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Recent Developments on Disclosure of Exculpatory Information

BY SARAH Q. WIRSKYE

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court created a constitutional duty on the part of prosecutors to turn over "evidence favorable to an accused … where the evidence is material to either guilt or punishment." Over the last year, there have been several significant developments regarding *Brady* law, in part spurred by the *Brady* violations in the Ted Stevens prosecution. Two of the more significant developments are several newly-issued memoranda for Justice Department prosecutors and the American Bar Association Formal Opinion 09-454.

Memoranda for Justice Department Prosecutors

On January 4, 2010, Deputy Attorney General David W. Ogden sent Department of Justice (DOJ) prosecutors three memoranda regarding discovery in criminal matters. These policies, like other DOJ policies, provide guidance but, as stated, do not have the force of law or confer any rights, privileges or benefits.

The first memorandum addresses requirements for local-office discovery policies in criminal matters. The document begins by stating that no new disclosure obligations are created by the policy guidelines and that the disclosure obligations are already set forth in Federal Rules of Criminal Procedure 16 and 26.2, *Brady*, *Giglio* and the Jencks Act. Although DOJ policy provides for broader disclosure than *Brady* and *Giglio*, the directive requires each office to establish a discovery policy.

The second memorandum pertains to issuance of guidance and a summary of actions taken in response to the report of the DOJ Criminal Discovery and Case Management Group.

Finally, the third memorandum contains four steps for prosecutors regarding criminal discovery. The first step is gathering and reviewing discoverable information. Prosecutors should look at the "prosecution team" (for which the guidelines provide criteria in defining) when gathering and reviewing discoverable information. The review process should cover the following areas:

1. The investigating agencies' files;
2. Confidential informant, cooperating witness, human source and source files;
3. Evidence and information gathered during the investigation;
4. Documents or evidence gathered by civil attorneys and/or regulatory agencies and parallel civil investigations;
5. Substantive case related communication;
6. Potential *Giglio* information regarding law enforcement witnesses;
7. Potential *Giglio* information relating to non-law enforcement witnesses; and Federal Rule of Evidence Declarants; and
8. Information obtained in witness interviews.

The second step for the prosecutor is to establishing who should conduct the review. The policy states that while it would be preferable for prosecutors themselves to review information, such a review may not be feasible or necessary. Step three is making the disclosure. Prosecutors are encouraged to provide broad and early discovery consistent with any countervailing considerations. The fourth step is for prosecutors to make a good record regarding disclosure.

ABA Formal Opinion 09-454

On July 8, 2009, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 09-454, entitled "Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense." Notably, the opinion is more demanding than any Constitutional obligations.

Opinion 09-454 is based upon the Model Rules of Professional Conduct, which are the basis for lawyer ethics codes in every state except California. However, ABA Opinions are advisory, and thus do not have the force of law. States and judges can, however, incorporate the ABA's new interpretation into their Rules and Orders. Indeed, U.S. District Judge Emmet Sullivan in Washington D.C. has already issued a standing order that incorporates opinion 09-454.

Under the opinion, there is no materiality or admissibility requirement, as required under the Constitution. While a prosecutor must disclose known information, he has no duty to search for exculpatory information; however, he cannot close his eyes to the obvious. Disclosure must also be timely so that, for example, a defendant can make an informed decision regarding a plea offer. The opinion further states that the defendant cannot waive his right to exculpatory information in exchange for leniency. Exculpatory information regarding sentencing must also be disclosed. Finally, supervisory lawyers in a prosecutor's office have an obligation to ensure that their lawyers comply with these obligations.

Conclusion

While there have been significant developments regarding the disclosure of exculpatory information, some practitioners believe progress still needs to be made. Although the DOJ policies and memoranda and the ABA opinion contain more expansive discovery obligations, they do not have the force of law. Many defense attorneys believe that codification of these policies would be helpful while most governmental entities believe it is not necessary. It remains to be seen what the effects of this recent guidance will be and whether there will be a further push to codify more expansive disclosure of exculpatory material. **HN**

Sarah Wirskye is a Partner at Meadows, Collier, Reed, Cousins, Crouch & Ungerman, LLP and is also a CPA. She can be reached at swirskye@meadowscollier.com.