United States Attorney
Western District of Oklahoma

Policy Memorandum

[CR 14]

Date: October 15, 2010

Subject: Discovery Policies and Procedures In Criminal Prosecutions

This memorandum describes the policy of the United States Attorney's Office for the Western District of Oklahoma relating to the identification, acquisition and disclosure of discovery material in criminal cases. In general this memorandum will discuss an Assistant United States Attorney's (AUSA)[1] disclosure obligations under federal rules, federal statutes, case law, local rules and policies of the Department of Justice. Additionally, this memorandum will discuss the relationship among AUSAs, agents, local law enforcement, federal agencies and any other agency/individual who may be considered a member of the "prosecution team."

This policy is intended to provide consistency in our discovery practice while at the same time provide flexibility and discretion to AUSAs in individual cases.[2] AUSAs should remember that complete and early discovery is in the best interest of the government and the defendant. AUSAs are obligated to comply with the continuing duty to disclose discoverable material.

This policy provides internal guidance to AUSAs in the Western District of Oklahoma[3] and cannot be relied upon to create any substantive or procedural rights enforceable at law by any person in any administrative, civil or criminal matter. *United States v. Caceres*, 440 U.S. 741 (1979).

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[1] As used in this policy, "AUSA" includes Special Assistant United States Attorneys and DOJ lawyers working on a case in this district.

[2] This is an internal policy and is not for dissemination outside the United States Attorney's Office for the Western District of Oklahoma.

[3] This policy is composed of attorney work product having been prepared in contemplation of foreseeable criminal litigation and containing insights and advice in anticipation of issues that likely will be encountered in such litigation. Additionally, this discovery policy is part of a deliberative process within the USAO intended to encourage continued open and frank discussions between AUSAs and supervisors in contemplation of reasons and rationales for any future changes.

I. Government's Obligations

A. Federal Rule of Criminal Procedure 16

Fed. R. Crim. P. 16(a) sets forth the government's basic discovery obligations. Discovery obligations also are reflected in the Joint Statement of Discovery required by Local Criminal Rule 16.1. An AUSA must disclose the following material:

- Substance of any relevant oral statement made by the defendant in response to interrogation by a known government agent;
- Any relevant written or recorded statement of the defendant within the possession of the government that the attorney for the government knows exists or through due diligence could know exists;
- For an organizational defendant, any statement made by a person capable of legally binding an organization or a person legally involved in the offense and capable of binding the organization;
- Defendant's prior record;
- All documents or other tangible evidence the government plans to introduce in its case-in-chief or which are material to the defense;
- Reports of physical, mental, or scientific examinations (such as handwriting analysis, drug analysis, fingerprint reports) to be introduced by the government in its case-in-chief or which are material to the defense;
- Expert witness disclosures and summaries.

Disclosure of witness statements is not controlled by Fed. R. Crim. P. 16 but rather is governed by the *Jencks Act*, 18 U.S.C. § 3500, and Fed. R. Crim. P. 26.2.

B. Witness Statements

1. *The Jencks Act*, 18 U.S.C. § 3500

The *Jencks Act*, 18 U.S.C. § 3500, requires the government to make a "witness statement" available to the defense after the witness testifies on direct examination. A witness statement includes writings that the witness made and signed or adopted; recordings and transcribed statements of the witness; substantially verbatim written recordings by a person interviewing the witness; and grand jury transcripts.[4]

While as a matter of law, a court cannot order the government to disclose a witness' statement before the witness has testified at trial, the policy of this office requires disclosure of witness statements, including grand jury transcripts, sufficiently in advance to allow the defense to make use of the information. If a threat against a witness exists, an AUSA may consider delaying disclosure of the statement until closer in time to the start of trial, and seek a protective order limiting the dissemination of the statement to defense counsel only.

An agency report of an interview of a witness typically is not a "witness statement" because the report is not substantially verbatim and has not been adopted by the witness. However, it is the practice of this office to disclose interview reports of witnesses who will be called by the government at trial. While judges and defense counsel often treat agents' interview reports as witness statements, AUSAs should resist that characterization of the reports. Disclosure of non-testifying witnesses is left to the discretion of the AUSA on a case-by-case basis; however, an AUSA should take care to examine these statements for *Brady* and/or *Giglio* material. Should an AUSA have any reservation about whether a particular witness statement may assist the defense, you should err on the side of disclosing the statement. At a minimum, an AUSA should consult with the Criminal Chief, Deputy Criminal Chief or Senior Litigation Counsel about disclosing the statement.

