Federal Courts Will No Longer Brook Prosecutor Misconduct

By **Celeste Koeleveld and Carlisle Overbey** (February 10, 2022)

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Federal prosecutors have recently been facing scrutiny for allegedly misleading the defense and the court.

In yet another example, on Jan. 25, Chief U.S. District Judge Elizabeth Wolford of the U.S. District Court for the Western District of New York ordered an evidentiary hearing in a $500 million real estate fraud case to determine whether the charges should be dismissed with prejudice because of discovery violations and misrepresentations that she is concerned may have been intentional.

Those ethical breaches included telling a magistrate judge that discovery was complete when the government had not yet turned over the contents of several phones and computers and then continuing to mislead the court as to the status of discovery.

The Western District of New York case, U.S. v. Giacobbe, thus joins a growing list of cases in which federal courts have determined that federal prosecutors have engaged in serious misconduct.

Most notably, in the 2020 U.S. v. Nejad decision,[1] U.S. District Judge Alison Nathan of the U.S. District Court for the Southern District of New York heavily criticized the government for failing to turn over exculpatory evidence, requiring the entire U.S. Attorney's Office for the Southern District of New York to read her opinion and referring the prosecutors to the Office of Professional Responsibility for disciplinary review.

And in a highly unusual move, following the conviction, the prosecutors themselves filed a nolle prosequi with the court, declaring that they no longer wanted to pursue charges and seeking an order of dismissal. Ultimately, Judge Nathan vacated the conviction and dismissed Nejad's case with prejudice.

Groundhog Day?

The missteps in Giacobbe and Nejad bookend other recent serious errors by prosecutors.

As with the discovery failings in Giacobbe, in the April U.S. v. Weigand decision, U.S. District Judge Jed Rakoff of the Southern District of New York admonished prosecutors for their inadvertent failure to disclose significant discovery from an iPad seized from a cooperating witness until the third day of trial, remarking sarcastically, "I see Judge Nathan's opinion [in Nejad] has had meaningful deterrent effect."[2]

Similarly, in the 2020 U.S. v. Jain decision, U.S. District Judge P. Kevin Castel of the Southern District of New York criticized prosecutors and the FBI for neglectfully delaying disclosure of a significant amount of discovery totaling five terabytes of data.[3]

The court chastised the prosecution and the FBI, noting that the conduct "besp[oke] of negligence" and ordered corrective action to be taken to ensure that this "sorry chapter cannot be repeated." The court required that a letter from the U.S. attorney's office senior

leadership be filed publicly on the docket addressing what corrective action would be taken by the office.

And, as in Nejad, several courts have criticized the government for both making false statements to the court and for failing to disclose Brady material.

In the January U.S. v. Ahuja decision in the Southern District of New York, U.S. District Judge Katherine Polk Failla discussed false statements made by the government to the court concerning modifications to a plea allocution for a cooperating witness, which were discovered by the defense post-trial via a Freedom of Information Act request.[4] As with Jain, the Ahuja court ordered sworn statements from the prosecution team to be filed concerning those false statements, and the matter is pending.

Finally, though the criticism arose in a different procedural posture, in the 2020 U.S. v. Schulte decision, U.S. District Judge Paul Crotty of the Southern District of New York instructed the jury on drawing adverse inferences based on the prosecutor's failure to timely disclose Brady and Federal Rule of Criminal Procedure 16 material. Specifically one witness had been put on administrative leave, arguably because of suspicions that he had been involved in the crime the defendant was charged with in.[5]

Is a Change in Disclosure Rules in Order?

While increased scrutiny of prosecutors' compliance with their discovery and other obligations is welcome news for defense counsel, the obvious concern is that many prosecutorial missteps go unexposed and unaddressed, to the potential detriment of fair, reliable and just outcomes.

One way to remedy that danger is to level the playing field and change the disclosure rules. Many missteps could be avoided, for example, with open-file discovery, so that defense counsel's access to critical evidence would not depend solely on the prosecutor's sometimes flawed judgments about what is relevant and material to the defense and what is potentially exculpatory. Particularly in data-heavy cases, as white collar cases tend to be, open-file discovery should be the standard.

Another necessary reform is an amendment to Federal Rule of Criminal Procedure 17 to make it easier for the defense to subpoena records that are material to the defense, without the judicially imposed requirements of specificity and admissibility that are often impossible to meet even where exculpatory evidence exists.

The current limitations on Rule 17 make it far too difficult to mount a defense while the government has nearly unchecked power to gather records through grand jury subpoenas and to interview witnesses — who often feel obligated to speak to federal law enforcement.

Furthermore, prosecutors should be required to make a good faith effort to identify trial exhibits at a sufficiently early stage to allow defense counsel to adequately assess the evidence and prepare for trial.

Ultimately, it is a question of fairness and due process. A five-terabyte data dump, leaving it to the defense to conduct a meaningful review with often woefully inadequate resources, is simply not consistent with due process. Reforms like these would enable defense counsel to mount a meaningful defense while serving as a check on government power and limiting the impact of government missteps.

The End of an Era

Even in the absence of such changes in rules and procedures, defense counsel should take full advantage of federal judges' growing intolerance of prosecutorial misconduct. The unmistakable message from these cases is that federal prosecutors can no longer expect to be given the benefit of the doubt when defense counsel and the courts uncover discovery failures or other questionable conduct.

The implications for the defense bar are clear.

First, defense counsel should scrutinize prosecutors' actions during the pretrial process, especially discovery delays or gaps, and make a careful record of every apparent misstep.

Second, defense counsel should bring those missteps to the prosecutor's and importantly, the court's, attention early and often, to put pressure on the U.S. attorney's offices. This is particularly crucial in white collar cases, in which the volume of discovery may overwhelm inadequately resourced prosecutors and increase the chance of errors.

That pressure may result in or call attention to further failures that may be helpful to the defense, particularly because district courts have been more willing to impose consequences on the U.S. attorney's offices, including requiring prosecutors to submit affidavits, conducting evidentiary hearings, and, at least in Giacobbe, considering whether the misconduct warrants a dismissal of the charges with prejudice.

The era in which federal judges are willing to give prosecutors the benefit of the doubt regarding apparent discovery violations or inaccurate representations may be coming to an end.

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[1] No. 18 Cr. 224 (AJN), ECF Docket Nos. 379, 397 (S.D.N.Y. Sep. 16, 2020).

[2] No. 20 Cr. 188 (JSR), ECF Docket No. 295 (S.D.N.Y. April 21, 2021).

[3] No. 19 Cr. 59 (PKC), 2020 WL 6047812 (S.D.N.Y. Oct. 13, 2020).

[4] No. 18 Cr. 328 (KPF), ECF Docket Nos. 385, 424 (S.D.N.Y. Jan. 13, 2021).

[5] No. 17 Cr. 548 (PAC), ECF Docket Nos. 328, 345 at 12 (S.D.N.Y. 2020).