DISCOVERY POLICY[1]

United States Attorney's Office
District of New Hampshire

October 15, 2010

JOHN P. KACAVAS
United States Attorney

PROTECTED INFORMATION
ATTORNEY CLIENT PRIVILEGE/WORK PRODUCT DOCTRINE
FOIA/PRIVACY ACT PROTECTED - 5 U.S.C. § 552(b)

[1]This policy guidance is intended to satisfy the January 4, 2010 directive from the Deputy Attorney General to develop a discovery policy with which Assistant United States Attorneys in this district must comply. The guidance, which is solely prospective, is for internal use only and does not create any privileges, benefits, or substantive or procedural rights, enforceable by any individual, party, or witness, in any administrative, civil or criminal matter.

I. Introduction.

It is the policy of the United States Attorneys Office for the District of New Hampshire (USAO-NH) to provide discovery in criminal cases that is consistent with the goals of truth seeking in the prosecution of criminal cases and promoting the fair administration of justice. To achieve and advance these goals, the USAO-NH adopts the following practices concerning discovery in criminal cases. Any staff member of the USAO-NH involved in the prosecution of criminal cases is expected to be completely familiar with this policy and to abide by the practices set forth below.

Discovery in criminal cases is generally governed by the disclosure obligations set forth in four sources of authority: Federal Rules of Criminal Procedure 16 and 26.2, 18 U.S.C. § 3500 (the Jencks Act), case law outlining the requirements for disclosure of exculpatory and impeachment material, and Section 9-5.001 of the United States Attorney's Manual relating to the disclosure of exculpatory and impeachment material. All staff members involved in criminal cases should be familiar with the requirements established by these sources of authorities.[2] Assistant United States Attorneys involved in criminal cases are responsible for compliance with the requirements set forth by these authorities, and that responsibility cannot be delegated to support staff members of the office.

While it is the policy of the USAO-NH to provide discovery that is broader and more expansive than is required by the sources of authority set forth above, the district's discovery

[2]Staff must also be familiar with the redaction requirements set forth by Fed. R. Crim. P. 49.1 and the Privacy Act, 5 U.S.C. § 552a. No discovery should be distributed that is not bate stamped and redacted.

policy should not be characterized as "open file" discovery. Even under the expansive discovery policy adopted by this district, there may be instances where discoverable material is inadvertently omitted from production and use of the term "open file" discovery thus results in an unintentional misrepresentation of the scope of materials provided. Furthermore, because the concept of what the "file" is can be imprecise, representations that the prosecutor is providing "open file" discovery potentially exposes the prosecutor to broader disclosure requirements than intended, or to sanctions for failing to disclose documents that the court deems part of the file, e.g. agent rough notes, internal memoranda, that the prosecutor never deemed to be part of the "file."

II. Federal Rule of Criminal Procedure 16(a)(1); LCrR 16.1(a)(1)..

It is the policy of the USAO-NH to provide all materials required by Fed. R. Crim. P. 16(a)(1), except for expert witness disclosures, within 14 days of the date of arraignment whether or not a defendant requests such production.[3] Expert witness disclosures will be made not later than 30 days before trial. The information that must be produced under the Rule[4] includes:

[3]Fed. R. Crim. P. 16(a)(1) is triggered upon a defendant's request. LCrR. 16(a)(1) does not require the defendant to make a request for discovery and requires production within 14 days of the date of arraignment unless the parties agree on a different date. The district's policy is more expansive than the local rule because the policy does not require a request by a defendant.

[4]Fed. R. Crim. P. 16 explicitly excludes from disclosure witness statements and internal reports written by government agents or attorneys in connection with the investigation or prosecution of the case. Disclosure of witness statements is governed by Fed. R. Crim. P. 26.2 and by the Jencks Act, 18 U.S.C. § 3500.

A. The substance of any oral statement made by the defendant,[5] or that portion of any written record containing the substance of an oral statement by the defendant;

B. A copy of any written or recorded statement by the defendant that is within the government's possession, custody or control, or which the government knows or through due diligence could know exists,[6] including any grand jury testimony of the defendant relating to the charged offense.

