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DOJ Adopts New Discovery Policy for Criminal Matters and Appoints First National Coordinator for Criminal Discovery Initiatives

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Background

After several well-publicized discovery missteps by the U.S. Department of Justice (the "DOJ"), most notably during the prosecution of former United States Senator Ted Stevens last year, the DOJ appointed Andrew Goldsmith[1] as its first national coordinator for criminal discovery initiatives on January 15, 2010.

In response to the Stevens' debacle and public criticism from a number of federal judges, the DOJ convened a working group to explore the DOJ's policies, practices, and training related to criminal case management and discovery. Following recommendations from this group, the DOJ issued three memoranda on January 4, 2010—including guidance for all federal prosecutors—that detail the steps the Department has taken to ensure that prosecutors assess and meet their obligations to disclose information to criminal defendants. While a long overdue and welcome step, there is enough latitude permitted to temper enthusiasm.

The most important of these memoranda[2] detail procedures that prosecutors must follow when providing discovery in criminal matters. While apparently trying to promote consistency across offices with this memorandum, the DOJ does not adopt a "one-size-fits-all approach," and notes that "[i]n many cases, broad and early disclosures might lead to a speedy resolution and preserve limited resources for the pursuit of additional cases. In other cases, disclosures beyond those required by relevant statutes, rules and policies may risk harm to victims or witnesses, obstruction of justice, or other ramifications contrary to our mission of justice."

In a memorandum to all U.S. attorneys and heads of Department litigating components that handle criminal cases,[3] Deputy Attorney General David W. Ogden directed each "office,"[4] to establish a discovery policy by March 31, 2010. The policy must be followed by prosecutors within that office and must reflect district and circuit precedent and address, among other things, the timing, scope, and form of disclosures, including the disclosure of reports of interviews with testifying and nontestifying witnesses. At the same time, departures from that policy should be allowed on a case-by-case basis where "specific, case-related considerations may warrant a departure from the uniform discovery practices of the office." Each U.S. Attorney's Office ("USAO") and litigating component has already named a "discovery coordinator," who is expected to provide discovery training for that office.

In addition to requiring a written policy from each office, the Justice Department will create an online directory of discovery resources, a handbook on discovery and case management, and a mandatory training program for law enforcement agents. The Department also plans to use its computer forensics working group to examine how the DOJ catalogues electronically stored information.

Guidance for Prosecutors Regarding Criminal Discovery

Ogden notes in his Office Memorandum that the Guidance Memorandum "is not intended to establish new disclosure obligations," as "[t]he discovery obligations of federal prosecutors are generally established" by Rules 16 and 26.2 of the Federal Rules of Criminal Procedure, the Jencks Act,[5] *Brady v. Maryland*,[6] and *Giglio v. United States*.[7] This guidance should be followed by prosecutors "in every case … subject to legal precedent, court orders, and local rules," and provides "prospective guidance only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits."[8] In addition to these discovery obligations, the DOJ has not changed its policy to provide exculpatory and impeachment information as described in section 9-5.001 of the United States Attorneys' Manual.

The DOJ defines its new discovery process as having four steps. Step 1 of the new discovery process is gathering and reviewing discoverable information.[9] First, the federal prosecutors, in preparing for trial, must seek all exculpatory and impeachment information from all members of the prosecution team,"[10] which includes federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant. USAM § 9-5.001. Second, the prosecutor should determine what materials to review. To ensure that all discovery is disclosed on a timely basis, generally all potentially discoverable material within the custody or control of the prosecution team should be reviewed. The review process should cover (1) the investigative agency's files; (2) confidential informant, witness, and source files; (3) evidence and information gathered during the investigation; (4) documents or evidence gathered by civil attorneys and/or regulatory agencies in parallel civil investigations; (5) substantive case-related communications; (6) potential *Giglio* information relating to law enforcement witnesses; (7) potential *Giglio* information[11] relating to non-law enforcement witnesses and Federal Rule of Evidence 806[12] declarants; and (8) information obtained in witness interviews.

Step 2 of the new process consists of conducting the review of potentially discoverable information. While it would be "preferable" if the assigned prosecutor could review the information himself in every case, "such review is not always feasible or necessary." The prosecutor should develop a process to ensure that discoverable information is identified and may include agents, paralegals, agency counsel, and computerized searches in the review process to discharge their duties. At the same time, the prosecutor should not delegate the determination to disclose information to such agents. In cases involving voluminous evidence obtained from third parties, prosecutors should consider providing defense access to the voluminous documents to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence.

Step 3 of the new process involves the actual disclosure to counsel for the defendant. The Guidance Memorandum reiterates the DOJ's understanding of a prosecutor's disclosure obligations[13] and notes that prosecutors are encouraged to provide discovery both broader and more comprehensive than those obligations. In particular, Ogden notes that reports of interview ("ROIs") of testifying witnesses are not considered Jencks material unless the report reflects the statement of the witness substantially verbatim or the witness has adopted it. Ogden observes that practices differ among the

USAOs and the components regarding disclosure of ROIs of testifying witnesses and that prosecutors should be familiar with and comply with the practice of their offices.

Ogden encourages prosecutors never to describe the discovery provided to a defendant as "open file." The primary purpose of this advice is to avoid misrepresenting the scope of discovery if inadvertent omissions occur.

Ogden encourages prosecutors to disclose exculpatory information reasonably promptly after discovery. Impeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. In the absence of guidance from local rules or court orders, prosecutors should consider making Rule 16 materials available as soon as is reasonably practical but must make disclosure no later than a reasonable time before trial.

Step 4 of the new process is making a record of the disclosure. Generally, prosecutors should make a record of when and how information is disclosed or otherwise made available to avoid litigation over discovery issues.

