCAL R. CRIM. P. 16.1; N.D.

authority of the Rules Enabling Act, which allows district courts to make rules governing the practice in their own districts.[72] A majority of the district judges may enact local criminal rules "after giving appropriate public notice and an opportunity to comment."[73] The new rules must be "consistent with" federal law.[74] The rules are generally binding, although judges have discretion in whether and how to apply them in individual cases.[75] For example, judges need not apply local rules where doing so would work a manifest injustice.[76]

Relatedly, many district courts have sought to regulate criminal discovery without resorting to the formal local rulemaking process by a majority of judges. District judges have used alternative means to regulate discovery: district-wide general orders,[77] other standing orders,[78] voluntary rules of civility,[79] and Speedy Trial Act plans.[80]

ILL. LOCAL R. CRIM. P. 16.1; N.D. IOWA LOCAL R. CRIM. P. 16; S.D. IOWA LOCAL R. CRIM. P. 16; D. MASS. LOCAL R. 116.1–116.6; D. MINN. LOCAL R. 12.1; D. MONT. LOCAL R. CRIM. P. 16.1; D. NEB. LOCAL R. CRIM. P. 16.1; D. NEV. LOCAL R. CRIM. P. 16-1; D.N.H. LOCAL R. CRIM. P. 16.1; D.N.M. LOCAL R. CRIM. P. 16.1; N.D.N.Y. LOCAL R. CRIM. P. 14.1; E.D.N.C. LOCAL R. CRIM. P. 16.1; D. N. MAR. I. LOCAL R. CRIM. P. 17.1; E.D. OKLA. LOCAL R. CRIM. P. 16.1; N.D. OKLA. LOCAL R. CRIM. P. 16; W.D. OKLA. LOCAL R. CRIM. P. 16.1–16.2; E.D. PA. LOCAL R. CRIM. P. 16.1; W.D. PA. LOCAL R. CRIM. P. 16; D.R.I. LOCAL R. 16; D.S.D. LOCAL R. CRIM. P. 16.1, 47.1; E.D. TENN. LOCAL R. 16.2; M.D. TENN. LOCAL R. CRIM. P. 16.01; W.D. TENN. LOCAL R. CRIM. P. 16.1, W.D. TEX. LOCAL R. CRIM. P. 16, app. 16 at 3 (Disclosure Agreement Checklist); D. UTAH LOCAL R. CRIM. P. 16-1; D. VT. LOCAL R. CRIM. P. 16; E.D. WASH. LOCAL R. CRIM. P. 16; W.D. WASH. LOCAL R. CRIM. P. 16; N.D. W. VA. LOCAL R. CRIM. P. 16.01–16.12, 47.01; E.D. WIS. LOCAL R. CRIM. P. 16.

72 28 U.S.C. § 2071 (2012); FED. R. CRIM. P. 57; Linda J. Rusch, *Separation of Powers Analysis as a Method for Determining the Validity of Federal District Courts' Exercise of Local Rulemaking Power: Application to Local Rules Mandating Alternative Dispute Resolution*, 23 CONN. L. REV. 483, 487-88 (1991). Local criminal rules were formerly regulated under the Criminal Rules Enabling Act until 1988, when Congress amended the Rules Enabling Act to encompass both civil and criminal rules. Max Minzner, *The Criminal Rules Enabling Act*, 46 U. RICH. L. REV. 1047, 1058 (2012).

73 FED. R. CRIM. P. 57(a)(1).

74 28 U.S.C. § 2071(a) (2012); *see infra* Section IV.D.

75 CHARLES ALAN WRIGHT ET AL., 12 FED. PRAC. & PROC. CIV. § 3153 (2d ed. 2017) (citing Hollingsworth v. Perry, 558 U.S. 183 (2013), and some contrary authority).

76 *See, e.g.*, Note, *Rule 83 and the Local Federal Rules*, 67 COLUM. L. REV. 1251, 1264 n.70 (1967) (citing United States v. Bradford, 238 F.2d 395 (2d Cir. 1956)) (discussing cases along spectrum, from courts use of minimal to maximal discretion in disregarding local rules).

77 *See, e.g.*, *In re* Criminal Trial Scheduling and Discovery, Standing Order No. 15-2 (D.N.J. 2015) [hereinafter D.N.J. Standing Order] (signed by the Chief Judge only); General Order Regarding Best Practices for Electronic Discovery of Documentary Materials in Criminal Cases, G.O. 09-05 (W.D. Ok. 2009). Other "general orders" have not applied to all cases. Instead, the same order was entered in several or all cases. *See, e.g.*, Revised Criminal Procedural Order, General Order No. 242 (D. Idaho 2010) (revised Dec. 2014).

78 D. CONN. LOCAL R. CRIM. P. 16(a); Standing Order for Discovery and Inspection and Fixing Motion Cut-Off Date in Criminal Cases, No. 03-AO-027 (E.D. Mich. 2003) [hereinafter E.D. Mich. Standing Order]; S.D. W. Va. Arraignment Order and Standard Discovery Requests (S.D. W. Va. 2017) (effectuates LOCAL R. CRIM. P. 16.1); W.D. Mich. Standing Order, *supra* note 70; D.N.J. Standing Order, *supra* note 77; *cf.* Stipulated Discovery Order (N.D. Iowa 2017) (Standard Criminal Trial Management Order regulating Jencks Act disclosures).

79 *See, e.g.*, M.D. ALA. LOCAL R. CIV. P. 83.1(g); E.D. WASH. LOCAL R. 83.1(k); Civility

Judges acting alone have issued standing orders (sometimes called "local local rules") for all criminal cases in their courtroom.[81] Some of these districts have local rules and other local policies.[82] What local rules and all these other forms of discovery regulation have in common is that they conserve judicial resources by allowing judges to make policies that regulate discovery in all cases, instead of deciding discovery case-by-case.[83]

Despite the importance and variety of local criminal discovery procedures, scholars have paid little attention to them.[84] I describe several such procedures in the rest of this Article and explain how local discovery rules help to address the two critiques described in this Part. First, in Sections II.A and II.B, I describe how these local rules are designed to broaden the scope and quicken the timing of discovery. The rest of Parts II and III describe other local procedures that facilitate broad, early discovery, and Section IV.A describes evidence that these local rules are working in practice. Second, I discuss in Section IV.B how these local rules limit the power of prosecutors in discovery by strengthening judicial monitoring and giving the defense more opportunities to confer with the prosecution, arrive at stipulations, and file motions to compel discovery.

II. LOCAL RULES THAT STRENGTHEN PROSECUTORIAL DISCLOSURE OBLIGATIONS

This Part considers how local rule reforms aim to strengthen

Principles Administrative Order, No. 08-AO-009 (E.D. Mich. 2008); STATE BAR OF CA., CALIFORNIA ATTORNEY GUIDELINES OF CIVILITY AND PROFESSIONALISM (2017), http://www.cacd.uscourts.gov/attorneys/admissions/civility-and-professionalism-guidelines; D.C. BAR, VOLUNTARY STANDARDS OF CIVILITY IN PROFESSIONAL CONDUCT (2017), https://www.dcbar.org/bar-resources/legal-ethics/voluntary-standards-for-civility (attached as appendix to local rules); MICHIGAN BAR, STANDARDS FOR CIVILITY IN PROFESSIONAL CONDUCT (2017); *see also* PROFESSIONALISM CODES (AM. BAR ASS'N 2017) , https://www.americanbar.org/groups/professional_responsibility/committees_commissions/standingcommitteeonprofessionalism2/professionalism_codes.html (list of civility codes in state and federal courts). These civility guidelines are generally not a basis for sanctions.

80 18 U.S.C. § 3165 (2012) (requiring "each district court" to prepare a Speedy Trial Act plan, which must be approved by a reviewing panel and forwarded to the Administrative Office of the United States Courts).

81 *See, e.g.*, Emmet G. Sullivan, District J., Standing *Brady* Order (D.D.C. 2017) (issued in every case, regulating disclosure of *Brady* material).

82 *See, e.g.*, D. CONN. LOCAL R. CRIM. P. 16 (incorporating standing discovery order published in the criminal appendix to the local rules); S.D. W. VA. LOCAL R. CRIM. P. 16.1 (incorporating the Arraignment Order and Standard Discovery Request); General Order Regarding Best Practices for Electronic Discovery of Documentary Materials in Criminal Cases, G.O. 09-05 (W.D. Okla. 2009).

83 *See* JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 4–8 (1978).

84 *But see, e.g.*, Minzner, *supra* note 72; WRIGHT ET AL., *supra* note 75, at § 3152.

prosecutorial obligations to disclose more discovery to the defense earlier in the case. In Section II.A, I discuss local criminal rules that expand the scope of discovery beyond what Rule 16 and the *Brady* rule require. Section II.B describes local discovery rules that advance the time by which discovery must generally be provided.

Local rules regulating the scope and timing of discovery are particularly significant for defendants in plea bargaining: most defendants plead guilty, and the "discount" they receive for doing so can depend, to some extent, on how early in the case they plead guilty.[85] Furthermore, defendants who receive more discovery earlier in the case have a greater opportunity (assuming their attorney competently makes use of the disclosures) to prepare for plea discussions. This may allow defendants to enter into fairer and more fully informed pleas earlier in the case. This benefit is especially important to factually innocent defendants.

Section II.C describes local rules requiring prosecutors to inform the court of what they have and have not produced to the defense, and when they will produce it. These rules encourage prosecutors to be more transparent and timely in producing discovery and allow judges to sanction prosecutors who misrepresent the status of discovery.

Finally, I describe in Section II.D several local rules that require the parties to confer about discovery outside of court and, if possible, to reach stipulations and apprise the court of their joint discovery plan. This may help prosecutors to better fulfill their discovery duties, to the extent that such conferences provide defense attorneys with opportunities to make case-specific discovery requests; remind prosecutors of their discovery duties; and result in stipulations which specify how those duties apply to particular cases. Section III.A additionally considers how such conferences can give judges clear, case-specific grounds for enforcing prosecutorial discovery duties.

A. *Expanding the Scope of Discovery*

Rule 16 requires the prosecution to provide, upon the defendant's request, discovery that is "material to preparing the defense [or that] the government intends to use [] in its case-in-chief," and lists certain categories of evidence that must be turned over without regard to materiality (such as the defendant's statement and criminal history).

---

85 Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1065 (2006) ("As a general matter it makes sense for a defendant who is inclined to plead guilty to do so as early as possible, since the government's plea offer rarely improves with time.").

This triggers the defendant's reciprocal discovery obligations.[86] Courts have interpreted Rule 16's materiality standard as follows: "There must be some indication that the pretrial disclosure of the disputed evidence would have enabled the defendant significantly to alter the quantum of proof in his favor."[87] It does not matter whether material evidence itself is inculpatory or exculpatory.[88] Instead, the policy behind Rule 16 "materiality" has to do with defense preparation. Indeed, the Advisory Committee intended Rule 16 to "contribute . . . to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea."[89]

Rule 16 materiality is thus broader than *Brady*, which does not require evidence to be turned over unless it is both material (not just to preparing the defense as in Rule 16, but to the outcome of the case)[90] and exculpatory. Additionally, *Brady* materiality is measured by whether the information "consists of, or would lead directly to, evidence admissible at trial for either substantive or impeachment purposes."[91] In contrast, Rule 16 materiality is broader, because it is measured by whether there is a "strong indication" that the disclosure would "play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal."[92] Finally, whereas Rule 16 is enforced in trial courts, *Brady* is usually enforced on appeal when finality interests are strong.[93]

Many districts have broadened the scope of discovery by local rule. They have done so by adding several categories of evidence that must be turned over, regardless of whether they are material to the preparation of the defense. These include search warrants and supporting affidavits,[94] court orders and other documentation relating to wiretaps,[95]

---

86 FED. R. CRIM. P. 16(a)(1).

87 United States v. Ross, 511 F.2d 757, 763 (5th Cir. 1975).

88 United States v. Baker, 453 F.3d 419, 424 (7th Cir. 2006) (Rule 16 requires production of inculpatory and exculpatory evidence); United States v. Marshall, 132 F.3d 63, 67–68 (D.C. Cir. 1998) (same).

89 FED. R. CRIM. P. 16 advisory committee's note to 1974 amendment (cited in *United States v. Marshall*, 132 F.3d at 68) In spite of this committee note, the text of the rule fails to assure defendants discovery in time for plea bargaining.

90 *See* Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987).

91 United States v. Phillip, 948 F.2d 241, 249 (6th Cir. 1991); *see also* Wood v. Bartholomew, 516 U.S. 1, 8 (1995) (no *Brady* violation where it is not reasonably likely that prosecutor's failure to disclose inadmissible polygraph evidence would have resulted in a different trial outcome); Brady v. Maryland, 373 U.S. 83, 87–88 (1963) ("A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant."); Jason B. Binimow, Annotation, *Constitutional Duty of Federal Prosecutor to Disclose* Brady *Evidence Favorable to Accused*, 158 A.L.R. Fed. 401 (2015) (collecting cases).

92 United States v. Lloyd, 992 F.2d 348, 351 (D.C. Cir. 1993) (quoting United States v. Felt, 491 F. Supp. 179, 186 (D.D.C. 1979)).

93 *Structuring*, *supra* note 38.

94 D. HAW. LOCAL R. CRIM. P. 16.1(a); D. UTAH LOCAL R. CRIM. P. 16-2.

written descriptions of any consensual interceptions (e.g., when a confidential informant secretly recorded conversation with the defendant),[96] and evidence relating to any procedure in which a witness who will testify at trial identified the defendant.[97]

Even more significant, many local rules incorporate the *Brady* standard. That standard is already binding on prosecutors, but is typically only enforced by appellate courts.[98] Local discovery rules bring *Brady* back into trial courts using two general approaches. First, dozens of districts' local rules require prosecutorial production of exculpatory material by specific reference to *Brady* or its progeny or using the same basic legal parameters as *Brady* (i.e., material, exculpatory evidence).[99] Several of these districts list impeachment (*Giglio*) evidence separately, often allowing later disclosure due to witness security concerns.[100]

Second, several districts require disclosure of "exculpatory evidence" or "evidence favorable to the defendant" without reference to *Brady* case law or materiality.[101] A few districts do so explicitly, with language such as "without regard to materiality."[102] At least seven others do so implicitly.[103] These local rules (and general and standing orders)[104]

---

95 D. MASS. LOCAL R. 116.1I(1)(C).

96 D. MASS. LOCAL R. 116.1(c)(1)(D).

97 D. MASS. LOCAL R. 116.1(c)(1)(F). Other categories include inspection of vehicles and vessels, and latent fingerprints. Standing Discovery Order, ¶¶ L, M (N.D. Ala. 2017).

98 *See Structuring*, *supra* note 38.

99 RULE 16 SURVEY, *supra* note 7, at 26–31, app. B, tbl. 1 at 26–31 (specifically Approach 1, Groups 1 and 2, listing thirty-one districts); *see, e.g.*, M.D. ALA. LOCAL R. CRIM. P. 16.1(a)(1)(B) (requiring early production of *Brady* material, defined as "[a]ll information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, without regard to materiality, within the scope of Brady v. Maryland, 373 U.S. 83 (1963)); D. HAW. LOCAL R. CRIM. P. 16.1 (requiring early production of *Brady* material, citing *Brady* but providing no further definition).

100 Giglio v. United States, 405 U.S. 150 (1972); RULE 16 SURVEY, *supra* note 7, at app. B, tbl. 1 at 26–31 (specifically Approach 1, Groups 3 and 4). For a sample listing of such districts, see *infra* notes 112–15 and accompanying text.

101 RULE 16 SURVEY, *supra* note 7, at app. B, tbl. 1 at 26–31 (specifically Approach 2), app. B, tbl. 3 at 44.

102 Standing Order on Criminal Discovery, CR. Misc. No. 534 (M.D. Ala 1999); *see* S.D. ALA. LOCAL R. CRIM. P. 16; N.D. FLA. LOCAL R. 26.2.

