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The Ted Stevens Prosecution — What's The Lesson?: Part 1

Law360, New York (March 29, 2012, 1:40 PM ET) -- At this point, we've all read, or at least heard, about the botched prosecution of former U.S. Sen. Ted Stevens and the shocking misconduct of the prosecution team. We know that Stevens was tried in a six-week trial just before his re-election bid, found guilty of criminal false statements, and his resulting loss in that election shifted the majority in the U.S. Senate from Republican to Democratic. Some commentators have stated that the shift had a significant impact on major legislation voted on thereafter, including President Obama's health care package.

What some may not know is that Stevens was indicted only three and one-half months before the November 2008 general election, arraigned less than two months before the start of trial, and a jury returned its guilty verdict just eight days before the vote. In addition, the charges brought against Stevens — to all of which he asserted his innocence — arose out of the alleged failure to report certain gifts and liabilities on financial disclosure statements.

Members of the Senate are required to file the financial disclosure statements with an administrative office of the Senate, and the statements are subject to review by a committee of the Senate responsible for making and enforcing rules and regulations imposed by the Senate on its own members. In short, Stevens was indicted nearly on the eve of the election for failing to report items on financial disclosure statements that were congressionally required and regulated.

On March 15, Henry F. Schuelke III, the special prosecutor appointed by Judge Emmet G. Sullivan, who presided over Stevens' trial, released a 500-plus page report detailing the constitutional discovery and due process abuses perpetrated by the prosecutors and agents handling the case. Most alarming, Schuelke and his colleague, William Shields, found in some instances that the abuses were intentional.

As a result, we've now heard the cries for retribution against the prosecutors who brought the case against Stevens. Schuelke's report concluded that the prosecutors' intentional misconduct did not violate a clear and unambiguous order of the court (because the court did not order Stevens' prosecutors to follow the existing law that they were already obligated to follow), and therefore there was insufficient evidence to charge them with criminal contempt.

However, the report remained silent as to whether the prosecutors could or should be charged with criminal obstruction of justice, making false statements or suborning perjury. Judge Sullivan did not instruct Schuelke to address those crimes in his investigation or report.

Putting aside the question of what should be done with the specific Stevens case prosecutors, what lesson should we take from all this?

The Legislative Reaction

Stevens' statement to Judge Sullivan, when granting the government's own motion to void the jury verdict and dismiss the indictment with prejudice after a new team of prosecutors was assigned to the case and uncovered the tip of the prosecutorial misconduct iceberg, says it all.

He said that he wanted to do what he could to assure that others would not fall victim to similar government misconduct. He said that he hoped that "when the dust settles, I may be able to encourage the enactment of legislation to reform the laws relating to the responsibilities and duties of those entrusted with the solemn task of enforcing criminal laws."

Of course, Stevens was not able to fulfill this goal personally, as he lost the November 2008 election for his seventh full term in the U.S. Senate, and then perished in an August 2010 plane crash in his home state of Alaska.
Undoubtedly in reply to Stevens' last legislative aspiration, on March 15, 2012, the same day as the release of Schuelke's report, Sen. Lisa Murkowski, R-Alaska, now the senior Senator from Alaska and a former friend and colleague of Stevens, introduced Senate Bill 2197, the Fairness in Disclosure of Evidence Act of 2012.

Sen. Murkowski introduced the bill on behalf of herself, Sen. Dan Inouye, D-Hawaii, (Senator Stevens' close friend in the Senate), Sen. Daniel Akaka, D-Hawaii, Sen. Kay Bailey Hutchison, R-Texas, and Sen. Mark Begich, D-Alaska, the candidate who beat out Stevens in the November 2008 election.

Although the new bill is a long way from becoming law, and certainly will be hotly debated, the Fairness in Disclosure of Evidence Act takes the first step in fulfilling Stevens' goal that no other citizen will be the victim of similar government misconduct. The proposed legislation is being backed by the National Association of Defense Lawyers, the American Bar Association, The Constitution Project and other defense rights groups.

