

Memorandum



To: Criminal AUSAs and SAUSAs
Western District of Arkansas

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Date: August 31, 2010

Subject: Policy for Discovery in Criminal Cases

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I. Introduction

This Memorandum sets forth the policy for the Western District of Arkansas regarding discovery in criminal cases.¹ This policy shall apply in all criminal cases arising in the Western District of Arkansas except those involving national security-related investigations and/or classified materials, which will be the subject of a separate policy. This Memorandum also contains specific, case-related considerations that may warrant a departure from the uniform discovery practices of the office and the procedures prosecutors² are required to follow to obtain supervisory approval to depart from the uniform practices in an appropriate case.

PROSECUTORS SHOULD BE FAMILIAR WITH THE *Guidance for Prosecutors Regarding Criminal Discovery* ISSUED BY THE DEPUTY ATTORNEY GENERAL ON JANUARY 4, 2010. A copy of that memorandum is attached (Attachment 1). That Guidance provides “a methodical approach to consideration of discovery obligations that prosecutors should follow in every case” and focuses on our obligations to ensure, in the first instance, we have all of the discovery that may need to be disclosed to defendants. This policy focuses on what we disclose and how we provide access to our discovery. Of course, prosecutors must also be familiar with the circuit and district court precedent and the local rules. Where there is or develops an inconsistency between those authorities and this policy, the former controls.

Prosecutors should also be familiar with statutory, rule-based, and case-based discovery obligations under Rule 16, the Jencks Act, *Brady v. Maryland*, and *Giglio v. United States*.

Finally, prosecutors should be aware that the U.S. Attorney’s Manual (USAM §9-5.001) “requires prosecutors to go beyond the minimum obligations required by the Constitution and establishes broader standards for disclosure of exculpatory and impeachment information.” In short, DOJ policy requires disclosure of “information beyond that which is ‘material’ to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419

¹ This memorandum provides only internal guidance for the United States Attorney’s Office for the Western District of Arkansas. It is not intended to, does not, and may not be relied upon to create any substantive or procedural rights enforceable at law by any person in any administrative, civil, or criminal matter or case. Nor are any limitations hereby placed on the otherwise lawful litigation prerogatives of the United States Department of Justice. See United States Attorney’s Manual (USAM) § 1-1.100. See also *United States v. Caceres*, 440 U.S. 741 (1979).

² The term “prosecutor” includes Assistant United States Attorneys and Special Assistant United States Attorneys.

(1995),” and encourages prosecutors to “err on the side of disclosure.” The policy requires prosecutors to produce “information,” not just “evidence,” and counsels that the prosecutor must consider the cumulative impact of items of information.

II. Nature of Discovery Disclosures

The Western District of Arkansas will provide prompt discovery in criminal cases consistent with the law, security, and policy set forth below. We will also provide copies of certain discovery to defendants in either paper or electronic form. The policy regarding producing copies of discovery to defendants will vary, however, depending on the nature of the case and the nature of the discovery, as set forth in more detail below.

A. A Note on Terminology

Our discovery policy is not an “open file” discovery policy. That does not mean the scope of our discovery disclosure is any less restrictive than before. The term “open file” discovery can be misleading. First, we will not always disclose everything in discovery (for example, we may not disclose a document in discovery if there is a safety issue, as explained in more detail below). Second, we may rightfully withhold items as allowed by Rule 16. Accordingly, we should never refer to our discovery policy as “open file.” Rather, we will simply describe our policy as a “discovery” policy.

B. A Note on Redaction

The need to redact discovery to protect the identity of witnesses and victims will arise repeatedly in criminal cases. The circumstances when redaction may be appropriate are outlined below. When discovery is redacted, it must be done in a manner that makes it clear to the reader the discovery has been redacted. For documents, the redaction should be made with a black marker or there must be some written notation of a redaction whenever it is done. The best practice is to also document that the prosecutor has alerted defense counsel that discovery has been redacted. This should be either in the form of a letter or a note in the discovery identifying the discovery redacted and the nature of the redaction.

C. Pretrial Discovery Order

In most cases, there is a discovery order entered by the magistrate. A copy of a standard Discovery Order is attached. (Attachment 2). Prosecutors should adhere to the standard discovery order in all cases unless there is a safety or security concern or doing so would not be in the best interest of the United States. In the event such a concern arises, the prosecutor should notify a supervisor immediately and proceed accordingly.

