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M e m o r a n d u m

Date: September 15, 2010

To: Criminal Division

From: Nicholas A. Klinefeldt
United States Attorney

Subject: Discovery Policy

This discovery policy is effective immediately within the Southern District of Iowa. It provides prospective guidance only. This policy is not intended to have the force of law or to create or confer any rights, privileges, or benefits to defendants, nor does it place any limitations on the otherwise lawful litigation prerogatives of the United States Department of Justice and the United States Attorney's Office for the Southern District of Iowa. *See United States v. Caceres*, 440 U.S. 741 (1979).

This is an internal document, not for dissemination outside of the United States Attorney's Office.

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I. INTRODUCTION

This policy governs criminal discovery for the U.S. Attorney's Office for the Southern District of Iowa. It applies to all attorneys handling criminal cases under the authority of the United States Attorney for Southern District of Iowa, including Assistant U.S. Attorneys, Special Assistant U.S. Attorneys, and Department of Justice attorneys.

The first principle that prosecutors should keep in mind is that this policy is not a substitute for being familiar with the relevant authorities. This policy provides guidance on gathering, tracking, reviewing, and producing information to criminal defendants in accordance with statutory and case law, the Constitution, Department of Justice policy, and the applicable local rules of court and professional conduct, including Federal Rules of Criminal Procedure Rules 12, 16, and 26.2; the *Jencks* Act, 18 U.S.C. § 3500; *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and their progeny; applicable Supreme Court and Eighth Circuit decisional law; USAM 9-5.001 (Disclosure of Exculpatory and Impeachment Information) and 9-5.100 (Potential Impeachment Information on Law Enforcement Witnesses); and the Deputy Attorney General's Memorandum dated January 4, 2010. Attorneys are expected to be familiar with these authorities, to comply with those authorities, and to stay aware of any changes to those authorities. This policy should not be considered to be an exclusive or exhaustive list of a prosecutor's discovery obligations.

Second, subject to security concerns and the needs of individual cases, prosecutors should provide discovery beyond what the rules, statutes, and case law mandate. This approach may be referred to as "expansive discovery," but should not be referred to as "open file discovery." Our files should never be completely open (to preserve information protected by the attorney-client privilege and the work product doctrine), and there may be times when another government agency may have material or information of which we are not aware. The use of the term "open file discovery" is therefore inexact and potentially misleading.

Third, prosecutors should remain mindful that it is the responsibility of the case attorney to ensure compliance with the government's discovery obligations. While case agents, paralegals, legal assistants, and others may provide assistance, the ultimate decision-making responsibility rests with the case attorney. Prosecutors may not delegate the government's disclosure obligations to anyone else and are expected to personally review the government's discovery materials prior to disclosure. In order to avoid subsequent disputes regarding what was provided or made available to the defense, prosecutors should always document such matters in the case file.

Finally, any departure from this policy requires approval from the Criminal Chief.

II. SCOPE OF DISCOVERY

A. Rule 16 Materials

Rule 16 materials must be provided to defense counsel *upon request*, and it is important to document that request in the case file. Likewise, prosecutors should request that reciprocal discovery be provided from defendants, and document that such request has been made, in every case.

Rule 16 materials include:

1. Defendant's oral statements made to law enforcement in response to interrogation by a person the defendant knew was law enforcement, if the government intends to use the statement at trial (*and we should disclose all such statements, even if we do not intend to offer them at trial*).

2. Defendant's written or recorded statements, including grand jury testimony.

3. Statements by an organizational defendant.

4. Defendant's prior record.

5. Documents and objects for use in our case-in-chief, which are material to preparing the defense, or which belong to the defendant.

6. Reports of examinations and tests.

7. Expert witnesses – summary of opinion, bases and reasons, and qualifications.

Rule 16 materials thus include physical evidence, such as evidence seized from a defendant at the time of the defendant's arrest or pursuant to a search warrant. *Such evidence should be made available, whether or not we intend to use it at trial.*

B. Exculpatory and Impeachment Material

We have constitutional obligations, as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), and other case law, to disclose exculpatory and impeachment information when such information is material to guilt or punishment, *regardless of whether a defendant makes a request for such information*. Exculpatory and impeachment information is deemed material to a finding of guilt when there is a reasonable probability that effective use of that information will

result in an acquittal. Prosecutors must take a broad view of materiality and err on the side of disclosure.

The Department of Justice has adopted a policy (USAM 9-5.001) that requires us to go beyond the strict requirements of *Brady* and *Giglio* and other relevant case law. This includes:

1. 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.

2. 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.

3. Admissibility of the exculpatory or impeachment information – our disclosure requirement applies even when the information subject to disclosure is not itself admissible evidence.

4. 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.

Similarly, Rule 3.8(d) of the Iowa Rules of Professional Conduct, which applies to us, *see* Local Rule 83.1(g), imposes requirements regarding exculpatory and impeachment material:

> The prosecutor in a criminal case shall . . . 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 a prosecutor is relieved of this responsibility by a protective order of the tribunal.

