

DISCOVERY POLICY

This policy represents the United States Attorney’s Office for the District of North Dakota (USAND) criminal case discovery policy. The policy does not cover every discovery issue an AUSA may face in making discovery decisions. The policy is a starting guide and intended to give you a framework from which further research/discussion may be required. USAND supervisors, the Discovery Coordinator, and other DOJ resources are available to assist AUSAs in properly meeting discovery obligations.

The United States’ criminal discovery disclosure obligations are generally set forth in Fed. R. Crim. P., R. 16 and R.26.2, 18 U.S.C. § 3500 (*Jencks Act*), *Brady*¹ and *Giglio*² (collectively referred to as “discovery obligations.”) AUSAs should be aware that USAM Section 9-5.001 details DOJ policy regarding disclosure of exculpatory and impeachment information and provides for broader and more comprehensive disclosure than required by *Brady* and *Giglio*. In addition to federal rules, case law, and the USAM, the District of North Dakota Office Manual provides further guidance and, when not in conflict with this policy, should be used as a supplement to this policy memorandum.

In addition, two links may be helpful regarding Discovery: the first is a link to the new discovery “Bluebook” and the second is a working link to the relevant section of USAbook:

<http://dojnet.doj.gov/usao/eousa/ole/usabook/disc/index.htm>

<http://dojnet.doj.gov/usao/eousa/ole/tables/subject/disco.htm>

¹*Brady v. Maryland*, 373 U.S. 83 (1963) followed by *U.S. v. Bagley*, 473 U.S. 667, 682 (1985) and *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (prosecutors have a duty to learn of any favorable evidence known to others acting on the Government’s behalf in the case; explains the Government’s duty to disclose evidence favorable to an accused and material to guilt or punishment).

²*Giglio v. United States*, 405 U.S. 150 (1972).

I. Standard Discovery Policy

AUSAs will follow the Standard Discovery Policy (SDP) except in unusual circumstances. Under the SDP, this office will provide the defense with access to investigative reports, witness statements and interview reports, potential exhibits, grand jury transcripts of testimony of trial witnesses, exculpatory information and all other information the defense is entitled to receive under Rule 16, as provided in the most recent SDP form letter.

The defense may request that this Office follow its SDP. The AUSA should send a form letter to defense counsel outlining the SDP stating that the defense request for standard discovery triggers reciprocal discovery responsibilities for the defense. [Form letters are referenced in the Office Manual and appear in the Office Manual Appendix.] All letters transmitting copies of SDP material or inviting defense counsel review of discovery must itemize discovery in detail that will reasonably avoid later confusion or debate. Correspondence should clearly identify discovery that has been provided to the defense so that any AUSA can easily ascertain the completeness of discovery, Brady and Jencks Act disclosures.

II. Stipulated Discovery Agreement

An AUSA can enter a Stipulated Discovery Agreement (SDA) where appropriate. The SDA may address victim/witness security issues, and provide the defense more discovery material than required by rule or statute. In such cases, an SDA letter inviting an agreement should be sent to defense counsel. [See Appendix for form letter.]

When the United States enters into an SDA, the United States will include or make available, law enforcement reports (excluding evaluative material or work product such as possible defenses and legal strategies), and evidence, or existing summaries of evidence, which provide bases for the case against the defendant. The discovery file will include all Rule 16, Brady, and Jencks Act materials according to applicable statutes, case law, and policy.

The United States should disclose witnesses' statements no later than ten (10) working days before trial. If statements are obtained nine (9) days or less before trial, or during trial, the statements should be disclosed no later than three (3) days before the witness testifies. The United States may disclose grand jury testimony of trial witnesses three days prior to trial, pursuant to the Court's Standing Order.

The United States may redact or withhold information from discovery for security concerns, or to protect an ongoing investigation. This does not preclude the defendant from requesting *in camera* review of such material by the Court, upon proper showing, in order to determine whether it should be disclosed in accordance with Fed. R. Crim. P. 16. Where the United States withholds information, notice of the withholding, along with a general description of the type of material withheld, will be included in the discovery file. Except for material subject to disclosure by Rule 16, Brady, the Jencks Act, or other applicable law, the discovery file should not contain evidence used solely for impeachment or rebuttal.