103 N.D. CAL. LOCAL R. CRIM. P. 16-1, 17.1-1; S.D. GA. LOCAL R. CRIM. P. 16; E.D.N.C. LOCAL R. CRIM. P. 16.1; M.D.N.C. LOCAL R. CRIM. P. 16.1; W.D. PA. LOCAL R. CRIM. P. 16; S.D. W. VA. LOCAL R. CRIM. P. 16.1(a); E.D. WIS. LOCAL R. CRIM. P. 16; Arraignment Order and Standard Discovery Requests, 1(h) (S.D. W. Va. 2017) (ordering the government to "[d]isclose to defendant all evidence favorable to defendant").

104 *See, e.g.*, Emmet G. Sullivan, District J., Standing *Brady* Order (D.D.C. 2017). The District of Colorado's standard form "Discovery Conference Memorandum and Order" requests, on behalf of the defense, that the prosecution disclose all *Brady* material and reiterates the government's *Brady* duties. Discovery Conference Memorandum and Order (D. Colo. 2016). The District of New Mexico provides its magistrate judges with a model discovery order appended to its local rules which extensively regulates criminal discovery in all cases, including ordering the government to disclose *Brady* material. Standing Order, ¶ 6 (D.N.M. 2016) [hereinafter D.N.M. Standing Order].

greatly broaden the scope of *Brady* and should in theory result in much more discovery for the defense.[105] This type of reform comes closer to incorporating Model Rule 3.8(d)'s standard, which already regulates prosecutors in most jurisdictions but is weakly enforced through state disciplinary bodies.[106] Putting that standard in local rules makes it much easier for judges to enforce.

While expanding the grounds for discovery, some districts are also attempting to limit the grounds for obtaining discovery to the federal rules and the local rule regulating discovery.[107] This type of provision apparently responds to the concern of some district courts that discovery motions often fail to specify a legal basis for ordering discovery. Local rules may provide such a basis where Rule 16 does not.[108]

In short, local rules are expanding the scope of Rule 16 discovery. This reform, in conjunction with reforms that regulate and accelerate the time of discovery, promises to greatly improve criminal justice by giving prosecutors more specific rules about what to turn over and when, by giving judges more ways to enforce those rules, and perhaps by ultimately delivering more material discovery to criminal defendants.[109]

B. *Advancing the Timing of Pre-Plea Discovery*

About twenty-five districts have adopted local criminal rules requiring disclosures early in the case.[110] However, judges in all districts have authority under Rule 16 to set case-specific timelines even without a local discovery rule.[111] Relatedly, many districts have also attempted to expedite discovery by doing away with discovery requests. These local

105 For some empirical justification for this, see *infra* Section IV.A.

106 *See also* MODEL RULES, *supra* note 26 and text accompanying note 26.

107 *See, e.g.*, D.N.M. Standing Order, *supra* note 104, at ¶ 5 ("Unless mandated by the remaining paragraphs of this Order, evidence not otherwise subject to disclosure under Rule 16 is not required to be produced pursuant to this standing discovery Order.").

108 *See id.*

109 *Cf.* Mike Klinkosum, *Pursuing Discovery in Criminal Cases: Forcing Open the Prosecution's Files*, CHAMPION (May 2013), http://www.nacdl.org/Champion.aspx?id=28476 (discussing open-file discovery generally); *see also* W.D. TEX. LOCAL R. CRIM. P. 16(a), app. at 3 (Disclosure Agreement Checklist); D. UTAH LOCAL R. CRIM. P. 16-2 (search warrant documentation); E.D. WIS. LOCAL R. CRIM. P. 16(a) (open file policy); Speedy Trial Act Plan (S.D. Iowa 2007).

110 A few districts require disclosure a few days before trial. *See, e.g.*, D. MONT. LOCAL R. CRIM. P. 16.1(a) (requiring disclosure of *Brady* material and results of physical or mental examinations or tests seven days before trial); E.D. WIS. LOCAL R. CRIM. P. 16(a)(4) (when the government is following an open-file policy, materials must be disclosed no later than fifteen days before trial); *see also* RULE 16 SURVEY, *supra* note 7, at app. B, tbl. 2 at 32–39 (collecting local rules).

111 *See* FED. R. CRIM. P. 16(d)(1) ("At any time the court may, for good cause . . . grant other appropriate relief.").

rules, taken together, seek to advance the timing of discovery to be of use to the defense during plea negotiations and trial preparation.

Many criminal local rules require Rule 16 disclosures soon after the arraignment, typically within a specified number of days, often seven, ten, or fourteen.[112] Many districts require disclosure of all exculpatory evidence, including *Giglio* materials, at a time close to the arraignment.[113] Relatedly, some districts have devised two and three-tiered disclosure schemes in which the bulk of criminal discovery must be provided soon after the arraignment, but certain discovery can be delayed until just before the trial.[114] Many districts require the production of *Brady* material at a time close to the arraignment, but do not require the production of *Giglio* material, which may implicate witness safety concerns, until a time close to trial.[115] The Local rules in New Hampshire do not require the production of any exculpatory evidence until twenty-one days before the trial.[116]

---

112 *See, e.g.*, S.D. GA. LOCAL R. CRIM. P. 16.1 (within seven days of arraignment); D. HAW. LOCAL R. CRIM. P. 16.1(a) (within seven days of arraignment); D. NEB. LOCAL R. CRIM. P. 16.1(a)(3) (within fourteen days of arraignment); M.D. TENN. LOCAL R. CRIM. P. 16.01(a)(2) (within fourteen days of arraignment); W.D. TEX. LOCAL R. CRIM. P. 16(b)(1)(C) (within fourteen days of arraignment); D.N.M. Standing Order, *supra* note 104, at ¶ 2 (within seven days of entry of standing order, government must provide all Rule 16 disclosures and defense must provide reciprocal discovery); Arraignment and Pretrial Discovery Order (D.R.I. 2017) [hereinafter D.R.I. Order] (within five days of arraignment); E.D. Mich. Standing Order, *supra* note 78 (parties must meet and confer about discovery within ten days of arraignment unless otherwise ordered by court). The District of Puerto Rico's local discovery rule states that the "government may *voluntarily* disclose, within thirty (30) days after the arraignment, all material discoverable pursuant to FED. R. CRIM. P. 16." D.P.R. LOCAL R. 116(a) (emphasis added).

113 *See, e.g.*, M.D. ALA. LOCAL R. CRIM. P. 16.1(a)(1)(B) (*Brady* material), 16.1(a)(1)(C) (*Giglio* material); S.D. ALA. LOCAL R. CRIM. P. 16(b)(1)(B) (*Brady* material), 16(b)(1)(C) (*Giglio* material); D. CONN. LOCAL R. CRIM. P. 16 app. at 147–50 (Standing Order on Discovery); N.D. FLA. LOCAL R. 26.2(d); S.D. FLA. LOCAL R. 88.10(c) (*Brady*), 88.10(d) (*Giglio*) (prior convictions of testifying informants); D. MASS. LOCAL R. 116.2; W.D. TEX. LOCAL R. CRIM. P. 16, app. at 3 (Disclosure Agreement Checklist covers *Brady* and *Giglio* material); Revised Criminal Procedural Order, No. 242, ¶ 5 (D. Idaho 2010).

114 *See* D. MASS. LOCAL R. 116.2; D. MONT. LOCAL R. CRIM P. 16.1(a) (for FED. R. CRIM. P. 16(a)(1)(A), (B), (C), (D), (E) and (G), discovery shall be provided fourteen days after arraignment; for FED. R. CRIM. P. 16(a)(1)(F), discovery shall be as soon as reasonably possible but no later than seven days before trial); D. VT. LOCAL R. CRIM. P. 16; Sarah W. Hays, Mag. J., Standing Order for Criminal Cases (W.D. Mo. 2017) [hereinafter Hays Standing Order]; *In Re* Criminal Discovery, No. 2015-5 (D. Or. 2015).

115 D. HAW. LOCAL R. CRIM. P. 16.1(a) (most prosecution discovery to be provided within seven days of arraignment), 16.1(h)(2) (impeachment material to be provided when ordered by the court); D. MASS. LOCAL R. 116.2(B) (exculpatory information within twenty-eight days of arraignment; *Giglio* at least twenty-one days before trial); N.D.N.Y. LOCAL R. CRIM. P. 14.1.D. VT. LOCAL R. CRIM. P. 16 (*Brady* evidence within fourteen days of arraignment; *Giglio* at least fourteen days before jury selection); W.D. Mich. Standing Order, *supra* note 70, at ¶ E (impeachment information to be disclosed in time for "effective use at the time of trial"); D.N.J. Standing Order, *supra* note 77 (encourages early disclosure of *Brady* material and disclosure of *Giglio* material before the final pretrial conference).

116 D.N.H. LOCAL R. CRIM. P. 16.1(d).

Many local rules have done away with disclosure requests for common discovery items already referenced in the Federal Rules. Rule 16 requires the defense to request certain discovery; the prosecution, if it provides that discovery, may request reciprocal discovery.[117] These requests are routine and probably only slightly increase litigation costs. Local rules doing away with such requests require the exchange of discovery without any requests and appear to be intended to help the parties get needed disclosures early in the case. Mandating automatic disclosures probably helps parties that forget to make the request; the local rules may limit the parties' need to dispute the sufficiency of each other's requests.[118]

At least a dozen districts have local criminal discovery rules that do away with the Rule 16 requirements that the parties request discovery.[119] Several have done so for *Brady* and *Giglio* material only.[120] Many others have done so for both *Brady* and *Giglio* material and Rule 16 discovery material.[121] The request requirement has often been eliminated by stating explicitly that no defense request is necessary.[122] More often, the local rule simply directs the prosecutor to produce discovery; no defense request is mentioned.[123] Other districts have also done away with the

---

117 FED. R. CRIM. P. 16 (a), (b). There are special rules governing discovery requests relating to certain defenses. *See* FED. R. CRIM. P. 12.1 (alibi), 12.2 (insanity), 12.3 (public authority).

118 *See, e.g.*, D. HAW. LOCAL R. CRIM. P. 16.1(a) ("Requests for discovery required by Fed. R. Crim. P. 16 are entered for the defendant by this rule so that the defendant need not make any further requests for such discovery," unless the defendant files a notice that he will not request discovery.); D.R.I. LOCAL R. CRIM. P. 16 ("Within 7 days after arraignment, the attorney for the government and the attorney for the defendant shall exchange written requests for disclosure of material and information pursuant to Fed. R. Crim. P. 16(a) and (b)."); D.N.M. Standing Order, *supra* note 104, at ¶ 1 Unless he files a waiver, the defendant is deemed to have made all Rule 16 discovery requests and be subject to reciprocal discovery. In the District of Colorado, the standard discovery order itself constitutes all required Rule 16 discovery requests, although defendants who want to avoid triggering reciprocal discovery obligations may opt out. Discovery Conference Memorandum and Order (D. Colo. 2016).

119 D. HAW. LOCAL R. CRIM. P. 16.1(a) ("Requests for discovery required by Fed. R. Crim. P. 16 are entered for the defendant by this rule so that the defendant need not make any further requests for such discovery."); I. Leo Glasser, District J., Certificate of Engagement and Criminal Pre-Trial Order [hereinafter Glasser Order] ("Defendant is deemed to have requested all information subject to disclosure by the government pursuant to Federal Rule of Criminal Procedure 16(a), unless a written waiver of such request is filed with the Court within five days.").

120 RULE 16 SURVEY, *supra* note 7, at app. B, tbl. 4 at 47–50; *see, e.g.*, N.D. FLA. LOCAL R. 26.2; Revised Criminal Procedural Order, No. 242, ¶¶ 1, 5 (D. Idaho 2010); W.D. Mich. Standing Order, *supra* note 70, at ¶¶ A, D, E.

121 RULE 16 SURVEY, *supra* note 7, at app. B, tbl. 4 at 47–50; *see, e.g.*, D. MASS. LOCAL R. 116.1–116.2; D.N.H. LOCAL R. CRIM. P. 16.1; N.D.N.Y. LOCAL R. CRIM. P. 14.1(b); W.D. TEX. LOCAL R. CRIM. P. 16 app. at 16-3 (Disclosure Agreement Checklist); D. VT. LOCAL R. CRIM. P. 16(a).

122 *See, e.g.*, D. MASS. LOCAL R. 116.1(a)(1); D.N.H. LOCAL R. CRIM. P. 16.1.

123 RULE 16 SURVEY, *supra* note 7, at app. B, tbl. 4 at 47–50 (collecting examples); *see, e.g.*, N.D.N.Y. LOCAL R. CRIM. P. 14.1(b); W.D. TEX. LOCAL R. CRIM. P. 16(a)(1) ("The parties need not make standard discovery requests . . . if . . . they confer . . . and sign and file a copy of the

Federal Rule of Evidence Rule 404(b)'s requirement that the defense request 404(b) evidence.[124] The District of Nebraska takes an unusual approach, "presuming" that a defense discovery request has been filed but still requiring the defense to make the request. However, notwithstanding the defense failure to make the request, the prosecution must still provide discovery unless the defense files a notice stating that it does not want discovery under Rule 16(a)(1).[125]

The local rules eliminating defense discovery requests, combined with local rules requiring discovery at or near the time of arraignment, evince a policy in criminal cases of getting key information into the parties' hands early in the case as efficiently as possible. This helps the parties to prepare for plea bargaining or trial earlier in the case and with less litigation.

Local rules require that early discovery could help make *Brady* more effective. *Brady* has no time limits; it simply requires evidence to be disclosed in time for the defense to make effective use of it at trial.[126] This is not helpful for plea bargaining defendants. State ethical rules require "timely disclosure" of exculpatory evidence.[127] Those rules are seldom enforced,[128] and the timely disclosure standard in particular is vague and would be difficult to enforce. Department of Justice policy similarly requires "early discovery,"[129] but this internal policy may be insufficient to constrain prosecutors in all cases. First, early discovery is vague and is to be determined by prosecutors "on a case-by-case basis."[130] Second, the policy by its own terms is not enforceable in court.[131] Third, even where prosecutors violate Justice Department policy, the Department rarely disciplines its own prosecutors.[132] All this is to say that, in spite of the fact that federal discovery is already regulated in many ways, local discovery rules could provide highly effective regulation because they are directly enforceable by federal

---

Disclosure Agreement Checklist."); D. VT. LOCAL R. CRIM. P. 16(a).

124 *See, e.g.*, D. VT. LOCAL R. CRIM. P. 16(d)(2); E.D. WASH. LOCAL R. CRIM. P. 16(a)(8); N.D. W. VA. LOCAL R. CRIM. P. 16.06.

125 D. NEB. LOCAL R. CRIM. P. 16.1.

126 *See, e.g.*, United States v. Beale, 921 F.2d 1412, 1426 (11th Cir. 1991) ("A *Brady* violation can also occur if the prosecution delays in transmitting evidence during a trial, but only if the defendant can show prejudice, e.g., the material came so late that it could not be effectively used.").

127 MODEL RULES, *supra* note 26, at r. 3.8(d).

128 LERMAN & SCHRAG, *supra* note 25, at 64–69 (discussing under enforcement of state ethical rules).

129 *See* Ogden Memorandum, *supra* note 23 ("Prosecutors are encouraged to provide broad and early discovery consistent with any countervailing considerations.").

130 *Id.*

131 *Id.* (Policy is "not intended to have the force of law or to create or confer any rights, privileges, or benefits." (citing United States v. Caceres, 440 U.S. 741 (1979))).

132 Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. CRIM. L. & CRIMINOLOGY 881, 890 (2015).

judges.

There is a fairly broad range of timing requirements among the districts, ranging from at the arraignment to thirty days after the arraignment. All such requirements must balance the defense interest in swift discovery, which is usually a prerequisite to effective case preparation, and the costs to the prosecution of producing discovery quickly. It is also possible that prosecutors in districts that have no time requirements for producing discovery, or even districts that have a thirty-day deadline, might try to use discovery rights as a bargaining chip in plea negotiations.[133] This would seemingly be more likely in simple cases, like Fast-Track immigration cases. The prosecution has a *Brady* duty to turn over exculpatory evidence even after a guilty plea.[134]

Mandatory early disclosures pose other concerns in criminal cases. For example, disclosing impeachment information too early in the case can pose significant witness security concerns.[135] Prosecutors must anticipate such problems to the extent possible and seek court orders under Rule 16 to delay disclosure.

