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The Jencks Joke

Law360, New York (April 16, 2012, 12:54 PM ET) -- The *sturm und drang* surrounding the report on the mess the government made of its prosecution of the late Sen. Ted Stevens lays bare something that prosecutors and defense attorneys have known for decades: The Jencks Act is a joke. But it's no laughing matter.

Among the many dimwitted elements of the government's discovery practices in the Stevens case was its approach to the Jencks Act — the law that requires the government to turn witness statements over to the defense. The prosecution team — with the blessing of the highest levels of the U.S. Department of Justice — took the position that FBI reports of witness interviews were not witness statements under the Jencks Act and withheld them from the defense, turning them over only when ordered to do so by the court in the middle of trial.

Two things are notable about the Stevens team's approach to discovery under Jencks: (1) As a matter of law, it is technically permissible under Jencks, and (2) as a matter of practice, almost nobody, including the DOJ itself, actually reads Jencks this way.

And this is the problem with the Jencks Act. While the law reads one way, in practice, it is unworkable. And so most prosecutors, defense attorneys and judges follow the spirit of Jencks and a set of informal, unwritten Jencks practices that diverge sharply from the plain language of the law. Predictably, the chasm between the law and practice generates a lot of unpredictability and, occasionally, as in the Stevens case, disaster.

The Jencks Act finds its roots in a 1950s decision by the United States Supreme Court, in which Clinton Jencks challenged his conviction for lying about his membership in the Communist Party. The two key witnesses for the government in this wholly circumstantial case were longtime FBI informants, and both had submitted regular reports to their FBI handlers, none of which were produced to the defendant.

The court found the government's failure to disclose the reports impermissibly deprived the defense of critical impeachment information, noting that "[e]very experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory."

Concerned that Jencks would permit defendants to "rummage" and "rove at will through Government files," Congress passed the Jencks Act, which purported to reaffirm the holding of Jencks while placing limitations on its application. Title 18, United States Code, Section 3500, Congress' gloss on Jencks required the government to produce to the defense government witness "statement[s]" following direct examination.

Over the years, practice has diverged from the law in two critical respects. First, the Jencks Act narrowly defines a "statement" as a recording, a transcript, or a writing signed or adopted by a witness. The problem is that most witness statements gathered by law

enforcement do not fall in these categories — instead, agents interview witnesses and then memorialize those interviews in reports written by the agents and never shown to the witnesses. Thus, what is in some cases the only record of what a key witness said would not be discoverable under Jencks.

Some courts, however, suggested that parts of an agent's report could be Jencks because they reflected what a witness actually said. The inequity of depriving the defense of such critical information was palpable, and the potential law enforcement complications of picking and choosing what was and was not Jencks, gave rise to a sensible informal practice of treating agent reports as the equivalent of statements and disclosing them under Jencks.

The second way Jencks Act law and practice diverged was in the timing of the production. While the law allows a prosecutor to hold a statement until after the witness has testified on direct, the production of voluminous witness statements moments before cross-examination of a key witness clearly smacked of unfairness to the defense, and carried the potential of significant trial delays and inefficiencies. So, a practice developed of providing Jencks in advance of witness testimony, and often, along with other discovery.

When Jencks discovery tracked the informal practice, all was well. But when prosecutors chose to stand on their technical rights under Jencks, problems ensued. Defense attorneys accustomed to agent reports and pretrial disclosure howled. Courts accustomed to advance government disclosure of agent reports and government practices that avoided such discovery disputes in criminal cases were perplexed and frustrated.

The Stevens case, however, reveals even greater dangers triggered when the government seeks only to comply with the plain language of the Jencks Act. First, the government provided the defense summaries purporting to reflect Brady (exculpatory) information in witness statements. The defense compellingly argued that the statements were not produced in a usable format — that is, in a format that could be used to cross-examine a witness.

The government then produced a collection of heavily redacted interview reports purporting to reveal only what was exculpatory. In the midst of the testimony of the key government witness, the government realized it had over-redacted, and produced a less-redacted report reflecting critical statements that powerfully supported Stevens' defense. This incident led to the discovery of other withheld, exculpatory witness statements, and ultimately led to the dismissal of the Stevens case.

This points to the central problem with government efforts to game the discovery process through mere technical compliance with Jencks, particularly where Jencks intersects with Brady. The Supreme Court summarized this problem best in Jencks itself: "Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled see them to determine what use may be made of them. Justice requires no less."

Even a seasoned prosecutor is ill-equipped to predict whether or how helpful a statement may be to the defense, and a prosecutor who tries to game the Jencks process by abandoning established informal practices and instead complies with the mere letter of the Jencks Act violates the spirit of the Supreme Court's holding in Jencks. Such an approach is highly likely to deprive the defense of discovery to which it is entitled and risks a Stevens-like result.

New legislation introduced in the wake of the report on the Stevens trial attempts to address part of the Jencks problem. Courts have traditionally held that the Jencks Act trumps a prosecutor's Brady obligations — that is, that a prosecutor can withhold from the

defense even exculpatory Brady material contained witness statements until after the witness testifies on direct. The Fairness in Disclosure of Evidence Act of 2012 (FIDE) requires the production of favorable information to the defense "without delay," "notwithstanding section 3500(a) [the Jencks Act] or any other provision of law." This would undoubtedly cure part of the problem.

But the problem will still remain, because as the Supreme Court said in Jencks, "only the defense is adequately equipped to determine the effective use" of witness statements and exculpatory information. Even under the act, prosecutors ill-equipped to assess the favorability of evidence bear the primary responsibility of doing so.

And so, as with the Jencks Act, the FIDE Act will fall short of the practices that ensure the defense a fair trial — in particular, open-file discovery practices in which prosecutors do not pick and choose what evidence to share with the defense, but provide the defense the full scope of the evidence and witness statements and let the truth out. If the Department of Justice wishes to avoid more results like those of the Stevens trial, it should embrace open-file discovery as part and parcel of its interest, so aptly put by the Supreme Court "not that it shall win a case, but that justice shall be done."

One hopes that at some point, the Jencks Act will be amended to reflect these kinds of best practices. Until then, Jencks will continue to be a joke. Justice demands more.

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