DISTRICT DISCOVERY POLICY
DISTRICT OF SOUTH CAROLINA

I. Introduction

A. Generally

This policy states the discovery policy for the United States Attorney's office in the District of South Carolina in criminal cases. This policy is written to ensure that the United States Attorney's office complies with all discovery obligations as required by Department of Justice (DOJ) policy and federal law. In addition, in an effort to promote plea agreements and to reduce discovery litigation, the policy provides for voluntary production of other investigative materials within a reasonable period of time prior to trial. The policy will be referred to as the "District Discovery Policy".[1]

An AUSA must always comply with those discovery requirements imposed by law and DOJ policy.[2] However, from time to time, variance from the District Discovery Policy may be appropriate. Reasons may include, but are not limited to: safety and security of witnesses, the continued viability of investigative efforts, or the interests of national security. If an AUSA believes a reason for variance from the policy exists, the AUSA should consult his/her supervisor. The U.S. Attorney must approve a decision not to follow this policy. If supervisory approval is granted, notice should be given to both the court and defense counsel as soon as practicable, preferably either in writing or on the record at a pretrial proceeding.[3] AUSAs are not required to give the reasons for their decision in their notice to the court and/or defense counsel in a case.

B. Scope of Applicability

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[1]The policy is not an "Open File Policy" and should never be described as such. See DOJ "Guidance for Prosecutors Regarding Criminal Discovery", page 9, January 4, 2010.

[2]The Department's disclosure obligations are generally set forth in Fed. R.Crim. P. 16 and 26.2, 18 U.S. C. § 3500 (the Jencks Act, *Brady*, and *Giglio* (collectively referred to herein as "discovery obligations"). Additionally, Hyperlink § 9-5.001 provides for broader disclosures than required by *Brady* and *Giglio*.

[3]The same practice should be followed if an AUSA initially follows the policy, but subsequently gets supervisory approval to stop following the policy.

The District Discovery Policy confers no substantive rights on the defendant but rather operates as an expeditious and efficient facilitator of the resolution of cases. A defense counsel and defendant's ultimate decision to proceed to trial or to plead guilty often is facilitated by the candor of an AUSA backed up by demonstrated strength of the government's case.

Nothing in this policy shall obligate the government to provide a defendant with separate copies of any item at the government's expense; the government will provide such copies where practicable and where appropriate payment arrangements can be made, but the government only obligates itself to provide reasonable access to discovery items for inspection.

This discovery policy does not govern disclosure in cases involving terrorism and 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 than an element of the IC possesses discoverable material, then a prudential search generally is not necessary.

II. Sources of Obligations and Resources

A. Federal prosecutors are subject to several overlapping legal and ethical standards with respect to discovery

1. Relevant legal standards under the Federal Criminal Rules and applicable case law.

The government's production and disclosure obligations derive from (1) Fed. R. Crim Proc. 16, 12.2 and 12(b)(4), (2) statute –18 U.S.C. Sec. 3500, which is also known as the

Jencks Act; (3) case law; and (4) the South Carolina Rules of Professional Conduct.

2. Expanded discovery obligations adopted by the Department of Justice and the USAO of the District of South Carolina.

Generally, the obligations imposed by DOJ are broader than those required under the Rules and case law. Prosecutors should be mindful that DOJ policy and the District Discovery Policy encourage broad and early disclosure in order to promote truth-seeking and to foster a speedy resolution of the case. These considerations, however, must be counterbalanced with the specific needs of the case, the need to protect witnesses and the need to protect ongoing investigations.

a. Hyperlink Guidance for Prosecutors Regarding Criminal Discovery, DAG Ogden, Jan. 4, 2010 (hereinafter "Jan. 4, 2010 Guidance")

b. Hyperlink U.S. Attorney's Manual (USAM) § 9-5.001 and Hyperlink USAM § 9-5.100

3. Rules of Professional Conduct

AUSAs generally satisfy their ethical obligations when they comply with DOJ guidance. The Rules of various jurisdictions, however, differ. When in doubt, consult with the District PRO and/or PRAO.

III. Gathering and Reviewing Potentially Discoverable Information

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. This search duty also extends to information prosecutors are required to disclose under Federal Rules of Criminal Procedure 16 and 26.2 and the *Jencks* Act.

