MEMO TO PROSECUTORS

DOJ Focuses on Discovery Obligations

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January 4, 2010, memoranda address recent failures to disclose exculpatory evidence

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"Any discovery lapse, of course, is a serious matter. Moreover, even isolated lapses can have a disproportionate effect on public and judicial confidence in prosecutors and the criminal justice system. Beyond the consequences in the individual case, such a loss in confidence can have significant negative consequences on our effort to achieve justice in every case."

—David W. Ogden, January 4, 2010

In a speech commemorating the fortieth anniversary of her ascension, Queen Elizabeth II reflected on the travails of the year then drawing to a close by noting: "1992 is not a year on which I shall look back with undiluted pleasure." At the close of 2009, Attorney General Eric Holder may well have shared Queen Elizabeth's sentiments. More specifically, 2009 saw a series of high-profile prosecutions end disastrously for the government, with federal district court judges in cases across the country excoriating the government for misconduct in withholding exculpatory evidence from defendants. As those abuses have come to light, the Justice Department has taken a series of steps to remedy these failures, most recently by issuing a series of three memoranda in January of this year that address in some detail the obligations of prosecutors to provide criminal defendants with exculpatory evidence. This article explores those memoranda and highlights some of their implications for criminal defendants in future cases.

The Government's Discovery Obligations

Although it is beyond the scope of this article to describe fully the government's criminal discovery obligations, some brief background follows to provide context. The government's obligations to produce information to defendants in federal criminal prosecutions arise from at least three distinct sources: the due process clause of the Fifth Amendment to the U.S. Constitution; the Federal Rules of Criminal Procedure (FRCrP) (in particular, FRCrP 16); and individual federal prosecutors' ethical and professional obligations (see Rule 3.8(d) of the Model Rules of Professional Conduct and Section 9-5.001 of the *U.S. Attorneys' Manual*). The U.S. Supreme Court first articulated the scope of the government's due process obligation in the seminal case *Brady v. Maryland*, 373 U.S. 83 (1963), noting that "the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Since deciding *Brady*, the Supreme Court has addressed the scope of that right in a number of subsequent cases, including *Giglio v. United States*, 405 U.S. 150 (1972). In so doing, the Court consistently has maintained a requirement that the evidence satisfy a test of materiality as to guilt or punishment in order for its nondisclosure to rise to the level of a *Brady* violation. FRCrP 16 also applies a materiality standard to the production of evidence to criminal defendants, requiring that, upon request by the defendant, the government produce items "material to preparing the defense." In contrast to *Brady* and its progeny and to FRCrP 16, both Rule 3.8 of the Model Rules of Professional Conduct and Section 9-5.001 of the *U.S. Attorneys' Manual* recognize that the government has what is sometimes referred to as a "Super-*Brady*" obligation to disclose information "beyond that which is 'material' to guilt . . . ." (*U.S. Attorneys' Manual* at § 9-5.001(C).)

The Stevens Prosecution and Other Recent Misconduct Cases

Prosecutorial misconduct in connection with the failure to produce exculpatory evidence came to prominence in 2009, during the prosecution of Alaska Senator Ted Stevens. Judge Emmet J. Sullivan, a federal district court judge in the District of Columbia, set aside the verdict against Senator Stevens and dismissed the indictment against him with prejudice, after it came to light that the government had failed to turn over government interview memoranda documenting conversations with a key prosecution witness that significantly undermined the government's case. Judge Sullivan chastised the government severely for its misconduct, noting that "this is not about prosecution by any means necessary" and that the government had "repeatedly failed" to meet its most basic discovery obligations. Judge Sullivan subsequently appointed, sua sponte, a special prosecutor to investigate the possibility of criminal contempt charges against the prosecutors.

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Following on the heels of Senator Stevens's case, several other cases in 2009 saw the government reprimanded for withholding exculpatory evidence. One of the most significant was *United States v. W.R. Grace*, No. 05-07 at 3-4 (D. Mont. Apr. 28, 2009), a prosecution of W.R. Grace and several of its former executives that the government termed one of the most significant indictments for environmental crime in the nation's history. There, the court concluded that the government had withheld key information regarding its star witness from the defendants and elected to read a stinging special instruction to the jury regarding the prosecution's misconduct. Following the revelation of the withheld evidence, the government dismissed its case as to two of the defendants and the jury ultimately acquitted the others. As problems similar to those that arose in the prosecutions of Senator Stevens and W.R. Grace continued to arise in other cases throughout the year, the government began taking steps to evaluate its approach to compliance with its discovery obligations.

