UNITED STATES ATTORNEY'S OFFICE
MIDDLE DISTRICT OF ALABAMA
DISCOVERY POLICY–10/13/2010

INTRODUCTION

On January 4, 2010, the Deputy Attorney General directed each United States Attorney's Office to adopt a discovery policy, in order to ensure, to the extent possible, uniform discovery practices within districts. The matters described below are intended to supplement, not supersede, the policies of the Department of Justice, as set forth in USAM §§ 9-5.001 and 9-5.100. In addition, Criminal Resource Manual 165 provides detailed guidance to prosecutors on discovery issues and contains further discussion on many of the issues touched on in this policy.

Section 1. Disclosure Required By Law

Pursuant to Fed. R. Crim. P. 16, the Jencks Act, Fed. R. Evid. 404(b), the district court's Standing Order on Discovery, and the Government's constitutional obligation to disclose exculpatory material *see Brady v. Maryland*, 373 U.S. 83 (1963), including impeachment material, *United States v. Giglio*, 405 U.S. 150 (1972), absent a court order to the contrary, the Government has the obligation to disclose the following materials at the following times:

ITEM	**TIME FOR DISCLOSURE**
Defendant's Oral Statement (Rule 16(a)(1)(A))	Arraignment
Defendant's Written Statement (Rule 16(a)(1)(B)(i))	Arraignment
Written Record of Defendant's Oral Statement (Rule 16(a)(1)(B)(ii))	Arraignment
Defendant's Grand Jury Testimony (Rule 16(a)(1)(B)(iii))	Arraignment
Statement of Organizational Defendant (Rule 16(a)(1)(C))	Arraignment
Defendant's Prior Record (Rule 16(a)(1)(D))	Arraignment

ITEM	TIME FOR DISCLOSURE
Documents and Objects (a) material to defense, (b) intended to be used by Government in case-in-chief, and (c) obtained from or belonging to defendant (Rule 16(a)(1)(E))[1]	Arraignment
Reports of Examinations and Tests (Rule 16(a)(1)(F))	Arraignment
Written Summary of Expert Witness Testimony (Rule 16(a)(1)(G))	Arraignment
Brady material (Standing Order ¶ 1(B))	Arraignment
Giglio material (Standing Order ¶ 1(C))	Arraignment
Prior convictions of testifying informants (Standing Order ¶ 1(D))	Arraignment
Details of Identification Procedure (Line up, photo spread, etc.) (Standing Order ¶ 1(E))	Arraignment
Inspection of Seized Vehicles, Vessels or Aircraft (Standing Order ¶ 1(F))	Arraignment
Defendant's Fingerprints (Standing Order ¶ 1(G))	Arraignment
Rule 404(b) Notice (Standing Order ¶ 1(H))	Arraignment
Wiretap Details (Standing Order ¶ 1(I))	Arraignment
Prior Witness Statements (Rule 26.2; Standing Order ¶ 2(A))	Per Rule 26.2, after witness testifies; per Standing Order, "early disclosure" is "suggest[ed]."

[1]With respect to items for which copying is impractical (or impermissible, such as child pornography), the AUSA must advise defense counsel of the general nature of what is available for inspection and where inspection may take place. A record should be maintained of whether defense counsel took advantage of the right to inspect.

ITEM	TIME FOR DISCLOSURE
Agent rough notes (Standing Order ¶ 2(B))	Government Must Advise Agent to Preserve[2]

Absent an indication of possible witness tampering, an AUSA has the discretion to produce Jencks material at arraignment. An AUSA must seek supervisory approval to delay production until after the witness testifies (i.e., to disregard the court's "suggestion" that Jencks material be produced early).

On those rare occasions, e.g., complex cases and/or cases initiated by criminal complaint, when discovery cannot be completed before the arraignment date, the AUSA shall file a Motion to Modify the Standing Order on Criminal Discovery.

