Memorandum

U.S. Department of Justice

United States Attorney
District of Minnesota

Subject	Date
District of Minnesota Criminal Discovery Policy	October 15, 2010

To	From
All Criminal AUSAs	B. Todd Jones United States Attorney

INTRODUCTION

On January 4, 2010, the Department issued guidance for prosecutors regarding criminal discovery. The guidance is intended to "establish a methodical approach to consideration of discovery obligations that prosecutors should follow in every case to avoid lapses that can result in consequences adverse to the Department's pursuit of justice." The guidance directs each United States Attorney's Office to establish a written discovery policy.

The Department recognizes that discovery practices vary by district. The directive, therefore, permits each district to establish a discovery policy that takes into account local practice. This memorandum outlines the discovery policy for the District of Minnesota. This memorandum provides only internal guidance for the United States Attorney's Office for the District of Minnesota. It is not intended to, does not, and may not be relied upon to create any substantive or procedural rights enforceable at law by any person in any administrative, civil, or criminal matter or case. Nor are any limitations hereby placed on the otherwise lawful litigation prerogative of the United States Department of Justice. See USAM § 1-1.100. AUSAs are expected to make reasonable and good faith efforts to comply with this policy. This policy shall apply in all criminal cases arising in the District of Minnesota, except those involving national security, including terrorism, espionage, counterintelligence, and export enforcement.[1]

[1]National security cases can present unique and difficult criminal discovery issues with far reaching implications for national security and the nation's intelligence community. The

This District's policy on the disclosure of information and evidence is intended to be broader than what is required by relevant statutes, rules, and the Constitution. However, in certain cases, countervailing considerations, including risk of harm to victims or witnesses, obstruction of justice, and privacy concerns, counsel against broad and early disclosure. In those cases where an AUSA wishes to deviate from the discovery principles set forth in this policy and restrict discovery, supervisory approval is required and such approval must be documented in the case file. In certain instances, for example in the middle of trial, an AUSA may be unable to obtain supervisory approval to deviate from this policy. In those instances, the AUSA should obtain supervisory approval as soon as practicable. No approval is necessary to provide discovery that is broader than provided for in this policy.

DISTRICT OF MINNESOTA DISCOVERY POLICY

1. Gathering Discoverable Information - The Prosecution Team

The discovery obligations of federal prosecutors are generally established by Federal Rules of Criminal Procedure 16 and 26.2, 18 U.S.C. § 3500 (Jencks Act), Brady, and Giglio. In addition, the U.S. Attorney's Manual describes DOJ's policy for disclosure of exculpatory and impeachment information. See USAM §§ 9-5.001 ("Policy Regarding Disclosure of Exculpatory and Impeachment Information") and 9-5.100 ("Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Witnesses ('Giglio Policy')").

Department of Justice has developed special guidance for those cases. See Acting Deputy Attorney General Gary G. Grindler's September 29, 2010, memorandum, "Policy and Procedures Regarding the Government's Duty To Search for Discoverable Information in the Possession of the Intelligence Community or Military in Criminal Investigations." AUSAs should review that guidance and should consult with their supervisors and the National Security Division of the Department of Justice with respect to criminal discovery in those cases.

The first question to be asked in every case is where to look for discoverable information. Department policy requires prosecutors to seek discoverable information from all members of the prosecution team. In most cases, the prosecution team will include the federal agents and state and local law enforcement officers working on the case. USAM § 9-5.001.

In determining who should be considered part of the prosecution team, an AUSA must determine whether the relationship is close enough to warrant inclusion for discovery purposes. When in doubt, consult with your supervisors and/or the District's Discovery Coordinator. Examples include:

- Multi-district investigations – the prosecution team could include the AUSAs and agents from the other district(s).

- Regulatory agencies – the prosecution team could consist of employees from non-criminal investigative agencies such as the SEC and FDIC.