D. Access v. Copies

Prosecutors should, whenever possible and within the limits set forth in this section, endeavor to provide copies of discovery to defense counsel. The extent to which we will provide copies of discovery to counsel will depend on both the nature of the case and the nature of the information. Prosecutors retain the discretion to request defense counsel review the discovery file and identify information they wish copied.

1. Narcotics, Firearm, Violent Crime, and Other Cases Endangering Witnesses

Circulation of copies of interview reports or recordings can endanger cooperators, informants and witnesses. Accordingly, in drug and violent crime cases, prosecutors should not provide defendants with copies of statements by cooperators and informants, or other documents such as plea agreements or proffer agreements, that would reveal the fact of cooperation or assistance provided to the government, unless it is necessary under the discretion of the prosecutor. Unless mere disclosure of the witness' identity would create a safety risk, the defendant should still be provided access to the information in discovery. If the prosecutor believes it is necessary for safety reasons to conceal identifying information about a witness, the prosecutor may redact the discovery. Of course, the prosecutor must still comply with the case law and the Jencks Act. Either a copy of the discovery or the information contained in the discovery must be produced to defendant in a manner and as required by the Jencks Act, the Pretrial Discovery Order, and the Local Rules in the event the case proceeds to trial or the Jencks Act is otherwise implicated.

2. Victim Cases

In some cases, victims may continue to be victimized by defendants and their associate, or be subject to harassment or embarrassment if copies of discovery pertaining to the victims were provided to defendants. Access to the documents should nevertheless be provided to defense counsel in discovery, where appropriate. Personal identification information may be redacted from discovery pertaining to victims. The prosecutor must still comply with the case law and the Jencks Act, the Pretrial Discovery Order, and the Local Rules.

3. Grand Jury Transcripts

Copies of grand jury transcripts, accompanied by a letter or memorandum regarding further distribution, may be provided to defendants in discovery as long as it is otherwise provided consistent with Rule 6(e) of the Federal Rules of Criminal Procedure and subsections II(D)(1)-(3).

4. Tax Records

Copies of tax records belonging to the defendant may be provided to the defendant as part of the discovery consistent with other provisions of this policy. To the extent, however, the discovery file contains tax documents pertaining to other people, those copies may not be provided to defendants as part of our expanded discovery without supervisory approval.

5. Check-out Copies of Documents

In some cases where we do not provide copies of discovery to defense counsel (such as certain witness interview reports in narcotics cases), there may be instances where defense counsel request permission to show a copy of a particular document to the defendant. Occasionally, defendants do not trust the defense attorney's notes and if the defendant can actually see the document, it helps resolve the case. In those instances, prosecutors, at their discretion, may allow the defense attorney to obtain a copy of the relevant document with the understanding that no actual copies be provided to the client, rather, the attorney may only show it to his or her client. These limitations should be memorialized in a cover letter or other document provided to the defense attorney with the copy of the document in question.

6. Other

Issues may arise regarding privacy, practicalities (such as volume, the nature of the information that make copying difficult, or timing), or other factors that would make providing copies of discovery unworkable. Our office retains the discretion to not provide copies of expanded discovery to defendants. Moreover, the office will retain the discretion not to provide copies of expanded discovery to defense counsel who have demonstrated an abuse of the courtesy, or with regard to defense counsel with whom our office is unfamiliar or has no track record. Supervisory approval is required when a prosecutor does not wish to provide copies of expanded discovery under these circumstances.

III. Scope of Discovery Disclosures

A. Production of Reports and Recordings of Interviews

Generally, absent safety concerns, reports and recordings of interviews of witnesses should be included in discovery, or, in accordance with the standards set forth under the Jencks Act, or, when the statements include exculpatory information. Early disclosure may occur at the prosecutor's discretion.

B. Production of Substantive Case-Related Communications

While this policy focuses primarily on communication via e-mail,³ the general principals regarding communication of substantive case-related communications should apply to communications in whatever form.