The AUSA shall inform the defense that discovery may only be used in connection with the pending federal criminal against the defendant. Discovery shall not be disclosed to or used by any person other than the defendant, defense counsel, and counsel's staff, agent(s) or expert(s) retained by defendant.

[See Appendix for Stipulate Discovery Order]

III. Closed File Cases

An AUSA may maintain Closed File Cases (CFC) when appropriate. The defense must be notified in writing and a file record must be made whenever a CFC is indicated. [See Appendix for form letter.] AUSAs are reminded of their obligation to provide Brady material as soon as possible in all cases. Furthermore, AUSAs should provide Jencks Act material in a fashion

designed to avoid interruptions at trial whenever possible, without prejudice to the prosecution. [A standing order of the District Court requests that grand jury transcripts be released at least three days before the witness will testify.]

AUSAs must document all discovery responses in CFCs. Usually this documentation will occur in discovery responses.

a. Timing of Discovery Disclosure

1. Discovery – AUSAs should think about and address discovery issues prior to indictment. AUSAs should discuss discovery issues with Automated Litigation Support (ALS) personnel during the investigative stage, in appropriate cases. AUSAs should begin making discovery information available to the defense upon formal request from the defense, and upon indictment and arraignment. A standard discovery form letter can be sent to the defense in advance of disclosure.
 - a. Exculpatory information (including information which the defense may assert is exculpatory) must be disclosed promptly. *Brady* requires disclosure of fact-based impeachment including material witness inconsistencies. **Note:** *Brady* is a rule of disclosure not admissibility.
 - b. Impeachment information contemplated by the *Giglio* rule should be disclosed at a reasonable time prior to trial, once trial witnesses are determined, which may not be known until close to trial. (See USAM § 9-5.001).
 - c. AUSAs should timely provide Jencks Act information to avoid interruptions in trial whenever possible, and without prejudicing the prosecution. [A standing order of the District Court provides that grand jury transcripts may be released at least three days before the witness will testify.]

Prosecutors 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 chances of reaching a just result.

b. Disclosure of Reports of Interview for Testifying/Non-Testifying Witnesses

AUSAs should provide defense counsel with access to all investigative reports, witness statements or interview reports in SDP cases.

In CFCs- keep in mind:

Reports of interview (ROI's) such as FBI 302's and DEA 6's are not considered *Jencks* material, unless the ROI contains a verbatim statement of the witness or the witness has adopted it. Therefore, the general policy is that ROI's are not turned over to the defense in CFCs.

Exceptions may apply where an ROI contains impeachment or exculpatory information. If an exception applies, consideration should be given whether to provide the ROI itself or compose a letter to the defense that contains impeachment/exculpatory information.

An agent's ROI is *Jencks* material if the agent is going to testify about the subject matter contained in the ROI. Therefore, you must disclose an ROI as *Jencks* material of a testifying agent.

c. Providing Disclosure Beyond the Requirements of R. 16, R. 26.2, Brady, Giglio and Jencks

Generally, the SDP provides the defense with broader and earlier discovery than is required by rule.

AUSAs should consider standard discovery in most cases, because it promotes truth-seeking and helps achieve a just and speedy case resolution, particularly when the defense realizes the overwhelming nature of the United States' evidence. In addition, broad and timely discovery may provide AUSAs with a margin of error where, in good faith, we may have overlooked discoverable information.

For example, in cases where there is documentary evidence too voluminous to review completely, an AUSA should consider providing the defense access to all of it, lest there be inadvertent discovery of information later, that could be material, or in case impeachment/exculpatory information was not earlier disclosed.

AUSAs should not refer to the SDP as "open file" discovery. Instead, AUSAs should reference the Standard Discovery Policy. Reference to the SDP may reduce the risk that the defense will argue that a misrepresentation was made about the scope of discovery; for example, if an inadvertent omission occurs, or if an AUSA's definition of "open file" is different from the defense definition.