C. Witness Statements

1. What is a Statement?

The Jencks Act (18 U.S.C. § 3500) and Fed. R. Crim. P. 26.2 require disclosure of a witness's statements that relate to the subject matter of the witness's testimony at trial or a hearing. Both the Jencks Act and Rule 26.2 define "statement" to include:

a. a *written* statement that the witness makes and signs or otherwise adopts and approves.

b. a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording (which may include handwritten notes).

c. prior testimony, including grand jury testimony.

2. Interview Reports of Testifying Witnesses

Generally, an agent's report of interview (e.g., FBI "302" or "DEA-6"), is not considered a statement of the witness who was interviewed, unless, as noted above, the report contains a substantially verbatim recital of the witness's statement, or the witness reviews and adopts the report. *See United States v. Willis*, 997 F.2d 407, 413-14 (8th Cir. 1993). A witness may be deemed to have adopted the report or notes that were taken during an interview if the witness agrees with an agent's oral recitation of his notes or report to see if the notes or report is correct. Additionally, a report of interview (or other activity) is considered a statement of the *agent* who prepared the report, and thus must be provided as Jencks Act material of the *agent* if it relates to the subject matter of the agent's testimony. *See United States v. New*, 491 F.3d 369, 376 (8th Cir. 2007). A report of interview may also contain exculpatory information or information inconsistent with or otherwise impeaching of a testifying witness or the government's theory of the case.

It is the policy of this office to disclose reports of interviews of witnesses anticipated to testify at trial in the exercise of an expansive discovery practice. *A decision to withhold a report of interview of a testifying witness must be approved by the Criminal Chief.*

3. Interview Reports of Non-Testifying Witnesses

Reports of interviews of non-testifying individuals should be reviewed, but prosecutors are not required to produce interview reports of non-testifying individuals unless the reports contain exculpatory information or information inconsistent with or otherwise impeaching of a testifying witness or the government's theory of the case.

4. Agent Notes

Although it is not necessary to produce an agent's handwritten notes as part of Rule 16 discovery or the Jencks Act, *see United States v. Greatwalker*, 356 F.3d 908, 911 (8th Cir. 2004), it is necessary to preserve them in the event that the accuracy of the related formal report become an issue. If the notes contain favorable information that is not memorialized in a formal report or any information that is materially inconsistent with the formal report, the notes or the information should be produced. Consistent with preferred Eighth Circuit practice, *see United States v. Leisure*, 844 F.2d 1347, 1361 n.10 (8th Cir. 1988), prosecutors should request agencies to preserve their handwritten notes.

Importantly, the government may *not* limit its obligation to disclose exculpatory or impeachment evidence of which it is aware either by simply declining to make a written record of the information in the first place or by omitting the information in a final draft of the memorandum of interview and destroying the notes that contain that information. The substantive demands of *Brady* and *Giglio* are not thwarted by the manner in which the government treats or packages exculpatory information. *Prosecutors must emphasize with all members of the prosecution team that exculpatory and impeachment information must be disclosed, regardless of whether we make a formal record of it.*

5. Applicability of the Jencks Act and Rule 26.2

The Jencks Act applies to trials. Rule 26.2 applies to:

- preliminary hearings;
- detention hearings;
- suppression hearings;
- trials;
- sentencing hearings;
- hearings to consider revocation of probation or supervised release; and
- 2255 hearings.

D. Internal Documents and Work Product

Discovery materials do not normally include information concerning Departmental policy, policies of the U.S. Attorney's Office, internal decisions, or work product produced by the prosecutor. Additionally, discovery materials generally will not include work product and case analysis produced by agency counsel or the case agent. *See* Fed. R. Crim. P. 16(a)(2). *Any request for this type of information should be brought to the attention of a supervisor.*

III. GATHERING DISCOVERY MATERIALS

Introductory Note: Prosecutors should ordinarily gather all discoverable material prior to the time of indictment. This is necessary to allow for sufficient review of the case which, in turn, is necessary in order to make an appropriate charging decision. If these materials have not been gathered and reviewed, the indictment will not be approved absent exceptional and compelling reasons. Supervisors may allow limited exceptions to this requirement in order to allow the filing of criminal complaints and indictments for reactive or fast-moving cases, or where there is a compelling reason to file immediate charges because of an ongoing investigation or public safety concerns. Prosecutors nonetheless should review the available materials prior to filing charges, ensure that additional reports are timely proved, and conduct an appropriate review of the relevant facts and circumstances to ensure that the charges are supported by probable cause and will be supported by sufficient, admissible evidence.

A. When to Begin

Prosecutors should inform all members of the prosecution team of the government's discovery obligations, and the materials that the prosecutor will need to review, at the onset of any investigation. This communication should be ongoing. To facilitate this process, immediately upon the assignment of any new case or matter the prosecutor must send an approved letter to all members of the prosecution team explaining these obligations. As explained below, the membership of the prosecution team may include one or several agents and may, for example, include state and local officers when a case has been adopted by a federal agency.

