Memorandum

Subject	Discovery best practices	Date	October 15, 2010
To	All Criminal AUSAs	From	Zane David Memeger United States Attorney

Our office has historically practiced what some lawyers refer to as "open-file" discovery and for good reason. Using this method, in most cases, discovery is mostly a straightforward and, although time consuming, relatively easy part of the prosecution; AUSAs simply compile all of the evidence obtained during the investigation and make it available to defense counsel. Nonetheless, there are some complicated issues that we confront in many cases. If such issues arise or you have any questions or concerns, please discuss them with a supervisor.

This memorandum is designed to give guidance to AUSAs on how to conduct discovery in criminal cases. This is a confidential document for the use of personnel in this office only, and is not intended to create any additional rights for criminal defendants or for any other person. It is not intended to answer every question that comes up in discovery. The purpose is to help to conduct discovery properly and efficiently.

Following is the preferred process for conducting discovery. This is the same way our office has always done it. Although this is preferred process, we must be flexible and creative in dealing with discovery issues. There are three basic sources of discovery law: Federal Rule of Criminal Procedure 16, the Jencks Act, codified at 18 U.S.C. § 3500 and Rule 26.2, and information covered by Brady v. Maryland, 363 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). Department of Justice policy, as set forth in the United States Attorney's Manual, provides that we produce discovery more broadly than legally required.

Prosecutors should never describe the discovery being provided as "open file." Even if the prosecutor intends to provide expansive discovery, it is always possible that something will be inadvertently omitted from production and the prosecutor will then have unintentionally misrepresented the scope of materials provided. Furthermore, because the concept of the "file" is imprecise, such a representation exposes the prosecutor to broader disclosure requirements than intended or to sanction for failure to disclose documents, e.g. agent notes or internal memos, that the court may deem to have been part of the "file."

Although the practices discussed in this memorandum will be appropriate in virtually every case our office brings, cases involving national security, classified information, or other similar information raise other issues. While discovery is best accomplished with broad and early disclosure, there are times when national security cases may require disclosing only what the law requires when the law requires it. These matters require a careful analysis of the national security concerns. At all times, we must carry out our duty to protect national security and assure criminal defendants receive all the discovery to which they are entitled. AUSAs must consult with Deputy Criminal Chief Tay Aspinwall regarding discovery when assigned to such cases.

1. Initial discovery: Shortly after a case is charged by indictment or information, the assigned AUSA should send out a discovery letter advising defense counsel that certain discovery is available for inspection and copying. It goes without saying that this and all subsequent discovery letters should be in the case file and at your fingertips for trial and other hearings. This initial discovery should include Rule 16 material, such as the defendant's statements and the defendant's criminal record. See Federal Rule of Criminal Procedure 16(a)(1)(A). You should inform defense counsel how the material will be available, e.g., upon request, you will produce paper copies, electronic copies, or that the material will be made available for inspection and copying by defense counsel. With the exception of a defendant's statements and criminal record, defense counsel are required to pay for discovery material. We should provide discovery electronically in as many cases as possible.

2. Jencks Act material and investigative reports: The Jencks Act and Rule 26.2 require that statements of witnesses be produced only *after* their direct testimony. The Act only requires production of substantially verbatim transcripts or adopted statements, such as signed statements, signed confessions, grand jury testimony, court testimony, and depositions. See 18 U.S.C. § 3500(e). Strictly speaking, this does not include reports agents prepare summarizing interviews of witness such as FBI 302s or DEA 6s. See United States v. Starusko, 729 F.2d 256, 263 (3d Cir. 1984). Such reports must be produced, however, if the witness has read them before testifying. Nonetheless, this office has traditionally produced these types of reports when the Jencks material is produced. Although the Act does not require pretrial production of these materials, they should be made available before trial. This serves three purposes: it prevents last-minute and disruptive continuances to give defense counsel an opportunity to review this material, it facilitates defendants pleading guilty, knowing the evidence against them, and it maintains our credibility with the court.

In most cases, agents interview and produce reports for us and we grand jury many more witnesses than we will call at trial. Even though these reports and transcripts relate to witnesses we will not call at trial, they may have information relevant to the investigation. In addition, a witness may have information that is helpful to the defense that should be disclosed as part of our Brady obligation. We should generally produce these reports and transcripts to defense counsel at the time we turn over the Jencks material. If there is a reason why you believe such material should not be produced or you have some question about this, see a supervisor. There may be good reason not to produce this material such as privacy, national security, or safety concerns.

Also, agents increasingly communicate with victims and witnesses using e-mail, text messages, and other electronic methods. Agents should keep copies of these electronic communications in their case file if they contain substantive information and produce them to us.

