Panel Discussion: Criminal Discovery In Practice

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PANEL DISCUSSION: CRIMINAL
DISCOVERY IN PRACTICE

Moderator: Ellen S. Podgor†

Panelists:
The Honorable Gerrilyn G. Brill
Nina Ginsberg, Esq.
G. Doug Jones, Esq.
Art Leach, Esq.
Larry Pozner, Esq.

PROFESSOR PODGOR: In this afternoon's session on federal
criminal discovery, we're going to explore how practitioners
approach the subject and how the judiciary might perhaps look
on it also. We have five participants in the panel here. Each of
the five participants are going to initially speak, we will then
have an opportunity for them to interact, expressing their views
of what others have said, and then we'll give an opportunity for
you in the audience to present any questions that you might
have.

Our first speaker is Larry Pozner. Larry Pozner, for those of
you who might not know him, is the president of the National
Association of Criminal Defense Lawyers.¹ Our second speaker

† Professor of Law at Georgia State University College of Law. Although she spent
the Fall semester as a Visiting Scholar at Yale Law School, she returned to Georgia State
to moderate the Symposium. She is the co-author of White Collar Crime in a Nutshell
(2d ed. West 1997) with Professor Jerold H. Israel and White Collar Crime: Law and
Practice (West 1986) with Professor Jerold H. Israel and the Honorable Paul Borman.
Professor Podgor is a member of the American Law Institute, a member of the Advisory
Board of the BNA Criminal Practice Manual, and served as Chair of the Criminal Justice
Section of the American Association of Law Schools in 1998. She is Co-Chair of the
Champion Advisory Board and the Discovery Reform Committee of the National
Association of Criminal Defense Lawyers.

¹ Larry Pozner is a Fellow of the American Board of Criminal Lawyers. Mr. Pozner
is a former Professor of Law at the University of Denver, where he was voted best
professor by the student body. He has been listed in the Best Lawyers in America for
over ten years.

Mr. Pozner worked as the NBC legal analyst for the Oklahoma City bombing trials
and is a frequent guest on “Meet the Press,” “Larry King Live,” “The Jim Lehrer News
Hour,” and “CNN Crossfire,” as well as on the “Today Show” and “Rivera Live.”
Mr. Pozner is the acknowledged authority on cross-examination in America. He is the

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is going to be G. Douglas Jones. Doug Jones is the United States Attorney for the Northern District of Alabama. Our third speaker is Magistrate Judge Gerrilyn Brill. Our fourth speaker is Nina J. Ginsberg, a practicing attorney from Alexandria, Virginia. And our fifth speaker is Art Leach. He is presently an

co-author, with Roger Dodd from Georgia, of the book *Cross-Examination, Science and Techniques* (Charlottesville, Va., Michie Co. 1983), and has given more than 200 lectures in 45 states on cross-examination and trial tactics.

2. Doug Jones was nominated to be the United States Attorney for the Northern District of Alabama by President Clinton on September 2, 1997. On September 8, 1997, Mr. Jones was appointed by the court to serve as Interim United States Attorney, and on November 8, 1997, Mr. Clinton's nomination of Mr. Jones was confirmed by the United States Senate. He is a graduate of the University of Alabama and Cumberland School of Law. After his graduation from law school, Mr. Jones served as staff counsel to the United States Senate Judiciary Committee for United States Senator Heflin. From 1980 to 1984, he was an Assistant United States Attorney in Birmingham. He was in the private practice of law from 1984 to 1997. Immediately prior to his nomination as United States Attorney, Mr. Jones was a shareholder with the law firm of Jones, Bowron & Selden in Birmingham.

Although best known for his work in criminal defense, and specifically in complex federal white collar crime cases, he was also active in civil litigation, particularly in the area of personal injury. He has previously served as the chairperson of the Criminal Law Committee of the Alabama Bar Association. He has served as a member of the Board of Governors and Executive Committee for the Alabama Trial Lawyers Association. From 1983 to 1984, he served on the Board of Directors of the National Association of Criminal Defense Lawyers. And from 1980 to 1992 was a member of the Board of Directors of the Alabama Criminal Defense Lawyers Association. He has participated in the Local Rules Committee on the Civil Justice Reform Committee for the United States District Court for the Northern District of Alabama; and from 1980 to 1984, he was a member of the Attorney Advisory Committee for the Defendant Services Division of the Administrative Office of the United States Courts in the Northern District of Alabama. He has lectured extensively throughout the state of Alabama, as well as across the nation, on areas primarily dealing with the criminal justice system. Many of you have probably heard his name recently in connection with the bombing case that is in Birmingham, Alabama. He is the United States Attorney handling that case.

3. Magistrate Judge Gerrilyn Brill was sworn in by the United States District Court, Northern District of Georgia, as a United States Magistrate Judge on January 20, 1985. Prior to her appointment, Magistrate Judge Brill was in the private practice of law and later with the United States Attorney's Office for the Northern District here in Georgia. She was appointed Interim United States Attorney in November of 1983 and served in that position for three months. From March of 1991, she served as first Assistant to the United States Attorney. Magistrate Judge Brill received her undergraduate degree in economics in 1972 from Northwestern University in Evanston, Illinois, and her Juris Doctorate degree in 1975 with distinction from Emory University School of Law.

4. Nina Ginsberg is a partner in the law firm of DiMuro, Ginsberg & Lieberman. Nina Ginsberg is admitted to the bars of the Commonwealth of Virginia and the District of Columbia and admitted to practice in the Supreme Court, numerous federal courts, and courts of appeal. Her major emphasis is criminal litigation. She's a graduate of the Antioch School of Law and has a Bachelor of Arts degree in history from the University of Rochester. She's a member of the Virginia State Bar, a Bar Counsel member, and a
Assistant United States Attorney and chief of the Organized Crime Strike Force.  

We present the five speakers who are going to discuss discovery in practice.  

[Applause]

MR. POZNER: Thank you, Ellen. The title on the brochures and on the posters says "Federal Criminal Discovery: A Tool for Truth." As a lifelong criminal practitioner, I would correct it with a question mark. Federal criminal discovery on the defense side is a myth.

The United States government, which promises justice to its citizens and makes speeches, continually saying that they care about the rights of the citizen accused, has developed a system, codified it in law, a system that is systematically depriving American citizens of the chance of a fair trial.

The United States Attorneys around the country are entitled by law to withhold the statements of witnesses until a trial begins. If you are fighting about money in America, you can have full discovery of everything your opponent intends to do to you years in advance of trial. But if you’re fighting for your life, for your liberty, in America, you can get sandbagged every day.

Why does this system exist? It exists because the very powerful forces of the federal government, the political forces of

member of numerous committees there. She was also on the Board of Directors from 1989 to 1995 of the National Association of Criminal Defense Lawyers. She serves continually as a member of the Lawyers Strike Force Committee, a very important committee of the NACDL. She has been chair of the Judicial Liaison Committee of the NACDL, she’s formerly been chair of the Amicus Committee of NACDL, vice chair and member of the Forfeiture Committee, and has served on the Judicial Screening Committees and served as a contributing editor on the Criminal Law Advocacy Reporter. She’s also been an adjunct professor at George Mason University School of Law, a member of the Virginia College of Criminal Defense Attorneys, a member of the Alexandria Bar Fee Arbitration Committee, and a member of the Judicial Screening Committee of the Virginia Women’s Association. Some of you may have seen Nina Ginsberg’s name in the newspaper regarding a recent case dealing with an alleged spy. And the name of the case was the Pitts case.

5. In January 1993, Art Leach joined the United States Attorney's Office for the Northern District of Georgia in Atlanta. After serving as an Assistant District Attorney in Tifton, Georgia, and as an Assistant United States Attorney in Savannah, Mr. Leach served as Chief of Asset Forfeiture for the Southern District of Georgia. And in 1991, he accepted a one-year appointment as Assistant Director for Policy and Operations in the Executive Office for Asset Forfeiture in Washington, D.C.
the federal government, have tried to devise a system where the
government gets to win regardless of the truth. If the truth were
really what we cared about, we would not have a system that
allowed one side to control access to information.

The names of the witnesses? You go figure it out. How to find
them? You go figure it out. What have they said about your
client? We're not going to tell you. This is not a system designed
currently to get at the truth. If we want to live up to the
Constitution of the United States, if we want to live up to the
tone of the Bill of Rights, we must create a more modern
system. A system that recognizes that in the complex world of
modern criminal law, the truth has to be available to both sides;
the facts have to be available equally; the statements of
witnesses have to be on the table as soon as they are practically
available so that both sides can come to court and advocate
fairly. Only then will the citizen accused have an equal shot at
justice. Until then, I must tell you, I am disappointed in my
federal government, I am disappointed in the system we have
created, and I cannot tell you it is a system that lives up to the
spirit of America.

Thank you.

MR. JONES: Larry, why don't you take a minute to tell us what
you really think about it.

Well, you know, it's interesting. I've served with Larry as a
board member of the Criminal Defense Lawyers and I share a
lot of those same concerns, absolutely.