Section 2. Disclosure of Exculpatory and Impeachment Material Required By DOJ Policy

The Department of Justice has adopted a policy that requires us to go beyond even the strict requirements of *Brady* and *Giglio* and other relevant case law. Specifically:

i. Exculpatory information - information that is inconsistent with any element of the crime or which establishes a recognized affirmative defense, regardless of whether the prosecutor believes the information is admissible evidence or will make a difference between conviction or acquittal.

ii. Impeachment information - information that either casts a substantial doubt on the accuracy of any evidence the prosecutor intends to rely on to establish an element (including but not limited to witness testimony) or which might have a significant bearing on the admissibility of prosecution evidence. This is regardless of whether the prosecutor believes the information is admissible as evidence or will make a difference between conviction and acquittal.

iii Admissibility of the exculpatory or impeachment information - our disclosure requirement applies

[2] *See* Section 9, infra, for times when the Agent's notes must be produced.

even when the information subject to disclosure is not itself admissible evidence.

iv. Cumulative impact - if the cumulative impact of several pieces of information meets the disclosure requirements, disclose all of the information even if the pieces, considered separately, do not meet the requirements.

See United States Attorney's Manual § 9-5.001.

Section 3. Disclosure Beyond Legal and DOJ Requirements

Prosecutors have discretion to provide discovery beyond what the rules, statutes, case law, and DOJ policy mandate. The decision in any particular case on whether, how much, and when to provide materials in excess of that which is required will rest with the assigned AUSA. There may well be good reason for withholding something that does not have to be disclosed, such as the need to protect a witness or safeguard investigations of other people or other crimes committed by the defendant, or to preserve a legitimate trial strategy. On the other hand, expansive discovery may facilitate plea negotiations or otherwise expedite litigation. It can also reduce complaints by the defense. For example, in cases where there is documentary evidence too voluminous to review completely, an AUSA should consider providing the defense access to all of it lest there be a later inadvertent discovery by the AUSA of something that arguably should have been produced. In the long term, moreover, expansive discovery may foster or support our Office's reputation for candor and fair dealing.

Prosecutors should NOT refer to the expansive discovery practice as "open file discovery." Our files should never be completely open (to preserve attorney-client privileged information and the work product doctrine) and there may be times when another government agency might have some material or information of which you are not aware. The use of the term "open file" is therefore inexact and potentially misleading.

Section 4. Disclosure of Interview Memorandum

a. Testifying Witnesses

Although agents' reports of interview are not considered Jencks material of the witness, absent supervisory approval, the AUSA should treat such reports as if they were Jencks material and produce them at the time other Jencks material is produced (or at such earlier time as the AUSA deems appropriate).

In producing agent reports of witness statements, AUSAs should be careful not to characterize a witness interview as a Jencks statement in discovery letters or court pleadings if the interview does not fit the Jencks Act's definition of a witness statement. Additionally, because a witness interview report is not Jencks material unless the witness has adopted the memorandum as his statement, AUSAs should object to the use of the report in cross examination as if it were the witness's statement. In considering whether to produce reports of witness statements, AUSAs should consider potential serious threats to witness safety, national security, or ongoing criminal investigations before disclosing witness interviews.

b. Non-testifying Witnesses

The agent's memorandum of the interview of a non-testifying witness should be produced as Jencks material of the agent, if the agent will be testifying and the statement "relates to the subject matter" of the agent's testimony. If neither the agent nor the witness will be testifying, then the AUSA may, but need not, disclose the memorandum.

Section 5. The Prosecution "Team"

A. What Agencies are Part of the Team

Department policy states:

> It is the obligation of federal prosecutors in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant.

USAM § 9-5.001. This search duty also extends to information prosecutors are required to disclose under Federal Rules of Criminal Procedure 16 and 26.2 and the Jencks Act.

