

The Government's Disclosure Requirements in the District of NH

By Patrick Queenan

In federal criminal cases, the Government's discovery obligations are generally dictated by the Jenks Act, the Federal Rules of Criminal Procedure 16 and 26.2 (to include LCrR 16.1), and the constitutionally mandated disclosure requirements related to impeachment and exculpatory evidence established in *Brady v. Maryland*, *Giglio v. United States*, and their respective progeny. In New Hampshire, however, like many other judicial districts, federal prosecutors are subject to more expansive disclosure requirements under the Rules of Professional Conduct as well as their agency's discovery policies.

Recently, the Department of Justice (DOJ) released an updated Justice Manual (formerly referred to as the United States Attorney's Manual). It is touted as the first comprehensive review and overhaul of the DOJ's public policies and procedures in more than 20 years. It includes the Policy Regarding Disclosure of Exculpatory and Impeachment Information (9-5.001) and a section on Criminal Discovery (9-5.002). Additionally, the United States Attorney's Office for the District of NH (USAO) has its own local discovery policy (the DNH Policy), which is currently available on the DOJ's website.

Although the guidance set forth in the Justice Manual remains largely unchanged from prior versions, it is nonetheless necessary to review the discovery policies to appraise whether the practice in our district truly conforms to the controlling policies and other applicable disclosure requirements.

This article outlines the Government's disclosure requirements in the District of NH related to witness statements and *Brady* and *Giglio* material in both the guilt and sentencing phase of a criminal case.

Witness Statements

Under both Rule 26.2 and the Jenks Act, the Government is required to produce prior statements from a testifying witness *after* the witness has testified on direct examination. Fortunately, our local rule mandates that the Government produce the witness statements "at least seven (7) days prior to the commencement of the proceeding." The rule allows for an exception when "the government determines that circumstances call for later disclosure as allowed by Rule 26.2 and [the Jenks Act]." Likely the late disclosure exception is triggered only in circumstances when disclosure would compromise national security, witness safety, or the integrity of a truly ongoing investigation.

The DNH Policy, however, calls for disclosure "well before the deadlines" set forth in the applicable rules. Specifically, according to the DNH Policy, the USAO's "general practice will be to produce witness statements as recorded in police reports, FBI 302s, DEA 6s and similar law enforcement reports of interviews within *14 days of the defendant's arraignment.*" (Emphasis added). According to

the DNH Policy, the USAO provides “early production” of witness statements and other discovery material in order to “facilitate negotiated dispositions of cases, to prevent the need for a continuance of criminal cases, to enhance the truthseeking mission of the office, and to ensure the fair administration of justice.” It is also district policy to “produce in discovery statements made by or attributed to witnesses that are not going to be called to testify.”

Exculpatory & Impeachment Information

Under *Brady* and *Giglio*, government disclosure of exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial. This disclosure requirement extends to evidence material to guilt or punishment.

As to guilt, evidence is material when there is a reasonable probability that effective use of the evidence will result in an acquittal. The Justice Manual — which the DNH Policy explicitly incorporates — recognizes this is often a difficult assessment and provides that “prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence.” The Justice Manual requires disclosure of:

- a) information beyond that which is “material” to guilt;
- b) information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless as to whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime; and
- c) information that either casts a substantial doubt upon the accuracy of the evidence, the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence.

Although LCrR 16.1(c) requires the disclosure of evidence material to issues of guilt or sentencing at least 20 days before trial, the DNH Policy requires disclosure “within 10 days of the defendant’s arraignment and to provide prompt disclosure of exculpatory information on a continuing basis through the end of the case.” And the DNH Policy requires disclosure of impeachment evidence “at least 20 days before trial.”

The exculpatory evidence and impeachment disclosure requirements also extend to punishment. This continued disclosure obligation should not be overlooked or neglected as most hotly litigated issues within our district relate to the application of sentencing factors, as opposed to issues surrounding guilt or innocence. The sentencing guidelines require the Court to make factual findings related to the defendant’s role in the offense. Often, the parties will dispute the application of certain aggravating adjustments, such as whether sophisticated means are used, the quantity of drugs, the amount of financial loss, and the defendant’s role in a conspiracy.

Under *Brady* and *Giglio*, the defendant is entitled to exculpatory or impeachment evidence favorable to her position as to each relevant sentencing factor at issue. Additionally, federal prosecutors are mandated by the McDade Amendment (28 U.S.C. § 530B) to comply with all state and federal laws and rules governing attorney conduct. In New Hampshire, prosecutors are subject to New Hampshire Rule of Professional Conduct 3.8. (Special Responsibilities of a Prosecutor) and the applicable disclosure obligations adopted from the ABA’s Criminal Justice Standards for the Prosecution Function.

Among other requirements, Rule 3.8 requires prosecutors to:

[M]ake timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor ...

Arguably, the materiality standard at sentencing is whether the evidence would alter a finding of preponderance of the evidence required to prove any of the sentencing guideline adjustments. Often, this favorable information will be found in law enforcement reports or witness statements.

The Justice Manual requires prosecutors to disclose exculpatory and impeachment information “that casts doubt upon proof of an aggravating factor at sentencing ... no later than the court’s initial presentence investigation.”

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