I've been in the United States - as a United States Attorney
now for fourteen months, and one of the areas that we have
been most concerned about in practice, and I'm not talking
about the strict rules that you see in a book, but in terms of
practice, is how to fairly do criminal defense discovery. Because
I think for those of you who were here this morning, Chris
Darden\(^6\) hit the nail on the head. The issue is one of

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\(^6\) Christopher Darden is an Assistant Professor at Southwestern University School of Law, where he teaches Criminal Law and Criminal Procedure. Prior to teaching, Mr. Darden served as a Deputy District Attorney with the Los Angeles County District Attorney's Office from 1980 to 1995. He is the author of *In Contempt*, a 1996 book that recalls his life and his experiences as prosecuting attorney during the O.J. Simpson trial. Professor Darden participated in the Symposium as a speaker on the first panel: Overview of Discovery Rules. He compared the federal discovery rules to discovery rules
fundamental fairness. And oftentimes that does not mean following black letter law. Because the problem is not just federal prosecutors, the problem is also Congress. Because our system of criminal justice, as you may have seen in some of your elections a couple of weeks ago, can often be used as a whipping boy and turned into demons.

We take a little bit different approach in my district. It is one that has evolved primarily since I have been United States Attorney. Because we're really talking about a number of different issues. We're talking about documents that Professor Henning talked about a lot today in white collar cases. Those are enormous problems sometimes in major white collar cases. I'm not talking about witness statements, we'll get to that in a minute. I'm talking about documents that are subpoenaed by a grand jury, that may have been seized in a warrant; but primarily subpoenaed. Documents that are brought before a grand jury and analyzed. And in a major white collar case, that can amount to thousands and sometimes tens of thousands, and in a major, major case, hundreds of thousands of documents.

Now, there's a real problem because not all of those documents are going to be, 1) used at trial; or 2) relevant at trial or to anything that is going on. So we're having to kind of look at what to do about the major case documents. As Rule 16 says now, unless there's something in one of those documents that's exculpatory, we don't have to turn it over, only that which we're going to use at trial, that which is material to the preparation of the defense, or that which we obtained from the defendant must be turned over under the Rule.

Now, the biggest problem I've always had with criminal discovery both as an Assistant, as a defense lawyer, and as

7. Professor Henning was a senior attorney at the United States Securities and Exchange Commission in the Enforcement Division for four years and a trial attorney with the United States Department of Justice in the Criminal Division for three years before joining the Wayne State faculty in 1994. He has published extensively in law reviews, journals, and professional publications with a focus on white collar crime and constitutional criminal procedure issues. Professor Henning participated in the Symposium as a speaker on the second panel: Special Issues in Federal Criminal Discovery. He discussed discovery in white collar crime cases. Additionally, he wrote an article on that same topic. See Peter J. Henning, Defense Discovery in White Collar Criminal Prosecutions, 15 Ga. St. U. L. Rev. 501 (1999).

United States Attorney, I have a real hard time convincing my Assistant U.S. Attorneys that they often don’t know what may be material to the defense. They just don’t always get it. We’re taking the approach now that every document that we gather in the course of an investigation will be made available to the defense. And it should be made available at the time of arraignment. We’re going to hope to segregate that. We will have our exhibit list, we will have other documents that are there. And this doesn’t necessarily include the “Brady material.” But the defense should have access, I believe, to any document that we have gathered in the course of our investigation. And those may be from a number of different agencies.

In this day and age, it’s rare when you have only one federal investigative agency investigating a case. Often there are other agencies. And more often than not, as we were discussing up here earlier, you have state and local folks. One of the things I think that has evolved over the last few years is the number of state and local police officers and sheriffs who are working federal cases. And they’re not used to the same kind of discovery rules and document gathering sometimes as the federal agencies are.

The second thing is with regard to witness statements. The witness statement of a defendant is going to be turned over as a matter of course. But what about, as Larry said, the witnesses out there that you don’t really have witness statements from. Most people – I don’t know if you realize it, I know we’ve got a lot of law students here – federal government, the FBI, DEA, the ATF, they don’t take down witness statements. They don’t get a statement that somebody looks at and then they sign it and adopt it as their own. They do summaries of those statements. And under those rules, unless it has some kind of exculpatory material, Larry is absolutely right, under the rules, we have absolutely no obligation to turn over a witness interview, a summary of an interview, a summary of a statement. And even

9. “Brady material” refers to the requirement that exculpatory information in the possession of the Government must be turned over to the defense within a reasonable time prior to trial, pursuant to the Supreme Court’s decision in Brady v. Maryland, 373 U.S. 83 (1963).

10. Mr. Jones is making reference to Professor Darden’s discussion on federal and local discovery rules during the morning session of the Symposium.
under the Jencks Act\textsuperscript{11} that kicks in in the middle of a trial, we don’t have to turn those over. It’s only when there’s inconsistencies or “\textit{Brady} material.”\textsuperscript{12} And that’s been a real problem. I think it’s a major problem in trying to create an element of fundamental fairness in a trial. It is also the major problem that we have in dealing with federal agencies who are concerned about witnesses.

Recently we have adopted in our district, and it is literally only Doug Jones and applies to my district; I cannot speak for the Justice Department as a whole. We have adopted a program of discovery that we will make available all of the witness summaries, all of the witness statements. At this point in this process, we’re not making them available for copying, but we’re making them available so that the defendants and their attorney can go through the witness statements, they can see the names. We will cross out some identifying data or some material that we deem confidential, but those are going to be available. They’re going to be available for review prior to any pretrial conference, so the defendant will at least have an opportunity when he goes into a pretrial conference, and has to have his motions done, to know exactly what the witnesses are saying, who the witnesses are, and then they can plan from there. We’re doing the same thing with grand jury material and the Jencks material. Those will be made available and, in fact, those will be copied in the week prior to trial and literally turned over to the defense for use. We’re not going to wait until the middle of cross-examination or just after we get a witness off the stand and delay the trial. We’re going to turn those over ahead of time.

Now, there’s some caveats that I do think have to be talked about, especially in violent crime cases and drug cases. There is a concern, there is a major concern of the safety of some witnesses. Ten years ago, or thirteen years ago when I left the U.S. Attorney’s office, I never saw a problem with witnesses being subject to reprisals. As a defense lawyer, most of the time, I never saw anything that would border that. But I can tell you that is changing, at least in my district. Over the last two years, we’ve had six witnesses murdered. One fairly recently. And

\textsuperscript{12} See supra note 9.
there’s a real concern. And there is a concern that a lot of the witnesses who do come forward, they don’t want their names out there. And generally they’re not going to be until after a case is indicted. We’re taking the position at that point that, look, you’re likely to be a witness in this case, you’re likely to have to get up at trial, and the only thing that we have a responsibility to do is to go ahead and disclose that information.

As a practical matter, I think that that is going to help in the Northern District of Alabama, which traditionally has one of the fastest dockets in the country anyway, but I think it’s going to help. I think it’s going to help not only the defense, it’s going to help the court, I think it’s going to help my prosecutors, and I also think it’s going to have an effect on the agents. Because when an agent is out there doing the summary of an interview, sometimes the agent’s take is put on there, as opposed to a witness’s. I think the agents are going to be very accurate in what they say, and in what they do with these summaries, because they know that they are going to be reviewed.

So when it comes right down to it, Larry and I are probably not as far off as you might think in terms of the discovery. I can’t say that’s going to be the case for all United States Attorneys. When I started to try to implement this process in my office, I had a lot of assistants that had been there a long time, I got two reactions: 1) we don’t have to do it; and 2) we’ve never done it this way before. So there is an inertia that’s built in with regard to criminal discovery.

But I do believe in a more open discovery – and there has to be some bounds. We do have to maintain some degree – be able to withhold certain information if we have a legitimate basis for belief that a witness’s life may be in danger. I’m not talking about somebody who has – who thinks, oh, gosh, if I talk, then somebody’s going to come kill me. That’s not a legitimate basis. But we’ve got a lot of threats. We have legitimate threats and legitimate safety concerns that often come up that we have to be very conscious of. Especially since, you know, Congress has now put on the United States Attorneys the Victim Witness Protection Act.¹³ We can be liable for witnesses who we don’t adequately protect sometimes. Financially liable.

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So there are a lot of things going on out there that are really a tough time for prosecutors to juggle. Overall, you hear over and over today, I think, that a more liberal discovery policy than what we have in place in black letter law right now should be adopted. To be honest, my experience has been that, in practice, that’s happening anyway. But it’s not on a uniform basis. One of the things that I did in my office is try to get some consistency because that’s not happening around the country. There are offices that have a more liberal policy than mine and then there are other offices that probably go straight by the letter of the law. And discovery is the issue, I think, out of every criminal case that I’ve ever tried, that I’ve ever prosecuted, that I’ve ever defended, the discovery issues more than search warrant issues, more than anything else, it is the discovery issues that create and generate so much – so many of the motions, so many of the hearings. And I think anything that we can do to cut down on that is going to help the system. I think it’s going to make the system go smoother. Quite frankly, I think you’re going to see a lot more guilty pleas than what we even have, which is a lot, but I think if you look at the studies that are done down in the state of Florida, where they have much more liberal discovery, including depositions, once all those went into effect, the percentage of guilty pleas went up even higher. So, anything that makes the system a little better, I think, is something that we ought to do.