Prosecutors should also ensure that materials gathered during the investigation are being cataloged and stored in an appropriate matter, so that they can easily be prepared for discovery. For example, documents and reports should be scanned into electronic form upon receipt.

B. Where to Look – The Prosecution Team

We must locate and disclose all discoverable materials, including information that is exculpatory and/or impeaching of a prosecution witness, that is within the possession of the "prosecution team." This team includes the agents and law enforcement officers who helped to develop the case or worked with or under the supervision of the prosecutor during the investigation.

The "prosecution team" may also include other agencies. In multi-district investigations that include both Assistant U.S. Attorneys and prosecutors from a Department litigating component or other U.S. Attorney's Office, and parallel criminal and civil proceedings, this definition will necessarily be adjusted to fit the circumstances. In addition, in complex cases that involve parallel proceedings with regulatory agencies (SEC, FDIC, EPA, etc.), or other non-criminal investigative or intelligence agencies, the prosecutor should consider whether the relationship with the other agency is close enough to make it part of the prosecution team for discovery purposes.

We should err on the side of inclusiveness when identifying the members of the prosecution for discovery purposes: This will help locate all discoverable information, make it less likely that there will be future litigation over *Brady* and *Giglio* issues, and can help us avoid surprises at trial.

Factors to be considered in determining whether to review potentially discoverable information from another federal agency include:

- whether the prosecutor and the agency conducted a joint investigation or shared resources related to investigating the case;
- whether the agency played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in targeting discussions, or otherwise acting as part of the prosecution team;
- whether the prosecutor knows of and has access to discoverable information held by the agency;
- whether the prosecutor has obtained other information and/or evidence from the agency;
- the degree to which information gathered by the prosecutor has been shared with the agency;
- whether a member of an agency has been made a Special Assistant United States Attorney;
- the degree to which decisions have been made jointly regarding civil, criminal, or administrative charges; and

- the degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party.

In cases arising out of investigations conducted by multi-agency task forces or otherwise involving state law enforcement agencies, the prosecutor also should consider the following factors, in addition to those stated above:

- whether state or local agents are working on behalf of the prosecutor or are under the prosecutor's control;
- the extent to which state and federal governments are part of a team, are participating in a joint investigation, or are sharing resources; and
- whether the prosecutor has ready access to the evidence.

C. What to Review

All evidence and other potentially discoverable material gathered during the investigation, whether in our custody or the custody or control of the other members of the prosecution team, should be reviewed. Special care should be given to gathering exculpatory/impeachment information and witnesses' statements. Specifically, the prosecutor should review the following:

1. All of the Agency's Investigative Files

Prosecutors should review all of the agency's investigative files, including all portions of the substantive case file and any other file or documents the prosecutor has reason to believe may contain discoverable information. This includes reports of interview and investigative activity, inserts, e-mails, and similar documents. In the event that the agency considers a particular document to be an internal or administrative document, the prosecutor should discuss with the agency and/or the prosecutor's supervisor turning the information over in another form.

2. All of the CI/CW/CHS/CS Files

Prosecutors should review all of the CI/CW/CHS/CS files, by whatever name the agency labels these, for such witnesses who are expected to testify or whose credibility may otherwise be at issue. Agencies who make use of confidential informants and cooperating individuals have their own established procedures for retaining information about those witnesses. The agencies may keep multiple files containing different types of records or information. Thus, inquiries to agencies about informants should include a review of every kind of file that might contain information about the individual. The *entire file*, not just

the part relating to the current case, should be reviewed. If the prosecutor believes that the circumstances of the case may warrant review of a non-testifying source's file, the prosecutor should discuss this matter with a supervisor and then, if warranted, following the agency's procedures for requesting review of such a file.

3. Evidence Obtained Via Subpoena, Searches, and Other Legal Process

Prosecutors should review all evidence/information obtained or gathered during the investigation via subpoena, search warrants, consent searches, or otherwise other legal process. With respect to electronically-stored evidence, including e-mails, sufficient time must be allotted for a search of hard drives, disks, and other storage hardware. These searches may take a long time, so they should be undertaken well before indictment.

4. Evidence Gathered by Civil or Regulatory Agencies

Prosecutors should review all evidence/information gathered by civil or regulatory agencies (including the Department of Justice and the Civil Division of the USAO).

5. Physical Evidence and Surveillance

Prosecutors should review all physical evidence gathered by any means, including search warrants, consent searches, searches incident to arrest, etc. Prosecutors should take particular care to ensure, at the earliest opportunity, that firearms and physical evidence that may qualify as contraband, such as drug evidence, will be preserved until the time of trial. Prosecutors should confer with a supervisor and/or the district's Drug Evidence Destruction Coordinator if an agency expresses a desire to dispose of any physical evidence, such as bulk drug evidence, prior to the conclusion of a case or investigation. *See* USAM § 9-100.100. Prosecutors should also ensure that records of any surveillance activity, such as reports, as well as audio and video records, are identified and cataloged.