Finally, many districts require that, where the government provides early discovery, the defense must reciprocate, sometimes within a set time period.[136] Other districts have accelerated prosecutorial discovery obligations without doing likewise to the defense's obligations.[137]

---

133 Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 83 (2015) ("Waivers of discovery . . . rights are sprouting up like wildfires.").

134 Brady v. Maryland, 373 U.S. 83, 87 (1963).

135 *See* FED. R. CRIM. P. 16 advisory committee's note to 1966 amendment (discussing the court's authority to deny, restrict, or defer discovery for security reasons).

136 D. MASS. LOCAL R. 116.1(d) (unless a defendant waives early prosecution discovery, the defense must provide reciprocal discovery within twenty-eight days of the arraignment); D. NEB. LOCAL R. CRIM. P. 16.1(b)(1) (on receipt of early government discovery, the defense must provide reciprocal discovery within thirty days after the arraignment); D.N.H. LOCAL R. CRIM. P. 16.1(b)(2) (same); N.D. W. VA. LOCAL R. CRIM. P. 16.01 (government must supply discovery within fourteen days upon request; then defense must supply reciprocal discovery within fourteen days); S.D. W. VA. LOCAL R. CRIM. P. 16.1 (same); Stipulated Discovery Order (N.D. Iowa 2017) (where the parties so stipulate, if defense receives government's standard discovery file, it must provide expanded reciprocal discovery; no time period specified). In the District of Utah, where the government provides early Jencks Act/Rule 26.2 statements, the defendant must do likewise. D. UTAH LOCAL R. CRIM. P. 16-1(e).

137 *See, e.g.*, W.D. PA. LOCAL R. CRIM. P. 16(B) (prosecution must provide discovery at arraignment upon request, but no corresponding defense duty); *see also* W.D. TENN. LOCAL R. CRIM. P. 16.1(c)(1) ("If the United States Attorney requests reciprocal discovery, and defense counsel has reciprocal discovery, then defense counsel shall respond in writing at least 14 days before trial."); D. UTAH LOCAL R. CRIM. P. 16-1(c) (no time limit for Rule 16 reciprocal discovery), 16-1(e) (no time limit for reciprocal Jencks Act statements).

C. *Requiring Prosecutors to Make a Record of the Status of Discovery*

Several districts have local rules requiring the prosecution to make an official record of what discovery it has and has not provided. These rules can serve as an important check on prosecutorial decisions not to disclose by putting the defense or the court on notice of such decisions. Two types of such rules are certifications of compliance, and declination procedures.

Several districts' local rules require prosecutors to certify their compliance with discovery obligations either in writing, or in open court, or both. For example, in the Western District of Oklahoma, the parties must meet and confer about discovery within fourteen days of the not-guilty plea.[138] Within seven days of that conference, they must file a Joint Statement of Discovery Conference, which requires the parties to state any contested issues of discovery and requires the prosecution to certify disclosure of several types of evidence, including all *Brady* material, whether there is wiretap evidence, whether an informer will testify, and notices of certain defenses.[139] Other districts likewise require prosecutors to certify in a court filing what disclosures they have made.[140] The Eastern District of Oklahoma had such a requirement for a time but did away with it.[141] The American Bar Association has previously recommended the use of criminal discovery checklists.[142]

Prosecutors who must affirm on the record very early in the case whether they have provided all *Brady* material have a strong incentive to provide such material, which would then probably be useful to the

---

138 W.D. OKLA. LOCAL R. CRIM. P. 16.1(a).

139 W.D. OKLA. LOCAL R. CRIM. P. 16.1(b), app. V.

140 *See, e.g.*, D. NEB. LOCAL R. CRIM. P. 16.1(a)(4) ("Upon providing the required discovery, the government must file and serve a notice of compliance."); D. NEV. LOCAL R. CRIM. P. 16-1; D. UTAH. LOCAL R. CRIM. P. 16-1(h). Under the District of Colorado Standard Discovery Conference Memorandum and Order referenced in the local discovery rule, the prosecutor must sign a memorandum certifying whether a confidential informant was a participant or a witness to the alleged crime and whether that informant will testify trial; and whether recordings or surveillance evidence exists and whether it will be turned over. That memorandum becomes the basis of a court discovery order. Discovery Conference Memorandum and Order, Section I.D, E (D. Colo. 2016).

141 There, prosecutors were formerly required to "provide discovery to the Defendant contemporaneously with the arraignment, ... be prepared to announce the status of discovery on the record," and file a joint disclosure agreement with the defense, to "encourage early, voluntary and complete discovery." E.D. OKLA. LOCAL R. CRIM. P. 16.1(A)(1) (amended July 5, 2016). That Disclosure Agreement Checklist, set forth on a court form in an exhibit to the Local Rules, forced the prosecutor to make specific, detailed discovery commitments on the record. The Local Criminal Rules were amended on July 5, 2016 to do away with that requirement. *Id.*

142 ABA, Resolution 104A Adopted by the House of Delegates (Feb. 14, 2011); *see also* Darryl K. Brown, *Defense Counsel, Trial Judges, and Evidence Production Protocols*, 45 TEX. TECH L. REV. 133, 145–49 (2012).

defense not just in trial preparation but also in plea bargaining, or to seek a court order exempting them from that requirement.[143] Even if that court order is obtained ex parte, at least a judicial officer will have considered the *Brady* question independently of an executive branch officer.[144] Defense counsel will likewise have a stronger incentive to make appropriate disclosures early in the case, and both parties will be on notice that, if their discovery representations prove to be false, the court would have a clear basis for sanctions.

The Eastern District of Michigan, which regulates discovery by standing order instead of local rules, has an optional certification procedure.[145] There, the prosecution can elect to meet and confer with the defense about discovery or to file a signed discovery notice on the court's form.[146] That discovery notice must provide great detail about what discovery materials are in the prosecution's knowing possession, including Rule 16 discovery, search warrant materials, wiretap materials, and Federal Rules of Evidence 404(b) materials.[147] This procedure seems less effective because it allows prosecutors to elect to meet and confer informally with the defense in lieu of making a clear, public record of their disclosures.

Declination procedures are another way that courts keep track of disclosures.[148] Several districts have established declination procedures in their criminal local rules so that the prosecution must inform the defense of the general nature of the discovery that the prosecution is choosing, at least for a time, to withhold.[149] Declination procedures can be invoked where the prosecution is concerned that disclosing

---

143 *See* Jason Kreag, *The* Brady *Colloquy*, 67 STAN. L. REV. ONLINE 47, 47 (2014) (calling for "a short *Brady* colloquy during which a judge would question the prosecutor on the record about her disclosure obligations. Such a colloquy would provide judges an additional tool to enforce *Brady*, nudge prosecutors to comply with their disclosure obligations, and make it easier to punish prosecutors who commit misconduct."); *see also* Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L.J. 1321, 1332, 1345 (2011) (discussing similar state requirements and similar recommendation by American College of Trial Lawyers; asserting "[a]ny lawyer is likely to exercise greater care when required to certify that he has done so to a court").

144 *Structuring*, *supra* note 38, at 39–51 (describing how separation of powers principles can improve *Brady* enforcement).

145 The Western District of Texas has a similar procedure which allows the parties to elect whether to file a Disclosure Agreement Checklist. W.D. TEX. LOCAL R. CRIM. P. 16(a); *cf.* Yaroshefsky, *supra* note 143 (discussing proposal for checklist system).

146 *See* E.D. Mich. Standing Order, *supra* note 78, at ¶ 1.

147 The defense still must request the materials. *Id.*

148 *But see* FED. R. CIV. P. 26(b)(3) (civil declination procedure).

149 *See* S.D. GA. LOCAL R. CRIM. P. 16(g); C.D. ILL. LOCAL R. CRIM. P. 16.1(B); N.D. ILL. LOCAL R. CRIM. P. 16.1(b); D. MASS. LOCAL R. 116.6; E.D. PA. LOCAL CRIM. R. 16.1(c); W.D. WASH. LOCAL R. CRIM. P. 16(d); N.D. W. VA. LOCAL R. CRIM. P. 16.02; Stipulated Discovery Order, ¶ 2 (N.D. Iowa 2017) ("When the United States withholds information from the expanded discovery file, notice of the withholding, along with a general description of the type of material withheld, will be included in the expanded discovery file."); E.D. Mich. Standing Order, *supra* note 78, at ¶ 2.

information will expose witnesses to threats or bodily harm, or where an ongoing investigation may be compromised. The court may issue an order delaying the discovery or even concluding that the discovery need not be provided at all.

The Northern District of West Virginia has a typical declination procedure. There, where the government declines to provide a requested disclosure, it must set forth in writing its reasons for refusing to do so. The prosecutor assigned to the case[150] must sign the writing and "specify the specific types of disclosures that are declined."[151] In the Eastern District of Michigan, if the prosecution determines that disclosing any Rule 16 or *Brady* materials would be "detrimental to the interests of justice," the government may decline to disclose such materials as long as it advises defense counsel in writing of this declination.[152] If defense counsel wishes to challenge that declination, it must do so "forthwith."[153]

By putting the defense on notice of prosecutorial non-disclosures, these rules allow the defense to file a motion to compel discovery, perhaps after meeting and conferring with the prosecution. Such motions force the prosecution to justify to the court, at least in camera, its reasons for withholding discovery.

Declination procedures are a salutary development in criminal cases. Such procedures allow courts and defense attorneys to hold prosecutors accountable for their exercise of discovery discretion.

D. *Requiring Joint Discovery Conferences Between the Parties*

Several districts have local discovery rules requiring the parties to confer with each other, enter into stipulations that clearly define their discovery obligations, and seek court enforcement for noncompliance. These local rules should be beneficial by helping prosecutors to comply

---

150 In the Northern District of Illinois, prosecutors invoking this procedure must receive approval from the United States Attorney or First Assistant United States Attorney. N.D. ILL. LOCAL R. CRIM. P. 16.1(b).

151 PUB. DEF. SERV. FOR THE D.C., SPECIAL LITIG. DIV., *BRADY V. MARYLAND* OUTLINE 31 n.22 (2013), http://www.pdsdc.org/docs/default-source/default-document-library/brady-outline-final-(2013).pdf?sfvrsn=0 (citing N.D. W. VA. LOCAL R. CRIM. P. 16.02); *see also* W.D. TEX. LOCAL R. CRIM. P. 16(a)(1), app. at 16-3 (requiring parties to file a "Disclosure Agreement Checklist" which includes lines for "exculpatory material" and "impeachment material"; the government may indicate it has been "disclosed, [that it] will disclose upon receipt, [that it] refuses to disclose, [or that this is] not applicable"). A District of New Jersey judge put a declination procedure in a discovery order. Order for Discovery and Inspection, No. CRIM 06-553, 2006 WL 3095956, at *2 (D.N.J. Oct. 30, 2006). I am not sure if this reflects district-wide practice. I give special thanks to Professor Cynthia Jones for her helpful comments to me regarding this type of rule.

152 *See* E.D. Mich. Standing Order, *supra* note 78, at 2, ¶ 2.

153 *See id.*

with their discovery obligations, helping judges to monitor that compliance, and resulting in more material discovery for the defense.

For example, in the Middle District of Tennessee, "[t]he parties shall make every possible effort in good faith to stipulate to all facts or points of law the truth and existence of which is not contested and the early resolution of which will expedite the trial."[154] Furthermore, "[t]he parties shall collaborate in preparation of a written statement to be signed by counsel for each side, generally describing all discovery material exchanged, and setting forth all stipulations entered into at the conference."[155] They must file this statement with the court.[156] These provisions encourage the parties to resolve their own discovery issues and set their own discovery schedule, although it does not specify when this discovery conference is to be held.

One unique provision comes from the Western District of Texas. There, the parties may hold a discovery conference off the record and fill out a disclosure agreement checklist. That checklist reviews several categories of discovery, including law enforcement reports, witness list and statements, defendant's statements and criminal history, and *Brady* and *Giglio* material. For each category, a party may state whether the evidence has been disclosed, will be disclosed upon receipt, or will not be disclosed. Where a party declines to disclose, the opposing party may file a motion to compel within fourteen days of the filing of the checklist.[157] According to the Local Rules Committee, this local rule provides a "formal means by which the parties can, by agreement, regulate their discovery practice."[158] The uniqueness in this provision is the detailed form which guides the parties in making stipulations and facilitates, where necessary, court enforcement of the stipulations.

Another interesting example can be found in the District of Nevada.[159] At any point in the case, the court or a party, for good cause shown, can designate a case as "complex."[160] In complex cases, the parties must file a joint discovery plan with the court that addresses the scope, timing, and method of disclosures, pretrial motion deadlines,

154 M.D. TENN. LOCAL R. CRIM. P. 16.01(a)(2)(m).

155 M.D. TENN. LOCAL R. CRIM. P. 16.01(a)(2)(n). The Southern District of Florida had this same provision in its local rules but repealed it on December 1, 2016. S.D. FLA. LOCAL R. 88.10(p) (2014).

156 M.D. TENN. LOCAL R. CRIM. P. 16.01(a)(2)(n).

157 W.D. TEX. LOCAL R. CRIM. P. 16(a)(3). This rule was last revised December 2009, four years before the Michael Morton Act greatly liberalized criminal discovery in Texas. *See generally* Cynthia E. Hujar Orr & Robert G. Rodery, *The Michael Morton Act: Minimizing Prosecutorial Misconduct*, 46 ST. MARY'S L.J. 407, 413–19 (2015) (describing the Act).

158 W.D. TEX. LOCAL R. CRIM. P. 16(a) committee note 1.

159 D. NEV. LOCAL R. CRIM. P. 16-1.

160 This designation is perhaps inspired by 18 U.S.C. § 3161(h)(7)(B)(ii) (tolling speedy trial clock in "complex" cases), as in D. ARIZ. LOCAL R. CRIM. P. 16.2(a), which has a similar but much simpler procedure.

Speedy Trial Act stipulations, and "electronic exchange or storage of documents."[161] In noncomplex cases, the local rules there presume, but do not require, that all criminal cases are subject to "joint discovery agreement[s]" to be filed within seven days of arraignment.[162] Under a joint discovery agreement, no party needs to make Rule 16 discovery requests and the parties are encouraged to set disclosure deadlines. If the parties fail to arrive at a joint discovery agreement, the government must file a unilateral "government disclosure statement," detailing "[t]he scope, timing, and method of the government's disclosures" required by law or that the government intends to produce.[163] Nevada's unique discovery regime appears intended to shape the parties' discovery discussions and encourage stipulations, especially in complex cases.

Some districts encourage the parties to meet about criminal discovery early in the case without requiring them to arrive at stipulations or to file a joint discovery plan.[164] An interesting example can be found in the D.C. District Court. There, the local rule states: "Defense counsel shall consult with the attorney for the United States prior to the first status conference in a criminal case and shall attempt to obtain voluntary discovery of all materials and information to which the defense may be entitled."[165] This rule requires the parties to attempt to agree upon discovery issues before seeking court intervention. The rule is enhanced by the voluntary local civility code,[166] attached as an

---

161 D. NEV. LOCAL R. CRIM. P. 16-1(a)(2)(F).

162 D. NEV. LOCAL R. CRIM. P. 16-1(b)(1).

163 D. NEV. LOCAL R. CRIM. P. 16-1(b)(2) There are currently no published cases interpreting or even citing this Rule.

164 *See, e.g.*, D. ALASKA. LOCAL R. CRIM. P. 16.1(a) (parties "must confer regarding pretrial discovery"); C.D. ILL. LOCAL R. CRIM. P. 16.1(C) ("If additional discovery or inspection [beyond the Rule 16 disclosures exchanged within seven days of arraignment], attorney(s) for the defendant(s) will confer with the appropriate Assistant United States Attorney within 14 days of the arraignment (or such later time as may be set by the presiding judge for the filing of pretrial motions) with a view to satisfying those requests in a cooperative atmosphere without recourse to the court. The request must be in writing, and the United States Attorney will respond in a like manner."); N.D. ILL. LOCAL R. CRIM. P. 16.1(a) (requiring the parties to "confer and attempt to agree on a timetable" regarding several discovery issues); E.D.N.C. LOCAL R. CRIM. P. 16.1(b) (requires parties to hold "Criminal Pretrial Conference" for exchange of discovery, not for stipulations, but allows the parties to do so by mail); W.D. OKLA. LOCAL R. CRIM. P. 16.1(a); D.R.I. LOCAL R. CRIM. P. 10.1 (requires the parties, "[w]ithin 7 days after arraignment, [to] confer in an effort to reach an agreement regarding discovery and any other matters that may be the subject of any motion that counsel intends to file"); N.D. W. VA. LOCAL R. CRIM. P. 16.01(h) (requirement to confer in complex cases); Standing Discovery Order, ¶ O (N.D. Ala. 2017) ("The parties shall make every possible effort in good faith to stipulate to all facts or points of law the truth and existence of which are not contested and the early resolution of which will expedite the trial.").

