CHAPTER NINE

DISCOVERY PROCEDURES IN CRIMINAL CASES

1. General Policy

This Chapter contains the discovery policies applicable in criminal cases in the Western District of Missouri.[1] Every AUSA[2] must know the rules, statutes and court decisions which govern the production of discovery. In particular, all AUSAs must be familiar with and adhere to the discovery policies of this District as well as the policies contained in the Department's **Guidance for Prosecutors Regarding Criminal Discovery**.

2. Gathering Discoverable Information - The Prosecution Team

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 includes not just the federal agents who worked on the case but also any state and local law enforcement officers who worked on the case.

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 supervisor and/or the District's Discovery Coordinator.[3] 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.

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[1]The policies in this chapter apply to all criminal matters arising in the Western District of Missouri. Additional policies apply in cases involving national security (including terrorism, espionage, counterintelligence, and export enforcement), which can present unique and difficult discovery issues with far reaching implications for national security and the nation's intelligence community. Prosecutors handling national security cases must adhere to the **discovery policy applicable in national security cases**, issued by the Department of Justice on September 29, 2010, and should consult with their supervisor, the Criminal Division Chief, and the National Security Division of the Department of Justice for guidance on criminal discovery in such cases.

[2]AUSA refers not only to Assistant United States Attorney but also includes Special Assistant United States Attorney (SAUSA).

[3]The District's current Discovery Coordinator is SLC Linda Parker Marshall.

- State/local agencies – a state and local officer is a part of the "prosecution team" if the AUSA or federal agent is 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" include:

- 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;
- Whether the AUSA knows of or has access to discoverable information held by the agency or entity;
- The degree to which information or evidence has been shared or exchanged with the other agency or entity;
- The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges;
- 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; and
- Whether the AUSA has control over or has directed action by the other agency or entity.

Many cases arise out of investigations conducted by multi-agency task forces or otherwise involve state law enforcement agencies. In such cases, AUSAs should consider factors such as:

- Whether state or local agents are working on behalf of the AUSA or are under the AUSA'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 AUSA has ready access to the evidence obtained by the joint investigation.

In the Eighth Circuit, courts generally will evaluate the role of a state or local law enforcement agency on a case-by-case basis. *See, e.g., United States v. Jones*, 471 F.3d 868, 871-72 (8th Cir. 2006)(discussing factors that constitute significant federal participation in execution of state search warrant); *United States v. Moeckly*, 769 F.2d 453, 463 (8th Cir. 1985)(Jencks Act does not

apply to statements made by state officials when there is no joint investigation or cooperation with federal authorities).

AUSAs should take an expansive view and err on the side of inclusiveness in deciding who should be considered part of the "prosecution team." Carefully considered efforts to locate discoverable information can help avoid motion practice and future litigation over *Brady* and *Giglio* issues and avoid surprises at trial. Additional guidance on this issue is set forth in the Department's **Guidance for Prosecutors Regarding Criminal Discovery**.

3. 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 some cases it may not be practical for the AUSA to conduct the review personally. The AUSA, however, is ultimately responsible for all disclosure decisions. Therefore, the AUSA should develop a review process that will ensure discoverable information is identified. In cases involving voluminous evidence obtained from third parties, the AUSA should consider providing defense with access to the voluminous documents to avoid the possibility that a well-intentioned review process nonetheless fails to identify discoverable material.

AUSAs should pay particular attention to several specific issues, including the following:

a. The Investigative Agency's file

For all DOJ law enforcement agencies, AUSAs should have access to the investigative files of the agency. 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. The investigative agency's entire investigative file, including documents such as FBI Electronic Communications (ECs), inserts, e-mails,[4] etc., should be reviewed for discoverable information. If such information is contained in a document that the agency deems to be an "internal" document such as an e-mail, an insert, an administrative document, or an EC, it may not be necessary to produce the internal document, but it will be necessary to produce all of the discoverable information contained in it.

b. 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 be 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

[4]See the discussion of e-mail, *infra* at pages 11-12.

procedures for requesting the review of such a file. If issues develop regarding access to such files, contact the Chief of the Criminal Division and/or the District's Discovery Coordinator.

c. 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.

