Bloomberg BNA

The United States
Law Week

Case Alert & Legal News™

PROSECUTORIAL MISCONDUCT

The Prosecutorial Misconduct Report in *United States v. Stevens* And the Fairness in Evidence Disclosure Act of 2012: Two Strong Steps Toward Open File Discovery



By Mark A. Srere, Ian Barlow, and David C. Russell

A bill recently introduced in Congress could have a significant impact on how federal criminal cases are prosecuted, broadening the scope of evidence that prosecutors must provide to defendants before trial. The Fairness in Evidence Disclosure Act of 2012 (S. 2197) (the ''Evidence Disclosure Act'') was proposed by Sen. Lisa Murkowski (R-Alaska) in response to reports of prosecutorial misconduct in the prosecution of former Sen. Ted Stevens. Although the Department of Justice generally opposes efforts to expand the scope of required disclosures, the bill has bipartisan support in the Senate and, in the aftermath of the Stevens trial, has a chance of being passed by the Senate this year.

The Evidence Disclosure Act was prominently discussed at a Senate Judiciary Committee hearing on March 28, 2012, where special counsel Henry Schuelke testified about his report on misconduct in the Stevens case. In response to questions from members of the Judiciary Committee, Schuelke agreed that Congress should consider requiring federal prosecutors to disclose any evidence favorable to defendants. He further testified that the Evidence Disclosure Act would require such disclosures, and that he supported that aspect of the bill. Currently, federal prosecutors in many districts have the discretion to disclose favorable evidence only if they believe such evidence is material, a standard that is sometimes defined as likely to change the outcome of a potential trial.

When asked about the DOJ's opposition to this reform, Schuelke noted that the DOJ's own internal guidance for prosecutors now encourages disclosure of any favorable evidence, but that the internal guidance does not have the force of law. Schuelke found it unusual for the DOJ to object to Congress codifying into law a practice that the DOJ already encourages.

Based on their questioning of Schuelke, it appears that many members of the Senate Judiciary Committee support the bill, including Democratic Whip Richard Durbin (D-Ill.), Judiciary Committee Chairman Patrick Leahy (D-Vt.), and Judiciary Committee Ranking Member Chuck Grassley (R-Iowa). A diverse range of interest groups also supports the bill, including the American Bar Association,[1] the Chamber of Commerce,[2] and the American Civil Liberties Union.[3]

[1] *See* http://www.abanow.org/2012/03/sen-murkowski-commended-for-highlighting-fairness-in-evidence-disclosure/ (last visited May 7, 2012).

 ISSN 0148-8139

Current Standards Related To Prosecutors' Discovery Responsibilities

Prosecutors in each federal district court operate under different policies regarding the timing and scope of disclosure of exculpatory and impeachment evidence, subject to the minimum standards set forth by *Brady v. Maryland*,[4] *Giglio v. United States*,[5] the Jencks Act,[6] the local rules of the individual district court, and the U.S. Attorneys' Manual.[7] Although the Department of Justice has issued guidance to assist each U.S. Attorney's Office in developing its discovery policies, that guidance still leaves room for great variance in disclosures. For example, those guidelines recognize with approval that ''practices differ among the USAO's and the components regarding the disclosure of Reports of Interviews of testifying witnesses.''[8] The guidelines also encourage prosecutors to make case-by-case determinations about when to disclose exculpatory material based on factors including ''strategic considerations,'' ''investigative agency concerns,'' and protecting other ongoing investigations.[9]

The local rules implemented by district courts also vary on a district-by-district basis, particularly in terms of their parameters for *Brady* disclosures.[10] In the Middle District of Alabama, the government must provide ''[a]ll information and material known to the government which may be favorable to the defendant on the issues or guilt or punishment, without regard to materiality,'' and such disclosures must be made at arraignment.[11] In the District of New Hampshire, however, the government need only provide information that is ''material to issues of guilt or punishment,'' with the decision about what is material left to the prosecutor, and such disclosures need only be made 21 days before trial.[12] Other districts, such as the District of Maryland, have no local criminal discovery rules at all.[13]