165 D.D.C. LOCAL R. CRIM. P. 16.1.

166 D.C. BAR, VOLUNTARY STANDARDS OF CIVILITY IN PROFESSIONAL CONDUCT pmbl. (2017) ("These standards are designed to encourage us, as lawyers and judges, to meet our obligations of civility and professionalism, to each other, to litigants, and to the system of

appendix to the local rules. These voluntary standards evince a strong policy of attorneys working closely together to resolve issues among themselves as much as possible without going to the judge.[167]

Local requirements for joint discovery conferences change criminal discovery under the Federal Rules in many ways. First, these requirements make it easier for the court to impose sanctions for failure to meet any agreed-upon deadlines.[168] Although Rule 16(d)(2) already allows the court to enter any order "that is just under the circumstances" for failure to comply with the requirements of Rule 16, joint discovery conferences whose results are reduced to writing or stated on the record make the parties' discovery obligations much more specific. The court can thus more easily issue orders sanctioning noncompliance.

Second, by giving the defense an opportunity to discuss discovery with the prosecutor, such conferences should help prosecutors to comply with their discovery obligations. A more open dialogue between the prosecution and the defense from the outset of the case could help make the defense aware of the general nature of the discovery that could be available in the case. This will permit the defense to make additional discovery requests. Likewise, prosecutors who have conferred with defense counsel about discovery may have a better understanding of the defense case, or at least of the defense's discovery requests. Such prosecutors will be in a better position as the case goes forward to recognize and turn over material, exculpatory evidence as *Brady* requires. Thus, joint discovery conference requirements could facilitate conversations that make the notoriously difficult *Brady* standard more workable.

Third, where parties in a criminal case cooperate regarding discovery, the litigation may be expedited and made more efficient. If they are forced to confer, they may arrive at an optimal discovery schedule that the court needs only to ratify. Additionally, a defense attorney that meets face to face with the prosecutor may be able to tailor boilerplate discovery requests.[169] The flip side, of course, is that these

---

justice.").

167 *Id.* ("While these standards are voluntary and are not intended by the D.C. Bar Board of Governors to be used as a basis for litigation or sanctions, we expect that lawyers and judges in the District of Columbia will make a commitment to adhere to these standards in all aspects of their dealings with one another and with other participants in the legal process."); *id.* ¶ 12 ("We will confer with opposing counsel about procedural issues that arise during the course of litigation, such as . . . discovery matters, pre-trial matters, and the scheduling of meetings, depositions, hearings, and trial. We will seek to resolve by agreement such procedural issues that do not require court order. For those that do, we will seek to reach agreement with opposing counsel before presenting the matter to court."); *id.* ¶ 15 ("We will make good faith efforts to resolve by agreement any disputes with respect to matters contained in pleadings and discovery requests and objections.").

168 In the District of Arizona, if the court determines that a case is "complex," the parties must confer to develop a discovery schedule. D. ARIZ. LOCAL R. CRIM. P. 16.2(a).

169 Joseph Gallagher, *E-Ethics: The Ethical Dimension of the Electronic Discovery*

discovery conferences may improperly require adversaries to cooperate to the detriment of their clients.[170] That is, prosecutors and defense attorneys have duties to their respective clients, and they should not be made to enter into stipulations or joint discovery plans that good advocacy and the interests of justice do not require, solely to avoid conflict.

All these local rules discussed in this Part generally require prosecutors to turn over more discovery at an earlier point in the case. This is partly facilitated by requirements that the prosecution collaborate directly with the defense to arrive at discovery stipulations, and by requirements that make a record of what discovery has and has not been provided so that the parties have an opportunity to file discovery motions. In the next Part, I will discuss how local rules have greatly strengthened the judge's role in overseeing the discovery phase of the case.

III. ENHANCED JUDICIAL MONITORING OF CRIMINAL DISCOVERY

Local criminal discovery rules frequently allow judges to actively manage the discovery phase of the litigation, similar to the role of civil "managerial judges."[171] This trend could be called "criminal managerial judging."[172] It is strongly influenced by the local rules discussed in Part II, like requiring the parties to confer about discovery and submit joint discovery plans, and setting rules that regulate the scope and timing of discovery. But in this Part, I discuss other types of local rules that strengthen judges' ability to enforce discovery rules and manage the discovery phase of the case. They include, as discussed in Section III.A,

Amendments to the Federal Rules of Civil Procedure, 20 GEO. J. LEGAL ETHICS 613, 618 (2007).

170 *See The Case for Cooperation*, 10 SEDONA CONF. J. 339, 349 (2009); Henry J. Kelston, *The Next Phase in the Evolution of Cooperation*, 37 AM. J. TRIAL ADVOC. 577, 578 (2014); Mitchell London, *Resolving the Civil Litigant's Discovery Dilemma*, 26 GEO. J. LEGAL ETHICS 837, 840, 842 n.36 (2013) (citing John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547 (2010) (extensive history of civil discovery)) (good history of civil initial disclosures and explanation of conundrum between adversarial ethics and cooperative discovery).

171 Judith Resnik coined this term. *See* Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 158 n.73, 185 (1997) (citing Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 647–49 (1994)); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 377 (1982).

172 Scholars have noticed that the trend toward judicial participation in plea bargaining is a form of criminal managerial judging. *See* Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 326 (2016) ("With no fanfare from scholars, 'managerial judging,' the philosophy that transformed civil litigation in the late twentieth century, has finally taken hold in criminal litigation, more than thirty years later."). I have previously argued in favor of greater judicial participation in plea bargaining. *See* McConkie, *supra* note 58, at 65.

holding pretrial (pre-plea) discovery conferences resulting in case-specific orders that regulate the timing and scope of discovery. These pretrial discovery conferences are different from joint discovery conferences. In joint discovery conferences, the parties confer about discovery off the record and reach stipulations if possible. In contrast, judges preside over pretrial discovery conferences and issue discovery orders, often based in part on the parties' prior agreements.

In Section III.B, I discuss how several districts have given judges greater authority over discovery motion practice to help them regulate discovery. This includes setting motion deadlines, requiring the parties to meet and confer before filing such motions, and defining the appropriate grounds for discovery motions. These grounds can include the case-specific discovery orders discussed in Subpart A.

Finally, in Section III.C, I discuss how local criminal rules have institutionalized the role of magistrate judges in managing criminal discovery. They have also specified several additional grounds beyond those listed in Rule 16 for sanctioning parties who commit discovery violations. Furthermore, local Speedy Trial Act plans strengthen judges' ability to regulate discovery by mandating discovery deadlines and through other means.

I discuss below in Sections IV.A and IV.B the practical and procedural significance of criminal managerial judging. It responds to the critique of Section I.B.1 by empowering trial judges to manage prosecutorial discovery decisions, which should ultimately result in more discovery to the defense earlier in the case.

A. *Pretrial Discovery Conferences*

Rule 17.1 permits the court to hold pretrial conferences "to promote a fair and expeditious trial."[173] The Advisory Committee Note indicated that the rule was "cast in broad language so as to accommodate all types of pretrial conferences."[174] This must include pretrial discovery conferences, although the rule does not mention them.[175] Consequently, several districts by local rule have adapted Rule 17.1 to pretrial discovery conferences. These on the record conferences are often mandatory and detailed in terms of what discovery matters are

---

173 FED. R. CRIM. P. 17.1.

174 FED. R. CRIM. P. 17.1 advisory committee's note to 1966 rules (citing Brewster, *Criminal Pre-Trials—Useful Techniques*, 29 F.R.D. 442 (1962); Estes, *Pre-Trial Conferences in Criminal Cases*, 23 F.R.D. 560 (1959); Kaufman, *Pre-Trial in Criminal Cases*, 23 F.R.D. 551 (1959)); WRIGHT ET AL., *supra* note 32, at § 292.

175 *Cf.* Klein, *Monitoring the Plea Process*, *supra* note 8, at 564 (proposing new Federal Rule 11.1 requiring a pre-plea conference to "make transparent and record the investigation by defense counsel and discovery offered by the federal prosecutors under Rule 16").

to be discussed. Many of the same districts that require joint discovery plans use the pretrial discovery conference to discuss and issue orders based on those plans. Criminal pretrial conferences greatly strengthen judges' ability to regulate discovery, because these conferences produce law of the case that results in discovery schedules, provides additional grounds for discovery motions, and strengthens judges' ability to enforce discovery orders.

The District of Massachusetts provides an excellent example of mandatory discovery conferences, but the full import of such conferences can only be understood in the context of that District's other local discovery rules. There, the prosecution must provide automatic discovery within twenty-eight days of arraignment.[176] Seven days later the parties must confer and file a joint memorandum which addresses discovery issues, speedy trial issues, and pretrial motions. Fourteen days later, an initial status conference is held before the magistrate to discuss that joint memorandum.[177] The court may hold interim status conferences as necessary until the final status conference; before each interim status conference, the parties must file a joint report. At the final status conference, the parties must discuss any discovery that has not yet been produced and when it will be produced, whether all outstanding discovery issues have been resolved, and by when they will be resolved.[178]

The case goes to the district court when "discovery is complete" or the only remaining issues are best decided by the district court.[179] After the district judge gets the magistrate judge's Final Status Report, the district judge conducts a "Rule 11 hearing" (for a guilty plea) or an "Initial Pretrial Conference."[180] At that initial pretrial conference, the court must, inter alia: (1) "confirm that all discovery has been produced, all discovery disputes have been resolved";[181] (2) order the government to disclose exculpatory information no later than twenty-one days before trial, unless the declination procedure has previously been invoked;[182] and (3) "determine whether the parties have furnished statements . . . of witnesses they intend to call in their cases-in-chief and, if not, when they propose to do so."[183]

In summary, this extraordinarily detailed procedure makes judges active managers and overseers of the entire pretrial/pre-plea discovery process. Where the defense and prosecution must arrive at a joint

176 D. MASS. LOCAL R. 116.1.
177 D. MASS. LOCAL R. 116.5(a).
178 D. MASS. LOCAL R. 116.5(c)(2).
179 D. MASS. LOCAL R. 116.5(b).
180 D. MASS. LOCAL R. 117.1(a).
181 D. MASS. LOCAL R. 117.1(a)(2).
182 D. MASS. LOCAL R. 117.1(a)(4).
183 D. MASS. LOCAL R. 117.1(a)(5).

discovery plan, the defense has a greater role in shaping the prosecution's discovery obligations. The joint discovery plan, other stipulations and on the record statements become additional bases for discovery motions. The court, by holding frequent pretrial discovery conferences, can learn more about discovery issues in the case, remind the prosecution of its discovery obligations, and enter additional discovery orders as needed. This shifts the power in criminal discovery away from prosecutors and toward trial judges and defense attorneys.

Massachusetts is not the only district to adopt strong pretrial conference rules. The Districts of Colorado and New Jersey have similarly robust regimes, as do several others.[184] Several other districts have weaker local rules governing pretrial conferences, typically in the form of discretionary conferences that may but need not deal with discovery.[185] Usually these pretrial conference rules are paired with a joint discovery conference requirement.[186]

Relatedly, a few districts have established multi-tiered discovery,

---

184 *See, e.g.*, S.D. ALA. LOCAL R. CRIM. P. 16, 17.1 (detailed local discovery rule plus additional requirements for pretrial scheduling conferences in complex cases); D. COLO. LOCAL R. CRIM. P. 17.1.1 ("A magistrate judge shall enter a Discovery Conference Memorandum and Order at the time of or no later than 14 days after the arraignment, and direct counsel to obtain from the district judge assigned to the case deadlines for filing pretrial motions and a trial date."); D. HAW. LOCAL R. CRIM. P. 17.1.1 (requires the magistrate judge to conduct at least one pretrial conference and suggests several possible topics, including discovery); D. NEV. LOCAL R. CRIM. P. 16-1 (within seven days of arraignment, parties must confer to develop a proposed complex case schedule); D. N. MAR. I. LOCAL R. CRIM. P. 17.1.1 (pretrial conference must deal with several enumerated discovery matters); W.D. OKLA. LOCAL R. CRIM. P. 16.1, 16.2 (form for Joint Statement of Discovery Conference, to be filed within fourteen days of arraignment); M.D. TENN. LOCAL R. CRIM. P. 16.01(a)(2) (pretrial conference within fourteen days of arraignment, deals with Rule 16, reciprocal discovery, *Brady*, notices of defenses); W.D. WASH. LOCAL R. CRIM. P. 16(a) (discovery conference within fourteen days of arraignment where all Rule 16 discovery is provided); E.D. WIS. LOCAL R. CRIM. P. 12 (provides for pretrial discovery conferences in unusually complex cases); Robert Junell, District J., Standing Discovery and Scheduling Order (W.D. Tex. 2003); D.N.J. Standing Order, *supra* note 77; *cf.* D. ARIZ. LOCAL R. CRIM. P. 16.2(a) (mandatory discovery conference in complex cases).

185 *See e.g.*, N.D. FLA. LOCAL R. 26.2(B), (G)(1) (requires discovery conference seven days before trial); N.D. GA. LOCAL R. CRIM. P. 17.1 (mandatory pretrial conference before magistrate may deal with discovery motions); D.P.R. LOCAL R. 117.1(a) (discretionary pretrial conferences); E.D. TENN. LOCAL R. 16.2 (pretrial conference is mandatory but the local rules does not specify how it is to be conducted); D. UTAH. LOCAL R. CRIM. P. 16-1(f) ("The court may order discovery as it deems proper under Fed. R. Crim. P. 17.1. A notification of compliance [specifying with particularity the matter produced for discovery] with any such discovery order, must be made by the party required to make disclosure.").

186 N.D. CAL. LOCAL R. CRIM. P. 16.1(a). Within fourteen days of a defendant's plea of not guilty, parties must "confer with respect to a schedule for disclosure" of Rule 16 material. *Id.* This is a prerequisite to a motion to compel discovery; pretrial conferences are discretionary, but if held, parties must file a pretrial conference statement addressing discovery matters. *Id.* at 17.1-1; *see also* E.D. PA. LOCAL R. CRIM. P. 16.1(a) (parties must confer within seven days of arraignment and at that conference, or as soon as possible thereafter, the government must comply with Rule 16 discovery obligations); D. UTAH LOCAL R. CRIM. P. 16-1 (requires joint discovery statements, notification of compliance procedure; if the defense disagrees, it must, in order to preserve its rights, file an objection).

granting greater discovery rights to defendants in felony cases (and occasionally Class-A Misdemeanors).[187] Other districts grant further discovery rights in felony cases deemed to be "complex," according to a classification from the Speedy Trial Act. Such cases might be subject to a more extended and extensive pretrial discovery phase, including more discovery conferences with the judge, more discovery deadlines, and more judicial oversight generally of what gets turned over and when.[188] This helps ensure sufficient judicial supervision in the cases most likely to have a complex discovery phase.

B. *Discovery Motions*

Rule 12 regulates motion practice generally, but local rules have begun to specifically regulate discovery motions. Many local rules have specified the exclusive grounds for discovery motions. Sometimes they require that the moving party cite the particular local rule provision or standing order paragraph that authorizes the discovery.[189] Local rules may permit a discovery motion where a party violates a local rule or discovery stipulation, thereby expanding the grounds for discovery motions.