1. Use of Email for Case-related Communication

There are three general categories within which most case-related e-mails fall: (a) potentially privileged communications; (b) substantive communications; and (c) purely logistical communications. Each of these terms is defined below.

a. Potentially Privileged Communications

"Potentially privileged" emails include "attorney-client privileged" or "work product" communications (1) between prosecutors on matters that require supervisory approval or legal advice, e.g., prosecution memoranda, *Touhy* approval requests, *Giglio* requests, etc, and involving case strategy discussions; (2) between prosecutors and other USAO personnel⁴ on case-related matters, including but not limited to organization, tasks that need to be accomplished, research, and analysis; (3) between prosecutors and agency counsel on legal issues relating to criminal cases such as *Giglio* and *Touhy* requests; (4) from USAO personnel and personnel at other United States Attorneys' Offices and the Department of Justice personnel on case-related

³In this policy, the term "e-mail" includes any form of written electronic messaging using devices such as computers, telephones, and blackberries, including, but not limited to, e-mails, text messaging, instant messages, tweets, and voice mail messages that are automatically converted to text.

⁴"USAO personnel" includes, but is not limited to, paralegals, auditors, legal assistants, victim-witness staff, LEC coordinator, student interns, and contractors in the Western District of Arkansas.

matters, approval, or legal advice; and (4) from the prosecutor to an agent⁵ or USAO personnel giving legal advice or requesting investigation of certain matters in anticipation of litigation (“to-do” list). These e-mails are generally not discoverable. Please note: E-mails from USAO personnel or an agent to the prosecutor in response to “to-do” list emails could possibly fall within the “substantive” communications that may not be privileged. Also, privileged communications may point to *Brady, Giglio*, or Rule 16 information that is not in, or obviously in, the case file.

b. Substantive Communications

“Substantive” communications include reports about investigative activity⁶, discussions of the relative merits of evidence, characterizations of potential testimony, interviews of or interactions with witnesses/victims, and issues relating to credibility. These e-mails may be discoverable.

c. Purely Logistical Communications

“Purely logistical” communications include e-mails that only contain travel information or dates and times of hearings or meetings. E-mail may be used to communicate purely logistical information, to send formal investigative reports as attachments, or to communicate efficiently regarding non-substantive issues such as scheduling meetings, interviews, and court appearances. These e-mails are generally not discoverable.

2. Retention of E-mails

All “potentially privileged” and “substantive” emails should be printed and maintained in the case file in accordance with the Federal Records Act and 36 CFR 1234.2. The Act requires retention of e-mails that contain substantive case-related information, including “potentially privileged” information. These records should be reviewed by prosecutors as potential discovery material.

⁵“Agent” includes, but is not limited to, any person conducting investigation on the case such as local, state, and federal law enforcement officers, revenue agents, auditors, financial analysts, and civil investigators participating in affirmative civil enforcement investigations. It could also include USAO personnel such as paralegals and auditors if such personnel are asked to complete tasks that are investigative in nature such as researching electronic databases, analyzing records, etc.

⁶ E-mail communications from paralegals, auditors, student interns, or other USAO personnel may become Jencks Act material if such communications relate to matters on which they later become a witness, e.g., e-mails relating to results of searches of electronic databases, analysis of financial records, etc.

3. Guidelines for Handling Substantive Communications

When substantive communications are sent via email, these guidelines should be followed:

- a. If e-mail is used to communicate substantive case-related information with agents, victims, witnesses, or anyone else, the e-mail must be printed and maintained in the case file.
- b. As part of the discovery collection and review process, prosecutors should routinely ask USAO personnel and agents to provide them with copies of all e-mails that contain substantive case-related information. This includes, but is not limited to, communications between agents and between agents, prosecutors, any USAO personnel, or anyone else, just as any formal reports would be collected and reviewed.
- c. While substantive e-mails need to be maintained and reviewed during the discovery phase, any discoverable information may be disclosed in a redacted or alternative form (e.g., a letter or memo) in appropriate circumstances, particularly when agency policy or practice disfavors disclosure of e-mails. Redaction may also be appropriate if an e-mail contains a mix of substantive, potentially privileged and purely logistical communications.
- d. Prosecutors and any USAO personnel who interact with victims and witnesses should limit e-mail exchanges to nonsubstantive matters such as the scheduling of interviews or notification of dates and times of hearings. Similarly, prosecutors should strongly encourage agents to limit e-mail exchanges with victims or witnesses to non-substantive matters. Any substantive information received from a victim or witness should be considered potential *Jencks Act* material and also be maintained for *Brady/Giglio* review. If USAO personnel other than the prosecutor receives a substantive e-mail from a victim or witness, such e-mail should be forwarded to the prosecutor(s) assigned to the investigation or case.