If a witness statement contains *Brady* and/or *Giglio* material, it should be disclosed sufficiently in advance of any evidentiary hearing or trial to allow the defense to make use of it, regardless of whether the government intends to call the witness at trial. In addition, an AUSA should disclose to the defense the statements of all witnesses the government intends to call at trial not less than 14 days before trial.[5] If a new witness becomes known to the government shortly before

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[4] Fed. R. Crim. P. 49.1 requires redaction of certain categories of information from statements that will be made part of the record including social security numbers, date of birth, financial account numbers, names of minors and street address of witnesses.

[5] This 14- day period is established in the Joint Statement of Discovery Conference pursuant to the Local Court Rules.

trial or even during the trial, the government should provide the witness' statement to defense counsel as promptly as possible either in the form of a new investigative report or a letter disclosing the substance of the statement.

If early disclosure of *Brady* and/or *Giglio* material would subject a witness to harassment, intimidation or threaten an ongoing investigation, an AUSA should consider filing an ex parte sealed motion and proposed order requesting the court delay the disclosure of such witness statement until a specific date and request a protective order limiting the dissemination of the statement to defense counsel.

In this District, disclosure of an agent's rough notes of a witness interview is not required when the notes are reduced to a formal report and provided to the defense. If there is a reason to believe that the agent's notes may materially vary from the written report, an AUSA should review the notes. Absent a court order, a prosecutor generally should not turn over agent notes unless there is no other means available to meet the government's discovery obligations.

2. Federal Rule of Criminal Procedure 26.2

As a practical matter, AUSAs should be aware that Fed. R. Crim. P. 26.2 is similar to 18 U.S.C. § 3500, except that it applies to the government *and the defense*. This rule incorporates the Supreme Court's holding in *United States v. Nobles*, 422 U.S. 225 (1975), which upheld a district court's refusal to permit a defense investigator from testifying about his interviews of witnesses until the court had inspected his reports and then turned the relevant portions over to the government for use in cross-examination.

Similar to the government's duties under the *Jencks Act*, Fed. R. Crim. P. 26.2 requires the defendant to produce statements of witnesses who will be called to testify, excluding a statement of the defendant. Furthermore, if a defense counsel fails to comply with an order to deliver a statement of a witness to the attorney for the government, the rule requires the district court order the testimony of the witness to be stricken from the record. If the *government* disobeys a court order to produce a statement the court may declare a mistrial, if in the interest of justice.

Fed. R. Crim. P. 26.2 applies equally to the government and defense at trial, suppression hearings, sentencings, hearings to revoke or modify probation or supervised release, detention hearings and preliminary hearings.

C. ***Brady* and *Giglio***

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is

material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Nine years later, in *Giglio v. United States*, 405 U.S. 150, 154 (1972), the Supreme Court held that *Brady* material includes information that might be used to impeach key government witnesses. The Court reasoned that when the reliability of a given witness may well be determinative of guilt or innocence, non-disclosure of evidence affecting a witness's credibility falls within the general rule of *Brady*. Impeachment as well as exculpatory evidence falls within the rule of *Brady v. Maryland*. *United States v. Burke*, 571 F.3d 1048 (10th Cir. 2009).

For discovery purposes, *Brady* and *Giglio* material are somewhat distinctive with "*Giglio* material" being the label for *impeachment evidence*, and "*Brady* material" being the label for every other kind of evidence that could be helpful to the defendant's efforts to create a reasonable doubt (*exculpatory evidence*) or receive a lower sentence (*mitigating circumstances*). Additionally, in certain situations, *Giglio* material may also include disclosure of disciplinary records of a law enforcement officer. (See discussion in witness issues section).

