

Understanding Criminal Discovery

Outline

- Differences Between Criminal and Civil Discovery
- Categories of Discovery Generally
- What's Changed
 - Overall Changes
 - What's Changed in Each District – Discovery Policies
- Why the Rules Changed
- How to Deal with the Changes in the Context of Environmental Prosecutions
- How Electronic Communications Could Negatively Impact Prosecutions

Differences Between Criminal and Civil Discovery

- Government has an affirmative duty to provide defendants with evidence gathered during an investigation to defend him/herself at trial
- Obligation to preserve evidence once an investigation begins
- Inability to negotiate criminal discovery

Categories of Discovery

- General Criminal Categories of Discovery
 - Rule 16
 - Brady
 - Giglio
 - Jencks
 - 404(b)
- Other Categories
 - Electronically Stored Information (“ESI”)
 - Agency Records

Federal Rules of Criminal Procedure Rule 16

- Rule 16 Requires the government to provide the defendant with the following if it will be used at trial by the government or is helpful in preparation of the defense:
 - Defendant's Oral Statements
 - Defendant's Written or Recorded Statements
 - Statements of employees with the legal authority to bind the organization (e.g., company)
 - Prior record
 - Documents, objects, reports, examinations, etc.
- Rule 16 does not require the government to provide:
 - Internal government documents, memos, etc. made by an attorney or other government agent in connection with the investigation or prosecution except as required above

Discovery Required by Case Law

- Supreme Court Cases
 - *Brady* – Exculpatory material
 - *Giglio* – Impeachment Material
 - *Henthorne* is a 9th Circuit that addresses the duty to examine government employee personnel files upon a defendant's request for their production
 - *Jencks* – Government Witness Statements
 - Codified at 18 U.S.C. § 3500

Categories of Discovery

- 404(b) Evidence
 - Character Evidence
- Other Categories . . .
 - Electronically Stored Information (“ESI”)
 - Agency Records

What's Changed?

- Overall Changes
 - ESI
 - More Expansive View of *Brady/Giglio/Jencks*
 - Duty to Gather Additional Information Beyond the Case File from “Related Proceedings”
- What's Changed in the District -- Discovery Policies in Each District

Why the Changes?

- Problematic Cases
 - United States v. Theodore Stevens
 - United States v. W.R. Grace
- United States Justice Department Response
 - OPR Investigations
 - Revamped Department-Wide Discovery Policies
 - Training
 - Districts Were Compelled to Update and Submit Discovery Policies – e.g., NDNY, WDNY, EDTN, ECS
- Federal Agency Response
- Cases of Interest
 - United States v. Suarez – preservation of ESI
 - United States v. Stein – release of agent notes under Rule 16

What's Changed?

- Overall Changes
 - ESI
 - More Expansive View of *Brady/Giglio/Jencks*
 - Duty to Gather Additional Information Beyond the Case File from “Related Proceedings”
- What's Changed in the District -- Discovery Policies in Each District

How Do We Deal with
These Changes in the
Context of Environmental
Cases?

What's the Playing Field?

- Federal Rules of Criminal & Civil Procedure
- Local Rules
- Standing Orders
- Discovery & Scheduling Orders (“DSOs”)
- Discovery Policies & Choice of Policy
 - District
 - DOJ Litigating Component
 - ECS Discovery Policy § I
- CID Policies – e.g., EPA Region 2 v. EPA Region 4
- Other Law Enforcement Policies – NYS v. EPA

Who Are the Players?

(ENRD Policy § II(E))

- Investigation Team
 - EPA-CID
 - NYS-DEC
 - NYS-DOL
- Other Agencies Who “May Possess Files Relevant to the Investigation”
 - EPA Region
 - OSHA
 - Other States

Document Inventory
Meeting With the Entire
Investigation Team Well In
Advance of Indictment

What's Been Generated So Far

- IARs & Notes
- Photos
- Permit/Document Reviews
- ESI – Emails, etc. (what of these are potentially discoverable)
- Expert Materials – e.g., NEIC reports
- GJ Materials

How Do We Get It Organized?