That’s just an area – those are quick – I think what we’re looking for is some feedback, but we really – it’s an interesting issue because you do have a lot of personalities that come into it. And lawyers on both sides of the aisle get sometimes vested and too interested in their cases. And when that happens, you have game playing on both sides of the aisle. And I don’t think that that’s real good. And I think that when you open up the discovery process, a lot of that can go away. And I do think that one of the things that has to happen, and what I told my assistants, is that we need to use our reciprocal discovery rules just as much. Because if we’re going to seek the truth, there are things that I know that are in defense lawyers’ files that we might often forget to ask. One of the things that prosecutors
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forget to ask for is reverse Jencks.\textsuperscript{14} As a defense lawyer, and I
know everybody that has defended cases will sit there, and they
may have some, and they’re going to turn it over if it is
requested properly. But they sit there very quietly and probably
ninety-nine times out of a hundred, it’s not asked for.

I think from a practical standpoint, it’s essential that as much
information be put on the table as early as possible so that the
court can schedule the cases properly, so that the defense and
the prosecution have the time to really look and see whether or
not there’s a realistic possibility of settlement of a case; and if
not, go in and do the jobs that everybody does best, and that is
to get the facts before a jury and let a jury, which is still the
greatest system we have in the world, determine the guilt or
innocence of someone accused of a crime.

JUDGE BRILL: I understand that most of you in the audience
are law students. I understand there also may be some
practitioners in the audience. I was not here for the morning
session, but I can tell from the outline that you have already
discussed Rule 16,\textsuperscript{15} which is the basic rule governing discovery
in federal courts; \textit{Brady},\textsuperscript{16} \textit{Giglio},\textsuperscript{17} the Jencks Act,\textsuperscript{18} which is
codified in Title 18, Section 3500. And as law students, you can
read these rules, you can read the cases interpreting \textit{Brady},
\textit{Giglio}, and Jencks; but generally what you don’t learn in law
school and what I hope to give you some guidance on in my
remarks is how does it all fit together in court, what is the
practice under which discovery is conducted in court, and what
is the role of the judge. To understand that, you have to have a
basic understanding, first, of how a case proceeds through the
system. To start out with, a case is initiated either with a
complaint and an arrest warrant or an indictment and an arrest
warrant. And the difference is significant to a practitioner. It’s
significant when you’re talking about discovery, because when
a case proceeds with a complaint and an arrest warrant, a

\textsuperscript{14} The Jencks Act covers discovery of prosecution information by a criminal
defendant. "Reverse Jencks" refers to information and evidence obtained by the defense
to which the prosecution seeks to gain access (also known as reciprocal discovery).
\textsuperscript{15} \textsc{Fed. R. Crim. P. 16}.
\textsuperscript{16} \textit{Brady v. Maryland}, 373 U.S. 83 (1963).
\textsuperscript{17} \textit{Giglio v. United States}, 405 U.S. 150 (1972).
\textsuperscript{18} 18 U.S.C. § 3500 (1894).
practitioner has many more opportunities for discovery than might otherwise be available. And I want to talk a little bit about that.

When law enforcement reacts to a crime, say a bank robbery, a drug bust, a car jacking, some of the cases that we’re seeing typically now in federal court, a complaint is drawn up, presented to a magistrate judge. The magistrate judge decides whether there is sufficient probable cause set forth in the complaint; if so, signs the complaint. The person is brought into court for their initial appearance before a magistrate judge. I think that’s pretty much the same in all federal district courts. It’s required under the Rules that a person who is arrested be brought without undue delay before a magistrate judge. The person then has their initial appearance, they are advised of their rights. At that stage, if a person cannot afford counsel, counsel is appointed. And by the way, most counsel in federal court are appointed counsel. It’s the exception rather than the rule to have someone who is not appointed counsel. A person is entitled to a preliminary examination and also entitled to have the judge take up the question of bond. The government quite often moves for detention, which means that the government is asking that the person be held without bond, typically in cases of violent crime or a person with a serious criminal history.

Now, you might say, what does this have to do with discovery? Well, if a person is entitled to a preliminary examination, the Government has to prove in court with witnesses that there was probable cause to believe that the person committed the offense. And quite often, defense attorneys . . . use these hearings, the preliminary examination and the bond hearing, as an opportunity to discover information about the case. And this is separate and apart from any discovery that they are entitled to under Rule 16 of the Federal Rules of Criminal Procedure.

Every district has its peculiarities. There are local rules for the federal district courts and it’s important for all of you as future practitioners to become familiar with the practice in the particular court that you are going to be appearing in. For example, in the Northern District of Georgia, there is a rule that all discovery has to be made available at the time of the arraignment. The arraignment is when the person appears to enter their plea after they have been indicted. Quite often, the Government will show up at the arraignment, turn over a
package of material to the defense. But quite often the Government cannot comply with the rule because they don't have all the material available; in which case, they present their information to the court and the court directs them either to provide the information within a certain period of time or to turn it over forthwith.

Now, in our district, in the Northern District of Georgia, the magistrate judges actually preside over all the discovery disputes and discovery motions. And the practice is for the defense attorneys to file their motions within ten days after the arraignment. Usually what happens is we get a stack of motions about this thick, usually they file a detailed discovery motion that comes right off of the word processor and is not in any way tailored to the particular facts of the case, and ask for things that they are entitled to by operation of law under Rule 16. 19 But for some reason, this is the practice that has grown up in the district—that these generalized motions are filed.

Generally the Government does not respond to the motions, but the motions are ruled on orally by the magistrate judge at a pretrial conference. The magistrate judge will preside over a hearing where the motions are presented. Now, typically what happens is the magistrate judge, and I know this is my practice, I will say, “Are there any areas of dispute that need to be addressed?” And we do not go over the motions paragraph by paragraph because the Government knows what it's required to produce under Rule 16 20 and generally will produce that information without being ordered to do so by the court. However, there often are disputed areas. And I share Mr. Pozner's concern about some of the fairness — or whether the federal rules adequately protect defendants of giving them full knowledge of what they're entitled to know or what they need to know in order to adequately defend the case.

One particular area that comes up at the pretrial conferences is that of other criminal activity. Under Rule 404(b) of the Federal Rules of Evidence, the Government is required to give the defense reasonable notice of any other criminal activity other than what is charged in the indictment. So the question becomes: What is reasonable notice? I consider [it] one of my

20. Id.
important duties [to] ensur[e] that there is fairness in the defense being notified at an early stage of what else the Government is going to be relying on to make its case. Quite often, I found, particularly in the area of white collar crime, and this may have been brought up in your morning session, that when the case goes to trial, a large part of the case, a large part of the Government's case might actually be uncharged conduct; might actually be brought in under the theory of proving the defendant's intent to commit the crime and showing other criminal activity. So it's very important from my perspective as a judge that the defense be provided with this information as soon as possible so that adequate preparation can be conducted by the defense attorney.

Another typical disputed area would be witness lists. Now, Mr. Pozner mentioned that witness lists are not required in federal criminal law. And that is true. Generally . . . I [find] that in the white collar cases, the defense can pretty much figure out who the witnesses are from the large amount of documentary evidence that they're given. However, the court can exercise its discretion to order the Government to provide the defense with the names of the witnesses. And I will always hear from the defense, I'll give them an opportunity to argue why in this particular case a witness list should be provided. And I have, on occasion, ordered a witness list to be provided to the defense, even though it's not specifically provided for under the Rules.

Just to back up a little bit, I mentioned opportunities for discovery other than that under Rule 16.21 The bond hearing, even if it's not a probable cause hearing, I think is an important opportunity for the defense to gather information about the case. Quite often the agent is testifying, and it gives the defense an opportunity to cross-examine the Government's law enforcement agent and discover information that might not otherwise be available in discovery.

I'm sure you've all talked about Brady material earlier this morning. And I think it's very important for prosecutors to realize how Brady should be interpreted. And I call it the "ouch test." If a prosecutor is looking at its case and says "Ouch, that hurts," that means it should be turned over to the defense.

21. Id.
Basically anything that hurts the prosecution's case is arguably favorable to the defense. At the very least, it should be provided to the court for the court's review to decide that it should be turned over. But in most cases, if it hurts the prosecution's case, it's going to be favorable to the defense, and should be turned over. You shouldn't need to read a whole bunch of cases to figure that out if you are a prosecutor.

