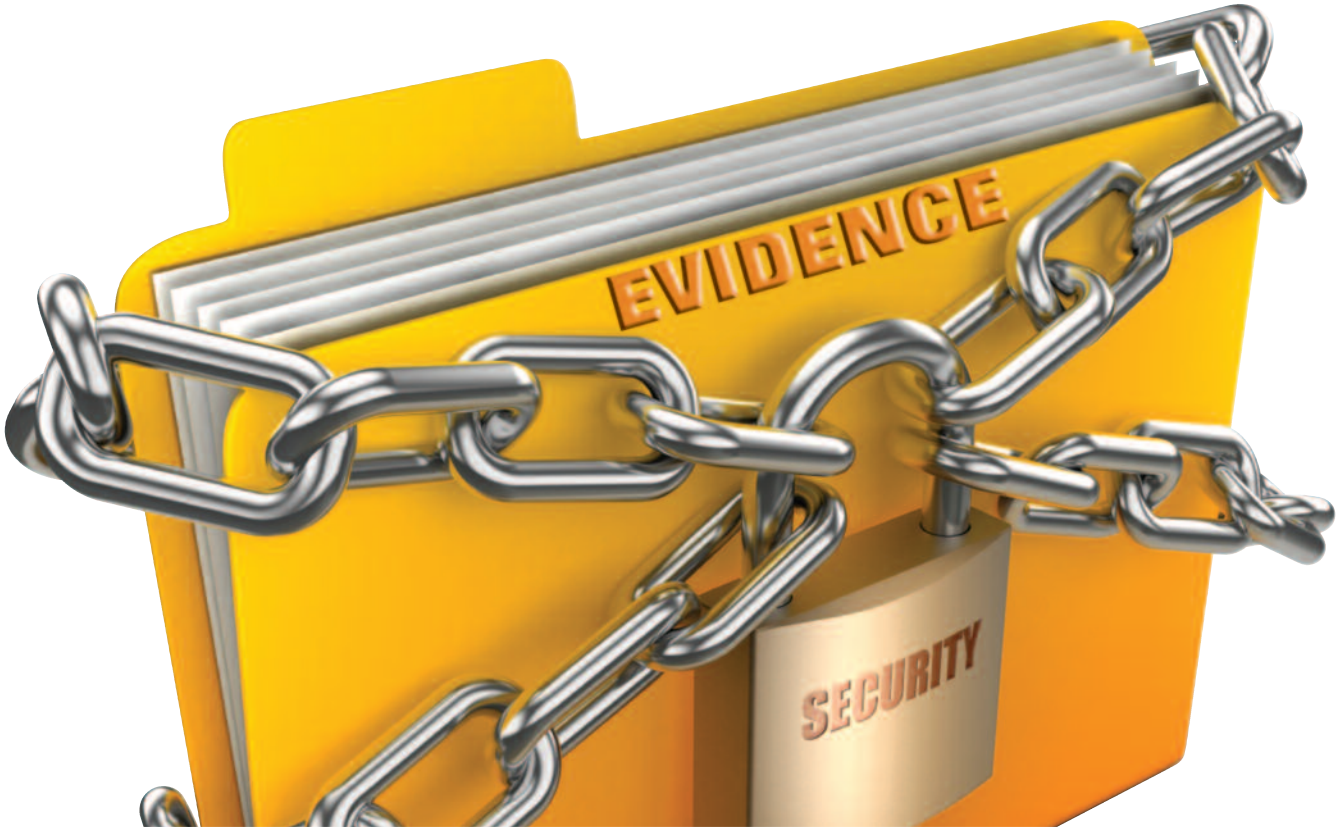

The 'Chief' Problem With Reciprocal Discovery Under Rule 16

what is meant by a defendant's "case-in-chief" — a term undefined by Rule 16 and rarely interpreted by the courts. This lack of guidance leaves defendants with a vexing choice: disclose too much and give away trial strategy, or disclose too little and risk exclusion of key evidence. This article recommends — as the best compromise between compliance and zealous advocacy — that defense counsel disclose only evidence in defendants' exclusive possession that they intend to use at trial for an initial purpose other than impeaching a government witness. It also suggests several defense strategies for using the rules to pursue the maximum informational return for this disclosure.

Successfully defending complex white collar criminal cases without the benefit of discovery from the government is impossible. Defending such cases *with* the benefit of discovery is often not much easier. Even though costly and time-consuming document review can help identify potentially relevant documents lurking in a warehouse full of boxes, there is often no telling which documents the government will actually use to prove its case at trial; that is, which ones will be part of its "case-in-chief." The Federal Rules of Criminal Procedure do offer defendants token means of pursuing that information. But the rules also exact a high price from defendants who seek any discovery at all, requiring that such defendants provide the government with materials they intend to use in their own cases "in-chief." Anything not disclosed to the government runs the risk of exclusion from trial.