- Rule #1: Handle the Documents As Few Times As Possible
- Rule #2: Organize Early, Often, and With an Eye Towards:
 - Continuing the Investigation
 - GJ Presentation
 - Discovery
 - TRIAL
- Rule #3: Use the Resources that Are Available – i.e., databases

Best Approach To Date

- Organize Files By Source
- Send to DC
 - Exact Duplicates for OLS and Others As Necessary
 - Scan prep
 - Load Into Concordance As “Kept in the Ordinary Course”***
 - Assign Document Control Numbers (a.k.a., Bates Stamps)
 - Populate Fields
 - GJ Materials?
 - Date Added
 - Source
 - Tagging for
 - Hot Docs
 - GJ Presentation
 - Brady/Giglio/Jencks
 - Trial Exhibits
- Originals Returned to Document Repository***
- Repeat this Process as New Materials Come In

CHATTANOOGA-HAMILTON COUNTY AIR POLLUTION CONTROL BUREAU

Incident Report

Date of Incident: September 8, 2005

Incident #: 05-298

- Source:
1. Gary Fillers & Donald Fillers, purportedly d/b/a Watkins Street Project LLC
2420 East Main Street, Chattanooga, TN 37404
 2. A.D.C. Systems, Inc.
2473 Baker Road, Goodlettsville, TN 37072
Registered Agent: Keith Stanton, 2715 Bransford Ave, Nashville, TN 37204
 3. Mathis Companies, Inc.
701 Morrison Springs Road, Suite 40003B, Chattanooga, TN 37415
Registered Agent: James F. Mathis - Same Address

Location: 1701 Watkins Street, Chattanooga, 37404

Nature: Open Burning Odor Nuisance Odor/Nuisance
 Asbestos VE's Permit Condition
 Chemical Spill/Release Other:

Detected by: Complaint Patrol Inspection Self Reported
 Other

Recommendations Or Action Taken: Unfounded No further action
 Verbal Warning Open Burning Violation Warning Notice #
 NOV Warning NOV Director's Conference
 NOV Court Other: Being investigated by EPA

Findings:

SYNOPSIS:

In late 2004 a structure was demolished at 1700 Watkins Street within the city limits of Chattanooga and within Hamilton County Tennessee. On September 14, 2005 suspected regulated asbestos containing material was identified by the Air Pollution Control Bureau. Test results showed the sampled material was positive for asbestos. Regulated asbestos containing materials were identified and outlined in an asbestos survey prior to the demolition beginning. For reasons currently under investigation by the US EPA, all of the identified RACM was not removed prior to the demolition taking place. Demolition of the structures began in late 2004 with demolition efforts stopping in approximately July 2005. Debris from the demolished structure was scattered throughout the property that involves nearly a complete city block. The site sat idle for approximately two months. Regulated asbestos containing material was identified on approximately 40% of the property mixed in with other debris. The site adjoins property where an active day care facility is located and is in a residential and commercial area.

City, County, State and Federal agencies were notified of the findings. The US EPA and Chattanooga-Hamilton County Air Pollution Control Bureau monitored the clean up efforts by the property owner. The site was cleaned of environmental concerns by October 27, 2005.

The incident is currently being investigated by the US EPA.

File Edit Search Documents Tools Help



<Quick search>

- Default tag
- 1st Prod Scrn
- APC Black Book
- Check with Matt
- Do Not Produce
- Final Production
- Giglio
- Hearing Jencks Production
- IAR attachments
- IAR Defendants
- IARs
- IARs with attachments
- Jencks
- Jencks/Giglio
- Kathryn/Brady
- Mathis Sketchy Practices
- new iars
- PDF of Pictures
- printing
- Printing Emails for Todd
- printing exhibits 2nd attempt
- printing exhibits 3rd attempt
- printing exhibits 4th attempt
- Printing IARs
- Produce 1/7/10
- PRODUCE 11/16/10
- Produce 11/18/09
- Produce 2/22/10
- PRODUCE 4/8/10
- PRODUCE 5/17/10
- PRODUCE 7/22/10
- Produce 9/22/09

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What Else Do We Need?