In principle, the proposed new law largely legislates what is already existing case law concerning a prosecutor's discovery obligations. However, it does make two important changes to the existing legal framework concerning discovery.

First, the proposed law would bring greater uniformity and certainty to the application of discovery standards. The U.S. Supreme Court cases of Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972), require the production of exculpatory and impeachment evidence favorable to the defendant and material to the issues of guilt or punishment, without the need for a request for the information by the defense. Evidence is material to a defendant's case where the government's failure to disclose it would undermine confidence in the verdict.

Rule 16 of the Federal Rules of Criminal Procedure requires the disclosure to the defense of information, documents and materials if they are “material to preparing the defense,” or the government intends to use the material in its case-in-chief at trial, or the material was obtained from or belongs to the defendant. In addition, Rule 16 provides that discovery obligations thereunder kick in upon a defendant’s request. Although a request is typically made in contested cases, it may not be in cases where the defendant agrees to plead early in the case, which may be even before an indictment is returned by a grand jury.

Federal courts around the country vary in their implementation of these standards. At one end of the spectrum, some courts impose the requirements through local rules further defining Brady/Giglio and Rule 16 material, specify the timing for initial disclosures, make disclosure obligations continuing, and provide specific sanctions for prosecutors' failures to meet disclosure obligations. At the other end of the spectrum, some jurisdictions have no local rule or guidance relating to prosecutorial discovery obligations and leave the Supreme Court’s pronouncements in Brady and Giglio and the broad requirements stated in Rule 16 to stand on their own.

The Fairness in Evidence Disclosure Act would require government prosecutors to disclose to the defense all information, documents and materials that “may reasonably appear to be favorable to the defendant” regarding guilt, sentencing or matters before the court in a given case. The new proposed standard does not turn on materiality. Accordingly, the proposed legislation would broaden and replace the existing standard for evidentiary disclosure under Brady/Giglio and Rule 16.

Although the prosecutor would still make the determination of what must be disclosed to the defense, lowering the bar arguably would make more information subject to disclosure and make the determination less arduous and less prone to error than the existing materiality standard. In addition, the proposed legislation would require disclosure of all of these categories of evidence without the need for a request by the defense.

The new proposed law would require prosecutors to turn over favorable evidence “without delay” after a defendant is arraigned and “without regard to whether the defendant has entered or agreed to enter a guilty plea.” Practically speaking, the law seeks to ensure that a defendant receives favorable discovery promptly after a case is instituted against him, and even a defendant who has pled or agreed to plead guilty will receive all of the evidence favorable to his case. In many jurisdictions, before taking a guilty plea, courts do not ensure that defendants or their counsel have reviewed or even received any discovery in their cases, let alone favorable discovery, which of course could change their minds about a decision to plead.

The other major change proposed by the new law is also both a timing and a substantive change. Federal prosecutors often — and most criminal defense counsel say routinely — withhold FBI Form-302 reports (“302s”), which are written summaries of a witness’ statements to an FBI agent, or similar reports prepared by other government agents, or materials written by a witness, until just before trial, or just before a witness has testified at trial.

The Jencks Act, 18 U.S.C. § 3500 et seq., permits the government in criminal cases to withhold statements or reports made by government witnesses or prospective government witnesses other than the defendant until the witness has testified on direct examination at trial (most courts today consider the production of Jencks materials after a witness has already testified on direct to be too late, and the position of the government in the Stevens case that formal FBI interview summary memoranda would not be turned over at all is a rarity and, I would suggest, an aberration).

The practical effect of this rule is that, at best, defense counsel does not receive valuable impeachment evidence until just before a witness testifies, making it difficult to effectively use the information or conduct further investigation. At worst, the statements contain evidence of guilt or exculpatory information that should have been turned over much earlier pursuant to Brady/Giglio and their progeny, which, as we saw in the Stevens case, can have the effect of seriously compromising the defendant's case.

