New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 248—NO. 2
TUESDAY, JULY 3, 2012

WHITE COLLAR CRIME

Expert Analysis

'Brady' Reform at the Congressional Level

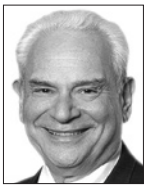
Instances of prosecutorial misconduct related to the government's disclosure obligations in criminal cases have been well-documented in this column,[1] as well as in the national and international media. Highly-publicized reports of the government failing to meet its disclosure obligations have led to numerous congressional hearings, a court-ordered investigation,[2] and extensive internal review by the Department of Justice. Nevertheless, many believe that the true solution to repeated missteps by prosecutors is legislative. Proponents maintain that congressionally mandated changes are required to clarify and consolidate the hodgepodge of statutes and court and ethics rules that, along with the U.S. Constitution and case law, currently set forth guidance for prosecutorial disclosure.

The government vehemently disagrees, arguing that instances of wrongdoing, such as the exoneration of former U.S. Senator Ted Stevens after the revelation of serious discovery violations by federal prosecutors, are an aberration and that the Justice Department has responded appropriately in "enhancing the supervision, guidance, and training that it provides its prosecutors and by institutionalizing these reforms so that they will be a permanent part of the Department's practice and culture."[3]

U.S. Senator Lisa Murkowski (R), who represents Stevens's home-state of Alaska, believes that the Justice Department has failed to take these "aberrations" seriously, however, and has been arrogant and dismissive in its approach.[4] Earlier this year, Murkowski sponsored a bill entitled "Fairness in Disclosure of Evidence Act of 2012,"[5] which seeks to add a provision to Title 18 requiring government attorneys to disclose favorable information to defendants in criminal prosecutions. The act, which is similar in many respects to the one proposed by the National Association of Criminal Defense Lawyers in July 2011,[6] is currently being considered by the Senate Judiciary Committee.

The Act

The act imposes upon government attorneys the duty to disclose "covered information," which is defined as evidence that may reasonably appear to be favorable to defendants in criminal prosecutions.[7] The definition includes any such evidence that is within the possession, custody, or control of the prosecution team or the existence of which is known, or by the exercise of due diligence would become known, to the attorney for the government.[8]



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Further, it requires the government to turn over this information without delay after the defendant's arraignment and before the entry of a guilty plea or as soon as reasonably practicable upon discovery of the covered information.[9]

> Although many practitioners applaud the Fairness in Disclosure of Evidence Act's efforts to clarify the "what" and "when" of prosecutorial disclosure obligations, there are some perceived weaknesses in the proposed statute.

This timing requirement is significant in two respects. First, it requires the production of material contained in witness statements, previously withheld by prosecutors until after the witness had testified pursuant to the Jencks Act. In addition, it mandates the disclosure of evidence prior to a guilty plea which, as noted by one practitioner, makes it "less likely that the government (and/or a lazy defense) secures a guilty plea without disclosing the warts in its case."[10]

The disclosure obligations set forth under the act exist notwithstanding any other provision of law.[11] However, the act recognizes two exceptions to the mandated disclosure. First, the government may apply for an order of protection against the immediate disclosure of information that is favorable to the defendant if: 1) it is favorable only because it would provide a basis to impeach a witness; and 2) there is a reasonable basis to believe that the identity of the potential witness is not known to the defendant and disclosure of such information would present a threat to the safety of the potential witness or any other person.[12] The second exception to the government's disclosure obligation applies where a defendant knowingly, intelligently and voluntarily waives his right and the court finds such waiver is in the interest of justice.[13]

The proposed statute also sets forth penalties for noncompliance by the government.[14] Where there is reason to believe the government has failed to comply with the statute, the burden is on the government to prove otherwise. After determining the extent of and reasons for noncompliance, the court may: postpone or adjourn the proceedings; exclude or limit testimony or evidence; order a new trial; dismiss the case with or without prejudice; or order any other remedy determined appropriate.

In fashioning an appropriate remedy, the court should consider the totality of the circumstances, including: the seriousness of the violation; the impact of the violation on the proceeding; whether the violation resulted from innocent error, negligence, recklessness, or knowing conduct; and the effectiveness of alternative remedies to protect the interests of the defendant and the public in assuring fair prosecutions and proceedings.

Finally, the act sets forth the standard of review in any appellate proceeding initiated by a criminal defendant on the basis of a violation of the statute. Typically, courts review *Brady* appeals for harmless error. The proposed statute raises the bar, however, providing that a "reviewing court may not find an error arising from conduct not in compliance with this section to be harmless unless the United States demonstrates *beyond a reasonable doubt* that the error did not contribute to the verdict obtained."[15]

Senate Hearings

On June 6, 2012, the Senate Judiciary Committee held a hearing on "Ensuring that Federal Prosecutors Meet Discovery Obligations" to discuss the legislation.