Ogden concludes the Guidance Memorandum by noting that "[t]his guidance does not and could not answer every discovery question because those obligations are often fact specific."

Analysis

No Single Set of Rules

While the new guidelines may help to harmonize the way various DOJ offices approach their discovery obligations in criminal cases, the guidelines do not impose a single set of rules. Instead, The Guidance Memorandum leaves it to the individual offices to create their own individual rules. While the tone from the DOJ has certainly improved, it is precisely this scattered approach to discovery that has spawned some of the recent abuses.

Prosecutor Decides Where to Search for Exculpatory Evidence

In cases involving multi-district investigations involving multiple DOJ components, the prosecutor decides which agencies are part of the "prosecution team" and whether that agency's files will be reviewed for exculpatory information. "This definition will necessarily be adjusted to fit the circumstances" and only "some factors" for the prosecutor to consider are listed.

In "complex cases" that involve parallel proceedings with regulatory agencies, the prosecutor "should consider whether the relationship with the other agency is close enough to make it part of the prosecution team for discovery purposes." The prosecutor will review that agency's files only if the prosecutor determines that the regulatory agency is part of the prosecution team. Prosecutors are not required, but "may very well" want, to review the files of an agency that is not part of the prosecution team "not only to locate discoverable information but to locate inculpatory information that may advance the criminal case." At the same time, the prosecutor should review civil case files from an ongoing parallel civil proceeding in which Department civil attorneys are participating.

Timing of Disclosures Unclear

The Guidance Memorandum does not specify *when* a prosecutor has to disclose information to counsel for the defendant. Exculpatory information should be disclosed "reasonably promptly after discovery." Impeachment information "will typically be disclosed at a reasonable time before trial." Witness security, national security and "other issues" may require that "disclosures of impeachment information be made at a time and in a manner consistent with the policy embodied in the Jencks Act." Prosecutors "should consider making Rule 16 materials available as soon as is reasonably practical" but can make disclosure as late as "a reasonable time before trial." The Guidance Memorandum only requires exculpatory and impeaching information to be disclosed if the prosecutor determines that such information is "material" in nature.

Prosecutor Decides What to Preserve and What to Disclose

All "substantive[14] case-related internal communications," including emails, memoranda, and notes must be preserved and reviewed.

All exculpatory information that is material in nature must be produced, regardless of the format of the information. However, if the discoverable information is contained elsewhere, the prosecutor may choose to produce it in a certain format (*e.g.*, if information reported in an email is "fully memorialized elsewhere" in a report of interview, disclosure of that report will "ordinarily satisfy" the disclosure obligation).

"Although not required by law, generally speaking, witness interviews[15] should be memorialized by the agent." Interview memoranda of witnesses expected to testify and of non-testifying individuals "who provided relevant information" should be reviewed, but not necessarily disclosed.

"Material variances" in a witness's statements must be disclosed, including variances that occur within the same interview or trial preparation session. Prosecutors should also disclose material exculpatory or impeachment information discovered for the first time in a trial preparation session. Otherwise, prosecutors need not memorialize trial preparation sessions.

Agent notes need only be reviewed if "there is a reason to believe that the notes are materially different from the memorandum, if a written memorandum was not prepared, if the precise words used by the witness are significant, or if the witness disputes the agent's account of the interview."

Conclusion

At the end of the day, so much of the guidance is left to the individual prosecutor that it is impossible to predict the impact these guidelines will have.

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[1] Goldsmith is a former state and federal prosecutor, who has most recently served as the first assistant chief of the Environmental Crimes Section of the Environmental and Natural Resource Division of the DOJ.

[2] *Guidance for Prosecutors Regarding Criminal Discovery* ("Guidance Memorandum"). In the Guidance Memorandum, Ogden notes that additional guidelines for national security investigations and prosecutions are forthcoming.

[3] *Requirement for Office Discovery Policies in Criminal Matters* ("Office Memorandum").

[4] The term "office" is left undefined but appears to mean entire districts and litigating components and not require a policy for each office within a district or litigating component.

[5] 18 U.S.C. § 3500.

[6] 373 U.S. 83 (1963).

[7] 405 U.S. 150 (1972).

[8] *United States v. Caceres*, 440 U.S. 741 (1979).

[9] The memorandum defines "discovery" or "discoverable information" as including information required to be disclosed by Fed. R. Crim. P. 16 and 26.2, the Jencks Act, *Brady*, *Giglio*, and additional information disclosable pursuant to USAM § 9-5.001.

[10] "Prosecution team" is not defined in the Guidance Memorandum, but the prosecutor determines the composition of the "prosecution team," in part by analyzing how closely the prosecutor has worked with other agencies in investigating and prosecuting the case. This "definition will necessarily be adjusted to fit the circumstances" of each case.

[11] Information tending to impeach the character or testimony of the prosecution's witness at trial.

[12] Federal Rule of Evidence 806 requires, among other things, that the prosecution disclose any statement or evidence that is inconsistent with hearsay or other statements the prosecution seeks to put into evidence at trial.

[13] As noted above, Ogden states that the Department's disclosure obligations are generally set forth in Fed. R. Crim. P. 16 and 26.2, 18 U.S.C. § 3500 (the Jencks Act), *Brady*, and *Giglio*.

[14] "'Substantive' case-related communications are most likely to occur (1) among prosecutors and/or agents; (2) between prosecutors and/or agents and witnesses and/or victims; and (3) between victim-witness coordinators and witness and/or victims" and include "factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility."

[15] The Guidance Memorandum defines "interview" as "a formal question and answer session with a potential witness conducted for the purpose of obtaining information pertinent to a matter or case." The definition does not appear to require substantive information provided outside of a formal interview to be memorialized by the agent, but obliquely acknowledges that "[s]ubstantive, case-related communications are addressed above" and are thus subject to review and disclosure.