A comprehensive list of factors to consider in determining whether an agency is part of the prosecution team is set forth in Criminal Resource Manual 165, Step 1(A). In the easiest case, "the prosecution team" will include the federal law enforcement officers within the relevant district working on the case. However, many cases arise out of investigations conducted by multi-agency task forces or otherwise involve local law enforcement. In such cases, there is a substantial risk that the prosecutor will be charged with

knowledge of the contents of the state file. *See United States v. Atone*, 603 F.2d 566, 570 (5th Cir. 1979) ("[E]xtensive cooperation between the investigative agencies convinces us that the knowledge of the state team . . . must be imputed to the federal team."). Similar issues can arise in multi-district investigations and investigations that include prosecutors from DOJ or another USAO and criminal cases that are conducted parallel or subsequent to related civil or administrative proceedings.[3]

AUSAs should err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes. Carefully considered efforts to locate discoverable information will help avoid surprises at trial, reduce accusations of discovery violations, and, more often than not, lead to the discovery of inculpatory material.

If the AUSA believes that a government agency is in possession of *Brady/Giglio* material but is declining to make it available, the AUSA should advise the defense of that fact.

B. Who Should Gather the Information

When possible, the AUSA should personally review agency files for potentially discoverable information. In large or otherwise complex cases where personal review is not feasible, AUSAs should (1) meet with the individuals who will be assisting in gathering discovery to develop a discovery gathering plan, and (2) oversee the gathering and production of discovery to ensure that all discoverable information is identified and produced. Nevertheless, the AUSA assigned to the case remains ultimately responsible for the production of all discoverable information.

Section 6. Case Related Communications

Because of the duty imposed upon AUSAs to disclose material, AUSAs should avoid substantive case related communications with other AUSAs, agents or witnesses through any electronic means, including but not limited to email and text messages, especially where those communications involve trial or investigative strategy, witness statements, witness credibility or trial exhibits. (This is not intended to discourage the use of email to transmit materials such as investigative reports that previously would have been sent by fax or mail.) Any AUSA who does communicate through these mediums should be mindful that those communications may be

[3]Different issues arise in national security cases. DOJ has advised that it intends to issue further guidance on these issues.

discoverable and disclosable to the defense and the courts. Keep in mind that electronic records must be printed and stored in the agent/AUSA file just as any other written records would need to be preserved. Also be aware that witnesses may have communicated by email with the victim/witness coordinator, and those emails must be reviewed.

The format of the information does not determine whether it is discoverable. For example, exculpatory information that the AUSA receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email. When the discoverable information contained in an email or other communication is fully memorialized elsewhere, such as in a report of interview or other document(s), then the disclosure of the report of interview or other document(s) will ordinarily satisfy the disclosure obligation.

Section 7. *Giglio* Material for Law Enforcement Witnesses

Under DOJ policy, AUSAs must discuss potential *Giglio* issues with any testifying federal agent. If any issues are disclosed, the AUSA must bring the issues to the *Giglio* Policy Coordinator, who will follow the procedure established in USAM §9-5.100.

With respect to local law enforcement, it would appear that the Government has no obligation to even review such files. *See United States v. Dominguez-Villa*, 954 F.2d 562, 565-66 (9th Cir. 1992) (holding that "the district court exceeded its authority by requiring [the Government to] review . . . personnel files of state law enforcement witnesses").

Nevertheless, as a strategic matter, AUSAs should make the same inquiries of testifying local law enforcement officers as they would of a federal agent. If any issues are disclosed, the AUSA must bring the issues to the *Giglio* Policy Coordinator. If there are issues and we are unable to obtain relevant documents, then defense counsel should be advised of the issues and the fact that we have sought but been unable to obtain the documents.

Section 8. *Giglio* Material for Non-Law Enforcement Witnesses

A criminal history check should be performed on all witnesses. Any convictions or conduct that might be admissible under Fed. R. Evid. 608(b) should be disclosed. This should be done sufficiently in advance of trial so that the AUSA may file a timely motion in limine with respect to any convictions/608(b) conduct that the defense should not be permitted to use in cross-examination.