Some districts, in expanding the list of grounds for discovery motions, have also limited other grounds for such motions. For example, the Northern District of New York's local discovery rule is the "sole means for the exchange of discovery in criminal actions except in extraordinary circumstances."[190] That rule could be problematic,

---

187 *See, e.g.*, D. ALASKA. LOCAL R. CRIM. P. 16.1(a) (no pretrial discovery conference necessary for misdemeanors); D. MASS. LOCAL R. 116.1, 116.5 (more extensive pretrial discovery conferences for felonies and Class-A misdemeanors).

188 *See, e.g.*, S.D. ALA. LOCAL R. CRIM. P. 17.1(a) (In "unusually complex" cases, the government must notify the court so that a pretrial scheduling conference may be held; a case is unusually complex "by reason of the number of parties, the novelty of legal or factual issues presented, the volume of discovery materials, or other factors peculiar to that case."); D. ARIZ. LOCAL R. CRIM. P. 16.2 (in "complex" cases, parties should meet and confer to arrive at discovery stipulations; the court will then hold a status conference "to determine a schedule for discovery, motions and any other pretrial case management issues"); D. NEV. LOCAL R. CRIM. P. 16-1; D.N.M. LOCAL R. CRIM. P. 16.2; N.D. W. VA. LOCAL R. CRIM. P. 16.01(h); D.N.J. Standing Order, *supra* note 77 (standing order provides for, in cases involving extensive discovery, multi-stage discovery and a discovery conference for the judge to monitor compliance); *see also* Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27 (1994).

189 *See, e.g.*, D.N.M. Standing Order, *supra* note 104 (requires all discovery motions to: (1) specify the evidence that should be produced; (2) specify the paragraph of the standing order that requires its production; and (3) name the attorney who has failed to produce it, as well as a description of the reasons that attorney gave for not doing so).

190 N.D.N.Y. LOCAL R. CRIM. P. 14.1(a). Of course, local rules that purport to limit the grounds on which discovery motions can be made cannot limit a court's inherent authority to regulate discovery. *See* CARY ET AL., *supra* note 21, at 321–47 (this may be what the drafters intended by the phrase "extraordinary circumstances").

because it fails to regulate all legal means of seeking discovery, such as the court's inherent power to order discovery or the special procedures relating to alibis and insanity defenses. However, it further provides: "This Rule is intended to promote the efficient exchange of discovery without altering the rights and obligations of the parties, while at the same time eliminating the practice of routinely filling perfunctory and duplicative discovery motions." Thus, the rule seems designed to streamline discovery procedures, not to necessarily close off already-existing avenues for discovery.[191] Other rules require the moving party to "specify exactly" the sought-after discovery."[192] Local discovery rules have also regulated discovery motion practice in other ways, such as by motion deadlines, and meet and confer requirements. These requirements, taken together, give the parties the opportunity to settle discovery disputes informally before resorting to litigation.

Federal Rule 12 makes clear that the court has authority to fix motion deadlines but does not actually set any deadlines.[193] However, many local rules require the court to set motion deadlines.[194] Many of them require all motions to be filed within a specified number of days following the arraignment.[195] This encourages the parties to conclude the discovery phase of the case long before trial, when cases are likely in any event to settle.

Meet and confer requirements established by local rule usually require a moving party to certify, before the filing of a motion to compel discovery, that the parties have met and conferred and attempted to informally resolve the problem.[196] This is the single most common kind

---

191 *Cf.* W.D. Mich. Standing Order, *supra* note 70, at ¶ O ("This order is designed to exhaust the discovery to which a defendant is ordinarily entitled and to avoid the necessity of counsel for the defendant(s) filing routine motions for routine discovery"; providing procedure for defense discovery motions concerning items not covered by the Order as long as the defense has first made a formal request and the government has denied that request).

192 D.R.I. LOCAL R. CRIM. P. 12(c)(1) ("All motions for discovery shall specify exactly what the movant seeks."); *see also* D.R.I. Order, *supra* note 112, at ¶ III.

193 FED. R. CRIM. P. 12(c)(1) ("The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing. If the court does not set one, the deadline is the start of trial.").

194 *See, e.g.*, D. COLO. LOCAL R. CRIM. P. 17.1.1 (requiring the magistrate judge to "direct counsel to obtain from the district judge assigned to the case deadlines for filing pretrial motions and a trial date"); D. HAW. LOCAL R. CRIM. P. 16.1(i)(2); D. N. MAR. I. LOCAL R. CRIM. P. 12.1 (all motions must be filed within fourteen days of entry of plea).

195 *See, e.g.*, N.D. IOWA LOCAL R. CRIM. P. 12(a) (all non-trial-related motions must be filed within twenty-eight days of the first arraignment); W.D. TEX. LOCAL R. CRIM. P. 12 ("Unless otherwise ordered by the court, the defendant must file any pretrial motion . . . within 14 days after arraignment"; the government must file its pretrial motions soon thereafter.); N.D. W. VA. LOCAL R. CRIM. P. 47.01(a) (all motions must be filed "within fourteen (14) days after receipt by defense counsel of LR Cr P 16.01 materials unless the Court, for good cause shown, extends the time").

196 *See, e.g.*, E.D.N.Y. LOCAL R. CRIM. P. 16.1; N.D.N.Y. LOCAL R. CRIM. P. 12.1(b); S.D.N.Y. LOCAL R. CRIM. P. 16.1; M.D. TENN. LOCAL R. CRIM. P. 12.01(a), 16.01(b); D. VT. LOCAL R. CRIM. P. 16(f); D.R.I. Order, *supra* note 112.

of local criminal discovery rule provision. Another kind of provision does not require the parties to meet and confer, but requires the moving party to certify that it has requested certain discovery and that request has been declined.[197]

Such requirements serve a few purposes. First, they encourage parties to resolve discovery issues informally. Judges in civil and criminal cases alike know that discovery motions can require judges to wade into a logistical thicket. The parties may be in a better position to resolve such disputes informally. The policy behind the rules "reject[s] the pure adversarial view of discovery."[198] Second, like the local rules requiring joint discovery conferences, meet and confer requirements empower the defense attorney vis-à-vis the prosecutor. At first blush, they may seem to deflect responsibility off of the court to regulate discovery. But when combined with other strong enforcement mechanisms, they should actually tend to empower the defense by forcing the prosecutor to the table and have a conversation about discovery. That conversation can potentially give both parties new discovery ideas; in particular, prosecutors who are seeking in good faith to comply with discovery obligations will hear the defense attorney out and may provide additional discovery whose relevance becomes apparent only after the parties confer.

C. *Magistrate Judges, Sanctions, and Speedy Trial Act Plans*

In this Section, I consider a few other beneficial local rule developments that strengthen the roles of judges in managing the pretrial discovery phase. Although no single one of these developments alone dramatically changes discovery, when taken together with the other developments I have discussed in Part III, they greatly increase the authority of judges to monitor pretrial discovery. First, several districts rely on magistrate judges to manage criminal discovery. Second, local rules can make it easier for district judges to sanction the parties (especially prosecutors) for discovery violations. Third, several districts' Speedy Trial Act plans require discovery to be provided and discovery motions to be heard early in the case.

Many districts are turning to magistrate judges to take a greater role in pretrial criminal discovery. By statute, magistrate judges may "hear and determine any pretrial matter pending before the court,"

---

197 W.D. Mich. Standing Order, *supra* note 70; D.N.M. Standing Order, *supra* note 104, at ¶ 8 (requires request be made to the attorney that is specific, describes the reasons for the attorney's denial).

198 Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2024 (1989).

including discovery motions.[199] Furthermore, they "may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."[200] The Supreme Court has explained: "The generality of the category of 'additional duties' indicates that Congress intended to give federal judges significant leeway to experiment with possible improvements in the efficiency of the judicial process that had not already been tried or even foreseen."[201] Thus, magistrate judges can have broad authority and district courts are required by statute to establish rules, including local rules, regulating their duties.[202]

Although federal magistrate judges have long been active in discovery in civil cases, they have had a more limited role in criminal proceedings.[203] Many district courts by local rule are expanding that role. For example, they either permit or require magistrate judges to: set discovery schedules[204]; issue discovery orders[205]; hold discovery hearings[206]; rule on non-dispositive motions, such as discovery motions[207]; determine ex parte whether certain information is *Brady* material[208]; and preside over hearings when the prosecutor invokes the declination of evidence procedure.[209] This is consistent with the expansion in the last quarter-century of magistrate judges' role in federal felony proceedings.[210] In short, there are virtually no limits on what discovery matters that magistrates are being empowered to handle.

As in civil cases, magistrate judges may be able to help relieve

---

199 28 U.S.C. § 636(b)(1)(A) (2012).

200 *Id.* § 636(b)(3).

201 Peretz v. United States, 501 U.S. 923, 932 (1991).

202 28 U.S.C. § 636(b)(4) (2012).

203 Peter G. McCabe, *A Guide to the Federal Magistrate Judge System*, FED. BAR ASS'N, 43, 46 (2014), http://www.fedbar.org/PDFs/A-Guide-to-the-Federal-Magistrate-Judge-System.aspx?FT=.pdf ("The Federal Rules of Civil Procedure contemplate that judges will be active civil case managers.").

204 *See e.g.*, N.D. CAL. LOCAL R. CRIM. P. 7-1(b)(7); E.D. LA. LOCAL R. CRIM P. 12 (discovery motion deadlines); D. MASS. LOCAL R. 116.1(e) ("At arraignment, the judicial officer shall set a date for completion of automatic discovery in accordance with this rule."); D. NEB. LOCAL R. CRIM. P. 12.3(a); D. UTAH LOCAL R. CRIM. P. 16-1(c) ("A discovery request under Fed. R. Crim. P. 16 must be made not later than the date set by the district or magistrate judge.").

205 N.D. IOWA LOCAL R. CRIM. P. 16; D. UTAH LOCAL R. CRIM. P. 16-1(f), (g). In several districts, magistrate judges issue orders regulating discovery at the outset of the case. *See, e.g.*, Hays Standing Order, *supra* note 114.

206 *See e.g.*, D. COLO. LOCAL R. CRIM. P. 17.1.1; D. HAW. LOCAL R. CRIM. P. 17.1.1.

207 D. MINN. LOCAL R. 12.1 advisory committee's note to 2014 amendment (stating that magistrate judges hear discovery motions, although the rule itself does not require it).

208 Glasser Order, *supra* note 119 ("The Magistrate Judge is authorized to assist in determining whether information is *Brady* material by examining such information *in camera* and advising the government"; magistrate also authorized to decide disputes between the parties over appropriate time periods for pretrial discovery).

209 N.D. W. VA. LOCAL R. CRIM. P. 16.02.

210 Douglas A. Lee & Thomas E. Davis, "*Nothing Less Than Indispensable*": *The Expansion of Federal Magistrate Judge Authority and Utilization in the Past Quarter Century*, 16 NEV. L.J. 845, 938 (2016).

overburdened district judges from the duties of managing criminal discovery. Indeed, helping district judges to handle their caseloads was one purpose of the legislation that expanded the magistrates' duties.[211] It makes sense for magistrates to play this role, because in the last quarter-century, the number of federal magistrates has greatly expanded, while the number of district judges has grown slowly.[212] Thus, to the extent that managing pretrial criminal discovery consumes additional judicial resources, it seems likely that magistrate judges will have to take on much of that work.

Just as local rules regarding the role of magistrates have enhanced the judiciary's role in monitoring discovery, so too have local rules that regulate sanctions. Judges already have the power, under Rule 16(d)(2), to issue various sanctions for violating Rule 16.[213] The court may issue orders compelling discovery,[214] granting a continuance,[215] excluding undisclosed evidence,[216] or any other relief that is "just under the circumstances."[217] The court "may" but is not required to enter any of these orders. Certain sanctions are mandatory where a party who calls a witness disobeys an order to produce a statement.[218]

Some local discovery rules have specified other available sanctions. For example, several local rules state that a violation of the local discovery rule will subject a party to sanctions.[219] This may be necessary to effectively enforcing local discovery rules; because Rule 16's sanction provision applies only to violations of Rule 16 itself,[220] violations of local rules might not otherwise trigger that provision.

Other local rules specify under what conditions certain sanctions may be applied, such as the Massachusetts local rule permitting the judge to grant a discovery motion if the opposing party fails to meet and confer with opposing counsel within seven days of a discovery motion being filed.[221] Other local rules provide for attorney fees and fines.[222]

---

211 Peter G. McCabe, *A Guide to the Federal Magistrate Judge System*, FED. BAR ASS'N, 10 (2014) (citing S. REP. 90-371, at 9 (1967)).

212 *See* Lee & Davis, *supra* note 210, at 856–57.

213 *See* FED. R. CRIM. P. 16 advisory committee's note to 1966 amendment; *see also* LAFAVE ET AL., *supra* note 9, at § 20.6 (describing sanctions for pretrial discovery violations generally).

214 FED. R. CRIM. P. 16(d)(2)(A).

215 FED. R. CRIM. P. 16(d)(2)(B).

216 FED. R. CRIM. P. 16(d)(2)(C).

217 FED. R. CRIM. P. 16(d)(2)(D).

218 FED. R. CRIM. P. 26.2(e).

219 E.D. CAL. LOCAL R. 440(d); D. MASS. LOCAL R. 1.3; W.D. Mich. Standing Order, *supra* note 70 ("Failure to abide by this order may result in the imposition of sanctions.").

220 FED. R. CRIM. P. 16(d)(2).

221 D. MASS. LOCAL R. 37.1.

222 In the Northern District of Iowa, "the local civil rules govern criminal proceedings to the extent they are not inconsistent with any express provision of a local criminal rule." N.D. IOWA LOCAL R. CRIM. P. 1(b). Possible sanctions provided for under the local civil rules "may include, but are not limited to, the exclusion of evidence, the prevention of witnesses from testifying, the

Still other rules describe how the good or bad faith of the party failing to disclose is relevant to sanctions.[223] While Rule 16's sanction provision is already strong, local rules that flesh it out may embolden judges to sanction parties who commit discovery violations, especially violations of the court's own local rules. I would predict that the application of more sanctions would lead to better compliance with discovery rules.

In addition to local discovery rules relating to magistrate judges and sanctions, the Speedy Trial Act plans of many districts expand judicial authority to monitor discovery. The Speedy Trial Act[224] sets forth procedures for expediting the disposition of criminal cases in accordance with the constitutional speedy trial guarantee.[225] Each district court is required by statute to prepare a written plan describing the specific steps it will take to comply with the Speedy Trial Act.[226]

Several districts' Speedy Trial Act plans work in tandem with local rules to regulate and expedite criminal discovery and pretrial conferences. The District of Nebraska provides a representative example. The rules there presume that the defense has requested discovery,[227] require most prosecution discovery to be produced to the defense within fourteen days of arraignment, and allow the court to set other discovery-related deadlines that can only be continued upon good cause.[228] The local rules do not provide for other judicial pretrial management of discovery, but the Speedy Trial Act Plan does. That Plan requires that "[r]easonable discovery, motion, and pleading deadlines"

striking of pleadings or other filings, the denial of oral argument, and the imposition of attorney fees and costs." N.D. IOWA LOCAL R. CIV. P. 1(f); *see also* D. HAW. LOCAL R. CRIM. P. 16.1(e) (sanctions include fines).

223 W.D. TEX. LOCAL R. CRIM. P. 16(c) (providing criteria, such as good faith, for when late-disclosed evidence may be excluded); *see also* D.R.I. Order, *supra* note 112, at committee note 2 (mandatory sanctions for willful violations of order).

224 18 U.S.C. §§ 3161–3174 (2012).

225 United States v. MacDonald, 456 U.S. 1, 7 n.7 (1982).

226 *See* 18 U.S.C. § 3165(a) (2012); *see also* 18 U.S.C. § 3165(b) (2012) ("The planning and implementation process shall seek to accelerate the disposition of criminal cases in the district consistent with the time standards of this chapter and the objectives of effective law enforcement, fairness to accused persons, efficient judicial administration, and increased knowledge concerning the proper functioning of the criminal law."). Several districts have Speedy Trial Act plans, including: the Central District of California, Eastern District of Pennsylvania, Middle District of Pennsylvania, District of Maryland, Eastern District of Arkansas, Eastern District of Michigan, District of Nebraska, Southern District of Iowa, and the District of Delaware. These plans used to be part of Criminal Rule 50(b). *See* JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 124 (1977). Even though these plans function much as local rules and have overlapping purposes, they have a totally different process for development and review.