The April 14, 2009, Holder Memorandum

On April 14, 2009, two weeks after the dismissal of the charges against Senator Stevens, Attorney General Eric Holder "announced comprehensive steps to enhance the Justice Department's compliance with rules that require the government to turn over certain types of evidence to the defense in criminal cases." (Dep't of Justice Press Release "Attorney General Announces Increased Training, Review of Process for Providing Materials to Defense in Criminal Cases" (Apr. 14, 2009) *available at* http://www.justice.gov/opa/pr/2009/April/09-opa-338.html.) The press release quoted the attorney general as stating that he was "committed to ensuring that our prosecutors are provided sufficient training to understand fully their discovery obligations, and that they receive the support and resources necessary to do their jobs in a manner consistent with the proud traditions of this Department." In terms of specific measures to implement this articulated goal, the press release set forth the following measures:

- Providing supplemental training to federal prosecutors throughout the Department on their discovery obligations in criminal cases. Training will begin in the coming weeks.
- Establishing a working group of senior prosecutors and Department officials from each component to review the discovery practices in criminal cases. The working group, to be headed by the Assistant Attorney General of the Criminal Division and the Chair of the Attorney General's Advisory Committee, will review the need for:
  - Improvements to practices and policies related to the government's obligations to provide material to the defense in criminal matters;
  - Additional resources, including staffing and information technology, needed to help prosecutors fulfill their discovery obligations;
  - Additional discovery-related training for other Department prosecutors.

(*Id.*)

The January 4, 2010, Ogden Memoranda

As part of the "supplemental training" promised by the attorney general in his April 14, 2009, memorandum, Deputy Attorney General David W. Ogden issued three internal memoranda on January 14, 2010, (collectively, the "Ogden Memoranda") (*available at* http://blogs.usdoj.gov/blog/archives/493), that address in significant detail the government's obligations with respect to criminal discovery. The memoranda consist of the following: (i) a memorandum for department prosecutors entitled "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" (the "DP Memo"); (ii) a memorandum to all United States attorneys and the heads of litigating divisions entitled "Requirements for Office Discovery Policies in Criminal Matters" (the "USA Memo"); and (iii) a memorandum for department prosecutors entitled "Guidance for Prosecutors Regarding Criminal Discovery" (the "Guidance Memo"). The memoranda are as important for what they do not address as what they do. A topic-by-topic synopsis of key points in the memoranda follows.

Standardization of the criminal discovery process within each district; development of written discovery policies. One problem that has plagued the criminal discovery process is a lack of uniformity in the way federal prosecutors address their discovery obligations. A 2007 report by the Federal Judicial Center found that U.S. attorneys' offices followed a variety of formal and informal discovery policies; indeed, out of 94 districts, only 37 "reported having a relevant local rule, order, or procedure specifically governing disclosure of *Brady* material." (Brady v. Maryland *Material in the United States District Courts: Rule, Orders, and Policies* at 7.)

The Ogden Memoranda recognize that inconsistent discovery standards can present problems. However, the memoranda focus on inconsistency within federal districts, and do not address the issue of inconsistencies within the system as a whole: "The Working Group Report recognized that some local variation in discovery practices is inevitable. Inconsistent discovery practices among prosecutors within the same office, however, can lead to burdensome litigation over the appropriate scope and timing of disclosures, judicial frustration and confu-

sion, and disparate discovery disclosures to a defendant based solely on the identity of the prosecutor who happens to have been assigned a case." (*USA Memo*.) This narrowed focus on practices within a given jurisdiction naturally leads to a correspondingly narrow corrective measure: "In order to assist prosecutors maintain this familiarity and to establish uniform criminal discovery practices within the same office, I am today directing the USAOs and each Department litigating component handling criminal matters to develop a discovery policy that reflects circuit and district court precedent and local rules and practices." (*USA Memo*.)

The Guidance Memo stresses the importance of prosecutors understanding the applicable discovery obligations that will be set forth in these written discovery policies: "In order to meet discovery obligations in a given case, Federal prosecutors must be familiar with these authorities and with the judicial interpretations and local rules that discuss or address the application of these authorities to particular facts. In addition, it is important for prosecutors to consider thoroughly how to meet their discovery obligations in each case." In light of past government practice, it is likely that the government will take the position that these policies are not legally enforceable. Indeed, it is entirely unclear whether these policies will be made public. It is likely that private citizens and interested organizations will seek access to the policies by Freedom of Information Act requests. Until these efforts succeed, defendants may have little direct recourse in the event they believe that a prosecutor is not following his or her office's own policies.

