DISCOVERY POLICY

United States Attorney's Office
Central District of Illinois

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PROTECTED INFORMATION

ATTORNEY CLIENT PRIVILEGE/WORK PRODUCT DOCTRINE

FOIA/PRIVACY ACT PROTECTED - 5 U.S.C. § 552(b)

General Principles for Discovery

This document sets forth the Office's policy on discovery in criminal cases. The Outline that follows is intended to provide a checklist and general guidance. The Office's policy and the Outline do not create or confer any rights, privileges, or benefits on any person. *See United States v. Caceres*, 440 U.S. 741 (1979). **Any matter involving national security, including terrorism, espionage, counterintelligence, and export enforcement, can present unique and difficult criminal discovery issues.** ***See* discussion *infra* pp. 13-15.**

The discovery obligations of federal prosecutors in this District are established by the Federal Rules of Criminal Procedure, 18 U.S.C. § 3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), and relevant case law, the Department of Justice's policy on the disclosure of exculpatory and impeachment information, the Local Rules of Criminal Procedure, the Arraignment Orders entered in particular cases, and the rules governing professional conduct. We must comply with the authorities set forth above. Thus, the first principle in the discovery policy for this Office is **"obey all rules."**

Second, as a general matter and allowing for the exercise of prosecutorial discretion and subject to the needs of individual cases, **prosecutors in this District are encouraged to provide discovery beyond what the rules, statutes, and case law mandate** ("expansive discovery"). The decision in any particular case on whether, how much, and when to provide materials in excess of that which is required will rest with the lead prosecutor in a case. There may well be good reason for withholding something that does not have to be disclosed, such as the need to protect a witness or safeguard investigations of other people or other crimes committed by the defendant, or to preserve a legitimate trial strategy. Keep in mind, however, that expansive discovery may facilitate plea negotiations or otherwise expedite litigation. Moreover, in the long term, expansive discovery may foster or support our Office's reputation for candor and fair dealing.

Finally, if you decide to adopt expansive discovery in a case, **do NOT refer to the expansive discovery practice as "open file discovery."** Our files should not ever be completely open (to preserve attorney-client privileged information and the work product doctrine) and there may be times when another government agency might have some material or information of which you are not aware. The use of the term "open file" is therefore inexact and potentially misleading.

These three general principles provide the basic foundation for this Office's discovery policy. The Outline that follows provides further guidance. The Outline does not and could not answer every question that may arise in a particular case. There is no substitute for being intimately familiar with the rules, statutes, and case law. Compliance with the governing legal authorities and this Office's policy on discovery will help to achieve a fair and just result in every case, which is our singular goal in pursuing a criminal prosecution.

1. **Definitions and Disclosure Requirements**[1]

a. **RULE 16**

i. STATUTORY REQUIREMENT (F.R.Cr.P. 16(a))

(1) Government's disclosure obligation triggered upon request

(2) Disclosure obligation continues up and during trial

ii. Central District of Illinois Practice

(1) *See* Local Rule 16.1

(2) Rule requires parties to "confer" within 7 days after arraignment

(a) If a request for discovery is to be denied or postponed, it MUST BE IN WRITING

(b) Any additional request (beyond that required) must be in writing

Practice Tip: It is important to inventory/document the discovery disclosures you've made.

iii. INFORMATION NOT SUBJECT TO DISCLOSURE

(1) Reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case.

(2) Does not authorize the discovery or inspection of witness statements (3500 material) yet; as a practical matter, may want to provide at this time.

iv. THE DEFENDANT'S DISCLOSURE REQUIREMENTS

[1]Specific, case related considerations may warrant a departure from the basic discovery practices of the office. Because it is expected that such considerations will sometimes justify a departure from the particular office practice, AUSAs are directed to consult with their branch chiefs and the First Assistant U.S. Attorney for approval to depart from the basic practice.

(1) The defendant's disclosure obligations triggered ONLY IF the defendant requested disclosure from the government pursuant to Rule 16(A)(1)(E). *See* Rule 16(b)(1)(A).