What documents a defendant must turn over is a problematic question, to be sure. The answer depends on

Background: A Flawed Rule

Rule 16's provision on defense discovery requires:

> Upon a defendant's request, the government must permit the defendant to inspect … [items], if … within the government's possession … and:
>
> (i) the item[s are] material to preparing the defense;
>
> (ii) the government intends to use the item[s] in its case-in-chief at trial; *or*
>
> (iii) the item[s were] obtained from or belong[] to the defendant.[1]

If the defendant makes such a request and the

BY SARA KROPF, ANDREW GEORGE, WILLIAM C. CLEVELAND, AND JULIE RUBENSTEIN

> government complies, then the defendant must permit the government, upon request, to inspect …
>
> (i) [items that are] within the defendant's possession; … *and*
>
> (ii) [items that] … the defendant intends to use … in [his] *case-in-chief* at trial.[2]

This language presents three significant problems for defendants. First, by stating the *government's* obligation in the *disjunctive* and the *defendant's* obligation in the *conjunctive*, the rule saddles the parties with unequal obligations. The government seemingly may bury its "evidence-in-chief," that is, evidence it intends to introduce during its case-in-chief,[3] within its much larger overall discovery, rather than identifying it specifically.[4] In other words, if there are 100 boxes of documents that may be material to preparing the defense, and 75 documents in those boxes that the government intends to use at trial, the government has met its obligations under Rule 16 when it turns over the 100 boxes. There is no requirement in Rule 16 that the government separate out its case-in-chief documents. Yet the defense is expected to turn over, in response, items that (1) are in its possession *and* (2) it intends to use in its case-in-chief. Rule 16 literally mandates that defendants go fish through the warehouse for the government's evidence-in-chief but serve the government their own evidence-in-chief on a silver platter.

The second problem with Rule 16 is that it is silent as to whether a defendant must turn over documents to the government that are already part of the government's discovery in the case. It is also silent as to whether the defendant must identify documents that it intends to use in its case-in-chief when those documents are also identified as part of the government's "evidence-in-chief" (which courts sometimes require the government to identify, even though Rule 16 does not require it). In theory, it makes little sense to force a defendant to disclose documents of which the government is already aware.

The third problem is that Rule 16 assumes that a defendant, who has the right to present *no* defense at trial, can and should be expected to identify ahead of time what evidence he will use to prove his innocence. Congress has grappled with this issue over the years but has not resolved it.

First proposed in 1944 amidst a debate about the desirability of criminal discovery, Rule 16 was ultimately adopted in 1946.[5] The original rule provided only for court-ordered defendant discovery of resources "material to the preparation of his defense."[6] Amendments in 1966, however, reworded the rule and greatly expanded its scope, providing for discovery not only by the defendant but also by the government.[7] The defendant had to disclose any tangible objects that he "*intend[ed] to produce at the trial* and which [were] within his possession, custody or control."[8] This disclosure was not automatic; rather, a defendant's request for discovery opened the door for the government to request reciprocal discovery.

But in 1970 the Advisory Committee on Criminal Rules proposed new amendments, which the Supreme Court approved in 1974,[9] giving the government an *independent* right to discovery — requiring no triggering by the defendant — of any items the defendant "intends to introduce as evidence in chief at the trial."[10] In its notes to the proposed rule, the Advisory Committee indicated that the revision was meant to broaden discovery overall, noting that "[t]he majority of the Advisory Committee is of the view that the two — prosecution and defense discovery — are related and that the giving of a broader right of discovery to the defense is dependent upon giving also a broader right of discovery to the prosecution."[11]

Congress recognized the problem with the Advisory Committee's view: giving the government an independent right to discovery might run afoul of defendants' Fifth and Sixth Amendment rights. This concern received significant attention during congressional hearings on the proposed rule. One professor testified, "[T]he rule violates the Fifth Amendment … because, the defendant is 'compelled' to give information."[12] He offered the following example:

> A defendant accused of murder knows of an eyewitness who will testify that the act was done in self-defense. Ordinarily, the defendant will not introduce that testimony unless the government succeeds in establishing a *prima facie* case against him. Under the proposed rule, the defendant is compelled to disclose the existence of this witness because, if he doesn't, and the government establishes its case against him, his testimony may be barred. But the government might not have a *prima facie* case against the defendant before its examination of the witness. If this witness provides information which does establish the government's case, then the defendant has been compelled to incriminate himself.[13]

Similarly, a public defender explained:

> The proposed mutuality of discovery proposition is also unrealistic in failing to consider the unpredictability of the trial process. Often, a defendant may simply choose to put the government to its proof and not present any evidence at all. This strategy may change with the testimony of the last government witness who injects a devastating blow to the defense strategy. … Even if a defense is anticipated, it is often impossible to predict the exact nature of government testimony which will need to be rebutted during a defense case. … With a few exceptions, discovery in the context of a criminal case is a one-way street. When a sanity or alibi defense is anticipated, it may be fair to require the defendant to provide notice of this defense and a list of witnesses. However, this is not cause to abandon several hundred years of procedural evolution with respect to the criminal trial process by flinging the doors of discovery wide open to the prosecution.[14]

In response to these concerns, Congress reintroduced the defense-triggered version of the rule in 1975, thinking that would cure the rule's constitutional infirmities.[15] Yet, the notion of a defendant's "evidence-in-chief" remained in the adopted rule.[16] Though reinstating the triggering mechanism fixed some constitutional concerns, it did not eliminate the faulty assumption that defendants can define their exhibits before seeing the government's presentation of evidence.