3. Brady and Giglio material: Brady requires prosecutors to produce all materially exculpatory information to defense counsel. Giglio material is information that can be used to impeach our witnesses, such as prior inconsistent statements, prior convictions or acts of dishonesty, plea or immunity agreements, non-subject letters, and the substance of other government promises. This includes bad acts reflecting on the credibility of law enforcement witnesses. Please follow the procedure outlined here if there is a request from defense counsel for such information. If such information exists, it should be produced at a reasonable time before trial to allow the trial to proceed efficiently. Considerations of such as witness security and national security may counsel later disclosure. Such matters should be discussed with a supervisor. United States Attorney's Manual § 9-5.001 provides additional guidance regarding what Department of Justice policy says we must disclose.

We should take a broad view of exculpatory material. Many times we do not know the full nature of the defendant's defense and cannot foresee exactly what will be relevant to it. Hence, producing all such material, even if its materiality is dubious, is advisable. The USAM § 9-5.001 says the following regarding affirmatively exculpatory evidence:

> 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.

As to impeaching evidence, the USAM, § 9.5001 provides:

> 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.

Finally, the USAM § 9.5001 makes clear that we are not to restrict our disclosures to evidence that we believe is admissible:

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Unlike the requirements of *Brady* and its progeny, which focus on evidence, the disclosure requirement of this section applies to information regardless of whether the information subject to disclosure would itself constitute admissible evidence.

4. Agent rough notes: Increasingly, defense counsel successfully request agents' rough notes taken during interviews. We are responsible for producing Brady and Giglio material even if it is contained in agents' rough notes – or even in our own notes. Rough notes are Brady material when they contain information that is exculpatory and material that is not contained in the final report. Rough notes are Giglio material if there are important inconsistencies between the notes and final report, or between the notes and the witness' testimony. Thus, for key witnesses as well as notes of a defendant's interview, agents' rough notes should be reviewed by the AUSA or by the recording agent for such material. See here for questions on issues related to rough notes.

Agents must be cognizant of exculpatory or impeaching material provided by witnesses during interviews and it must be included in the report. For example, when a witness lies in an interview but later comes clean in the same interview, we must make sure that this fact is disclosed in the report. If it is not disclosed in the report, we still have an obligation to inform defense counsel of the inconsistency.

5. Disclosures by witnesses during trial preparation: When AUSAs prepare witnesses for grand jury testimony, trial, or other hearing, witnesses may make disclosures that are either inconsistent with what they told agents or they tell us about

some otherwise unknown criminal activity or impeachment material. Such material must be disclosed to defense counsel in a timely fashion either one of two ways: the case agent must prepare a report summarizing the new information or the AUSA must write a letter to defense counsel doing the same. United States Attorney's Manual § 9-5.001 provides additional guidance.

6. Documents and other information obtained during pretrial period: Usually, we issue trial subpoenas for documents or obtain other documents pretrial. Additionally, our expert reports, such as interstate nexus experts in gun cases, fingerprint analysis, drug experts in drug cases, etc., are discoverable under Rule 16(a)(1)(G). These materials should be produced to defense counsel as they are received.

7. Defense disclosures: We are entitled to discovery from defense counsel and must demand it in writing, or on the record if done in court. Our form discovery letter contains such a demand. Usually, judges are sympathetic to our requests that the defendant produce discovery and will order defense counsel to produce it.

8. Keeping a record: It is critical to maintain a record of what is produced to defense counsel. It does no good to produce material if we cannot prove we have done so. There are a number of ways to do this. The discovery letter can contain an index of what you are producing. If you do this, include a sentence requesting counsel to call you if any material is missing. You may create a second discovery disc, if you are producing the material electronically. That disc should be kept with the file. You could also make a second paper copy of what you have disclosed. It is also advisable to consider bates stamping all copies of discovery. If the material is too voluminous to produce in any of these manners and the AUSA is making the material available for inspection, the case agent should compile an inventory of the materials made available to defense counsel.

9. Agent and officer personnel files: DOJ policy requires that federal agents must inform the prosecutor of any "potential impeachment information prior to providing a sworn statement or testimony in any investigation or case." United States Attorney's Manual § 9-5.100. If an agent makes such a disclosure to an AUSA, that AUSA must consult a supervisor before using that agent in any matter. From time to time, defense attorneys request the personnel file of federal agents. Such requests must be handled through Supervisory AUSA Rich Zack. Our office takes hundreds of cases each year investigated by the Philadelphia Police Department and other local police departments. In these cases, it is the AUSA's responsibility to obtain a list of Internal

Affairs investigations for each police officer witness to determine whether there is material that must be disclosed in discovery. See Supervisory AUSA Kathy Stark about how to make such a request.

10. Redactions and Protective Orders: We have an important duty to protect the privacy of witnesses and victims of crimes. Accordingly, we must redact personal identifiers of victims and witnesses, such as birth dates and social security numbers, from documents we produce. Also, we are entitled to obtain protective orders limiting the use of discovery material. We should make liberal use of such orders.

11. Supervision: AUSAs should consult a supervisor any time discovery issues arise.