Even when courts find that prosecutors have violated their constitutional duty to provide exculpatory evidence within the scope of *Brady v. Maryland*, a guilty verdict will be overturned only if the defendant can prove that there is a ''reasonable probability'' that disclosure of the withheld evidence ''would have produced a different result.''[14]

The Reforms Proposed By the Evidence Disclosure Act

The current version of the Evidence Disclosure Act would require federal prosecutors to disclose any information that ''may reasonably appear to be favorable to the defendant'' regarding the determination of guilt, any preliminary matters pending before the court, or sentencing.[15] The bill requires that such information be provided to the defendants ''without delay after arraignment and before the entry of any guilty plea.''[16]

The legislation contains two exceptions to the disclosure requirements through which prosecutors may withhold such evidence. First, classified information, as defined by Section 1 of the Classified Information Procedures Act, ''shall be treated in accordance with'' the CIPA.[17] Second, prosecutors may seek a protective order delaying the disclosure of the identity of government witnesses if such disclosure would present a threat to that witness or any other person.[18] Such a delay would be limited to 30 days before trial, unless the government can show compelling circumstances, in

---

[2] *See* http://www.uschamber.com/press/releases/2012/march/us-chamber-hails-introduction-exculpatory-evidence-bill-us-senate (last visited May 7, 2012).

[3] *See* http://www.aclu.org/blog/capital-punishment-criminal-law-reform/brady-reform-new-legislation-win-justice (last visited May 7, 2012).

[4] 373 U.S. 83 (1963).

[5] 405 U.S. 150 (1972).

[6] 18 U.S.C. § 3500.

[7] *See* January 4, 2010 Memorandum from Deputy Attorney General David W. Ogden regarding the Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group at 3 (''directing that each USAO and component develop a discovery policy that establishes discovery practice within the district or component.''), available at http://www.justice.gov/opa/pr/2010/January/10-dag-043.html (last visited May 7, 2012); *see also* Jan. 4, 2010 Memorandum from Deputy Attorney General David W. Ogden regarding Guidance for Prosecutors Regarding Criminal Discovery (''Guidance for Prosecutors''), available at http://www.justice.gov/dag/discovery-guidance.html (last visited May 7, 2012).

[8] *See* Guidance for Prosecutors, *supra* n.6, at 5.

[9] *Id.*

[10] *See generally* Federal Judicial Center 2010 Final Report to the Advisory Committee on Criminal Rules regarding District Court disclosure Practices in Criminal Cases, available at http://www.fjc.gov/library/fjc_catalog.nsf (last visited May 7, 2012).

[11] Middle District of Alabama Standard on Criminal Discovery, available at http://www.almd.uscourts.gov/rulesproc/criminfo.htm (last visited May 7, 2012).

[12] District of New Hampshire Local Rule 16.1.

[13] *See* D. Md. Local R. 209 on discovery in criminal cases, stating that the rule is ''reserved for future use.''

[14] *Banks v. Dretke*, 540 U.S. 668, 699 (2004) (quoting *Kyles v. Whitley*, 514 U.S. 419, 422 (1995)).

[15] S. 2197, Section 2(a)(1).

[16] *Id.* Section 2(c)(1).

[17] *Id.* Section 2(d)(2).

[18] *Id.* Section 2(e).

Mark A. Srere is a partner at Bryan Cave LLP and a member of the White Collar Defense & Investigations/Securities Enforcement and Litigation Client Service Group. He provides a full range of services to individual and corporate clients that are targets of criminal prosecution, from grand jury appearances to trials, and counsels corporate clients on compliance issues and internal investigations.

Ian Barlow is an associate in Bryan Cave's White Collar Defense and Investigations/Securities Enforcement and Litigation and Commercial Litigation Client Service Groups. He has represented clients in criminal trials, government investigations, and a broad array of civil litigation matters.

David C. Russell is a senior policy advisor for Bryan Cave's Public Policy and Governmental Affairs Group. Russell worked for nearly a decade on Capitol Hill, including serving on the staff of the late Sen. Ted Stevens (R-Alaska).