In 2002, the Advisory Committee replaced the "evidence-in-chief" lan-

guage with the equally confusing phrase "case-in-chief." Congress intended to simplify the rule by "tracking" the language of the government's discovery obligation.[17] But the action of Congress not only suggests that there is something parallel between a "defendant's case-in-chief" and the "government's case-in-chief" (there isn't), it again provides no guidance to defendants as to how to meet this obligation, because it fails to explain what these terms mean.

What Is a Defendant's 'Case-in-Chief'?

A "case-in-chief" is generally defined as "[t]he part of a trial in which a party presents evidence to support [a] claim or defense."[18] What constitutes the *government's* case-in-chief is obvious: it is the first phase of trial, when the government bears the burden to prove a defendant's guilt by establishing the elements of the offense. What constitutes the *defendant's* case-in-chief as understood by Rule 16, however, is not so simple. It is not merely what happens after the government rests its case.

A defendant's case-in-chief undoubtedly includes evidence he intends to offer in support of an affirmative defense, such as alibi or insanity. This makes some sense. The defendant bears the burden of proof on these issues. The existence and scope of these affirmative defenses have little to do with how the government puts on its case, and a defendant will have spent time before trial marshaling evidence in support of them. Moreover, the evidence may include materials that are in the defendant's exclusive possession, and fairness dictates disclosure to the government. Affirmative defenses, however, are rare in complex, white collar cases.

What else constitutes the defendant's case-in-chief? This is the harder question. As explained below, Rule 16 defines a defendant's case-in-chief as occurring whenever a defendant presents evidence for a nonimpeachment purpose, both during and after the government's case. Where the defense attorney cross-examines a government witness, for instance, any exhibit introduced for a purpose other than impeaching that witness may be viewed as the defendant's evidence-in-chief. Especially if the defense also intended to call that witness, its cross-examination can quickly become part of its case-in-chief under Rule 16, regardless of whether the government has rested its case. Any evidence introduced for a nonimpeachment purpose during that cross-examination, or after the government rests, must have been turned over ahead of time.

This obligation seemingly conflicts with the notion that, of course, a criminal defendant has no obligation to present any case at all. As Justice Black remarked while dissenting in *Williams v. Florida*, "[t]hroughout the process the defendant has a fundamental right to remain silent, in effect challenging the state at every point to: 'Prove it!'"[19] Even if a defendant chooses to put on a case, what evidence he ultimately presents will be a *reaction* to the government's case-in-chief — for example, which witnesses testified, what they said, the effectiveness of cross-examination, whether certain exhibits were admitted by the court, the perceived jury reaction, and so forth. A defendant may go to trial not intending to put on a case, but then change his mind mid-trial if the government's case is stronger than expected. To expect a defendant to disclose ahead of time exactly what evidence he will use at trial during his case-in-chief ignores the realities of a criminal trial because even armed with an indictment, an exhibit list, and a witness list from the government, a criminal defendant still faces considerable uncertainty as to the precise contours of the government's case. Logically speaking, until the government rests, there is no such thing as a defendant's case-in-chief.

A defendant may know from the indictment the elements of the offenses he has been charged with, but he cannot know with any certainty how the government will seek to prove those offenses. Even with a witness list from the government, a defendant cannot know before trial what testimony will be presented against him. He cannot generally depose witnesses as in a civil case.[20] Government interview memoranda are notoriously vague and incomplete. Grand jury testimony may provide some sworn testimony of certain witnesses, but not every trial witness will have appeared before the grand jury, nor will the prosecutor have asked about every issue or exhibit during the grand jury testimony of each witness.

Equating the positions of the prosecution and defense before trial "compares elephants and peanuts and finds them equal."[21] Indeed, as noted during the 1975 congressional hearings on proposed changes to Rule 16:

> The government has available to it the most extensive investigative resources imaginable — the FBI, specialized federal law enforcement agencies such as the Narcotics Bureau and the Internal Revenue Service, and all state and local police organizations. Every conceivable kind of expert is available from government agencies, plus the services of specialized crime experts and laboratory facilities of the FBI. In addition, the government has available to it the best pretrial discovery device that any lawyer could ever wish for — the grand jury. … In contrast, most defendants have almost no investigative resources available to them.[22]

In response to these advantages, the Constitution gives defendants certain advantages at trial, according to Justice Black:

> *[A] tactical advantage to the defendant is inherent in the type of trial required by our Bill of Rights.* The Framers were well aware of the awesome investigative and prosecutorial powers of government and it was in order to limit those powers that they spelled out in detail in the Constitution the procedure to be followed in criminal trials.[23]