(2) If the defendant made disclosure request, the defendant must permit government to inspect, copy or photograph

(3) The defendant Not Required to Disclose. *See* Rule 16(b)(1)(A)

(a) Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:

(i) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; OR

(ii) a statement made to the defendant, or the defendant's attorney or agent, by:

1) the defendant
2) a government or defense witness; or
3) a prospective government or defense witness

v. CONTINUING DUTY TO DISCLOSE - Rule 16(c)

(1) If additional evidence discovered before or during trial, you must promptly disclose the new evidence to the other party or the court if:

(a) the evidence or material is subject to discovery or inspection under Rule 16; and

(b) the other party previously requested, or the court ordered, its production.

vi. Exceptional Circumstances – Court Involvement -Rule 16(d)

vii. Penalties for Failure to Comply

(1) if a party fails to comply with Rule 16 the court may:

(a) order that party to permit discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;

(b) grant a continuance;

(c) prohibit that party from introducing the undisclosed evidence;

(d) enter any other order that is just under the circumstances

viii. **RULE 12.1 NOTICE OF ALIBI DEFENSE**

(a) Government's request for notice and the defendant's response

(b) Disclosing government witnesses

(c) Continuing duty to disclose

(d) Failure to comply

PRACTICE TIP: In view of the government's obligation to disclose certain information about its witnesses if the defendant responds to the government's request, it may be best to make this request closer to trial rather than earlier in the prosecution

ix. **RULE 12.2 NOTICE OF AN INSANITY DEFENSE; MENTAL EXAMINATION**

Note: If the defendant provides notice of an insanity defense, upon the government's request, the court MUST order the defendant to be examined under 18 U.S.C. § 4242.

x. **RULE 12.3 NOTICE OF A PUBLIC-AUTHORITY DEFENSE**

Note: the notice must include:

(i) the law enforcement agency or federal intelligence agency involved;

(ii) the agency member on whose behalf the defendant claims to have acted; and

(iii) the time during which the defendant claims to have acted with public authority.

b. **BRADY/GIGLIO**

i. BRADY OBLIGATION. *Brady v. Maryland*, 373 U.S. 83 (1963)

(1) Disclose evidence that is favorable to the accused and material to the determination of guilt or to the appropriate punishment

(2) Applies to guilt and sentencing phases

ii. GIGLIO OBLIGATION. *Giglio v. United States*, 405 U.S. 150 (1972)

(1) Extends Brady principles to evidence affecting the **credibility of government witnesses**.

(2) For an extensive discussion of cases interpreting *Brady* and *Giglio*, *see* USA Book, "Brady & Giglio Issues" (http://10.173.2.12/usao/eousa/ole/usabook/bgig/bgig.pdf).

(3) The Central District of Illinois adopted a policy regarding disclosure of Brady and Giglio materials in 2007.

iii. Timing of disclosure

(1) USAM 9-5.000 through 9-5.150 and CD IL Policy:

"It is the policy of the United States Attorney's Office that a prosecutor must disclose information that either casts a substantial doubt upon the accuracy of any evidence -- including but not limited to witness testimony -- upon which the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information must be disclosed regardless of whether the information subject to disclosure would itself constitute admissible evidence."

(a) requires disclosure beyond what is constitutionally required
(b) dispenses with materiality requirement and requires disclosure beyond information that is material to guilt as set

forth in *Kyles v. Whitley*, 514 U.S.. 419 (1995) and *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999)

(c) must disclose information inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense

(d) must disclose impeachment information that either :

(i) casts a substantial doubt upon the accuracy of any evidence upon which the prosecution intends to rely to prove an element of any crime charged;

(ii) or might have a significant bearing on the admissibility of prosecution evidence; or

(iii) applies to information (not just evidence) regardless of whether the information itself constitutes admissible evidence;

(2) Obligations at guilty pleas

(i) *Brady* material – Best practice is to disclose *Brady* material prior to guilty plea

(ii) *Giglio* material – no obligation to disclose prior to guilty plea per Supreme Court in *U.S. v. Ruiz*, 536 U.S. 622, 629 (2002))(Constitution does not create a general discovery right for trial preparation or plea negotiations), **BUT**

(iii) Consider disclosing prior to guilty plea, depending on the facts and circumstances of case; e.g., if witness is only witness or material witness to event

BE AWARE: PROSECUTOR'S GOOD OR BAD FAITH IS TECHNICALLY IRRELEVANT FOR BRADY ANALYSIS

(3) *See also* Illinois Rule of Professional Conduct 3.8(d) (which requires prosecutor to "make timely disclosure of "all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense...." (Note that an ABA