Another thing that I see with the defense bar in the Northern District of Georgia is that they are very creative in gathering information, notwithstanding the restrictions under Rule 1622 that Mr. Pozner talked about. What they do is they subpoena information. This is something that you might not realize from reading the Rules, but the defense, even pretrial, is entitled to use Rule 17(c) of the Federal Rules of Criminal Procedure to get material in advance of trial. And quite often I have defense attorneys come to me, they come to me ex parte, which means without notice to the other side, and say, will you sign this order to enable me to get information from the local police, from the federal prisons, from hospitals, from any number of sources. And quite often I do authorize those subpoenas in the interest of fairness, realizing that the rules don't provide for complete discovery to the defense necessary to prepare the case.

So that's something that you learn with experience, is to look for other opportunities outside the Rule to gather the information that you need. As Mr. Jones mentioned, more and more cases that we see in federal court are coming from state and local police agencies. It used to be in the old days, when I first started as an Assistant U.S. Attorney, that virtually all of the law enforcement agents who were making the cases and presenting them to the U.S. Attorney's Offices were federal agents. Now that seems to be the exception rather than the rule. And most of the drug cases, the violent crime cases that we see in federal court are actually made, at least in the Northern District of Georgia, are actually made by state and local agents or state and local agents who are participating in task forces with federal agents. And what that means is very often there's a police file that exists that the defense attorneys get just by subpoenaing just the local police officers. If it's a bank robbery,

they subpoena the bank investigative file that’s done by the bank’s private security, or the same thing for a bank fraud case, and they get valuable information in that way to help them gather more information on their case.

State and local transcripts, I’ve seen this very often where a person has had a preliminary hearing in a state court, they’ll subpoena or ask the judge to authorize them to receive a state or local transcript. I think the point in all of this is that if you’re going to be a practitioner, you have to know more than just what is written down in black and white in Rule 1623 or what is in the case law. It’s very important for you to understand the practice in your particular district, how cases proceed through the system, what opportunities are available for additional discovery.

I think that as you start out in your careers, it’s very important for you to develop mentors, to talk to people. If you intend to be a federal criminal lawyer, either a prosecutor or a defense attorney, it’s filled with mine fields. Unfortunately, the basic rules do not provide complete fairness. And it’s important for you to develop a complete understanding of not just what’s in the rules, not just what’s in the case law, but what is the practice in your district, how do cases proceed through the system, and what opportunities are available to you, to better represent your client.

MS. GINSBERG: I wish Doug Jones would come to my district and be the U.S. Attorney there. Because I think he’s probably – he is the only U.S. Attorney that I’ve come in contact with who has policies that even remotely, remotely resemble his policies and the procedures that he’s trying to implement. And I think if we had that, we’d be going a long way toward helping defendants get fair trials. We don’t have it and part of the reason we don’t have it is until someone you know or care about is faced with defending themselves against criminal charges, you don’t care. Nobody cares. They want bad people put away. They look to the law enforcement officers and prosecutors and courts to help get rid of these bad people and make them safe. And the officers and the prosecutors do get affected by their role as, I

23. Id.
think, gate keepers to the safety of the community in some way and get very protective about their cases. And the idea that discovery is a tool that can help you get to the truth from a criminal defense lawyer’s perspective is—it’s almost laughable. The efforts that criminal lawyers have to go to get even small amounts of information to find out what their clients are being accused of are just—it’s a continual effort to try and find a way around rules that, in my view, are designed to prevent disclosure of information.

When we go into court, you hear so often from a judge or from a prosecutor responding to a discovery issue, the Government knows what it’s required to produce, just as the Judge said. The Government knows what its obligations are under *Brady*, and judges don’t want to go beyond that. They’re faced, as the judge said, with usually boilerplate discovery motions that are not helpful to anybody. And lawyers that have that kind of a practice are not serving their clients’ interests at all. But routinely, boilerplate motions get filed, prosecutors stand up in court and say we have a standard discovery order that we use in this district, the judge says why are you not signing this everybody, and the judge will tell everybody that he or she knows that the Government knows what its discovery obligations are and basically don’t want to hear these disputes. It is a very, very difficult problem for defense lawyers. It is probably the biggest problem in figuring out how to defend a case. In the district that I practice in, we’re known around the country as the “rocket docket.” Cases literally go to trial in seventy days. It doesn’t matter how complicated the case is, it doesn’t matter that the Government has spent two and-a-half years putting together its case, your client gets indicted and you are in trial in seventy days.

We don’t have judges who believe that they are empowered to tell a prosecutor to produce a witness list. We don’t get witness lists in my district. And I think most criminal lawyers that I know are not in districts where judges will order a prosecutor to disclose a witness list. Normally what you hear from a judge is “the rules don’t permit it, or they don’t authorize it; even though I think you should get a witness list, I can’t tell the prosecutor

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to do it. If the prosecutor wants to do it, that’s fine; but I don’t have the power to make a prosecutor give you a witness list.”

What we’re confronted with so often are reasons from prosecutors that discovery should not be produced. And when I say discovery, it usually doesn’t include things like Rule 16,25 because that – everybody understands that there are certain types of documents that just have to be produced. But the question of whether something is material to the preparation of the defense is a requirement of Rule 16. But as a defense lawyer, I have never felt comfortable that a prosecutor is able to know what is material to my preparation of a defense. The prosecutor does not know what the defense may or may not be. And it is often in possession of large amounts of either documentary evidence or physical evidence that he has no idea contains information that I would feel is necessary to the preparation of the defense.

So instead of filing very general, long discovery motions that basically track the statute or track the case law, I think it’s incumbent on a defense lawyer to make very specific, whenever possible, very specific discovery requests that don’t draw the court into an unnecessary hearing that the judge is not going to want to resolve anyway and does not give the prosecutor a way out, of saying, well, this is standard and we’re going to produce what we know we have to produce.

Often we hear that the requested information is not in the actual possession of the prosecution. And now with these multi-state and multi-jurisdictional investigations, that’s more and more true. The Government’s obligation is not just to produce information that is in its physical possession. In multi-jurisdictional investigations, it is incumbent on the prosecutor, the prosecutor has an affirmative duty to search the records of other federal agencies or state agencies who are actively involved in the investigation or who have active involvement with witnesses that are potential Government witnesses and find out if Brady,26 Giglio27 material exists.

It’s not sufficient for a prosecutor to come into court and say, we don’t have that information. And that comes up frequently

in the context of Brady when you're trying to get a pre-sentence report, for example, or information about someone who you have concluded is going to be a Government witness; the prosecutors will respond, well, that's the probation office, or that's a document that belongs to the probation office or the court. And I think it's - as the Judge said, you have got to get creative in how you're going to get these kinds of documents or other evidence that can help you confront what turns out to be, in some cases, massive amounts of evidence against your client.

For instance, with a pre-sentence report, you frequently hear, and I think the case law probably supports this, that a pre-sentence report is not a Jencks Act statement, even though it has statements that were made by the person that is the subject of the report that you think ought to be disclosed. Don't stop if someone says that to you. You have to take it to the next step. There are parts of a pre-sentence report that probably are Jencks Act statements. There's part of the pre-sentence report that's called the defendant's version of the events. Many times lawyers, because they don't want their client to just ramble about the facts of the case with the probation officer, will have their clients submit a written version of the offense. This is signed by the client; that's obviously their statement. That can be extremely helpful if that person who is the subject of the pre-sentence report is later going to be a witness against your client in a different case, or even in the same case. Often people waiting to be sentenced will write letters to the judge admitting all kinds of sorrow about what they've done, apologizing for everything that they've - the harms that they brought people. And the letters that get attached to the pre-sentence report that are written by the defendants often contain facts about the case that could end up being inconsistent with something that that

28. Under the Jencks Act, 18 U.S.C. § 3500, a statement includes three categories of documents:
   (1) a written statement made by said witness and signed or otherwise adopted or approved by him,
   (2) a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with making of such oral statement, and
   (3) recording or transcription of a statement made by said witness to a grand jury.
29. See supra note 28.
person ends up testifying in the trial that you’re trying. Those are the kind of things that you have to keep looking for.

And you also have to figure out ways that you can make your requests – you ask the court to order the production of this kind of information, you have to make your requests specific. It’s not enough to just say, I assume that the person admitted he was guilty of these things and admitted other things in the version of the offense or in some other part of the document, the financial section. It will be your – a request that just says, I assume that this is going to help me – is going to be treated as conclusory. And conclusory requests, they just don’t get granted and they’re not the basis for any relief on appeal. So you have to try and get specific information that can help you support your request and then you have to try and figure out where you can get that kind of information, like ordering the transcript from that person’s sentencing hearing. Which issues that are disputed in the pre-sentence report are litigated and sometimes those are financial issues, they are issues that involve sentencing factors, they involve issues of role in the offense, there may be statements made about relative culpability that could end up helping you in your case. And the only way to find out about it is to go and get what you can from a public record which, in this case, would be a transcript or filings that are made in connection – objections to the pre-sentence report, using those public documents that you can get access to as a basis for making specific requests to the court for information that you can’t get access to.