While each district is required to develop its own policy, copies of the policies are to be shared with the Department of Justice: "I encourage you to create or modify your policy as soon as possible, but in any event you are directed to have a revised or new policy in place no later than March 31, 2010, and to provide a copy to the Office of the Associate Attorney General and the Office of the Deputy Attorney General. USAOs should also provide a copy to the Executive Office for United States Attorneys." (*USA Memo*.) It remains unclear whether the Department of Justice, having received the policy of each district, will take an active role in their modification or implementation.

As noted above, the Ogden Memoranda do not go so far as to impose specific, uniform discovery standards applicable throughout the country: "The guidance is subject to legal precedent, court orders, and local rules." (*Guidance Memo*.) Accordingly, inconsistent access to exculpatory evidence for defendants from district to district remains a very real possibility. Of course, because the United States courts of appeal may adopt conflicting rules of law, a certain degree of variability among departmental policies is inevitable. For this reason, a number of commentators have suggested amending FRCrP 16 to ensure defendants throughout the country the same degree of access to exculpatory evidence. The government has consistently and, so far, successfully blocked such efforts.

Appointment of discovery coordinators and training. An important component of the government's efforts to standardize discovery and avoid future lapses is its renewed emphasis on education and oversight. To that end, "[e]ach USAO and the litigating components handling criminal cases have now named a discovery coordinator, and those coordinators attended a 'Train the Trainer' discovery conference at the National Advocacy Center in October. These coordinators will provide discovery training to their respective offices no less than annually and serve as on-location advisors with respect to discovery obligations." (*DP Memo*.) However, it appears that the exact content of those training sessions are not available to the public.

The failure to invite other constituencies, such as the defense bar and the ABA, to participate in this training offers little assurance that trainees will receive a fair and even-handed introduction to these contentious issues. As a general matter, we would encourage the Department of Justice to schedule regular meetings with representatives of the defense bar and the ABA's Criminal Justice Section to discuss discovery issues generally in order to ensure an ongoing dialogue about these issues.

Use of criminal discovery coordinators by line prosecutors. Even with the most comprehensive of training programs in place, it would be hopelessly optimistic to believe that every prosecutor will make the correct discovery decision in absolutely every instance. Moreover, the myriad pressures inevitably placed on prosecutors to obtain convictions can make reaching the correct decision even more difficult. In recognition of this, the Ogden Memoranda encourage prosecutors "to consult with the designated criminal discovery coordinator in their office when they have questions about the scope of their discovery obligations." (*Guidance Memo*.) Similarly, the USA Memo advises U.S. attorneys and litigation component heads that "your policy must set forth procedures prosecutors are required to follow to obtain supervisory approval to depart from the uniform practices in an appropriate case." The efficacy of this process remains to be seen, but it certainly has the potential to allow for more objective application of discovery rules by supervisors who likely are not as invested in the outcome of a given case as the subordinate who is actually prosecuting it.

Seeking guidance from the trial judge. The Ogden Memoranda contemplate that courts can have a role to play early on in determining what evidence should be

provided to a criminal defendant. When consultation with the district's discovery coordinator does not answer the prosecutor's questions, the Ogden Memoranda suggest the prosecutor seek guidance from the court: "When the disclosure obligations are not clear or when the considerations above conflict with the discovery obligations, prosecutors may seek a protective order from the court addressing the scope, timing, and form of disclosures." (*Guidance Memo.*) Advising judges of "close calls" and seeking guidance from the court are positive steps but only time will show just how frequently prosecutors actually exercise this option.

Dissemination of information from Department of Justice headquarters. Although the primary focus of the department's efforts is on the local level, there is nevertheless a certain amount of guidance from the Department of Justice headquarters in Washington, D.C. In particular, the DP Memo indicates that Main Justice will:

- Create an online directory of resources pertaining to discovery issues that will be available to all prosecutors at their desktop;
- Produce a Handbook on Discovery and Case Management similar to the Grand Jury Manual so that prosecutors will have a one-stop resource that addresses various topics relating to discovery obligations;
- Implement a training curriculum and a mandatory training program for paralegals and law enforcement agents;
- Revitalize the Computer Forensics Working Group to address the problem of properly cataloguing electronically stored information recovered as part of federal investigations;
- Create a pilot case management project to fully explore the available case management software and possible new practices to better catalogue law enforcement investigative files and to ensure that all the information is transmitted in the most useful way to federal prosecutors.

(*DP Memo*.)

