

## **CRIMINAL DISCOVERY POLICY**

United States Attorneys' Office  
Eastern District of Michigan  
October 15, 2010

### **DISCOVERY POLICY**

This memorandum sets forth the general discovery policy of the United States Attorneys' Office for the Eastern District of Michigan, applicable to all criminal cases brought by this office, and applicable to all attorneys for the government in those cases (including criminal, civil and appellate AUSAs, as well as SAUSAs, all collectively referred to hereafter as "AUSAs").<sup>1</sup> It is the policy of this office to meet our legal obligations with respect to discovery in criminal cases and to provide defendants as much discovery material as possible, consistent with our obligation to protect the interests of the United States, including most significantly our national security interests and the safety of victims and witnesses. Pursuant to this policy, all AUSAs must comply with all applicable legal requirements, all Department of Justice policies and legal standards,<sup>2</sup> and the principles and approval requirements set forth below. To ensure continued compliance, all AUSAs are required to participate in annual discovery training. Absent strong case-specific reasons, AUSAs should also generally follow the best practices outlined below.

#### **General Discovery Principles**

1. Defendants in criminal cases have a right to a fair trial. Discovery is an integral part of providing each defendant with that fair trial.
2. It is in the interests of the United States for criminal cases to proceed in a fair, prompt, and efficient manner. The interests of the United States are usually also served by early and informed plea discussions.

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<sup>1</sup> This Policy, and the Eastern District of Michigan Discovery Resource Manual, are for internal guidance only, are protected by all applicable protections and privileges, and do not create any enforceable rights of defendants or third parties. This Policy supersedes all prior discovery policies issued by the U.S. Attorney's Office for the Eastern District of Michigan.

<sup>2</sup> The general rules governing discovery in criminal cases are found in Rule 16, Fed.R.Crim.P. The rules and policies governing production of witness information and statements are found at 18 U.S.C. § 3500, Rule 26.2, Fed.R.Crim.P., and USAM § 9-6.200. Other authorities are discussed below.

3. In complying with a defendant's right to a fair trial, attorneys for the government must also recognize and serve several additional rights and interests of the United States. These include the government's paramount interest in protecting national security, and in protecting national security information. The United States also has a responsibility to protect the rights and interests of crime victims and witnesses, and to protect the integrity of on-going investigations and sensitive law enforcement information.
4. It is the responsibility of the AUSA assigned to each case to provide discovery in criminal cases in a way that respects a defendant's rights and protects and serves any countervailing interests of the United States.
5. In light of the fact-specific nature of discovery issues, it is the policy of this office to vest maximum discretion in the AUSA assigned to each case. Therefore, no general discovery "rules" apply to all cases, except those required by law, by the U.S. Attorneys' Manual, and by this policy. Discovery decisions must be made based on the particular facts of each case, in the best judgment of the AUSA responsible for the case.
6. AUSAs should never describe the discovery provided as being "open file." Rather, the AUSA assigned to each case is responsible for knowing the applicable discovery obligations, identifying and mastering all discoverable facts, and making a fact-specific decision in each case about what information should or must be disclosed, what information must not be disclosed, and when disclosure should take place. This responsibility may not be delegated to paralegals, agents, secretaries or any other persons.
7. In order to meet the constitutional requirements of *Giglio v. United States*, 405 U.S. 150 (1972) and its progeny, as well as the more expansive standards of USAM § 9-5.001, as they apply to law enforcement witnesses, AUSAs must take certain defined steps in every case. As an initial matter, AUSAs must send a standard form *Brady/Giglio* letter to the case agent at the outset of the case. Prior to calling any law enforcement officer as a witness, all AUSAs must discuss with the law enforcement officer the disclosures required by *Brady/Giglio* and the USAM provisions, and must inquire whether the law enforcement witness is aware of any information about him/herself that might be subject to disclosure under that authority. Finally, AUSAs must also ensure that *Giglio* checks are performed for each and every law enforcement witness for the government who will testify at a suppression hearing and/or at trial. The request for a *Giglio* check should be made via email to the Criminal Chief, and the request must include the name, badge

number and department or agency for each law enforcement witness. Such a request must be sent to the Criminal Chief no later than three weeks prior to the testimony of non-federal law enforcement officers and no later than two weeks prior to the testimony of federal agents. It is the responsibility of each AUSA to ensure that *Giglio* checks have been completed prior to calling a law enforcement officer as a witness. The government has the responsibility to disclose *Brady/Giglio* material even in the absence of a demand for discovery from the defense.