227 D. NEB. LOCAL R. CRIM. P. 16.1; *cf.* M.D. TENN. LOCAL R. CRIM. P. 12.01 (making reference to the Speedy Trial Act Plan, attached as Appendix 2 to the Local Rules); Speedy Trial Act Plan regulates motion practice at § 4(f)(6); *see also* Section II.B (discussing local rules doing away with discovery requests).

228 D. NEB. LOCAL R. CRIM. P. 16.2.

should be set "at arraignment or as soon thereafter as practicable."[229] The purpose of this provision is "[t]o minimize undue delay and to further the prompt disposition of criminal cases." Thus, districts may use their Speedy Trial Act plan as an alternative or supplemental source of authority for expediting litigation through judicial management of discovery.[230]

Because efficiently managing discovery is essential to quickly getting cases to trial (or a plea bargain), the Speedy Trial Act plans are consistent with other local rules providing for strong judicial management of criminal discovery.

IV. THE LOCAL RULES REVOLUTION IS SUCCEEDING

As I explained in Part II, these local rules require prosecutors to turn over more discovery earlier in the case. Part III explained how these local rules greatly strengthen the role of trial court judges. This Part describes important implications of the rules. Section IV.A explains the key practical implication: greater discovery rights for criminal defendants may make plea bargaining more accurate in the sense that the parties will have better access to information about the case, which should result in convictions and sentences more commensurate with the criminal conduct.

I next turn from practical to procedural implications. Section IV.B explains how these local rules, taken together, should strengthen the enforcement of the *Brady* rule and adapt it to plea bargaining. In Section IV.C, I explain that the proliferation of local rules fractures criminal procedure nationally, but that fracture could be a good thing if it is a step toward better national rules. Finally, Section IV.D discusses the question of whether local discovery rules are "consistent with" federal law, as the statute governing local rulemaking requires. It concludes that most of the rules are consistent, but even if they are not, nationwide adoption would obviate that problem.

---

229 Speedy Trial Plan (D.D.C. 2002); *see also* D.D.C. LOCAL R. CRIM. P. 45.1 (incorporates by reference the District's Speedy Trial Act Plan), http://www.dcd.uscourts.gov/sites/dcd/files/Speedy-Trial-Plan2010.pdf. In the District of Columbia, the Speedy Trial Act Plan says: "Unless the court otherwise directs, all pretrial motions shall be filed within 11 days of arraignment, and the opposing party shall have 5 days to respond." *Id.* at (B)(6); M.D. TENN. LOCAL R. CRIM. P. app. 2, § (4)(f)(6) (Speedy Trial Act Plan requires the parties to first request discovery informally and then file a discovery motion within ten days of the denial of that request).

230 D. NEB. LOCAL R. CRIM. P. 50.2. Like most districts' Speedy Trial Plans, the Nebraska Plan is cast in general terms and doesn't set forth sanctions for failure to provide discovery. Nebraska Local Rule 50.2 cross-references the District Speedy Trial Act Plan without providing for any additional obligation that the parties follow it. *Id.* Another example is the Standard Arraignment and Pre-trial Discovery Order in the District of Rhode Island, which excludes ten days of time for Speedy Trial Act purposes to give the defendant time to examine discovery and prepare pretrial motions. D.R.I. Order, *supra* note 112, at § V.

A. *National Survey Measuring Effects of Local Discovery Rules*

The greatest promise of discovery reform by local rule is getting more material discovery to the defense earlier in the case. Although little empirical research has been conducted into whether that promise is being realized,[231] the Federal Judicial Center undertook a nationwide online survey in 2010 of federal judges, prosecutors, and defense attorneys regarding discovery practices in their districts.[232] Largely ignored in the literature,[233] this survey provides a wealth of information about practitioners' perceptions about local discovery practice.

The survey compared "broader disclosure districts" with "traditional districts." Broader disclosure districts were defined as having a local rule, standing order, or other policy requiring disclosure by the prosecution to the defense that extended beyond the requirements of *Brady v. Maryland*, *Giglio v. United States*, Rule 16, or Criminal Rule 26.2.[234] The survey found thirty-eight such districts.[235] About one-fourth of judges and U.S. Attorney's Offices, and about one-third of defense attorneys felt that their local discovery rule or policy differed significantly from Rule 16.[236] All other districts were considered "traditional."[237]

Some of the most important empirical questions about the local discovery rules are first, whether prosecutors in those districts are turning more discovery over to the defense, and second, whether that additional discovery is "material" (affects case outcomes). The Rule 16 Survey suggests that local discovery rules have in fact resulted in a modest increase of material discovery to the defense, as well as an increase in discovery violations relating to the timing and scope of

---

231 A few scholars have conducted empirical work relating to criminal discovery, especially so-called open file discovery. *See supra* note 43.

232 *See* RULE 16 SURVEY, *supra* note 7, at 1. 43% of judges (644 of 1,505) completed the survey, as did 31% of private attorneys (4,545 of 14,726), 47% of federal defenders (612 of 1,290), and 91% of U.S. Attorney's Offices (85 of 93). *Id* at 8. Individual Assistant U.S. Attorneys were not asked to respond.

233 *But see* Jenia I. Turner & Allison D. Redlich, *Reply to Miriam Baer and Michael Doucette's Reviews of Two Models of Pre-Plea Discovery in Criminal Cases*, 73 WASH. & LEE L. REV. ONLINE 471, 475 n.18 (citing RULE 16 SURVEY).

234 The survey question for judges, prosecutors and defense attorneys was:

> Does a local rule, standing order, or other policy in your district require disclosure by the prosecution to the defense that extends beyond the requirements of *Brady v. Maryland*, *Giglio v. United States*, Rule 16 (Discovery and Inspection), or Rule 26.2 (Producing a Witness's Statement)? For example, your district may have specific time requirements for disclosure or mandate automatic disclosure.

RULE 16 SURVEY, *supra* note 7, app. E1, no. 3 at 1, app. E2, no. 4 at 1, app. E3, no. 3 at 1.

235 *Id.* at 11.

236 *Id.* at app. C, tbl. 7 at 6.

237 Rule 16 has not substantively changed since the survey was administered.

discovery.

The survey asked judges, prosecutors, and defense attorneys whether prosecutors understood their discovery obligations. Judges in broader disclosure districts reported that prosecutors there were somewhat more likely to "usually understand" their disclosure obligations (51% in broader disclosure districts versus 48% in traditional districts) and just as likely (47% versus 47%) to always understand those obligations.[238] Defense attorneys reported that prosecutors in broader disclosure districts were far more likely to "always understand" (23% versus 12%) and "usually understand" (59% versus 48%) those obligations. U.S. Attorney's Offices reported a slightly increased understanding (80% versus 78% in the "always" category). Overall, practitioners generally believed that prosecutors in the broader disclosure districts have a somewhat greater understanding of their disclosure obligations. This is consistent with the survey data below suggesting that those prosecutors are turning over more discovery and committing fewer *Brady* violations.[239] It also somewhat undercuts the Department of Justice's long-standing opposition to amending Rule 16 to codify *Brady* on the ground that *Brady* obligations are "clearly defined by existing law."[240]

Defense attorneys in broader disclosure and traditional districts were asked about the number of cases in the past five years in which they believed that the government had failed to provide exculpatory or *Giglio* information. Whereas only 40% of defense attorneys in traditional districts could report that there were no such cases, 52% of defense attorneys in broader disclosure districts reported no such cases. The percentage of defense attorneys that did report such violations was correspondingly diminished in broader disclosure districts.[241] It thus appears that defense attorneys in the broader disclosure districts were aware of fewer disclosure violations relating to exculpatory and *Giglio* information.[242]

---

238 *Id.* at app. C, tbl. 8 at 7.

239 *Id.* Likewise, it appears that prosecutors in broader disclosure districts followed a more consistent approach to disclosures. Defense attorneys in those districts reported large improvements in the categories of "always consistent" (16% versus 9%) and "usually consistent" (50% versus 40%). Judges, in contrast, found a very small decline in consistency (-3 in "always consistent," 32% versus 35%; +3 in "usually consistent," 56% versus 53%). *Id.* at app. C, tbl. 9 at 8.

240 *Id.* at 3.

241 *Id.* at app. C, tbl. 21 at 14. Defense attorneys reporting one such case went down from 16% in traditional districts to 15% in broader disclosure districts; those reporting two to four such cases went down from 28% to 22%; those reporting five to ten such cases went down from 11% to 7%; those reporting eleven to twenty went down from 3% to 1%. *Id.* Of course, defense attorneys often cannot know when they haven't received discovery.

242 Of course, correlation does not equal causation, and it's possible that districts with fewer discovery violations are the districts most likely to issue local discovery rules in the first place.

Relatedly, defense attorneys in broader disclosure districts were much more satisfied than their counterparts in traditional districts with prosecutor compliance with discovery obligations. Whereas only 40% of defense attorneys in traditional districts reported being "satisfied" or "very satisfied" with prosecutorial compliance, that jumped to 60% in broader disclosure districts.[243] In contrast, judges were about equally satisfied with prosecutorial compliance as between the two kinds of districts.[244]

Judges were asked to estimate the number of cases in the past five years in which they had concluded that the prosecution had failed to comply with its disclosure obligations pursuant to local rule or standing order.[245] This question was not limited to disclosure of exculpatory and *Giglio* information. The incidence of apparent violations appeared to go up substantially in broader disclosure districts. That is, judges in such districts were much less likely to report no such violations (61% in broader disclosure districts versus 74% in traditional districts). Reports of only one such violation stayed about the same. Reports of two to four violations went up (to 22% from 14%), as did reports of five to ten violations (to 5% from 3%).[246]

Thus, discovery violations relating to exculpatory and *Giglio* information may have gone down, but overall discovery violations may have gone up. What kinds of discovery violations increased? The Rule 16 Survey provides an intriguing insight. Judges, defense attorneys, and prosecutors were asked what was the nature of the most frequent disclosure violation by the government. Judges in broader disclosure districts thought that "failure to disclose on time" was the most common violation and were much more likely than judges in traditional districts to believe this (61% versus 41%), and much less likely to name as other candidates "failure to disclose at all" (8% versus 19%), or "scope of disclosure" (26% versus 31%).[247]

Defense attorneys in both kinds of districts believed that "failure to disclose at all" was the most common violation, but those in broader disclosure districts were less likely than those in traditional districts to believe this (36% versus 44%). Attorneys in broader disclosure districts were more likely to think that "failure to disclose on time" was the most common type of violation (29% versus 21%). Defense attorneys in both types of districts essentially agreed as to whether scope of disclosure was the most common violation (29% versus 30%).[248] Finally, U.S.

---

243 *Id.* at app. C, tbl. 27 at 20.
244 *Id.*
245 *Id.* at app. E1, no. 15 at 5.
246 *Id.* at app. C, tbl. 24 at 15.
247 *Id.* at app. C, tbl. 25 at 17.
248 *Id.*

Attorney's Offices in broader disclosure districts were much more likely than their counterparts in traditional districts to name scope and timing as the most frequent violations (36% versus 15% and 43% versus 31%, respectively), and dramatically less likely to name "failure to disclose at all" (14% versus 46%).[249] One caveat is that relatively few U.S. Attorney's Offices responded to this particular question.[250]

In summary, judges, prosecutors, and defense attorneys agreed that "failure to disclose on time" was a much more common type of discovery violation in broader disclosure districts, and that failure to disclose at all was a much less common violation. Thus, assuming as the survey data seems to indicate that overall discovery violations increased in broader disclosure districts, it appears that this increase was due to a great number of violations relating to the scope and timing of discovery. This perhaps indicates that, in broader disclosure districts, judges were making effective use of local discovery rules governing scope and timing. At the same time, such districts had fewer violations relating to failure to disclose exculpatory information at all, perhaps because local discovery rules were more clear, more exacting, and more enforceable by judges. Such rules would have been expected to more effectively incentivize prosecutors to make disclosures.

Defense attorneys reported that, in those cases where exculpatory or *Giglio* information was not turned over, prosecutors in broader disclosure districts were less likely to have withheld such information based on materiality grounds. To put it another way, defense attorneys believed that prosecutors in traditional disclosure districts more often determined that discovery was not material and chose not to disclose it on that basis.[251] Thus, it appears that, in broader disclosure districts, prosecutors were turning over discovery with less regard to whether such discovery was material.

Overall, the Rule 16 Survey suggests that, while *Brady* violations in broader disclosure districts appeared to go down, the composition of disclosure violations changed. For example, districts with local rules expanding the scope of discovery and providing specific deadlines saw a greater number of disclosure violations, presumably because courts could now more easily enforce the scope and timing of discovery. At the same time, those districts saw fewer violations based on a failure to disclose exculpatory information.

The Rule 16 Survey provides some evidence that the discovery deadlines in broader disclosure districts effectively incentivize early disclosures. In the Rule 16 Survey, about two-thirds of federal judges

---

249 *Id.*

250 Fourteen offices from broader disclosure districts responded; thirteen traditional districts responded. *Id.*

251 *Id.* at app. C, tbl. 22 at 14.

and three-fifths of attorneys reported that their district required prosecutors to disclose within a fixed time after arraignment or indictment.[252] Defense attorneys overwhelmingly agreed that the timing requirements were "very important:" 62% said they were "in most cases," and 33% said they were "in some cases."[253]

Prosecutors and judges saw a downside to such requirements. One in six U.S. Attorney's Offices (17%) reported that the requirement had caused "serious problems in some cases."[254] Nearly half of the offices reported that the requirements had caused "minor problems in some cases."[255] About a quarter (26%) of them reported that the timing requirement had not "caused problems for federal prosecutors."[256]

The survey attempted to quantify a few of these problems. Three-fifths of U.S. Attorney's Offices reported that, because of the timing requirement, they had been unable to obtain cooperation from a witness in the past five years either "rarely" or "sometimes."[257] Forty percent of the offices never had that problem.[258] Similarly, U.S. Attorney's Offices in broader disclosure districts were somewhat more likely to report that, in the past five years, they had sought protective orders prohibiting or delaying disclosure based on witness safety or other security concerns.[259]

Judges corroborated prosecutors' opinions that broader disclosure districts saw an uptick in discovery-related security issues. About three-fourths of judges believed their district's "local rule requirements of disclosure of exculpatory information" had never "resulted in threats or harm to a prosecution witness." But a quarter of the judges believed that the requirements had indeed resulted in such threats or harm in a range between one and ten cases.[260] Judges were asked a similar question about the disclosure of *Giglio* information and gave very similar responses.[261]

This survey must be read cautiously and in light of other empirical work. As is well known, opinion surveys are designed to measure perceptions, which do not necessarily reflect reality. Still, it would be impossible to fully understand the operation of criminal discovery rules without surveying the judges and lawyers who directly work with those rules. Future scholarship may use many different methods to quantify

252 *Id.* at app. C, tbl. 12 at 9.
253 *Id.* at app. C, tbl. 13 at 10.
254 *Id.*
255 *Id.*
256 *Id.*
257 *Id.* at app. C, tbl. 15 at 11.
258 *Id.*
259 *Id.* at app. C, tbl. 20 at 13.
260 *Id.* at app. C, tbl. 18 at 12 (7% of judges thought there had been threats or harm in one case; 11% thought that it had occurred in two to four cases; 7% thought that it had occurred in five to ten cases).
261 *Id.* at app. C, tbl. 19 at 12.

the effects of these rules, such as by counting *Brady* appeals before and after their passage, studying the number of dismissals and case filings before and after their passage, or computing average case disposition times before and after their passage.

Another important question is whether and to what extent defendants are waiving these discovery rights in plea bargaining.[262] Although many local rules require disclosures relatively soon after the arraignment and thus before a plea deal is reached, this concern could be particularly important in cases that are disposed of quickly, such as Fast-Track immigration cases.