The responsibility for coordinating these various functions was delegated to a newly created national coordinator of Criminal Discovery Initiatives. On January 15, 2010, the Department of Justice announced the appointment of Andrew Goldsmith to that position. Prior to this appointment, Goldsmith served as first assistant chief of the Environment and Natural Resources Division's Environmental Crimes Section. While in that position, he was part of the prosecution team in the *W.R. Grace* case discussed earlier in this article. Goldsmith will set much of the tone for this initiative and he therefore carries a significant burden.

Electronically stored information represents a unique discovery challenge. Goldsmith has experience with the issue and, in fact, coauthored an article entitled "Investigations and Prosecutions Involving Electronically Stored Information" in the May 2008 *United States Attorneys' Bulletin*. In the article, Goldsmith discusses at length "the promise and potential peril of demanding ESI production." Among the challenges facing Goldsmith is developing and implementing internal policies within the Department of Justice to ensure that government-generated ESI is properly maintained, reviewed, and produced to defendants. Ironically, the government's failure to produce e-mails was one of the most significant issues in the *W.R. Grace* case.

The guidelines in the Ogden Memoranda are not intended to be binding. The government has consistently argued, and courts have generally agreed, that the *U.S. Attorneys' Manual* does not create judicially enforceable rights for defendants. (*See generally* United States v. Montoya, 45 F.3d 1286, 1295 (9th Cir. 1995) ("[F]ailure to strictly comply with the United States Attorneys' Manual creates no enforceable rights.") (citations omitted); United States v. Lorenzo, 995 F.2d 1448, 1453 (9th Cir. 1993); ("[T]he U.S. Attorneys' Manual is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.") (citation and internal quotation marks omitted)). The Ogden Memoranda make a similar claim, purporting to: "provide[ ] prospective guidance only . . . not intended to have the force of law or to create or confer any rights, privileges, or benefits." (*Guidance Memo.*) This limitation raises questions about the diligence with which the policies in the Ogden Memoranda will be enforced and the severity of the consequences for violations of those policies. It is for this reason that some have argued that the way to ensure real change is through amendment of FRCrP 16, which would be legally binding on prosecutors.

The Ogden Memoranda were developed internally at the Department of Justice and without any input from other affected stakeholders. According to the DP Memo:

> [The] guidance was developed at my request by a working group of experienced attorneys with expertise regarding criminal discovery issues that included attorneys from the Office of the Deputy Attorney General, the United States Attorneys' Offices, the Criminal Division, and the National Security Division. The working group received comment from the Office of the Attorney General, the Attorney General's Advisory Committee, the Criminal Chiefs Working Group, the Appellate Chiefs Working Group, the

Professional Responsibility Advisory Office, and the Office of Professional Responsibility.

Noticeably absent from the list of those consulted were organizations such as the American Bar Association, the National Association of Criminal Defense Lawyers, and the American College of Trial Lawyers. The failure to create a collaborative process where input was actively solicited from the defense bar represents a missed opportunity to draw upon the experience and collective wisdom of the defense bar and other private practitioners.

Guidance on composition of the "prosecution team." Many criminal cases originate in investigative work undertaken by federal and state regulatory or law enforcement agencies. At a certain juncture in the investigation, the decision is made that the underlying facts merit potential criminal charges, and the Department of Justice steps in and begins the process of building a case. As more fully discussed above, a criminal defendant is entitled to certain information from the government. But who is the government? Clearly, it includes the Department of Justice. But what about the other federal and state agencies that may have been involved in the case from the beginning? The precise scope of the government's disclosure obligations has been the subject of significant litigation in the past. The *U.S. Attorneys' Manual* offers the following guidance on the composition of the "prosecution team:" "Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant" (*U. S. Attorneys' Manual* at § 9-5.001.)

The Ogden Memoranda tacitly recognize that, particularly in complex cases involving multiple investigative agencies, the question of who is part of the prosecution team may be difficult to answer: "[I]n complex cases that involve parallel proceedings with regulatory agencies (SEC, FDIC, EPA, etc.), or other non-criminal investigative or intelligence agencies, the prosecutor should consider whether the relationship with the other agency is close enough to make it part of the prosecution team for discovery purposes." (*Guidance Memo*.) As a general principle, the Ogden Memoranda seek to create an environment where close questions are decided in favor of disclosure: "Prosecutors are encouraged to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes." (*Id.*) Even if an agency is not part of the prosecution team, it may still be appropriate for the prosecutor to review the agency's files: "[I]f a regulatory agency is not part of the prosecution team but is conducting an administrative investigation or proceeding involving the same subject matter as a criminal investigation, prosecutors may very well want to ensure that those files are reviewed not only to locate discoverable information but to locate inculpatory information that may advance the criminal case." (*Id.*)

The Ogden Memoranda provide the following factors to consider in determining whether a particular federal agency is part of the prosecution team:

- 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 U.S. attorney;
- The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges;
- 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.