I was involved in a case with a prison murder where we tried to prove that there was a gang that the defendants – the witnesses against the defendants were motivated by the gang, the inter-gang rivalry in the prison. And we requested Bureau of Prison documents that would prove that the defendants – the witnesses were members of rival gangs or a rival gang. And the judge in our district said, you know, may be or may not be, but you haven’t said – I don’t know if they are. Your request is too speculative and we’re not going to require the production of this information. What we ultimately did is go back to the prison, interview some other inmates, find out – get statements from inmates who would confirm that these potential Government witnesses were members of a rival gang, go back to the court
again, and say, now we’ve made a more specific showing, now we want these records. And we got them.

Getting good discovery is probably what will make the difference in most cases between winning and losing a case. Unfortunately, a lot of these cases are not later decided until the discovery was not produced, you end up on appeal, you end up arguing Brady\(^{30}\) violations. And at that point, it’s extremely difficult to prove that the outcome of your case would have been different when faced with all the weight of the evidence that has come in against your client.

Another major problem that we, I think, encounter is responses, almost over-responsive production. The open-file response. It is – in big document cases, it is not uncommon for the U.S. Attorney’s office to say: Here are the documents, you have access to them. Do what you want with them. That is an overwhelming task. Unless you have very rich clients with lots of resources, it is impossible to go through file cabinets full of documents, make any sense out of them, figure out what might be helpful to you. It’s impossible to really figure out what’s there, no less get a sense of what might or might not be helpful to you. So it is very important not to let either a prosecutor or a judge say, you have nothing to complain about, you’ve been given everything. That – it’s, I think, absolutely essential that you have access to what the Government has access to, but it should not relieve the prosecutor from identifying what is Brady material,\(^{31}\) identifying what are Jencks Act statements,\(^{32}\) and segregating them in a way that can be used in a criminal case by a lawyer who may or may not have other help, may or may not have other co-defendants with other lawyers, may or may not have the resources of investigators and paralegals to go through mountains of cases.

In the spy case I was involved in, we had two court-appointed lawyers. Fortunately it was an interesting enough case that other lawyers in our offices were willing to help, but did not get paid for the time that the other lawyers put in. And we got paid forty dollars an hour for our time. And we had a sealed room down in the basement of the courthouse and sealed file cabinets

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31. See supra note 9.
32. See supra note 28.
that contained thousands and thousands of pages of documents and thirteen months of wire taps. It was virtually impossible to make any sense out of that amount of information in the time frame that we had. And we had a little more than what was normal, but without the cooperation of a very honest Assistant U.S. Attorney who had a lot of integrity, we would have totally floundered and not in any way been able to provide a meaningful defense to our client or evaluated the strength of the Government’s case and the advisability of entering into an early plea.

So that is – having too much information is sometimes as dangerous or harmful or unproductive as having not enough information.

Another real problem that I find is the distinction or the tension, I guess, that arises when you talk about when certain types of evidence have to be disclosed. You have Jencks. The requirements under the Jencks Act are only that a statement of a witness be disclosed after he testifies on direct examination. In practical terms, that’s not happening very much anymore. Most prosecutors and courts are saying, at least produce the Jencks material a couple of days before trial. It really leaves very little time to investigate, to use the information effectively. What it does allow you to do is compare what they say now and compare what they said before and try and catch them in an inconsistency. That’s not always enough. And there’s usually a lot more in the Jencks material that ought to be followed up on and it’s useful in many more ways than just to show inconsistent statements. But what happens when you have a Jencks statement that’s also Brady or Giglio material, which is supposed to be produced in enough time to be used effectively at trial? You can get into a lot of arguments over what it means to be used effectively at trial and how much time do you need for that, but many – probably half of the jurisdictions, half of the circuit courts have ruled what I think is really – it’s unbelievable, have said that when you have

33. See id.
35. See supra note 28.
36. Id.
Jencks Act material\(^{39}\) that's also \textit{Brady} material,\(^{40}\) the disclosure – the timing of disclosure is governed by the Jencks Act,\(^{41}\) which means that even where you have evidence that is exculpatory, evidence that may prove that a criminal defendant is innocent or not guilty of the crime that he's charged with, that if that evidence comes in the form of a statement of a Government witness, that there's no obligation to produce it until after the witness testifies on direct examination. Or even in the practical sense, in our district, we get Jencks\(^{42}\) three days before trial.

If that is the kind of system that can produce a fair trial, personally I don't get it. And I think it's urgent for people, for lawyers, criminal lawyers, to try and use whatever other creative methods they can to try and get this information. Because people, clients are being convicted of crimes, they are probably not large numbers, but significant numbers of innocent people who are being convicted of crimes because the evidence that is in the possession of the prosecutors is not being turned over. And unfortunately that happens in more cases than you'd like to think about because prosecutors want to win and because they're influenced by the enthusiasm of the case agents. I can tell you a lot of times prosecutors have said to me, "The agent won't let me do it." I mean, it's – it shouldn't be, but it is. So it is, I think, just a matter of absolute importance not to give up on discovery issues, to use whatever resources you have to make specific requests and try and at least, at a minimum, create a record so that if the evidence is withheld, you can show what you might have been able to do had you had that evidence in a timely fashion.

**JUDGE BRILL:** Nina, can I ask you a question? You've been talking about discovery in the context of preparation for trial. Isn't it also important to have it for sentencing, particularly under the sentencing guidelines?

**MS. GINSBERG:** It's important for sentencing. I should also say that the Federal Rules of Criminal Procedure have extended the

\(^{39}\) See supra note 28.

\(^{40}\) See supra note 9.


\(^{42}\) See supra note 28.
Jencks Act requirements. Not only – Jencks does only apply in sentencing, but it applies to preliminary examination, which is a preliminary hearing, it applies in bond detention hearings, it applies in revocation hearings, probation revocation or revocation of supervised release.

Lawyers, as a practical matter, they don’t ask for Jencks material in these other kinds of hearings. It is available, you should get it. Brady material is required, it requires production of exculpatory evidence in these other kinds of hearings.

You very rarely hear discovery motions filed in the context of a sentencing proceeding. They should be. Your sentence in a federal case can be enormously enhanced, based on evidence which is proved by a preponderance of the evidence. So it is extremely important to get whatever available discovery you have – you can get in these other proceedings.

Mr. Leach: What I hope to do in my portion is to give you the federal prosecutor’s viewpoint. And let me start by saying that I’d like to take you back to a period of time several years ago, January 1, 1994. I’d like to take you back to Mr. Jones’ district, Birmingham, Alabama, where my witness, Melvin Burnett, was found in the New Hill section of Birmingham shot sixteen times. He was kidnapped, he was carried off into New Hill, and he was murdered. He was a witness of my mine in a large-scale narcotics case and he was killed because of his testimony. We know that because about six weeks ago, we convicted his murderers. One particular individual, Ernest Patton, who had the greatest motive to murder Melvin Burnett, did so because, and he stated it to his lieutenants, because Melvin Burnett was going to testify against him.

I’d like to also take you to a time about a year after that, West Palm Beach, Florida. Ernest Kitchens, a man who sat as close to me as Judge Brill is sitting right now, and he told me that the man against whom he was going to testify would have him

44. See supra note 28.
45. See supra note 9.
46. Judge Brill and Mr. Leach were sitting on either side of Ms. Ginsberg at a conference table during the panel discussion.
murdered. Ernest responded to a knock at his front door and he was shot dead between the eyes in front of his children.

All this is to say that it is a very dangerous world. And federal prosecutors, indeed, all prosecutors, have many interests that must be balanced; one of which clearly is the constitutional rights of the accused. That is acknowledged. But protection of witnesses and protection of the community are also important.

Now, what I hope to develop in my time is how a prosecutor's view and his practices in the discovery phase of a case touch upon all the items that are mentioned in the title of this portion of this symposium.47

One's discovery practices as a prosecutor most certainly do touch upon your ability to effectively prepare a case. They easily affect the trial of the case. And perhaps most prominently, it affects how you are going to be viewed by the court. And it has two roles in that regard. Number one, you have Judge Brill and you have the other magistrates. And it wouldn't take a rocket scientist to realize that each Assistant United States Attorney in the courthouse just down the road from where we sit has got a reputation. And your reputation for fairness and being forthright in your discovery practices are very important to the discretionary rules that are going to be made by the magistrates who sit on the sixteenth floor of the Richard Russell [Federal] Building. Your discovery practices also, in large part, affect your reputation with the defense bar. And this is an important item. Are there individual Assistant United States Attorneys who like having a negative reputation with the defense bar? I suppose so. I can't understand why, but I suppose so. Your baseline, that is, your baseline reputation is generated by what you do in discovery, the fairness of your discovery practices. And it also affects how counsel will view you in the tight cases where you have a heart-felt belief that there is danger to your witnesses. And in this particular case, we're going to get a whole lot closer to the strict construction of Rule 16.48

Now, why is it that defense counsel forms this opinion of your reputation, based on discovery? Many of the first contacts with defense counsel surround or go around the discovery practice.