d. Regulatory Agency/DOJ Civil attorney files

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

e. Substantive Case-Related Communications

"Substantive" case-related communications may contain discoverable information. Those communications that contain discoverable information should be maintained in the case file or otherwise preserved in a manner that associates them with the case or investigation. "Substantive" case-related communications are most likely to occur (1) between prosecutors and/or agents, (2) between prosecutors and/or agents and witnesses and/or victims, and (3) between victim/witness coordinators and witnesses and/or victims. Such communications may be memorialized in e-mails, memoranda, or notes. "Substantive" communications include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility. Communications involving case impressions or investigative or prosecutive strategies without more would not ordinarily be considered discoverable, but substantive case-related communications should be reviewed carefully to determine whether all or part of a communication (or the information contained therein) should be disclosed.

While it may be a good practice to encourage agents to limit the amount of substantive case-related e-mails they create, prosecutors should also remember that with few exceptions (*see, e.g.*, Fed.R.Crim.P. 16(a)(1)(B)(ii)), the format of the information does not determine whether it is discoverable. For example, exculpatory information that the prosecutor receives during a conversation with an agent or witness is no less discoverable than if that same information were contained in an e-mail. When the discoverable information contained in an e-mail or other communication is fully memorialized elsewhere, such as in a report of interview or other document(s), then the disclosure of the report of interview or other document(s) will ordinarily satisfy the disclosure obligation.

f. Treatment of Reports of Interview as Jencks Act Statements

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 never should concede that such interview reports are Jencks Act material, the policy in this district is to disclose such interview reports as if they are Jencks Act material. An AUSA must obtain advance written approval from their immediate supervisor and the Chief of the Criminal Division to deviate from this practice.

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, legitimate privacy concerns, investigative agency concerns, or other strategic considerations that improve our chances of reaching a just result.

g. Treatment of Discoverable Information from the Intelligence Community (IC)

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 of the Department of Justice (NSD) regarding whether to request a prudential search of the pertinent IC element(s). All prudential search requests and other discovery requests of the IC must be coordinated through NSD.

Although discovery issues relating to classified information are most likely to arise in national security cases, they may also arise in a variety of other criminal cases, including narcotics cases, human trafficking cases, money laundering cases, and organized crime cases. In particular, it is important to determine whether the prosecutor, or another member of the prosecution team, has specific reason to believe that one or more elements of the IC possess discoverable material in the following kinds of criminal cases:

- Those targeting corrupt or fraudulent practices by middle or upper officials of a foreign government;
- Those involving alleged violations of the Arms Export Control Act or the International Emergency Economic Powers Act;
- Those involving trading with the enemy, international terrorism, or significant international narcotics trafficking, especially if they involve foreign government or military personnel;
- Other significant cases involving international suspects and targets; and
- Cases in which one or more targets are, or have previously been, associated with an intelligence agency.

For these cases, or for any other case in which the 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.

4. Timing of Disclosures - Deciding Between Voluntary and Statutory Discovery

Once the discovery material has been gathered and reviewed, the timetable for disclosing it will depend on whether the AUSA elects to provide *voluntary discovery* or *statutory discovery*.[5] AUSAs in this district are encouraged to provide *voluntary discovery*, that is, to provide discovery sooner than required by applicable rules, statutes, or case law.

An AUSA's decision to provide voluntary discovery requires no supervisory approval. If the AUSA determines that discovery will be produced on a voluntary basis, the following disclosure timetable should be used:

- materials subject to disclosure under the Federal Rules of Criminal Procedure,[6] 18 U.S.C. § 2518(9) (pertaining to wire taps), *Brady*[7] and *Giglio*, and any other applicable case law (except *Jencks* statements) should be made available for inspection and/or copying within ten (10) days of the arraignment or upon receipt by government counsel, whichever event occurs later;

- *Jencks* material (18 U.S.C. § 3500 and/or Rule 26.2 pertaining to production of witness statements) should be made available for review and/or copying no later than ten (10) calendar days prior to trial or hearing.