As for state agencies, the prosecutor "should consider (1) whether state or local agents are working on behalf of the prosecutor or are under the prosecutor's control; (2) the extent to which state and federal governments are part of a team, are participating in a joint investigation, or are sharing resources; and (3) whether the prosecutor has ready access to the evidence." (*Guidance Memo*.)

It will be interesting to see whether courts look to the factors in the Guidance Memo when considering this issue. With the relevant case law inconsistent throughout the United States, adoption of a standardized template across the country would be a positive step.

The government recognizes that discovery in national security cases presents unique challenges. As the last decade has amply illustrated, ensuring that the rights of criminal defendants are preserved can become problematic in cases that involve national security concerns. The Ogden Memoranda recognize this tension and promise further guidance in the future on this subject. As a general matter, the Ogden Memoranda advise prosecutors to be mindful of their discovery obligations in national security cases even before an indictment is filed: "Pros-

ecutors should begin considering potential discovery obligations early in an investigation that has national security implications and should also carefully evaluate their discovery obligations prior to filing charges." (*Guidance Memo*.) It will be interesting to see the new guidance when the Department of Justice issues it and to evaluate whether it may be implemented effectively.

The Ogden Memoranda do not require the prosecutor to personally undertake discovery reviews of agency files. Problems in discovery can arise when the prosecutor delegates the review of case files to investigative agents or other government personnel who are not as familiar with the scope of the government's criminal discovery obligations. In the government's recent unsuccessful prosecution of W.R. Grace, for example, important exculpatory material initially was not produced to the defendants because an agent conducted a *Brady* review of his files using an incorrect standard. A significant missed opportunity in the Ogden Memoranda is their failure to take a hard line against this practice: "It would be preferable if prosecutors could review the information themselves in every case, but such review is not always feasible or necessary." (*Guidance Memo*.) The Ogden Memoranda try to ameliorate the potentially deleterious effects of screening for exculpatory material by nonlawyers by continuing to impose an overarching, supervisory obligation on the prosecutor:

> The prosecutor is ultimately responsible for compliance with discovery obligations. Accordingly, the prosecutor should develop a process for review of pertinent information to ensure that discoverable information is identified. Because the responsibility for compliance with discovery obligations rests with the prosecutor, the prosecutor's decision about how to conduct this review is controlling. This process may involve agents, paralegals, agency counsel, and computerized searches. Although prosecutors may delegate the process and set forth criteria for identifying potentially discoverable information, prosecutors should not delegate the disclosure determination itself.

(*Guidance Memo*.)

Although the prosecutor's retention of his or her obligation for oversight may help reduce problems such as those that arose in the *W.R. Grace* case, it remains to be seen whether this protocol will ultimately be successful.

(CI)/witness, (CW)/human source, (CHS)/source, (CS) files. The Ogden Memoranda recognize the importance of CI, CW, CHS, and CS files: "The credibility of cooperating witnesses or informants will always be at issue if they testify during a trial." (*Guidance Memo*.) Notably, the Ogden Memoranda allow the prosecutor to exercise his or her discretion in deciding whether to turn over the actual information in the file or only a summary of that information: "[P]rosecutors should consider whether discovery obligations arising from the review of CI, CW, CHS, and CS files may be fully discharged while better protecting government or witness interests such as security or privacy via a summary letter to defense counsel rather than producing the record in its entirety." (*Guidance Memo*.) The issue of the adequacy of such summary disclosure letters by prosecutors will likely be the subject of future discovery litigation.

Shifting of discovery burdens in complex, document-heavy cases. It is not uncommon, particularly in complex corporate prosecutions, to have cases involving thousands or even millions of pages of documents. In such cases, document management becomes a significant issue for both the government and the defendants. The Ogden Memoranda permit the government to discharge its discovery obligations by providing entire agency files without differentiating among the material contained in those files: "[I]n cases involving a large volume of potentially discoverable information, prosecutors may discharge their disclosure obligations by choosing to make the voluminous information available to the defense." (*Guidance Memo*.) Elsewhere, the Ogden Memoranda state "[i]n cases involving voluminous evidence obtained from third parties, prosecutors should consider providing defense access to the voluminous documents to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence." (*Guidance Memo*.) Such "open file" discovery, while certainly maximizing disclosure, effectively shifts the burden of document review from the government to defense counsel. On the other hand, an intrinsic problem when the government screens for *Brady* material is that, because it does not know the defendant's theory of the case, it may not be able to recognize information that may, in the eyes of the defendant, be exculpatory.