A. The Prosecution Team

In most cases, "the prosecution team" will include the agents and law enforcement officers within the relevant district working on the case. In multi-district investigations, investigations that include both AUSAs and prosecutors from a DOJ litigating component or other USAO, and parallel criminal and civil proceedings, this definition will necessarily be adjusted to fit the circumstances. In addition, in complex cases that involve parallel proceedings with regulatory agencies (SEC, FDIC, EPA, etc.) or other non-criminal investigative or intelligence agencies, the prosecutor should consider whether the relationship with the other agency is close enough in the particular case to make it part of the prosecution team for discovery purposes. Factors to be considered include:

1. Whether the AUSA/case agent conducted a joint investigation or shared resources relating to the investigation with the other district or regulatory agency;

2. Whether the other agency/district played an active role in the prosecution's case including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in targeting discussions, or otherwise acting as part of the prosecution team;

3. Whether the prosecutor knows of and has access to discoverable information held by the agency;

4. The degree to which information gathered by the prosecutor has been shared with the agency;

5. Whether a member of an agency has been made a Special Assistant United States Attorney on the case;

6. The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges in the case; and

7. The degree to which the interest's of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party.

"Prosecutors are encouraged to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes." Jan. 4, 2010 Guidance.

B. Specific Practices

1. Start of Investigation

In all cases, as early as possible and long before indictment, AUSAs should work with investigators to plan for how discovery obligations will be addressed and satisfied. AUSAs should provide the following guidance to investigators, either orally or in writing.

(a) Witness Interviews

Although not required by law, generally speaking, witness interviews[4] should be memorialized by the agent.[5] Agent and prosecutor notes, if any, and original recordings should be preserved, and AUSAs should confirm with agents that substantive interviews will be memorialized. When an AUSA participates in an interview with an investigative agent, the AUSA and agent should discuss note-taking responsibilities and memorialization before the interview begins (unless the

[4] "Interview" as used herein refers to a formal question and answer session with a potential witness conducted for the purpose of obtaining information pertinent to a matter or case. It does not include conversations with a potential witness for the purpose of scheduling or attending to other ministerial matters. Potential witnesses may provide substantive information outside of a formal interview, however. Substantive, case-related communications are addressed below. Trial preparation meetings with witnesses are also separately addressed below.

[5] In those instances in which an interview is audio or video-recorded, further memorialization will generally not be necessary, other than, of course, memorialization of the fact that such an interview occurred.

AUSA and the agent have established an understanding through prior course of dealing). Whenever possible, AUSAs should not conduct an interview without an agent present, to avoid the risk of making themselves a witness to a statement and being disqualified from handling the case if the statement becomes an issue. If exigent circumstances make it impossible to secure the presence of an agent during an interview, AUSAs should make every attempt to have another office employee present.

Interview reports are not considered the *Jencks* material of the person interviewed, unless they contain a verbatim statement of the witness or the witness has adopted it. *See United States v. Roseboro*, 87 F.3d 642, 645 (4th Cir. 1996). Bear in mind however, that interview reports may be *Jencks* material as to the authoring agent should the agent take the stand to testify about what was said during the interview.

Even though interview reports are generally not *Jencks* material for the interviewed witness, the standard practice is to produce the reports to the defense, and that is certainly the safest course of conduct. However an AUSA may decide not to produce the reports (if they have not been adopted by the witness) for legitimate security reasons. As an alternative to producing the reports, an AUSA may consider allowing defense counsel to review them and take notes.

Importantly, interview reports that do not constitute *Jencks* material may still contain *Brady* or *Giglio* material that is subject to disclosure. Thus, if an AUSA elects not to produce a report about a testifying witness because the report was not adopted by the witness (and therefore, not *Jencks* material), the AUSA must still review the report for *Brady* and *Giglio* material. If the report contains either, the relevant content must be disclosed regardless of whether the report itself constitutes *Jencks* material and is produced. Moreover, AUSAs should be aware of the contents of the reports while the interviewed witness is testifying and should watch for inconsistencies between the reports and the testimony, which may trigger a disclosure obligation that did not exist previously.

If an AUSA produces the interview reports, personal identifiers within the reports such as home addresses, dates of birth, and social security numbers should be redacted in accordance with the standard redaction procedures that apply to court filings. Also the AUSAs should require that within 15 days of final resolution of the case all matters disclosed to the defense be immediately returned to the United States Attorney's Office.

