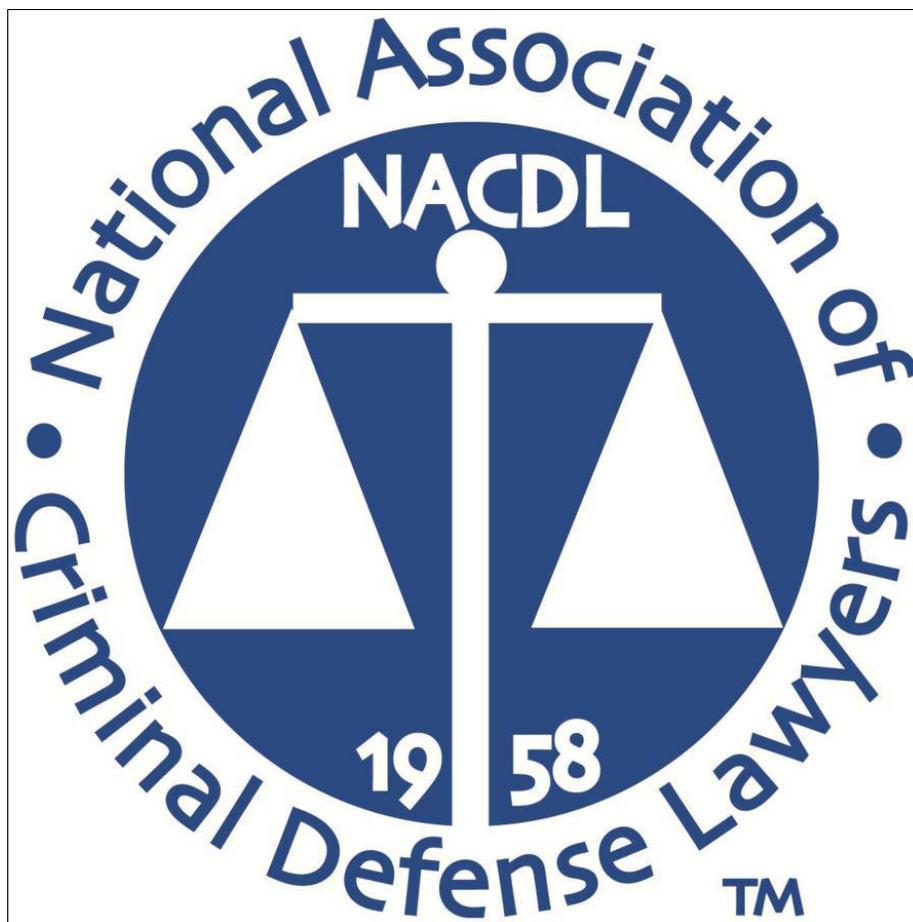


National Association of Criminal Defense Lawyers

Proposed Discovery Reform Legislation



**Adopted by the Board of Directors
May 20, 2011**

18 USC § 3014. Duty to Disclose Favorable Information (New)

- (a) In any criminal prosecution, the attorney for the government shall provide to the defendant all information, data, documents, evidence or objects that—
 - (1) may reasonably appear to be favorable to the defendant with respect to the determination of guilt, or of any preliminary matter, or of the sentence to be imposed; and
 - (2) are within the possession, custody or control of the United States, or the existence of which is known, or by the exercise of reasonable diligence would become known, to the attorney for the government.
- (b) The attorney for the government shall disclose the information, data, documents, evidence or objects described in subsection (a) without delay after arraignment, and prior to the entry of any guilty plea pursuant to an agreement with the government, or if such information is not then known, immediately upon its existence becoming known, without regard to whether the defendant is proceeding to trial or has entered or agreed to enter a guilty plea.
- (c) The obligation described in subsections (a) and (b) shall be discharged notwithstanding section 3500(a) of this title or any other provision of law (including any rule or statute), *provided that* where the materials to be disclosed under this section are “classified information” as defined by the Classified Information Procedures Act, that Act’s protective procedural provisions shall apply.
- (d) Upon motion of the United States, the court may issue an order to protect against the immediate disclosure to a defendant or to a defendant and counsel for a defendant, of material otherwise required to be disclosed under subsection (a), if—
 - (1) the disclosure is favorable to the defendant solely because it would provide a basis to impeach the credibility of a potential witness, and
 - (2) the United States establishes a reasonable basis to believe that:
 - (i) the identity of the witness is not already known to any defendant, and

- (ii) disclosure of the impeaching information to a defendant or to a defendant and counsel for a defendant would reasonably present a threat to the safety of the witness or of any other person.

The court may delay disclosure under this subsection until a reasonable time before the date set for trial, but no less than 30 days, and only so long as the preconditions specified herein continue to exist. The court may permit the United States to make its application under this subsection under seal to the extent necessary to protect the identity of the witness, but any *ex parte* submissions shall be summarized for the defendant in sufficient detail to permit the defense a meaningful opportunity to be heard on the question, including the need for any such protective order or its scope.

(e) No provision of this section may be waived by any defendant except in open court, and upon a factually supported finding that the proposed waiver is knowingly, intelligently and voluntarily offered and that the interests of justice so require.

(f) At any time prior to entry of judgment, upon motion of a defendant or on its own motion, if there is reason to believe the attorney for the government has failed to comply with subsection (a) or (b), the court shall determine whether the United States is in compliance and if not, the extent of and reason for any non-compliance. The court shall enter its findings in the record.

(g) Remedies –

(1) If the court determines that the United States has failed to discharge its duty under subsection (a), or has failed to discharge its duty in a timely manner under subsection (b), the court shall order appropriate remedial measures. Relief may include postponement or adjournment of the proceedings, exclusion or limitation of testimony or evidence, ordering a new trial, dismissal, or other appropriate remedies. In fashioning a remedy, the court shall consider the totality of the circumstances, including the seriousness of the violation, its impact on the proceeding, whether the failure resulted from innocent error, negligence, or knowing conduct, and the effectiveness of alternative remedies to protect the defendant's and the public interest in assuring fair prosecutions.

(2) If the court grants relief under subparagraph (f)(1), on a finding that the failure was due to negligence or knowing conduct by the United States, it may order that the defendant recover from the United States the defendant's costs and expenses incurred as a result of the failure, including reasonable attorney's fees (without regard to the terms of any fee

agreement between the defendant and defense counsel). For purposes of this subparagraph, “the defendant” includes any federal public defender or community defender agency, and also includes the fund for providing court-appointed counsel under the Criminal Justice Act (section 3006A of this title).

(h) Harmless error. On the hearing of any appeal or writ of certiorari initiated by a criminal defendant presenting an issue of fact or law under this section, the court shall apply the harmless error rule only if persuaded beyond a reasonable doubt that the error or defect did not affect the defendant's substantial rights.