"Substantive case-related communications." According to the Ogden Memoranda, discoverable information will often be found in what is referred to as "substantive case-related communications." (*Guidance Memo*.) These communications "are most likely to occur (1) among prosecutors and/or agents, (2) between prosecutors and/or agents and witnesses and/or victims, and (3) between victim-witness coordinators and witnesses and/or victims." Communications that are "substantive," "include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility." (*Guidance Memo*.) Although litigation-strategy documents are generally not

subject to production, prosecutors are encouraged to review those to determine whether any discoverable information is contained within them. This was a particularly problematic area in the *W.R. Grace* case because the government failed to disclose, until late in the trial, information regarding extensive meetings and e-mails involving government agents and the government's star witness. The guidance in the Ogden Memoranda, while helpful, does not go far enough in highlighting the potential significance of this category of information.

The form of the information does not preclude its production. Communication increasingly occurs by way of e-mail or other forms of electronic transmission. The Ogden Memoranda provide a helpful reminder to prosecutors that, with few exceptions, "the format of the information does not determine whether it is discoverable." (*Guidance Memo*.) For example, "material exculpatory information that the prosecutor receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email." (*Guidance Memo*.) However, the Ogden Memoranda give prosecutors the discretion to refrain from producing an underlying document if the information contained in that document is memorialized in another written document that already has been produced: "When the discoverable information contained in an email or other communication is fully memorialized elsewhere, such as in a report of interview or other document(s), then the disclosure of the report of interview or other document(s) will ordinarily satisfy the disclosure obligation." (*Guidance Memo*.) Such latitude ultimately may lead to problems because it relies upon the assumption that the memorializing of such information will be done correctly and in a way that does not occlude the salient facts. The Ogden Memoranda recognize this possibility, cautioning that "[i]f discoverable information is not provided in its original form and is instead provided in a letter to defense counsel, including particular language, where pertinent, prosecutors should take great care to ensure that the full scope of pertinent information is provided to the defendant." (*Guidance Memo*.)

In the absence of compelling reasons, however, it is unclear why the default rule should not be to produce the actual document and thereby avoid the risk of even unintentional omission or miscommunication. More fundamentally, the Ogden Memoranda fail to acknowledge that defense counsel is entitled to the underlying document, to use as an impeaching document at trial, if that document is authored by or sent to the witness.

Defining the scope of *Giglio*. Discharging the production obligations articulated in *Giglio v. United States*, 405 U.S. 150 (1972), which requires that prosecutors provide defendants with material evidence that tends to impeach the credibility of government witnesses, is critical to ensuring that a defendant's due process rights are protected. The Ogden Memoranda offer a lengthy list of material that would qualify as discoverable under *Giglio*: prior inconsistent statements (possibly including inconsistent attorney proffers), statements or reports reflecting witness statement variations, benefits provided to witnesses (dropped or reduced charges, immunity, expectations of downward departures or motions for reduction of sentence, assistance in a state or local criminal proceeding, considerations regarding forfeiture of assets, stays of deportation or other immigration status considerations, S-Visas, monetary benefits, nonprosecution agreements, and letters to other law enforcement officials setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf, relocation assistance, consideration or benefits to culpable or at-risk third parties), other known conditions that could bias the witness (animosity toward defendant, animosity toward a group of which the defendant is a member or with which the defendant is affiliated, relationship with victim, known but uncharged criminal conduct), prior acts under Fed. R. Evid. 608, prior convictions under Fed. R. Evid. 609, known substance abuse or mental health issues or other issues that could affect the witness's ability to perceive and recall events. (*Guidance Memo*.) The Ogden Memoranda also recognize that *Giglio* materials can come in the form of inconsistent witness statements that occur during a single interview: "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." (*Guidance Memo*.)