(b) Rough Interview Notes

Agents should be asked to retain all rough notes of interviews (whether taken by hand or on computer), even if notes are described, consolidated, or otherwise formalized in a final investigative report, including a final MOI, FBI-302, DEA-6 or ROI (collectively, "MOI").

Within the framework of the analysis above regarding the production of interview reports, an AUSA generally need not produce the rough notes than an agent takes during a witness interview. *See United States v. Hinton*, 719 F.2d 711, 722 (4th Cir. 1983) ("[T]he investigative notes of a government agent, made in the course of interviewing witnesses, which are later incorporated in the agent's formal 302 report, are not statements within the meaning of Section 3500(e)(1)").

Exceptions to this general rule include instances where there are inconsistencies between the notes and the final interview report or there is no other means available to satisfy the government's discovery obligations. Agents should be directed to review their rough notes to determine whether any inaccuracies or omissions exist within their written reports. An AUSA should review the rough notes if there is reason to believe there are inconsistencies, a written memorandum was never prepared, the precise words a witness used are important, or the witness disputes the agent's account of the interview. If it turns out that there are inconsistencies between the notes and the final report, the government must produce the notes.

(c) Correspondence Practices

Agents should be instructed that all correspondence relating to the investigation must be retained with the case file. Correspondence includes formal and informal written correspondence.

(i) Email: Any substantive e-mail communication from/to an agent who is a potential witness or from/to any witness which relates to the agent's or witness's potential testimony, must be preserved, printed and timely provided to the U.S. Attorney's Office for review and for potential use as discovery material just like any more formal written agency reports. "Substantive" communications include summaries of investigative activity, discussions of the relative merits of evidence, characterization of potential testimony, interactions with witnesses/victims, and issues relating to credibility.

Recognizing that e-mail communications may not be as complete as investigative reports and may have the unintended effect of circumventing an agency's procedures for writing and reviewing reports, AUSAs are to ask agents to refrain from using e-mail messages for "substantive" communications about the facts of a case. If, notwithstanding the AUSAs requests to the agent, substantive information pertaining to a case or witness is communicated in an email, the AUSA and Agent should save and print out the email and maintain the printed email in the case file for review and possible production.

Agents should be instructed that this policy is not intended to discourage emails between agents and AUSAs regarding investigative strategies or legal issues, nor is it intended to discourage the efficient practices of sending formal investigative reports as email attachments to prosecutors or of using email for scheduling (e.g., a witness interview, grand jury time, etc.).

2. Pre-Indictment

(A) Instructions to case agent regarding materials to be gathered.

AUSAs should ask the case agent to gather all discovery materials outlined in Part IV below. The request should be made sufficiently in advance of indictment so that the gathering and review process can be completed before the indictment is returned. If the nature of the case makes that timing impossible, the request should be made as early as practicable.

(B) Instructions to Victim/Witness Coordinator regarding statements by victims or witnesses.

In cases involving victims, AUSAs should give the relevant victim/witness coordinator a list of victims prior to indictment. AUSAs should also instruct the victim/witness coordinator to provide the AUSA with any statements the victims may make about the offense. AUSAs should instruct the victim-witness coordinator and the case agent to record all benefits or services provided to the victim-witness, including non-monetary benefits or assistance.

3. Information to be Reviewed

To ensure that all discovery is disclosed on a timely basis, generally all potentially discoverable material within the custody or control of the prosecution team should be reviewed. [6]

A. The Investigative Agency's Files- AUSAs may choose to review the file or request production of potentially discoverable materials from the case agents. However, the prosecutor is responsible for compliance with discovery obligations. Although prosecutors may delegate the process and set forth criteria for identifying potentially discoverable information, prosecutors should not delegate the disclosure determination itself.

[6]How to conduct the review is discussed below.

1. The file includes documents such as FBI Electronic Communications (ECs), case-related DEA teletypes, inserts, emails, etc.

2. If discoverable information is contained in a document that the agency deems to be an "internal" document such as an email, an insert, an administrative document, or an EC, it may not be necessary to produce the internal document, but it will be necessary to produce all of the discoverable information contained in it. AUSAs should also discuss with the investigative agency whether files from other investigations or non-investigative files such as confidential source files might contain discoverable information. Those additional files or relevant portions thereof should also be reviewed as necessary.

