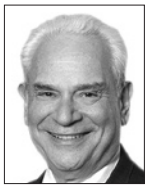
New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 246—NO. 46
TUESDAY, SEPTEMBER 6, 2011

WHITE-COLLAR CRIME

Expert Analysis

'Brady' Obligations: Codification and Clarification



By **Elkan Abramowitz**

And **Barry A. Bohrer**

Recent events in a certain local prosecution of international interest highlighted the salutary effect of early prosecutorial disclosure of information favorable to the defense. The nature of a prosecutor's disclosure obligations derives from a variety of sources, including the U.S. Constitution, federal and state statutes and case law, court rules, and ethics rules. Nevertheless, reports of prosecutorial misconduct related to non-disclosure are abundant.[1] There have been various efforts to more clearly define a prosecutor's duty in this regard. Resistant to these attempts, the Department of Justice has undertaken to handle the problem internally. Practitioners question whether the government properly can police itself with respect to such matters, and they advocate for substantive change.

The latest attempt at external reform comes from the National Association of Criminal Defense Lawyers (NACDL). In July 2011, the organization released proposed legislation that addresses gaps in the existing framework and sets forth remedial action that can be taken by a trial court where the prosecution is derelict in its duties. Stressing that federal criminal proceedings should be governed with fairness, the NACDL opined that "[t]he time to put teeth into *Brady* obligations is long overdue."[2]

Existing Framework

The Supreme Court has interpreted the U.S. Constitution as imposing on prosecutors an affirmative duty to disclose "evidence favorable to an accused… where the evidence is material either to guilt or punishment."[3] The nuances of the Court's decision in *Brady v. Maryland* have led to disagreement between the government and the defense bar about the extent of the government's obligation. What evidence qualifies as material? When is the government obligated to make such disclosure? Does a prosecutor have to determine whether other government agencies are in possession of "favorable" evidence?

Federal and state courts have attempted to resolve some of this uncertainty by implementing rules defining the boundaries of the government's *Brady* obligations.[4] In addition, Federal Rule of Criminal Procedure 16 compels the government to produce to a criminal defendant documents and objects "material to preparing the defense" upon request, even if the government does not intend to use the items in its case-in-chief at trial. Federal law further requires the government to turn over prior statements of a government witness after that witness has testified.[5]

> The nuances of the Court's decision in 'Brady' have led to disagreement between the government and the defense bar about the extent of the government's obligation.

Government lawyers also are subject to state ethics rules that, in some cases, impose disclosure obligations broader than those mandated by statute or case law. ABA Model Rule of Professional Conduct 3.8(d), which has been adopted in many states, requires the prosecution to timely disclose "all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." This provision has been interpreted to apply to all favorable evidence regardless of its perceived materiality.[6]

Numerous other sources define a prosecutor's obligation and serve as "guidance" for courts and attorneys. One such source is the American Bar Association's Criminal Justice Standards, frequently cited by federal courts as a guide for attorney conduct in criminal cases.[7] Currently, the ABA is considering proposed revisions to the Prosecution Function Standards, including a wholesale replacement of the standard titled "Disclosure of Evidence by the Prosecutor" to specifically address issues related to the scope and timing of the disclosure and the definition of "materiality."[8]

This patchwork nature of case law, statutes, and rules setting forth a prosecutor's disclosure obligations has been the subject of debate for decades. For the second time in the past five years, an effort to amend Rule 16 to more explicitly outline the requirements for the exchange of discovery in a federal criminal case has been rejected by the Judicial Conference Advisory Committee on Criminal Rules. Such amendments were strongly opposed by the Department of Justice,[9] and the committee voted 6-5 not to recommend a rule change. Stating that the committee "was not convinced that the problem is so severe as to warrant a rule change," the Committee Chairman, Circuit Judge Richard C. Tallman of the U.S. Court of Appeals for the Ninth Circuit, noted that the committee "has been impressed with the steps the DOJ has taken and will take to ensure that prosecutors assess and meet their disclosure obligations."[10]

Justice Response

The U.S. Attorney's Manual interprets *Brady* to reach only "[e]xculpatory and im-peachment evidence…material to a finding of guilt" and interprets the "materiality" standard as requiring disclosure only "when there is a reasonable probability that effective use of the evidence will result in an acquittal."[11] In response to high-profile reports of prosecutorial misconduct in connection with these disclosure obligations, the Department of Justice instituted new training requirements for federal prosecutors,[12] issued a detailed memorandum titled "Guidance for Prosecutors Regarding Criminal Discovery" setting forth steps to be taken by prosecutors to meet all legal requirements, and announced the creation of a Professional Misconduct Review Unit to handle disciplinary actions for Justice Department attorneys.[13]