6. Substantive Communications Between Prosecutors, Agents, Witnesses, Victims, Victim-Witnesses Coordinators, Etc.

Prosecutors should review all substantive communications/correspondence including e-mails, text messages, and letters, between and among prosecutors, agents, witnesses, victims, victim-witness coordinators, etc. Prosecutors are reminded, consistent with the offices's "Office Policy E-Mail Retention and Disclosure" dated November 23, 2009 (or any subsequently revised versions of this policy), that all "substantive" and "potentially privileged" emails must be

printed out and maintained in the case file, along with any email communication with outside parties. "Substantive" communications, which must be reviewed with particular care, include reports about investigative activity, discussions of the relevant merits of evidence, characterizations of potential testimony, interviews of or interactions with witnesses/victims, and issues relating to credibility.

7. Confidential Informants and Witnesses Testifying Under Plea or Immunity Agreements

Prosecutors should investigate confidential informants, or a witnesses who have agreed to cooperate pursuant to plea or immunity agreements, very thoroughly. Among other things, prosecutors should investigate and disclose any information obtained in the following areas when a confidential informant or cooperating witness will be testifying at trial or a hearing:

- the witness's relationship with the defendant;
- the witness's motivation for cooperating/testifying;
- drug and alcohol problems;
- all benefits the witness is receiving, including:
    - Monetary payments – how are they calculated?
    - Expenses, costs and housing, including any temporary relocation assistance provided under the EWAP program – is anyone paying?
    - Immigration status for the witness and/or family members
    - Arrests – intervention by law enforcement
    - Taxes – has the witness paid taxes on informant payments?;
- any notes, diaries, journals, e-mails, letters, or other writings by the witness;
- prison files, tape recordings of telephone calls (such as are maintained by local jails and the Bureau of Prisons), and e-mails (including emails available from the Bureau of Prisons); and,
- criminal history (including any pending arrest warrants).

8. Potential Impeachment Information Relating to Non-Law Enforcement Witnesses

Any time the government has reason to question a witness's credibility, the government has a duty to inquire. *See United States v. Osorio*, 929 F.2d 753 (1st Cir. 1991). Thus, *all* potential *Giglio* information known by or in the possession of the prosecution team relating to non-law enforcement witnesses should be gathered and reviewed. That information includes, but is not limited to:

- prior inconsistent statements (possibly including inconsistent attorney proffers, *see United States v. Triumph Capital Group*, 544 F.3d 149 (2d Cir. 2008));
- statements or reports reflecting witness statement variations;
- benefits provided to witnesses, including of the type described in the previous subsection;
- other known conditions that could affect the witness's bias, such as animosity toward defendant, animosity toward a group of which the defendant is a member or with which the defendant is affiliated, relationship with a victim, and known but uncharged criminal conduct (that may provide an incentive to curry favor with a prosecutor);
- specific instances of misconduct involving dishonesty, *see* Fed. R. Evid. 608(b);
- untruthful character, *see* Fed. R. Evid. 608(a);
- prior convictions, *see* Fed. R. Evid. 609;
- physical or mental incapacity; and,
- known substance abuse or mental health issues or other issues that could affect the witness's ability to perceive and recall events.

As a matter of good practice, the prosecutor should obtain criminal history information for all non-law enforcement government witnesses no later than 10 days before trial.

9. Fed. R. Evid. 806 Declarants

Prosecutors must review potential *Giglio* information for any witness whose hearsay statement will be offered under Fed. R. Evid. 801(d)(2)(A), (D), or (E), even if the witness will not be called. This is because, under Rule 806, the credibility of such a declarant nonetheless is implicated at trial.

10. *Giglio* Information – Law Enforcement Officers

Prosecutors should have candid conversations with the agents with whom they work regarding any potential *Giglio* issues involving law enforcement officers, and they should follow the office's *Giglio* policy dated May 15, 1997 (or as this policy may be revised in the future). In general, the office's *Giglio* policy contemplates the following procedure:

(1) All law enforcement witnesses will receive a letter in advance of their testimony, which explains their obligation to disclose any potential *Giglio* information to the prosecutor.

(2) The USAO will make a formal *Giglio* request to an officer's agency in the following circumstances:

(a) there has been a court order to do so;
(b) there is a formal request from defense counsel, whether by letter or motion, which is received sufficiently in advance of trial to allow processing of the request;
(c) the prosecutor or the prosecutor's supervisor is aware of potential *Giglio* information, either based on their own knowledge or other sources, including information provided by a law enforcement officer involving his or her own potential *Giglio* material; or
(d) there are other unique circumstances, which make a formal *Giglio* request appropriate.