47. This portion of the Symposium was entitled Panel Discussion: Criminal Discovery in Practice.
48. FED. R. CRIM. P. 16.
That attorney will learn about the case and will learn quite a bit about whether the Government is ready to prosecute the case by the way the discovery material is presented. The level of your organization as reflected in the discovery material and how well your discovery material fits to the allegations in your indictment will say a lot to counsel about the case and about the type of prosecutor you are.

Now, prosecutors disagree a lot about discovery. I would venture to say that with each individual Assistant United States Attorney at the Richard Russell [Federal] Building, you would find a series of opinions that vary widely. Many have a view of open-file discovery. I would suggest to you, however, though, the reality is that it is not really open-file discovery. They're not giving up their work product, they're not giving up their notes to the agents and the notes that the agents are generating back. I would submit to you that, for a federal prosecutor who is working on a complex case, open-file discovery is the lazy approach to handling discovery. In most cases, it means that the prosecutor believes that the evidence is overwhelming; that a detailed review of that evidence will take place at some later time when it is clear that a plea is not possible and the case is going to trial. There are many problems with open-file discovery, but I'll give you at least two of them. Number one is, as counsel for the Government, as the prosecutor, you'll be unaware of many details that appear in what you are presenting for discovery. There may be a host of defenses present in that information that a conscientious Assistant United States Attorney would pursue and resolve before indicting the case. By the time the prosecutor realizes the problems that exist, it's probably going to be too late. Second, there may be many things within that file that need to be done to sure up the case. We, too, are investigators. And to thoroughly review a case prior to trial and prior to indictment, you should look and you should investigate those defenses.

Finally, I agree with much of what has been said as to the documents that exist in places that have not been presented to you. Federal agents love to bring the bow tie case to an Assistant United States Attorney. When I say bow tie, I mean they are presenting to you an accordion file and they are saying this is everything that you need to know to go forward with this case. And the Assistant United States Attorney that goes forward on
that basis is not doing their job. They're not doing it from the constitutional standpoint. Because everything that's been said here about our responsibilities to thoroughly investigate what are in police files, FBI files, and those dozens of file cabinets tucked away in some dark corner someplace is absolutely correct. This is Supreme Court case law that no one can challenge. That is our responsibility. But it is sad to say that, on occasion, Assistant United States Attorneys don't think about their responsibilities in that regard, do not pursue that investigation.

But I can tell you for my part that I go through every document, that I try to turn over every rock that I think needs to be turned over, and I try to do it prior to the time that discovery goes out. Am I always successful? No. But do I let defense counsel know where I am in the process? Yes. At that initial discovery meeting that Judge Brill referenced to you,49 I may go in there and say, I have brought together seven file drawers full of material that I am going through. It is all the historical information that has any connection to this case. And as I find material that needs to be disclosed, I will disclose it.

I also like Judge Brill's "ouch test."50 I'm surprised for all the years I've known Judge Brill that I haven't heard it before. I have a test of my own. And that is, when you are looking at Brady,51 if you have to think about whether it should be disclosed, it probably needs to be disclosed. And I'll just give you one very brief aside that actually happened. Judge Brill knows what case I'm talking about.

There was an investigation where the FBI had an undercover operation, and it touched in some regard on prostitution activities in the northeast. And a certain witness working with the Government went into a brothel with specific and strict instructions not to partake. The agents could hear the tinkling of the belt buckle hitting the floor. And the discussion actually took place, fortunately it was not me, I did participate in the discussion, and you could imagine what my opinion was, as to whether that needed to be disclosed. Now, if you have to think about it, you better give it up. Which is what we did. It ended up

49. See supra pages 791-92.
50. See supra pages 793-94.
being a big issue in the trial, and rightfully so. Not so much for what the agent did—that is the individual who was present, not a federal agent, just an individual working with agents—but for how the agents handled that situation after the fact.

Now, what is the preferred route for discovery? How should it really be handled? What is the appropriate way for handling it? An Assistant United States Attorney or the prosecutor in state practice, wherever, should go through all the material with an eye towards the rules and should prepare files to disclose the information in an orderly fashion.

This is one of the major complaints. And I totally, totally agree with Ms. Ginsberg in her comments about just opening up the door to the evidence room and saying, well, have a great time. That is irresponsible in my view. It does not promote justice. The way that I handle complex preparation of my discovery is I take a piece of white, plain paper, and I write in a black felt tip marker what the evidence is that follows. And I do that for each logical break in the evidence. Now, am I doing this just so I can make it easy for Ms. Ginsberg when she comes in and looks at my case? Absolutely not. I go back to what I told you at the beginning. I go back to the reputation of the Assistant United States Attorney and what is going to happen in the administration of justice when you are in front of a judge and trying your case. And when counsel says, “Judge, may I have a moment with counsel,” when I’m getting ready to tender a document, Judge grants that, Ms. Ginsberg walks over to me and says, “Art, I don’t remember seeing that document.” And this happens a lot in trials, especially complex trials. “Where was that in discovery?” And it is a great thing for both counsel and for prosecution when I can go to my discovery file, pull it out, I’ve got my cover sheet, five pages in, there it is. Great, that’s fine. Thank you very much. We’re ready to proceed. That is the way it ought to happen. And if a prosecutor isn’t organized, there is no way defense counsel can pull the material together. Not without, as Ms. Ginsberg said, somebody with really deep pockets that’s going to spend thousands of hours and sort through material and really get a good picture of what is there.

52. See supra page 800.
53. See supra page 800.
We must always remember that we have to tender all the information that is material to the defense. And the way I look at that is that Brady\textsuperscript{54} and material to the defense go hand in hand. You have to be thinking about Brady material\textsuperscript{55} when you're thinking about what's material to the defense. We go to the "ouch test," we go to my, "if you have to think about it, disclose it test."

You have to give up exculpatory and impeaching information. And that means in all the files: police files, FBI files, all the agencies that are involved. Keep in mind that what is in the Government's possession as defined by the case law does not matter what's at the FBI office, doesn't matter what's at the U.S. Attorney's office. And it has to be that way. So that it imposes an affirmative duty on Assistant United States Attorneys to go out there, scour that information, because we are the only people who have access to it. And oftentimes, let me tell you, it is difficult for Assistant United States Attorneys to get that information. FBI loves to tell Assistant U.S. Attorneys, you can't see it. Well, I can dismiss this case. And it takes a tough individual to tell the agents that. And any USA who tells a lawyer that the agent won't let me do what is just and right in the case ought to be fired.

Now, what about Jencks Act material?\textsuperscript{56} We've talked about that. That is statements of the witnesses. And you have heard from many of the speakers how reprehensible our practices are. And this is really why I told you the story about my two witnesses. This is where the balancing act really comes into play is with these witnesses and their statements. Because when we disclose those statements to counsel, we lose total control of those statements. And the one thing that we learned with regard to Melvin Burnett is that Ernest Patton had a copy of his testimony, had a copy of the testimony that was going to be damaging to him. And that was a critical piece of information in causing Melvin Burnett to be killed.\textsuperscript{57}

So we have to be careful about that information. I think Ms. Ginsberg was absolutely correct. The practice is that they get it

\textsuperscript{54} Brady v. Maryland, 373 U.S. 83 (1963).
\textsuperscript{55} See supra note 9.
\textsuperscript{56} See supra note 28.
\textsuperscript{57} See supra page 803.
out there in sufficient time so that it can be read prior to trial. In my recent case, which was three months in the Government's case in chief, I got it out there two weeks ahead of time so that people could have an opportunity to look at that information prior to the witnesses taking the stand. And be mindful now, two weeks before the trial began, when the Government's case in chief was going to be three months long. I mean, there was a lot of time to look at that information and sort it and get together for trial.

There was some mention made by Mr. Jones about reciprocal discovery. Many Assistant U.S. Attorneys do not pursue reciprocal discovery, that is, evidence coming back towards us, because of the claim that we don't ever get any. And I think the practice, which is not just in the Northern District but in many districts around the United States, of not filing a discovery motion is wrong. You have to pursue discovery from the Government standpoint as vigorously as the defense pursues it from us. I think it's important that you ask for the reciprocal Jencks Act material. We do that. I get it. So I don't know where those statements from many AUSAs come from. But I do not find it as surprising that those Assistant U.S. Attorneys do not get reciprocal discovery. Put yourself in defense counsel shoes for a moment. If there was no motion filed and if you had several pieces of critical evidence that you were concerned you did know but you were concerned that Government's counsel could easily, with the resources of the FBI, counter, wouldn't you feel responsibility to, under your responsibility of zealously defending your client, not to surrender those items until the last possible moment? It's just good lawyering. Happens all the time. So I remove the temptation by filing the motion, making repeated motions to compel production of that information. And then when it does not come and it's produced at the last moment, I move the court to exclude the information.

Which is another part of the complaint from Assistant U.S. Attorneys, that the court never excludes. Not my experience at all. Many federal judges have excluded evidence tendered at the last moment when the Government has properly filed a motion,

58. See supra note 14 and accompanying text.
59. See supra note 14 and accompanying text.
moved to compel, received a compulsion order, and they haven’t produced. I mean, it just makes sense.