1. Examples of *Brady* material

As discussed above, *Brady* material is defined generally as any evidence favorable to an accused that is material to the question of either guilt or punishment. It is impossible to list all of the different kinds of evidence that the government might be required to disclose but the following categories describe some of the most common *Brady* material that triggers disclosure:

- Evidence tending to show that someone else committed the criminal act.
- Evidence tending to show a defendant did not have the requisite knowledge or intent.
- Evidence tending to show the absence of any element of the offense, or which is inconsistent with any element of the offense (e.g., evidence showing that an alleged interstate wire transfer was actually an intrastate wire transfer).
- Evidence tending to show the existence of an affirmative defense, such as entrapment or duress.
- Evidence tending to show the existence of past or present circumstances that might reduce the defendant's guideline range under the federal Sentencing Guidelines[6] or

[6] See, *Chaney v. Brown*, 730 F.2d 1334 (10th Cir. 1984) (prosecution's failure to disclose FBI reports that could have raised inference defendant did not personally commit murders was sufficient to undermine jury's imposition of the death penalty by undermining statutory aggravating factors found by jury to support sentence, but insufficient to overturn convictions due to overwhelming evidence of his involvement in

make inapplicable to the defendant a mandatory minimum sentence.

2. Examples of *Giglio* Material

To decide what evidence is covered by *Giglio*, one needs to consider how a witness can be impeached. AUSAs should be especially alert to the existence of evidence relating to the first two forms of impeachment described below, namely, a witness's bias and a witness's prior misconduct involving dishonesty.

a. Bias

A witness can be impeached with evidence that he has a bias against the defendant or in favor of the government. See, *United States v. Abel*, 469 U.S. 45 (1984). The sources of such bias are too numerous and varied to catalogue, but here are a few illustrations:

- A witness might dislike the defendant because of some unrelated previous encounter between the two or because of the defendant's race, ethnicity, religion, nationality or sexual preference.

- A witness who has some actual or potential exposure to criminal penalties arising from the subject matter of the prosecution may have a pro-government bias resulting from his interest in receiving leniency from the government, which may take many forms, such as a plea agreement with the possibility of reducing the witness's potential sentence, an agreement not to seek forfeiture of his property, a decision to place him in the witness security program, or a decision to grant full transactional immunity. Another form of favorable treatment that could lead to pro-government bias in a government witness is the government's giving a witness money, gifts, or any other thing of value. With respect to an incarcerated government witness, such favorable treatment may also include his transfer to a more comfortable facility or his receipt of special jailhouse privileges.

- A witness may have a pro-government bias resulting from the government's favorable treatment of a relative or friend who has criminal exposure.

- A witness may have a pro-government bias because he fears unfavorable treatment in a related or unrelated proceeding pending before another government agency or court, or because he fears that such a proceeding will be instituted.

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kidnapings and murders).

b. Specific Instances of Misconduct Involving Dishonesty

A witness can be impeached with evidence of a prior act of misconduct involving dishonesty, even if it has not resulted in a criminal charge or conviction. Fed. R. Evid. 608(b). Examples of such prior misconduct may include lying (or failing to disclose material facts) on a job application, tax return, or search warrant affidavit; lying to criminal investigators or in a court proceeding; and stealing or otherwise misappropriating property.[7]

c. Criminal Conviction

A witness can be impeached with evidence of a prior felony conviction. Fed. R. Evid. 609(a)(1). He can also be impeached with a prior misdemeanor conviction involving false statement or any other form of dishonesty. Fed. R. Evid. 609(a)(2).

d. Prior Inconsistent Statements

A witness can be impeached with evidence of prior inconsistent statements. Fed. R. Evid. 613.

e. Untruthful Character

A witness can be impeached by the testimony of a second witness that he has a reputation in the community for being untruthful. Similarly, a witness can be impeached by the testimony of a second witness that in the opinion of the second witness, based on the second witness' dealings with and observations of the witness, the witness is generally untruthful. Fed. R. Evid. 608(a).

f. Incapacity

A witness can be impeached with evidence of defects in his physical or mental capacities at the time of the offense or when he testifies at a hearing or trial. This could include poor vision, inebriation, drug-induced stupor or other conditions.

