



## Justice Would Be Served by an ‘Open File’ Policy for Prosecutors

Mar 02, 2012

A couple of years ago, the U.S. Department of Justice made an effort to systematize and improve its discovery obligations under *Brady v. Maryland*, the 1963 Supreme Court case that requires prosecutors to disclose information in their files that would tend to exculpate criminal defendants. A U.S. attorney, speaking at a conference of defense lawyers, commented at the time that the department takes its *Brady* obligations seriously.

We replied then that in our view, the new Brady guidelines merely perpetuated the status quo rather than promising real change or a system in which prosecutors make significant disclosures to defendants before trial of the contents of their files.

“Whether criminal defendants will obtain discovery of all materials to which they are entitled will still be largely dependent on the judgments of the individual prosecutors,” we wrote. “Perhaps the answer is that the government should simply err in the direction of providing open discovery of its files to defendants.”

Just the other day, *The New York Times* editorialized in favor of such “open-file” policies, in which prosecutors turn over to defense lawyers all information favorable to the defense, regardless of whether that information would directly affect the outcome of the case.



In the same vein that we wrote in 2010, the *Times* said that the Justice Department “continues to take half-measures in response to its own failures to meet disclosure requirements.”

The department, while it adheres to the letter of the *Brady* case, says its policy is to turn over only those documents that are both exculpatory and material to the result of the case. The *Times* points out that this is inadequate. Since 96 percent of criminal cases end in a plea bargain, the rule “puts defendants at a disadvantage in negotiation: without access to information in the government’s files, they don’t know the evidence they face and can’t assess their odds at trial.”

We agree. An open-file policy makes sense for prosecutors at both the federal and state levels. Exceptions would need to be made to prevent, for example, the identity of a confidential informant or similar information. But we believe that a broad disclosure rule would help bring into reality a portion of the Justice Department’s mission statement – “to ensure fair and impartial administration of justice for all Americans.”

tags: [Brady materials](#), [prosecutors](#)

*Crime in the Suites is authored by the Ifrah Law Firm, a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.*

*The commentary and cases included in this blog are contributed by Jeff Ifrah and firm associates Rachel Hirsch, Jeff Hamlin, Steven Eichorn and Sarah Coffey. These posts are edited by Jeff Ifrah and Jonathan Groner, the former managing editor of the Legal Times. We look forward to hearing your thoughts and comments!*