Although a judge has broad discretion to deal with these issues at trial, for example by limiting the government's evidence, giving the defense additional leeway, or dismissing a case, the reality is that the effect of late or nonexistent disclosure (if the witness never takes the stand at trial) is often fatal to the defendant's case.

Moreover, courts differ in their tolerance of prosecutors relying on the Jencks Act to delay disclosure of information to the defense. Technically, the materials may be covered by the Jencks Act in addition to being Brady or Giglio information. Judges may be more tolerant of these practices where some disclosure of the information already has been made, although not the exact version or wording of the information that appears in the materials that prosecutors claim are Jencks Act materials.

An extreme example of this issue appeared in the Stevens case, where the prosecutors wrote so-called "discovery letters" to the defense, summarizing information that was in the FBI's 302s in a much-abbreviated explanation. There, the prosecution summarized the 302s for more than 50 interviews of the government's star witness against Stevens in just 11 lines. The government's practice was satisfactory to the court, and the only reason that the government ended up having to produce the actual 302s to the defense is because the defense pushed for the 302s, arguing that the defense could not impeach or refresh recollection with a summary letter and needed the 302 to do that.

Ultimately, the court ordered the prosecution to provide all 302s in unredacted form when the government reported that it had found statements that were "arguably" Brady information when conducting a rereview of the 302s after the first day of the government's star witness's testimony. Schuelke's report found that the government's summary of the testimony failed to disclose critical impeachment information against the witness and exculpatory evidence with respect to Stevens.

Even in cases where the situation is not so extreme, the wording of a particular statement by a witness made contemporaneous to the witness's utterance is presumed to be more accurate, and it is easy to envision that a later summary of statements will be less precise or change the meaning entirely.

The Fairness in Disclosure of Evidence Act essentially legislates that the Jencks Act does not trump a prosecutor's Brady/Giglio discovery obligations. In theory, that principle is not new, but it is variously and inconsistently applied. The proposed law provides that the favorable information that is in the possession, custody or control of government prosecutors or agents, or the existence of which is known, or by the exercise of due diligence would become known, to the prosecutor, must be disclosed to the defense irrespective of the provisions of the Jencks Act.

The proposed law also provides that, like other favorable information known to the prosecution team, witness statements and reports, even if they fall into the category of Jencks Act material, must be produced without delay after arraignment and before the entry of any guilty plea. (Cases involving classified information will continue to be governed by the Classified Information Procedures Act, which specifically addresses the unique discovery, timing and procedural issues in those cases.) In other words, a prosecutor cannot avoid timely producing interview summaries, reports or other materials that contain Brady/Giglio materials by relying on their status as Jencks Act material because the witness will or may testify at trial.

Significantly, the clarity of the proposed law and the fact that the discovery principles would be legislated also will make its application more consistent, easier for courts to enforce, and a potential criminal violation if prosecutors fail to follow it. Still, Senate Bill 2197 does not get us all the way there. There will continue to be the potential for mischief or for unintentional error that fatally damages a defendant's case. Prosecutors who play with the timing or method of disclosures are playing with fire.

Especially after a spate of recent federal and state misconduct cases, it is easy to conceive of an evidence summary that strays from the intent of a statement (Stevens case), heavily edited applications for government investigative techniques that leave out information critical to approval (application for wiretap authority in the Raj Rajaratnam case[1]), and exculpatory witness statements that are improperly withheld (Duke lacrosse case).

Part two of this article will examine why full disclosure, or "open file" discovery, is the only way to ensure that defendants get the information they need to effectively defend their cases, to limit the exposure of prosecutors to allegations of misconduct for their handling of discovery issues, and to guarantee fair trials and verdicts that stand up against collateral attack and appeal.

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[1] Akin Gump Strauss Hauer & Feld LLP serves as legal counsel to Raj Rajaratnam in the case U.S. v Rajaratnam (09 Cr. 01184)