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WHITE-COLLAR CRIME

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Codify Government's Duty to Disclose Information to the Defense?

WHITE-COLLAR defense counsel are often faced with both too little and too much information in preparing for trial in a complex criminal case. They may not know how the government intends to prove their client's involvement in the offense charged or the identities of the uncharged individuals with whom he or she is alleged to have acted. On the other hand, they may be buried in tens of thousands of pages of pretrial disclosures that provide no meaningful guidance as to the evidence the prosecution intends to introduce at trial.

The Federal Rules of Criminal Procedure, deliberately tailored to avoid requiring pretrial disclosure of how the government intends to prove its case, offer only minimal assistance to the defense. Prosecutors tend to give these rules the most miserly interpretation possible, and courts in most districts put little, if any, pressure on prosecutors to provide more than the barest disclosures. Most courts are also willing to leave the timing of disclosures largely in the prosecution's hands, ignoring the realities that defense counsel face in preparing complex litigation for trial and permitting the government to wait until shortly before trial before disclosing information that has long been in its possession. Government manipulation of the discovery rules tip the already uneven scales farther in the prosecution's favor, forcing defendants to consider plea offers with only a limited understanding of the government's case and hampering trial preparation efforts for those few defendants who opt to go to trial. Such practices have prompted the U.S. District Court for the District of Massachusetts to impose, through a series of local rules, more expansive disclosure obligations on criminal litigants than do the Federal Rules and have led the American College of Trial Lawyers to call for revisions to the Federal Rules that would address the scope and timing of the government's as yet uncodified disclosure obligations regarding exculpatory information.

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Scope of the Federal Rules

Most of the disclosure obligations in federal criminal proceedings are set forth in Rule 16, which provides that upon request from the defendant, the prosecution must provide disclosure of a defendant's own statements and prior criminal record, as well as of documents and other tangible evidence or test results that are material to the defense, are intended for use in the government's case-in-chief, or that belong to the defendant. The prosecution must also provide the defense with a written summary of expert testimony that it intends to use in its case-in-chief. Under the Jencks Act[1] and Rule 26.2, statements of testifying witnesses (other than the defendant) need not be produced until after the witness has taken the stand, although in practice such statements are routinely provided on the eve of trial or shortly before the witness is scheduled to testify.

The disclosures mandated by the Federal Rules frequently prove inadequate for defense counsel preparing to defend a complex federal criminal charge. Such gaps could theoretically be filled through liberal use of bills of particulars and witness and exhibit lists, which would assist the defense by narrowing and defining the specific facts against which the defendant must defend. But the government routinely denies such requests, and the courts only rarely step in to order their production.

Bills of Particulars

In *United States v. Bortnovsky*,[2] the U.S. Court of Appeals for the Second Circuit held that a defendant may seek a bill of particulars under Rule 7(f) in order to "identify with sufficient particularity the nature of the charge pending against him, thereby enabling the defendant to prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy should he be prosecuted a second time for the same offense." Despite this apparently broad

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language, courts in this circuit have consistently narrowed the use of bills of particulars to those instances where an indictment, viewed in the context of all other information made available to the defendant, is so general that it fails to advise the defendant of the specific acts of which he is accused. "The ultimate test in deciding whether a bill of particulars should be ordered is whether the information sought is necessary, as opposed to helpful, in preparing a defense."[3] Trial courts consistently refuse requests for bill of particulars that seek a preview of the government's theories or the manner in which it will prove its case.[4]

Defendants often seek further particularization of the manner in which they are alleged to have violated the law and the people with whom they are alleged to have acted. *United States v. Nachamie*[5] is one of the rare instances where the defendants were successful in obtaining a bill of particulars providing additional information in both of these areas. In that case, the defendants were charged with engaging in a protracted Medicare fraud scheme. The indictment listed five ways in which the defendants had falsified Medicare claims, and the government turned over more than 200,000 documents relating to 2,000 claims pursuant to Rule 16(a)(1). Because the prosecution did not specify which of the claims covered by those documents was false, or the manner in which any given claim was false, the court found that the government had not complied with its obligation to provide adequate notice to the defense and ordered it to supply a bill of particulars identifying each allegedly false claim and the manner in which it allegedly falsified.

As a practical matter *Bortnovsky* and *Nachamie* provide little support to the defendant seeking clarification of the government's theories. In *United States v. Reddy*,[6] the defendants were largely unsuccessful in their quest for a bill of particulars elaborating on charges in the indictment that they had violated certain unspecified GAAP and corporate accounting practices, principles of business judgment and street practices in the manner in which they had managed the accounting for a division of a financial services corporation. The court found that the indictment charged the defendants with defrauding the company that had purchased their business by manipulating entries in the books, and that the criminal conduct charged did not consist of violating accounting principles and reasonable business judgment. Rather, those references were included in the indictment to add detail to the allegations that the defendants knew that their accounting practices were false, and accordingly did not require further particularization.

