

## CLIENT ALERT

### **NEW DEPARTMENT OF JUSTICE GUIDANCE SEEKS TO CURB DISCOVERY ABUSES THAT PLAGUED DOJ CASES IN 2009**

In the wake of allegations of prosecutorial misconduct in a number of high-profile prosecutions throughout 2009, the Department of Justice (DOJ) has thoroughly revamped its procedures for turning over evidence to the defense in criminal cases. On January 4, 2010, DOJ issued new guidance to all of its prosecutors mandating minimum standards the prosecutors must meet regarding discovery in criminal cases. The guidance, issued by Deputy Attorney General David Ogden, requires the 93 U.S. Attorney's offices and the other prosecuting offices within the Justice Department to establish standards governing where prosecutors must search for discoverable evidence in criminal cases, how that search should be conducted and what evidence should be turned over to defense counsel. General counsel's offices should familiarize themselves with the guidance as it will impact every federal criminal case undertaken by DOJ.

### **RECENT ALLEGATIONS OF PROSECUTORIAL MISCONDUCT**

The new procedures instituted by DOJ were issued in response to a series of highly publicized prosecutions in which charges were dismissed after the prosecutors on the matter were accused of misconduct involving either withholding or misusing key evidence.

In April 2009, a federal court in Washington, D.C., granted the government's motion to overturn the convictions against former Sen. Ted Stevens. The government was forced to dismiss what was one of its highest-profile public corruption cases after it was revealed that the prosecutors on the matter had failed to turn over key evidence to defense counsel, including witness statements that contradicted important parts of the government's case against Stevens. The prosecutors are now being investigated by a special counsel for possible criminal contempt violations.

In December 2009, a federal court in Los Angeles dismissed charges against three executives of Broadcom Corporation whom the government had accused of fraud relating to the backdating of stock options. Broadcom co-founder Henry Samueli, who had pleaded guilty, testified for the government in the trial of Broadcom former chief financial officer William Ruehle. The district court took the highly unusual step of reversing Samueli's conviction after he testified and directing an acquittal of Ruehle. The court also dismissed the fraud charges pending against Henry T. Nicholas III, the company's other co-founder. The court based its ruling on a finding that the government had "intimidated and improperly influenced" witnesses crucial to the defense.

At the end of December, another federal judge in Washington ordered the dismissal of indictments against five Blackwater Worldwide security guards charged in connection with a notorious 2007 fire in Baghdad's Nisour Square. The judge in the Blackwater matter found that the government committed a "reckless violation of the defendants' constitutional rights" by improperly using statements the defendants had been compelled to give.

#### **THE NEW GUIDANCE PROVIDES MINIMUM STANDARDS AND ENCOURAGES BROADER DISCLOSURES OF EVIDENCE**

The new guidance issued by the deputy attorney general is the product of a working group put together to undertake a thorough review of DOJ's discovery practices in light of the discovery failures in these and other recent cases. The working group determined that the "incidents of discovery failure are rare." Nevertheless, the new guidance is part of DOJ's effort to counter the "disproportionate effect on public and judicial confidence in prosecutors and the criminal justice system" brought on by allegations of prosecutorial misconduct.

The guidance creates minimum standards for disclosures of evidence in all prosecuting offices throughout the DOJ. The working group found that, while 90 percent of all U.S. Attorney's offices have standardized discovery policies, only 52 percent of DOJ's other litigating components (such as the Criminal, Antitrust and Tax divisions) have standardized discovery policies. The guidance issued by Deputy Attorney General Ogden provides minimum standards that must be adhered to by all offices (both the U.S. Attorney's offices and the DOJ litigating components) when prosecutors are deciding which files should be searched for discoverable evidence and how much of that evidence should be turned over to defense counsel.

Each prosecuting office in the department is required to develop its own written discovery policy implementing these standards by March 31, 2010. DAG Ogden made clear that the guidance provides merely the "minimum considerations" that must be applied in every criminal case. The guidance includes an expectation that prosecutors will "provide discovery broader and more comprehensive" than the minimum discovery obligations.

## KEY POINTS IN THE NEW GUIDANCE

The new guidance is an attempt by DOJ to help prosecutors meet their obligation to provide defense counsel with relevant evidence, especially including exculpatory evidence, as required by the Federal Rules of Criminal Procedure, the Jencks Act, *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). The guidance is broadly divided into two parts: the first part explains where prosecutors must search for potentially discoverable evidence; the second part describes the types of files that must be reviewed. In both areas, DOJ has provided some helpful guidance on difficult issues that should be of interest to general counsel.

Prosecutors are reminded of their obligation to search for discoverable material in the files of “all members of the prosecution team.” But when determining who falls within the prosecution team, prosecutors must “err on the side of inclusiveness.” The guidance instructs DOJ prosecutors to consider discoverable material in agencies outside of DOJ, even including non-law enforcement agencies.

The guidance takes a particularly broad view of discovery when an agency such as the Securities and Exchange Commission or the Environmental Protection Agency is investigating the same subject matter as the DOJ’s criminal investigation. When there is such a “parallel” investigation, the DOJ must consider whether its relationship with the agency is close enough that the agency must be viewed as part of the prosecution team whose files must be searched for material that can be discoverable by defense counsel. But even in those instances when the prosecutors determine that the staff of a parallel agency investigation is not part of the prosecution team, the guidance encourages prosecutors to review those files for potentially discoverable evidence.

In addition to describing where prosecutors must look for discoverable evidence, the guidance covers the types of files that must be reviewed by prosecutors. The guidance provides explicit instructions regarding the files of investigative agencies used by DOJ. Whether the matter was investigated by a DOJ agency, such as the FBI, or by a law enforcement agency outside DOJ, such as the Defense Criminal Investigative Service, prosecutors are required to search for discoverable material in the entire investigative file. The guidance notes that the files to be searched include, for example, e-mails, FBI Electronic Communications and files the agency maintains pertaining to testifying cooperators and informants. “Generally, all evidence and information gathered during the investigation should be reviewed.” (See “[Memorandum for Department Prosecutors.](#)”)

The guidance also provides standards relating to the discovery of witness statements. An area of particular concern with witness statements is materially inconsistent statements made by a witness, which are required to be turned over under *Giglio*. Every time a witness is interviewed in an investigation, unless the interview was merely to help the witness prepare for trial, the guidance creates an expectation that a law enforcement agent will create a written memorandum of the interview. Each such memorandum must be reviewed when prosecutors are

deciding what evidence to provide defense counsel. In addition, those interview memoranda are expected to document every material variance in a witness's statement, **even if the variance occurred within the course of a single interview**. And, of course, the guidance makes clear that such variations in a witness's statement should be turned over to defense counsel. The new guidance even suggests that a witness's statement that is inconsistent with information previously provided to DOJ by that witness's attorney may create a variance that should be provided to defense counsel.

## CONCLUSION

The new guidance will impact every federal criminal case throughout the country. For the first time, DOJ has required its prosecuting offices to put in writing the standards each office will use to determine what information will be turned over to defense counsel. The guidance mandates minimum standards that will create a uniformity in discovery standards across DOJ offices that previously has not existed. Moreover, the guidelines would seem to confirm that prosecutors must search a broad array of potentially discoverable information, including electronic data such as e-mails. By reiterating in several places that prosecutors should err on the side of inclusion and by requiring prosecutors to thoroughly scour their files—indeed, by requiring in many cases that prosecutors review files in agencies wholly outside of DOJ—the DOJ has taken important steps towards correcting some of the abusive practices that occurred in the last year.

## CONTACT INFORMATION

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