Time to Make Brady Compliance Part of Prosecutors' Culture

November 17, 2010

On Thursday, November 4, 2010, Rod Rosenstein, the U.S. Attorney for Maryland, defended the U.S. Department of Justice's recent efforts to address its compliance with *Brady v. Maryland,* the 1963 Supreme Court case requiring prosecutors to disclose information that would tend to exculpate criminal defendants.

Rosenstein, speaking before a group of defense attorneys at an American Bar Association town hall meeting, said that the DOJ takes its discovery obligations seriously. Rosenstein said that prosecutors now have new guidelines that represent a change in the culture of the department on *Brady* compliance. Programs are in place for regular *Brady* training, and written office policies and discovery coordinators address *Brady* concerns and attempt to harmonize the approaches to discovery obligations taken by various DOJ offices.

In our view, however, the new guidelines simply maintain the status quo and do not really promote change at all.

The background for Rosenstein's comments is as follows. After several high-profile discovery missteps, the DOJ issued three memoranda on January 4, 2010, which include guidance for all federal prosecutors and details the steps the department has taken to address *Brady* concerns. The most notable instance of government non-compliance with *Brady* came in April 2009 when the DOJ dismissed a seven-count public corruption indictment of former U.S. Senator Ted Stevens. The dismissal followed a guilty verdict in a jury trial, during which the judge repeatedly rebuked prosecutors for failing to disclose evidence that was potentially helpful to the defense.

After the dismissal in the Stevens case, Attorney General Eric Holder Jr. announced that he would require additional training for federal prosecutors to bolster their knowledge of the rules governing discovery in criminal cases. The most important of these memoranda detail procedures that prosecutors must follow when providing discovery to criminal defendants. Although the intent of these memoranda is to encourage consistency across the board in

criminal matters, they do not adopt a "one-size-fits-all approach." The DOJ noted: "In many cases, broad and early disclosures might lead to a speedy resolution and preserve limited resources for the pursuit of additional cases. In other cases, disclosures beyond those required by relevant statutes, rules and policies may risk harm to victims or witnesses, obstruction of justice, or other ramifications contrary to our mission of justice."

In a memorandum to all U.S. attorneys and department heads handling criminal cases, then Deputy Attorney General David W. Ogden directed each office to establish a discovery policy by March 31, 2010. The memorandum provides that departures from each office's discovery policy should be allowed on a case-by-case basis where "specific, case-related considerations may warrant a departure from the uniform discovery practices of the office."

But the DOJ guidelines, while attempting to provide a systematic approach to prosecutors' discovery obligations, actually do not result in national uniformity. Whether criminal defendants will obtain discovery of all materials to which they are entitled will still be largely dependent on the judgments of the individual prosecutors. The guidelines do not create any enforceable discovery rights.

Although an unambiguous rule that would mandate the disclosure of all exculpatory evidence, except in the most extraordinary circumstances, would seem required by *Brady,* Rosenstein said that he does not think such a rule is necessary. So even after the DOJ's "new" guidelines, individual prosecutors will continue to be free to develop their own discovery practices and to depart from them at will, allowing prosecutorial misconduct to go unpunished, and, in some instances, undetected. Perhaps the answer is that the government should simply err in the direction of providing open discovery of its files to defendants.

Crime in the Suites is authored by the Ifrah Law Firm, a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.

The commentary and cases included in this blog are contributed by Jeff Ifrah and firm associates Rachel Hirsch, Jeff Hamlin, Steven Eichorn and Sarah Coffey. These posts are edited by Jeff Ifrah and Jonathan Groner, the former managing editor of the Legal Times. We look forward to hearing your thoughts and comments!