(3) Any potential *Giglio* information provided from an agency will be reviewed in accordance with the office's *Giglio* policy and will not be released until after we seek a specific protective order from the court. We will always propose that such a protective order require that any *Giglio* information ordered disclosed remain at all times in USAO custody, and we will never voluntarily agree to release copies of *Giglio* materials to defense counsel.

Under the office's *Giglio* policy, doubts are resolved in favor of disclosure by the agency to the U.S. Attorney's Office. "Impeachment information" is defined to include the following:

(1) any finding of misconduct that reflects upon the truthfulness or possible bias of the agent;

(2) any past or pending criminal charge brought against the agent;

(3) any finding of lack of candor by the agent during an administrative inquiry (or by a judge); and

(4) any credible allegation of misconduct that reflects upon the truthfulness or possible bias of the agent that is the subject of a pending investigation.

11. Information Obtained in Witness Interviews and Trial Preparation Meetings with Prosecutors

a. Notetaking

When a prosecutor participates in a witness interview, the prosecutor and the agent should discuss note-taking responsibilities in advance. Generally, the agent should take notes and prepare a report of interview for interviews and proffers conducted during the course of the investigation; conversely, when the interview is more properly characterized as preparation for testimony in advance of a trial, hearing, or grand jury proceeding, the prosecutor typically will take any notes, the agent should not take notes, and no report will be prepared. If a witness preparation session occurs well in advance of trial or may cover significant new ground with the witness, the prosecutor may wish to have the agent take notes and prepare a report of interview.

b. Witness Contact Without an Agent

Whenever possible, prosecutors should not conduct an interview, or have any contact with witnesses, without having an agent present to avoid making themselves the sole witness to the statement and, thus, risking disqualification from handling the case if the statement becomes an issue. If exigent circumstances make it impossible to secure the presence of an agent, prosecutors should have another office employee present. Office employees, such as paralegals and legal assistants, may not be used during interviews with in-custody witnesses without supervisory approval, which rarely, if ever, will be granted.

c. Witness Statement Variations

Material variations in a witness's statements should be memorialized, even if they are made within the same interview, and they should be provided to the defense as *Giglio* information.

d. Trial Preparation Meetings with Witnesses

When preparing a witness for a hearing or trial, be very aware of our continuing obligation to disclose information that might be exculpatory or have impeachment value. Thus, if a witness provides information that conflicts in material ways with information the witness has previously provided, or conflicts with material information provided by other witnesses, we should disclose that conflict to the defendant. Likewise, if a witness provides any additional information that may qualify as potentially exculpatory information under this policy, which information has not previously been provided, it should be

disclosed. Circumstances will dictate the form in which this type of information will be disclosed, which may include directing the agent to prepare a report or conveying the information to defense counsel by letter (or, as a last alternative, on the record in open court). Whatever mechanism is used, a clear and permanent record of the disclosure must be made.

e. Retaining Agent and Prosecutor Notes

Agent notes should be retained consistent with the policy set forth above. Prosecutor notes of interviews with witnesses should be maintained in the case file, and they should be clearly marked to identify the date of the interview and the persons present.

D. Who Conducts the Review

In most cases, review of the above materials should be conducted personally by the prosecutor. In some cases, such as those involving voluminous information, this may not be feasible. In such cases, the prosecutor should develop a clear process to ensure that discoverable information is identified. This process may involve agents, paralegals, agency counsel, and computerized searches.

Although prosecutors may delegate the process and set forth criteria for identifying *potentially* discoverable information, prosecutors may not delegate the disclosure determination itself.

In cases involving voluminous evidence obtained from third parties, such as bank and other business and financial records obtained pursuant to subpoena or search warrant, prosecutors should consider providing the defense with access to all of the information to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence.

IV. PREPARING AND DISCLOSING DISCOVERY MATERIALS

A. Timing

Absent a stipulated discovery order, the following deadlines should be observed:

1. Rule 16 Materials

Rule 16 discovery materials should be disclosed within the time ordered by the court – normally no later than 10 days after arraignment, and only after the defendant's request for Rule 16 discovery has been documented. Prosecutors

should routinely ask for the full 10-day period to allow support staff sufficient time to assemble the materials for disclosure without impairing their ability to fulfill other obligations, including discovery obligations in other cases.

2. Exculpatory and Impeachment Material

Potential *Brady* material, other than impeachment material, likewise should be provided within 10 days of arraignment, or as soon as possible after it is obtained. Impeachment material should be disclosed no later than 5 days in advance of trial.

3. Witness Statements

Jencks Act material (other than grand jury transcripts) and agency reports of interview should be disclosed no later than 10 days in advance of trial, and grand jury transcripts of witnesses reasonably anticipated to be called as government witnesses should be made available at the U.S. Attorney's Office no later than 5 days in advance of trial. Again, the request and disclosure should be documented.