The Rule 16 Survey generally measured practitioners' perceptions about the effects the local discovery rules in their district. It distinguished between broader disclosure districts and traditional districts by asking whether local discovery rules "extended beyond the requirements" of federal law, but it rarely attempted to disaggregate any particular reforms from the whole package. For example, the survey had specific questions about expanding the scope of *Brady* and accelerating the timing of discovery. But it did not ask about other reforms, like pretrial conferences and discovery motion reform. Further empirical research must be conducted into those reforms in particular. Still, it seems reasonable to assume that many survey participants, when asked the broad question of whether their local discovery rules "extended beyond the requirements" of federal law, were thinking about all discovery reforms, including pretrial discovery conferences and discovery motion reform. Thus, the aggregate data gives some sense of their attitudes toward their local discovery rules taken as a whole.

The survey compared opinions about broader disclosure districts with opinions about traditional districts and demonstrated significant differences of opinion between how discovery worked in the two kinds of districts. These differences show correlation, but the survey results cannot prove that the differences were caused by the passage of local discovery rules. The sampling of the survey was not representative because respondents self-selected by choosing to respond, and the survey data does not reveal the geography of survey respondents.[263] Furthermore, individual prosecutors were not surveyed; instead, an official at each U.S. Attorney's Office filled out the survey on behalf of the entire office.[264]

More research needs to be done into whether and how much

---

262 *See* Klein et al., *supra* note 133 ("Waivers of discovery . . . rights are sprouting up like wildfires.").

263 *See* Miriam H. Baer, *Some Skepticism about Criminal Discovery Empiricism*, 73 WASH. & LEE L. REV. ONLINE 347, 352 (2016) (discussing the importance of representative sampling in surveys About criminal discovery); Turner & Redlich, *supra* note 233, at 476 n.18.

264 RULE 16 SURVEY, *supra* note 7, at app. D, at 2; *see also* Turner & Redlich, *supra* note 233, at 476 n.18.

enhanced discovery actually improves case outcomes. It does seem reasonable, at least in theory, to suppose that some defendants who are factually innocent will choose, based on the additional discovery mandated by these local discovery rules, to contest their charges instead of pleading guilty, thereby improving the accuracy of plea bargaining.[265]

B. *Local Rules Rebalance Justice System and Strengthen* Brady

Taken together, local criminal discovery rules tend to empower trial judges and defense attorneys, and to diminish the roles of prosecutors and appellate judges. This is effectively a rebalancing of the separation of powers from a prosecution-heavy system to one where the judicial can more effectively balance (or check) the executive. Local rules do this by encouraging prosecutors to cooperate more with the defense. They also invigorate *Brady* enforcement by allowing trial judges to actively manage discovery throughout the pretrial stage of the case. The role of appellate judges in enforcing *Brady* is correspondingly diminished.

One important implication of these local discovery rules is that they may encourage parties, instead of behaving as adversaries, to cooperate for both the public and defendants' good. These rules structure ongoing discussions about discovery by requiring the parties to meet and confer about discovery issues, to file joint discovery reports, and to address discovery in court and on the record. Such discussions educate prosecutors, give them a better idea of what disclosures the defense needs to prepare its case, and ultimately help prosecutors to comply with their *Brady* and other discovery violations. Such collaboration should make discovery less adversarial and even more inquisitorial.[266] This lesson has not been lost on many judges; for example, the stated purpose of the standing discovery order for the District of New Jersey is "to encourage but not require both the Government and the defense to provide discovery beyond that which is required by law."[267] There is reason to believe that many prosecutors, who see themselves not only as adversaries but as ministers of justice in discovery, will truly cooperate with the defense under a rules regime that facilitates, guides, and encourages that cooperation.

---

265 *See* Grunwald, *supra* note 43 (citing the paucity of empirical research assessing the effectiveness of broader discovery). However, some research has been encouraging. *See, e.g.*, Turner & Redlich, *supra* note 43.

266 *See* Laurie L. Levenson, *Discovery from the Trenches: The Future of* Brady, 60 UCLA L. REV. DISCOURSE 74, 81 n.31 (2013) (citing Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1 (2004)).

267 D.N.J. Standing Order, *supra* note 77, at ¶ 9.

Furthermore, all these local rule reforms taken together help prosecutors to produce discovery early in the case. Rule 16 and *Brady* require the production of discovery only in time to be used at trial.[268] Neither do they require prosecutors to provide impeachment information for use in plea bargaining.[269] There is a circuit split on whether *Brady* requires the prosecutor to provide exculpatory evidence in plea bargaining, and the Supreme Court has not decided the question.[270] But many local rules require prosecutors to turn over material within days of arraignment, and to hold an early joint discovery conferences with the defense; judges help enforce early discovery through pretrial discovery conferences early in the case that result in discovery deadlines. This has the effect of adapting Rule 16 and *Brady* to the plea bargaining context, a development of tremendous importance considering that criminal trials have all but disappeared.

These findings dovetail with scholarship demonstrating that, the longer a case drags on, the more prosecutors are invested in its outcome and less inclined to turn over exculpatory evidence.[271] The rules in some districts that require early production of evidence, in general and of exculpatory evidence in particular,[272] thus require disclosure of exculpatory material at a point in the case in which it is easier for prosecutors to make such disclosures.[273]

Brady has traditionally been enforced by judges on appeal. But the new local rules, by strengthening discovery obligations and incorporating the *Brady* standard, have made it easier for trial judges to enforce *Brady*. Prosecutors are more likely to prevail on *Brady* issues on appeal because of finality concerns and the difficulty of proving that withheld evidence would have changed the outcome, but the trial judge's calculus is different. Judges who apply *Brady* pretrial do not ask what would have changed the outcome; they ask what might yet change the outcome. That latter question is much more similar to one of Rule 16 materiality.[274] Thus, trial judges, in an abundance of caution and with no finality concerns to distort their analysis, may be more inclined to order the production of potentially exculpatory materials. This is consistent with the American Bar Association Standard in Model Rule 3.8(d), which does away with materiality for exculpatory evidence and

---

268 *See* United States v. Beale, 921 F.2d 1412, 1426 (1991).

269 *See* United States v. Ruiz, 536 U.S. 622, 629 (2002) (Constitution does not require pre-guilty plea disclosure of impeachment information); *Structuring*, *supra* note 38, at 42–45.

270 James M. Grossman, Comment, *Getting* Brady *Right: Why Extending* Brady v. Maryland*'s Trial Right to Plea Negotiations Better Protects a Defendant's Constitutional Rights in the Modern Legal Era*, 2016 B.Y.U. L. REV. 1525, 1542 (2016).

271 *See* Baer, *supra* note 60.

272 *See, e.g.*, E.D.N.C. LOCAL R. CRIM. P. 16.1 (requires disclosure within twenty-one days and without a materiality requirement).

273 *See* LAFAVE ET AL., *supra* note 9, at § 20.3(n) n.284.

274 *See supra* Section II.A.

requires the disclosure of "information" instead of admissible evidence.

Local rules also strengthen district judges because prosecutors cannot easily litigate the validity of the rules. In the first place, that would put prosecutors, who deal with the same judges every day, in the uncomfortable position of challenging a rule before one of the very judges who promulgated it. It does appear that in many districts judges have sought prosecutorial input in the passage of local discovery rules, but that has not stopped courts from passing many local discovery rules similar to those that the Department of Justice has opposed on a national level.

In short, local discovery rules effectively rebalance the system. They empower defense attorneys with information to be better advocates for their clients, they ensure that juries are better informed in adjudicating cases, and they help judges to adjudicate and sentence more justly. Broad criminal discovery makes the defense attorney a more effective check on the prosecutor, and it permits defendants to make more intelligent decisions about whether and on what terms to plead guilty.

Taken together, these local rule innovations strengthen *Brady* and Rule 16 and expand their scope, move *Brady* enforcement out of the appellate courts and into trial courts, and adapt *Brady* and Rule 16 to plea bargaining, where they are most needed.

C. *Fracture of Criminal Discovery Could Lead to National Reform*

One advantage of the Federal Rules of Criminal Procedure is that they are uniform nationwide, so that justice should not vary depending on where a case is litigated.[275] Although local rules can address many serious critiques of federal discovery, they also present a new challenge: the fracture of federal discovery practice. This fracture could conceivably cause similar cases prosecuted in different districts with different discovery rules to have different case outcomes. Little research has been done on this point, but at least one scholar has made a convincing case for it.[276] The problem is easy to imagine in the case of local discovery rules that mandate early discovery. Defendants in districts which mandate broad and early disclosures seem more likely to receive the discovery they need to fully prepare for plea bargaining than defendants in other districts who may plead guilty without the benefit of such disclosures.

Uniformity is concededly valuable where the national rules are fair and effective. But as I have argued, the federal criminal discovery rules

---

275 Dession, *I*, *supra* note 9, at 700.

276 *See, e.g.*, Meyn, *supra* note 54, at 1115–20. More empirical research is necessary to determine to what extent outcomes between districts differ based on local discovery regimes.

are deficient, and many local discovery rules appear to be better. In this context, at least, there appears to be a benefit to "federal federalism," whereby each district is a "rules laboratory"[277] that can experiment with procedural innovations. Perhaps the successful local discovery rules will serve as patterns for nationwide reform.[278] However, this laboratory model of rulemaking is much less effective if the districts do not make systematic attempts to evaluate the success of their rules innovations.[279]

For example, before 1993, several districts required some form of mandatory initial disclosures in civil cases through local rules, standard interrogatories, and standing orders.[280] These diverse local innovations eventually inspired a national rule that standardized the practice.[281] Likewise, if the experience of broader disclosure districts continues to be positive, hopefully Rule 16 will eventually be amended along the lines of the local rule reforms described herein.[282] The "siren song of uniformity" should not distract us from our ultimate quest for better procedure.[283]

D. *Exceeding the Legal Authority for the Revolution*

An even more serious objection to local discovery rules is that many of them may have been promulgated in violation of federal law. The Rules Enabling Act and Criminal Rule 57 require that, when a district court makes local rules, those rules must be "consistent with" federal law.[284] Even though several of these local discovery rules are

277 *See* Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901 (2002) (explaining how local rules become national rules); *see also* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 897–900 (1999) (section entitled "The Golden Age of Court Rulemaking: 1950-1970").

278 Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929 (1996) (considers procedural localism, the CJRA, and limits on congressional authority in rulemaking); Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 759 (1995) (critiquing localism in rulemaking); Samuel P. Jordan, *Local Rules and the Limits of Trans-Territorial Procedure*, 52 WM. & MARY L. REV. 415 (2010); Richard Marcus, *Confessions of a Federal "Bureaucrat": The Possibilities of Perfecting Procedural Reform*, 35 W. ST. U. L. REV. 103 (2007).

279 Subrin, *supra* note 198.

280 FED. R. CIV. P. 26 advisory committee's note to 1993 amendment.

281 *Id.* ("The rule is based upon the experience of district courts that have required disclosure of some of this information through local rules, court-approved standard interrogatories, and standing orders.").

282 For a thoughtful critique of this approach, see Michael A. Livermore, *The Perils of Experimentation*, 126 YALE L.J. 636, 642 (2017) ("Whether policy experimentation can be expected to lead to socially beneficial outcomes depends on the balance between deliberative information and political information and how that information is put to use.").

283 Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 CASE W. RES. L. REV. 501, 502 (2016).

284 *See* FED. R. CRIM. P. 57(a)(1); *see also* 28 U.S.C. § 2071(a) (2012).

salutary, a few of them are not consistent with federal law. And perhaps all of them taken together work such a large change in federal discovery as to no longer be consistent with federal law.

Courts have not often considered the meaning of "consistent with" in this context.[285] The First Circuit has tested consistency by asking "first, whether the [federal rule and local rule] are textually inconsistent and, second, whether the local rule subverts the overall purpose of the federal rule."[286] This approach accords with the 1944 Advisory Committee Note to Criminal Rule 57: "While the rules are intended to constitute a comprehensive procedural code for criminal cases in the Federal courts, nevertheless it seemed best not to endeavor to prescribe a uniform practice as to some matters of detail." It also accords with the dictionary definition of the term, which includes not only "free from variation" (a nonsensical interpretation for this context, because all local rules vary from the federal rules) but also "compatible."[287] Thus, local rules should be deemed consistent with federal rules where they address only "matters of detail" and are compatible with the text and purpose of the federal rules.

Whether these local discovery rules confine themselves to "matters of detail" is doubtful; several of them go beyond that. It could be argued that the Federal Rules of Criminal Procedure establish a comprehensive discovery regime that, in conjunction with *Brady* and the Jencks Act, carefully balances the relevant interests in discovery. Even small variations from the Federal Rules could upset this delicate balance. Three examples could be given that have already been discussed. First, Rule 16 requires discovery requests, but several local rules abrogate that requirement. Second, Rule 16 is conspicuously silent on deadlines for pre-plea and pretrial discovery, instead giving courts authority to regulate the timing of discovery case-by-case. However, many local rules require the production of discovery long before trial.[288] Thus, perhaps local rule discovery deadlines that presumptively apply to each case contradict that rule. Third, local rules that expand upon the list of items to be disclosed in every case could be said to contravene Rule 16's requirement that only specified categories must be disclosed in each case.[289] Fourth, although Rule 17 only permits pretrial discovery

---

285 *See, e.g.*, Baylson v. Disciplinary Bd. of Sup. Ct. of Pa., 975 F.2d 102, 107 (3d Cir. 1992). *But see* Stern v. U.S. Dist. Court for Dist. of Mass., 214 F.3d 4, 21 (1st Cir. 2000) (striking down local rule requiring judicial pre-approval of grand jury subpoenas for defense attorneys).

286 Whitehouse v. U.S. Dist. Court for Dist. of R.I., 53 F.3d 1349, 1363 (1st Cir. 1995).

287 *Consistent*, MERRIAM-WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/consistent (last visited Sept. 4, 2017).

288 *See supra* Section II.B.

289 In other words, while Rule 16 mentions the defendant's prior record and statements, certain documents and objects, reports of examinations and tests, and expert discovery, many local rules require the government to disclose search warrant materials, materials related to identifications, and wiretap materials.

conferences, many districts now require them.

If any one of these differences seems inconsequential, the combined effect of all of the local rules is not. As I have argued in this Article, the local discovery rules of many districts, when taken as a whole, work a revolution in federal criminal discovery. They expand the scope, accelerate the timing, and provide several procedural mechanisms that greatly empower judges and defense attorneys to influence, monitor, and check prosecutorial discovery decisions. These local rules upset the old balance of discovery, putting a thumb on the scale for both judges and defense attorneys. A revolution, by its nature, goes well beyond mere "matters of detail."

On the other hand, one could argue that the local discovery rules are still generally compatible with the spirit of Rule 16. Each Federal Rule of Criminal Procedure should be read in light of Rule 2's interpretative canon that all rules, including Criminal Rule 57's "consistent with" provision, should be interpreted "to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay."[290] Read in that light, these local discovery rules should be seen as "consistent with" the federal rules because they are generally compatible with Rule 16 and they improve the quality of justice and fairness of administration. Textual support for this point of view can be found for local rule treatment of the scope and timing of disclosures and pretrial discovery conferences.

As to scope of discovery, the Advisory Committee made clear in its 1974 Note that the rule generally set a floor, not a ceiling, on how much discovery the court could order: "The rule is intended to prescribe the minimum amount of discovery to which the parties are entitled. *It is not intended to limit the judge's discretion to order broader discovery in appropriate cases*." Local rules and local local rules about discovery are arguably consistent with this idea of judicial discovery discretion. Furthermore, judges can always decide in particular cases, on a showing of good cause, to modify the application of a local discovery rule.[291]

Likewise, as to timing, Rule 16 makes clear that the judge must decide the appropriate timing in individual cases: "At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief."[292] If judges can decide timing in

---

290 FED. R. CRIM. P. 2 (itself was a local rule innovation); *see* FED. R. CRIM. P. 17.1 advisory committee's note to 1966 amendment ("Pretrial conferences are now being utilized to some extent even in the absence of a rule.").