- State/local agencies – a state and local officer is a part of the "prosecution team" if the AUSA or federal agents are directing the officer's actions or if the state or local officer participated in the investigation or gathered evidence which ultimately led to the charges.

Considerations in determining whether an agency or entity should be considered part of the "prosecution team":

- Whether the AUSA or investigative agency conducted a joint investigation or shared resources with the other agency or entity;

- Whether the other agency or entity played an active role in the AUSA's case;

- The degree to which information or evidence has been shared or exchanged with the other agency or entity; and

- Whether the AUSA has control over or has directed action by the other agency or entity.

AUSAs should take an expansive view and err on the side of inclusiveness in deciding who should be considered part of the "prosecution team." Additional guidance on this issue is set forth in the DAG's January 4, 2010, Guidance for Prosecutors Regarding Criminal Discovery.

2. What to Review Once the Prosecution Team is Defined

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. In most cases it is not practical for the AUSA to conduct the review. In such cases, the prosecutor should develop a process for review to ensure that discoverable information is identified. It is the AUSA, however, who makes the ultimate disclosure decision.

a. Specific Issues

1. The investigative agency's file

For DOJ law enforcement agencies, AUSAs should have access to the agencies' investigative files. AUSAs should review the files or request production of potentially discoverable materials from the case agents. With respect to outside agencies, AUSAs should request access to files or request production of all potentially discoverable material.

2. Confidential Informant, Confidential Witness, Confidential Human Source, and Confidential Source Files

For testifying witnesses, the AUSA should ensure that the entire file for each witness is reviewed, not just the part relating to the current case. If an AUSA believes that the circumstances of the case warrant review of a non-testifying source's file, the prosecutor should follow the agency's procedures for requesting the review of such a file. If issues develop regarding access to such files, contact the District's Discovery Coordinator.

3. Evidence

Generally, all evidence and information gathered during the investigation should be reviewed for discoverable material, including all evidence obtained via subpoenas, search warrants, or other legal process. In cases involving voluminous evidence, this requirement may be met by permitting defense counsel access to all of the material.

4. Regulatory Agency/DOJ Civil attorney files

If an AUSA has determined that a regulatory agency is a member of the prosecution team or has information that the regulatory agency has material discoverable evidence, the AUSA should arrange for that agency's files to be reviewed for discoverable material.

3. Timing of Disclosures

a. Rule 16 and Rule 12 Discovery

Every Magistrate Judge in the District orders at arraignment the production of Rule 16 discovery by a certain date. You should comply with the order by either sending the Rule 16 material to defense counsel or making the Rule 16 material available for review. A form letter is available for your use on hotdocs.

It is the policy of the District to turn over Rule 12 material (e.g., search warrants, reports of search and seizure and arrests, and witness identification) to the defense with the Rule 16 material. It is in our interest to provide such notice by turning over evidence that may be the subject of a motion to suppress as soon as possible. Furthermore, if you have a case in which there is evidence that is not covered by a discovery rule but that may be the subject of a motion to suppress (for example identification procedures), you should turn the material over with the Rule 16 material.

AUSAs should always consider security concerns of victims/witnesses when making discovery timing decisions as well as protecting ongoing investigations, preventing obstruction of justice, investigative agency concerns and other strategic considerations that improve our chances of reaching a just result in our cases.

b. Expert Disclosures

Rule 16 requires disclosure upon the request of the defendant of a written summary of a testifying expert's expected testimony, including the expert's opinions, bases and reasons for the opinions, and the expert's qualifications. In most cases, expert disclosures are not made by the Rule 16 deadline in the arraignment order because either the government has not determined whether an expert will testify or the expert has not yet been identified. Therefore, Magistrates typically set a date for expert disclosures that is tied to the trial date. These disclosure dates are not uniform and vary by Magistrate, and in certain cases no disclosure date is set. Thus, with respect to expert disclosures, AUSAs should make expert discloses in compliance with any pre-trial order, but in the absence of such an order, no later than one week prior to trial.

c. Confidential informants

Roviaro v. United States, 353 U.S. 53 (1957), and its progeny mandate the disclosure of the identity of government informants under a narrow set of circumstances. As a general rule, the government does not have to disclose the identity of an informant unless the informant has relevant information that is helpful to the defense, i.e., he or she was an eyewitness to the charged offense. Informants who merely act as tipsters should never be disclosed.