Demand Was Successful

The defendants in *Nachamie* were also successful in their demand for further information concerning the identities of unindicted co-conspirators with whom they were alleged to have acted. Setting forth the factors to be considered in determining whether to grant such a request, the court reasoned that "[i]f there are a large number of co-conspirators and a long-running conspiracy, a defendant is more likely to be surprised by the identity of other co-conspirators, whom he may never have met." Because there were a large number of alleged co-conspirators, the conspiracy was alleged to have taken place over a number of years, the government had produced voluminous documents, and there was no legitimate concern of risk to individuals or to the government's case, the court ordered production of the names of the unindicted co-conspirators in order to prevent unfair surprise and to enable the defendants to prepare for trial.[7] In other cases, where a conspiracy was more limited in scope and duration, courts have declined to order the government to disclose the identities of co-conspirators.[8] Moreover, complexity alone is not enough for the defendant seeking a bill of particulars. According to one court, defendants should not be allowed to "use the vastness or complexity of the alleged conspiracy and its attendant documentary evidence as a sword against the government when the [i]ndictment, discovery, and other information provided by the government adequately notify the [d]efendants of the charges against them."[9]

The government has likewise sought to remove a weapon from the defense by insisting that any production of particulars be deemed a "draft" unusable by the defense as an admission by the government.[10]

A government exhibit list can be invaluable to the defendant preparing for trial of a complex scheme or fraud. Courts in this circuit are divided as to whether they have the authority to order pretrial production of such lists. The *Nachamie* court held that the government could not be required to produce an exhibit list under Rule 16, but went on to base its order requiring a bill of particulars in part on the government's refusal to identify the documents on which it intended to rely. Other courts have not been deterred by the lack of statutory authority to order production of such lists, finding that the interests of justice and fairness mediate in favor of such disclosure, particularly where the government has produced large numbers of documents.[11]

Similarly, although Rule 16 does not provide for disclosure of a government witness list in advance of trial, courts in this circuit have recognized that such lists can be invaluable to the preparation of an effective defense, particularly where the defendants lack the ability to interview the entire universe of potential witnesses identified in the government's Rule 16 disclosures. To obtain a witness list, a defendant must show that the request is reasonable and that the list would be material to the defense's trial preparation.[12] Courts have considered such requests in the context of a five-factor test set forth in *United States v. Turkish*,[13] which takes into consideration (1) whether the offense charges involves a crime of violence; (2) whether the defendant has been charged or convicted of a violent crime; (3) whether the evidence at trial will consist primarily of documents (which by their nature are not easily altered); (4) whether production of a witness list increases the likelihood that the government's witnesses will be unwilling to testify; and (5) whether defendants have limited resources to investigate and prepare their defense. In a complex document-based prosecution, defendants have on occasion obtained a government witness list,[14] but even in complex cases, such requests rest firmly in the trial court's discretion and are more often than not denied in the 25 years since *Turkish*.[15]

No federal rule or statute addresses the disclosure of exculpatory information. The Second Circuit's 2001 decision in *United States v. Coppa*,[16] left the decision of what

exculpatory evidence the government must provide and when that evidence must be supplied, firmly in the hands of the prosecution. The court of appeals clarified that *Brady* and *Giglio* do not require disclosure of all exculpatory information, but only of information which, if not disclosed, would have a reasonable probability of affecting the outcome of the trial. The court explained that this test requires the prosecution to make disclosures based on a prediction of their impact on the trial. *Coppa* also addressed the timing of such disclosures, holding that due process requires only that *Brady* and *Giglio* information be disclosed in time for its effective use at trial and abrogating a lower-court decision requiring immediate disclosure of exculpatory information upon request from the defendant.[17] In its subsequent decision in *United States v. Gil*,[18] the court made clear that the prosecution's control over the timing of such disclosures was not completely unfettered, finding that the government had suppressed information that was both favorable and material for *Brady* purposes by disclosing it just days before the beginning of trial in a manner that did not permit its effective use by the defense. The critical information was contained in a two-page document, included in two boxes labeled "3500 material," provided days before a Monday trial. The court vacated the defendant's conviction, concluding that even though the memo was produced before trial, the defense was not in a position to identify its usefulness because it was delivered at a time "presumably when a conscientious defense lawyer would be preoccupied working on an opening statement and witness cross-examinations, and all else."