  LW ISSN 0148-8139

which case the government could withhold the evidence longer, and possibly permanently.[19]

Perhaps the most significant reform in the Evidence Disclosure Act is the standard of review for violations. Under the proposal, when defendants allege that the government has violated the Evidence Disclosure Act's provisions, the burden is placed on the government to ''demonstrate[ ] beyond a reasonable doubt that the error did not contribute to the verdict obtained.''[20]

Although the Evidence Disclosure Act is a Strong First Step in Reform, Open File Discovery is a Better Way to Provide Fair Disclosures in Criminal Proceedings

The Evidence Disclosure Act is a strong first step in making uniform, fair disclosure rules—and providing strong incentives to the government to heed those rules—but the best route to ensuring fairness in the criminal justice system would be nationwide adoption of open file discovery. The central shortcoming of the proposed legislation is that it still leaves with the prosecutor the ultimate decision as to whether a particular piece of evidence is potentially favorable to a criminal defendant.

Even if the Department of Justice instructed prosecutors to err on the side of disclosure, the very fact that individual prosecutors would have to make the decision leaves open the possibility of error, oversight, and willful withholding of evidence favorable to the defense. Moreover, it is entirely likely that an honest and diligent prosecutor could disagree with a defense attorney about whether evidence is favorable. Finally, the question of whether evidence is favorable in a particular case will continue to be a subject for additional litigation. Complete open file discovery eliminates all of these concerns. Of course, even under such an open file discovery regime, prosecutors should still be able to seek protective orders and withhold certain information if necessary for reasons of national security or individual safety.

Although open file discovery provides obvious benefits to defendants, many prosecutors also find it beneficial. For example, Maryland Attorney General Douglas Gansler has recognized its superiority, and North Carolina Attorney General Roy Cooper has stated that it also decreases the likelihood of convictions being overturned on appeal.[21] According to two assistant U.S. attorneys in the Southern District of Texas, open file discovery ''frequently impels defendants to opt for a guilty plea rather than trial.''[22] Although there has been little statistical analysis of the subject, academics also argue that open file discovery would reduce litigation, both during discovery and post-trial.[23]

It also appears unlikely that open file discovery would impede federal prosecutors' ability to obtain convictions in meritorious cases. Indeed, based on data published by the U.S. court system, it appears that the conviction rate in federal districts that have the most liberal formal discovery rules is nearly identical to the overall nationwide percentage of defendants who are convicted (including both guilty pleas and trial convictions).[24] In the 2011 fiscal year, the nationwide conviction rate was 90.894 percent while for the most liberal districts it was 89.874 percent.

By enacting the Evidence Disclosure Act, Congress would be taking an important step in protecting the rights of individuals caught in the criminal justice system. We hope that it will be a first step and that eventually, either through legislation or through policies put in place at the DOJ, prosecutors will be required to engage in open-file discovery.

---

[19] *Id.* Section 2(e)(2)(A).

[20] *Id.* Section 2(i).

[21] *See* Avis E. Buchanan, *Fairer Trials and Better Justice in D.C.*, WASH. POST, Oct. 28, 2011, available at http://www.washingtonpost.com/opinions/fairer-trials-and-better-justice-in-dc/2011/10/25/gIQATkFMQM_story.html (last visited May 7, 2012).

[22] Don DeGabrielle & Mitch Neurock, *Federal Criminal Prosecutions: A View From the Inside of the U.S. Attorney's Office*, 43 HOUS. LAW. 32, 34 (2005).

[23] *See, e.g.*, Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1651 (2010); Natasha Minsker, *Prosecutorial Misconduct in Death Penalty Cases*, 45 CAL. W. L. REV. 373, 404 (2009).

[24] The districts are the District of Connecticut, the Southern District of West Virginia, the Middle District of Alabama, the Southern District of Alabama, and the Northern District of Florida. In these districts, the local rules or standing orders explicitly require that prosecutors disclose to defendants all favorable evidence and impeachment material within 14 days of arraignment, without regard to materiality.