Supporters of Rule 16 as it stands may respond that any constitutional problems are cured by the fact that a defendant only finds himself in the position of having to choose between revealing trial strategy and risking preclusion of evidence if he chooses to take advantage of Rule 16 by requesting discovery in the first place.[24] But the premise that the defendant "invites" this choice is a false one. Few defendants, if any, will choose to forgo discovery, because they will not be able to adequately prepare their defenses without it.[25] Opting out will rarely be an option. The reality of complex, multi-defendant, white collar cases is that the government will frequently have collected thousands of boxes of evidence containing millions of pieces of paper. The "open-file" policy for many U.S. Attorney's Offices means that the government will simply give a defendant the key to the warehouse. Even if he retains a large law firm, a defendant

needs the government to narrow down these documents to a manageable exhibit list if he is to have any chance of presenting a successful defense.

Identifying the Government's Evidence-in-Chief

The Federal Rules of Criminal Procedure offer two options for identifying the government's evidence-in-chief, but neither is particularly successful in practice. The first is to request an order that, in fulfilling its Rule 16 discovery obligations, the government specify which portion of its discovery constitutes evidence-in-chief. Some courts are more receptive to such requests than others — some see specificity as required;[26] others see it as discretionary and deny the request.[27] The most compelling argument in favor of such specificity from the government is that Rule 16 mandates specificity on the part of defendants, and it is recommended that defendants incorporate this argument into their discovery requests.[28]

Rule 16 requires that defendants turn over *only* evidence-in-chief, meaning that the government finds out exactly what the defendants' evidence-in-chief is. Fairness seemingly dictates that defendants receive the same information. Defendants should not have to spend massive amounts of time and money reviewing documents so that they can simply take a better-educated guess at something they are required to tell the government explicitly. Moreover, defendants who are aware of the government's evidence-in-chief are in a (somewhat) better position to identify their own evidence-in-chief because they are (somewhat) informed as to what evidence they will have to respond to at trial.

The second solution is provided by Rule 12(b)(4)(B). The good news with this type of discovery is that it carries no reciprocal obligations and seemingly requires greater specificity than Rule 16. The bad news is that it is limited in scope, is not animated by fairness, and is often ignored by prosecutors without consequence. It reads:

> At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.[29]

By its own language, this rule seemingly requires greater detail than Rule 16(a)(1). Whereas Rule 16 merely allows the defense to inspect and copy, Rule 12(b)(4)(B) seemingly requires the government to give "*notice* of its intent to use (in its case-in-chief) any [suppressible] evidence."[30] But in practice, many prosecutors, in attempting to fulfill their Rule 12(b)(4)(B) notice obligations, simply grant the defendant access to all information discoverable under Rule 16, i.e., the keys to the warehouse. Some district courts allow this while others do not.[31] The only *circuit* court to rule on the matter — the First Circuit — has sided with the defense, holding that while the "open-file policy" may satisfy Rule 16, "[t]he open-file policy does not, in and of itself, satisfy [the] notice requirement [of 12(b)(4)(B)] because it does not specify which evidence the government intends to use at trial."[32] Yet the First Circuit also cautions that Rule 12(b)(4)(B) was "not designed to aid the defendant in ascertaining the government's trial strategy, but only in effectively bringing *suppression motions* before trial, as required by Rule 12(b)(3)."[33] That means that the scope of Rule 12 discovery may be limited to evidence-in-chief that is potentially suppressible, such as the fruits of illegal searches, seizures, or confessions.[34]

Whatever its scope may be, prosecutors frequently disregard Rule 12(b)(4)(B) requests, usually without penalty.[35] This happens because, remarkably, this "rule" carries *no* sanction for noncompliance. The government's failure to comply with a Rule 12(b)(4)(B) request entitles the defendant to relief only where it results in prejudice[36] or, sometimes, where it involves bad faith.[37] Why create a toothless rule? The Advisory Committee's comments on the subject indicate a perhaps unwarranted faith in prosecutors' likelihood of compliance — and a surprising lack of faith in prosecutors' ability to comply:

> No sanction is provided for the government's failure to comply with the court's [12(b)(4)(B)] order because the committee believes that the attorneys for the government will in fact comply. … An automatic exclusion of such evidence, particularly where the failure to give notice was not deliberate, seems to create too heavy a burden upon the exclusionary rule of evidence, especially when defendant has opportunity for broad discovery under Rule 16.[38]

Compliance With Rule 16

As illogical as Rules 12 and 16 may be, defendants are stuck with them. Unfortunately, there are very few cases to guide a defendant in this area. A defendant can approach compliance with Rule 16 in one of three general ways: conservatively, moderately, or aggressively. Under a conservative approach, a defendant turns over every piece of defense evidence that could conceivably be used at trial for any reason. This approach will certainly comply with Rule 16, but will give away the defendant's entire trial strategy. It is both unwise and unnecessary, and no case law requires it.