Notwithstanding the occasional decision finding that the prosecution has overstepped the bounds of due process, the current state of the law encourages the prosecution to push the limits on the extent and timing of *Brady* and *Giglio* disclosures. Following a number of abuses,[19] the District of Massachusetts promulgated a local rule in 1998 that imposes far more extensive discovery obligations on the prosecution than the federal rules. Local Rule 116.2 contains a detailed definition of exculpatory information and requires that in most circumstances the government must give that information to the defendant under a proscribed timetable.

Information to be Disclosed

Within 28 days of arraignment, it must disclose any information that would tend to directly negate the defendant's guilt (including the failure of any percipient witness to make a positive identification of the defendant) or that would cast doubt on the admissibility of evidence that the government anticipates offering in its case in chief. Other information that must be disclosed within the same time period includes statements of any promises, rewards or inducements made to any witness that the government intends to call in its case-in-chief, as well as the criminal record of or information concerning criminal charges pending against any such witness.

The Rule sets forth a second level of exculpatory information that must be produced no later than 21 days before trial, such as information that casts doubt upon the credibility of a witness that the government intends to call in its case-in-chief, including inconsistent statements by that witness or any other person, or evidence of witness bias against the defendant and a description of any prosecutable federal offense known to have been committed by such witness. The rules contain a procedure under which the government may decline to produce required information, but that procedure places the burden on the government to demonstrate why disclosure should not be made.[20]

The American College of Trial Lawyers has recently called for the Federal Rules to follow the lead of the District of Massachusetts and codify the government's obligations to disclose information favorable to the defense through amendments to the Federal Rules.[21] It comments that "[w]ithout a clear definition of favorable evidence nor a disclosure timetable, prosecutors have interpreted the constitutional discovery obligations inconsistently and too often disclosed favorable information on the eve, during or after trial or not at all." Its proposed amendments to Rules 11 and 16 would define favorable information to which the accused is entitled, require the government to disclose such information within 14 days of a request from the defendant or before a guilty plea is entered, and impose a due diligence obligation on the prosecutor to consult with government agents and locate favorable information.

Furnishing adequate information in a timely fashion so that defendants can make informed decisions about whether and how to mount a defense hardly seems an unreasonable standard. With public attention focused on several showcase white-collar trials, the time is right to consider codifying the government's obligation to disclose information to the defense, if not through amendments to the Federal Rules, then perhaps through the local rules.

(1) 18 USC §3500.

(2) 820 F2d 572 (2d Cir. 1987).

(3) *United States v. Lauerson*, 1999 WL 440619 (SDNY June 28, 1999).

(4) See, e.g., *United States v. Gottlieb*, 493 F2d 987 (2d Cir.1974); *United States v. Conley*, 2002 WL 252766 (SDNY Feb. 21, 2002); *United States v. Nova-Nunez*, 1997 WL 30965 (SDNY Jan.24, 1997).

(5) 91 FSupp2d 565 (SDNY 2000).

(6) 190 FSupp2d 558 (SDNY 2002).

(7) 190 FSupp2d 558 (SDNY 2002).

(8) See, *United States v. Joseph*, 2003 WL 22019427 (SDNY Aug. 23, 2003); *United States v. Patterson*, 2002 WL 31890950 (SDNY Dec. 27, 2002).

(9) *United States v. Rigas*, 258 FSupp2d 299 (SDNY 2003).

(10) See *United States v. GAF Corp.*, 928 F2d 1253 (2d Cir. 1991).

(11) See, e.g., *United States v. Falkowitz*, 214 FSupp2d 365 (SDNY Aug. 7, 2002).

(12) *United States v. Cannone*, 528 F2d 296 (2d Cir. 1975).

(13) 458 FSupp 874 (SDNY 1978).

(14) See *Falkowitz*, 214 FSupp2d at 394-5.

(15) See, e.g., *United States v. Beeman*, 2003 WL 22047871 (SDNY Aug. 29, 2003).

(16) 267 F3d 132 (2d Cir. 2001).

(17) *United States v. Shvarts*, 90 FSupp2d 219 (EDNY 2000).

(18) 297 F3d 93 (2d Cir. 2002).

(19) In *United States v. Mannarino*, 850 FSupp 57 (D. Mass 1994), the court condemned the "pattern of sustained and obdurate indifference to, and unpoliced subdelegation of, disclosure responsibilities by the United States Attorney's Office."

(20) Massachusetts Local Rule 116.6.

(21) Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16, American College of Trial Lawyers, approved by the Board of Regents, March 2003.