NOVA SCOTIA BRANCH
CANADIAN BAR ASSOCIATION

S U B M I S S I O N
TO THE ROYAL COMMISSION
ON THE
PROSECUTION OF DONALD MARSHALL, JR.

Fall 1988

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When the Government of Nova Scotia established the Royal Commission on the Prosecution of Donald Marshall, Jr., on the 20th day of October, 1986, it was natural for the Canadian Bar Association to become involved. The findings of this Royal Commission will, without doubt, become a "watershed" for reform of certain neglected and tired aspects of the criminal justice system, especially some of its procedural safeguards which failed at almost every turn in this case.

Aside from the important matters of police and prosecutorial conduct and the findings of fact which evolve therefrom, the key to uncovering the injustice to Donald Marshall, in the opinion of this submission, turns on the Crown's failure to disclose exculpatory (favourable to the accused) evidence to Donald Marshall or his counsel, before during or after his trial and appeal. It is this obligation to disclose evidence favourable to the accused which will be carefully examined in this submission. This report further endeavours to recommend some solutions and methods to improve the disclosure practice by the Crown to the accused and its counsel.

A C K N O W L E D G M E N T S

I would like to take this opportunity to thank Professor William Kaplan, at the University of Ottawa Law School, who researched and wrote the preliminary draft of this submission; Bryan Williams, Q.C., President of the Canadian Bar, 1987 - 1988; William Monopoli and John Giokas, Directors of Legislation of Law Reform of the Canadian Bar Association in Ottawa; and my partners at Boyne Clarke, with special thanks to David J. Bright and Bea Renton.

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October 28, 1988

INTRODUCTION

What information to disclose to an accused in a criminal matter is a question that has long vexed the legal profession. The answer to this question requires a balancing between the interests of the state in the administration of criminal justice and the right of the accused to a fair trial. On one hand, Crown prosecutors are understandably reticent to release information that, if misused, could result in justice not being done. Witness tampering, fabrication of evidence and alibis to meet the Crown's stated case and the elimination of surprise are just three of the concerns Crown prosecutors raise when asked to broaden the scope of information to be disclosed to lawyers for an accused. On the other hand, lawyers for the defence need sufficient information for the preparation of their case and it is the State that generally controls access to that information. Defence counsel need to know not just the evidence against the accused, but the evidence in his or her favour along with evidence that is apparently neutral, suggesting neither guilt or innocence. Only with full and timely access to the information gathered by agents of the State can defence lawyers properly discharge their burden of holding the State to the criminal burden of proof.

It has long been accepted as indispensable for the fair administration of criminal justice in our society that some access by the accused to the State's case against him/her is required. But what type of access? To statements? To witnesses? To an accused's entire file? And when should access take place? Before the trial? During the trial? Or after the trial if relevant evidence subsequently comes to the attention of the Crown? What this report seeks to do is, first, to historically review the duty of Crown counsel to disclose exculpatory evidence to the accused. Second, to examine in a

limited manner the general disclosure practice of prosecuting attorneys in a number of Canadian Provinces and Territories, the United States and in some foreign jurisdictions. Third, to review canons of professional ethics relating to disclosure of State evidence to an accused. Finally, to draw from this review, some solutions to improve Crown disclosure practice so that another Donald Marshall, Jr. case shall never occur again.

Chapter 1

Historical Review and the Law

There have never been, nor are there today, any legislative requirements in Canada compelling Canadian prosecutors to make complete disclosure of their case to the defence prior to trial. Notwithstanding this legislative lacuna, there is one area to which Canadian judges have, from time to time, turned their attention and formulated general principles which establish a Crown duty of disclosure of exculpatory evidence.

In Lemay v. The King (1) the late Mr. Justice Locke declared that counsel for the prosecution must ". . . not hold back evidence because it would assist an accused . . ." (2) This is not to say that as a result of this decision Crown counsel had an obligation to disclose all information in their possession tending to suggest innocence to counsel for an accused. Lawyers prosecuting criminal trials were, instead, to exercise discretion as to which witnesses were material and which were not. One commentator described the obligation as follows: "The word 'material' must be taken to refer to facts which are material either to guilt or to innocence, but in making a judgment in this situation, the crown counsel must have regard to the reliability of the evidence in question. To attempt to go beyond that which has been indicated, and to formulate rules that must govern the exercise of the discretion, would, in effect, be putting an end to the discretion. The consequence of this conduct would be to hinder, rather than promote, the fair and impartial administration of criminal justice. It cannot be the rule that counsel for the

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1 [1952] 1 S.C.R. 232.

2 Ibid at p. 241.

prosecution must call each and every person who may be in a position to testify." (3) So, as formulated in the Lemay case, Crown counsel was not obliged, as a matter of principle to call a witness where the effect of eliciting that testimony would be to allow a guilty person, through, for example, perjury, to escape justice. Where, however, the effect of evidence disclosure would be to reveal facts material to the innocence of an accused, this consideration cannot apply and disclosure must be made.

Three years later, in 1955, the late Mr. Justice Ivan Rand further defined the disclosure duty of Crown prosecutors. In Boucher v. The Queen, (4) Rand J. wrote: "It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before the jury what the Crown considers to be reliable evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty which in civil life there can be none charged with greater personal responsibility. It is to be performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings." (5) The principles embodied in this judgment would

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3 Keith Turner, "The Role of Crown Counsel in Canadian Prosecutions," (1962) 40 Canadian Bar Review 439 at p. 453.

4 [1955] S.C.R. 16.

5 Ibid at pp. 23-24. See also Richard v. The Queen, (1960) 126 C.C.C. 255 per Bridges J.A. at p. 280, Regina v. Lalonde, (1972) 5 C.C.C. second series, p. 168 and Martin, "Preparation for Trial," Law Society of Upper Canada, Special Lectures, 1969, p. 221 at p. 235 at seq; Mark M. Orkin, Legal Ethics: A Study of

subsequently be mirrored in the Canadian Bar Association Code of Professional Conduct and in the various provincial law society codes.

What commentary the disclosure principles of these judgments elicited was agreed: "the ethical obligations of a prosecutor as interpreted by the Supreme Court of Canada, require him, at a minimum, to disclose evidence favourable to the accused at some stage prior to the verdict."(6) This duty implicitly imposed an obligation on the police to disclose such evidence to the prosecutor. (7) The disclosure duty of the prosecutors was at best a minimum standard: "If the primary task of the prosecutor is to see that 'justice' is done, should he not disclose the evidence before the trial and should he not also allow the defence access to unfavorable evidence so that there is an opportunity to make any necessary investigations? Surely surprise does not always result in 'justice' being done? Surely 'justice' also requires that the accused have access to what appears to the prosecution to be neutral evidence. If discovery is denied, are we not merely paying 'lip service to grandiose concepts' and preventing them from having any practical effect by procedural rules which deny counsel access to the facts which he must know in order to make them effective?"(8) Notwithstanding this trenchant observation and seemingly clear statement of

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Professional Conduct, (Toronto: Cartwright & Sons, 1957, p. 116ff.)

6 Anthony Hopper, "Discovery in Criminal Cases," (1972) 50 Canadian Bar Review 445 at p. 469.

7 Ibid. Indeed, according to Lord Devlin this obligation was, in fact, a legal duty. It was "strongly arguable that police or prosecutors who suppress evidence favourable to the accused are guilty of obstructing justice." Cited Ibid.

8 Ibid.

principle by the Supreme Court of Canada, the disclosure requirements of Crown prosecutors remained, as a matter of practice, largely unaffected by these judicial developments.

As late as 1968, Professor Brian A. Grosman of the Faculty of Law of McGill University observed that it was only those defence lawyers who were part of a "reciprocating environment" who received disclosure from the Crown. Those who were not, did not. What was this reciprocating environment? Those who are "trusted," Professor Grosman wrote, along with those who are "safe", will "obtain full disclosure of the prosecution's case prior to trial." How were these assessments made? "The defence lawyer is 'safe' if he enters a proportionate number of guilty pleas, does not utilize the evidence obtained in pre-trial disclosure for cross-examination of prosecution witnesses and is likely to enter a guilty plea after an assessment of the prosecution's evidentiary strength."(9) Dissatisfaction over this situation led to numerous calls by the defence bar and a recommendation to this effect from the Law Reform Commission of Canada for the institutionalization of a process of discovery, analogous to discovery in civil law, in criminal cases. "If defence counsel has an opportunity to discover the prosecution's case in advance, the weaknesses of the case can then be discussed with the prosecutor and the apparent strengths can be made the subject of further investigation . . ."(10) The calls were unheeded. In fact, the only further developments to take place in this area

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9 Brian A. Grosman, "The Role of the Prosecutor," (1968) 11 Canadian Bar Review 580 at p. 586.

10 Anthony Hopper, "Discovery in Criminal Cases," (1972) 50 Canadian Bar Review 445 at p. 465. See also Criminal Procedure - Discovery, Working Paper No. 4, Law Reform Commission of Canada; John Sopinka, "Criminal Procedure: Discovery," (1975) 7 Ottawa Law Review, 288ff.

were initiatives by the Canadian Bar Association and by some provincial law societies in the drafting and publication of guidelines for the ethical and professionally responsible practice of law, as well as issue of guidelines by the Ontario Ministry of the Attorney General and by a recommendation of the Uniform Law Conference. The canons of professional conduct will be reviewed in Chapter Five of this brief. The recommendations of the Uniform Law Conference will be considered in the next section of this brief.

While these developments brought about some positive change, disclosure of exculpatory evidence does not, even today, occur in every case. Indeed, inadequate and incomplete disclosure continues to potentially affect some criminally accused. Re Cunliffe ([11]) is a recent case in point. The Crown prosecutor in that case knew of the existence of witnesses favourable to the accused who had been charged with murder but did not disclose their existence to the lawyer for the defence. The Law Society of British Columbia ruled that failure to disclose this material evidence constituted professional misconduct.

The Law Reform Commission of Canada has examined the issue of Crown disclosure to the defence on two occasions. In 1974, they produced the Report, Discovering Criminal Cases (1974). The recommendations, included the requirement for the prosecution to disclose to the defence not only statements of witnesses it proposed to call, but also the identity of persons who had provided information to police or prosecutors. The Commission recommended that legislation be implemented to set out the rules for disclosure.

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11 Re Cunliffe and Law Society of British Columbia 13 C.C.C. (3d) 560.

The Law Reform Commission again dealt with this issue in its 1984 Report entitled, Disclosure by the Prosecution, and made recommendations which included the incorporation of a crown disclosure procedure in an amendment to the Criminal Code.

Chapter 2

The Practice and The Canadian Scene

Until recently Crown disclosure usually took place in an ad hoc fashion, often the result of personal relationships between Crown attorneys and the defence bar. The disclosure was often supplemented by defence counsel using the preliminary inquiry as a means of learning about the Crown case against an accused.

The preliminary inquiry as presently constituted, however, offers little in the way of an opportunity for discovery by defence counsel, as the purpose of it, as stated in the Criminal Code, and by the Supreme Court of Canada, is to determine whether there is sufficient evidence to put the accused on trial.(12) In some jurisdictions local Crown attorneys call only enough evidence to satisfy the preliminary burden of proof to see the case put over for trial. In other jurisdictions more complete disclosure is made. The result of differing practices is a morass of case law concerning adduction of new evidence by the Crown during the actual trial of an accused, and, more importantly, unfairness to the accused. Moreover, preliminary inquiries are slow, expensive and inefficient means for providing an accused with information about the case the State will try to make in court. Nevertheless, in some jurisdictions preliminary inquiries remain the only means, pursuant to the relevant provisions of the Criminal Code, through which the accused can obtain access to information about the Crown's case.