At the other end of the spectrum, a defendant following an aggressive approach only identifies evidence intended to support affirmative defenses, such as alibi or insanity. A defendant who does not have an affirmative defense would therefore not make any disclosure at all, because any defense he might present at trial would be contingent on how the government presents its case at trial. This approach is the most logically sound as it is consistent with the burdens of proof of a criminal trial, but it has not received judicial endorsement. In fact, in *United States v. Hsia*, the district court rejected the defendant's argument that she had no evidence to turn over to the government pretrial because she had no "*present* intention to do anything but cross-examine the government's witnesses."[39] The defendant argued, in effect, that because she did not intend at that point to introduce any evidence after the government rested, she had no evidence-in-chief.[40] The court disagreed, admonishing her that any evidence she used at trial for nonimpeachment purposes would be excluded.[41]

The risk that a court will follow *Hsia*'s reasoning is too great to recommend the aggressive approach. The moderate approach is the best compromise between strict compliance and zealous advocacy. *If the government is ordered to specify its evidence-in-chief, a defendant should turn over*

all evidence (including evidence from the government's discovery[42]) that, in his good-faith estimation, he plans to use at trial for a primary purpose other than impeaching a government witness. To be consistent with this rule, a defendant probably *should* also identify items as evidence-in-chief even when they are on the government's exhibit list. But because the government cannot seriously claim to be unfairly surprised[43] by its own evidence-in-chief, defendants may be able to omit such evidence from their own exhibit lists when case circumstances appear favorable. *If the government is not ordered to specify its evidence-in-chief, a defendant should only turn over evidence in his exclusive control that he intends to use for a primary purpose other than impeaching a government witness.*

This approach strikes a balance between revealing defense strategy and risking exclusion of crucial evidence. It is also supported by the limited case law. Many courts have held that Rule 16 does not require a defendant to disclose evidence properly used to impeach a government witness who testifies during the government's case-in-chief.[44] This qualification makes sense:

> [A] defendant's interest in being able to conduct a vigorous and effective cross-examination — an interest central to the right of a criminal defendant under the Sixth Amendment "to be confronted with the witnesses against him" — would be impaired if he had to give a précis of his cross-examination to the prosecution before trial.[45]

Even the court in *Hsia* agreed with this reasoning:

> Of course, if the defendant uses a document merely to impeach a government witness, and not as affirmative evidence in furtherance of her theory of the case, it is not part of her case-in-chief. Indeed, unlike affirmative evidence presented to support her defense, she may not even know she may need to use such impeaching material until after she hears the direct testimony of the witness.[46]

Other federal courts also draw the line for Rule 16 disclosure at impeachment evidence. The Seventh Circuit found an abuse of discretion where a district court required a defendant to disclose evidence intended to impeach a government witnesses.[47] Likewise, the Eighth Circuit found that a district court abused its discretion by excluding an undisclosed letter used for impeachment purposes.[48] Conversely, in *United States v. Young*,[49] where a defendant attempted to circumvent Rule 16 by calling undisclosed evidence "impeachment evidence," the Fourth Circuit found a Rule 16 violation because the defendant, in truth, "*intended* to offer the [evidence] not for impeachment purposes but as 'evidence in chief' that [the witness] had committed the crime."[50] *Young* thus stands for the proposition that Rule 16 does not protect a defendant whose "true intent" was to avoid disclosure by improperly impeaching a witness with undisclosed evidence-in-chief.

But what is impeachment? It includes anything that is "offered to discredit a witness and reduce the effectiveness of her testimony."[51] Courts have identified several types of impeachment evidence: (1) impeachment by demonstration of bias, prejudice, interest in the litigation, or motive to testify in a particular fashion; (2) impeachment by contradiction; (3) impeachment by demonstration of incapacity to perceive, remember, or relate; (4) impeachment by untruthful character or prior bad acts; (5) impeachment by conviction of a crime; and (6) impeachment by prior inconsistent statement.[52] The broad definition of "impeachment evidence" gives defendants some latitude to aggressively define what would be used in this way.

A defendant who genuinely intends to use evidence primarily to impeach a government witness is likely to be found in compliance even where the impeachment evidence at issue also happens to corroborate his case-in-chief by refuting the government's case. This follows from cases such as *United States v. Givens*,[53] which found no error where a trial court admitted undisclosed government evidence, because the government had properly used it for impeachment purposes. The court reasoned, "[t]he evidence was offered to impeach [defendant's] wife's testimony. … The fact that it provided some remote corroboration for the eyewitness testimony that [defendant] was the perpetrator [did] not establish that it was 'intended for use by the government as evidence-in-chief at the trial.'"[54]

There is evidence, however, that can be fairly used for *both* impeachment *and* nonimpeachment purposes. Consider, for example, a situation in which (1) a defendant has evidence contradicting the grand jury testimony of "John Smith" (who is on the government's witness list), and (2) this evidence provides key support for the defendant's theory of the case. It is both proper impeachment evidence *and* evidence that the defendant would unquestionably use after the government rests if he could not use it to impeach Mr. Smith. Does Rule 16 require pretrial disclosure of this evidence?