IV. Discovery Guidelines

a. Scope of the Prosecution Team

AUSAs are obliged to seek all exculpatory and impeachment information from members of the Prosecution Team. Generally, the Prosecution Team includes federal agents, state, tribal, and local law enforcement officers, and other government officials participating in the investigation. (USAM § 9-5.001).

An AUSA must determine the closeness of the relationship when determining participating members of the Prosecution Team. AUSAs should err on the side of inclusion; and, when in doubt AUSAs should consult supervisors and/or the Discovery Coordinator. Prosecution Team examples may include the following:

1. Multi-district investigations – the Prosecution Team could include the AUSAs and agents from the other district(s).
2. Regulatory agencies – the Prosecution Team could consist of employees from non-criminal agencies such as SEC, FDIC, U.S. Trustee, etc.
3. State/Tribal/Local agencies – a police officer is a part of the Prosecution Team if the investigation is a multi-agency task force and the AUSA is directing the officer’s actions, in any way; or if the officer/trooper participated in the investigation, or gathered evidence which ultimately led to charges.

Considerations in determining whether an agency or district should be included as part of the Prosecution Team:

- a. Whether the AUSA/case agent conducted a joint investigation, or shared resources relating to the investigation with the other district or regulatory agency;
- b. Whether the other agency/district played an active role in the case;
- c. The degree to which decisions have been made jointly, regarding the other district’s or agency’s investigation and yours;
- d. Whether the AUSA has ready access to the other entity’s evidence; and
- e. Whether the AUSA has control over or has directed action by the other entity.

Again, AUSAs should take an expansive view in deciding who are members of the Prosecution Team.

b. What to Review Once It Is Determined Who Is Part of the Prosecution Team, and Therefore Which Material Is In the Custody or Control of the AUSA

1. The investigative agency's file – the AUSA should consider personally reviewing agents' files to include all the ROI's, e-mails, etc.
2. Confidential Informant (Testifying Witness) file – the entire file not just the part relating to the current case should be reviewed.
3. Confidential Informant (Non-Testifying) – if circumstances warrant, the AUSA should request access to these files.
4. Evidence – an AUSA should review all evidence obtained including information obtained as the result of search warrants and subpoenas.
5. Regulatory Agency/DOJ Civil attorney files – the AUSA should request all information relating to the case.

c. Case-related Communications Through Electronic Medium Such as Email

The use of email³ has become widespread. Although email is a time-saving and effective tool, it may have significant, possibly adverse, discovery consequences, if not used thoughtfully. AUSAs should be circumspect in communicating with other AUSAs, agents or witnesses through any electronic means, including but not limited to email and text messages, especially where those communications involve trial or investigative strategy, witness statements, witness credibility or trial exhibits, because of AUSAs' duty to disclose material, documents and information falling within the ambit of the

³In this policy, the term "email" includes any form of written electronic messaging using devices such as computers, telephones, and blackberries, including, but not limited to, emails, text messaging, instant messages, tweets, and voice mail messages that are automatically converted to text (e.g., Google voice, Spinvox, etc.).

Rules 16, 26.2 of the Federal Rules of Criminal Procedure, Title 18 United States Code, Section 3500, *Giglio*, *Brady*, *Kyles v. Whitley*, and *Bagley*,.

The use of email to communicate substantive case-related information in criminal and parallel criminal/civil cases may trigger our responsibilities under the Jencks Act, Federal Rules of Criminal Procedure Rules 16 and 26.2, *Brady/Giglio*, USAM 9-5.001, and the Federal Records Act.

i. Email falls generally into three categories: (a) potentially privileged communications; (b) substantive communications; and (c) purely logistical communications:

- (a) Email may be the most efficient and appropriate method for AUSAs to communicate with one another and with other USAO personnel regarding case strategy, case organization, and case-related tasks; to seek approval or legal advice from supervisors, or other designated attorneys, in accordance with office policy; 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 email is potentially privileged and as such may be protected from discovery.
- (b) Email from an agent, witness, or other USAO personnel that contains “substantive” case-related information raises more legal issues. Thus, AUSAs and other USAO personnel must be circumspect in the exchange of such email. AUSAs, other USAO personnel, and agents 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 substantive written communications from agents about

cases should be in the form of a formal investigative report, rather than an email.