Concern over inadequate and varying disclosure processes led Ontario Attorney General Roy McMurtry, in 1981, to table in the Ontario Legislature guidelines subsequently issued to Crown

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12 Patterson v. The Queen, [1970] S.C.R. 409 at p. 412.

prosecutors respecting disclosure in criminal cases. These guidelines are reproduced completely in Appendix E to this report.

The guidelines recognize the general duty of Crown counsel to disclose both the Crown's case and make the defence aware of any relevant evidence that may be helpful to the defence and that is worthy of consideration by the court, but which the Crown may not intend to call as part of the case for the prosecution. The guidelines do not set out specific procedures for providing disclosure, nor do they establish any mechanism for ensuring uniformity in disclosure. Rather they create a discretionary regimen under which disclosure will be determined by the local Crown attorney in accordance with local Crown and police resources and with the needs of the local defence bar. As a result, disclosure practices vary throughout the province of Ontario.
The decision to provide guidelines on disclosure rather than rules was, apparently, a deliberate one. It was made in order to ensure flexibility and to give Crown counsel discretion in their application depending on local conditions. The notion behind the retention of discretion was to provide a means of ensuring that certain information, that could lead either to injustice through perjury or injury to witnesses and victims remain confidential. However, the defence bar charges that the decision to retain discretion over disclosure, has proved both unworkable and, in some cases, unfair. In some localities Crown counsel provide defence lawyers with near-to-complete access to an accused's file, but in other localities only limited disclosure is made. The defence bar in Ontario has asked, on at least one occasion, that the guidelines be replaced with legislation stipulating

mandatory practice and procedure for defence access to Crown information. (13)

Disclosure requirements of Ontario Crown counsel was one of the matters considered by the Hon. Mr. Justice T.G. Zuber. In his recently issued, Report of the Ontario Courts Inquiry, Mr. Justice Zuber reviewed the practice and problems of Crown disclosure in Ontario. Justice Zuber noted that while the guidelines improved the overall practice of Crown disclosure, serious difficulties remain. One of the first problems that Justice Zuber identified was unavailability of Crown prosecutors with sufficient time to devote to making adequate disclosure. Justice Zuber recommended that additional Crown prosecutors be hired.

Another problem that was brought to Justice Zuber's attention, in the form of submissions from the defence bar, was the degree of Crown disclosure. These submissions urged Justice Zuber to recommend that more detail respecting the Crown's case be disclosed and that copies of witness statements be provided rather than simple summaries or outlines of the testimony witnesses are expect to give. Mr. Justice Zuber, however, was satisfied that adequate disclosure was being made and that no changes were necessary in this area.

Where Mr. Justice Zuber did recommend change was in respect of the guidelines themselves. Justice Zuber adopted the submission of the defence bar, that because the guidelines were only guidelines they were not being uniformly followed. "In some areas of the province, full disclosure is made but, in others, it

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13 See "Has Crown's disclosure duty changed with Charter?," The Lawyers's Weekly, October 10, 1986, pp. 10-11.

is inadequately made."(14) The explanation for inadequate disclosure was concern over fabrication of testimony to meet expected evidence. Mr. Justice Zuber, while cognizant of this potential problem, stated that he was "not convinced that this possibility is so great that it should lead to a shutdown of the disclosure process in some areas of the province."(15) Furthermore, Mr.Justice Zuber added, it did not "appear reasonable that the likelihood of fabricated defenses is the subject of such variation from region to region to justify a similar variation in the disclosure process. If disclosure in a particular region is perceived to lead to reasonable grounds for believing that defenses are being fabricated, then the appropriate remedy is to initiate an investigation with a view to laying criminal charges for obstructing justice, or some like criminal offence."(16) Having concluded that the guidelines were not being uniformly applied, and that no compelling reason existed for variations in their application, Mr. Justice Zuber recommended that the Attorney General upgrade the existing guidelines respecting Crown disclosure to the status of a directive to be observed unless the Crown prosecutor could demonstrate to the Attorney General why, in a particular case, disclosure should not be made.

In preparation for this submission, a questionnaire was sent to all provincial Attorney Generals with regard to Crown disclosure. Many of the provinces have adopted the Uniform Law Conference Disclosure Guidelines which are reproduced in their entirety in Appendix D of this report. At the present time, these guidelines

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14 The Hon. Mr. Justice Thomas Zuber, "Report of the Ontario Courts Inquiry," (Toronto: Ministry of the Attorney General, 1987) at p. 233.

15 Ibid at p. 234.

16 Ibid.

have been adopted by the Province of Manitoba, Alberta, New Brunswick and Nova Scotia (as of July 22, 1988). These rules acknowledge the general duty on the part of the Crown to disclose the case-in-chief for the prosecution to counsel for the accused. Furthermore, the guidelines provide for the continuing disclosure of any new and relevant evidence that becomes known to the Crown.

It is understood that there is a continuing obligation on the prosecution to disclose any new relevant evidence that becomes known to the prosecution without the need for further requirement for disclosure.([17])

While the Uniform Law Conference Guidelines appear to be progressive, there are many shortcomings, some of which include:

1. The continuing obligation to disclose is on the "prosecution" not the police, yet the police are often the gatherers and recipients of new evidence.

2. The evidence must be "new" to be provided to the defence under the continuing obligation to disclose rule. Numerous appeals in the U.S. and in Australia by the defence on inadequate disclosure have been lost because the Court held that the evidence was not "new". (See Appendices B and C.)

3. The new evidence referred to must also be "relevant". It is left to the discretion of the Crown to decide if the new evidence is relevant. Obviously, if new evidence is developed in a case, it should be provided to the defence. What is considered

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17 Uniform Law Conference Disclosure Guidelines, Uniform Law Conference, Halifax, 1985.

relevant evidence to the defence, may not be relevant to the prosecution.

4. Under the Guidelines the Crown may still refuse to disclose names and addresses of "potential witnesses", because of the perceived need to protect these witnesses from intimidation and harassment. This rule is contrary to the spirit of full disclosure. One cannot assume defence counsel would approach a witness in other than a professional manner. There are serious consequences in the Criminal Code for anyone who intimidates, threatens or harasses witnesses. However, there may be a rare occasion where a potential witness cannot be identified and their identity should be protected by an application to the Court. However, their evidence should still be disclosed.

5. Disclosure to an unrepresented accused by the Crown is left to the discretion of the Attorney General. This is unfair to an accused who has the right to represent himself and make full answer and defence. It is difficult to see how a guideline such as this does not violate the Canadian Charter of Rights and Freedom.

6. The final clause of the Uniform Guidelines provides that, ". . . full and fair disclosure should be given unless there is a demonstrable need that such full and fair disclosure should not be given." The vagaries of what a "demonstrable need" may be in the eyes of a Prosecutor invites problems.

7. The Guidelines do not provide for aggrieved parties seeking Crown disclosure to appeal a decision not to disclose.

8. There is no mention in the Guidelines of the obligation on the Crown to advise the defence what the nature of the

information is the Crown has not disclosed and the reasons for the denial.

9. Finally, the Guidelines provide no sanctions which the defence can seek to enforce against the Crown to ensure compliance to the Guidelines.

Some provinces, however, have made some marked improvements over the Uniform Law Conference Disclosure Guidelines. Manitoba's Guidelines, have restrictions on disclosing police information that is collected during investigation. Police investigatory records are not released to defence counsel without the consent of the police. The Manitoba Guidelines require the disclosure of witnesses' names favourable to the accused but there is no obligation to provide information on what these witnesses would say. The Guidelines further stipulate that all disclosure information is to be revealed on a "timely basis", but it is unclear what this means.

Nova Scotia has recently invoked new Disclosure Guidelines, which provide for fuller disclosure. Prior to the recent amendments, defence counsel were only entitled to read and not photocopy a "will say" statement of a witness. The new Guidelines entitle defence counsel to photocopies of all written signed statements. It would appear this only applies to witnesses to be called in the Crown's case in chief.

It may be argued, however, that Nova Scotia has actually taken a step backward with its new Disclosure Guidelines. Under the Uniform Guidelines, an accused is entitled to a "summary of witnesses' statements or the contents of witnesses' statements". Now in Nova Scotia an accused is only entitled to a "summary prepared by the investigating police agency of the case as a whole". The new Guidelines say the defence is entitled to "all

written statements made by witnesses" to be called by the Crown. This does not include someone who did not give a written statement but who the Crown intends to call. Second, the Uniform Guidelines permit Crown disclosure of the criminal records of certain witnesses. The new Nova Scotia guidelines make no such provision. Where the defence has no access to CPIC (Canadian Police Information Centre) or other data sources, this may prejudice the defence.

No province, however, specifically provides for the disclosure of information that comes to light after the trial process has commenced, nor after the trial process has concluded. The only mention in the Uniform Guidelines is the "continuing obligation" to disclose but it does not define the time frame. Crown non-disclosure of exculpatory evidence during and after the trial was a crucial factor in the conviction of Donald Marshall.

Similarly, Crown discretion in disclosure also invites reform. A close examination of the B.C. Crown Manual (18), demonstrates a myopic attitude toward discretionary Crown disclosure. The Manual states:

> "To release these comments and opinions (from police) except in extraordinary circumstances would discourage the investigator from providing these to Crown counsel . . . These comments are not provided to defence unless counsel decides that the proper administration of justice requires it."

Crown counsel's discretion is so broad and subjective, the B.C. Guidelines are seriously flawed.

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18 See Appendix A

C A N A D A

SURVEY OF PROVINCIAL AND TERRITORIAL PROCEDURES - FALL, 1988

	No. of Full-Time Prosec.	No. of Part-Time Prosec.	Part-Timers Do Code	Part-Timers Political Appointments	Written Disclosure Guidelines: Before Trial	During Trial	After Trial	Statutes to Compel Disclosure	Disclosure of Witness Names and Statements to Help Accused	Adopted Uniform Law Conference Disclosure Guidelines	Law or Rules to Compel Police	Comments and Notes
B.C.	170	NR	NR	NR	Yes	Yes	NR	No	Discretionary	No	No	Copy of Guidelines provided. Similar to Uniform Code.
Alberta	150	100	Yes	No	Yes	No	No	No	Yes	Yes	NR	Uniform Code adopted.
Sask.	44	40	Yes	NR	Yes	No	No	No	Yes	Similar	No	Guidelines provided are similar to the Uniform Code guidelines.
Manitoba	50	0	N/A	No	Yes	No	No	No	Discretionary	Yes	No	Guidelines are similar to Uniform Code.
Ontario	NR	NR	NR	NR	Yes	NR	NR	NR	No	Similar	No	Similar to Uniform Code.
Quebec	NR	NR	NR	NR	NR	NR	NR	NR	NR	NR	NR	
N.B.	40	6 - 12	Yes	Yes	Yes	Yes	NR	No	Yes, but discretionary	No	No	Adopted Guidelines prior to Uniform Code law guidelines (reference in Guidelines to Cunliffe v. Law Soc. of B.C.) - continuing obligation to disclose.
N.S.	98	35	No	Yes	Yes	Yes	Yes	No	Yes, but discretionary	Yes	No	adopted Guidelines July 22, 1988 - same as New Brunswick except does not adopt Cunliffe rule but does provide copies of all written statements of witnesses, possibly including notes on verbal statements.
PEI	NR	-	-	-	-	-	-	-	-	-	-	
Nfld.	NR	-	-	-	-	-	-	-	-	-	-	
NWT	9	0	Yes	NR	Yes	No	No	No	No	No		
Yukon	NR	-	-	-	-	-	-	-	-	-	-	

NR = No Response
N/A = Not Applicable

Chapter 3

The United States Situation

State disclosure of evidence to accused persons is not just a matter of rules or canons of professional ethics, it is a question of constitutional law. According to the Supreme Court of the United States, the suppression by the prosecution of evidence that is material either to guilt or innocence violates the due process clause of the Bill of Rights. In Mooney v. Holohan([19]) the Supreme Court held that the state's knowing and intentional use of perjured testimony to obtain a conviction violated a defendant's right to due process and to a fair trial. In Alcorta v. Texas([20]) the duty of the prosecution to disclose evidence to the accused was further broadened. That case concerned the failure of the prosecution to reveal to the accused perjured material evidence which resulted in the accused being convicted of a more serious offense than he would have been had the perjury been revealed. Failure to bring the perjury to the attention of the accused was a denial of the due process provisions of the Bill of Rights. This issue was also canvassed in Napue v. Illinois ([21]), while in Brady v. Maryland([22]) the duty to disclose was further developed. The Supreme Court held that "the suppression by the prosecution of evidence favourable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespec-

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19 294 U.S. 103 (1935). See also Pyle v. Kansas, 317 U.S. 213, (1942).