C. Giglio Information

1. Duty of Disclosure

Arkansas prosecutors bear specific responsibilities under the Arkansas Rules of Professional Responsibility, that the district's Court Rules make applicable to all attorneys practicing in federal court in the Western District of Arkansas. See Local Rules: Model Federal Rules of Disciplinary Enforcement. Prosecutors have certain "special responsibilities," including the duty to

make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Arkansas Rules of Professional Conduct 3.8(d). Commentary to this rule further provides that "evidence tending to negate the guilt of the accused includes evidence that tends to impeach a witness for the State." See also the Deputy Attorney General's discovery memo dated January 4, 2010, for guidance on information to be disclosed pursuant to *Brady* (exculpatory evidence) and *Giglio* (impeachment information) at <http://www.justice.gov/dag/discovery-guidance.html>.

Information that would tend to impeach a government witness or disprove a defendant's guilt will, of course, vary depending on the offenses charged, nature of the evidence, and defenses asserted. *Giglio* material includes information that tends to impeach agents and officers who conducted an investigation, and this policy is intended to address how such material is defined, collected, handled, and disclosed within the office of the United States Attorney for the Western District of Arkansas.

2. Policy: Impeachment Materials Generally

a. DOJ Policy Regarding Impeachment Information

In addition to following the guidance issued by the Deputy Attorney General in January 2010, prosecutors must comply with Department of Justice policy concerning the disclosure of material favorable to a defendant, whether exculpatory or impeaching. The policy is set out in § 9-5.001 of the U.S. Attorney's Manual that can be accessed at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm.

USAM § 9-5.001(C) requires disclosure of exculpatory and impeachment information beyond that which is constitutionally and legally mandated, including (1) any information inconsistent with an element of a crime charged or consistent with a

recognized affirmative defense; (2) any information that casts a substantial doubt upon the accuracy of evidence or that may have significant impact on the admissibility of government evidence; (3) disclosure of information without regard to its admissibility, and; (4) information which, viewed in isolation, may not call for disclosure but cumulatively satisfies the policy's requirement for disclosure.

USAM § 9-5.001(D) addresses the timing of disclosure and requires information be turned over in time to allow a defendant to effectively use the information, generally in advance of the beginning of the trial or other proceeding. Exculpatory material is to be disclosed reasonably promptly after it is discovered. Impeachment information will typically be disclosed at a reasonable time before trial to allow the case to proceed efficiently. The policy allows prosecutors to consider other legitimate significant interests, such as witness security, and to disclose after a witness has testified pursuant to 18 U.S.C. § 3500 (the Jencks Act). Any exculpatory or impeachment information that casts doubt on an aggravating sentencing factor but is not pertinent to proof of guilt must be disclosed "no later than the court's initial presentence investigation." Finally, if disclosure is to be delayed due to the classified nature of the information, a supervisor must approve the delay and defendant must be notified regarding when and how disclosure will occur.

b. USAO WDAR Policy on *Giglio* Disclosures

It is the policy of this office to produce material required to be disclosed pursuant to *Giglio* at the earliest time possible, while accounting for witnesses' safety, the integrity of other investigations, national security, and legitimate privacy concerns of witnesses. The same policy will be applicable when information is learned by the prosecution later in the litigation and when information becomes significant or pertinent after a trial or hearing is underway.

In general terms:

* Prosecutors should ensure criminal history databases are checked when circumstances suggest a witness may have a criminal history. Criminal convictions should be disclosed.

* Prosecutors should make appropriate inquiry of all witnesses, including law enforcement agents and officers, to determine whether information subject to prosecutors' disclosure obligations exists. (See policy regarding law enforcement agents at Section III(C)(3).) Appropriate questions and extent of the inquiry will vary from witness to witness, but, for example, inquiries should routinely be made about matters such as criminal history (including arrests), accusations of dishonesty made against the witness (including lawsuits), and disciplinary actions previously brought against law enforcement personnel. More extensive inquiry will be necessary of witnesses where circumstances suggest impeachment information likely exists. This

refers to witnesses who receive benefits based on their testimony or may have other biases or a known history of criminal conduct.