B. Stipulated Discovery Order

In all cases, prosecutors should request that an approved stipulated discovery order be imposed, unless it would not be in the best interests of the United States. *A prosecutor may not decline to enter into the stipulated discovery order, or make any alterations to the form stipulated discovery order, without approval from the Criminal Chief.* Likewise, if for some reason the stipulated discovery order is not entered, the prosecutor should contact the Criminal Chief.

Under the stipulated discovery order, we ordinarily will agree to provide Jencks Act material (other than grand jury transcripts) and related materials (including reports of interview) at the same time that Rule 16 materials are made available. Grand jury testimony of witnesses who are reasonably anticipated to be called to testify at trial ordinarily will be disclosed at a later point in advance of trial.

C. *Pro Se* Defendants

The manner of providing discovery in cases involving *pro se* defendants will depend upon many variables, including whether the court has appointed standby counsel and whether the defendant is being held in custody pending trial. We ordinarily should seek a similar discovery order to that used in other cases before releasing discovery. We should seek to release discovery to standby counsel, if standby counsel has been appointed and is communicating with the defendant. Additionally, in the case of a

defendant being held in custody, the prosecutor should discuss the proposed logistics for making discovery available with the U.S. Marshals Service before making any commitment to the defendant, standby counsel, or the court regarding the manner in which discovery will be disclosed.

D. Copies

Prosecutors should provide copies of discovery to defense counsel, as opposed to merely providing them access to the discovery at the U.S. Attorney's Office. This usually can be done by scanning the documents and providing them on a CD, which can be delivered to defense counsel. Discovery materials ordinarily should not be disseminated by email. In addition, prosecutors should also bates-stamp discovery whenever practicable. Potential exceptions are as follows:

1. Security Concerns

Some cases pose particular security concerns with respect to producing material to defense counsel. These cases may include drug and violent crime cases involving copies of statements, testimony, and cooperation agreements of cooperating witnesses, and cases in involving information pertaining to victims in which victims may continue to be victimized by defendants and their associates, or may be subject to harassment or embarrassment if discovery pertaining to them was circulated. In these cases, materials should ordinarily be released provided that they are (1) subject to a protective order; and, (2) watermarked with information identifying to which attorney they are being provided. *If the prosecutor believes that these measures are not sufficient to address the security concerns posed in a particular case, the prosecutor should contact the Criminal Chief.*

2. Large Volume of Documents

In cases where a large volume of documents needs to be disclosed, prosecutors are encouraged to consider ways to allocate that cost to the defendant. For example, prosecutors may provide access to the documents for review at the United States Attorney's Office or some other location, provided that a clear record is made that identifies what is available for review.

3. *Giglio* Information – Law Enforcement Officers

Prosecutors may not provide copies of *Giglio* information relating to law enforcement officers outside of this office. Rather, as indicated above, this information should be reviewed by defense counsel at the United States Attorney's Office, subject to a protective order.

4. Child Pornography

As indicated below, copies of material deemed to be child pornography may not be provided outside this office. Other arrangements should be made to review evidence in these cases.

E. Making a Record

1. What is Disclosed

Prosecutors should always provide defense counsel with a letter describing what materials are being provided and what materials to which defense counsel is being provided access. This letter should include a description of the content of the materials, even if the materials are being provided on a CD. Again, prosecutors are encouraged to bates stamp discovery materials to aid this process.

Review of physical evidence, or documentary evidence maintained by the investigating agency, should be done at the agency's premises. Defense counsel should be notified by letter of the general nature of the items available for review, along with instructions as to how to make arrangements to review them (generally by scheduling an appointment with the case agent during normal business hours).

2. What is Not Disclosed

Separately, the prosecutor should maintain a record of materials that are not being disclosed, as well as of non-redacted versions of reports, etc. This may be done by using a folder marked "Discovery Withheld." Good practice requires regular review of those materials, in the event that circumstances have changed, making some of these materials discoverable.

F. Redaction

1. Method of Redactions/Access to Originals

It will often be necessary to redact portions of discovery materials before they are disclosed to defense counsel. While the physical redaction may be delegated to a legal assistant, paralegal, or agent, the ultimate decisions must be made by the prosecutor. *This means that the prosecutor must review and have access to the unredacted document.*

Redactions must be made in a manner making clear to the reader that the document has been redacted. Ordinarily, this can be done with a black marker or via a written notation on the document. The best practice is for the prosecutor to

alert defense counsel, either by letter or by a note within the discovery file, indicating that the document has been redacted and the nature of the redaction.

2. Personal Identifying Information and Agency File Numbers

Personal Identifying Information, such as dates of birth, addresses, telephone numbers, and social security numbers of witnesses normally should be redacted, unless the nature of the case makes this information directly relevant (for example, a case involving identity theft or false representation of a social security number) or unless the discovery materials are so voluminous as to make redaction impractical (for example, bank records bearing the social security numbers of the account holder).

In addition, agency file numbers should be redacted from agency reports.