In those instances where we are required to disclose the identity of the informant, Magistrates typically require the government to make the informant available to the defense. A number of Magistrates set a date by which the informant must be identified and made available for an interview. With respect to these disclosures, AUSAs should make informant disclosures in compliance with any pre-trial order, but in the absence of such an order, no later than one week prior to trial.

d. Federal Rules of Evidence 404(b), 413 and 414

Federal Rule of Evidence 404(b) requires reasonable pretrial notice of other crimes or bad act evidence to be offered by the United States. Given that it would likely be held to be ineffective assistance of counsel not to make such a request,

notice should be provided even if no request is made. Similar notice obligations exist for introduction of evidence in sexual abuse cases. FRE 413 authorizes introduction of evidence of similar crimes in sexual assault cases, and FRE 414 allows introduction of similar evidence in child molestation cases.

Both FRE 413 and 414 mandate that the government must give notice of its intention to offer such evidence and disclose the evidence to the defendant at least 15 days prior to trial, and AUSAs must comply with this requirement. FRE 404(b) mandates reasonable notice without a specific deadline. However, in many cases Magistrates set a specific deadline for disclosure of 404(b)-type evidence. AUSAs should disclose FRE 404(b) evidence in compliance with an pre-trial order, but in the absence of such an order, no later than one week prior to trial.

e. Jencks Act Material

Although not required by the Jencks Act, the policy in the District is to disclose Jencks Act material three days before trial. In many cases, however, AUSAs should consider giving broader and earlier discovery than required by the policy because it fosters a speedy resolution of many cases. Early and broad disclosure also lessens or negates any issues concerning whether the Jencks Act material contains Brady or Giglio information. An AUSA must obtain supervisory approval to disclose Jencks Act material less than three days before trial. Withholding of such material should be based on security concerns of victims and witnesses, protecting ongoing investigations, preventing obstruction of justice, investigative agency concerns, or other strategic considerations that improve our chances of reaching a just result.

Eighth Circuit law is clear that agent interview reports are not Jencks Act material for the individual interviewed unless the individual adopted the report or the report is a substantially verbatim recitation of what the individual said during the interview. While we should never concede that such interview reports are Jencks, the policy in the District is to disclose such interview reports because they may contain Brady/Giglio information. Therefore, if an AUSA seeks to disclose interview reports for testifying individuals that are not technically Jencks

Act material less than three days before trial, the AUSA must obtain supervisory approval.

An AUSA is not required to disclose interview reports for non-testifying individuals. However, AUSAs should err on the side of disclosing such reports absent concerns related to witness safety, obstruction of justice, ongoing investigations, or legitimate privacy concerns.

Rule 26.2 applies the Jencks Act to suppression hearings, and to the extent specified in the rules, to other proceedings such as preliminary, sentencing, and detention hearings. The rule requires production of the statement of a witness, other than the defendant, after the witness has testified upon motion of the party who did not call the witness. AUSAs must be prepared to provide such statements to defense counsel at these various hearings.

f. Brady and Giglio

AUSAs are constitutionally required to provide Brady and Giglio material to defense counsel. Government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial.

Department policy set forth in USAM 9-5.001 requires disclosure by AUSAs of information beyond that which is "material" to guilt. Under Department policy a prosecutor must:

- Disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime.

- Additionally, a prosecutor must disclose information that either casts a substantial doubt upon the accuracy of any evidence – including but not limited to witness testimony – 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 it is

likely to make the difference between conviction and acquittal of the defendant for a charged crime.