B. Confidential Informant/Source Files

The credibility of cooperating witnesses or informants will always be at issue when they testify, and accordingly, AUSAs should investigate these witnesses thoroughly. AUSAs should look for–and if found, disclose–impeachment information relating to such circumstances as the witness's relationship with the defendant, the witness's motivation for cooperating and/or testifying; drug and alcohol problems; benefits the witness is receiving such as monetary payments, expenses, costs, or housing; the immigration status of the witness and/or family members; intervention by law enforcement in connection with arrests or other legal entanglements; taxes paid on informant payments; notes, diaries, journals, e-mails, letters, or other writings by the witness; prison files, tape recordings of telephone calls, and e-mails, if the witness is in custody; and, or course, criminal history.

Confidential informant files should be reviewed for discoverable information and copies made of relevant portions for discovery purposes. The *entire* informant file of any testifying informant, not just the portion relating to the current case, including all proffer, immunity and other

agreements, assessments, payment information and other potential impeachment information should be included within this review. AUSAs should also consult with the case agent(s) to ensure that all potentially discoverable information has been properly documented in the CI and/or other pertinent file. AUSAs should take steps to protect the non-discoverable, sensitive information found within a CI, CW, CHS or CS file.

If a prosecutor believes that the circumstances of the case warrant review of a non-testifying source's file, the prosecutor should follow the agency's procedures for requesting the review of such a file.

AUSAs should consult with the case agent(s) or other appropriate personnel to determine whether any statutes, agency regulations or policies prohibit disclosure of potential *Giglio* materials—e.g., I.R.S. taxpayer information, drug and alcohol counseling records, certain DEA intelligence files—and/or other privacy and security considerations. If such considerations prohibit direct disclosure of a document or file, the AUSA may choose to disclose discoverable information in summary format to the defendant rather than producing the underlying documents. If such considerations prohibit disclosure of the information in any form, the AUSA should consult with USAO and Agency supervisors to determine whether the information may be disclosed to the Court, *in camera* and the impact on the case if the court determines that the information must be released.

C. All evidence and information gathered during the investigation.

D. Documents or evidence gathered by civil attorneys and/or regulatory agencies in parallel civil investigations.

E. Substantive case-related communications

"Substantive" case-related communications may contain discoverable information. Those communications that contain discoverable information should be maintained in the

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

F. *Giglio* information for law enforcement witnesses (see generally USAM 9-5.100 and the District's Giglio Policy (hyperlink)

G. *Giglio* information for non-law enforcement witnesses, includes, but is not limited to:

1. Prior inconsistent statements;

2. Benefits provided to witnesses, including but not limited to:

(a) Dropped or reduced charges,

(b) Immunity,

(c) Expectations of downward departures or motions for reduction of sentence,

(d) Assistance in a state or local criminal proceeding,

(e) Considerations regarding forfeiture of assets,

(f) Stays of deportation or other immigration status considerations,

(g) S-Visas,

(h) Monetary benefits,

(i) Non-prosecution agreements,

(j) Letters to other law enforcement officials (e.g. state prosecutors, parole boards) setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf,

(k) Relocation assistance, and

(l) Consideration or benefits to culpable or at risk third-parties;

3. Witness bias, including but not limited to:

(a) Animosity toward defendant,

(b) Animosity toward a group of which the defendant is a member or with which the defendant is affiliated,

(c) Relationship with a victim, and

(d) Known but uncharged criminal conduct (that may provide an incentive to curry favor with a prosecutor);

4. Prior acts under Fed. R. Evid. 608 and prior convictions under Fed. R. Evid. 609,

5. Known substance abuse or mental health issues; and/or

6. Inconsistent witness statements. Note: The Jan. 4, 2010 DAG Guidance contains detailed instructions for ensuring that inconsistent witness statements are properly documented and disclosed. AUSAs must be familiar with those requirements. In general:

   (a) AUSAs should take appropriate steps to ensure that all witness interviews are memorialized in a report,

   (b) Material variations by a witness should be documented and must be disclosed, and

   (c) AUSAs may need to review agents' notes on a case-by-case basis.