- (c) 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.

Be careful not to use unprofessional language or engage in editorial or unprofessional dialogue via email. Email may tempt use of slang or other “humorous” language that may seem clever or harmless at the time, but may be deemed unprofessional and unfortunate when viewed in public light.

ii. Definitions:

- (a) “Potentially privileged” email includes “attorney-client privileged” or “work product” communications (a) between AUSAs on matters that require supervisory approval or legal advice, e.g., prosecution memoranda, *Touhy* approval requests, *Giglio* requests, etc, and involving case strategy discussions; (b) between AUSAs and other USAO personnel on case-related matters, including but not limited to organization, tasks that need to be accomplished, research, and analysis; (c) between AUSAs and agency counsel on legal issues relating to criminal cases such as *Giglio* and *Touhy* requests; and (d) from the AUSA to an agent or USAO personnel giving legal advice or requesting investigation of certain matters in anticipation of litigation (“to-do” list). Please note: Email from USAO personnel or an agent to the AUSA in response to “to-do” list emails could possibly fall within the “substantive” communications that may not be privileged. Also, privileged communications may point to *Brady*, *Giglio*, or Rule 16 information that is not in, or obvious in, the case file.

- (b) “Substantive” communications include reports about investigative activity⁴, discussions of the relative merits of evidence, characterizations of potential testimony, interviews of or interactions with witnesses/victims, and issues relating to credibility.
- (c) “Purely logistical” communications include emails which only contain travel information, or dates and times of hearings or meetings.
- (d) “Agent” includes, but is not limited to, any person conducting investigation on the case such as state, tribal, and federal law enforcement officers, revenue agents, auditors, financial analysts, and civil investigators participating in affirmative civil enforcement investigations. It could also include USAO personnel such as paralegals and auditors if such personnel are asked to complete tasks that are investigative in nature such as researching electronic databases, analyzing records, etc.
- (e) “AUSA” includes an Assistant United States Attorney or Special Assistant United States Attorney.
- (f) “USAO personnel” includes, but is not limited to, paralegals, auditors, legal assistants, victim-witness staff, and experts/contractors.

iii. All “potentially privileged” and “substantive” email must be printed and maintained in the case file in accordance with the Federal Records Act.

⁴ Email communications from paralegals, auditors or other USAO personnel may become Jencks Act material if such communications relate to matters on which they later become a witness, e.g., emails relating to results of searches of electronic databases, analysis of financial records, etc.

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

- (a) If email is used to communicate substantive case-related information with agents, victim/witnesses, or anyone else, the email must be printed and maintained in the case file.
- (b) As part of the discovery collection and review process, AUSAs should routinely ask USAO personnel and agents to provide them with copies of all email that contains substantive case-related information. This includes, but is not limited to, communications among agents, and between agents, AUSAs, any USAO personnel, or anyone else, just as any formal reports would be collected and reviewed.
- (c) While substantive email needs to be maintained and 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 USAO/agency policy or practice disfavors disclosure of email. Redaction may be appropriate if an email contains a mix of substantive, potentially privileged communications, and purely logistical information.
- (d) AUSAs and 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.

d. Obtaining *Giglio* Information from Local Law Enforcement Agencies

Giglio Policy (Law Enforcement Witnesses)

1. Overview

AUSAs must be familiar with the District's *Giglio* plan and obtain all potential impeachment information directly from agency witnesses. The office has a designated Requesting Official concerning *Giglio/Brady* material to formalize this process. The Requesting Official coordinates all formal requests from the U.S. Attorney's Office to covered law enforcement agencies, to search for impeachment information on potential witnesses. Tribal and Local law enforcement agencies are included in this policy.