- ENRD Policy §§ II(E)(4-5) – collect other materials from agencies that “may possess files relevant to the investigation”
 - We’re obligated to look for exculpatory materials, but this is a great opportunity to look for inculpatory and 404(b) materials as well
 - Sharing Letters

[REDACTED]
Counsel for Occupational Safety and Health Administration
United States Department of Labor
[REDACTED]

Via: USPS & Email

Re: [REDACTED]

Dear Ms. [REDACTED],

Upon information and belief, Occupational Safety and Health Administration ("OSHA") issued fines of \$ [REDACTED] to [REDACTED] in or around [REDACTED]. We understand that there may have been investigation, citations, and/or other fines that were issued prior to [REDACTED] as well. Please provide copies of any material in the possession of OSHA in connection any investigations of [REDACTED] from 2005 to the present date. The requested material includes, but is not limited to: documents, memorandums, computer printouts, notes, video footage, photographs, recorded interviews, records of violations, and the complete administrative records supporting any notices of violation, citation, fine, etc.

The requested material would be helpful in investigating and prosecuting the above-listed entities/individuals who, along with other co-conspirators, created, operated, and concealed an illegal landfill in Upstate, New York. Additionally, these entities/individuals have processed and transported hazardous materials (e.g., regulated asbestos-containing materials) across state lines without following applicable regulations. Potential charges include violations of the Clean Water Act, Resource Conservation and Recovery Act, Superfund statute, conspiracy statute, and wire/mail fraud statutes. Moreover, the targets of our investigation have been implicated in a pattern of conduct that has obstructed our investigation to include fabricating false documents, falsifying [REDACTED], and making false representations to the Environmental Protection Agency. Therefore any material which members of OSHA prepared and maintained in connection with their inspections, investigations, and citations of [REDACTED] is likely to contain pertinent information which we need to review as soon as possible.

Should you need further information, I am available at the numbers/addresses listed in the letterhead. Thank you in advance for your continuing assistance with this case.

Sincerely,

Todd W. Gleason
Environmental Crimes Section

What Else Do We Need?

- ENRD Policy §§ II(E)(4-5) – collect other materials from agencies that “may possess files relevant to the investigation”
 - We’re obligated to look for exculpatory materials, but this is a great opportunity to look for inculpatory and 404(b) materials as well
 - Agency Requests & Sharing Letters (Handout #1)
 - Privilege Reviews
- Criminal Histories
- *Henthorn* Requests

Get Everyone On The Same Page

- Letter to Investigation Team
 - Similar to a 6(e) Letter

Investigator
New York State Police

Re: Discovery Obligations Related to United States v. [REDACTED]
Case No. [REDACTED]

Colleagues:

This letter memorializes our prior conversations regarding the government's discovery obligations. Please ensure that all members of the investigative team review this letter. If you or any other members of the investigative team have any questions about anything discussed in this letter, please contact me or one of the other attorneys on the case.

Exculpatory and Impeachment Material

As you are aware the government has a Constitutional obligation to disclose any and all exculpatory and impeachment materials, sometimes referred to respectively as *Brady* and *Giglio* materials. Exculpatory material is material that generally is favorable to the defense, including information that is inconsistent with any element of any crime charged against the defendants or information that establishes recognized affirmative defenses. Impeachment material is material that casts doubt upon the accuracy of any evidence—including but not limited to witness testimony—that we intend to rely on to prove any element of any crime charged. Some examples of impeachment evidence are a witness' prior criminal history or information that suggests a witness has a bias against the defendants. When we know of such material, but have no record of it, we must still produce it. For instance, if a member of the prosecution team is aware of a witness statement that could be used for impeachment, but that statement was never written down, we must reduce it to writing and produce it to the defense.

Jencks Material

Pursuant to 18 U.S.C. § 3500, the government is obligated to produce to the defendants statements of prospective government witnesses that relate to the subject matter of the witnesses' testimony. For the purposes of *Jencks* disclosures, a "statement" is defined as (1) a written statement made by a witness and signed or otherwise adopted or approved by him; (2) a

stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by a witness and recorded contemporaneously with the making of such oral statement; or (3) a statement, however taken or recorded, or a transcription thereof, if any, made by a witness to a grand jury. Although an agent's notes and/or report of interview are usually not *Jencks* (as to that witness), they need to be identified and preserved. Reports of interview are occasionally turned over—even those of interviewees who are not prospective witnesses. Any email you may have received from a witness may also be *Jencks*. And, depending on the context, emails you or another agent may send that discuss the substance of this case may be *Jencks* if you or that other agent takes the stand as a witness for in the government's case in chief. Please check your email records for these kinds of emails. Going forward, during trial preparation, you should avoid to the extent possible sending substantive emails about the case.