8. Information obtained during proffers, whether by attorney proffer or interviews with the potential government witness, is not exempt from our disclosure obligations. A record should be made of all material information, including all material discrepancies and changes in a witness's statement, and this record should be reviewed before trial in light of our disclosure obligations.
9. Our discovery obligation in a criminal case is a continuing one, and remains fully effective through sentencing.
10. The government must be able to track and document its production of all discovery material, both to ensure that proper disclosures are made and to ensure that we can substantiate the disclosures.
11. The United States has a compelling interest in protecting the security and privacy of crime victims and witnesses. Therefore, all documents produced in discovery must be redacted to remove identifying information such as Social Security number, date of birth, driver's license number, etc. In cases where there is a specific need to produce such identifying information to the defense, or where the administrative costs of redaction are exorbitant, the unredacted discovery must be produced under the authority of a protective order, and should generally be produced with a distinctive watermark affixed.
12. 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 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 level 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.

### **Best Practices**

13. Rule 16 discovery should be produced as soon after arraignment as possible, and no later than required under the local Standing Order Governing Discovery in

## Criminal Cases.

14. Ordinarily, all documents produced in discovery must be identifiable by Bates number or an equivalent means of identification. If documents are made available for review in lieu of being copied and produced, a record of what was made available must be kept in the case file. If the volume of documents in a particular case renders Bates numbering uneconomical, a record must nonetheless be kept identifying which documents have been produced or reviewed.
15. Congress has expressed a strong commitment to the safety and security of government witnesses, through its enactment of the Jencks Act, 18 U.S.C. § 3500. Under that Act, the United States may not be required to produce statements of its witnesses prior to the witness's testimony. This statute enables prosecutors to protect their witnesses from harassment, threats, harm and efforts to obstruct justice, as well as to protect on-going investigations and sensitive law enforcement information. Nonetheless, often these concerns are not operative in a case, and other countervailing interests, such as the interests of the government in an efficient trial, may predominate. AUSAs should consider in each case whether the interests of the United States are best served by producing Jencks material well in advance of trial, for reasons such as facilitating plea discussions or facilitating an efficient trial, or instead whether the interests of the United States are best served by invoking our rights under the Jencks Act and delaying production of witness statements until close to, or even during trial.
16. When an AUSA concludes that the interests of the United States are best served by early disclosure of Jencks Act material, the AUSA should also consider whether those interests are best served by making discovery available for inspection but not copying, or by producing copies of statements pursuant to a protective order, or some other intermediate form of production. On the other hand, when an AUSA concludes that the interests of the United States are best served by delaying production of Jencks statements or other discovery material, the AUSA should consider whether some limited form of production might still protect the interests of the United States, such as producing discovery material relative to some of the witnesses, or making the material available pursuant to a protective order, or making the material available close to but still prior to trial. When an AUSA determines that it is in the best interests of the United States to withhold Jencks Act statements of witnesses until a point less than three days prior to the witness testifying, the AUSA must consult with his or her supervisor about that determination.