291 FED. R. CRIM. P. 16(d).

292 FED. R. CRIM. P. 16(d)(1). True to the extent that local rules require production of witness statements sooner than after the witness's direct examination, they violate the Jencks Act. More research must be done into whether courts are forcing the early production of such statements over the parties' objections.

individual cases, then they can make a generalized finding by local rule that certain deadlines should be presumptively applicable to all cases, and that generalized finding is consistent with Rule 16.

One matter of timing that local rules have not formally changed is Jencks Act statements. Even in districts that advance the timing of other discovery, local rules often expressly exempt Jencks material.[293] Where prosecutors have refused to turn over such material before the witness testifies on direct examination, appellate courts have consistently enforced the Jencks Act's strict timing requirement.[294] Still, local timing requirements can be seen as judges' way of pushing against Jencks, and when judges require early discovery, prosecutors may be more likely not to assert their rights under the Jencks Act.[295]

Finally, mandatory pretrial conferences are but a small step beyond permissive ones. Criminal Rule 17.1 already gives the court discretion to hold such conferences on its own motion, and the purposes of such conferences include addressing discovery matters.[296] The notion of all the judges in a district deciding by local rule to do so in every case is not incompatible with Rule 17.1.

Doing away with discovery requests by local rule, however, directly and specifically contravenes Rule 16. Although such local rules would improve criminal justice, they seem to exceed the authority given to courts under the Rules Enabling Act.

Regardless of whether these local rules violate federal law, a practical point seems relevant here: local rules are rarely challenged or overturned, either on appeal or by circuit judicial council.[297] In particular, I have been unable to find any examples of local criminal discovery rules being thus challenged or overturned. It appears that this lax enforcement of the Rules Enabling Act has been a good thing, because discovery rule innovation has flourished. Many of these local

---

293 *See, e.g.*, D.N.H. LOCAL R. CRIM. P. 16.1(e) ("[T]he government determines that circumstances call for later disclosure as allowed by Rule 26.2 and 18 U.S.C. § 3500."); M.D. ALA. LOCAL R. CRIM. P. 16.1(a)(2) (similar rule); *cf.* N.D.N.Y. LOCAL R. CRIM. P. 14.1(e) ("The Court requests that the government, and where applicable, the defendant, make materials and statements subject to Fed. R. Crim. P. 26.2 and 18 U.S.C. § 3500 available to the other party at a time earlier than rule or law requires to avoid undue delay at trial or hearings.").

294 *See* Ellen S. Podgor, *Criminal Discovery of Jencks Witness Statements: Timing Makes a Difference*, 15 GA. ST. U. L. REV. 651, 669 (1999) (citing United States v. Algie, 667 F.2d 569, 570 (6th Cir. 1982)) (Jencks Act violated where judge, as matter of courtroom policy, ordered prosecutors to disclose Jencks statement before trial).

295 *Id.* at 671 ("[P]rosecutors routinely do not contest court orders that require an early release of Jencks material.").

296 FED. R. CRIM. P. 16 advisory committee's note to 1966 amendment ("Where pretrial hearings are used pursuant to Rule 17.1, discovery issues may be resolved at such hearings.").

297 LAURIE L. LEVENSON, FEDERAL CRIMINAL RULES HANDBOOK (2017) (section on Rule 57 collecting cases of local criminal rules that have been overturned); *see also* WRIGHT ET AL., *supra* note 75, at § 3153 ("[T]he problem of divergence between local and national rules has remained. . . . Policing local divergences has proved difficult.").

rules, tried in the laboratory of their home districts, may set the stage for national discovery reform that improves federal criminal justice by putting more discovery in the hands of the defense, earlier in the case. This, in turn, should be expected to improve the functioning of the adversary system for both trials and plea bargains.

CONCLUSION

While local rule reforms do indeed push the boundaries of the Rules Enabling Act and go against nationwide uniformity, they could also inspire national reform. These local rules give clear, enforceable directives to prosecutors, and they better equip judges to carefully monitor the parties' compliance. The rules make discovery obligations more clear because they are more specific as to scope and timing. They are better enforceable because the court can compel the production of discovery, or order other sanctions, based on specific local rules and case-specific discovery orders.

In a larger sense, the local rules greatly enlarge the procedural importance of pretrial discovery. Rather than merely requiring the parties to exchange discovery on request, the best local rules elevate pretrial criminal discovery to its own distinct stage of the case, not unlike what the Federal Rules of Civil Procedure did to pretrial civil discovery.[298] The best local rules define the following process for this pretrial discovery stage: the parties confer about discovery issues, the scope and timing of disclosures and motions, and possible stipulations. The court holds one or more discovery conferences (perhaps concurrently with the arraignment or an already-scheduled pretrial conference), and issues a discovery order that either memorializes the parties' joint plan or modifies it as the judge sees fit. As the case progresses, the parties should have expanded grounds for discovery motions, both because they have conferred about discovery and because the local rules and discovery orders provide specific direction about what is to be produced and when. The local discovery rules tend to provide for much broader discovery to the defense, although prosecutors can seek to withhold certain discovery by invoking a declination procedure.

Speaking broadly, these rules transform and revolutionize the discovery process from one that is more based on individual prosecutorial discretion about what and when to disclose, to a process that involves more prosecutorial collaboration with (and accountability to) defense attorneys and judges. This tends to "rebalance" the system by reducing prosecutorial discretion in discovery and increasing the

298 I intend to explore the "civilization of criminal discovery" in a future article.

ability of judges and defense attorneys to influence and regulate that discretion.

As the national Rule 16 Survey shows, there is reason to believe that these discovery rules, taken together, are working as intended; that is, that prosecutors are complying with their discovery obligations and turning over more material discovery at an earlier point in the case. Of course, much more research remains to be done. If the rules are working, then criminal defendants are better informed, earlier in the case. They can thus prepare their cases better for plea bargaining or trial.

The local rules discussed herein should inspire a national amendment to Rule 16 with the following features (set forth in greater detail the Appendix):

The parties must confer about discovery and submit a joint discovery plan (or separate proposed discovery orders) within seven days of arraignment.

The prosecution must provide discovery within fourteen days of the arraignment without a request; the defense must reciprocate within fourteen days of receiving prosecution discovery.

The scope of Rule 16 discovery should be broadened to include exculpatory evidence and a few other specific categories of evidence. Exculpatory evidence should be turned over within fourteen days of arraignment, but impeachment evidence must be turned over within fourteen days of trial unless the court orders otherwise.

The court must hold a pretrial discovery conference within twenty-one days of the arraignment and issue a discovery order detaining the scope and timing of disclosures and motions.

The parties must put on the record what discovery they have provided, what discovery they intend to provide and when, and what discovery they intend not to provide at that time by invoking the declination procedure.

The parties must attempt to resolve discovery issues informally before filing discovery motions.

A national amendment along these lines would vindicate the work of local rules committees around the country.

Of course, the Department of Justice opposed amending Rule 16 in 2007[299] and would likely oppose these proposed amendments. However, the local rules revolution is already underway: the experimentation of district courts throughout the country has yielded many important innovations with long track records. The fact is, many of these local discovery rules strike a better procedural balance between the roles of prosecutors, judges, and defense attorneys. By improving defense access to discovery while preserving prosecutors' ability to withhold or defer

299 Peter A. Joy & Kevin C. McMunigal, *The Ethics of Prosecutorial Disclosure*, 30 CRIM. JUST. 41, 43 (2015).

disclosure on good cause, they may achieve more just results.

APPENDIX: MODEL PROVISIONS FOR AMENDING THE FEDERAL RULES

The following model provisions for national reform are based on the local rules from various districts, with several changes of my own. Except as noted, the additional language would be inserted into Rule 16.

A. *Eliminate Discovery Requests*

All discovery for which a request is currently required under Rule 16, as well as the notice required by Federal Rule of Evidence 404(b), shall be provided to the opposing party without such a request.

B. *Timing of Disclosures*

All disclosures required by this rule shall be provided within fourteen days of the arraignment or the defendant's not guilty plea, whichever is later, unless the court orders otherwise, except that impeachment evidence need only be disclosed in time for effective use at trial.

C. *Scope of Disclosures by the Attorney for the Government*

Within the time limits provided for under this rule, the attorney for the government shall make the following disclosures:

Exculpatory Information. "All evidence or information known to the attorney for the government 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, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal."[300]

A defendant may not waive discovery of exculpatory evidence except in open court. The court may not accept the waiver unless the court determines that (A) the proposed waiver is knowingly, intelligently, and voluntarily offered; and (B) the interests of justice require the proposed waiver.[301]

Search Warrants. "Any search warrants and supporting affidavits

---

300 MODEL RULES, *supra* note 26, at r. 3.8(d).

301 Based on the Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. (2012), found in Joy, *supra* note 31.

that resulted in the seizure of evidence that is intended for use by the government as evidence in its case-in-chief at trial or that was obtained from or belongs to the defendant."[302]

Electronic Surveillance. (1) "[a] written description of any interception of wire, oral, or electronic communications as defined in 18 U.S.C. § 2510, relating to the charges in the indictment in which the defendant was intercepted and a statement whether the government intends to [use] any such communications as evidence in its case-in-chief; and (2) a copy of any application for authorization to intercept such communications relating to the charges contained in the indictment in which the defendant was named as an interceptee or pursuant to which the defendant was intercepted, together with all supporting affidavits, the court orders authorizing such interceptions, and the court orders directing the sealing of intercepted communications under 18 U.S.C. § 2518(a)."[303]

Consensual Interceptions. (1) "[a] written description of any interception of wire, oral, or electronic communications, relating to the charges contained in the indictment, made with the consent of one of the parties to the communication ('consensual interceptions'), in which the defendant was intercepted or which the government intends to [use] in its case-in-chief. (2) [n]othing in this subsection is intended to determine the circumstances, if any, under which, or the time at which, the attorney for the government must review and produce communications of a defendant in custody consensually recorded by the institution in which that defendant is held."[304]

Identifications. A written statement whether the defendant was a subject of an investigative identification procedure used with a witness the government anticipates calling in its case-in-chief involving a line-up, show-up, photospread or other display of an image of the defendant. . . . If the defendant was a subject of such a procedure, a copy of any videotape, photospread, image or other tangible evidence reflecting, used in or memorializing the identification procedure."[305]

D. *Discovery Conference Between Parties*

Within seven days of the arraignment or the defendant's not guilty plea, whichever comes later, the parties shall confer about discovery, including the scope and timing of all discovery described in this rule and any other discovery matters potentially relevant to a just and timely

302 D. HAW. LOCAL R. CRIM. P. 16.1(a).
303 D. MASS LOCAL R. 116.1(C)(1)(c).
304 D. MASS. LOCAL R. 116.1(C)(1)(d).
305 D. MASS. LOCAL R. 116.1(C)(1)(f).

resolution of the case.[306]

Within fourteen days of the arraignment or the defendant's not guilty plea, whichever comes later, the attorney for the government shall file a Joint Statement of Discovery Conference, described in this rule, signed by counsel for each side, generally describing all discovery material that has been or will be exchanged, including the dates of such exchanges, and setting forth all agreements and stipulations entered into at the conference.

If the parties are not able to agree on a Joint Statement of Discovery Conference, they must each file (1) a report on each of the foregoing items and (2) a proposed order regulating discovery in the case.

E. *Joint Statement of Discovery Conference (Certification of Compliance)*

The Joint Statement of Discovery Conference must certify that the parties met and conferred about discovery and must report on each of the following items[307]:

1) the specific time, date, and place at which the offense(s) charged is (are) alleged to have been committed;
2) any contested issues of discovery and inspection raised by any party;
3) any additional discovery or inspection desired by any party;
4) the fact that the prosecution has made disclosure to the defense of the following:
    a) all items listed above in "scope of disclosures by the attorney for the government" and all items currently listed in Rule 16, except that the government may decline to disclose any such evidence or information by invoking the declination procedure described in this rule;
    b) the existence or nonexistence of any evidence obtained through electronic surveillance or wiretap;
    c) the contemplated use of the testimony of an informer (include only the fact an informer exists and not the name or testimony thereof);
    d) the general nature of any evidence of other crimes, wrongs, or acts the government intends to introduce at trial pursuant to Fed. R. Evid. 404(b); and

306 The following proposed language is based largely on the Southern District of Florida's local discovery rules. S.D. FLA. LOCAL R. 88.10.

307 Based on W.D. OKLA. LOCAL R. CRIM. P. 16.1 and Appendix V.

e) the prior felony convictions of any witness the government intends to call in its case-in-chief;
5) notice of alibi;
6) notice of insanity defense or expert testimony of defendant's mental condition;
7) notice of defense based on public authority; and
8) the deadlines for all disclosures.

Counsel for both parties must truthfully state that they presently know of no additional discovery issues.

Counsel must expressly acknowledge their continuing obligation to disclose any materials that become known to counsel during the course of the pretrial investigation of this cause.

The Joint Statement of Discovery Conference shall contain a proposed order memorializing all agreements made by the parties at their discovery conference.

F. *Meet and Confer Requirement for Discovery Motions*

All motions for discovery or inspection shall contain a certification that counsel have engaged in a discovery conference and discussed the subject matter of each motion and have been unable, after a good faith effort, to reach agreement of the resolution of the issues. The certification for the motion shall set forth: (1) the statement that the prescribed conference was held; (2) the date of the conference; (3) the names of the parties who attended the conference; and (4) the matters which are in dispute and which require the determination of the court. The filing of any such motion for further discovery or inspection which does not include the required certification may result in summary denial of the motion or other sanctions.[308]

G. *Declination of Disclosure*

If in the judgment of a party it would be detrimental to the interests of justice to make any of the disclosures required by these rules, such disclosures may be declined, before or at the time that disclosure is due, and the opposing party advised in writing, with a copy filed in the Clerk's Office, of the specific matters on which disclosure is declined and the reasons for declining. If the opposing party seeks to challenge the declination, that party shall file a motion to compel that states the

308 To be inserted into FED. R. CRIM. P. 12. This proposed language is based largely on the Western District of Washington's meet and confer procedure. W.D. WASH. LOCAL R. CRIM. P. 16(f).

reasons why disclosure is sought. (Such motion shall comply with the meet and confer requirements of for discovery motions.) Upon the filing of such motion, except to the extent otherwise provided by law, the burden shall be on the party declining disclosure to demonstrate, by affidavit and supporting memorandum citing legal authority, why such disclosure should not be made. The declining party may seek leave to file its submissions in support of declination under seal for the court's in-camera consideration. Unless otherwise ordered by the court, a redacted version of each such submission shall be served on the moving party, which may reply.

This rule does not preclude any party from moving, ex parte, for leave to file an ex parte motion for a protective order with respect to any discovery matter. Nor does this rule limit the court's power to accept or reject an ex parte motion or to decide such a motion in any manner it deems appropriate.[309]

H. *Pretrial Conferences Regarding Discovery*

Within seven days of the receiving the Joint Statement of Discovery Conference, the court shall issue an order addressing (1) the timing and scope of all disclosures required by Rule 16 and (2) discovery motion deadlines. The court shall address discovery at all pretrial conferences. The court may hold one or more additional pretrial conferences regarding discovery.[310]

I. *Sanctions for Discovery Violations*

For failure to timely provide exculpatory information under this rule, the court may order the following remedies: (i) postponement or adjournment of the proceedings; (ii) exclusion or limitation of testimony or evidence; (iii) a new trial; (iv) dismissal of any or all counts with or without prejudice; (v) fines on the attorney; or (vi) any other remedy determined appropriate by the court.

In fashioning a remedy under this subsection, the court shall consider the totality of the circumstances, including—(i) the seriousness of the violation; (ii) the impact of the violation on the proceeding; (iii) whether the violation resulted from innocent error, negligence, recklessness, or knowing conduct; and (iv) the effectiveness of alternative remedies to protect the interest of the defendant and of the

---

309 This proposed language is based largely on the District of Massachusetts' declination procedure. D. MASS. LOCAL R. 116.6(A).

310 To be inserted into FED. R. CRIM. P. 17.1.

public in assuring fair prosecutions and proceedings.

Fines may only be imposed for violations that were negligent, reckless, or knowing. The imposition of fines is not to be deemed a finding of contempt unless so designated by the court.[311]

311 See Joy, *supra* note 31, at 40.