Critics of the Justice Department's new guidelines take issue with the fact that the policies are "internally controlled" and fail to provide for exter-

ELKAN ABRAMOWITZ *is a member of Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer. He is a former chief of the criminal division in the U.S. Attorney's Office for the Southern District of New York.* BARRY A. BOHRER *is a member of Morvillo, Abramowitz and was formerly chief appellate attorney and chief of the major crimes unit in the Southern District U.S. Attorney's Office.* GRETCHAN R. OHLIG, *an attorney, assisted in the preparation of this article.*

nal monitoring or oversight.[14] While applauding the government's renewed efforts, many practitioners believe clearer rules and statutes should be created and that a neutral party should determine whether and when prosecutors should be able to withhold evidence from the defense.[15]

NACDL's Proposed Legislation

The NACDL hopes to get the ball rolling in that direction, believing that the somewhat convoluted nature of the laws and rules governing discovery in criminal cases leaves "little incentive…for a prosecutor to provide more information than is absolutely essential, or to provide it until the last possible moment." On May 20, 2011, the Board of Directors of the NACDL passed a resolution endorsing model reform legislation drafted by the organization's Discovery Reform Task Force and vowing to "seek to advance the measures and principles embodied" in the legislation.

The proposed legislation would create a new provision in the federal code, titled "Duty to Disclose Favorable Information," and would require the government to disclose all information favorable to the accused in relation to any issue in a federal criminal case. In a press release accompanying the proposed legislation, NACDL President Jim E. Lavine stated that the organization's efforts were in response to the Justice Department's "determin[ation] to fight any effort to require its prosecutors to turn over all information favorable to the defense."[16]

Subsection (a) of proposed section 3014 of Title 18 requires the government to provide all information, data, documents, evidence or objects that "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," where such evidence is in the government's possession or is known to the government or would become known by the exercise of reasonable diligence. Stating that the term "favorable" is the most common phrase used in local rules adopted by federal district courts, the NACDL notes that the term "exculpatory," so frequently referenced in connection with a prosecutor's *Brady* obligation, is "nowhere found in the Supreme Court's main opinion in *Brady*."[17]

Subsection (b) requires a prosecutor to disclose the information "without delay" after arraignment or immediately upon its existence becoming known. According to the NACDL, this requirement "avoids tactical considerations from interfering with the prosecutor's ethical and constitutional obligations to the accused" by eliminating the prosecutor's option of speculating that the information might not be considered material.

The proposed statute also contains a provision allowing for the issuance of a protective order against the immediate disclosure to the defendant where the government demonstrates: (1) the evidence is favorable to the defendant "solely because it would provide a basis to impeach the credibility of a potential witness"; and (2) a reasonable basis to believe that the identity of the witness is not already known to the defendant and disclosure of the impeaching information would "reasonably present a threat to the safety of the witness or of any other person."[18] Disclosure may be delayed up to 30 days before trial.

Subsection (g) sets forth remedies to be pursued by a court that determines the government has failed properly to discharge its discovery obligations. According to the NACDL,

> It is also important that prosecutors recognize the ramifications of failing to adhere to this constitutional norm, now protected by this statute, and judges need authority beyond their supervisory powers to enforce the requirement of discovery and protect against pretrial gamesmanship that elevates an adversarial perspective over the demands of fair procedure and the search for truth. Thus a statute with clear mandates and provisions for non-compliance serves the judicial process with the accompanying mechanisms to assure compliance with the law.[19]

Appropriate remedies listed in the statute include postponement or adjournment of the proceedings, exclusion or limitation of testimony or evidence, ordering a new trial, and dismissal. The court is to consider the totality of the circumstances, including factors such as the seriousness of the violation, its impact on the proceeding, the prosecutor's state of mind, and the effectiveness of alternative remedies to protect societal interest in fair prosecutions.[20] Further, where the court finds the government's noncompliance was the result of negligence or knowing conduct, it may order the United States to pay the defendant's related costs and expenses, including reasonable attorney's fees.[21]

Finally, the proposed statute specifically provides that a prosecutor's discovery obligation remains notwithstanding any other provision of law except the Classified Information Procedures Act. The purpose of this provision, according to the NACDL, is to defeat any argument that *Brady's* constitutional requirements are restricted by laws, such as the Jencks Act, which does not require the production of witness statements until after the witness has testified. As drafted, proposed section 3014(c) clarifies that disclosure of all favorable evidence, including witness statements, is promptly required notwithstanding any restrictions found in the Jencks Act or other statutes.