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[7] In *Nuckols v. Gibson,* 233 F.3d 1261 (10th Cir. 2000), the court found a *Brady* violation in the State's failure to disclose, whether willful or inadvertent, that a deputy sheriff, who allegedly induced defendant's confession, had been implicated in thefts at the sheriff's office, and that the deputy had participated in a sale of guns, allegedly to fund a separate murder with which defendant was charged in a separate prosecution. The court found the failure to disclose the information was material because the deputy's credibility was important to establish the admissibility of the defendant's confession which was the only evidence linking defendant to the murder.

There is much case law interpreting *Brady* and *Giglio*. A situation may arise where it is unclear whether evidence is exculpatory. In this District, we interpret *Brady* and *Giglio* broadly. If an AUSA has any doubt whether a piece of evidence is exculpatory, he should discuss the evidence with Criminal Chief, Deputy Criminal Chief, or Senior Litigation Counsel. Generally, AUSAs are encouraged to err on the side of disclosure.

3. Related *Brady* and *Giglio* Related Witness Issues

a. Cooperators and "Progressive Truth Telling" and Trial Preparation

An AUSA is obligated to disclose any information or evidence in the government's possession that undermines the credibility of a government witness. For cooperating witnesses, we must disclose any and all agreements with the witness (proffer, plea, cooperation, immunity agreement) and any benefits conferred on the witness (payments, forfeiture waivers, reductions in sentence, forgone prosecutions, immunity from prosecution).[8]

If the witness has acted as a government informant on prior occasions, his prior service may constitute impeachment evidence that must be disclosed.[9] AUSAs should talk to agents and officers about their knowledge of the witness and about any material that may be in the agency or department files about the witness that may affect the witness' credibility. If a confidential informant will be called as a witness, an AUSA must review the agency's file on the witness for any possible *Brady* or *Giglio* information.

During interviews and proffer sessions, cooperating defendants may engage in a process of minimization of their own involvement in criminal conduct or the involvement of others. This type of "progressive truth telling" must be documented by your case agent in an investigative report and disclosed to defense counsel.

In grand jury or trial preparation, a witness or cooperating defendant may provide new or more detailed information. Generally such information does not need to be disclosed; however if the information is materially different from a previous statement, the information should be

[8] See, *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009) where the court reversed convictions for first degree murder and shooting with intent to kill when the prosecutor failed to disclose a tacit leniency agreement made with key witness in exchange for his testimony.

[9] In *United States v. Torres*, 569 F.3d 1977, 1283-1284 (10th Cir. 2009), the court reversed defendant's conviction for distribution of methamphetamine in light of government's near-total reliance on a DEA confidential informant where the government failed to disclose the confidential informant's breach of a prior agreement with the DEA, allegations of additional criminal conduct and one of two misidentifications of the defendant by the confidential informant.

disclosed.[10] Should such a situation arise, an AUSA should request the case agent take notes of the interview and prepare a new investigative report that contains the materially new or changed statement of the witness. If this situation occurs on the eve of trial or during the course of trial and sufficient time is not available for the agent to complete a new report, the AUSA may prepare a letter outlining the information and promptly disclose the information to defense counsel.

b. Law Enforcement Witnesses

Under Supreme Court and other precedent, *see, Kyles v. Whitley*, 514 U.S. 419 (1995), prosecutors are deemed to have knowledge of all material in the files of the agencies and police departments that have participated in the investigation. Such material includes the personnel files of the agents and police officers who are prospective government witnesses. In order to comply with our *Giglio* obligations in this regard, the Office instituted a policy that seeks the review of personnel and other law enforcement files that may bear upon the credibility of law enforcement witnesses.[11]

In every criminal investigation, an AUSA must identify as early as possible any federal, tribal, state or local law enforcement personnel who will provide testimony or serve as an affiant in the case. The AUSA must discuss the *Giglio* memorandum that outlines potential impeaching information with the law enforcement officers. This memorandum should be signed by the officer and maintained in the case file. The AUSA should discuss with the officers whether any disciplinary records or other impeachment materials exist. If any potential impeaching information that may affect the credibility of a prospective law enforcement witness is disclosed by the officer, the AUSA must contact the *Giglio* Coordinator to seek disclosure from the appropriate law enforcement agency.