17. Ordinarily, the rough notes of an agent are only the statement of the agent, and do not need to be produced in discovery, especially if a formal agency report of the interview is produced (FBI-302, DEA-6, etc.). However, upon demand of the defendant, the rough notes of an interview of the defendant are subject to the production requirements of Rule 16, Fed.R.Crim.P., to the extent that they contain the substance of a relevant oral statement of the defendant. AUSAs should also consider reviewing the rough notes of all interviews of significant government witnesses prior to trial for any potential *Brady* or *Giglio* material. Other than the rough notes required to be produced under Rule 16, *Brady* and *Giglio*, rough notes of interviews should not be produced in discovery.
18. With respect to reports of interviews that are not required to be disclosed under Rule 26.2, Fed.R.Crim.P., or USAM 9-5.001, AUSAs are nonetheless encouraged to consider providing this information as early as possible, so long as such production is consistent with the interests of the United States.
19. AUSAs should not ordinarily participate in any witness interview without an agent present. For trial preparation interviews, AUSAs should ensure that a record is made of any materially new or different information provided by the witness, and should review that information in light of the applicable disclosure principles.
20. AUSAs, support staff and victim-witness coordinators must be cognizant that substantive email communication between witnesses and the U.S. Attorneys' Office may be subject to the disclosure requirements of 18 U.S.C. §3500 and Rule 26.2, Fed.R.Crim.P. Due to the voluminous nature of email, and the resources required to store and search for substantive case related email, AUSAs, support staff and victim-witness coordinators should not engage in substantive email communication with law enforcement witnesses or other witnesses. AUSAs should advise agents, support staff and victim-witness coordinators of our office policy against such communications. Rather than sending an email on substantive case-related matters, agents should be encouraged to communicate to the United States Attorneys' Office through traditional methods such as FBI 302's and DEA 6's, which may be sent electronically. In the event that an agent or witness does send a substantive email or other electronic communication to an AUSA or support staff member, that message must be printed or otherwise stored in the case file, and catalogued for review and potential production pursuant our discovery obligations.
21. Prior to trial, AUSAs should identify and review all information gathered in the investigation, including all relevant agency files pertaining to their case, such as 1A files and informant files. AUSAs should give special attention to the question

of what constitutes the "prosecution team," and should consider whether it is warranted to review the files of any other governmental agency that is, or may be considered to be, part of the prosecution team, such as task-force partner agencies or referring agencies such as the SEC, FDA, etc.

22. The government is obligated to produce Brady and Giglio materials even in the absence of any request from the defendant. Similarly, our obligation to produce exculpatory or impeachment information pursuant to USAM 9-5.001 also stands independent of any defense request for such material. In contrast, our obligation to produce discovery material under Rule 16 is triggered only by a specific demand for such material from the defendant. AUSA's are encouraged, but not required, to condition production of discovery material under Rule 16 upon a demand from the defendant. When defendants make such a demand, the government is then entitled to reciprocal discovery of any corresponding discoverable materials in possession of the defendant. AUSAs are encouraged to take advantage of the availability of reciprocal discovery.

#### Approvals

23. Pursuant to USAM § 9-5.001, AUSAs are required to produce exculpatory material reasonably promptly after it is discovered. This requires disclosure earlier than does *Brady's* requirement to turn over exculpatory material at a point at which the defense is able to make reasonable use of the information at trial. To the extent an AUSA desires to delay the disclosure of exculpatory material until a point later than required under the USAM, the AUSA must obtain the approval of both the unit chief and the chief of the Criminal Division. A written copy of this approval should be maintained in the case file. In no event may disclosure of exculpatory material be delayed beyond a point at which the defense is able to make reasonable use of the information at trial.
24. Pursuant to USAM § 9-5.001, AUSAs must obtain the prior approval of their unit chief to delay disclosure of impeachment information until the start of trial or later. A written copy of this approval should be maintained in the case file.
25. AUSAs must obtain the approval of their unit chief to delay the production of material discoverable under Rule 26.2 until a point closer to trial than three days before the witness testifies. A written copy of this approval should be maintained in the case file.
26. AUSAs must obtain the approval of their unit chief and the chief of the Criminal Division before seeking a court order denying discovery of material covered by

Rule 16 or Rule 26.2. A written copy of this approval should be maintained in the case file.