C. Conducting the Review

The Jan. 4, 2010 DAG Guidance provides guidelines on how AUSAs should conduct their discovery review. The format of this review will necessarily be conducted on a case-by-case basis. It would be preferable if AUSAs could review the information themselves, but such review is not always feasible or necessary. However, it is the responsibility of the AUSA to ensure that all discovery obligations have been met. Accordingly, the AUSA should develop a process for review of pertinent information to ensure that discoverable information is identified. This process may involve agents, paralegals, agency counsel, and computerized searches. Although AUSAs may delegate the process and set forth criteria for identifying potentially discoverable information, AUSAs should not delegate the disclosure determination itself. In cases involving voluminous evidence obtained from third parties, AUSAs should consider providing defense access to the voluminous documents to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence. Such broad disclosure may not be feasible in national security cases involving classified information.

IV. DISCLOSING DISCOVERABLE INFORMATION

A. Rule 16

1. Rule 16 provides for the discovery, upon request of the defense[7], of the following if it is in the government's possession, custody, or control. AUSAs have a due diligence and affirmative duty to inquire of investigating agencies whether or not the following discoverable material exists:

   (a) The substance of any oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent;

   (b) Any written or recorded statement made by the defendant;

   (c) The portion of any written record containing the substance of any oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent;

   (d) Pursuant to an appropriate protective order, the recorded testimony of the defendant before a grand jury; Fed. R. Crim. P. 16(a)(1)(A) and (B).

AUSAs should ask all agents who had any contact or dealings with the defendant to report all statements, verbal and non-verbal, made by the defendant to any law enforcement officer. If a defendant made a statement to a law enforcement officer that is

[7]Because reciprocal discovery obligations are not triggered unless the defense requests discovery and the government complies, AUSAs must ensure that a defendant's request for discovery is memorialized (i.e. such as a letter from defense counsel or a request on the record) before discovery is disseminated.

not captured in a report, the substance of the statement must be disclosed to the defense.

EXAMPLES OF STATEMENTS THAT MAY BE PART OF RULE 16 DISCOVERY

(non-exhaustive)

- recordings, wiretaps, emails, text messages, FaceBook information, YouTube etc.;
- handwritten notes, confessions;
- signed documents; e.g. *Miranda* waiver form, consent to search;
- oral statements, whether or not memorialized in reports; anything defendant said to agents or others;
- excerpts from reports pertaining to statements;
- pedigree;
- bonds;
- financial statements;
- pretrial reports - you should not have these reports but if you do, or have information from such a report, consider whether you need to disclose and if so, how;
- probation reports - can be tricky issue - not usually disclosed but you must review it for information that you may have to disclose and consider how to disclose.

(e) If a defendant is an organization, upon a defendant's request, the government will disclose statements described in Rule 16(a)(1)(A) and (B) if the government contends the person making the statement : (i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee or agent, or (ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee or agent. Crim. R. 16(a)(1)(C).

(f) The defendant's prior criminal history; Fed. R. Crim. P. 16(a)(1)(D).

(g) Documents and objects, where disclosure is material[8] to defense, the government intends to use in case-in-chief; and/or the evidence was obtained from or belonged to the defendant. (Note: the Government is only required to produce what is in its possession, custody or control; but control may depend on whether state and local law enforcement or federal, state and local regulatory agencies are involved. *See*, Section II *supra*); Fed. R. Crim. P. 16(a)(1)(E) and

(h) Reports of scientific tests and medical examinations intended for use by the government as evidence in its case-in-chief, or material to the defense. Fed. R. Crim. P. 16(a)(1)(F).

(i) A written summary of testimony the government intends to use under Fed. R. Evid. 702, 703, or 705 (expert witness) as evidence in its case-in-chief at trial. This summary will describe the witness' opinions, the bases and reasons for those opinions and the witness's qualifications. Fed. R. Crim. Proc. 16(a)(1)(G).

It is important to note that under Rule 702 of the Federal Rules of Evidence, expert testimony includes not only anything of a scientific or technical nature, but also anything requiring specialized knowledge. It would include for example, testimony by a police officer based on his experience, about drug prices in his beat or what drug quantities are consistent with personal use as opposed to distribution or what "coded" language meant to the officer. See *United States v. Johnson,* ___F.3d ____ (4th Cir. August 16, 2010).

2. Special Situations

[8]The standard for materiality being where disclosure would enable the accused to substantially alter the quantum of proof in his favor.

Taint Teams and Firewalls - if there is a firewall/filter team, make sure filter team AUSA is passing on discoverable information to prosecution team AUSA. If using a taint team, be sure to consult with the Office of Professional Responsibility Officer (PRO).