Section 9. Changes in Witness's Statement

Witnesses' statements will sometimes vary during the course of an interview or investigation. For example, they may initially deny involvement in criminal activity, and the information they provide may broaden or change considerably over the course of time, especially if there are a series of debriefings that occur over several days or weeks. Material variances in a witness's statements should be memorialized, even if they are within the same interview, and they should be provided to the defense as *Giglio* information. Disclosure can take the form of an agent's memorandum of interview; if the statement is made in a trial preparation meeting where only the AUSA was taking notes, then disclosure can be made in the form of a letter to defense counsel memorializing the pertinent information.

Section 10. Disclosure of Agent Notes

There are times when an agent's rough notes will have to be produced. Notes may be substantive evidence pursuant to Fed. R. Evid. 803(1) (present sense impression) (for example, notes of an interview of the defendant or notes of surveillance).

Notes may also be required to be produced if they contain *Brady* or *Giglio* material that is not memorialized in the agent's interview memorandum.

Interview notes may also become Jencks material if the witness adopts the notes. This can happen if the witness agrees with an agent's oral recitation of the agent's notes to see if they accurately reflect what the witness said. Even if the witness does not adopt the notes, if the witness is going to testify to something significant that is (a) in the notes, but (b) not in the interview memorandum, production of the notes will help cut off (or at least rebut) a line of cross-examination.

Notes can become Jencks for the agent if the agent is going to testify about what the witness said during the interview.

Section 11. Making a Record of Disclosures

AUSAs must be able to demonstrate what information has been disclosed. Whenever possible, the AUSA should provide discovery at or prior to arraignment and put on the record the fact that discovery has been produced. Any post-arraignment discovery should be provided in a manner that provides evidence that the discovery has been produced.

All documents produced in discovery should be Bates numbered. All discovery should be accompanied by a cover letter (a) stating the Bates numbers of the documents produced, and (b) itemizing any non-numbered objects (such as videotapes). The AUSA must maintain a copy of the Bates numbered documents and any other objects produced in the case file.

Section 12. National Security Cases

Cases involving national security, including terrorism, espionage, counterintelligence, and export enforcement, can present unique and difficult criminal discovery issues. The Department of Justice has developed special guidance for those cases, which is contained in Acting Deputy Attorney General Gary G. Grindler's September 29, 2010, memorandum, "Policy and Procedures Regarding the Government's Duty To Search for Discoverable Information in the Possession of the Intelligence Community or Military in Criminal Investigations," available at:

http://dojnet.doj.gov/usao/eousa/ole/usabook/memo/icdisco.pdf

Prosecutors should consult that memorandum and their supervisors regarding discovery obligations relating to classified or other sensitive national security information. As a general rule, in those cases where the prosecutor, after conferring with other members of the prosecution team, has a specific reason to believe that one or more elements of the Intelligence Community (IC) possess discoverable material, he or she should consult NSD regarding whether to request a prudential search of the pertinent IC element(s). All prudential search requests and other discovery requests of the IC must be coordinated through NSD.

Although discovery issues relating to classified information are most likely to arise in national security cases, they may also arise in a variety of other criminal cases, including narcotics cases, human trafficking cases, money laundering cases, and organized crime cases. In particular, it is important to determine whether the prosecutor, or another member of the prosecution team, has specific reason to believe that one or more elements of the IC possess discoverable material in the following kinds of criminal cases:

- Those targeting corrupt or fraudulent practices by middle or upper officials of a foreign government;
- Those involving alleged violations of the Arms Export Control Act or the International Emergency Economic Powers Act;

- Those involving trading with the enemy, international terrorism, or significant international narcotics trafficking, especially if they involve foreign government or military personnel;

- Other significant cases involving international suspects and targets; and

- Cases in which one or more targets are, or have previously been, associated with an intelligence agency.

For these cases, or for any other case in which the prosecutors, case agents, or supervisors making actual decisions on an investigation or case have a specific reason to believe that an element of the IC possesses discoverable material, the prosecutor should consult with NSD regarding whether to make through NSD a request that the pertinent IC element conduct a prudential search. If neither the prosecutor, nor any other member of the prosecution team, has a reason to believe that an element of the IC possesses discoverable material, then a prudential search generally is not necessary.