In this District, we interpret Brady and Giglio broadly. If an AUSA has any doubt whether a piece of evidence is exculpatory, the evidence should be disclosed. The Criminal Chief, Deputy Criminal Chiefs, or the Discovery Coordinator should be consulted as issues arise.

With respect to the timing of disclosures, the District follows DOJ policy. DOJ policy directs disclosure of exculpatory (Brady) information "reasonably promptly after it is discovered," and directs that disclosure of impeachment information (Giglio) be made before trial. USAM 9-5.001. Delaying disclosure per the Jencks Act should be done only when necessary due to witness safety or other security concerns. An AUSA must obtain supervisory approval not to disclose impeachment information before trial or not to disclose exculpatory information reasonably promptly because of security of other concerns. Such approval must be documented in the case file.

1. Giglio Policy for Law Enforcement Witnesses

a. Federal Officers

In all cases in which federal law enforcement officers are scheduled to provide a sworn statement or testimony the AUSA will satisfy the requirements of the Giglio policy by either requesting impeachment information directly from the witness or affiant or by making a written request to the employing agency. If the AUSA is obtaining the information directly from the agent, the Giglio form currently available on hotdocs should be used to conduct this inquiry. If the agent answers yes to any of the Giglio questions, the AUSA should contact the Discovery Coordinator. The Discovery Coordinator will contact the agency's Giglio contact to obtain the relevant information. If the AUSA seeks a written request to the employing agency, the request will be made by the Discovery Coordinator. The AUSA is responsible for providing the Discovery Coordinator with relevant information to make the request. The AUSA should maintain documentation in the file to confirm that the AUSA completed the Giglio inquiry with respect to each testifying law enforcement officer.

When potential Giglio information exists, the AUSA should consult with the Discovery Coordinator, the Criminal Chief, and/or a Deputy Criminal Chief to determine whether it is appropriate to disclose the information, withhold the information, or seek ex parte, in camera review by the court concerning disclosure.

b. State and Local Officers

With respect to state and local officers, the AUSA will obtain the information directly from the officers by reviewing with the officers the questions on the Giglio hotdocs form. If the officer answers yes to any of the Giglio questions, the AUSA should contact the Discovery Coordinator who will contact the relevant law enforcement agency to obtain the relevant information. Again, the AUSA should document in the file compliance with this policy.

As set forth above, if potential impeachment information exists, the AUSA should consult with the Discovery Coordinator, Criminal Chief and/or Deputy Criminal Chief regarding whether and how to disclose the information.

4. Other Reoccurring Issues

a. Agent's Interview Notes

Agents typically make rough notes of witness statements during interviews. They then prepare an interview report based on the notes. Depending on agency policy, agents may retain their rough notes. It is the law of the circuit that these rough notes generally are not deemed to be Jencks Act material of the interviewed witness. If the notes are a faithful representation of what is contained in the formal report of interview, AUSAs have no duty to disclose the interview notes.

However, issues may arise when rough notes are inconsistent with the formal interview report. If the notes depart materially from what is contained in the formal report the notes may constitute Brady or Giglio material. If an AUSA has information that the interview notes may differ from the report of interview and thereby contain Brady or Giglio material, the AUSA should review the notes for disclosure issues. Disclosure of the notes (or the content of the notes) should be considered after

consultation with the Criminal Chief, a Deputy Criminal Chief, or the Discovery Coordinator.

b. Trial Preparation Witness Interviews

When preparing for trial, it is the practice of AUSAs in this district to meet with witnesses prior to their testimony. During this process, prosecutors and/or agents may make notes of the statements made by the witnesses. These notes, which typically are not memorialized in an interview report, may raise discovery issues.

First, if the witness statement is noted in verbatim or substantially verbatim form, it may constitute Jencks Act material that must be produced.

Second, if the witness provides information that is arguably exculpatory or makes a statement regarding a material fact that is arguably inconsistent with a prior statement of that witness, the AUSA must determine whether the information should be disclosed as Brady/Giglio.