20 355 U.S. 28 (1957).

21 360 U.S. 264 (1959).

22 373 U.S. 83 (1963).

tive of the good faith or bad faith of the prosecution."(23) The issue, according to one of numerous academic commentaries on the decision, was "not prosecutorial misconduct, but rather the defendant's constitutional right of access to favourable testimony."(24)

What the Brady case stands for is not the proposition that American prosecutors must open their files to criminally accused, but that they must disclose material evidence favourable to the accused. The distinction is, of course, that access to exculpatory evidence cannot impede the vindication of justice while access to inculpatory evidence can.

While the Brady case makes clear that material exculpatory evidence must be disclosed to the accused, not evident from the decision were the means for doing so. The result, was to reserve to prosecuting attorneys the discretion of deciding what evidence was favourable to an accused and what evidence was not. Criminally accused cannot help but believe that important decisions concerning evidence disclosure are, in these circumstances, being made by a biased party. At the very least, the prosecutor is faced with the almost impossible task of sifting through the evidence brought to his or her attention and attempting to determine which evidence is material and favourable to the accused and therefore subject to disclosure. This aspect of the

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23 Ibid. at p. 87.

24 Daniel J. Capra, "Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review," (1984) 53 Fordham Law Review 391 at p. 393. See also, Biglio v. United States, 405 U.S. 150 (1972).

Brady decision has received considerable academic commentary and criticism.(25)

Following the Brady decision American courts struggled to accommodate the Supreme Court requirement that the prosecutor disclose material evidence within the traditional adversarial system of criminal prosecution amid prosecutorial fears of an "open file" rule that members of the criminal bar claimed Brady had brought about. A trilogy of cases that reached the Supreme Court in the decade following Brady failed to provide lower courts with much guidance as to what constituted materiality insofar as the prosecutor's duty to disclose evidence was concerned. However, the Supreme Court of the United States again considered disclosure obligations of prosecuting attorneys in United States v. Agurs.(26)

Agurs, while not modifying the requirement of disclosure of exculpatory evidence, placed on attorneys for the defence certain obligations for the identification of such evidence, without providing them with more generalized access to prosecutors' files. Put another way, it became incumbent for defence attorneys to request exculpatory evidence from prosecutors rather than for prosecutors to automatically disclose such evidence to the defence. This decision led, in the United States, to a number of reform proposals including a recommendation calling for pre-trial in camera review of all information in possession of the

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25 See Capra, "Access to Exculpatory Evidence," at p. 392ff. Most of the other comments on the decision have been gathered together and are cited in Paul L. Caron, "The Capital Defendant's Right to Obtain Exculpatory Evidence from the Prosecution to Present in Mitigation Before Sentencing," [1985] 23 American Criminal Law Review 207.

26 427 U.S. 97 (1976).

prosecutor. The two key benefits of this reform proposal was that any such review would remove prosecutorial discretion in the identification of evidence beneficial to the accused, while avoiding the potential pitfalls of an "open file" rule. At the same time, it would relieve the defence attorney of any obligation to inquire into the existence of evidence favourable to the accused, an onerous, impractical and unfair burden considering that knowledge of any such evidence is in the hands of the prosecution. Implementation of this suggested reform was, perhaps, made unnecessary by a subsequent, and, to date, the latest, Supreme court decision on point.

In United States v. Bagley(27) the court held that a single due process test applied to a prosecutor's nondisclosure of exculpatory evidence, regardless of the request, if any, for the disclosure of such evidence. Exculpatory evidence, under the new test, was material "only if there is a reasonable probability that, had the evidence been disclosed to the defence, the result of the proceeding would have been different."(28) The test is a stringent one, and has been subjected to searching criticism, for under it, challenge to the prosecutorial nondisclosure of evidence will prove more difficult, and less successful, whether or not counsel for the defence has made a request for exculpatory evidence.

Notwithstanding the deficiencies of this decision, prosecutors who fail to disclose exculpatory evidence do so at their own peril. The general rule is that exculpatory evidence must be disclosed. Failure to do so, however, is not easily subject to review, for in almost all cases the accused will have no way of

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27 105 St. Ct. 3375 (1985).

28 Ibid. at p.3384.

knowing that his or her due process rights have been breached. As a practical matter, the fact remains that notwithstanding this broad requirement to disclose, the discretion as to what to disclose remains with the prosecutor, and absent any effective means of subjecting that discretion to review it may be exercised so as to deny defendants their constitutional rights. And even when a failure to disclose is revealed the Supreme Court test of a "reasonable probability" standard will be extremely difficult to meet. American common law suggests that constitutional guarantees alone are not enough to ensure disclose of exculpatory evidence. What is required is a practical means of making exculpatory evidence available in every case and making that means subject to some kind of review.

In a review of legal and ethical requirements for State disclosure to the accused in the United States, 37 states responded (see Appendix B) to a request for information. The vast majority of American States have transcended the constitutional verbiage of such decisions as Brady v. Maryland, United States v. Agurs, and United States v. Bagley (supra), to arrive at practical, criminal procedural requirements regarding State disclosure. Of particular note, are the States of Arizona, Florida, Hawaii, Maine, Massachusetts and Maryland. These States have enacted rules of criminal procedure that attempt to codify the constitutional requirement of State disclosure of exculpatory evidence. The phraseology generally employed therein is:

> "any material or information within the State's possession or control which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the punishment therefor": Rule 15.1(a)(7), Arizona Rules of Criminal Procedure.

Many States, however, do not provide for automatic disclosure as of right; but rather, require a written request or motion by the defence to trigger the disclosure procedure. Moreover, as earlier indicated, much discretion still rests with the prosecution in deciding what evidence is and is not favourable to the accused. Many States, however, have also specifically stated what evidence shall be furnished to the accused, e.g. written or recorded statements made by the defendant, the result of a search and seizure or wiretap, names and addresses of all witnesses which the prosecutor intends to call and all written or recorded statements.

The majority of States also provide for a "continuing duty of disclosure". In most instances this is limited to additional material or information that is discovered before or during trial and was previously requested by the accused.

Only a very small percentage of those States who responded have enacted criminal procedure rules which call for the mandatory disclosure of police-held exculpatory evidence and/or names of State witnesses to the accused. Arizona, Hawaii, Nebraska and Vermont extend the duty of disclosure to material and information within the custody or control of those who have participated in the investigation or evaluation of the case.

In a great number of States there is an added element to the process of disclosure in criminal prosecutions - the requirement of "reciprocal discovery". Arizona, Florida, Hawaii, Maine and Massachusetts are but a few examples of U.S. States that require disclosure by the accused. Generally, this is limited to submission to tests, examinations and inspections of the accused. However, in some instances if the accused demands disclosure, the following information and material which corresponds to that which the accused sought, must be disclosed to the prosecutor

e.g. the name, address and statement(s) of any person whom the accused expects to call as a trial witness, reports or statements of experts made in connection with the particular case, and any tangible papers or objects which the defence counsel intends to use at trial: e.g., Rule 3.220(b)(4), Florida Rules of Criminal Procedure.

The majority of States who responded to the question of whether ethical requirements for State disclosure exist, answered in the affirmative. Most of these States have adopted the ABA Model Code of Professional Responsibility, which requires a prosecutor to make "timely disclosure" to the defence counsel, or to the defendant who has no counsel, of the existence of evidence or information "known to the prosecutor . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment": Disciplinary Rule (DR) 7-103(B). Exculpatory evidence falls within this standard. The ABA has also developed Standards of Criminal Justice Relating to the Prosecution Function, which expand on the Model Code and have been adopted in some American jurisdictions. Standard 3-3.11(1) states that it is "unprofessional conduct for a prosecutor intentionally to fail to make disclosure to the defence, at the earliest feasible opportunity, of the existence of evidence which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment of the accused". It is also unethical for a prosecutor to intentionally "avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused": Standard 3-3.11(c).

In conclusion, most U.S. States have either enacted or are in the process of enacting legislation respecting the ethical and legal requirements for State disclosure. State statutes require prosecutors to respond to requests from the defence for excul-

patory material and information. Generally, the prosecutor's duty to disclose begins before the trial and continues throughout the proceeding, if additional material or evidence is discovered.

LEGAL AND ETHICAL REQUIREMENTS FOR STATE DISCLOSURE TO ACCUSED IN THE UNITED STATES

State	Ethical Requirements for State Disclosure	Legal Requirements for State Disclosure: Disclosure Before Trial	Legal Requirements for State Disclosure: Disclosure During Trial	Legal Requirements for State Disclosure: Disclosure After Trial	Mandatory Disclosure of Prosecution Held Exculpatory Evidence and/or Witnesses to Accused	Mandatory Disclosure of Police Held Exculpatory Evidence and/or Witnesses to Accused	Comments
ARIZONA	Yes E.R. 3.4(a) Arizona Rules of Professional Conduct state that a lawyer shall not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value".	Yes Rule 15.1(a) of the Arizona Rules of Criminal Procedure provides for broad, mandatory pre-trial disclosure by the prosecution. In particular, subsection (7) requires, disclosure of "[a]ll material or information which tends to mitigate or negate the defendant's guilt as to the offense charged, or which would tend to reduce his punishment therefor, including all prior felony convictions of witnesses whom the prosecutor expects to call at trial." Rule 15.1(c) provides for additional disclosure of evidence upon written request and specification by the defendant.	No Response	No Response	Yes See Rule 15.1(a)(7) (supra).	Yes Rule 15.1(d) states that the prosecutor's obligations under this Rule extends to material and information in the possession or control of members of his staff and of any other persons who are under the prosecutor's control.	Followed - Brady v. Maryland 373 U.S. 83 at 87, S.Ct. 1194, 10 L.Ed. 2d 215 (1963), wherein the Supreme Court ruled that "the suppression by prosecution of evidence favourable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of prosecution".

State	Ethical Requirements for State Disclosure	Legal Requirements for State Disclosure: Disclosure Before Trial	Legal Requirements for State Disclosure: Disclosure During Trial	Legal Requirements for State Disclosure: Disclosure After Trial	Mandatory Disclosure of Prosecution Held Exculpatory Evidence and/or Witnesses to Accused	Mandatory Disclosure of Police Held Exculpatory Evidence and/or Witnesses to Accused	Comments
ARKANSAS	No Response	Yes Rule 17.1(a) Arkansas Rules of Criminal Procedure - "upon timely request" by defense counsel. Rule 17.1(d) further states - "promptly upon discovering the matter, disclose to defense counsel any material or information within his (prosecutor's) knowledge, possession or control, which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the punishment therefor."	Yes Rules 17.1(a) and (b) and Rule 19(2) - if before trial "additional material or information" is discovered, that party shall notify the court and opposing counsel of its existence.	No Response	Yes Rule 17.1(d) (supra)	No Response	Brady v. Maryland followed.