While voluntary discovery is encouraged, there can be circumstances where it is more appropriate to provide *statutory discovery*, that is, to provide discovery consistent with the deadlines set by applicable rules, statutes, or case law. Examples of factors that could justify providing statutory discovery include victim or witness safety concerns, or when early disclosure could

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[5]Because the Court, the USAO, and defense counsel in this District rarely agree on the precise meaning of the term "open file" in the discovery context, an AUSA should never use that term to describe the discovery practices that will be utilized in any criminal prosecution.

[6]These include: Rule 12 (pre-trial motions); Rule 16 (general discovery matters); and Rule 41 (search warrants).

[7]See the discussion of *Brady* and *Giglio*, *infra* at pages 8-10.

substantially jeopardize an ongoing investigation, or the nature and complexity of the case, or other articulable concerns specific to an individual case.

An AUSA can provide statutory discovery only after obtaining prior written approval from both the AUSA's Unit or Branch Supervisor and the Chief of the Criminal Division. The request for approval for statutory discovery may be made by e-mail. The request for approval should contain a brief synopsis of the facts of the case and should state the reason(s) why the case AUSA believes statutory discovery is necessary. The written request for statutory discovery and approval should be placed in the case file by the AUSA, to include a copy of any e-mail request and approval.

If the case AUSA obtains approval to provide discovery on a statutory basis, the following disclosure timetable should be used:

- materials subject to disclosure under the Federal Rules of Criminal Procedure,[8] 18 U.S.C. § 2518(9) (pertaining to wire taps), *Brady*[9] and *Giglio,* and any other applicable case law (except *Jencks* statements) will be made available for inspection and/or copying at the time provided in the applicable statute, rule or decision, but in any event no later than ten (10) working days prior to trial or hearing, or immediately upon receipt by government counsel, whichever event occurs later (see Fed. R. Crim. P. 45);

- *Jencks* material (18 U.S.C. § 3500 and/or Rule 26.2) for a trial or hearing will be provided under the conditions set forth below.

5. Guidelines for Disclosure of *Jencks* Material Pursuant to Statutory Discovery

If the case AUSA obtains approval to provide discovery on a statutory basis, *Jencks* material shall be disclosed as described below:

- Depending upon the circumstances of each case, witness statements should be disclosed on the morning of the first day of trial, or as many as three days before trial so as to provide adequate time for review and preparation for cross-examination. Where the trial is expected to last more than two or three days, *Jencks* statements may be made available the day before the witness is expected to testify. Additionally, where there exists a threat of harassment or intimidation of a witness, discovery should be made available only after the witness testifies.

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[8]See footnote 5, *supra*.

[9]See footnote 6, *supra*.

- When witness statements are made available to defense counsel, a cover letter or other inventory itemizing the documents released must be utilized so the production of all required material can be verified in the event of a dispute.

- Discovery shall be further conditioned upon the return of all materials to the government at the end of each day of the trial or hearing and upon defense counsel's assurance that no copies will be made of any of the statements provided while in his/her possession.

- Federal Rules of Criminal Procedure 12 and 26.2 require production of witness statements at pre-trial suppression hearings and the procedures discussed in the immediately preceding three paragraphs should be followed. Such statements should be redacted to include only those portions of the statements which relate to the subject matter of the testimony at the hearing. In the interests of judicial efficiency, the statements may be made available for counsel's inspection either the day before or the morning of the hearing.

6. ***Brady/Giglio* Policy**

Brady material generally consists of evidence that is favorable to an accused as to either guilt or punishment. *Giglio* material generally consists of evidence that can be used to "impeach" a witness. Exculpatory (*Brady*) and impeachment (*Giglio*) material can take many forms and the characterization of material as exculpatory or impeachment is often dependent on the specific or unique facts of a particular case.

AUSAs are required to provide *Brady* and *Giglio* material to defense counsel as part of the constitutional guarantee to a fair trial. The United States Attorney's Manual contains the Department's policy for the disclosure of exculpatory and impeachment information. *See* **USAM 9-5.000**. All AUSAs must know and comply with this policy, which imposes disclosure obligations that exceed the Government's constitutional disclosure obligation under *Brady, Giglio*, and their progeny.

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. Your immediate supervisor, the Chief of the Criminal Division, or the Discovery Coordinator should be consulted as issues arise.

a. *Brady* Policy

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.