Just a word before I stop about Brady information. For those of you who become prosecutors, I suggest to you that you really take the broad view on Brady. And if you need to be persuaded, I suggest that you read the El Rukn decision out of Chicago. I do not know the Assistant United States Attorney who was raked, literally, over the coals in the El Rukn decision, but I would bet anything that that Assistant U.S. Attorney at each tidbit of information that came to his attention said, oh, it’s not significant. It’s not significant. Or, I’m too busy, I’ve got this and this I must do. This is the most important case in the office. And it was more omission than commission.

MR. POZNER: Art, why don’t you mention some of the El Rukn discovery issues?

MR. LEACH: I’ll let you do it. My point is that you would never want to be in that position during your career of having to face such an opinion naming you by name by an appellate court, to say nothing of all the constitutional responsibilities that come with being a prosecutor.

I thank you for your attention.

PROFESSOR PODGOR: At this point, before we open it up for questions, we’re going to give each of the panelists an opportunity to respond to the comments that they’ve heard. Mr. Pozner?

MR. POZNER: Well, in some ways, the panel is unfair because it’s enlightened. And we give a false impression that the world we live in out there is as enlightened as the group.

Would that all prosecutors at the trial level had Art’s sense of fair play and, I think, the very correct view that prosecutors are judged by their reputation and their reputations stem from discovery. If only it were true that United States Attorneys

60. See supra note 9.
across the country had the courage of Doug Jones to set up an office policy from the top down that preaches fairness.

But that’s not what’s going on out there. And in some sense, what’s going on out there is a reflection of what’s going on in this room. We went to school in an age and you go to school in an age where America glorifies winning. That is what we celebrate more than anything in this country: Winning. And the law keeps getting analogized to sports with dream teams, which I deplore, with who can get the job done, the go-to player in the clutch. And justice is not a sport. It is nice to win that book they give you for being top in your class, but when we leave the law school and get into the criminal justice field, we get confused about what being top in the class means and we come to believe it means winning at all costs. That is not the obligation of a defense lawyer, to win at all costs. It is not the obligation of the Government. But it is what drives us now in this country. How can I win? The rules are only there to be gentle guidelines to be ignored if possible, and certainly to be worked around if they would in any way inhibit winning.

But having created that system, the current discovery rules in the federal system make for game playing. And we are dependent now not on a system of justice or fairness, but on the integrity of the Doug Joneses and the Art Leaches of the world. The system ought not in the end exist on the integrity of the individual. The system ought to exist on its own sense of integrity. And that sense of integrity can only be restored if, at a federal level, we say the presumption will be that discovery will be open; that the witness names will be disclosed; that their statements, whether written out by the witness or summarized by the agent, will be handed over. And not two weeks before trial because, believe me, two weeks before trial, I’m psychotic. It’s way late to investigate at that time. I’m just trying to keep breakfast down at that point. That they will be given over immediately with, of course, the proviso that in the appropriate case, the federal government can seek a protective order saying, in this case, we should not disclose this witness’s name, this witness’s address, when they can make a showing that there’s a reason not to do so.

But until that day, what you have to do if you’re going to practice criminal defense work is you’ve got to pray that you land in the Northern District of Georgia with Art as your
prosecutor, that you practice in Alabama where Doug Jones runs an honest office, or that you come before a judge such as this judge who would ask you, counselor, are you saying "ouch"? Counselor, are you being fair? If only all the magistrates paid as much attention as did Judge Brill. I wish you well if you practice outside of those jurisdictions, because you will practice in an area that is dominated by lawyers who want to win and the oath to do justice is secondary.

MR. JONES: Very briefly. In my fourteen months as United States Attorney and working with other U.S. Attorneys around the country, I have found that the overwhelming number of federal prosecutors do have integrity. They do want to win. And they can do it and they can do it fairly because of the resources that the Government has.

I think there are exceptions to every rule. But I'm not as hard line as Larry is, I think I may have been at one point, that a lot of this is all an integrity issue. I can tell you, having been on - having had the really unique experience of being able to be on the defense standpoint scrambling around to try to get information, but at the same time, over the last fourteen months being able to review files and to go through the investigation, that sometimes prosecutors, they just don't know. An experienced prosecutor who's never defended someone accused of a crime may have all the good intentions, but doesn't know. It's overlooked. And that happens more than you like to think. That's why we're trying to take some of that and open it up a little bit so we don't have that problem. Because I do think that, by and large, the overwhelming majority of prosecutors in this country want to do what's right and want to do what's fair and want to do it honestly. There are exceptions to every rule. And I would invite you to read the El Rukn decision.63

One area that may not have been mentioned very much. We talked about Brady,64 and Brady and Giglio65 were often mentioned in the same sentence. Giglio is really different because it can be an impeaching instrument. One of the things you're seeing with all the U.S. Attorneys' offices now is being

63. Id.
very conscious of Giglio issues, not just from the standpoint of the snitch who may be in a drug case, but whether or not there are matters within the files of an agent or police officer that – Just this week, we disclosed in a drug case where a local police officer working on a task force about two years ago had lied to get a search warrant. The defense lawyer absolutely destroyed that witness on the stand. But from our standpoint, it had to be disclosed, and I think you’re going to see more and more of that.

Right now, this week, as a matter of fact, every U.S. Attorney’s Office has been meeting, representatives have been meeting to discuss Brady and Giglio issues, because they’re very important to the Department of Justice. And you’re going to be seeing more and more of that. I’m saying it’s important. We don’t want to try cases again. It doesn’t help the system, it doesn’t help us. And as a matter of fundamental fairness, even agents have material out there that can be used for cross-examination and we are developing guidelines to do that. And in some cases in some districts, you are seeing agents being assigned to desk duty because there are problems out there. And the prosecutors, and it is the prosecutors, and we have some resistance, but it’s the prosecutors who are saying to the FBI local SAC, the special agent in charge, this agent cannot work any cases, it’s just too much of a problem. And I want somebody up there that I can depend on and not have to get destroyed as a witness.

So with that said, the only other thing, it was said that discovery might make the difference between winning and losing. That is probably true in some cases. By and large, I take the view that it probably would not. I think my Assistants need to understand we have the resources; if we have the right person, open discovery is not going to make the difference in winning and losing that case. If it does make the difference, then we need to be questioning whether or not we should be bringing the case. There are those cases that it will be, but I think they’ll be rare. I think, more than likely, it is going to be the difference in whether or not a case tries for a week or two weeks or two months or whether it settles in a way that’s fair to everybody.

PROFESSOR PODGOR: Judge Brill?
JUDGE BRILL: I think that there’s an interesting debate about whether witness statements should be turned over by the prosecution to the defense at the earliest stages of the case. And it would require a legislative change to force that issue in all cases. Art Leach has a legitimate concern about witness safety, but I think that it would leave you with the wrong impression to suggest that that is the only reason that prosecutors do not turn over witness statements at an earlier stage in the case.

I was a prosecutor in white collar crime cases. Quite often my witness statements were victim statements. And the victims posed no threat to the defendants in the case, but yet, I had a concern about turning those statements over at the earliest stage in the case. And I think most prosecutors who are honest would agree that it’s a strategy concern. One of the concerns is that the defendant will tailor his or her testimony to get around what the witnesses, be they victims or some other witness, are saying. That is, the defendants will become more creative in creating their own evidence; that it will not, in the long run, lead to the truth. The reason I say this, it’s not for true confessions, but I just want you to have a realistic view of the types of cases that were handled and, if you get involved in this debate, to understand that there really is more to it than just saying it’s an issue of threats. I think it’s a very rare case where there is a legitimate threat issue. It’s probably far more likely that the prosecution or the Justice Department as a whole would be reluctant to such a rule change because of strategic concerns.

The other thing that I wanted to point out also in the interest of talking about reality here and practicalities is that some people might look at this whole issue and say what’s the difference, 80% to 90% or maybe even more of the people that are prosecuted really are guilty, end up admitting their guilt with guilty pleas. The vast majority of cases that are prosecuted result in guilty pleas. A very small percentage actually end up going to trial. So what’s the problem? They’re all guilty anyway. What difference does discovery make to the majority of the cases?

I mentioned to Nina Ginsberg sentencing.66 And the reason I did that is I think more and more, discovery is important to the

66. See supra pages 802-03.
issue of proper sentencing. In federal courts, we all operate now under the sentencing guidelines, which is a formula, essentially, that requires the judge to sentence within a particular sentencing guideline range if certain factors are present. The judge no longer has unfettered discretion to sentence whatever he or she feels is the appropriate sentence. Why is discovery important to this? Well, take a fraud case or any type of white collar crime case. The sentence is directly tied to the amount of money involved in the offense. If we have the type of case that Ms. Ginsberg described where you’re invited into a room with thousands of documents and multiple file cabinets, how are you ever going to figure out what the proper sentencing guideline range is? Role in the offense is important in arriving at the proper sentence under the sentencing guidelines. If the prosecution doesn’t turn over discovery, appropriate discovery, the defense attorney might not have the necessary information to argue his client’s lesser role in the offense, which could significantly affect the sentence.