State	Ethical Requirements for State Disclosure	Legal Requirements for State Disclosure: Disclosure Before Trial	Legal Requirements for State Disclosure: Disclosure During Trial	Legal Requirements for State Disclosure: Disclosure After Trial	Mandatory Disclosure of Prosecution Held Exculpatory Evidence and/or Witnesses to Accused	Mandatory Disclosure of Police Held Exculpatory Evidence and/or Witnesses to Accused	Comments
CALIFORNIA	Rule 7-102, California Rules of Professional Conduct, prohibits a member in government service from instituting or maintaining criminal charges unless the charges are supported by probable cause. Standard 3-3.11(a) of the American Bar Association Standards Relating to the Administration of Criminal Justice for the Prosecution Function (not binding in California) states that it is "unprofessional conduct for a prosecutor intentionally to fail to make disclosure to the defense, at the earliest opportunity, of the existence of evidence, which tends to negate the guilt of the accused or would tend to reduce the punishment of the accused." Further, Standard 3-3(11)(c) states that it "is unprofessional conduct for a prosecutor intentionally to avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused."	See Notes (1) and (2)See Note (1)	See Note (1)	See Note (1)	No Response	(1) The 58 countries of the State of California are free to develop their own criminal procedure rules regarding the disclosure of information by prosecution to the defense. A stricter duty has been imposed on prosecutors in California though, by requiring them to disclose substantial material evidence favourable to the accused without request: People v. Rutherford (1975), 14 Cal. 3d 399 (121 Cal. Rptr. 261, 534 P.2d 1341). Brady v. Maryland followed. (2) California courts have further held that they have an inherent power to order disclosure when necessary to guarantee the defendant a fair trial: Hills v. Superior Court (1974), 10 Cal. 3d 812, and Hofman v. Surperior Court (1981), 29 Cal. 3d 480. This right extends to the earliest stages, even before the preliminary hearing.	

State	Ethical Requirements for State Disclosure	Legal Requirements for State Disclosure: Disclosure Before Trial	Legal Requirements for State Disclosure: Disclosure During Trial	Legal Requirements for State Disclosure: Disclosure After Trial	Mandatory Disclosure of Prosecution Held Exculpatory Evidence and/or Witnesses to Accused	Mandatory Disclosure of Police Held Exculpatory Evidence and/or Witnesses to Accused	Comments
DELAWARE	Yes Rule 3.8, Code of Professional Responsibility (Delaware Bar Association) sets forth special responsibilities of a prosecutor which includes a duty to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor . . .".	No Response	No Response	No Response	No Response	No Response	Brady v. Maryland followed. Further, if the State at one time has possession of "Brady" material and then loses it or destroys it, then there may also held to be a duty of the Attorney General's office and all local, county and State investigative agencies to preserve such evidence: DeBerry v. State, Del. Supr. 457 A2d. 744 (1983).

State	Ethical Requirements for State Disclosure	Legal Requirements for State Disclosure: Disclosure Before Trial	Legal Requirements for State Disclosure: Disclosure During Trial	Legal Requirements for State Disclosure: Disclosure After Trial	Mandatory Disclosure of Prosecution Held Exculpatory Evidence and/or Witnesses to Accused	Mandatory Disclosure of Police Held Exculpatory Evidence and/or Witnesses to Accused	Comments
DISTRICT OF COLUMBIA	Proposed rules are awaiting approval. Rule 3.8 of the Proposed Rules of Professional Conduct stipulates special responsibilities of a prosecutor. In particular, Rule 3.8(d) states that the prosecutor shall not "intentionally avoid the pursuit of evidence or information because it may damage the prosecution's case or aid the defense". Subsection (e) further prohibits the prosecutor from intentionally failing "to disclose to the defense, at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense, or in connection with sentencing, intentionally fails to disclose to the defense any unprivileged mitigating information known to the prosecutor and not reasonably available to the defense . . .".	No Response	No Response	No Response	No Response	No Response	

State	Ethical Requirements for State Disclosure	Legal Requirements for State Disclosure: Disclosure Before Trial	Legal Requirements for State Disclosure: Disclosure During Trial	Legal Requirements for State Disclosure: Disclosure After Trial	Mandatory Disclosure of Prosecution Held Exculpatory Evidence and/or Witnesses to Accused	Mandatory Disclosure of Police Held Exculpatory Evidence and/or Witnesses to Accused	Comments
FLORIDA	No Response	Yes - (See Note) In addition, Rule 3.220(1)(a), Rules of Criminal Procedure, Fla. requires the prosecution to disclose to defense counsel after the filing of the indictment or information and "within 15 days written demand by the defendant", a broad range of information and material within the State's possession. Subsection (2) thereto states that ". . . the prosecutor shall disclose to defense counsel any material information within the State's possession or control which tends to negate the guilt of the accused as to the offense charged." Subsection (5) further states that "[u]pon a showing of materiality to the preparation of the defense, the court may require such other discovery to defense as justice may require".	Yes - (See Note) Rule 3.220(f) stipulates that if, "subsequent to compliance with the rules, a party discovers additional witnesses or material which he would have been under a duty to disclose or produce . . . he shall promptly disclose or produce such witnesses or material".	No Response	Yes See Rule 3.220(a)(2) (supra).	No Response	Brady v. Maryland followed. Also followed, U.S. v. Bagley, 473 U.S. 667 (1985), wherein the court held that if exculpatory evidence has not been disclosed by the prosecution, the standard to be applied when conviction is: ". . . if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome".

State	Ethical Requirements for State Disclosure	Legal Requirements for State Disclosure: Disclosure Before Trial	Legal Requirements for State Disclosure: Disclosure During Trial	Legal Requirements for State Disclosure: Disclosure After Trial	Mandatory Disclosure of Prosecution Held Exculpatory Evidence and/or Witnesses to Accused	Mandatory Disclosure of Police Held Exculpatory Evidence and/or Witnesses to Accused	Comments
GEORGIA	Yes EC 7-13, Georgia Code of Professional Responsibility (1987), states that the prosecution should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid the pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused. Disciplinary Standards 46 and 56 also prohibit any lawyer from refusing to disclose or from suppressing any evidence "required by law" to produce.	No	No	No	No Response	The prosecution does not have to make a complete and detailed accounting to the defense of all police work: Moore v. Illinois, 408 U.S. 786, 795 (1972). Brady v. Maryland, however, does extend to exculpatory evidence in the hands of the police a well as the District Attorney: Freemand v. State of Georgia, 599 F.2d 65 (5th Cir. 1979).	No Georgia statute or rule of practice exists which will allow discovery in criminal cases. Recently, though notions of fair trial and due process have opened the way to limited discovery in criminal cases in Georgia. For example, it has been held that Brady v. Maryland does not establish any right to pre-trial discovery in a criminal case, but instead seeks only to insure the fairness of the defendant's trial and reliability of the jury's determinations: McCleskey v. Zant, 580 I.Supp. 388 (1974).

State	Ethical Requirements for State Disclosure	Legal Requirements for State Disclosure: Disclosure Before Trial	Legal Requirements for State Disclosure: Disclosure During Trial	Legal Requirements for State Disclosure: Disclosure After Trial	Mandatory Disclosure of Prosecution Held Exculpatory Evidence and/or Witnesses to Accused	Mandatory Disclosure of Police Held Exculpatory Evidence and/or Witnesses to Accused	Comments
HAWAII	No Response	Yes Rules 16(a) and (b) of the Hawaii Rules of Penal Procedure provide for broad disclosure of any information or material by the prosecution if the defendant is charged with a felony and upon written request of defense counsel. Of particular interest, Rule 16(a)(2)(ii) requires automatic disclosure of matters within prosecution's possession or control including, "any material or information which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce his punishment therefor."	Yes Rule 16(e)(2) provides for a continuing duty to disclose "additional material or information which would have been subject to disclosure pursuant to this Rule 16 . . . and if the additional material or information is discovered during trial, the court shall also be notified".	See Rule 16(e)(2), (supra).	Yes See Rule 16(b)(2)(ii), (supra).	Yes Rule 16(b)(3) provides for disclosure of material or information by the prosecution, "upon written request of defense counsel and specific designation which would be discoverable if in the possession or control of the prosecutor and which is in the possession or control of other governmental personnel."	Brady v. Maryland followed.
ILLINOIS	No Response	No Response	No Response	No Response	No Response	No Response	Brady v. Maryland followed.
INDIANA	Yes Rule 3.8, Indiana Rules of Professional Conduct provides for disclosure by the prosecution. Subsection (d) requires the prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor".	No Response	No Response	No Response	No Response	No Response	

State	Ethical Requirements for State Disclosure	Legal Requirements for State Disclosure: Disclosure Before Trial	Legal Requirements for State Disclosure: Disclosure During Trial	Legal Requirements for State Disclosure: Disclosure After Trial	Mandatory Disclosure of Prosecution Held Exculpatory Evidence and/or Witnesses to Accused	Mandatory Disclosure of Police Held Exculpatory Evidence and/or Witnesses to Accused	Comments
IOWA	Yes DR 7-103, Iowa Code of Professional Responsibility for Lawyers, requires a "public prosecutor or other government lawyer in criminal litigation (to) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment".	No Response	No Response	No Response	No Response	No Response	Brady v. Maryland and U.S. v. Bagley followed.

State	Ethical Requirements for State Disclosure	Legal Requirements for State Disclosure: Disclosure Before Trial	Legal Requirements for State Disclosure: Disclosure During Trial	Legal Requirements for State Disclosure: Disclosure After Trial	Mandatory Disclosure of Prosecution Held Exculpatory Evidence and/or Witnesses to Accused	Mandatory Disclosure of Police Held Exculpatory Evidence and/or Witnesses to Accused	Comments
KENTUCKY	No Response	Yes Rule 7.24 of the Kentucky Rules of Criminal Procedure state that "on motion of a defendant the court may order" the prosecution to disclose to and/or permit the defendant to inspect certain evidence and material in the possession, custody or control of the Commonwealth. Rule 7.26 requires the prosecution to make available for examination and use by the defendant any statement of a witness prior to being called by the Commonwealth to testify. Rule 7.26 also requires the prosecution to make available for examination and use by the defendant any statement of a witness prior to being called by the Commonwealth to testify.	Yes Rule 7.24(8) states that if "subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested which is subject to discovery or inspection under the rule, he shall promptly notify the other party, or his attorney, or the court, of the existence thereof."	No	Rule 7.26, (supra).	No Rule 7.24(2) indicates that this provision "does not authorize pre-trial discovery or inspection of reports, memoranda, or other documents made by officers and agents of the Commonwealth in connection with the investigation or prosecution of the case, or of statements made to them by witnesses or by prospective witnesses (other than the defendant)."	
LOUISIANA	No Response	No Response	No	No	No	No Response	Brady v. Maryland followed.

State	Ethical Requirements for State Disclosure	Legal Requirements for State Disclosure: Disclosure Before Trial	Legal Requirements for State Disclosure: Disclosure During Trial	Legal Requirements for State Disclosure: Disclosure After Trial	Mandatory Disclosure of Prosecution Held Exculpatory Evidence and/or Witnesses to Accused	Mandatory Disclosure of Police Held Exculpatory Evidence and/or Witnesses to Accused	Comments
MAINE	No Response	Yes Rule 16(a)(1) of the Maine Rules of Criminal Procedure, 1988 specifies evidence that the prosecution is automatically required to disclose to the defendant within a reasonable time. In particular, subsection (D) thereof requires disclosure of a "statement describing any information known to the attorney for the State which may not be known to the defendant and which tends to create a reasonable doubt of the defendant's guilt as to the offense charged." Rule 16(b) states that "upon the defendant's written request" the prosecution shall allow reasonable access to certain other types of evidence which are in the possession or control of the State Attorney or any member of his staff or "any official or employee of this State or any political subdivision thereof who regularly reports or with reference to the particular case has reported to his office".					