We know of no case law to guide a defendant in such a situation. Our view, however, is that the defendant need not disclose such evidence *until it is clear that the defendant will be unable to use it for proper impeachment during the government's case*. Applying this guidance to the example above, if the government informs the defendant midway through its case that Mr. Smith will not testify, then the defendant should disclose the evidence at that time. If Mr. Smith testifies differently than the defendant expected — say, by recanting his grand jury testimony — there is no opportunity to impeach him with the evidence, and the evidence should be disclosed at the end of Mr. Smith's testimony. Disclosing the evidence as soon as possible, rather than waiting until the end of the government's case, will demonstrate the defendant's good faith in withholding the evidence before trial.

Of course, delayed disclosure carries a greater risk of exclusion than pretrial disclosure. Counsel must carefully weigh the importance of the evidence to the defense against this risk and be certain that they are acting in good faith by not disclosing the evidence before trial. Ultimately, the good judgment of counsel must be the final arbiter.

Two Practical Considerations

As defense lawyers develop their exhibit lists, two other considerations should be evaluated. First, out-of-town counsel should always seek guidance from local lawyers who are familiar with the practice of the particular court and, if possible, solicit information about the presiding judge. Some judges will have more lenient interpretations of Rule 16 and others will have stricter ones. This is one area where the experience of lawyers who regularly practice before that court is priceless.

Second, when defense counsel participates in a joint defense group, the various views of the members of that group must be taken into consideration. It will do no good for one defendant to withhold key impeachment evidence if another defendant discloses it as part of his "case-in-chief." Communication — and likely negotiation — among joint defense group members is a critical element of making sure one defendant's trial strategy is not inadvertently revealed by another defendant's more conservative view of Rule 16 disclosure obligations.

Notes

1. Fed. R. Crim. P. 16(a)(1)(E) (emphasis added).

2. Fed. R. Crim. P. 16(b)(1)(A) (emphasis added).

3. Fed. R. Crim. P. 16 advisory committee's note (1974).

4. Indeed, several courts have held that Rule 16 does not require the government to be specific as to what evidence it intends to use in its case-in-chief. *See, e.g.*, *United States v. Pearson*, 340 F. 3d 459, 468 (7th Cir. 2003), *vacated on other grounds*, *Hawkins v. United States*, 543 U.S. 1097 (2005) ("[W]e cannot find the district court abused its discretion for failing to order the government to furnish lists that Rule 16 does not require it to provide."); *United States v. Vilar*, 530 F. Supp. 2d 616, 636 (S.D.N.Y. 2008) ("[I]t is well settled that Rule 16(a)(1)(e) does not require the government to identify specifically which documents it intends to use as evidence.") (citation omitted); *United States v. Carranza*, No. 1:05-CR-197-4-TWT, 2007 WL 2422033, at *3 (N.D. Ga. Aug. 21, 2007) ("The language of Rule 16(a)(1)(E) … does not require the government to make specific identification of its case-in-chief documents separately from the other two categories of documents required to be produced."); *United States v. Causey*, 356 F. Supp. 2d 681, 686–687 (S.D. Tex. 2005) ("The plain language of Rule 16 does not require the government to specify from among the universe of discovery documents produced to defendants which documents it considers material to the defense or which documents it intends to use in its case-in-chief."); *United States v. Nachamie*, 91 F. Supp. 2d 565, 569 (S.D.N.Y. 2000) ("[T]he clear language of Rule 16(a)(1) … does not require the government to identify which documents fall in each category.").

5. 2 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 251, at 55–56 (3d ed. 2000) (emphasis added).

6. *Id.* at 52 n.1.

7. *Id.*

8. *Id.* (emphasis added).

9. *Id.* § 251, at 58.

10. 62 F.R.D. 271, 306 (1974).

11. Fed. R. Crim. P. 16 advisory committee's note (1974).

12. *Amendments to Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary*, 94th Cong. 6 (1975) (statement of Prof. Leon Friedman, Hofstra University School of Law); *see id.* at 7 ("The amendment to Rule 16(d) would impinge on [his] right to present witnesses. If the defendant refuses to submit a list of witnesses prior to trial, he may be denied the right to call witnesses at the trial. If he refuses to assist the prosecution by furnishing it with documents and physical evidence prior to trial, he may be barred from offering such items as evidence at the trial.").

13. *Id.* at 6.

14. *Amendments to Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary*, 94th Cong. 33–34 (1975) (statement of Charles M. Sevilla, Chief Trial Attorney, Fed. Defenders of San Diego, Inc.).

15. *See* H.R. Rep. No. 94-247, at 15 (1975) ("Requiring a defendant, upon request, to give to the prosecution material which may be incriminating, certainly raises very serious constitutional problems. The [House Committee on the Judiciary] deals with these problems by having the defendant trigger the discovery procedures.").

