# Commentary: When liberty is at risk, fair disclosure required

**David Oscar Markus** All Articles **Daily Business Review May 02, 2011**

In a civil case where only money and not liberty is at stake, every witness and every document must be turned over to the other side. There are no surprises.

The rules in Florida criminal courts are similar, requiring prosecutors to disclose their witnesses and evidence to the defense, and the accused is even permitted to take depositions.

But surprisingly, the federal criminal system — where one's liberty is most at risk — does not permit depositions and requires prosecutors to make only very limited disclosures.

Prosecutors, for example, need not provide the defense with statements that their witnesses made until that witness actually takes the stand. Practitioners call the federal system "trial by ambush."

What many people do not know is that federal prosecutors are not required to disclose exculpatory or impeachment information, unless a prosecutor determines that it is "material" to the defense.

Appellate courts have determined that evidence is considered material only if it was admissible and would have made a difference in the trial. Unfortunately, many prosecutors in their zeal to win convictions do not disclose plainly favorable information by making their own determination that it is not "material" to the defense.

That was supposed to change after the failed prosecutions of U.S. Sen. Ted Stevens, the Duke Lacrosse team, and a number of other high-profile cases around the country where prosecutors knowingly concealed powerful evidence helpful for the defense.

Judges in these cases wrote extensive orders criticizing prosecutors for not disclosing the exculpatory evidence and imposed sanctions.

There was also a call for the rules to be changed, requiring disclosure of all favorable information, not just what prosecutors deemed "material."

Even the attorney general called for more training and issued guidelines to all federal prosecutors, instructing that they should err on the side of being open, even if that openness hurt their case.

The AG reminded prosecutors that they were tasked with doing justice, not winning. Ethical standards established by most state bar rules also require disclosure, even if the evidence is not "material."

All of this sounded very promising, but actions speak louder than words.

Prosecutors continue to keep their files closed, telling lawyers and judges that they need not disclose basic items such as interview reports of witnesses, even when those witnesses lie under oath, because their boss's guidelines and state ethical rules are not the law and therefore are not binding on them.

Because of these recurring problems, on April 22, 2011, in Miami, the American Bar Association's Criminal Justice Section passed a resolution "urging" a change in the federal rules to require prosecutors to timely disclose all favorable information to the defense.

Only the Department of Justice member of the section voted against the resolution, arguing that individual prosecutors could be trusted without such a rule. Many judges, including Paul Friedman in Washington, D.C., have explained why the "trust us" argument is flawed: "Most prosecutors are neither neutral (nor should they be) nor prescient, and any such judgment necessarily is speculative on … many matters that simply are unknown and unknowable before trial begins."

Based on these guidelines and cases, a simple — and what should have been uncontroversial — change was suggested to the federal criminal rules: prosecutors would be required to turn over all favorable information to the defense, not just "material" evidence.

Despite the ABA's resolution, the Department of Justice just convinced the Criminal Rules Advisory Committee (the group that recommends changes to the Federal Rules of Criminal Procedure) to vote down (on a 6-5 vote) this proposed rule change.

Perhaps the Department of Justice would like to amend the plaque found in federal courtrooms that reads: "We who labor here seek the truth" with the addition, "only if we think it is material."

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