State	Ethical Requirements for State Disclosure	Legal Requirements for State Disclosure: Disclosure Before Trial	Legal Requirements for State Disclosure: Disclosure During Trial	Legal Requirements for State Disclosure: Disclosure After Trial	Mandatory Disclosure of Prosecution Held Exculpatory Evidence and/or Witnesses to Accused	Mandatory Disclosure of Police Held Exculpatory Evidence and/or Witnesses to Accused	Comments
MAINE Cont.		The scope of discovery may be limited to that which is "material to the preparation of the defense or which the attorney for the State intends to use as evidence in any proceeding or which were obtained from or belong to the defendant": Rule 16(b)(2)(A). Rule 16(c)(1) further provides that where informal disclosure procedures have been exhausted and the request is "reasonable", a defendant shall "upon timely motion . . . (and) upon a showing that the specific matter sought may be material to the preparation of his defense," given access to the defendant to: names and addresses of witnesses; written or recorded statements of witnesses and summaries contained in police reports or similar matter; and any record of prior criminal convictions of witnesses. A witness "includes any person known to the State who has some knowledge of the circumstances of the alleged offense."	Yes Rules 16(a)(2), 16(b), 16(c)(1) and (4), stipulate that there is a continuing duty to disclose the matters specified in these subdivisions.	Yes Rules 16(a)(2), 16(b)(4) and 16(c)(1) (supra).	Yes Rule 16(a)(1)(c) and 16(c)(1) (supra).	Yes Rule 16(b)(1) (supra).	Brady v. Maryland followed.

State	Ethical Requirements for State Disclosure	Legal Requirements for State Disclosure: Disclosure Before Trial	Legal Requirements for State Disclosure: Disclosure During Trial	Legal Requirements for State Disclosure: Disclosure After Trial	Mandatory Disclosure of Prosecution Held Exculpatory Evidence and/or Witnesses to Accused	Mandatory Disclosure of Police Held Exculpatory Evidence and/or Witnesses to Accused	Comments
MARYLAND	No Response	Yes Rule 4-262(a)(1) Maryland Criminal Procedure Rules states that in actions for offenses in District Court punishable by imprisonment, the prosecution "shall furnish to the defendant any material or information that tends to negate or mitigate the guilt or punishment of the defendant as to the offense charged". Further, upon request of the defendant, the defendant shall be permitted to inspect and copy "(A) any portion of a document containing a statement . . . (or) the substance of a statement made by the defendant to a State agent that the State intends to use at a hearing, other than a preliminary hearing, or trial", and (B) expert reports or statements. In Circuit Court, Rule 4-263(a) provides for disclosure of specific relevant material or information and "any material or information tending to negate or mitigate the guilt or punishment of the defendant as to the offense charged". Rule 4-263(b) further requires the disclosure of particular information or material "upon request" of the defendant.	Yes Rule 4-263(3) stipulates that a "party who has responded to a request or order for discovery (disclosure) and who obtains further material information shall supplement the response promptly". However, Rule 4-262(b) states that "discovery or inspection required or permitted by this Rule shall be completed before the hearing or trial".	Yes Rule 4-263(h) (supra).	Yes Rule 4-262(a)(1) and 4-263(a)(1) (supra).	No Response	Brady v. Maryland followed.

State	Ethical Requirements for State Disclosure	Legal Requirements for State Disclosure: Disclosure Before Trial	Legal Requirements for State Disclosure: Disclosure During Trial	Legal Requirements for State Disclosure: Disclosure After Trial	Mandatory Disclosure of Prosecution Held Exculpatory Evidence and/or Witnesses to Accused	Mandatory Disclosure of Police Held Exculpatory Evidence and/or Witnesses to Accused	Comments
MASSACHUSETTS	Yes Rule 3:07 and DR 7-103, Supreme Judicial Court Rules (Mass.), detail the special duties of a public prosecutor or other government lawyer. In particular, DR 7-103(B) states that they "shall make timely disclosure to counsel for the defendant, or to the defendant . . . of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment".	Yes Rule 16(a)(1), Massachusetts Rules of Criminal Procedure, provides for mandatory disclosure upon motion of a defendant of certain relevant evidence. Of particular importance, is subsection (c) which allows disclosure of "any facts of an exculpatory nature within the possession, custody, or control of the prosecutor". Rule 16(a)(2) allows for discretionary disclosure of relevant material and evidence upon motion of the defendant.	Yes Rule 16(a)(4) (supra), provides for a continuing duty to supply "additional information" which a party would have been under a duty to disclose or produce pursuant to a previous discovery order or rule.	Yes Rule 16(a)(4) (supra).	Yes Rule 16(a)(1)(c) (supra).	No Response	
MICHIGAN	No Response	No Response	No Response	No Response	No Response	No Response	Proposed Michigan Criminal Procedure Rules have been awaiting the approval of the Michigan Supreme Court since October, 1985.
MISSISSIPPI	No Response	Yes Rule 4.06, Mississippi Uniform Rules of Circuit Court Practice provides for broad pre-trial disclosure to the defendant and his counsel upon request.	Yes Rule 4.06 provides for a continuing duty to "promptly notify" the other party of "additional material".	Yes Rule 4.06 (supra).	Yes Rule 4.06(6) requires the prosecution "upon request" to disclose a "copy of any exculpatory material concerning defendant".	No Response See: Rule 4.06(6) (surpa).	

State	Ethical Requirements for State Disclosure	Legal Requirements for State Disclosure: Disclosure Before Trial	Legal Requirements for State Disclosure: Disclosure During Trial	Legal Requirements for State Disclosure: Disclosure After Trial	Mandatory Disclosure of Prosecution Held Exculpatory Evidence and/or Witnesses to Accused	Mandatory Disclosure of Police Held Exculpatory Evidence and/or Witnesses to Accused	Comments
MONTANA	No Response	Yes Rule 46-15-322(1) states that the prosecutor shall make available to the defendant "upon arrangement in district court or at such later time as the court for good cause permit", a broad range of material and information. In particular, subsection (C) requires the disclosure of "all material or information that tends to mitigate or negate the accused's guilt as to the offense charged or that would tend to reduce his punishment therefor".	Yes Rule 46-15-327 states that there is a "continuing duty" to promptly notify all other parties of "addition information or material that would be subject to disclosure had it been known at the time of disclosure".	Yes Rule 46-15-327 (supra).	Yes Rule 46-15-322(1)(e) and Rule 56-15-322(5), which permit the defense to make a motion for "additional material" upon a showing that he has substantial need for such material in the preparation of his case and that without the information he would suffer undue hardship in the preparation of his defense.	No Response	
NEBRASKA	Yes DR 7-103(B), American Bar Association Model Code of Professional Responsibility (adopted), which requires that a public prosecutor make "timely disclosure" to the defendant or defendant's counsel of the existence of evidence "known to the prosecutor . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment". See also, Standard 3-3.11 of the ABA Standards of Criminal Justice Relating to the Prosecution Function.	Yes Section 29-1912, Neb. Rev. Stat. (1985) provides for broad pretrial discovery "upon request" by the defense.	Yes Section 29-1918 states that there is a continuing duty "prior to or during trial" to disclose "additional material" subsequent to compliance with an order for discovery.	No Response	Section 29-1917 states that "at any time after the filing of an indictment or information in a felony prosecution . . . the defendant may request the court to allow the taking of a disposition of any person other than the defendant who may be a witness in the trial".	Yes Section 29-1914 stipulates that an order for discovery "shall be limited to items or information within the possession, custody, or control of the state or local subdivisions of government, the existence of which is known or by the exercise of due diligence may become known to the prosecution".	

State	Ethical Requirements for State Disclosure	Legal Requirements for State Disclosure: Disclosure Before Trial	Legal Requirements for State Disclosure: Disclosure During Trial	Legal Requirements for State Disclosure: Disclosure After Trial	Mandatory Disclosure of Prosecution Held Exculpatory Evidence and/or Witnesses to Accused	Mandatory Disclosure of Police Held Exculpatory Evidence and/or Witnesses to Accused	Comments
NEW HAMP-SHIRE	Yes Rule 3.8, New Hampshire Rules of Professional Conduct (1986), sets forth special responsibilities of a prosecutor. In particular, subsection (d) thereto requires the "timely disclosure to defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor".	No Response	No Response	No Response	No Response	No Response	

State	Ethical Requirements for State Disclosure	Legal Requirements for State Disclosure: Disclosure Before Trial	Legal Requirements for State Disclosure: Disclosure During Trial	Legal Requirements for State Disclosure: Disclosure After Trial	Mandatory Disclosure of Prosecution Held Exculpatory Evidence and/or Witnesses to Accused	Mandatory Disclosure of Police Held Exculpatory Evidence and/or Witnesses to Accused	Comments
NEVADA	Yes Rule 173, Nevada Supreme Court Rules of Professional Conduct requires fairness to opposing party and counsel. Rule 179 stipulates the special responsibilities of a prosecutor, which includes, "timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose . . . all unprivileged information known to the prosecutor".	Yes Rule 172.145 of the Nevada Revised Statutes, stipulates that if the prosecution is aware of any evidence which will explain away the charge, he/she shall submit it to the Grand Jury. Further, upon motion of a defendant the court may order the prosecution to permit pre-trial disclosure of particular information and material, "within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known," to the prosecution: Rule 174.235. Rule 174.245 also provides for the discretionary disclosure of other material and/or information upon motion of a defendant showing the "materiality to the preparation of his defense and that the request is reasonable".	Yes Rule 174.295 stipulates that there is a continuing duty to "promptly notify" the other party of "additional material" previously requested or ordered prior to or during trial.	No Response	No Response	No Response	

State	Ethical Requirements for State Disclosure	Legal Requirements for State Disclosure: Disclosure Before Trial	Legal Requirements for State Disclosure: Disclosure During Trial	Legal Requirements for State Disclosure: Disclosure After Trial	Mandatory Disclosure of Prosecution Held Exculpatory Evidence and/or Witnesses to Accused	Mandatory Disclosure of Police Held Exculpatory Evidence and/or Witnesses to Accused	Comments
NEW YORK	Yes DR 7-103(B), New York Code of Professional Responsibility (Performing the Duty of Public Prosecutor or Other Government Lawyer) requires "timely disclosure" to the defendant of the "existence of evidence known to the prosecutor . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment".	Yes Section 240.20, New York Criminal Procedure Law, provides for a broad right of pre-trial discovery upon demand of the defendant. Subsection (b) thereof states that the prosecutor shall disclose "[a]nything required to be disclosed prior to trial . . . pursuant to the constitution of this state or the United States".	No Response	No Response	Yes Rule 240.20(h) (supra).	No Response	Brady v. Maryland followed.
NORTH CAROLINA	Yes Rule 7.3, North Carolina Rules of Professional Conduct, provides for "timely disclosure to defense of all information known to him (prosecutor) that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose . . . all unprivileged mitigating information known to him".	Yes Section 15A-903, CH.15A, Criminal Procedure Act (N.C.), states that upon motion of a defendant, the court must order the prosecutor to disclose certain information and material.	Yes Rule 15A-907, establishes a continuing duty to "promptly notify" the other party of "additional evidence" discovered prior to or during trial which is or may be subject to inspection.	No Response	Section 15A-903(f), Criminal Procedure Act, states that no statement or report in the possession of the state that was made by a (prospective) state witness, other than the defendant, shall be the subject of discovery, etc., until that witness has testified on direct examination in the trial of the case.	Section 15A-903(f) (supra).	