16. Federal Rules of Criminal Procedure Amendments Act of 1975, Pub. L. No. 94-64, § 3, 89 Stat. 370, 375.

17. Fed. R. Crim. P. 16 advisory committee's note (2002).

18. Black's Law Dictionary 244 (9th ed. 2009).

19. *Williams v. Florida*, 399 U.S. 78, 112 (1970) (Black, J., dissenting).

20. *See* Fed. R. Civ. P. 30.

21. *Amendments to Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary*, 94th Cong. 161 (1975) (statement on behalf of the National Association of Criminal Defense Lawyers and the Washington Council of Lawyers).

22. *Id.* at 161–62.

23. *Williams*, 399 U.S. at 111–12 (Black, J., dissenting) (emphasis added). *See also Amendments to Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary*, 94th Cong. 33 (1975) (statement of Charles M. Sevilla, Chief Trial Attorney, Fed. Defenders of San Diego, Inc.) ("Through amended Rule 16(b), the proposed rules inaugurate an unprecedented opening of the defense case to government discovery. This provision was appended to Rule 16 to provide for the sanguine objective of mutuality of discovery. This is in reality a theoretical objective rather than a practical one. There can never be parity between the position of the United States and that of a defendant.").

24. *See, e.g.*, *United States v. Ryan*, 448 F. Supp. 810, 811 (S.D.N.Y. 1978), *aff'd*, 594 F.2d 853 (2nd Cir. 1978) ("If the defendant demands discovery of the government, he is waiving the protection against self-incrimination at least as far as documents are concerned.").

25. *See, e.g.*, *United States v. Tucker*, 249 F.R.D. 58, 60 (S.D.N.Y. 2008) ("[A]n innocent defendant has no *a priori* knowledge of the accusations against which she must defend herself, and thus must rely on the government's disclosures to calculate how best to present a defense.").

26. *United States v. Anderson*, 416 F. Supp. 2d 110, 115 (D.D.C. 2006) ("The defendant cannot satisfy that obligation simply "by providing the government with the thousands of pages of discovery [he] received from the government and stating that the documents upon which [he] intends to rely are found somewhere therein. … The reverse must also be true. … In short, for the intended reciprocity to be effectuated, the government must identify what it intends to rely on in its case-in-chief at trial before the defendant must identify what he intends to rely on in his."); *United States v. O'Keefe*, No. CR-06-0249, 2007 WL 1239207, at *2 (D.D.C. Apr. 27, 2007) ("Under [Rule 16] the government must identify specifically which items it intends to use in its case-in-chief at trial.").

27. *United States v. Giffen*, 379 F. Supp. 2d 337, 344 (S.D.N.Y. 2004); *Carranza*, 2007 WL 2422033, at *4 (pointing out that Rule 16 has no mandatory requirement but the court may use its discretion and order the government to provide an index of certain documents after "balancing the effect of premature disclosure of the government's work product against any unfairness inherent in the voluminousness of the production"); *United States v. Falkowitz*, 214 F. Supp. 2d 365, 392 (S.D.N.Y. 2002) (stating that mandatory disclosure "is not required [by Rule 16] and, if considered at all, may rest within the district court's discretion"); *see also United States v. Scrushy*, No. CR-03-BE-530-S, 2004 WL 483264 (N.D. Ala. Mar. 3, 2004) (arguing that requiring specificity from the government as to evidence-in-chief would be pointless because there are no apparent consequences for inaccuracy).

28. The only case we have seen that directly incorporates this reasoning is

United States v. Weissman, No. S294Cr.760(CSH), 1996 WL 751385 (S.D.N.Y. Dec. 26, 1996), which held that "the use of the disjunctive [in 16(a)(1)(E)] indicates that documents the government must produce fall into three categories. … The use of the conjunctive [in 16(b)(1)(A)] indicates that the documents the defendant must produce consist of a single category, namely, the defendant's trial exhibits." *Id.* at *1. The court went on to rely on a series of cases, including *United States v. Upton*, 856 F. Supp. 727, 746–48 (E.D.N.Y. 1994), *aff'd*, 78 F.3d 65 (2d Cir. 1996), *United States v. Poindexter*, 727 F. Supp. 1470, 1484 (D.D.C. 1989), *United States v. Turkish*, 458 F. Supp. 874, 882 (S.D.N.Y. 1978), *aff'd*, 623 F.2d 769 (2d Cir. 1980), and *United States v. Bortnovsky*, 820 F.2d 572, 575 (2d Cir. 1987), to find that "[t]he considerable weight of authority holds that the government's obligation to designate those documents falling within the category of intended trial exhibits arises out of Rule 16(a)(1)(C) [now renumbered as 16(a)(1)(E)], and that the government does not satisfy that obligation by producing masses of documents without designating which of them it will seek to introduce at trial." *Weissman*, 1996 WL 751385, at *1.

29. FED. R. CRIM. P. 12(b)(4)(B).

30. *Id.* (emphasis added).