Carol A. Brook, the Executive Director of the Federal Defender Program for the Northern District of Illinois, testified in favor of the legislation.[16] Brook noted that commentators believe that "factors as diverse as the difficulty of placing prosecutors in conflicting roles as architects of the government's case and the defense case; a 'win at all cost' mentality; vague and sometimes conflicting sets of rules; cognitive bias; tunnel vision; overwork; lack of supervision; and an overall culture of nondisclosure" have led to a culture that allows for the types of violations highlighted in the media.

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Brook opined, however, that the heart of the matter is the lack of clarity and inconsistent standards that define a prosecutor's discovery obligations. According to her, congressional initiative is needed to "fix" the problem and the proposed statute is a step in the right direction.

Under current law, courts interpret *Brady* as requiring prosecutors to turn over only that evidence deemed "material." Thus, government attorneys are required to make pretrial predictions about how a particular piece of evidence will affect a trial's outcome. Brook notes that the proposed legislation eliminates the subjective materiality analysis by imposing a more objective standard requiring prosecutors to disclose materials that reasonably appear favorable to a defendant. Further, Brook notes that the act's provisions regarding the timing of such disclosures allows for the production of favorable evidence for use in the sentencing process—significant because "few prosecutors believe they are obligated to disclose *Brady* evidence for sentencing purposes" despite the fact that the vast majority of federal cases result in pleas and sentences. Finally, Brook believes the act will create much-needed uniformity among and within U.S. attorneys' offices.

The Department of Justice has reacted to all calls for statutory reform of a government attorney's criminal discovery obligations with strong opposition. Its position on the Fairness in the Disclosure of Evidence Act is no different. Deputy Attorney General James M. Cole testified at the hearing, stating that the Justice Department had major concerns with the proposed litigation.[17] First, he opined that the legislation posed very real dangers to the safety and privacy of victims and witnesses whose rights must be balanced with those of a defendant.

Listing a number of examples in which witnesses were harassed or killed, Cole stated that "[l]egislation requiring earlier and broader disclosures would likely lead to an increase in such tragedies…[and] would also create a perverse incentive for defendants to wait to plead guilty until close to trial in order to see whether they can successfully remove identified witnesses from testifying against them." Addressing the dangers to crime victims, Cole noted that the act required the production of impeachment information on vulnerable victims, including children and rape victims.

Cole also expressed concern that despite the legislation's provision for a protective order, national security interests may be compromised. "In cases involving guilty pleas—where a defendant is necessarily prepared to admit facts in open court that establish he or she committed the charged offense(s)—such legislation would require the unnecessary disclosure of the identity of undercover employees or confidential human sources, scarce investigative assets who, once revealed, may no longer be used to covertly detect and disrupt national security threats."

Finally, Cole noted the "very substantial costs" the legislation's additional disclosure requirements would impose as parties litigate whether the government has complied with the statute, as well as "costs to the reputational and privacy interests of witnesses, and, if witnesses become less willing to step forward, costs to society from the loss of the just conviction of the guilty."

The Justice Department was not alone in its opposition to the legislation. Stephanos Bibas, a professor of law and criminology at the University of Pennsylvania Law School, testified that the act "distracts attention from the root problem," which is not one of standards, but of enforcement. Bibas opined that prosecutors fail to abide by their discovery obligations for two primary reasons—the need to gather evidence from across "far-flung agencies, case files, computers, lawyers, and teams," and the inability to identify favorable evidence while preparing for trial due to "tunnel vision."

According to Bibas, the proposed legislation would do nothing to attack these core problems, which he believes can only be resolved through increased enforcement. Finally, like the Justice Department, he argued that the pretrial production of impeachment material could seriously harm victims and witnesses.

Legal Community Reaction

Organizations such as the National Association of Criminal Defense Lawyers (NACDL) believe that passage of the legislation will empower prosecutors and "would represent a giant step forward in improving the fairness and accuracy of our criminal justice system."[18] Other commentators believe that the Justice Department's arguments against legislative reform rely on fear rather than facts.[19] Although the government's concerns for witness protection and national security are valid, they are not new concerns, and absent a statement that it is so, the government has failed to demonstrate that a broader disclosure standard or earlier disclosure will lead to an increased risk of danger to witnesses and victims or an increased risk to national security.

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Moreover, the act provides for a protective order where the government can show a reasonable basis to believe that the required disclosure would lead to an effort to harm or intimidate a witness. Further, the government offers no explanation as to why the Classified Information Procedures Act, specifically referenced in the proposed legislation, is insufficient protection.