* Although disclosure of information favorable to defendants satisfies due process obligations, disclosure does not necessarily equate to admissibility at trial. Further, even if evidence is deemed admissible, the court may place limitations on defendants' use of the impeachment material. Note that *Brady* and *Giglio* address disclosure, not admissibility, and defendants' use of impeachment information could be limited under the Federal Rules of Evidence by use of motions in limine and protective orders.

3. Policy: Handling Allegations of Law Enforcement Officer Misconduct and Negative Findings of Credibility

On occasion, credibility findings or allegations of misconduct by federal agents (or local or state officers associated with federal cases and task forces) are made. When allegations arise, they should be handled with uniformity, propriety, and consistency within Department of Justice policy. When a prosecutor becomes aware of a negative finding or comment by a judicial officer about the credibility or integrity of any law enforcement officer (federal, state, or local), the prosecutor must promptly report the finding or comment to a supervisor and the *Giglio* coordinator.

a. DOJ Policy Regarding Impeachment Information on Agents

The Attorney General first issued DOJ's Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy") in December of 1996. Essentially, the DOJ policy (subsequently amended) is intended to ensure prosecutors receive sufficient information from law enforcement personnel files to satisfy disclosure obligations and defendants' constitutional rights, "while protecting the legitimate privacy rights of Government employees [agents and officers]." DOJ's "Giglio Policy" (with 14 procedural provisions) is set out in **USAM § 9-5.100**, and can be accessed at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm

The official policy applies to DOJ and Treasury Department law enforcement agents. The USAO has historically used the same policy in handling impeachment material concerning all agents and officers working on federal cases.

b. Requesting Impeachment Information from Agencies

In short, USAM § 9-5.100 establishes a procedure by which the USAO may obtain, from a law enforcement agency's files, impeachment information concerning an

agent or other agency employee. Pursuant to the policy, a written request for information is made by the USAO's *Giglio* coordinator to an official at the agency after a prosecutor has contacted the *Giglio* coordinator about the need for the request. Normally, the request is necessary because a prosecutor has reason to believe impeachment information exists based on routine inquiries the prosecutor has made of an agent before the agent testifies or swears out an affidavit. The policy further addresses how the USAO should protect the information, when appropriate, from unnecessarily broad dissemination.

c. USAO WDAR Procedures Regarding Impeachment Information on Agents and Officers

To implement and comply with DOJ policy, the USAO has adopted the following procedures:

1. RESPONSIBILITIES OF PROSECUTORS AND LAW ENFORCEMENT AGENCY EMPLOYEES

The principal way the USAO will obtain *Giglio* information concerning law enforcement agents or officers is via request to their agency by the USAO's *Giglio* coordinator.

Federal agencies are obliged to instruct their employees regarding the need for this discussion with prosecutors. Agents also have an ongoing obligation to advise the prosecutor of potential impeachment information of which they become aware.

It is the responsibility of every prosecutor to promptly advise a supervisor and the *Giglio* coordinator whenever (1) a law enforcement official (federal, state or local) discloses problematic information during a *Giglio* inquiry, (2) a judicial officer makes any adverse finding concerning a law enforcement officer's credibility, and (3) a law enforcement officer has become the subject or target of an investigation or is charged as a defendant in a criminal case.

2. ACTIONS TAKEN AFTER CONSULTATION WITH SUPERVISOR AND *GIGLIO* COORDINATOR

After consultation with a supervisor and the *Giglio* coordinator, decisions will be made regarding how each individual situation should be handled. If an agent discloses matters pertaining to job-related misconduct or disciplinary matters, a formal written request for information from the agency's personnel file will be made by the *Giglio* coordinator. This request for *Giglio* information from an agency may be made at any time, and disclosure by an agent is not a prerequisite for an official request for information from a file.