31. *Compare United States v. Kelley*, 120 F.R.D. 103, 107 (E.D. Wis. 1988) ("[T]he government's response does not fulfill the requirements of [12(b)(4)(B)] since the defendant is still 'left in the dark' as to exactly what evidence, discoverable under Rule 16, the government intends to rely upon in its case-in-chief at trial. The open-file policy does not particularize this evidence."), *with United States v. Roberts*, No. 3:08-CR-175, 2009 WL 4060006, at *5 (E.D. Tenn. 2009) ("Rule 12(b)(4)(B) is not designed nor intended to be used to obtain more specific discovery than that provided by Rule 16.").

32. *United States v. de la Cruz-Paulino*, 61 F.3d 986, 993 (1st Cir. 1995) (quoting *United States v. Brock*, 863 F. Supp. 851, 868 (E.D. Wis. 1994)); *see also United States v. Smith*, No. 07-2171, 2008 WL 1932145, at **5 (3d Cir. May 5, 2008) ("[T]he simple provision of Rule 16 discovery does not satisfy the plain terms of Rule 12(b)(4)(B)."); *United States v. Cheatham*, 500 F. Supp. 2d 528, 534–535 (W.D. Penn. 2007) ("[W]hen the government has an open-file policy with regard to its prosecution, this policy does not comply with Rule 12(b)(4)(B). …").

33. *De la Cruz-Paulino*, 61 F.3d at 994 (emphasis added).

34. FED. R. CRIM. P. 12(d) advisory committee's comments (1974) ("In such cases in which a defendant wishes to know what *types* of evidence the government intends to use so that he can make his motion to suppress … he can request the government to give *notice* of its intention to use *specified* evidence. …") (emphasis added).

35. *Smith*, 2008 WL 1932145 at **4.

36. *De la Cruz-Paulino*, 61 F. 3d at 994–95 (finding no prejudice where the government introduced items from a crime scene it had failed to disclose beforehand, even though this prevented the defendant from filing a suppression motion and affected her trial strategy).

37. *Smith*, 2008 WL 1932145, at **5 (finding that the government was negligent, and not in bad faith, where for 14 months it failed to respond to the defendant's Rule 12(b)(4)(B) request, until the defendant moved to suppress the evidence, after which the government took another month to respond to the original request).

38. FED. R. CRIM. P. 12 advisory committee's note (1974).

39. *United States v. Hsia*, No. 98-cr-0057, 2000 WL 195067, at *1 (D.D.C. Jan. 21, 2000) (emphasis added).

40. *Id.* at *2.

41. *See id.*

42. *See Anderson*, 416 F. Supp. 2d at 115.

43. *See* FED. R. CRIM. P. 16 advisory committee's note (1974).

44. *See, e.g., United States v. Medearis*, 380 F.3d 1049, 1057 (8th Cir. 2004) ("[T]he requirement of reciprocal pretrial disclosure under Rule 16(b)(1)(A) includes only documents which the defendant intends to introduce during *his own case-in-chief*.") (emphasis added); *United States v. Moore*, 208 F.3d 577, 579 (7th Cir. 2000) (holding that "case in chief" language in Rule 16 excludes evidence used "to impeach the testimony of a witness for the prosecution"); *United States v. Cerro*, 775 F.2d 908, 915 (7th Cir. 1985) ("[N]othing in any of the [federal rules] suggests that impeachment evidence is discoverable.").

45. *Cerro*, 775 F.2d at 915.

46. *Hsia*, 2000 WL 195067 at *2 n.1.

47. *Moore*, 208 F.3d at 579.

48. *Medearis*, 380 F.3d at 1057–58.

49. *United States v. Young*, 248 F.3d 260 (4th Cir. 2001).

50. *Id.* at 269.

51. *Newsome v. Penske Truck Leasing Co.*, 437 F. Supp. 2d 431, 435 (D. Md. 2006).

52. *Id.*

53. 767 F.2d 574 (9th Cir. 1985).

54. *Id.* at 583.

About the Authors

Sara Kropf is a partner at Baker Botts L.L.P. She defends individuals and companies accused of fraud and conspiracy in both civil and criminal contexts.

Sara Kropf
Baker Botts L.L.P.
1299 Pennsylvania Ave. NW
Washington, DC 20004
202-639-7775
Fax 202-585-4096
E-MAIL sara.kropf@bakerbotts.com

William C. Cleveland is an associate at Baker Botts L.L.P. He handles a range of complex environmental litigation matters that involve air, water, and waste issues.

William C. Cleveland
Baker Botts L.L.P.
1299 Pennsylvania Ave. NW
Washington, DC 20004
202-639-7882
Fax 202-508-9330
E-MAIL william.cleveland@bakerbotts.com

Andrew George, a former associate at Baker Botts L.L.P., is a law clerk in the Eastern District of Virginia.

Andrew George

Julie Rubenstein is a former summer associate at Baker Botts L.L.P. She will join the firm in the fall as an associate after she is licensed.

Julie Rubenstein