

## Legal Updates & News

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#### Department of Justice Issues Memoranda Addressing Discovery Obligations of Prosecutors in Criminal Cases

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In the wake of recent high-profile criminal trials involving the failure of federal prosecutors to comply with their discovery obligations to provide exculpatory evidence to defendants, on January 4, 2010, the Department of Justice issued three memoranda that address discovery practices in criminal cases and outline specific steps intended to help ensure that federal prosecutors comply with their discovery obligations.

#### Recent High-Profile Lapses

Under *Brady v. Maryland* and *Giglio v. United States*, prosecutors are required to disclose information that would tend to exculpate criminal defendants, or that would tend to impeach the character or testimony of a government witness. The failure to turn over such material violates the Due Process Clause of the United States Constitution. Government losses in recent high-profile criminal cases have exposed what many believe to be widespread non-compliance with the full extent of these discovery obligations.

For example, in April 2009, the Department of Justice dismissed a seven-count public corruption indictment of former U.S. Senator Ted Stevens, following a jury trial and guilty verdict, after the presiding judge excoriated the prosecutors for repeatedly failing to disclose to the defense potentially helpful evidence, including prior statements from an important government witness that directly contradicted that witness's trial testimony. U.S. District Court Judge Sullivan said: "In nearly 25 years on the bench, I've never seen anything approaching the mishandling and misconduct that I've seen in this case."

In May 2009, W. R. Grace & Company and three of its former executives were acquitted of all charges, after a two-and-a-half-month jury trial, in one of the largest environmental prosecutions in the Department of Justice's history. The apparent reason for the acquittal: the government's failure to disclose to the defense evidence that undermined the credibility of its main witness. The judge explicitly instructed the jury that the government had "violated its solemn obligation and duty" by withholding such evidence. After receiving that instruction, the jury responded with a resounding verdict of "not guilty."

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## **The Justice Department's Response**

After the dismissal in the *Stevens* case, Attorney General Eric Holder announced that he would require additional training for federal prosecutors to reinforce their understanding of the rules that govern discovery in criminal cases. Holder also convened a working group to explore the Department's policies, practices, and training related to criminal case management and discovery. The group consisted of senior prosecutors from throughout the Department of Justice and from United States Attorneys' Offices, law enforcement representatives, and information technology professionals. As a result of the group's work, Deputy Attorney General David Ogden issued the three January 4, 2010 memoranda.

First, in a memorandum to all Department of Justice prosecutors, Ogden reminded prosecutors that their duty is to "seek justice," that any discovery lapse is a "serious matter," that "even isolated lapses can have a disproportionate effect on public and judicial confidence in prosecutors and the criminal justice system," and that broad and early disclosures might lead to speedier resolutions and preserve resources for the pursuit of additional cases. He confirmed that prosecutors should "take a broad view of materiality and err on the side of disclosing exculpatory and impeachment evidence."

Second, in a memorandum to United States Attorneys and the heads of Department of Justice litigating divisions that handle criminal cases, Ogden directed each office to develop by March 31, 2010, a discovery policy with which all prosecutors in that office must comply. The policy should reflect district and circuit court precedents and address, among other things, the timing of discovery and the disclosure of reports of interviews with testifying and nontestifying witnesses.

The third memorandum, entitled "Guidance for Prosecutors Regarding Criminal Discovery" ("Guidance") provides guidance for prosecutors in meeting their discovery obligations, including specific steps prosecutors must take and specific factors they must consider.

### **Key Features of the Guidance**

As a first step, the Guidance directs prosecutors to make sure they look for exculpatory and impeachment material held by all members of the prosecution team and "to err on the side of inclusiveness when identifying members of the prosecution team for discovery purposes." In complex white-collar investigations, the prosecution team will usually include various federal, and sometimes state, law enforcement agencies.

To determine when to look for potentially discoverable information from another federal agency, prosecutors are directed to consider:

- whether the prosecutor and the agency conducted a joint investigation or shared resources related to investigating the case;
- whether the agency played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in targeting discussions, or otherwise acting as part of the prosecution team;
- whether the prosecutor knows of and has access to discoverable information held by the agency;
- whether the prosecutor has obtained other information and/or evidence from the agency;
- the degree to which information gathered by the prosecutor has been shared with the agency;
- whether a member of an agency has been made a Special Assistant United States Attorney;
- the degree to which decisions have been made jointly regarding civil, criminal, or administrative charges; and
- the degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party.

To determine when to look for potentially discoverable information from state law enforcement agencies, prosecutors are directed to consider:

- whether state or local agents are working on behalf of the prosecutor or are under the

- prosecutor's control;
- the extent to which the state and federal government are part of a team, participating in a joint investigation, or sharing resources; and
- whether the prosecutor has ready access to the evidence.

The Guidance then directs prosecutors to review the following types of information within the custody or control of the prosecution team for potentially discoverable material:

- the investigative agency's files;
- confidential informant/witness files;
- evidence and information gathered during the investigation;
- documents or evidence gathered by civil attorneys and/or regulatory agencies, such as the SEC, in parallel civil investigations;
- substantive case-related communications;
- potential *Giglio* information relating to witnesses; and
- information obtained in witness interviews.

Of particular significance in white-collar cases is the direction in the Guidance regarding *Giglio* material and witness interviews. The Guidance includes a non-exclusive list of specific types of information that should be considered to be *Giglio* material. It also states that although not required by law, "generally speaking, witness interviews should be memorialized" by an agent who participates in the interview with the prosecutor, and that "material variances in a witness's statements should be memorialized, even if they are within the same interview, and they should be provided to the defense as *Giglio* information." Such information can often be critical to the outcome of complex criminal cases that go to trial.

### **The Potential Impact**

By bringing attention to prosecutors' discovery obligations, articulating the benefits of broad and early discovery, and providing a methodical approach to focus prosecutors on their discovery obligations in criminal cases, the Guidance is a useful step toward preventing egregious lapses such as those that prompted the Department's working group review. There are a number of areas, however, that the Guidance does not address and that may present continuing difficulties.

For example, the Guidance does not have the force of law and does not create any enforceable rights. Whether litigants will obtain discovery of all materials to which they are entitled will continue to depend largely on judgments by individual prosecutors, the diligence of defense counsel, and the willingness of the courts to enforce discovery rights.

Moreover, prosecutors and defense attorneys may have widely divergent views of what constitutes *Brady* material and *Giglio* material. The Guidance provides no definitions in that regard. In many instances, a prosecutor's overly narrow view of discovery obligations will likely continue to go undetected. Defense counsel must remain vigilant in attempting to obtain this information.

Finally, the Guidance will not result in national uniformity. Different United States Attorneys Offices and different components within the Department of Justice will continue to be free to develop their own practices regarding discovery issues, such as the timing of disclosures, the disclosure of memoranda from interviews of government witnesses and agent notes, and whether to provide discovery beyond the minimum requirements set out in the applicable cases, statutes, and rules.

Copies of the three January 4, 2010 memoranda from Deputy Attorney General Ogden are attached.

[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](#)

[Requirement of Office Discovery Policies in Criminal Matters](#)

Guidance for Prosecutors Regarding Criminal Discovery

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