Witness interview notes. In a number of recent cases, the production of agent interview notes has become a contentious issue. The Ogden Memoranda recommend, but do not require, (a) agents to memorialize witness interviews, (b) agents to preserve their rough notes and any interview recordings, (c) agents and prosecutors to "discuss note-taking responsibilities and memorialization before the interview begins," and (d) prosecutors to avoid interviewing witnesses by themselves "to avoid the risk of making themselves a witness to a statement and being disqualified from handling the case if the statement becomes an issue." (*Guidance Memo*.) On the thorny question of when both memorializing memoranda and rough notes should be produced, the Ogden Memoranda note: "Agent notes should be reviewed if there is a reason to believe that the notes are materially different from the memorandum, if a written memorandum was not prepared, if the precise words used by the witness are significant, or if the witness disputes the agent's account of the interview." (*Guidance Memo*.) It is likely that defendants will argue that restrict-

ing the review of such notes to the above circumstances, rather than requiring a comprehensive review of all notes in the government's files, applies an unduly restrictive standard and that this area will remain a contentious one in criminal prosecutions. Also absent from the discussion are answers to critical questions such as how quickly notes should be memorialized in the interview memos and whether interview memos prepared by prosecutors may be withheld under a claim of privilege.

Government trial preparation of witnesses. The government often takes the position that there is a difference, for production purposes, between investigative interviews of potential witnesses and actual trial preparation of those witnesses. The Ogden Memoranda seek to preserve some of this distinction, stating that "[t]rial preparation meetings with witnesses generally need not be memorialized." (*Guidance Memo*.) However, such distinction is not intended to trump the government's discovery obligations. Put simply, if *Brady* material is elicited during trial preparation, it must be disclosed to defendants: "[P]rosecutors should be particularly attuned to new or inconsistent information disclosed by the witness during a pre-trial witness preparation session. New information that is exculpatory or impeachment information should be disclosed consistent with the provisions of USAM § 9-5.001 even if the information is first disclosed in a witness preparation session. Similarly, if the new information represents a variance from the witness's prior statements, prosecutors should consider whether memorialization and disclosure is necessary [under *Giglio*]." (*Guidance Memo*.)

In large cases, the government may conduct extensive preparation sessions with key witnesses, including mock direct and cross-examinations. Applying the Ogden Memoranda to these efforts will be a challenge for the government and could well lead to the need for further clarification and guidance in the future. We would recommend that the guidelines be clarified to require that notes of such mock crosses be taken and that those notes should be reviewed for discoverable material (under FRCrP 16, the Jencks Act, or *Brady*). If notes are not taken and during or after trial the fact that a mock cross took place and no notes were taken is discovered, a prosecutor could be subject to claims that potential *Brady* evidence was withheld, especially if the witness is a problem witness who has changed his or her story previously, or it turns out that he/she is a defense-friendly witness.

Production of organizational witness statements. In most cases, it is not difficult to identify the defendant for purposes of production of defendant statements under FRCrP 16(a)(1)(A) and 16(a)(1)(B). Identifying the "defendant" can become more complex and problematic where the defendant is a corporation. This situation is covered under FRCrP 16(a)(1)(C), which seeks to apply the rules of FRCrP 16(a)(1)(A) and (B) in the corporate context. The Ogden Memoranda caution prosecutors to pay particular care to the application of these rules: "Prosecutors should pay particular attention to agent notes generated during an interview of the defendant or an individual whose statement may be attributed to a corporate defendant. Such notes may contain information that must be disclosed pursuant to Fed. R. Crim. P. 16(a)(1)(A)-(C) or may themselves be discoverable under Fed. R. Crim. P. 16(a)(1)(B)." (*Guidance Memo*.) Counsel representing corporate defendants should read FRCrP 16(a)(1)(C) with care and also familiarize themselves with cases such as *United States v. Clark*, 385 F.3d 609, 619-20 (6th Cir. 2004) and *United States v. Vallee*, 380 F. Supp. 2d 11, 12-14 (D. Mass. 2005), both of which are cited in the Ogden Memoranda.

The Ogden Memoranda discourage the use of the term "open file" discovery. Some prosecutors adopt what is often referred to as an "open file" discovery policy. Under an open file policy, the government provides a defendant with access to virtually all of the nonprivileged information in its possession that relates to that defendant's prosecution. The Ogden Memoranda neither endorse nor criticize the use of such a policy, but do advise prosecutors to avoid using the title "open file" when referring to their discovery practices:

> Prosecutors should never describe the discovery being provided as "open file." Even if the prosecutor intends to provide expansive discovery, it is always possible that something will be inadvertently omitted from production and the prosecutor will then have unintentionally misrepresented the scope of materials provided. Furthermore, because the concept of the "file" is imprecise, such a representation exposes the prosecutor to broader disclosure requirements than intended or to sanction for failure to disclose documents, e.g. agent notes or internal memoranda, that the court may deem to have been part of the "file."

(*Guidance Memo*.)

