



**U. S. Department of Justice**

*Pamela C. Marsh  
United States Attorney  
Northern District of Florida*

## **MEMORANDUM**

---

**DATE:** October 15, 2010  
**TO:** All Attorneys  
**FROM:** Pamela C. Marsh  
United States Attorney  
**RE:** Criminal Discovery Policy

The purpose of this memorandum is to establish a uniform criminal discovery practice throughout the district that reflects the law of this circuit and complies with both the letter and spirit of the rules, statutes, and policies governing criminal discovery in the federal system. AUSAs may not deviate from this policy except with the express approval of their immediate supervisor.

### **1. General Obligations**

AUSAs have a duty to be aware of and to comply with requirements of:

- a. Fed. R. Crim. P. 16
- b. Fed. R. Crim. P. 26.2 & 18 USC § 3500
- c. [NDFL Local Rule 26.3 \(Tab A\)](#)
- d. [USAM §9-5.001 et seq. \(Tab B\)](#)
- e. NDFL *Giglio* Policy
- f. [January 4, 2010 Memo from DAG: Guidance for Prosecutors Regarding Criminal Discovery \(Tab C\)](#)
- e. Pretrial Orders Issued by the Court in individual cases

### **2. Timing and Limitations On Disclosures**

Unless otherwise specified by court order, or by the rules, policies, or statutes listed in section 1 above:

- a. *Brady/Giglio* material shall be disclosed promptly upon its discovery unless immediate disclosure would jeopardize the security of witnesses or any other person, or would impede an ongoing investigation, or unless delayed disclosure is necessary to permit *in camera* review of the material by the court or to facilitate a

determination as to whether such review is necessary. Issues concerning whether specific material is disclosable should be discussed with the AUSA's supervisor.

- b. Protective orders not to disclose specific discovery or information should be obtained from the Court when appropriate. The use of a protective order is not a common procedure, and before filing a motion with the Court seeking such an order, the AUSA should consult with a supervisor.
- c. *Jencks* material shall be disclosed no later than the evening before a witness is expected to testify.

### **3. Record-keeping**

- a. Unless otherwise specified by court order, or by the rules, policies, or statutes listed in section 1 above, AUSAs shall maintain in the case file a written record of all disclosures made under this policy. AUSAs are encouraged but not required to use the attached form discovery letter in providing initial discovery. ([Tab D](#)).
- b. AUSAs are required to maintain within the case file records of all substantive case-related communications as detailed in this district's separate policy concerning stored electronic communications.

### **4. Agent reports and notes:**

Agents reports such as FBI 302s, DEA-6s, and other reports of interview and investigation that are not otherwise discoverable under court order or the rules, policies, or statutes listed in section 1 above, shall not be disclosed unless doing so would assist in plea negotiations, secure cooperation, or otherwise facilitate the efficient and expeditious resolution of the case. AUSAs must direct agents to preserve rough notes. These notes shall be disclosed only as required by court order or the policies, rules, and statutes listed in section 1 above. If the notes are fully incorporated into a memorandum or report that has previously been provided as discovery, the rough notes shall not be disclosed.

### **5. Email Policy**

AUSAs must comply with the District's "Email Use In Criminal and Parrallel Cases" policy implemented in March of 2010. The four page policy ensures a balance between using email as a valuable tool in cases, while minimizing problems that may stem from its careless or inappropriate use.

### **6. National Security Cases and Cases Involving National Security Information**

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." AUSAs 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 the National Security Division (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 AUSAs, 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 AUSA should consult with NSD regarding whether to make through NSD a request that the pertinent IC element conduct a prudential search. If neither the AUSA, 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.