Conclusion

The Department of Justice consistently has resisted legislative changes to clarify a prosecutor's obligation to turn over evidence to a criminal defendant. Practitioners find the government's position hypocritical on its face. As stated in one article, "Unlike the approach taken by DOJ when a corporation missteps, there has been no appointment of outside monitors to assure future and past compliance and no requirement for a more compelling compliance structure to assure no future violations."[22]

Addressing critics, Justice Department representatives have been dismissive, referring to calls for change as "gamesmanship" by defense attorneys seeking to "turn honest mistakes into instances of misconduct."[23] The simple truth is that the cost of such errors (e.g., retrial) is high for both the government and defendants. Recent events in certain high-profile federal cases indicate that the era of implicit trust in government attorneys to "do the right thing" in this area has ended and the time for real change has arrived.

1. See Elkan Abramowitz and Barry A. Bohrer, "'Brady' Obligations in the Twenty-First Century," New York Law Journal (May 3, 2011).

2. Press Release, National Association of Criminal Defense Lawyers (July 7, 2011).

3. *Brady v. Maryland*, 373 U.S. 83 (1963).

4. In 2007, 37 of 94 federal district courts reported having a local rule, order, or procedure specifically governing disclosure of *Brady* material. Laural Hooper and Shelia Thorpe, Federal Judicial Center, "*Brady v. Maryland* Material in the United States District Courts: Rules, Orders, and Policies," Report to the Advisory Comm. on Criminal Rules of the Judicial Conference of the United States at p. 7 (May 31, 2007). Further, all 50 states and the District of Columbia have a statute or rule addressing the prosecutor's obligation to disclose information to a criminal defendant. See id. Appendix E (setting forth State court policies).

5. Jencks Act, 18 U.S.C. §3500(b) (2006).

6. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Opinion 09-454 (2009).

7. Martin Marcus, "The Making of the ABA Criminal Justice Standards: Forty Years of Excellence," ABA Criminal Justice, Vol. 23, No. 4 (Winter 2009).

8. Ellen Yaroshefsky, "Prosecutorial Disclosure Obligations," 62 Hastings L.J. 1321 (May 2011).

9. At the April 22, 2011, meeting of the ABA's Criminal Justice Section, the Department of Justice member of the section was the only member to vote against a resolution urging amendment of Rule 16. David Oscar Markus, "When Liberty Is at Risk, Fair Disclosure Required," Daily Business Review (May 2, 2011).

10. "Judiciary Split on Need for Rule 16 Changes," The Third Branch: Newsletter of the Federal Courts (May 2011) (available at: http://www.uscourts.gov/News/TheThirdBranch/11-05-01/Judiciary_Split_on_Need_for_Rule_16_Changes.aspx).

11. United States Attorneys Manual 9-5.001(B)(1).

12. Memorandum for Heads of Department Litigating Components Handling Criminal Matters and All United States Attorneys from David W. Ogden re: Requirement for Office Discovery Policies in Criminal Matters (Jan. 4, 2010).

13. Press Release, Department of Justice, "Attorney General Creates Professional Misconduct Review Unit, Appoints Kevin Ohlson Chief" (Jan. 18, 2011).

14. Jim E. Lavine and Ellen S. Podgor, "First Person: The DOJ Should Practice What It Preaches," Corporate Counsel (April 25, 2011).

15. See Ellen S. Podgor, "New DOJ Discovery Policies Fall Short," White Collar Crime Prof Blog (Jan. 5, 2010).

16. Press Release, National Association of Criminal Defense Lawyers (July 7, 2011).

17. NACDL Commentary to Proposed Section 3014 at p. 3 (available at: http://www.nacdl.org/download/nacdl_model-18_usc_3014-final_6-15-11-commentary.pdf).

18. Proposed 18 U.S.C. §3014(d) (available at http://www.nacdl.org/download/nacdl_model-18_usc_3014-final_adopted.pdf).

19. NACDL Commentary to Proposed Section 3014 at p. 5.

20. Proposed 18 U.S.C. §3014(g)(1).

21. Proposed 18 U.S.C. §3014(g)(2).

22. Lavine and Podgor, "The DOJ Should Practice What It Preaches."

23. Remarks of Assistant Attorney General Lanny A. Breuer at the National District Attorneys Association Summer Conference (July 20, 2011).