Formal Opinion ABA Formal opinion 09-454 suggests our obligation is broader that the law requires – PRAO respectfully disagrees)

(4) exculpatory information must be disclosed reasonably promptly after it is discovered (except classified or National Security material)

(5) impeachment information typically disclosed a "reasonable time" before trial

(6) exculpatory and impeachment information that casts doubt upon proof of an aggravating factor at sentencing, but not related to proof of guilt, must be disclosed no later than the initial presentence investigation report

iv. Central District of Illinois Practice

(1) Do not take risks; if talking about it, probably should disclose it

(2) Disclose immediately

(3) If safety or security concerns:

seek to delay or restrict access

(i) *in camera* review by the court

(ii) protective order

(iii) disclosure of partial or redacted version of document

WARNING!! If classified information, see section below on Classified Material

PRACTICE TIP: Because a determination of what is *Brady* depends on the defense being offered, it can be helpful to state on the record in court that in order to fully comply with its *Brady* obligations, the government needs to know the defense.

v. Consequences of Nondisclosure

(1) Reversal of convictions

(2) Dismissal of Indictment

(3) Referral to Office of Professional Responsibility

(4) Bar Disciplinary Proceedings

(4) Publication of AUSA's name in Federal Reporters

(5) Award of Attorney's Fees

(6) Indictment of Prosecutor

(7) Civil suit against investigators and prosecutors

c. 3500 MATERIAL

i. What is 3500 material?

(1) Includes statement or report in government's possession

(a) written statement made by witness and signed or otherwise adopted or approved by him;

(b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantial verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; OR

(c) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

(d) NOTE: this would require any e-mail communication between witness and any government officer, agent or attorney (*see* CD IL E-mail Policy)

ii. Statutory requirement

(1) If the defendant makes a motion the court must order government to disclose statement or report of witness in the possession of the government AFTER the witness has testified on direct examination

(2) limited to subject matter of the testimony

(3) if government argues that statements or portions thereof are not the same subject matter, court can order *in camera* inspection

(4) if court excises portions of the statement over defense objection, government must maintain entire statement for purposes of appeal

(5) if government fails to comply with court order to disclose statement, court can strike witness's testimony or declare a mistrial

iii. Practice Guidance

(1) *See* discussion on USABook _ http://10.173.2.12/usao/eousa/ole/usabook/niss/20niss.pdf

iv. CD IL Practice

(1) In smaller cases (less than 100 pages of discovery) at least a week before trial (in the usual case)

(2) Typically earlier in white collar cases or cases with over 100 pages

(3) Later in cases where there are security issues

(4) May also seek protective order in some cases

(a) to prevent further dissemination of information

(b) redact information of ongoing investigation

v. Hearsay Declarants

(a) Disclose 3500 material

vi. Witnesses not called

Usually not required to disclose 3500 material unless it contains *Brady* information or is otherwise discoverable;

vii. Court's Discretion

Unlike *Brady/Giglio* material, court cannot order pre-trial disclosure of 3500 material, see *United States v. Percevault,* 490 F.2d 126, 129 (2d Cir. 1974), but often does.

viii. Subject Matter limitation

(1) Technically, disclosure is limited to the scope of the witness's testimony

PRACTICE TIP: It is good practice to turn over all of the information if it relates to the investigation or prosecution, even if the witness's testimony will be limited

(a) especially if the witness is the case agent

ix. Examples of 3500 Material

(1) prior testimony (grand jury; prior trial, etc.)

(2) reports (technically 3500 of agent who wrote report, not witness whose statement was recorded, unless adopted by witness. BUT see PRACTICE TIP below)

(3) recordings (including jail tapes)

(4) statements

(5) letters

(6) Miranda waivers

(7) consent forms

(8) notes? – agents and AUSAs (office practice not to disclose AUSA notes unless there is a reason to do so)

(9) emails

(10) text messages

(11) probation

(a) don't disclose PSR but must review to determine if it contains information that must be disclosed

(b) if PSR does include information to be disclosed, consider how to disclose – seek direction of court if necessary

(12) plea and cooperation agreements (formal or letters) (also technically *Giglio)*

(13) criminal history reports (also technically *Giglio*)

PRACTICE TIP: You should request that the law enforcement agency on the case check not only the federal database, but also the database of the states and municipalities where the witness is known to have lived, as some states and municipalities may not have entered relevant information into national databases. For example, the Title III database may not contain relevant charges, including misdemeanor charges that are related to credibility, like bad check charges, or currently pending arrest warrants.