The *Giglio* deliberative process is fully described in the WDOK *Giglio* policy. Every Criminal Division AUSA must be aware of and follow the procedures described in the policy. An AUSA should consult with the *Giglio* Coordinator and Criminal Chief on all disclosure issues involving law enforcement personnel files as more fully described in the *Giglio* policy.

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[10] Examples of substantively new or different information would include a witness who, for the first time during trial preparation, advises an AUSA and/or agent that (1) the witness can actually identify the bank robber; (2) the witness was present when the federal contracting officer asked for a kickback to award the contract; or (3) the witness bought drugs from three different conspirators, not just the main defendant in a drug trafficking case.

[11] The WDOK *Giglio* policy should be reviewed by all AUSAs. The policy is electronically maintained on the S-drive.

D. Emails

Be attentive when communicating through email. Statements of law enforcement officers and witnesses relating to a case must be preserved and may be discoverable, especially if the officer or witness testifies. The use of email for non-substantive case-related purposes (e.g., scheduling a meeting or informing someone of a court event) likely poses no discovery problem, unlike emails transmitting substantive information.

AUSAs should remember that the format in which information is received does not determine whether it is discoverable. Exculpatory information is no less discoverable regardless of whether the information is in the form of an email, written report or a verbal conversation. The use of email for discussion of a substantive issue is strongly discouraged.

AUSAs should discourage agents from creating any substantive and potentially discoverable material outside the realm of traditional reports. If communication via email is absolutely essential, advise your agents not to include any extraneous comments which could prove inappropriate if the body of the email requires disclosure.[12]

Emails related to any investigation or case that are privileged or substantive must be printed and retained in the case file. If substantive new information is contained in an email from a witness or agent, you should request the agent prepare an investigative report containing the information to satisfy discovery obligations. If an email containing such information is received on the eve of trial or during the course of the trial, an AUSA may provide the information to defense counsel by letter. If you are unsure how to handle a particular email when it becomes time to disseminate discovery, consult with the Criminal Chief, Deputy Criminal Chief, or Senior Litigation Counsel.

Emails to or from opposing counsel should be treated as if the email was a letter and should be printed and placed in the file. If you attach a document to an email to be sent to an opposing party, the document should be converted to Adobe Portable Document Format (PDF) prior to emailing. In Adobe PDF, the document will not be corrupted while being sent through the Internet and it cannot later be altered by the recipient.

E. DOJ Policy on Disclosure of Exculpatory and Impeachment Information

DOJ's policy on the disclosure of exculpatory and impeaching information is broader than what is required under *Brady* and *Giglio*. USAM 9-5.001 requires that prior to trial a federal

[12] As an example, an agent sends an email to the AUSA during a proffer session stating, "The witness is better today. They must have adjusted his meds." Although intended as a joke, this email raises questions about the witness' mental incapacity which may provide a basis for impeachment by defense counsel.

prosecutor disclose:

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

- Information that either casts a substantial doubt upon the accuracy of any evidence – including witness testimony – that the prosecutor intends to rely on to prove an element of any crime charged or that might have a significant bearing on the admissibility of prosecution evidence.

By requiring disclosure of evidence that is merely inconsistent with any element of a crime or that establishes an affirmative defense, DOJ essentially has dispensed with the threshold determination under *Brady* of whether evidence is *material* either to guilt or punishment to trigger disclosure.

DOJ also requires disclosure of certain exculpatory material to a grand jury even though such disclosure is not constitutionally required. In *United States v. Williams*, 504 U.S. 36, 52-54 (1992), the Supreme Court held the Fifth Amendment does not require a prosecutor to present exculpatory evidence to the grand jury. DOJ policy, however, requires disclosure to a grand jury of "substantial evidence" known to the prosecutor that negates the guilt of the target of the investigation before seeking an indictment against that person. *See*, USAM 9-11.233. While failure to follow departmental policy may not result in dismissal of an indictment, it could result in a referral by a district court to the Office of Professional Responsibility.