When the USAO must handle potential impeachment information regarding an agent, the personal professional reputation of the agency employee (and the agency) is generally implicated. USAO personnel must treat the information with care and professionalism. After the *Giglio* coordinator receives information from an agency, provisions of USAM § 9-5.100 dictate how the material will be handled and what limitations are placed on accessibility. The material may not be generally accessible, and only prosecutors who need to know should be given access. *Giglio* coordinators will keep materials that may be kept pursuant to policy and regulation and will make it available to prosecutors upon appropriate request. They will also return materials to the agency as required by policy and regulation.

Prosecutors should bear in mind that, while the *Giglio* policies address information gathering and handling, the policies do not resolve questions regarding whether the information qualifies as *Giglio* material or whether it must be disclosed.

In many cases, the information should be submitted to the court *ex parte* with a request for a ruling on whether it must be disclosed. In some cases, it will be disclosed to defense counsel with a motion in limine to exclude or limit the use of the information or protective orders to control further dissemination of the information. In clear cases, it will be disclosed immediately to the defense. The *Giglio* coordinator will provide guidance regarding these difficult and sometimes sensitive issues and has sample motions and memoranda.

If disclosure is made to the court or defense, the *Giglio* policy requires the USAO provide to the law enforcement agency a copy of the disclosed material and related pleadings and judicial rulings to the agency.

E. Trial Preparation Notes

When preparing for trial, it is the practice to meet with witnesses before trial. During this preparation process, both prosecutors and agents may make notes of the statements made by the witness. These notes raise a number of discovery issues.

First, the prosecutor should be aware that, if the witness statement is noted in verbatim or essentially verbatim form, it may constitute Jencks material that would have to be produced to the defendant like any other Jencks material.

Second, if, during the trial preparation session a witness makes a statement on a material fact that is arguably inconsistent with prior statements, it may constitute *Giglio* information that has to be disclosed to the defendant.

Third, if, during the trial preparation session, a witness makes a statement that is exculpatory, this information must be disclosed to the defendant. It may not be obvious to the prosecutor at the time of the trial preparation session that a statement may constitute *Giglio* or *Brady* material, but it may become apparent at a later time or during trial. For that reason, prosecutors must retain their notes, be cognizant of the potential they may contain *Giglio* or *Brady* material, and review them if an issue arises at trial that would alert the prosecutor that the notes may contain discoverable material.

Occasionally, during trial preparation only the attorney makes notes and the agents do not. If something arises during trial preparation that would require disclosure in discovery and the agent has not made any notes, the prosecutor should provide to defendant the substance of the information either in a letter or e-mail. In the alternative, the prosecutor may have the agent create a memorandum of interview regarding the information that needs to be disclosed to the defendant, assuming the agent has sufficient memory of the statement to do so accurately. With that in mind, the best practice is that when, during the course of witness preparation, a prosecutor realizes a witness has made a statement that should be disclosed in discovery, the prosecutor should ask the agent to make notes of the statements and to generate a report, even if, up to that time, the agent has not taken any notes. When prosecutors disclose an agent's report instead of the substance of the prosecutor's notes, the prosecutor should compare his or her notes to the agent's report to make sure all information that needs to be disclosed is contained in the agent's report. In any event, the prosecutor should retain any notes he or she created that reflect statements that are deemed discoverable.

F. Agent Hand-Written or Rough Draft Notes

Agents typically make handwritten rough notes of witness statements during interviews. They then convert their handwritten notes into a computer-generated report. Depending on agency policy, some agents retain their handwritten notes but do not

provide them to our office for inclusion in discovery. Other agencies routinely destroy hand-written notes after creation of the formal report. Our office will not dictate to agencies whether they retain or destroy their notes. Where, however, agencies retain handwritten notes of interviews, issues may arise about whether an agent's notes are consistent with the computer-generated report.

IV. Timing of Disclosures

Timely disclosure of discovery to the defense is very important. Timely disclosure aids in the speedy resolution of cases, which makes the use of our time more efficient. Further, the earlier we make discovery available, the more time we have to correct any mistakes in, or supplement, discovery in a reasonably timely manner. Finally, the sooner we disclose discovery, the better position we will be in should a discovery dispute arise. In addressing discovery disputes, courts often focus on whether the government's disclosure of discovery was made in a reasonably prompt manner.