You should also review the criminal history with the potential witness to ensure completeness.

Also see the "The Use of a Criminal as a Witness," by Senior United States Circuit Judge Stephen S. Trott, for an extensive discussion of the issues associated with using confidential informants and other cooperators.
(http://10.173.2.12/usao//eosua/ole/usabook/homi/07homi.htm).

(14) consider all documents signed or endorsed by the witness or that contain information provided by the witness (even if not technically 3500 material)

PRACTICE TIP: While an agent's report which includes reports of statements made by a witness are technically not "statements" of the witness under 18 U.S.C. §3500 unless adopted by the witness, but are rather statements of the agent, in the exercise of an expansive discovery practice, we generally disclose reports of interview to defense

counsel, absent an overriding reason to not do so. AUSAs are strongly advised to discuss this matter with a supervisor prior to deciding not to disclose these.

d. **RULE 26.2**

i. Similar to 18 U.S.C. § 3500 EXCEPT it applies to the government *and the defense* unlike 18 U.S.C. § 3500 which applies only to the government.

ii. Requires the disclosure of witness statements that relate to the subject matter of the witness's testimony, (except it does not apply to the defendant if the defendant testifies).

iii. Requires the court to order production if a request is made by either party.

iv. Provides for in camera inspection if either side claims privilege or information that does not relate to the subject matter of the testimony

v. Failure to obey a court order to produce or deliver a statement requires the court to strike the testimony of the witness from the record.

vi. If the government disobeys a court order to produce a statement the court must declare a mistrial if justice so requires.

vii. Statement is defined similarly to the definition in 18 U.S.C. § 3500.

WARNING!!!

e. **CLASSIFIED MATERIAL**

i. The Classified Information Procedures Act ("CIPA"), Title 18, United States Code, Appendix 3, controls the disclosure of classified information in discovery.

ii. If your case involves or implicates classified information, contact the Office's National Security Coordinator, ATAC coordinator or Chief of Violent Crimes & Terrorism at the earliest possible juncture.

(1) Early consultation and coordination with the appropriate component of the National Security Division (NSD) is required

regarding all discovery issues involving Classified information; and

(2) we should expect to be required by NSD to submit a detailed, case-specific discovery plan regarding all classified evidence in advance of NSD approval of any prosecution involving such evidence.

(3) 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.

(4) 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:

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

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

d. Other significant cases involving international suspects and targets; and

e. 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.

2. **WHERE? — Gathering and Reviewing Discoverable Information**

a. Where to Look

i. The Prosecution "Team" Concept/Prosecutor's Responsibility to Search

(1) Prosecutors on the case, including fellow AUSAs/DOJ lawyers in the office

(2) Case agents and other agents working on the case

(3) federal, state and local law enforcement agencies participating in the investigation and prosecution

(4) NOTE: With Parallel Proceedings and Task Forces, YOU MUST CHECK WITH other Task Force agencies. If there are parallel proceedings or investigations, be aware that THEY MAY ALSO BE A PART OF THE GOVERNMENT TEAM (even if they are not a part of your

investigaive team) If you are aware of investigations of your targets by the SEC, FTC, HHS, etc., please consult with your supervisor.

(5) The Scope of your "prosecution team" in National Security Cases may also be beyond your knowledge and control. Please consult with the National Security Coordinator and Criminal Chief in any such cases.

(6) DOJ policy (USAM 9-5.100) sets forth certain procedures for disclosing potentially impeachment information relating to law enforcement witnesses. ***See CD IL Giglio Policy***

(a) expects that we will obtain all impeachment material directly from witnesses and/or affiants obligated agency employees to inform prosecutors of potential impeachment information as early as possible (*see* CD IL *Giglio* Letter)

(b) recognizes that prosecutor may want to request potential impeachment information from investigative agency;

(c) sets forth procedures for those cases in which a prosecutor decides to make such a request to Federal Agency