F. The "Prosecution Team" Concept

In some cases, there may be *Brady* or *Giglio* material that an agent knows about but the AUSA does not. In 1995, the U.S. Supreme Court made clear that a defendant is entitled to the disclosure of all *Brady* and *Giglio* material known to any member of the prosecution team. *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995). Thus, if any member of the prosecution team knows of any *Brady* or *Giglio* material, the AUSA will be held legally responsible for disclosing that evidence to the defendant, whether or not he actually knows about the evidence. That is, the AUSA's ignorance of such evidence will not prevent a court from penalizing the government by suppressing evidence, vacating a sentence or reversing a conviction.

The prosecution team includes all "others acting on the government's behalf in the case." *Kyles*, 514 U.S. at 437. At a minimum, this includes all federal, tribal, state, and local law enforcement personnel directly involved in the investigation or prosecution of the federal criminal case. Because neither the good faith nor bad faith of a prosecutor has any bearing on the due process inquiry required under *Brady* and its progeny, the responsibility of acquiring and disclosing all

impeaching or exculpatory evidence known by any member of the prosecution team falls upon the AUSA. Accordingly, knowledge of an agent's personal, but undisclosed relationship with a government witness, "is imputed to the government, regardless of the prosecutor's apparent lack of knowledge." *United States v. Buchanan*, 891 F.2d 1436 (10th Cir. 1989).

The scope of what constitutes the prosecution team is unsettled and differs in the approach taken by the Circuit Courts of Appeal. An issue that will likely arise in many cases is whether the federal prosecution team includes government personnel who are not directly involved in the federal criminal investigation or prosecution but are directly involved in a federal *civil* or *administrative* investigation or proceeding relating to the same events. *Brady* should not be read as imposing a duty on a prosecutor to learn of information possessed by other government agencies that have no involvement in the investigation. However, where a prosecution has shared resources and labor with another agency related to the same or similar matter, knowledge of any *Brady* or *Giglio* material in such agency's files may be constructively inferred to the AUSA.[13] For discovery purposes, AUSAs should err on the side of inclusiveness when identifying members of the prosecution team.

Because the United States Supreme Court has held that the prosecutor will be deemed responsible for *Brady* and *Giglio* information in the agencies' files, an AUSA bears an obligation to be sure that a complete review has been conducted of the investigative files of all law enforcement agencies and, where appropriate, the relevant files of other agencies involved in the investigation or a parallel proceeding. While the AUSA is the responsible person, a review of the files may be delegated to the case agent or others assisting in the prosecution. A review of relevant investigative files preferably should be done before indictment but absolutely must be completed prior to trial.

G. Miscellaneous Discovery Issues

1. Classified Material

The Classified Information Procedures Act (CIPA) controls disclosure of classified material in discovery. If a case involves or implicates classified information, an AUSA should contact the office's Anti-Terrorism Council Coordinator.

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[13] *See also United States v. Combs*, 267 F.3d 1167, 1172-1175 (10th Cir.2001) (considering, but not deciding, whether knowledge that key government witness had failed several drug tests administered by Pretrial Services but not revealed by the probation officer to the government, should still be imputed to the government for *Brady* purposes); *United States v. Thornton*, 1 F.3d 149, 158 (3rd Cir. 1993) (prosecutors violated *Brady*'s disclosure requirements when they failed to make "any follow-up inquiry" of the DEA, after the DEA did not respond to an initial request to advise the prosecutors "of any payments [to witnesses] that would have to be disclosed under *Brady"*.)

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. Special guidance is set out 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. AUSAs should also review the USAM9-5001C.4 regarding disclosure of exculpatory impeachment material when dealing with classified information as well as consult with their supervisors and the Department's National Security Division for guidance on discovery issues.[14]

2. Disclosure of Tax Material

The use of tax returns or return information obtained directly from the Internal Revenue Service for use in non-tax criminal investigation is controlled by Title 26 of the United State Code. There is a significant difference between the showing needed to obtain and use the tax information for investigative purposes (reasonable cause to believe that the information is or may be relevant to the commission of a crime) and a showing to later use the tax information at trial. Tax information may be used at trial in a non-tax criminal case only after a finding by the court that the information is probative of an issue in the proceeding or upon an order requiring its production in discovery under Fed. R. Crim. P. 16 or the *Jencks Act*. 26 U.S.C. § 6103(i)(4)(A). As a general matter, an AUSA should file a sealed motion and proposed order, with the necessary finding that the information is "probative of an issue" in the case before disclosing tax information in discovery for use at trial. If disclosure is made inadvertently, without such an order, the AUSA must request the court make such finding prior to use in trial.