Therefore, prosecutors should generally have discovery ready for disclosure in compliance with the Pretrial Discovery Order. When new discovery is obtained, it should be added as soon as possible and defense counsel should be alerted in writing that discovery has been added to the file.

Ideally, in those cases where the prosecutor knows ahead of time who the defense counsel will be and intends to provide copies of discovery consistent with this discovery policy, the prosecutor may have the copies available to provide to defense counsel at the arraignment, or as soon as possible thereafter.

V. Form of Disclosures

We may disclose our discovery to defendants by providing them access to our discovery in our office and/or by providing copies of portions of our discovery to defendants. When practical, prosecutors should endeavor to provide defense counsel with discovery in electronic form.

Documents produced to defense counsel (in either paper or electronic form) should be produced in pdf format. Preferably, the documents should also be Bates-stamped. Whether provided in paper or electronic form, when we provide copies of discovery to defendants, a cover letter should accompany the discovery.

In cases involving a large amount of discovery, whenever copies of discovery are provided to defense counsel, defense counsel should defray the costs of providing copies. That may mean defense counsel will pay for copying costs, provide paper to the office, or provide blank CDs or DVDs. The nature and extent of requiring defense counsel to defray costs will depend, of course, upon the nature, scope, and volume of discovery being copied and the form in which the copies are being provided. Prosecutors have discretion to determine what will be required by defense counsel in this regard based on these factors.

VI. Documentation of Discovery

It is important that we carefully document what we have in our discovery. This can be accomplished by means of an index that identifies the information contained in discovery or it can be accomplished by means of Bates numbers. In either event, a record should be kept with the discovery reflecting what is contained within. When new information is added to existing discovery, a notation or record should be made of exactly what has been added, and when the information was added. When copies of discovery are produced to defense counsel, either in paper or electronic format, a letter should accompany the disclosure. That letter should identify with specificity (preferably by reference to Bates numbers) the information being produced to defense counsel. Another means of documenting what we produce to defendants is to create and retain a copy of those materials (either in paper form or on disc) indicating the date of the production.

VII. Departures from the Discovery Policy

A. Considerations

There are a number of considerations that may merit a departure from this discovery policy. They include, but are not limited to:

- * national security-related or classified information;
- * defendant's refusal to agree to the stipulated discovery order;
- * defendant's failure to comply with reciprocal discovery obligations;
- * defendant's production of false or misleading documents or information;
- * safety to witnesses, victims, and law enforcement officers;
- * volume of discovery making copying unduly burdensome;
- * nature of case making disclosure inappropriate for safety or other concerns;
- * abuse/misuse of discovery by defense counsel;
- * unknown or untested defense counsel;
- * unwarranted and unnecessary invasions of privacy;
- * defendant appearing pro se; and,
- * ongoing criminal conduct that is the subject of an ongoing investigation.

There may be other case-related considerations that are not listed above that may warrant a departure from this policy.

B. Procedures

If a prosecutor believes departure from these guidelines is appropriate in a particular case, the prosecutor is required to:

- 1) discuss the matter with the Criminal Chief;
- 2) follow the instructions given by the Criminal Chief;
- 3) draft a memorandum to the file outlining:
 - a) reasons for the departure;
 - b) supervisory consultation (date and identity of Criminal Chief);
 - c) directions provided by the Criminal Chief;
 - d) the scope and nature of the departure from the guidelines; and,
 - e) actions taken.

A copy of the memorandum authorizing departure from the discovery policy should be retained in the case file.

END

**** LIMITED OFFICIAL USE ****

Memorandum

To: Criminal AUSAs and SAUSAs
Western District of Arkansas

From: Christopher D. Plumlee
Assistant United States Attorney/Criminal Chief
Western District of Arkansas

Date: October 14, 2010

Subject: **ADDENDUM** To Policy for Discovery in Criminal Cases

- I. Policy update for cases involving terrorism espionage, counterintelligence and export enforcement. 1**

SUPPLEMENT TO DISCOVERY POLICY

Introduction

As an update and supplement to the Western District of Arkansas Discovery Policy issued August 31, 2010, the following provisions shall be included in this policy.

- I. Cases involving terrorism, espionage, counterintelligence and export enforcement.**

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." 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.

*****END*****

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