2. Requesting the Information

Once an AUSA determines a law enforcement agency employee will be a witness, the AUSA should timely make a request to the Requesting Official. The request should include the name of the agents and case, the nature of the charges, and the expected role of the witness in the case. Timeliness is essential in order to get the information in time for disclosure prior to trial. Many agency requests must be routed through headquarters and thus as much lead time as possible is preferred.

3. If Potential Impeachment Exists

The requesting official will immediately provide any negative information to the AUSA. The information must be treated as sensitive for purposes of storage and access. The AUSA handling the case will be responsible for determining the extent to which disclosure to the court and defense counsel is warranted. Where appropriate, the AUSA should seek an *ex parte in camera* review by the court regarding whether the information must be disclosed and

whether the information may be admissible at trial. Protective orders should be sought where possible.

e. Disclosure Questions Relating to Trial Preparation Witness Interviews

All AUSAs have a duty to timely interview all trial witnesses before calling them to testify. This duty includes, but is not limited to, reviewing all previous statements rendered by the witness either made under oath or during an interview with investigators. Moreover, trial witnesses should be shown the trial exhibits they will sponsor, authenticate, or introduce during their testimony.

Pre-Trial interviews should always be done in the presence of an agent, another AUSA, or victim/witness advocate. Many times it will be necessary for an agent to do a new ROI such as when the witness discloses information not previously disclosed. New information should immediately be disclosed to defense counsel. If the AUSA learns that any part of a pre-trial interview is *materially* different from a prior statement rendered by the witness, regardless of how or when made, the AUSA must immediately disclose the information to the defense. When considering disclosure, AUSAs should consider first going to the court and seeking an in camera review of the differences and or discrepancies and have the court determine if the differences and or discrepancies are, indeed, material, in view of *Kyles v. Whitley*, and *Bagley*.

f. Disclosure of Agent Notes

Agent notes are generally not Jencks material or discoverable pursuant to Rule 16 of the Federal Rules of Criminal Procedure. See, *United States v. Greatwalker*, 356 F.3d. 908, 911-912 (2004). AUSAs have no duty to disclose the interview notes, if the agent's notes are a faithful representation of what is contained in a report (ROI), . Conversely, disclosure should be made, if the notes depart materially from what is contained in the formal report, and after

consultation with an AUSA's supervisor and the Discovery Coordinator . An AUSA should consider reviewing the agent's notes to determine whether they are consistent with the formal ROI, when deciding whether to charge a violation of 18 U.S.C. § 1001 (false statement to the agent).

g. Maintaining Records of Disclosure

Faithful adherence to the discovery and disclosure duties imposed on AUSAs should be accompanied by evidence of timely discharge of those duties. As noted above, all letters transmitting copies of SDP material or inviting defense counsel review of this material must itemize this material in detail, sufficient to reasonably avoid later confusion or debate. The correspondence should clearly identify what has been provided, so that any AUSA who handles the case can easily determine whether information was properly disclosed. The USAO should maintain exact copies of information disclosed.

V. National Security

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.

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.

Cases involving national security, including terrorism, espionage, counterintelligence, and export enforcement, can present unique and difficult criminal discovery issues with far reaching implications for national security and the nation's intelligence community. The Department of Justice has developed special guidance for those cases, which is contained in Acting Deputy Attorney General Gary G. Grindler's September, 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, their supervisors, and the National Security Division of the Department of Justice for guidance on criminal discovery in those cases.

VI. Disclaimer

This is strictly an internal USAND discovery policy. It does not create or confer any rights, privileges or benefits to anyone, including prospective witnesses, subjects, targets, or defendants. This policy is not intended to have the force of law or binding directive. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal. No limitations are hereby placed on otherwise lawful litigation prerogatives of the Department of Justice and the United States Attorney's Office. United States v. Caceres, 440 U.S. 741, 751-752 (1979); United States v. Shulman, 466 F.Supp. 293 (S.D.N.Y. 1979).