

# Brady Material and the Expert Witness

Written by Michele Triplett

**M**ANY EXPERT WITNESSES feel they should not be required to know about judicial procedures. After all, expert witnesses are not lawyers; they are simply offering specialized information that may be beneficial to the investigation of a case. Nevertheless, the courts require everyone working on behalf of the government to understand their roles and responsibilities to the criminal-justice system. One of the least understood requirements of expert witnesses may have to do with the disclosure and testimony of “Brady material”.

## Disclosure Requirement

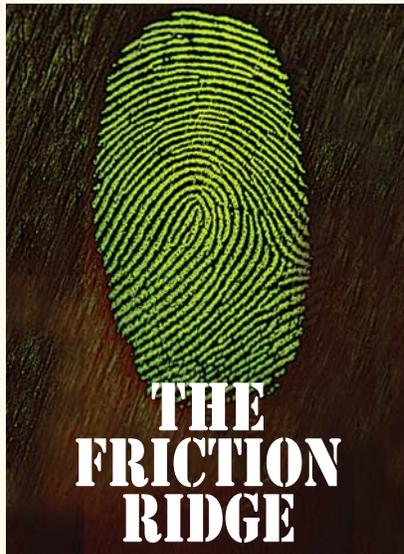
All state and federal courts have rules about what type of information must be revealed to the defense through a disclosure request. Federal courts generally follow the Federal Rules of Criminal Procedures Rule 16, while state courts may choose to follow other guidelines.

Regardless of the court, when the defense requests disclosure material, those working on behalf of the government must provide all relevant information (in accordance with local requirements) and not simply the information they want revealed to the defense. The government’s obligation to disclose information that may be valuable to the defense is commonly referred to as *Brady material*. This term comes from the US Supreme Court’s decision in *Brady v. Maryland* (1963) where the government withheld information from Brady that may have been useful in undermining the government’s case against him. The government’s failure to disclose this information violated due process under the 14th Amendment.

Since providing this information is a requirement, withholding such information is commonly referred to as a *Brady violation*, and will likely lead to a reversal of conviction on appeal.

## What is Brady Material?

*Brady material* is any information the government, or those acting on behalf of the government, has that may be beneficial to the defense. This includes information that may weaken the government’s case or undermine the testimony or credibility of the witness.



*Giglio v. United States* (1972) is an extension of *Brady* to include material that would impeach the character of a government witness. Impeachment material can include honesty, integrity, impartiality, and the credibility of an expert witness.

*United States v. Henthorn* (1991) is an extension of *Giglio* to include requests for personnel records of a government witness. These records may contain exculpatory information about the witness.

## Examples

In an effort to understand *Brady* material, it may be helpful to consider some examples of disclosure requests and *Brady* violations.

❑ In 2009, San Jose Police were accused of withholding information that was favorable to the defense by failing to note when another expert did not agree with the conclusion of a fingerprint comparison. An expert not identifying a print could undermine the strength of the identification. This failure to note disagreement was due to a lack of knowledge regarding disclosure requirements. No cases were overturned due to this failure, but San Jose did change its policies to document and report on non-agreements in the future.

❑ In 2010, the San Diego County District Attorney’s Office was accused of withholding fingerprint evidence when latent fingerprints were deter-

mined not to be clear enough to match. In the case of Kenneth Ray Bowles, six latent prints were identified as his, and one latent print was declared not clear enough to match. On appeal, San Diego Superior Court Judge Harry Elias found this to be a serious violation and ordered a new trial.

❑ Over the years, several motions have been filed claiming the AFIS candidate list produced by a computer search is *Brady* material. In several appeals, judges have determined that the candidate list would not have benefited the defense. It is possible, however, that in specific cases this information may be useful to the defense. The candidate list could display additional information that was not recognized by the initial examiner.

Agencies should be aware of *Brady* requirements in order to implement policies to retain necessary information. Agencies should also implement policies on how to handle disclosure material. While some agencies leave this responsibility up to the expert witness, other agencies require that all dissemination be done through management or through a legal unit so they can ensure the disclosure requirements of *Brady* are properly met.

In addition, agencies should ensure that expert witnesses are aware of *Brady/Giglio/Henthorn* so they are prepared to testify to exculpatory material. Testimony could be in regard to office policies, procedures, or events that took place in a specific case, or information about the government witness. If there is ever a question regarding *Brady* material, contact your agency’s legal unit or the prosecutor’s office. ☺

## About the Author

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