So I think it’s important to realize that it’s not just an issue of winning or losing at trial, or finding out whether the person really is or isn’t guilty; there are various gradations of guilt and those are all encompassed within the sentencing guidelines. And discovery is very important towards arriving at the truth in sentencing, not just the truth in guilt or innocence.

**PROFESSOR PODGOR: Ms. Ginsberg?**

**MS. GINSBERG:** I think more and more it sounds like everybody here at least agrees that the technical rules of discovery and disclosure are very limited, very restrictive. More and more it really, I think, depends on—as Larry said before—the integrity of the prosecutor, not only that, but the integrity of the defense lawyer, in terms of how much discovery you’re going to get in a given case.

It’s sometimes overlooked by zealous advocates that the best way to try and resolve some of these disputes is to do it without a fight. And there are certainly a large number of prosecutors who do try to be fair and I have found, as a defense lawyer, if you live in an area, you practice in an area for a while, you do have a reputation that is important to you. And if you are forthcoming and if you are honest and your reputation to your
opposing counsel is straightforward and reliable, I think you do stand in a much better posture to get the benefit of discretionary decision making by prosecutors. So that if you can convince a prosecutor of a genuine need for certain information and you can convince a prosecutor in a particular case why there is no real threat of harm to a witness, you have a chance to resolve some of these issues in an informal way, which is not only beneficial to your client, but to the court, to the whole process. And we shouldn’t overlook that.

There will be prosecutors who will say, in a white collar fraud case, they’re not going to disclose the identity of their witnesses because there’s a threat. Well, there’s no conceivable threat. There’s no, in my view, good reason not to identify the witnesses and produce the witness statements. And if the concern is that defendants will tailor their testimony, there are protective orders, there are mechanisms that can be utilized and should be utilized so that you can facilitate producing – getting that kind of information so that you can prepare your defense and not run afoul of the legitimate prosecutorial concerns.

I do think that it’s the minority of prosecutors that are going to prefer to be open with discovery than protective of their information. But I suggest, if you do become criminal lawyers, that in addition to taking the advantage of what you can in terms of motions and filings that you make and relief that you seek from the court, that you at least make the effort to get discovery on an informal basis. And how you practice as a lawyer and how prosecutors perceive you will be as important in whether a given prosecutor is going to elect to make information available to you as the other way around.

So those are – your personal integrity, not only in the courtroom but in informal settings where you can negotiate these kinds of things is as important as your ability to stand up in a courtroom and make a good legal argument about why certain evidence should be produced.

PROFESSOR PODGOR: Mr. Leach?

MR. LEACH: I think what I would like to leave everybody here with, particularly those who have any interest in becoming prosecutors, relates to Mr. Pozner’s comments about winning. And that is that it is very easy to get co-opted; that is, to feel that
you are part of the law enforcement team and winning is, above all, the most important thing. You have to remember that you are much more than part of the law enforcement team. You are the constitutional arm of the government. And you bring into the courtroom an awful lot of esteem for the United States when you walk in and you say, “Ladies and gentlemen of the jury, my name is Art Leach, and I represent the United States of America here.” And you need to always keep focused on the fact that you have to be the bridge between the agents and between the defense counsel, and the defendant ultimately, and that those responsibilities are just as weighty as presenting evidence and getting convictions and so forth. So be careful about being co-opted.

I feel that in my experience as an Assistant United States Attorney that hasn’t happened. But I can tell you way back in 1981 when I was an Assistant District Attorney and fresh out of law school, I was pretty close to being totally co-opted by the cops and so forth. Because I was in Tifton, Georgia, and I had nothing else to do but be an Assistant DA. And it was easy to get co-opted. But I was fortunate in that, as I left, I had some very great lawyers who sat me down who said, “Art, you are a very good lawyer. You need to sit down and think about these things.” I credit them with that and still visit those lawyers to this day.

I agree with Mr. Jones, in that the discovery is not going to make the case. It is definitely, without question, the quality of the investigation that is going to make or break the case. And when I say investigation, I’m not just talking about what the FBI is doing out there on the street. I mean, we could spend an entire symposium talking about how to investigate the case from an Assistant U.S. Attorney’s perspective. But the things that we do in front of the grand jury, the degree of care that we take to examine the case and to prepare the case so that we can be ready for trial and that we can – so that we can prepare the discovery materials is very important. Very briefly. Part of what I do with a grand jury is, when I bring people in, I subpoena all those distant records, the files that may be in some distant Maryland police department someplace. And some lucky officer from Maryland gets a trip to Atlanta. I get his files. So, I mean, it’s a swap out. And it’s important to do those things because that’s part of the preparation.
In terms of Jencks Act material, I want to say that I surrender incident reports, that is, police reports of events. I do that because I think it’s important from the case in chief standpoint. I don’t have to do it. I could make a construction of the Jencks Act where I could say, okay, you’re going to get that two days prior to trial. But I do that because oftentimes my physical evidence is delineated in those reports. And there’s never too much overlap in your discovery. Where counsel says, “I never knew about that murder weapon,” and you can say, (a) I gave you the murder weapon in discovery; but (b) there’s the police report where the murder weapon was found at the scene; and (c) here’s the chain of custody that was given to you in discovery that shows the murder weapon. So, enough.

Giglio involves our responsibilities to provide our deal, our arrangements, any considerations that have to do with witnesses that testify. Important point for people who will become prosecutors: Require your agents, your officers to give you a specific statement as to any money or things of value given to the people who will testify. I find that most helpful. Things that just haven’t come up in any other discussion suddenly come up in this document. And it’s not that the agents are affirmatively trying to conceal, it’s just a tender point as far as these people are concerned. So this tends to bring it out in the open and I explain to them our responsibilities.

Also, any time that you as a lawyer meet with an individual, after the El Rukn decision, even if we give them a can of Coke, it goes in the report that is given to counsel. Cigarettes, stick of gum, we do all that. It goes into the reports that go to defense counsel.

Always remember, a case, especially a complex case, can go through many agents, many Assistant United States Attorneys. The person who ultimately stands up in the court and says I represent the United States, that’s where the buck stops. And all this responsibility falls upon you if you have the privilege of doing that.

Thank you.

67. See supra note 28.
PROFESSOR PODGOR: Thank you very much. At this point, we’d like to open it up for questions. There are microphones in the two aisles. If anyone has questions, please come up to the microphone and ask your question of any of the panelists or all of the panelists.

MR. ANDRISE: This is a question for Mr. Jones and Mr. Leach. I was just curious as to whether either of your offices has had policies that—in light of, I guess—increased cooperation between the intelligence community and the law enforcement community, where you’ve got material that everyone who has looked at the file agrees that this is discoverable material but it’s come as a result of the work that the intelligence community has done and perhaps has been obtained under less than scrupulous means or the intelligence community says their first master is the State Department and their second master is the Justice Department and they’re not willing to reveal their sources and methods. What happens then?

PROFESSOR PODGOR: Could you please identify yourself also.

MR. ANDRISE: Jason Andrise, second year law student here at Georgia State.

MR. JONES: Well, there are mechanisms in place to handle security concerns, if that’s what you’re talking about. They are real complicated. Fortunately in my district, that’s a real rare occasion. We’re beginning to see more information out of like the Huntsville area where we have the big defense industry and some of those cases, especially with technology that’s going back and forth overseas. In Atlanta, Art, y’all may have had a little more to do with that. It just hasn’t come up very much for us. There are mechanisms for national security concerns, but not a lot of the intelligence cases — we just don’t see them. They don’t come to us. They don’t make cases. And they will handle those from a criminal standpoint, but handle them in a different way. But a lot of them are just that, intelligence type cases, that they don’t go forward and are used in a different way.

Art, you may have something different.
MR. LEACH: There is an entire procedure set up through the Department of Justice where information is cleared through intelligence agencies to be ultimately given to the law enforcement agencies. But frankly, I have seen nothing of that. I don't know that it's going to be terribly productive, because they are so restrictive in their sources and what they will tell you that anything they gave you would be virtually useless. So, while I hear that it is happening – and the classic example we're getting is that someone may call the FBI and say, "Go to this street corner at this time and look for this car and something's going to happen." And then the agents go out there and wait and make an independent observation. But frankly, I know of no example like that.

Now, part of my responsibility in the Organized Crime Strike Force is to investigate Russian organized crime. And with the increased assistance that was supposed to come from the intelligence agencies, I was certainly hoping that at least the potential targets of investigations could be run through the intelligence agencies, so I could just know from their standpoint, is this a member of Russian organized crime. They don't even give me that. So I find them virtually useless.

PROFESSOR PODGOR: Any other questions?
If not, I would like to thank very much each of our panelists [and] I would like to thank very much the Law Review for this presentation today. They have just put together a wonderful group of people and a wonderful issue that will be coming forth from today's discovery debate and presentations that we have heard.