(d) the procedure requires you to:

i. go to your Requesting Official – our Requesting Official is SLC Patrick Hansen

ii. Requesting Official (RO) will make request to Agency Official

iii. if information obtained, RO will discuss with AUSA and supervisor and consult with agency point of contact about the nature and extent of any disclosure of those materials

iv. the confidentiality of material not disclosed, or disclosed under a protective order must be safeguarded

b. <u>What to Review</u>

i. Investigative Agency Files

ii. Confidential Informant, Witness, Human Source Files, by whatever name the agency labels these. Agencies who make use of confidential informants and cooperating individuals have their own established procedure for retaining information about those witnesses. Some agencies may keep multiple files containing different types of information (e.g. one file for payments; another for information provided).

iii. Evidence and information gathered during the investigation

iv. Documents or evidence gathered by Civil attorneys and/or Regulatory Agency in parallel civil investigations.

v. Substantive case-related communications (e-mails, texts, etc)

vi. Potential Giglio information relating to law enforcement witnesses and Fed. R. Evid. 806 declarants

vii. Information obtained in Witness Interviews

(1) duty to disclose variations in statements

PRACTICE TIP: When a witness provides *additional information* than had previously been disclosed, is this 'inconsistent?' Courts very well may conclude that it is, and it should, therefore be disclosed

(2) new or inconsistent statements during trial preparation

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.

PRACTICE TIP: What is the standard? Measure any conflicting information provided by a witness against the standards set forth in the DOJ Policy, United States Attorney's Manual section 9-5.001

viii. Agents notes

ix. AUSA notes

(1) practice not to disclose BUT must review and disclose any info not otherwise disclosed in previous reports

(2) So: make sure agent is taking notes

(3) be mindful that in some districts (like SDNY) they disclose AUSAs notes

3. Conducting the Review

a. Who can review?

Agents, paralegals, agency counsel, computerized searches can identify potential discoverable information

b. Who makes the decision

AUSA must ultimately make decision re disclosure

4. Making the Disclosures

a. Beyond that discussed above – Court's discretion

i. District courts have broad discretion to set timetables for pre-trial disclosure

ii. Make *in camera* motions to delay disclosure if there are security concerns

b. Manner/Form of Disclosure

i. RULE 16

(1) bates stamp and copy – complete inventory if feasible

(2) keep copy for files

(3) if large production – consider having defense hire copy company

2. Form – Motion and Order for Copying

(a) send copy of order to copy company instructing them who can get copies of documents

(b) defense is required to pay for their own copies

(c) get record from copy company that the documents were requested by defense counsel

(4) Electronic disclosure

(a) keep exact copies of disks

(b) place bate stamp label on disk or number disks

c. Making/Keeping a Record

i. Always formalize disclosure by writing a letter stating when and how disclosure was made

ii. Voluminous copying send to outside secure copy service paid for by defense

d. Obtain Protective Order if necessary

e. Continuing Duty to disclose – Up to and including during trial

5. **Reporting Requirements**

REPORT TO SUPERVISORS AND GIGLIO DISCLOSURE OFFICER:

a. Any Unfavorable Credibility Findings of agents, officers or any other law enforcement witnesses;

b. Inappropriate behavior by law enforcement witnesses; or

c. Court's finding of willful nondisclosure or noncompliance with a court order on the part of an AUSA regarding discovery.

6. **Limiting Disclosures**

In a case where there are legitimate concerns about the safety of an informant or witness, it may be appropriate to apply to the court for a protective order limiting distribution and copying of material disclosed or about to be disclosed. There have been occasions when a witness's statement or grand jury testimony has been copied and distributed in a jail or to other potential defendants. Obviously, this may jeopardize the safety of the witness. In situations where this kind of concern is justified, courts have ordered defense counsel not to make copies of certain discovery material and not to let that material out of their personal custody. In these instances, the lawyers may

review the material in question with their clients, but may not provide the client with the documents or transcripts themselves.

ADDITIONAL CAUTION! *Child pornography may not be released to a defendant, notwithstanding its relevance and the fact that it may constitute evidence. Depictions of child pornography are* ***contraband****, and should receive special handling.*

7. **Cases Involving a Wiretap**

Interceptions (commonly referred to as "Title III wiretaps") present unique legal requirements. You should thoroughly familiarize yourself with all of the statutory requirements set forth in 18 U.S.C. § 2510 *et seq.*