The decision to avoid using the term "open file" is a sound one. Even where true open file discovery is practiced, certain materials, such as true work-product information, are almost always withheld. As a result, invocation of open file discovery can leave defendants with a false sense of security and make it a great deal more difficult to convince a judge to get involved in discovery disputes.

The breadth of discovery. The Ogden Memoranda offer a general endorsement of broad discovery: "Providing broad and early discovery often promotes the truth-seeking mis-

sion of the Department and fosters a speedy resolution of many cases. It also provides a margin of error in case the prosecutor's good-faith determination of the scope of appropriate discovery is in error. Prosecutors are encouraged to provide broad and early discovery consistent with any countervailing considerations." (*Guidance Memo*.)

That being said, the Ogden Memoranda also recognize that "prosecutors should always consider any appropriate countervailing concerns in the particular case." (*Guidance Memo*.) Among those countervailing factors are:

> protecting victims and witnesses from harassment or intimidation; protecting the privacy interests of witnesses; protecting privileged information; protecting the integrity of ongoing investigations; protecting the trial from efforts at obstruction; protecting national-security interests; investigative agency concerns; enhancing the likelihood of receiving reciprocal discovery by defendants; any applicable legal or evidentiary privileges; and other strategic considerations that enhance the likelihood of achieving a just result in a particular case.

(*Guidance Memo*.)

Furthermore, the Ogden Memoranda caution the prosecutor to make clear that when discovery broader than that which is required is provided, it should be framed in such a way that it does not create a right to such broader discovery: "Prosecutors are also encouraged to provide discovery broader and more comprehensive than the discovery obligations. If a prosecutor chooses this course, the defense should be advised that the prosecutor is electing to produce discovery beyond what is required under the circumstances of the case but is not committing to any discovery obligation beyond the discovery obligations set forth above." (*Guidance Memo*.)

The timing of production. One of the more contentious issues concerning criminal discovery is the timing of that discovery. In the past, there have been attempts to amend FRCrP 16 to require the early disclosure of materials to defendants. It goes without saying that the later a defendant receives a piece of information, the harder it is for the defendant to fully utilize it. According to the Ogden Memoranda, "[e]xculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant reasonably promptly after discovery. Impeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently." (*Guidance Memo*.) As discussed above, the Ogden Memoranda also allow prosecutors to consider other factors that may result in delayed production of discoverable information. To the extent there is a "general" discovery rule articulated in the Ogden Memoranda it is that "[i]n the absence of guidance from . . . local rules or court orders, prosecutors should consider making Rule 16 materials available as soon as is reasonably practical but must make disclosure no later than a reasonable time before trial." 9*Guidance Memo*.) Ironically, the attempt to impose a time requirement on FRCrP disclosures was a key component of recent attempts to amend FRCrP 16. The government's staunch opposition to those efforts makes it seem as though the government is willing to make a general pronouncement like this, but unwilling to accept that requirement as binding and legally enforceable.

Ongoing discovery obligation. The government's discovery obligations are ongoing and do not cease upon completion of production. If, at any time, discoverable information is found, that information must be produced to the defendant. The Ogden Memoranda reaffirm this requirement: "Discovery obligations are continuing, and prosecutors should always be alert to developments occurring up to and through trial of the case that may impact their discovery obligations and require disclosure of information that was previously not disclosed." (*Guidance Memo*.)

Recordkeeping. As discovery disputes in criminal cases have multiplied, it has become increasingly important for the government to maintain a record of what has been produced to the defendant. The Ogden Memoranda encourage the government to maintain careful discovery records and warn prosecutors of the failure to do so: "Keeping accurate records of the evidence disclosed is no less important than the other steps discussed above, and poor records can negate all of the work that went into taking the first three steps." (*Guidance Memo*.) When discovery disputes arise in the future, defendants will likely seek access to these records to evaluate the completeness of the government's discovery.

Concluding Thoughts

Despite some missed opportunities, the guidelines set forth in the Ogden Memoranda represent a significant step in the right direction. Perhaps even more important than the particular measures articulated in the Ogden Memoranda is what appears to be the government's recommitment to the foundational principles of discovery that ultimately derive from the Constitution itself. As the recent increase in incidents of alleged prosecutorial misconduct demonstrate, such reaffirmation was long overdue. In the coming months, the Department of Justice hopefully will follow Hamlet's advice and "suit the action to the word." Without the will and the resolve to implement and enforce the Ogden Memoranda, their guidelines will remain nothing more than unfulfilled promises. Only time will tell. ■

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