C. A copy of the defendant's prior criminal record;

D. A copy of any book, paper, document, data, photograph,[7] or tangible object[8] if the item is material to preparing the defense, or if the government intends to use the item in its case-in-chief at trial, or the item was obtained from or belongs to the defendant. In cases involving voluminous documentation where producing copies of such documentation is unduly burdensome or cost prohibitive, counsel for the defendant will be sent a letter apprising counsel of the existence of the material

---

[5]This policy is broader than the literal requirement of the Rule, which provides, in pertinent part: [T]he government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial." Fed. R. Crim. P. 16(a)(1) (West 2009).

[6]This requirement includes statements in the possession, custody or control of the prosecution team.

[7]Images depicting acts constituting child pornography will not be provided in discovery. Arrangements will be made with counsel for the defendant for counsel to view any such evidence in such cases.

[8]Rule 16(a)(1)(E) includes the phrase "building or places" in the government's obligation concerning inspection and photographing by the defendant. If any case in which the inspection and photographing of a building or place is material, the AUSA should make arrangements for such inspection and photographing within 10 days of the defendant's arraignment.

and inviting counsel to inspect and copy the material during normal business hours. Any such letter will be sent within 14 days of the defendant's arraignment.

E. A copy of any report or results of any physical or mental examination or scientific test or experiment within the government's possession, custody or control or which the government knows or through due diligence should know exists that is material to preparing the defense or which the government intends to use in its case-in-chief. AUSAs that receive or become aware of such reports or results after the date of the defendant's arraignment shall produce them within 10 days of the date the report or results are received or the date the AUSA is made aware of the existence of the report or results. AUSAs shall obtain appropriate protective orders restricting the dissemination of any results or reports containing sensitive personal information.

F. A copy of the report of any expert witness the government intends to use under Fed. R. Evid. 702, 703 or 705 in its case-in-chief at trial. If the AUSA receives the report after the date of arraignment, the AUSA shall produce the report within 10 days of receipt. If the report does not meet the disclosure requirements of Fed. R. Crim. P. 16(a)(1)(G), the AUSA must supplement the report with the information required by the Rule.

G. A copy of any search warrant, supporting application thereto, and inventory of items seized that resulted from a search of the defendant's person, residence, place of business, or property or in the seizure of evidence that is material to the defense or that the government intends to offer in its case-in-chief in connection

with the investigation of the charges set forth in the indictment.[9]

H. A copy of the application, order, supporting affidavits and orders directing that such pleadings be sealed for any authorized interception of electronic communications relating to the charges set forth in the indictment in which the defendant was named as an intercepted party or pursuant to which the defendant was intercepted. The provision of information under this paragraph will be subject to protective orders concerning its dissemination. The USAO-NH shall provide a copy of any transcript of intercepted conversations once such transcripts are finalized.[10] Drafts of transcripts will not be provided.

I. A copy of any the interception of any oral, wire, or electronic communication made with consent of one of the parties to the communication that relates to the charges in the indictment and through which the defendant was recorded or which the United States intends to offer as evidence in its case-in-chief. Copies of prison recordings fall under this paragraph. The provision of information under this paragraph may be subject to protective orders concerning its dissemination. The rule for transcripts of intercepted communications applies to consensually recorded communications.

---

[9]This disclosure is intended to facilitate the efficient administration of justice in that it provides the defendant with the information the defendant needs to determine whether or not a motion to suppress should be filed under Fed. R. Crim. P. 12(b)(3)(C).

[10]By agreeing to provide copies of transcripts of recorded conversations is such transcripts are prepared, the USAO-NH is not obligating itself to prepare transcripts of any recorded conversation.

III. Witness Statements - Fed. R. Crim. P. 26.2 and 18 U.S.C. § 3500.

It is the policy of the USAO-NH to produce witness statements,[11] in most cases, well before the deadlines set forth in Fed. R. Crim. P. 26.2, 18 U.S.C. § 3500, and LCrR 16.1(d). The general practice will be to produce witness statements as recorded in police reports, FBI 302s, DEA 6s and similar law enforcement reports of interviews within 14 days of the defendant's arraignment.[12] However, by providing reports that contain statements attributable to witnesses, the USAO-NH is not conceding that such reports qualify as witness statements subject to the Jencks Act or Fed. R. Crim. P. 26.2. Rather, early production of such documents is part of the district's effort to facilitate the efficient administration of criminal cases.