3. Information in Witness Statements and Agency Reports

Prosecutors must necessarily balance a variety of interests in redacting information from agency reports, particularly when the reports include information about ongoing investigations. Prosecutors should be familiar with Fed. R. Crim. P. 26.2(c), which provides that where a statement of a witness contains some material that is relevant to the case, but other material that is either privileged or does not relate to the subject matter of the witness's testimony, the government may call upon the trial court to review *in camera* the statement in its entirety and excise any privileged or unrelated portions of the statement before it is disclosed to the defense. Attorneys should be aware that Rule 26.2(c) provides for *in camera* review of redacted witness statements and should be prepared to submit the unredacted statement for *in camera* review. It sometimes may be appropriate for the government to initiate a request for *in camera* review, and prosecutors should discuss these situations with their supervisors.

G. Supplementing Discovery

When materials are added to discovery, the prosecutor should promptly notify defense counsel in writing and maintain a copy of the notification in the case file.

H. Making Discovery Available to the U.S. Probation Office

The prosecutor ordinarily should make discovery materials available for review by the U.S. Probation Office during the preparation of the presentence report. The prosecutor may provide copies, or temporarily loan the paper discovery file to the Probation Office, or make whatever other arrangements seem most convenient and appropriate, consistent with the District Court's administrative order filed December 10,

2001 (providing that any discovery materials released to the Probation Office shall be returned to the U.S. Attorney's Office, and that the Probation Office may not retain copies of discovery materials). The Probation Office should not be provided with any materials that have not been disclosed to the defendant's attorney.

V. SPECIAL CONSIDERATIONS

A. Sensitive Information

Certain categories of evidence are protected by specific statutes, rules, and DOJ policies, with which prosecutors should be familiar. Whether or not directly addressed in this policy, such requirements must be followed. These categories include the following:

1. Child Pornography

In child pornography cases, 18 U.S.C. § 3509(m) (part of the Adam Walsh Act) provides that a court cannot order the copying or reproduction of any child pornography, or material containing child pornography, including the duplication of the hard drives of computers and electronic storage media, so long as the government provides a reasonable opportunity to inspect, view, and examine the material in government offices. The statute also provides that this material is to remain in government care, custody, and control.

2. Title III Wiretaps

The disclosure of the contents of wire, oral, or electronic communications that were intercepted pursuant to a court order is governed by 18 U.S.C. § 2517. Prosecutors should review this section thoroughly upon obtaining the court authorization for the interception and before making any disclosures. Disclosure orders must be on file prior to submitting any information obtained from the interception to a grand jury and before indictment. In wiretaps authorized in the Southern District of Iowa, we typically will request an order from the judge supervising the wiretap that will allow us to disclose wiretap information in discovery.

If we intend to rely on intercepted communications at a detention or preliminary hearing, we must, at least ten (10) days before the hearing, serve the defense with a copy of the interception application and the court's authorization order. *See* 18 U.S.C. § 2518(9). While the judge may waive this requirement if it is not possible to comply with this deadline, failure to comply with the ten-day rule creates a significant risk that the intercepted communications will not be received into the record.

3. Tax Information

Tax information obtained in the course of a criminal investigation is governed by 26 U.S.C. § 6103. In the case of a non-tax investigation, where tax information has been obtained through an *ex parte* order, tax information cannot be provided in discovery without a specific court order, which we will routinely seek. *See* 26 U.S.C. § 6103(i)(4)(A). In the case of a tax investigation, we generally must seek a similar order in order to disclose any tax information, other than the defendant's own tax information. *See* 26 U.S.C. § 6103(h)(4)(A) and (D).

4. Suspicious Activity Reports

Disclosure of Suspicious Activity Reports (SARs) is restricted by the Bank Secrecy Act, which provides that SARs should not be disseminated outside of the law enforcement community. Where possible, prosecutors should avoid including SARs in discovery if the relevant information can be conveyed in another form, such as through the underlying records. DOJ policy indicates that SARs may be disclosed, however, if they contain exculpatory or potential impeachment material, or if disclosure is required under Rule 16 or the Jencks Act. *See Guidance for Disclosure of Suspicious Activity Reports (SARs)*, Memo. from Guy A. Lewis, Director of EOUSA, dated July 8, 2003. Even in those circumstances, however, prosecutors should ensure that a protective order is in place and should consider redacting the SAR to the extent possible.

5. Presentence Reports

Prosecutors should review the presentence report (PSR) relating to any witness who may testify. (If the witness was prosecuted in another district, the prosecutor should contact the other district to get the PSR.) The PSR may contain Jencks, *Brady*, or *Giglio* information that may need to be disclosed. Because presentence reports are prepared by the Probation Office, which is an arm of the court, we must seek a court order (and, in most cases, *in camera* review) of any PSR that we believe contains potentially discoverable information. *See* Local Criminal Rule 32(b); *United States v. Garcia*, 562 F.3d 947, 952-53. If a PSR appears to include such information, the matter should be submitted to the court at the earliest opportunity.