With respect to the timing of disclosures, DOJ policy directs disclosure of exculpatory (*Brady*) information "reasonably promptly after it is discovered," and directs that disclosure of impeachment (*Giglio*) information be made before trial**.** **USAM 9-5.001**. The disclosure timetables set forth above for both voluntary and statutory discovery are consistent with this DOJ policy. 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 witness security or other concerns. Such approval must be documented in the case file.

b. *Giglio* Policy for Federal Law Enforcement Witnesses

Giglio disclosures pertaining to law enforcement officers are a particularly significant aspect of an AUSA's discovery obligations. **USAM9-5.100** sets forth Department policy for the disclosure of impeachment information pertaining to federal law enforcement officers. All AUSAs must be familiar with and follow this policy.

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 directly communicating with the testifying agent or by submitting a written request to the employing agency. If the AUSA decides to obtain the information directly from the agent, and if the agent discloses a potential *Giglio* matter, the AUSA should contact the Chief of the Criminal Division, who will communicate with the agency's *Giglio* contact to obtain the relevant information. If the AUSA chooses to submit a written request to the employing agency, the request must be made through the Chief of the Criminal Division. The AUSA is responsible for providing the Chief of the Criminal Division 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 and/or the Chief of the Criminal Division to determine whether it is appropriate to disclose the information, withhold the information, or seek *ex parte*, *in camera* review by the district court concerning disclosure.

c. *Giglio* Policy for State and Local Law Enforcement Witnesses

With respect to state and local officers, the AUSA should obtain the information directly from the officers, and if an officer discloses a potential *Giglio* matter, the AUSA should contact the Chief of the Criminal Division who will communicate with the relevant law enforcement agency to obtain the relevant information. Again, the AUSA should document compliance with this policy in the case file.

As set forth above, if potential impeachment information exists, the AUSA is to consult with the Discovery Coordinator and/or the Chief of the Criminal Division to determine whether and how to disclose the information.

7. Other Recurring 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 Chief of the Criminal Division and/or the Discovery Coordinator.

b. Trial Preparation Witness Interviews

When preparing for trial, it is the practice 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 typically are not memorialized in an interview report and raise discovery issues.

First, if a verbatim or substantially verbatim statement from the witness is recorded in the notes, then the notes 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 how to disclose this information as *Brady/Giglio* material.

When considering disclosure, the AUSA may consider providing the information to defense counsel 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* material.

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.

c. E-mail

The use of e-mail has become widespread.[10] AUSAs, law enforcement agents, and other employees use e-mail to communicate about a variety of case related matters. While a valuable tool, e-mail may have significant adverse consequences if not used appropriately. The use of e-mail to communicate substantive case-related information in criminal and parallel criminal/civil cases may trigger AUSAs responsibilities under the Jencks Act, Rules 16 and 26.2 of the Federal Rules of Criminal Procedure, *Brady/Giglio*, USAM 9-5.001, and the Federal Records Act (discussed more fully below).

E-mails fall into three general categories: potentially privileged communications; substantive communications; and purely logistical communications.

E-mails 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 e-mails are "potentially privileged" and as such may be protected from discovery.

An e-mail that contains "substantive" case-related information raises additional legal issues. AUSAs and other personnel must be careful in the exchange of such e-mail. They should avoid using e-mail to communicate substantive case-related information in criminal and parallel criminal/civil cases whenever possible. Because e-mail 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 e-mail. Substantive e-mails may also create *Brady* and *Giglio* issues as noted above.

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[10]Text messaging and other forms of instant/electronic messaging are equally widespread. The guidelines with respect to e-mails are equally applicable to text messaging and any other form of instant/electronic messaging.

E-mail 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 e-mail, these guidelines should be followed:

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

b. As part of the discovery collection and review process, AUSAs should routinely ask agents and others to provide them with access to all e-mails that contain substantive case-related information. This includes communications between anyone who is part of the prosecution team, i.e., communications between agents, or communications between agents, AUSAs, and any USAO personnel, or communications between any members of the prosecution team. The e-mails should be collected and reviewed in the same manner that formal reports are collected and reviewed.

c. While substantive e-mails 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 e-mails. Redaction may also be appropriate if an e-mail contains a mix of substantive, potentially privileged communications, and purely logistical information.

d. AUSAs and any USAO personnel who interact with victims and witnesses should limit e-mail 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 e-mail 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 e-mail from a victim or witness, such e-mail should be forwarded to the AUSA(s) assigned to the investigation or case.