State	Ethical Requirements for State Disclosure	Legal Requirements for State Disclosure: Disclosure Before Trial	Legal Requirements for State Disclosure: Disclosure During Trial	Legal Requirements for State Disclosure: Disclosure After Trial	Mandatory Disclosure of Prosecution Held Exculpatory Evidence and/or Witnesses to Accused	Mandatory Disclosure of Police Held Exculpatory Evidence and/or Witnesses to Accused	Comments
OHIO	No Response	Yes Rule 16, Ohio Criminal Procedure Rules, provides that upon motion by the defendant, prior to trial, the court shall order the prosecuting attorney to disclose to defense counsel all evidence, known to the prosecuting attorney, favourable to the defendant and material to either guilt or punishment. Rule 16 thereby reflects a procedural codification of Brady v. Maryland.	Yes Ohio Criminal Procedure Rules provides for a continuing duty of disclosure.	No Response	Yes Rule 16 (supra).	No Response	
OREGON	Yes DR 7-103, State of Oregon Disciplinary Rule, requires the prosecution to make "timely disclosure" to the defense of the existence of exculpatory evidence.	No Response	No Response	No Response	No Response	No Response	Brady v. Maryland followed.

State	Ethical Requirements for State Disclosure	Legal Requirements for State Disclosure: Disclosure Before Trial	Legal Requirements for State Disclosure: Disclosure During Trial	Legal Requirements for State Disclosure: Disclosure After Trial	Mandatory Disclosure of Prosecution Held Exculpatory Evidence and/or Witnesses to Accused	Mandatory Disclosure of Police Held Exculpatory Evidence and/or Witnesses to Accused	Comments
PENNSYL-VANIA	Yes Rule 3.8, Rules of Professional Conduct (Special Responsibilities of a Prosecutor), amongst other things, requires the prosecutor to make "timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing . . . all unprivileged mitigating information known to the prosecutor".	Yes Rule 305(A), Pennsylvania Rules of Criminal Procedure, provides for informal pre-trial disclosure and inspection. Rule 305(B)(1) further states that upon request by the defendant, the Commonwealth shall disclose to the defendant a wide range of material and information, "provided they are material to the instant case". This right of disclosure includes "any evidence favourable to the accused which is material either to guilt or to punishment, and which is within the pos-session or control of the attorney of the Commonwealth": Rule 305.B(1)(a). However, the disclosure of certain information, such as the names, addresses and statements of eyewitnesses, co-defendants, etcetera, is subject to the defendant demonstrating that it is "material to the preparation of the defense, and that the request is reasonable": Rule 305.B(2). This test also applies to "any other evidence specifically identified by the defendant, provided the defendant can additionally establish that its disclosure would be in the interests of justice": Rule 305.B(2)(d).	Yes Rule 305.D provides for a continuing duty to disclose prior to or during trial "additional evidence or material previously requested or ordered to be disclosed".	No Response	Rule 3.05 A and B (supra).	No Response	

State	Ethical Requirements for State Disclosure	Legal Requirements for State Disclosure: Disclosure Before Trial	Legal Requirements for State Disclosure: Disclosure During Trial	Legal Requirements for State Disclosure: Disclosure After Trial	Mandatory Disclosure of Prosecution Held Exculpatory Evidence and/or Witnesses to Accused	Mandatory Disclosure of Police Held Exculpatory Evidence and/or Witnesses to Accused	Comments
RHODE ISLAND	Yes DR 7-103 and EC 7-13, Rhode Island Code of Professional Responsibility set forth ethical requirements for state disclosure. In particular, DR 7-103 states that the prosecution shall make "timely disclosure" to the defendant of the existence of evidence, known to the prosecutor that "tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment". (N.B. -in the process of adopting new rules.)	Yes Rule 16(a), Rhode Island Superior Court Rules of Criminal Procedure, provides for broad, pretrial disclosure "upon written request by a defendant" to inspect, listen to, copy or photograph certain information within the possession custody, or control of the state.	Yes Rule 16(h) provides for a continuing duty to disclose additional material which is discovered prior to or during trial.	No Response	Rules 16(a)(6) and (7) require upon written request by the defendant, disclosure of all state witnesses and all relevant recorded testimony before a Grand Jury of such persons, and all written or recorded verbation statements.	No Response	Brady v. Maryland followed.
SOUTH DAKOTA	Yes Rule 3.8(D), South Dakota Rules of Professional Conduct.	No	No	No	No Response	No Response	Brady v. Maryland followed; see State v. Wilde, 306 N.W. 2d 645 (S.D. 1981).
TENNESSEE	No Response	No Response	No Response	No Response	No Response	No Response	Brady v. Maryland followed.
TEXAS	Yes DR 7-103(B), Texas Disciplinary Rules (no specific citation provided) requires the prosecution to make "timely disclosure" to the defense of the "existence of evidence known to the prosecutor . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment".	No Response	No Response	No Response	No Response	No Response	Brady v. Maryland followed.

State	Ethical Requirements for State Disclosure	Legal Requirements for State Disclosure: Disclosure Before Trial	Legal Requirements for State Disclosure: Disclosure During Trial	Legal Requirements for State Disclosure: Disclosure After Trial	Mandatory Disclosure of Prosecution Held Exculpatory Evidence and/or Witnesses to Accused	Mandatory Disclosure of Police Held Exculpatory Evidence and/or Witnesses to Accused	Comments
UTAH	Yes Rule 3.8, Utah Rules of Professional Conduct (Special Responsibilities of a Prosecutor) and in particular, subsection (d) thereto, which requires the prosecution to make "timely disclosure" to the defense of "all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor".	No Response	No Response	No Response	No Response	No Response	

State	Ethical Requirements for State Disclosure	Legal Requirements for State Disclosure: Disclosure Before Trial	Legal Requirements for State Disclosure: Disclosure During Trial	Legal Requirements for State Disclosure: Disclosure After Trial	Mandatory Disclosure of Prosecution Held Exculpatory Evidence and/or Witnesses to Accused	Mandatory Disclosure of Police Held Exculpatory Evidence and/or Witnesses to Accused	Comments
VERMONT	No Response	Yes Rule 16(a), Vermont Rules of Criminal Procedure states that "upon a plea of not guilty the prosecuting attorney shall upon request of the defendant made in writing or in open court at his appearance . . . or at any time thereafter" disclose certain information and evidence to the defendant. Subsection (G) thereof, further requires the disclosure of "any other material or information not protected from disclosure . . . that is necessary to the preparation of the defense". If no request is made, the prosecutor "shall, at or before the status conference, disclose in writing the foregoing items (material or information) or . . . that they do not exist". Rule 16(b) requires the prosecution to disclose, "as soon as possible, after a plea of not guilty" collateral or exculpatory material or information "within his possession or control which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce his punishment therefor".	No Response	No Response	Yes Rule 16(b)(2) (supra).	Yes Rule 16(c) states that the scope of disclosure articulated in subdivisions (a) and (b) of this Rule also "extends to material and information in the possession, custody or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his office".	

State	Ethical Requirements for State Disclosure	Legal Requirements for State Disclosure: Disclosure Before Trial	Legal Requirements for State Disclosure: Disclosure During Trial	Legal Requirements for State Disclosure: Disclosure After Trial	Mandatory Disclosure of Prosecution Held Exculpatory Evidence and/or Witnesses to Accused	Mandatory Disclosure of Police Held Exculpatory Evidence and/or Witnesses to Accused	Comments
VIRGINIA	Yes DR 8-102 and EC-8-10, Virginia Code of Professional Responsibility (Special Responsibilities of a Prosecutor or Government Lawyer). In particular, DR 8-102(a)(4) requires the prosecution to: "[d]isclose to a defendant all information required by law". The Virginia State Bar Council has recently presented amendments to the Virginia Supreme Court for approval. If approved, DR 8-102(A)(4) will instead require the prosecution to: "[m]ake timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment".	No Response	No Response	No Response	No Response	No Response	Brady v. Maryland followed.
WEST VIRGINIA	No Response	No Response	No Response	No Response	No Response	No Response	Brady v. Maryland followed.

State	Ethical Requirements for State Disclosure	Legal Requirements for State Disclosure: Disclosure Before Trial	Legal Requirements for State Disclosure: Disclosure During Trial	Legal Requirements for State Disclosure: Disclosure After Trial	Mandatory Disclosure of Prosecution Held Exculpatory Evidence and/or Witnesses to Accused	Mandatory Disclosure of Police Held Exculpatory Evidence and/or Witnesses to Accused	Comments
WISCONSIN	Yes SCR 20:3:8, Supreme Court Rules specifies the special responsibilities of a prosecutor. Subsection (d) thereof requires the prosecution to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused, or mitigates the offense, and in connection with sentencing . . . all unprivileged information known to the prosecutor".	No Response	No Response	No Response	No Response	No Response	
WYOMING	No Response	No Response	No Response	No Response	No Response	No Response	

Chapter 4

International Approach

A 1946 case, R. V. Bryant and Dickson(29) stands for the proposition that "where the prosecution has taken a statement from a person whom they know can give material evidence but decide not to call him as a witness, they are under a duty to make that person available as a witness for the defence and should supply the defence with the witness' name and address."(30) This case is not authority for the proposition that the Crown is required in these circumstances to provide the defence with copies of any statement a witness might make, as only the name and address are required. Arguably, this limitation is not reconcilable with further judicial consideration of the subject, including the observations of Lord Denning, M.R.

Lord Denning has described the duty of the Crown prosecutor to disclose evidence beneficial to the accused as follows: "The duty of a [prosecutor] . . . is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence. It would be highly reprehensible to conceal from the court the evidence which such a witness can give. If [he/she] . . . knows, not of a credible witness, but a witness whom he does not accept as

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29 (1946) Cr. App. R. 146.

30 See Archbold, Criminal Pleadings, Evidence and Practice, (London: Sweet & Maxwell, 1985) p. 331ff.

credible, he should tell the defence about him so that they can call him if they wish."(31)

Lord Denning's views and the disclosure duty of Crown counsel was considered in R. v. Leyland Magistrates, ex parte Hawthorn.(32) In that case, the applicant was convicted for driving without due care and attention. It was subsequently learnt that two witnesses known to the police were not called at trial. The applicant sought judicial review to quash his conviction on the ground of the failure of the police to notify him of the existence of witnesses before the trial. The court held that the failure of the prosecution to notify the applicant of the existence of the evidence prevented the applicant from receiving a fair trial. The conviction was, accordingly, quashed.

Concern over inadequate and incomplete disclosure led to the introduction of Disclosure Guidelines in England and Wales in 1982. These guidelines are reproduced in their entirety in Appendix H to this report.(33) The English guidelines are extremely detailed and complex. However, in respect of one matter, the duty to disclose exculpatory evidence to lawyers for the accused these guidelines are crystal clear. Any information

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31 Dallison v. Caffrey, [1965] 1 Q.B. 348 at p. 369. However, see Diplock L.J. at p. 376 and R. v. Fenn, ruminations on this matter see, Lord Denning, The Road to Justice, (London: Sweet & Maxwell, 1955) pp. 36-37. For suggestions for future reform see, [1966] Criminal Law Review, 602 and undated report, "Availability of Prosecution Evidence for the Defence," cited in Anthony Hopper, "Discovery in Criminal Cases," 50 Canadian Bar Review, 445 at p. 477, footnote 160.

32 [1979] All E.R. 1, 209.