II. Manner and Timing of Disclosure

Discovery may be produced in electronic format, paper format or a combination of each. Production of discovery material in the form of electronic files, however, is encouraged and when used should follow the "Best Practices for Electronic Discovery of Documentary Materials in Criminal Cases" format which has been adopted by the District Courts in the Western District of Oklahoma.[15]

Grand Jury transcripts, tax returns and tax information should be segregated from all other discovery materials and provided to defense counsel on a separate CD or in a separate packet of

[14] While discovery issues related to classified information most likely will arise in national security matters, AUSAs should be aware they may also arise in other criminal cases.

[15] Documents should be in a .pdf format when produced in an electronic format for discovery.

written material. Separating these categories of documents from all other discovery will prevent inadvertent disclosure of this material to a United States Probation Officer who is preparing a presentence report.

Regardless of the format of discovery – CDs or paper – AUSAs should document disclosure. At a minimum this documentation should be through a written correspondence outlining what material is being provided to the defense, and AUSAs should consider requiring defense counsel to sign a receipt accepting the discovery material. In every case, a copy of the bate-stamped materials provided to defense counsel must be maintained by the AUSA and/or legal assistant in whatever format (CD or paper) the material was produced.

There is no rigid discovery method applicable to each case prosecuted in the WDOK. While each AUSA must follow the discovery rules mandated by the federal rules, federal statutes, case law, local rules and policies of DOJ, the method used to disclose that information is left to the discretion of the AUSA. Depending upon the amount of discovery, an AUSA may decide to scan every document, search warrant, affidavit, photo or other material acquired during the course of the investigation and provide to the defense. Other AUSAs may identify and provide to defense counsel all documents and material considered relevant, exculpatory or impeaching by the government to the charged conduct and then make other items acquired during the course of the investigation available for inspection by defense counsel. Still, other AUSAs may employ some additional method of discovery.

At a minimum, in cases involving voluminous documents or where production of all discovery may not be practical,[16] AUSAs should provide defense counsel access to inspect such material and copy additional documents as early as practical after arraignment of the defendant. Permitting such inspection will help AUSAs meet the discovery obligation imposed upon the government by Fed. R. Crim. P. 16.

Similarly, physical evidence such as cell phones, guns, computers, drugs, ledger books, clothing, masks and bank robbery notes should be made available for inspection by defense counsel after arraignment of the defendant. In some cases, inspection of physical evidence may result in a request for independent testing by a defense expert. Again allowing such inspections as soon as practical will help meet the government's discovery obligations under Fed. R. Crim. P. 16.

All AUSAs are required by the local rules of the district court to meet with defense counsel within 14 days after arraignment to confer about discovery issues, exchange discovery and sign the Joint Statement of Discovery. *See,* LCrR16.1(b). At the discovery conference, AUSAs are

[16] For instance, images and videos containing child pornography should be made available for inspection by defense counsel by should never be provided in discovery.

encouraged to provide initial discovery documents. As discussed in the Joint Statement of Discovery this may include known *Brady* and *Giglio* material, statements(s) of the defendant, existence of Title III interceptions, the existence of, but not identity of, an informant who may testify, any contemplated 404(b) evidence, prior convictions of any government witnesses, and expert/scientific reports.

III. What is Not Discoverable

An AUSA should avoid using the term "open file discovery" because there are a number of documents in a file that are not discoverable because they involve internal procedures as well as a deliberative work process and attorney work product. For instance, a request prepared by an AUSA to DOJ seeking authority to issue a subpoena to a lawyer or a media outlet, to immunize a witness, or to receive petit policy approval for a federal charge should not be disclosed.

This type of non-disclosure also applies to a prosecution memorandum prepared by an AUSA for the internal indictment review process, a plea memorandum prepared pursuant to the Holder Memorandum in the plea approval process, or a downward departure memo prepared for consideration by the downward departure committee. Additionally, internal memorandums or emails discussing trial strategy between AUSAs and/or AUSAs and agents should not be disclosed.

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