B. Victim-Witness

Statements to USAO personnel by victims and witnesses, including to the victim-witness unit, often may include potentially discoverable information. In addition to statements, we also may be required to disclose any benefits or services provided,

whether to crime victims or under the EWAP program. Prosecutors should confer with victim-witness staff at the point of indictment to determine whether such information exists, and they should remain in contact with victim-witness staff during the course of the prosecution. By the same token, victim-witness staff should immediately document any substantive contacts with witnesses or victims, as well as any benefits provided, and promptly provide this information to the prosecutor.

C. Post-Conviction Obligations

If the prosecutor learns of potentially exculpatory information after a case has concluded, the prosecutor should immediately discuss the issue with the Criminal Chief and/or the Professional Responsibility Officer. In many cases, we may be ethically required to disclose this information to the defendant and defendant's counsel and, in other circumstances, we (and/or the Department) may elect to make a disclosure as a matter of policy. *See* ABA Model Rule of Professional Responsibility 3.8(g) and (h).

D. Other Considerations

Prosecutors should bear in mind that several Rules of Evidence and Rules of Criminal Procedure include their own specific disclosure and notice requirements. Some of the most prominent of those rules are as follows:

1. Records of Regularly Conducted Activity

Notice of our intent to introduce records of regularly conducted activity pursuant to Fed. R. Evid. 902(11) (for domestic records) or 18 U.S.C. § 3505 (for foreign records). This may be accomplished as part of a formal discovery response.

2. Prior Convictions Older than Ten Years

Notice of intent to introduce evidence of a prior conviction to impeach a witness, and that more than ten years has passed since the date of the conviction or the release of the witness from confinement (whichever is later), pursuant to Fed. R. Evid. 609(b).

3. Co-Defendant Statements and *Bruton*

If we intend to introduce at trial statements by a defendant that have been redacted to eliminate references to co-defendants, pursuant to *Bruton v. United States*, 391 U.S. 123 (1968), submit the statements, with the proposed redactions highlighted, to the defense and the court, well before the pre-trial motions hearing.

This will put the defense on notice of our intent, avoid surprise, and provide the court sufficient time to rule on any defense objections.

4. Prior Bad Acts

Upon request, we are required to provide "reasonable notice" of any prior "crimes, wrongs, or acts" offered to establish "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b).

5. Notice of Alibi

A request for notice of alibi pursuant to Fed. R. Crim. P. 12.1. Our request will require the defendant to provide certain information, which will trigger our obligation to respond with the names, addresses, and telephone numbers of witnesses who will testify that the defendant was at the scene of the crime and also the names of rebuttal witnesses to the defendant's alibi defense.

6. Insanity and Mental Health

Notice from the defendant of intent to assert an insanity defense, or intent to introduce expert evidence relating to mental disease, defect or other condition, pursuant to Fed. R. Crim. P. 12.2. The notice should be given by the time set for filing pre-trial motions, or a later time set by the court.

7. Public Authority Defense

If a defendant intends to rely on the defense of actual or believed exercise of public authority on behalf of a law enforcement or intelligence agency, the defendant must provide timely notice pursuant to Fed. R. Crim. P. 12.3. The notice must be filed under seal if an intelligence agency is the purported source of public authority.

8. Organizations as Victims

If an organization is the victim of a charged federal crime, the government must file a statement identifying the victim-organization. If the victim-organization is a corporation, the statement must identify any parent corporation and any publicly held corporation that owns 10% or more of the victim-corporation's stock, or state that there is no such corporation. *See* Fed. R. Crim. P. 12.4.

9. Trial Subpoenas

Rule 17(c) of the Federal Rules of Criminal Procedure allows for the parties to subpoena documents or objects for use at trial. The parties may apply to the court for early production. Remember, production is to be made to the court (this usually translates to the Clerk's Office) prior to trial and the documents or objects are thereafter made available to all parties. That is, a Rule 17(c) subpoena is not a means to get exclusive access to potential evidence. When the material subpoenaed is disclosed, it is disclosed to all parties. *Be alert to any attempt by the defense – it may be intentional or inadvertent – to have the subpoenaed items delivered to their offices rather than the court.*

VI. DEPARTURES FROM THIS POLICY

A. Reasons

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

- 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;
- unwarranted and unnecessary invasions of privacy;
- defendant appearing *pro se*; and,
- ongoing criminal conduct that is the subject of an ongoing investigation

B. Procedure

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.

(4) Retain a copy of the memorandum authorizing departure from the discovery policy in the case file, and a provide a copy to the Criminal Chief.

C. Non-Applicability to National Security and Death Penalty Cases

This discovery policy does not govern disclosure in cases involving terrorism or national security, nor does it govern disclosure in death penalty cases. These categories of cases have certain unique discovery requirements and implicate special policy concerns. Discovery in such cases shall be governed in accordance with the law and any policy issued by the Department of Justice, and it shall be monitored by the First Assistant U.S. Attorney or the Criminal Division Chief.