Rule 16 Material

Pursuant to Federal Rule of Criminal Procedure 16, the government is obligated, upon the defendants' request, to disclose several categories of information, including:

- ◆ the substance of any relevant oral statement made by a defendant
- ◆ a defendant's written or otherwise recorded statement
- ◆ a defendant's prior criminal record
- ◆ documents and objects, within the government's possession, custody or control (1) that are material to preparing the defense; (2) that we intend to use in the government's case-in-chief; or (3) that were obtained from or belong to the defendant
- ◆ scientific tests that are material to preparing the defense or that we intend to use in the government's case-in-chief.

Although there may be cases where there are reasons to limit production based on Rule 16 (e.g., by withholding items that are obviously not material), in this case I have concluded that it is in the interests of the United States to produce all documents and objects seized during any search warrants, items produced by the defendants or third parties pursuant to grand jury subpoenas, items obtained from third parties or state agencies not pursuant to subpoena, and items obtained from witnesses. It is my intention to avoid contention over discovery by producing more than what is required.

Scope of the Investigative Team

The government is obligated to seek out discoverable materials from all members of the prosecution and investigative teams. For the purposes of the discovery obligations discussed above, members of the investigative team include federal, state and local law enforcement officers participating in the investigation and prosecution of the above referenced criminal case and related civil proceedings. Some members of the investigative team may have retired or otherwise ceased their involvement in the case. We have an obligation to seek out any and all discoverable materials that may be in their possession.

What Will Be Withheld

As I alluded to earlier, I do not intend to produce any agent rough notes, or our internal deliberations about this case (referrals, prosecution memoranda, etc.). Nonetheless, rough notes must be preserved. Further, you and the other agents on the case should review your notes to ensure that the reports of interview reflect the substance of interviews properly, *particularly with*

Get Everyone On The Same Page

- Letter to Investigation Team
 - Similar to a 6(e) Letter
- Discovery Plan
 - Cons
 - Tedious
 - Committing yourself in writing
 - Pros
 - No one can feign surprise when an issue arises
 - Expectations are clear from all points of view
 - It's required – ENRD Policy § IV(D)

Discovery Timing

- Look to Fed. Rules Crim. Proc., Local Rules, Standing Orders, & DSOs for the Timetable
- NDNY Example – Local Rule 14.1
 - 14 days after arraignment – Fed. R. Crim. P. 16(a), 12(d); Brady; FRE 404(b)
 - 14 days prior to jury selection – *Giglio* & Criminal Histories
 - A time “so as to avoid undue delay at trial or hearings” – Fed. R. Crim. P. 26.2 and 18 U.S.C. § 3500 materials (Jencks)

Discovery Process in NDNY

- 14 days after arraignment we produce at a minimum...
 - A DVD containing images/loadfiles of all documents in database except what is tagged as only Jencks and criminal histories
 - Expert Disclosures
 - 404(b) Notice
 - Reciprocal Discovery Demands ***
 - Discovery Letter – Handout #4
- Repeat and supplement as required by additional deadlines or new information coming in
- What we generally resist producing – “indexes,” “lists of hot docs,” “blowbacks,” and agent notes***

Pros & Cons of “Database Discovery”

Cons

- Shifts burden of work to us as opposed to “open file” methods
- Allows the defense to be more organized and potentially do their own presentations
- Opens the door for ESI disputes and “they’re papering us.”
- May be impractical for smaller cases

Pros

- Provides greater degree of control and tracking over documents
- Thoroughly documents discovery
- Avoids any need for mid-trial discovery***
- Undermines stock defense excuses – “they never gave me that.”
- Gives a head start on electronic courtroom presentation

How Electronic Communications Could Negatively Impact Prosecutions

Problems with Email & Text Communications

- Email and text messages are discoverable
- Meaning lost in translation
 - No nonverbal communication cues
- Email/Text is used to communicate to avoid communicating
- Assume that your email/text will be public information and write accordingly

Preservation Issues & Production Issues

- Communicate in methods that are easy to preserve and collect
- Text messages can be difficult to preserve/produce
 - Carrier contract dictates
- Voicemail can be difficult
 - Inability to search server or tapes
 - Time Limits on storage
 - Production in native format

Social Media

- Personal v. Agency Social Media
- Types
 - Website
 - Facebook
 - Twitter
 - Instagram
 - Blogs

Questions?

Report an Environmental Violation

www.epa.gov/tips/

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