# CRIMINAL LAW AND INDIVIDUAL RIGHTS SECTION

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## The District of Columbia Bar

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April 14, 1989

The Honorable Robert A. Shuker, Chairman
Criminal Rules Committee
Superior Court of the District of Columbia
Room 2620
500 Indiana Ave. N.W.
Washington, D.C. 20001

Re: Proposed Amendments to Superior Court Criminal Rule 16.

Dear Judge Shuker:

After much consideration the Criminal Law and Individual Rights Section of the D.C. Bar has determined that it is in the interest of the fair and efficient administration of justice to modify the existing Criminal Rule on discovery. It is felt that the present rule encourages a disparity in discovery practice among Assistant U.S. Attorneys and defense counsel, thereby arbitrarily impacting on the rights of some defendants. The limited discovery under the current rule also engenders unnecessary litigation over "Brady Issues", "Lewis Issues" and "Jenks Issues" which prolong trials and encourage appellate litigation. Moreover, it discourages or delays the process of plea bargaining in the local criminal justice system. Given the current crush of criminal cases in Superior Court it is essential that the system become more efficient while at the same time protecting the rights of our citizens who are presumed innocent. The opening up of the discovery process in criminal cases will serve both goals.

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MANDATORY DISCLAIMER

The views expressed herein represent only those of the members of the Criminal Law and Individual Rights Section of the District of Columbia Bar and are not those of the D.C. Bar or its Board of Governors.

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Our neighbors in Montgomery County have found that the practice of "Open File Discovery" in the State's Attorneys Office has encouraged defendants to accept plea bargains and expedited trials. They have not experienced problems with witness intimidation or subornation of perjury as a result of their discovery practice.

The attached rule is a proposed amendment to Sup. Ct. Crim. Rule 16 which has been officially adopted by the Criminal Law and Individual Rights Section and is being submitted to the Criminal Rules Committee of the Superior Court of the District of Columbia for consideration. The proposed rule adds Section (1)(E) witness names, addresses and statements which requires disclosure of government witnesses names, address and statements and modifies Section (2) by deleting the former section and adding Section (a - c) to identify specific matters not subject to disclosure including work product, identity of informants and any other matters which a court finds entails a substantial risk to any person. Section (a)(3) has been amended to conform with Section (1)(E) as it pertains to Grand Jury transcripts of government witness statements. Section (a)(1)(A) has also been changed from the prior proposal to include the disclosure of codefendant's statements. The matters deleted from the existing rule are in brackets and those added are in bold type.

Please advise us as to how we can aid the committee in its consideration of this issue.

Sincerely,

Richard Seligman
Co-chair

Janie Gardner
Co-chair

encl.
cc: David Luria, Attorney Advisor
Committee members

RULE 16: DISCOVERY AND INSPECTION

(a) Disclosure of evidence by the government.

(1) Information subject to disclosure.

(A) Statements of defendant and Codefendants. Upon request of a defendant the prosecutor shall permit the defendant to inspect and copy or photograph: Any [relevant] written or recorded statements made by [the] **any** defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the prosecutor; the substance of any oral statement which the government intends to offer in evidence at the trial made by **any** [the] defendant [whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent;] and recorded testimony of **any** [the] defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the Court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

(B) Defendant's prior record. Upon request of the defendant, the government shall furnish to the defendant such copy of his prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the prosecutor.

(C) Documents and tangible objects. Upon request of the defendant the prosecutor shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, building or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense, or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of examinations and tests. Upon request of a defendant the prosecutor shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the prosecutor, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

**(AMENDMENT)**

**(E) Witnesses names, address and statements:**

**Upon request of a defendant, the prosecutor shall provide the names and addresses as well as written or recorded statements and reports of all witnesses it intends to call at trial or who have information material to the preparation of his trial or who have information material to the preparation of his defense, which are in the possession, custody or control of the government, the existence of which is known or by the exercise of due diligence may become known to the prosecutor.**

(2) Information not subject to disclosure.

(Delete) [Except as provided in paragraphs (A), (B) and (D) of subdivision (a)(1), this Rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the prosecutor or other government agents in connection with the investigation or prosecution of the case, or of statements made by the government witnesses or prospective government witnesses except as provided in 18 U.S.C. Section 3500.]

**(AMENDMENT)**

**(a) Any documents to the extent that they contain the opinions, theories, conclusions, or other work product of the United States Attorney, or**

**(b) The identity of a confidential informant, so long as the failure to disclose the informant's identity does not infringe a constitutional right of the defendant and the U.S. Attorney does not intend to call the informant as a witness, or**

**(c) Any other matter if the court finds that its**

**disclosure would entail a substantial risk of harm to any person outweighing the interest in disclosure.**

(3) Grand jury transcripts. Except as provided in Rules 6, 12(e) and 26.2, and subparagraph (a)(1)(A) **and (a) (1) (E)** of this Rule, these Rules do not relate to discovery or inspection of recorded proceedings by the grand jury. (Emphasis on Amendment)

(b) Disclosure of evidence by the defendant.

(1) Information subject to disclosure.

(A) Documents and tangible objects. If the defendant requests disclosure under paragraph (a)(1)(C) or (D) of this Rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of examinations and tests. If the defendant request disclosure under paragraph (a) (1) (C) or (D) of this Rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results of reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or

control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.

(2) Information not subject to disclosure. Except as to scientific or medical reports, this paragraph does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

(c) Continuing duty to disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this Rule, he shall promptly notify the other party or his attorney or the Court of the existence of the additional evidence or material.

(d) Regulation of discovery.

(1) Protective and modifying orders. Upon a sufficient showing the Court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by a party, the Court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the Court enters an order granting relief

following such an ex parte showing, the entire text of party's statement shall be sealed and preserved in the records of the Court to be made available to the appellate court in the event of an appeal.

(2) Failure to comply with a request. If at any time during the course of the proceedings it is brought to the attention of the Court that a party has failed to comply with this Rule, the Court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other orders as it deems just under the circumstances. The Court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(e) Alibi witness. Discovery of alibi witnesses is governed by Rule 12.1 of the Criminal Rules of this Court. (Amended, Nov. 16, 1976; July 1, 1977; Sept. 1, 1985).