8. Maintaining a Record of Disclosures

Regardless of whether voluntary or statutory discovery is provided, 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.

It is also imperative in every case that AUSAs notify defense counsel of their obligations with respect to use of the discovery materials they receive and the return of it at the conclusion of a case. A cover letter with the following text should accompany the initial disclosure of discovery materials:

> As you know, discovery in criminal cases is furnished to you with the understanding that you will not disseminate or copy the material in any fashion. You, others on your staff, and your client are free to review and otherwise work with the discovery in your office, but copies of the discovery cannot be given to your client to take out of your office, nor is the discovery or any part of it to be copied or disseminated in any manner, to include any paper or electronic reproduction. Furthermore, upon conclusion of the case, you are required to return to us all the discovery production you receive from our office.
>
> If we learn that this agreement has been violated, we will withhold additional discovery in this case until disclosure is mandated by statute. Further, if a determination is made that the unauthorized dissemination was intentional, then this office may consider withholding discovery until mandated by statute in all future cases in which you appear as counsel of record.
>
> The United States Attorney's Office has experienced serious problems in the past when copies of discovery materials were provided to defendants in criminal cases. Consequently, we appreciate your complete cooperation with this policy.
>
> Please sign a copy of this letter and return it to the undersigned as soon as possible. Once the signed letter is returned, discovery materials will be produced.

Here is a suggested signature block for defense counsel:

> I/We agree to the conditions of production stated above.

_____ _____

Dated

(Name of Defense Counsel)
(Name of Defense Counsel's Firm)
Attorney for (Name of Defendant)[11]

[11]A sample cover letter in WordPerfect format is posted on the district's intranet site.

9. Cost

Regardless of whether discovery is produced on a voluntary or statutory basis, copies of discoverable material will be provided at the defendant's expense if private counsel has been retained. Materials may be provided to the Federal Public Defender or appointed counsel at no charge so long as the amount of material to be copied is not voluminous. Large amounts of copying are to be made at the defendant's expense and, if copies are provided by this office to private defense counsel, they should be billed at the rate of $.25 per page. Defendants may also utilize, at their expense, approved third-party copying services. In many instances, copying of electronic media (tapes, CDs, DVDs, etc.) can be accomplished using equipment in our office or the investigative agency, but blank electronic media should be provided by the defendant. The defendant is responsible for all costs associated with duplicating electronic media. Tape recorders or dictating equipment will not be allowed within the U.S. Attorney's Office.

10. Victim-Witness Considerations

When discretionary decisions regarding the nature and extent of discovery need to be made, AUSAs are expected to exercise that discretion in favor of protecting the rights and safety of victims, witnesses and cooperating individuals so disclosures of this nature should be as limited as possible under the circumstances of each case. To that end, it is not the policy of the U.S. Attorney's Office to automatically provide copies of the government's entire file in criminal cases. If *Jencks* material is to be disclosed prior to trial under voluntary discovery procedures, identifiers such as home addresses, telephone numbers and social security numbers should be redacted. Contact information for victims and witnesses, if necessary, is more appropriately provided in the witness list filed with the court just prior to trial.

11. Applicability of Chapter

These discovery policies are designed to give AUSAs flexibility to tailor discovery for a particular case. In most instances, it is to everyone's advantage to give almost complete access to the government's files. At the same time, this policy also enables AUSAs to deal with difficult counsel or sensitive cases. When in doubt, or if you have problems with the Court concerning discovery in one of your cases, you should immediately contact your supervisor, the Chief of the Criminal Division, or the District's Discovery Coordinator.

This policy is designed for internal guidance only and should not be disseminated to anyone outside the U.S. Attorney's Office without the approval of the FAUSA or the USA. Violation of any portion of this policy may be considered a cause for disciplinary action.

This policy 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 litigative prerogatives of the United States Department of Justice or the United States Attorney's Office for the Western District of Missouri. See USAM 1-1.100.