Practitioners note the significance of many of the legislation's proposed changes. In comments provided to an on-line blog community, one commentator opined that the legislation's proposed change to the harmless error standard is important given that "the current regime incentivizes prosecutors to evade *Brady* since prosecutors can enhance the odds of conviction through non-disclosure knowing that after a conviction appellate courts are loath to reverse."

Absent a finding that the discovery improperly withheld actually contributed to a jury's verdict, appellate courts will rarely find a constitutional violation. "Under such a standard, Mr. Cole can contend that reform is not needed since there has been no demonstration of systemic failure; systemic failure defined in such a way as to insure that no such showing could be made."[20]

Although many practitioners applaud the act's efforts to clarify the "what" and "when" of prosecutorial disclosure obligations, there are some perceived weaknesses in the proposed statute.[21] For instance, the act does not specifically include sanctions against a prosecutor who acts in contravention of the statute as an express remedy despite the egregious nature of the offense. In addition, a prosecutor's past misconduct and deterrence are not among the factors a court is to consider in fashioning a remedy. Finally, although the "favorable" evidence standard set forth in the act is preferable to the "material" standard applied under current law, it still gives the government some subjective wiggle room in determining which evidence should be produced, especially since only the defense really knows what is truly favorable to its case.

Conclusion

As one ethics scholar noted, as it currently stands, the scope of prosecutorial duties under *Brady* is a "concept [that] can be elaborated only in vague terms that leave much to the judgment of prosecutors and courts."[22] Recent instances suggest that prosecutorial judgment in these cases is not always sound, something Congress is apt to be sensitive to given the blatant wrongdoing in the Stevens case. Statements by Senator Patrick Leahy (D-Vt.) in his opening statement at the congressional hearings on the Fairness in Disclosure of Evidence Act about questionable prosecutorial judgment in the recent mistrial of former Senator John Edwards hint that Justice Department missteps may be hitting too close to home.

Next year marks the 50th anniversary of the Supreme Court's *Brady* decision. Whether the Legislature—or others—will be spurred to remove the tarnish to its legacy remains to be seen.

1. Elkan Abramowitz and Barry A. Bohrer, "'Brady' Obligations in the Twenty-First Century," *New York Law Journal* (May 3, 2011).
2. The Schuelke-Shields Report issued in response to an investigation ordered by Judge Emmet G. Sullivan who presided over the Ted Stevens case found that the government had engaged in willful nondisclosure in violation of *Brady* and *Giglio*. The 500-plus page report can be found at: http://lawprofessors.typepad.com/files/schuelke-shields-report.pdf.
3. Statement of James M. Cole, Deputy Attorney General, Before the U.S. Senate Committee on the Judiciary Entitled "Ensuring that Federal Prosecutors Meet Discovery Obligations" (June 6, 2012).
4. Testimony of Senator Lisa Murkowski Before the U.S. Senate Committee on the Judiciary Entitled "Ensuring That Federal Prosecutors Meet Discovery Obligations" (June 6, 2012).
5. S. 2197 (112th Cong., 2d Sess.).
6. Elkan Abramowitz and Barry A. Bohrer, "'Brady' Obligations: Codification and Clarification," *New York Law Journal* (Sept. 6, 2011).
7. §3014(a)(1).
8. §3014(b).
9. §3014(c).
10. Matthew Umhofer, "Fairness in Disclosure of Evidence Act: The Good and the Bad," Thompson Reuters News & Insight (April 23, 2012).
11. §3014(d).
12. §3014(e).
13. §3014(f).
14. §3014(h).
15. §3014(i) (emphasis added).
16. Statement of Carol A. Brook, Executive Director, Federal Defender Program for the Northern District of Illinois, U.S. Senate Committee on the Judiciary Hearing on "Ensuring That Federal Prosecutors Meet Discovery Obligations" (June 6, 2012).
17. Statement of James M. Cole, Deputy Attorney General, Before the U.S. Senate Committee on the Judiciary Entitled "Ensuring That Federal Prosecutors Meet Discovery Obligations" (June 6, 2012).
18. *NACDL News Release*, "NACDL Applauds Sensible, Bipartisan Discovery Reform Legislation Introduced Today in the U.S. Senate" (March 15, 2012).
19. Jon May, "Government's Response to Brady Reform Relies on Fear Not Fact," White Collar Crime Prof Blog (June 15, 2012).
20. Id.
21. See Umhofer, "Fairness in Disclosure of Evidence Act."
22. Bruce A. Green, "Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn From Their Lawyers' Mistakes," 31 *Cardozo Law Review*, 2161, 2164 (2010).