33 See Practice Note, [1982] 1 All E.R. 734 and see also Archbold, Criminal Pleadings, Evidence and Practice, p. 328ff.

that is or might be true, and which would go toward establishing the innocence of the accused or casting some doubt upon his guilt or upon some material part of the evidence relied on by the Crown, must be disclosed. Also, in 1985, special rules for disclosure were approved entitled, Magistrates' Courts (Advance Information) Rules 1985(a) (See Appendix I).

Where the information that must be disclosed is of a highly sensitive nature the guidelines provide for means to protect the interest that disclosure might affect, such as by blanking out the sensitive section of a statement. The exceptions to the general duty to disclose exculpatory evidence are set out in section 13 of the Guidelines and they do not appear to significantly limit the general duty to disclose. But it must be observed that these guidelines appear to be just that: guidelines. And it also appears that considerable discretion is left to crown prosecutors and their instructing solicitors as to what should be disclosed and what should not. Moreover, it should be noted that the defence is not provided with the same opportunity for discovery in Great Britain, as in Canada, as the English preliminary hearing is shorter and less reliant on the adduction of viva voce testimony.

SURVEY OF INTERNATIONAL DISCLOSURE PROCEDURES - FALL, 1988

Country	State Disclosure of Witnesses Statements Before Trial	State Disclosure of of Exculpatory Material to Accused	Does State Disclosure Legislation Exist	Ethical Requirements for State Disclosure	Comments
ENGLAND	Yes - but only in indictable or dual offences not summary offences	On indictable cases rules compel disclosure of copies "unused material" to the defense	No	Yes	Indictable and Dual Offence Disclosure - exceptions to disclosure are so broad - disclosure may be ineffectual. Further, police may object to disclosure - much discretion in the prosecutors to withhold "unused material" - Magistrate Courts Advance Information Rules do not apply to summary offences. Disclosure of Crown case witnesses only. No requirement to divulge evidence favouring the accused.
SCOTLAND	No guidelines - "underlying principle" exists	No guidelines - "underlying principle" exists	No	Yes	There is an obligation of the Crown to make disclosure of evidence favourable to the accused, but there are no written guidelines.
AUSTRALIA	None - but extensive case law obligating disclosure	No guidelines - but covered by extensive guidelines	No	Yes	Crown has discretion to provide exculpatory evidence only if he/she believes it is credible or is capable of being believed. Bar Rules require prosecutors to advise the defence of witnesses whose evidence he/she believes is relevant to the case for the defence. An independent Director of Public Prosecutions is instructed to disclose exculpatory material. See Lawless v. The Queen.

Country	State Disclosure of Witnesses Statements Before Trial	State Disclosure of of Exculpatory Material to Accused	Does State Disclosure Legislation Exist	Ethical Requirements for State Disclosure	Comments
NEW ZEALAND	Yes The current common law position in New Zealand, however, is that "if the police have interviewed a person who can give evidence upon a material subject and the prosecution does not intend calling him, then, whether the prosecutor considers him credit-worthy or not, it must make his name and address available to the defence". R. v. Mason, [1975] 2 N.Z.Z.R. 289; [1976] 2 N.Z.L.R. 122 (C.A.). It is for the prosecutor to decide whether the evidence is "material" but that decision must be reached with "complete fairness" to the defence. There is no general duty to produce statements made by such witnesses, except in exceptional cases. Nor is there a general rule of law requiring the prosecution to supply defence counsel with copies of all statements of witnesses called by prosecution, save previous inconsistent statements and witness statements shown to the accused with the specific purpose of noting his reaction thereto: R. v. Church (no cite provided).	No The Criminal Law Reform Committee, N.Z. has recommended that the prosecution be duty-bound to notify the defence of any exhibit which is "material". On request, a list of other exhibits relating to particular matters stated by the defence should also be supplied.	No	Yes	There is one categorical exception to the general principle that there is no duty to disclose statements by persons interviewed but not to be called. Section 344(C) of the Criminal Act, 1961 requires the prosecution to supply to the accused, on request, the name and address of any "identification witness", a statement of any description of the offender given by the witness, and a copy of any identikit picture or drawing made by such a witness or from information supplied by him or her. Production of this information may be excused if the Judge is satisfied that such an order is necessary to protect the witness or any other person.

Country	State Disclosure of Witnesses Statements Before Trial	State Disclosure of of Exculpatory Material to Accused	Does State Disclosure Legislation Exist	Ethical Requirements for State Disclosure	Comments
HOLLAND	Yes, with limitations. See Note	No Response	Yes	No Response	Pursuant to Articles 30, et. seq. of the Code of Criminal Procedure (Wetboek van Strafvordering, Sv.), the suspect is allowed access to the trial document. During the preliminary judicial examination, the examining magistrate and public prosecutor are authorized to withhold certain trial documents (Article 51, Sv.). The accused must be informed in writing that the trial documents are incomplete (Article 30, para. 2, Sv.). Once the examination has been concluded the accused is permitted to see all of the trial documents (Article 33, Sv.), including expert statements. The accused is also allowed to see the official record of his interrogation and those of other individuals, if their contents have been reported to the suspect by word of mouth [sic]. It is only during the preliminary judicial examination that the defence counsel may be present at the interrogations of witnesses (Article 186, Sv.); the accused may not attend unless permission is obtained (Article 187. Sv.). However, witness statements are made available after he is interrogated (supra). Disclosure must not conflict with the interests of the examination (Article 209 Sv.9). The Public Prosecutor is not obliged to allow the accused or his counsel to be present on any occasion when he is questioning witnesses (Article 148, para. 3 Sv.).

Country	State Disclosure of Witnesses Statements Before Trial	State Disclosure of of Exculpatory Material to Accused	Does State Disclosure Legislation Exist	Ethical Requirements for State Disclosure	Comments
GERMANY	Yes, with limitations. See Note.	Yes, with limitations. See Note.	Yes	No Response	Section 147(1) of the German Criminal Procedure Criminal Code, allows defense counsel to inspect files which are available to the Court, and to inspect officially secured pieces of evidence. However, if the termination of the investigation has not yet been noted in the file, the defense counsel may be refused the right of inspection, if such may endanger the purpose of investigation (Rule 147(2)). The following exception is made in respect of the above restriction: inspection of written records made the examination of the accused and of judicial acts of investigation to which defense counsel has been or should have been admitted, including the inspection of expert opinions. The defense counsel is to be notified as soon as the right of inspection exists again without restriction (s.147(6)). The result of investigation acts by the office of the public prosecutor shall be made part of the record (s.168(b)(1)). S.160(2) further states the public prosecutor is obliged to investigate not only incriminating, but also exonerating factors and, where there is a fear that any evidence may be lost, he has to make sure that such evidence is taken. The accused and defense counsel are permitted to be present during the judicial examination of a witness or expert (s.168(c)(2)). However, this does not hold true where a witness is examined by a public prosecutor.

Chapter 5

Ethical Considerations

> "The essence of professional responsibility is that the lawyer must act at all times uberrimae fidei, with utmost good faith to the court, to the client, to other lawyers, and to members of the public."
>
> - Canadian Bar Association, Code of Professional Conduct

Canadian codes of professional conduct establish minimum standards for the protection of the public. In the same way that provincial law societies have been given the duty of regulating the legal profession in the public's interest, the Canadian Bar Association and a number of provincial law societies have sought, through the promulgation of codes of professional conduct, to establish standards for the ethical practice of law. Codes of professional conduct cannot, and indeed do not, set out fixed rules to be followed by members of the profession. Rather, they set out guiding principles - principles that do not profess to establish standards for every ethical dilemma encountered by members of the bar, but guidelines that lawyers can look to for determining acceptable and unacceptable professional conduct.

(a) In Canada

At its Fifth Annual Meeting in September 1920, the Canadian Bar Association adopted a canon of ethical principles to be observed by members of the legal profession in Canada. Canon 1(2) thereof provided that: "When engaged as a public prosecutor [the lawyer's] primary duty is not to convict but to see that justice is done; to that end he should withhold no facts tending to prove either the guilt or innocence of the accused." Since then, the Canadian Bar Association has remained active in reviewing and

revising the ethical principles to be followed by the legal profession and has, in fact, taken a leadership role in this area. Today, the Canadian Bar Association's Code of Professional Conduct has been adopted by a number of provincial law societies. The Nova Scotia Barristers' Society adopted the CBA Code in 1974. Where the disclosure duty of the prosecutor is concerned the ethical considerations of the 1920's remain very much alive today.

Chapter One of the current CBA Code states that integrity is the fundamental and indispensable quality of any person seeking to practice law. "The lawyer," the Code says, "must discharge with integrity all duties owed to clients, the court, other members of the profession and the public." The Professional Conduct Handbook of the Law Society of Upper Canada sets out exactly the same rule. Integrity, simply stated, is the standard by which a lawyer's conduct must be judged.

Chapter Eight of the CBA Code establishes guiding ethical principles for the lawyer acting as an advocate. He or she must, the rule states, "treat the tribunal with courtesy and respect and must represent the client resolutely, honorably and within the limits of the law." Commentary to this chapter elaborates on the principle. Lawyers should not "knowingly attempt to deceive or participate in the deception of a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, **suppressing what ought to be disclosed** or otherwise assisting in any fraud, crime or illegal conduct (emphasis added)." The commentary to Chapter Eight further provides that a lawyer must not dissuade a material witness from giving evidence or advise such witness not to appear at a hearing. Identical guidelines

can be found in the guidelines for a number of provincial jurisdictions.(34)

In addition to the general duty to act with integrity and the more particular duty not to suppress evidence or dissuade relevant witnesses from appearing in proceedings, Crown counsel have a special duty under the CBA Code. Their duty is not to seek a conviction, but to see that justice is done through a fair trial upon the merits. According to Chapter Eight "Commentary Seven":

> "The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything which might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to the accused or defence counsel (or to the court if the accused is not represented) of all relevant facts and known witnesses, whether tending to show guilt or innocence."

Taken together these guidelines impose on all counsel both general and particular obligations. The general obligation to act with integrity is supplemented by an additional obligation of advocates to make all authorities, evidence and witnesses available to the tribunal. Moreover, Crown counsel are, under both the CBA Code and the Law Society of Upper Canada Professional Conduct Handbook, positively obligated to bring to the attention of an accused all evidence, whether favourable to the accused or not. There are no exceptions to this obligation. It

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34 See rule 10 of the Professional Conduct Handbook of the Law Society of Upper Canada, Article 44 of the Code of Professional Ethics of the Bar of the Province of Quebec and Rule c-12 of the Professional Conduct Handbook of the Barristers' Society of New Brunswick.

is clear. It is complete. It imposes a duty on Crown counsel to see that justice is done, not that accused persons are convicted. Arguably, this duty is the highest calling of a prosecutor in Canadian courts. When acting in the capacity of Crown counsel, lawyers must make full disclosure of documents, statements and other evidence to defence counsel before the trial, during the trial and after the trial. Failure to do so cannot be seen as anything other than a failure to adhere to the minimum ethical standards adopted by the Barrister's Society of Nova Scotia and numerous other jurisdictions in Canada.