Concerns relating to witness security, protecting witnesses and victims from harassment or intimidation, obstruction of justice, protecting the integrity of ongoing investigations, the application of privileges, national security interests or other considerations may warrant a delay - and the use of protective orders - in the disclosure of statements attributed to or made by witnesses. Under no circumstances will the statement of a testifying witness be produced less

---

[11]It is the district's policy to produce in discovery statements made by or attributed to witnesses that are not going to be called to testify. However, the district does not intend to produce impeachment evidence for such non-testifying witnesses unless there is another basis under which production is required. In such cases, appropriate protective orders may be sought.

[12]Statements of testifying witnesses as recorded in law enforcement reports of interviews are not Jencks Act material unless the witness has adopted the report or the report reflects a substantially verbatim statement of the witness. Accordingly, such reports are generally not discoverable until shortly before trial, LCrR 16.1(d)(requiring production seven days before the witness testifies), or after the witness has testified, Fed. R. Crim. P. 26.2 and 18 U.S.C. § 3500 (requiring production after the witness completes direct testimony). The USAO-NH policy is to provide such statements as part of the initial production of discovery in order to facilitate negotiated dispositions of cases, to prevent the need for continuances of criminal cases, to enhance the truth-seeking mission of the office, and to ensure the fair administration of justice.

than seven days before trial.

The USAO-NH does not include an agent's or law enforcement officer's rough notes of an interview within the scope of production under this policy. Rough notes will be produced only if the notes constitute the only record of an interview or if the notes contain exculpatory or impeachment information that is not provided by other means.

The USAO-NH does not include notes made during trial preparation sessions with witnesses as within the scope of production under this policy unless disclosure is required under some other discovery obligation, e.g., the trial preparation session results in the discovery of exculpatory or impeachment evidence. In such cases, the substance of the exculpatory or impeachment information will be produced to defense counsel via a letter from the AUSA..

Disclosures of the identity of informants, if applicable in a case, will be made in compliance with the requirements of *Roviaro v. United States*, 353 U.S. 53 (1957)("We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.")

IV. Exculpatory and Impeachment Information.

Department of Justice policy states:

> It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the

investigation and prosecution of the criminal case against the defendant.

USAM § 9-5.001.

It is the policy of the USAO-NH to disclose exculpatory information within 10 days of the defendant's arraignment and to provide prompt disclosure of exculpatory information on a continuing basis through the end of the case.[13] AUSAs handling criminal cases in the USAO-NH are familiar with the requirement to disclose exculpatory information as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Bagley*, 473 U.S. 667 (1985), and *Kyles v. Whitley*, 514 U.S. 419 (1995). It is the policy of the USAO-NH to take an expansive view in determining whether information is exculpatory or impeachment information as outlined in the policy set forth at United States Attorney's Manual, Section 9-5.001, and to provide disclosure consistent with that policy.

It is the policy of the USAO-NH to produce impeachment information for testifying witnesses at least 20 days before trial. AUSAs handling criminal cases in the USAO-NH are also familiar with the requirement to disclose impeachment information as required by *Giglio v. United States*, 405 U.S. 150 (1972). In instances where the USAO-NH chooses to provide discoverable information in a form other than its original form, the disclosures will be made through a letter signed by the AUSA assigned to the case. In such instances, AUSAs will take great care to ensure that the full scope of pertinent information is provided to the defendant.

There may be instances in which impeachment evidence is not disclosed if the case is resolved through a plea agreement. *United States v. Ruiz*, 536 U.S. 622 (2002). However, it is

[13]LCrR 16.1(c) requires the disclosure of evidence material to the issues of guilt or sentencing at least 20 days before trial.

the policy of the district to disclose information, regardless of the disposition of a case, 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.

V. General Practices.

The USAO-NH intends to provide discovery in the majority of cases through electronic production. Accordingly, counsel for defendants will be provided either CDs or DVDs containing the discovery. Each production will be accompanied by a cover letter signed by the AUSA responsible for the case that outlines the discovery on the CD or DVD being provided. This will be done by reciting the bate numbers of the pages of discovery provided on the disc as well as through narrative descriptions of items not subject to bate stamping (video clips, audio clips, etc).

As a general matter, the staff of the USAO-NH will not be allowed to send discovery by e-mail. Sending discovery to defense counsel through e-mail raises issues relating to the security of the information being transmitted over the Internet and thwarts the record keeping process for tracking discovery. In the rare instance when discovery is provided by e-mail, it should only involve bate stamped pages that have been redacted in compliance with the district's redaction obligations and practice.

Questions or concerns relating to the discovery in a given case should first be addressed to the AUSA assigned to the case.

VI. National Security Matters.

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.