Whether information is exculpatory may not become apparent until a later time or during trial. Prosecutors, therefore, should retain their rough notes and be cognizant of the potential they may contain Brady or Giglio information that may need to be disclosed.

When considering disclosure, the AUSA may consider providing the information by way of letter or e-mail. The AUSA may also go to the court and seek an in camera review of the information and ask the court to determine whether the information constitutes Brady or Giglio.

c. Email

The use of email has become widespread. AUSAs, law enforcement agents, and other employees use email to communicate about a variety of case related matters. While a valuable tool, email may have significant adverse consequences if not used appropriately. The use of email to communicate substantive case-related information in criminal and parallel criminal/civil cases may trigger AUSAs' responsibilities under the Jencks Act,

Federal Rules of Criminal Procedure 16 and 26.2, Brady/Giglio, USAM 9-5.001, and the Federal Records Act (discussed more fully below).

Emails fall into three general categories: potentially privileged communications; substantive communications; and purely logistical communications.

Emails may be used to communicate with others regarding case strategy, to seek approval or legal advice from supervisors or others, to give legal advice, or to request that an agent, paralegal, auditor, or other USAO personnel conduct certain research, analysis, or investigative action in anticipation of litigation. Such emails are "potentially privileged" and as such may be protected from discovery.

An email that contains "substantive" case-related information raises additional legal issues. AUSAs and other personnel must be careful in the exchange of such email. They should avoid using email to communicate substantive case-related information in criminal and parallel criminal/civil cases whenever possible. Because email communications from agents may not be as complete as investigative reports, and may have the unintended effect of circumventing the investigative agency's established procedures for writing and reviewing reports, AUSAs should advise investigative agents that, unless circumstances dictate otherwise, substantive written communications from agents about cases should be in the form of a formal investigative report, rather than an email.

Email may be used to communicate purely logistical information and to send formal investigative reports as attachments, or to communicate efficiently regarding non-substantive issues such as scheduling meetings, interviews, and court appearances.

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

1. If email is used to communicate substantive case-related information with agents, victim/witnesses, or anyone else, the email must be maintained in the case file or electronically in an Outlook folder. Alternatively, the AUSA should advise the agent to memorialize the substantive communication in a written interview report.

2. As part of the discovery collection and review process, AUSAs should routinely ask agents and others to provide them with access to all emails that contain substantive case-related information. This includes, but is not limited to, communications between agents, and between agents, AUSAs, any USAO personnel, or anyone else, just as any formal reports would be collected and reviewed.

3. While substantive emails need to be reviewed during the discovery phase, any discoverable information may be disclosed in a redacted or alternative form (e.g., a letter or memo) in appropriate circumstances, particularly when agency policy or practice disfavors disclosure of emails. Redaction may also be appropriate if an email contains a mix of substantive, potentially privileged communications, and purely logistical information.

4. AUSAs and any USAO personnel who interact with victims and witnesses should limit email exchanges to non-substantive matters such as the scheduling of interviews or notification of dates and times of hearings. Similarly, AUSAs should strongly encourage agents to limit email exchanges with victims or witnesses to non-substantive matters. Any substantive information received from a victim or witness should be considered potential Jencks Act material and also maintained for Brady/Giglio review. If USAO personnel other than the AUSA receives a substantive email from a victim or witness, such email should be forwarded to the AUSA(s) assigned to the investigation or case.

5. Maintaining a record or disclosures

It is imperative that AUSAs maintain a record of the disclosures made to defense counsel. The exact fashion in which an AUSA maintains a record will change depending of the facts of the case. For example, the AUSA may maintain a bates stamped copy of all material disclosed, a disk of all material disclosed, or a written record of the documents and evidence reviewed by counsel on particular dates. An AUSA must maintain a record of disclosures sufficient to counter a claim by defense counsel that a particular document or piece of evidence was not disclosed.