(b) In the United States

The first formal code of legal ethics in the United States dates from 1887 when Judge Thomas Goode Jones drafted the Alabama Code of Legal Ethics. This code served as a model for the American Bar Association's Canons of Professional Ethics, which was adopted in 1908. In 1969 the Canons were superceded by the American Bar Association's Model Code of Professional Responsibility, which differed from the Canons in two important respects: first, in format; and second, in language. The format was changed with the new Model Code organized in three parts: (i) Canons; (ii) Ethical Considerations; and (iii) Disciplinary Rules. The language was changed to eliminate the hortatory "should" and replace it with the mandatory "shall", insofar as the Disciplinary Rules were concerned.(35)

Promulgation by the American Bar Association of the Model Code of Professional Responsibility did not, of course, result in its immediate adoption in American courts. To become operative

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35 This section of the report was derived from L. Ray Patterson, Legal Ethics: The Law of Professional Responsibility, (New York: Matthew Bender, 1984) pp. 5-6.

within a State, a code of professional responsibility must be adopted by the State, usually by the supreme court of that State, or alternatively by the local bar association, which in most American States exercises a role synonymous with Canadian provincial law societies. The Model Code was adopted in every American State except for Illinois, which prepared and adopted its own code. A number of States, as part of the adoption process, modified and have subsequently amended, the ABA Code. Similarly, the ABA has, from time to time, amended the Code while these amendments have not been implemented by various States. Generally, however, the differences between States are few. Adoption by a State of the ABA Model Code does not apply to federal courts operating within that State. Those courts are separate from State courts and must, in and of themselves, adopt the ABA Model Code. Some have and others have not, although it is fair to say that the Model Code is persuasive authority even if not adopted by a particular federal court.

In 1977, an ABA commission was asked to review the Model Code. In 1983, the ABA adopted a new document, the Model Rules of Professional Conduct (see Appendix F). These rules, like the Model Code, must be adopted by each State and every federal court in order to come into effect and, in general, have not yet been so adopted. Accordingly, the Model Code remains the primary source of ethical principles for the practice of law in the United States.

The Model Code sets out the basic ethical standards of a prosecutor as follows:

> "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign

> and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defence of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused."(EC 7-13)

Not only is the duty of the prosecutor to disclose exculpatory evidence made plain in the ethical considerations of the American Bar Association Model Code, it is also elevated to the standards of a disciplinary rule: "A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." (DR 7-103)([36]) (See Appendix G).

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36 The ABA Standards for Criminal Justice (2nd ed. 1980) provide for full file disclosure, stating in part: "(a) Upon request of the defence, the prosecuting attorney shall disclose to defence counsel all the material and information within the prosecutor's possession or control...." This general mandate is restricted by a number of narrow exceptions, including where the prosecutor believes that disclosure raises a substantial risk of physical harm, intimidation or

Under the new Model Rules of Professional Conduct the role of the prosecutor is further defined and the changes that have been made reflect the judicial developments on point. The relevant provision of the Model Text Rule provides: The prosecutor in a criminal case shall: (d) make timely disclosure to the defence of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offence, and, in connection with sentencing, disclose to the defence and to the tribunal all unprivileged information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal." (Rule 3.8) ([37])

In summary, insofar as American ethical guidelines for the disclosure of exculpatory evidence are concerned, there is a duty and that duty is virtually unfettered. Considered alongside the requirements of American consitutional law, it is fair to say that where exculpatory evidence exists, it must be brought in some meaningful way to the attention of counsel for the accused or the accused if unrepresented. Failure to disclose such evidence not only raises serious constitutional issues, it also potentially gives rise to violations of the ethical standards adopted by the American states.

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bribery, which outweighs the benefits of disclosure to counsel for the defence. These standards do not, however, carry the weight of the Model Code, are not they, apparently, binding in any state. For relevant text of the ABA Standards for Criminal Justice (see Appendix G).

37 The commentary to the rule notes that: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt be decided upon the basis of sufficient evidence...."

(c) In the United Kingdom

There are two separate sources of ethical standards for the practice of law in the United Kingdom. The Law Society produces a loose-leaf handbook entitled Professional Conduct for Solicitors. This handbook is amended and added to from time to time as new issues arise. The Senate of the Inns of Court, the professional body for British barristers, has also turned its attention to the formulation of ethical guidelines of the practice of law and makes available the Code of Conduct for the Bar of England and Wales. This code was approved by the Bar in a General Meeting on 15 July 1980 and it applies to all British barristers.

As a general matter the code provides, inter alia, that it is the duty of every barrister: "(b) not to engage in conduct (whether in pursuit of his/her profession or otherwise) which is dishonest and which may otherwise bring the profession of barrister into disrepute, or which is prejudicial to the administration of justice."(38) Moreover, it also part of the general obligations of British barristers to observe the ethics and etiquette of the profession. Violation of either of these obligations, or of any of the specific obligations then set out in the code, constitute professional misconduct and are the proper subject of discipline.

The general obligations of the British barrister are similar in substance to the general obligations of Canadian lawyers found in the Canadian Bar Association Code of Professional Conduct and in the various law society codes: they require the barrister to act with integrity. And just as the Canadian equivalents codify the professional obligations of Crown counsel, so too does the British code.

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38 Section 6(b).

This code of conduct provides that: "It is not the duty of Prosecuting Counsel to obtain a conviction by all means at his command but rather to lay before the jury fairly and impartially the whole of the facts which comprise the case for the prosecution and to see that the jury are properly instructed in the law applicable to those facts."(39) Insofar as the duty of the Crown to disclose exculpatory evidence is concerned, the code requires that it be disclosed: "Where Prosecuting Counsel has in his possession statements from persons whom he does not propose to call as witnesses, he should regard it as normal practice to show such statements to the Defence. Where, however, the Defence already know of the existence, identity and whereabouts of any such person and are in a position to call him (as, for example, when a notice of alibi has been served, or when such person is married to a Defendant) and in other exceptional circumstances, the Prosecuting Counsel may, in his discretion, refrain from showing the statement to the Defence."(40)

In summary, therefore, the British code requires that Crown counsel disclose exculpatory evidence to lawyers for the accused. When considered alongside the guidelines on point, there appears to be an almost absolute professional and legal obligation in Great Britain to disclose exculpatory evidence to the accused.

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39 Section 159.

40 Section 160.

Chapter 6

Summary & Conclusions

A. Summary

Were the Crown disclosure problems in the Marshall case a rarity or were they symptomatic of a general reluctance of the State to provide more information to the accused? Clearly the latter is the case. The issue of State disclosure to the accused, balanced against the accused's right to make full answer and defence, goes beyond Canadian borders.

There are numerous examples of famous cases where non-disclosure has led to grave miscarriages of justice and wrongful convictions. In the United States the classic non-disclosure case is Brady v. Maryland (supra). In this case a prosecutor intentionally withheld a statement from the accused murderer's counsel where a third party had admitted committing the same murder. In the Australian case, Re Van Beelen (1974), 9 S.A.S.R. 163, a man was convicted of murder after two appeals on disclosure arguments. The Crown had failed to disclose a third party statement confessing to a murder with four independent witnesses supporting the guilt of the confessed person. Yet, the highest Court of Appeal in Australia stated that the Crown had no obligation to disclose those statements. They took this view because the police and the Crown were of the opinion that these statements were not believable and, therefore, should not be provided to the defence. This case highlights why Crown discretion in disclosure is unacceptable.

In another infamous Australian decision, Lawless v. The Queen (1979), 53 A.L.J.R. 733, has an uncanny resemblance to the Donald Marshall case. Peter Lawless was convicted of murder and it was

later determined that various pieces of critical exculpatory evidence were suppressed by the Crown, including a key eyewitness statement fully supporting Mr. Lawless' alibi. The prosecution also failed to disclose, at the first trial, the fact that the principal Crown witness had spent several weeks under institutional psychiatric care. Unfortunately, Lawless' appeals were rejected. The Court reiterated the principle that there is no requirement of Crown disclosure. Mr. Lawless, after being convicted, was finally pardoned several years later by the Australian Government.

From these various experiences there emerge at least six fundamental guiding principles that must be adopted to ensure fairness and justice in Crown disclosure.

B. Conclusions

1. **The requirement to disclose information to the Defence must apply to both the Crown Prosecutor and the investigating police agency.**

2. **The Crown Prosecutor and the police have a "positive duty" to make full disclosure to the accused.**

3. **The Crown Prosecutor and the police must not limit their disclosure to that evidence or information, which in their opinion is relevant and credible.**

4. **Disclosure to an accused must be a "continuing duty" even after the appeal periods have expired.**

5. Any decision not to make full disclosure to the Defence must be made by a Judge upon an inter partes application by the Crown Prosecutor, and not left to the discretion of a Crown Prosecutor or the police.

6. Mandatory disclosure shall be enforced through the adoption and implementation of sanctions by:

   (a) Amending the Criminal Code to establish a Crown disclosure procedure; and

   (b) Amending the legal profession's codes of ethics to incorporate more specific ethical guidelines regarding Crown disclosure.

Chapter 7

Recommendations

1. The Canadian Bar Association should strike a National Committee to review the Code of Professional Conduct to implement specific ethical guidelines for Crown disclosure.

2. The Canadian Bar Association should strike a National Committee to establish a supplementary special code of professional conduct for those practicing criminal law to be known as the Canadian Bar Association Standards for Criminal Justice.

3. That the Federal Government should implement amendments to the Criminal Code of Canada ([41]) as follows:

> PART XVIII.2 Disclosure
>
> 534.1 A justice shall not proceed with a criminal prosecution at the time that the accused first appears unless he has satisfied himself
>
> > (a) that the accused has been given a copy of the information or indictment reciting the charge or charges against him in that prosecution; and
> >
> > (b) that the accused has been advised of his right to request disclosure under section 534.2.

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41 As Adapted from the Law Reform Commission of Canada's Recommendations in its 1982 report, Disclosure by Prosecutors

534.2 (1) Upon request to the prosecutor, the accused is entitled, before being called upon to elect the mode of trial or to plead to the charge of an indictable offence, whichever comes first, and thereafter,

(a) to receive a copy of his criminal record;

(b) to receive a copy of any statement made by him to a person in authority and recorded in writing (or to inspect such a statement if it has been recorded by electronic means);

(c) to inspect anything that the prosecutor proposes to introduce as an exhibit and, where practicable, receive copies thereof;

(d) to receive a copy of any statement made by a person whom the prosecutor proposes to call as a witness or anyone who may be called as a witness, and recorded in writing or, in the absence of a statement, a written summary of the anticipated testimony of the proposed witness, or anyone who may be called as a witness;

(e) to inspect the electronic recording of any statement made by a person whom the prosecutor proposes to call as a witness;

(f) to receive, where his request demonstrates the relevance of such information, a copy of the criminal record of any victim or proposed witness; and

(g) to receive, where known to the investigating police agency and/or prosecutor in charge of the investigation, and not protected from disclosure by law, the name and address of any other person who may have information useful to the accused, or other details enabling that person to be identified,

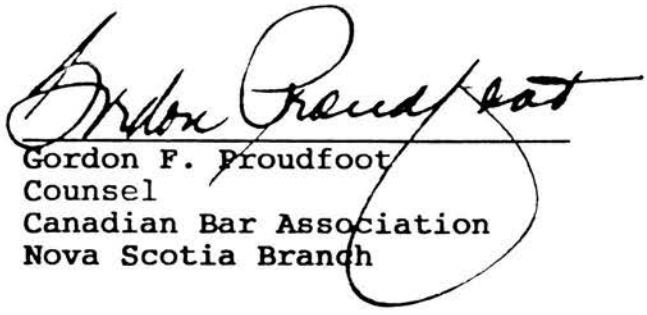
unless, upon an inter partes application by the prosecutor supported by an affidavit demonstrating that disclosure will probably endanger life or safety or interfere with the administration of justice, a justice having jurisdiction in the matter orders, in writing and with reasons, that disclosure be delayed until a time fixed in the order.

(2) A request under subsection (1) imposes a continuing obligation on the prosecutor and police agency to disclose the items within the class requested, without need for a further request.

(3) A statement referred to in paragraph (b), (d) or (e) of subsection (1) does not include a communication that is governed by Part VI.1 of this Act.

534.3 Where a "justice" having jurisdiction in the matter is satisfied that there has not been compliance with the provisions of section 534.2, he shall, at the accused's request, adjourn the proceedings until in his opinion there has been compliance, and he may make such other order as he considers appropriate in the circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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