3. Information not subject to disclosure (Rule 16(a)(2))

Except as Rule 16(a)(1) provides otherwise, the following are not subject to disclosure:

A. Reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating and prosecuting the case.

B. Statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

Nonetheless, AUSAs must review documents for *Brady* material (described in more detail, below) and, if such material is found, disclose it consistent with *Brady* disclosure requirements. In addition, as noted in § B(1)(a) at pages 6-7, the District's policy is to disclose such statements unless articulable and limited factors weigh in favor of non-disclosure.

4. Defendant's disclosure requirements (Rule 16 (b))

A. As noted above, the defendant's disclosure obligations are triggered ONLY IF the defendant requested disclosure from the government pursuant to Rule 16(a)(1)(E), the government complied, **and the government makes a discovery request**. (See Rule 16(b)(1)(A).) If all of these conditions are satisfied, the defendant must provide the government:

(1) documents and objects in defendant's control which he intends to use in his case-in-chief.

(2) reports of examinations and tests if in the defendant's control, the defendant intends to use them in his case in chief, OR defendant intends to call a witness who

prepared the report and the report relates to the witness's testimony.

(3) a written summary of any expert testimony the defendant intends to use under Rules 702, 703, or 705 as evidence at trial IF the defendant requests disclosure of government's expert witness and government complies OR the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony of the defendant's mental condition.

B. The defendant is not required to disclose

(1) reports (other than scientific or medical under Rule 16(b)(1)), memoranda, or other documents made by the defendant, or

(2) A statement made to the defendant or the defendant's attorney or agent during the case's investigation or defense; OR a statement made to the defendant, or the defendant's attorney or agent, by the defendant, a government or defense witness, or a prospective government or defense witness.

5. Continuing duty to disclose (Rule 16(c))

There is a continuing duty to promptly disclose additional discoverable evidence.

6. Regulating discovery (Rule 16 (d))

For good cause shown, the court may deny, restrict, defer or regulate discovery. Prior to turning over discovery, the AUSA should obtain an order from the court in which the matter is pending, regulating the handling, dissemination and disposition of the discovery.

If an AUSA determines that it is appropriate to make an *in camera* submission to the court for determination of whether or not a document is discoverable, the AUSA must ensure that the defendant is aware of the AUSA's request for *in camera* inspection.

If the request is not made in a manner that ensures it is reflected in the court record, the AUSA must document his/her file to reflect the date, time and manner in which the defendant was made aware of the request.

B. Rule 12.1 Government's disclosure obligations where defendant asserts certain defenses.

1. Notice of Alibi Defense - Rule 12.1

If in response to a government request pursuant to Rule 12.1(a)(1), the defendant provides specific notice to the government of an intention to assert an alibi defense, the government is then required within 14 days after the defendant's notice and no later than 14 days before trial, to give the defendant in writing:

(a) the name, address and telephone number of each witness the government will rely on to establish that the defendant was present; and

(b) each government rebuttal witness to the defendant's alibi defense.

2. Notice of Insanity Defense; Mental Examination - Rule 12.2

If the defendant provides specific notice to the government that defendant intends to assert a defense of insanity at the time of the alleged offense, or introduce expert evidence relating to a mental disease or defect or any other mental condition bearing on the defendant's guilt or issue of punishment in a capital case, the court MUST, upon the government's request, order the defendant to be examined under 18 U.S.C. § 4242.

3. Notice of Public Authority Defense - Rule 12.3

If the defendant provides specific notice that defendant intends to assert a defense of actual or believed exercise of public authority on behalf of a law enforcement agency or federal intelligence at the time of the alleged offense, the government is required to serve a written response within 14 days after receiving the defendant's

notice, but no later than 21 days before trial, admitting or denying that the defendant exercised the public authority identified in the defendant's notice. Thereafter, reference should be made to the Rule in order to assure that subsequent discovery obligations are met.

C. Disclosure of confidential informants

The standard for disclosure of the identity of a non-testifying confidential informant is reasonable probability that the informer can give relevant testimony material to the defense. Disclosure of the identity of a confidential informant is required where the informant is an active participant in the crime. Where the informant is more than a tipster but not an integral participant in the criminal activity, disclosure will only be compelled where the defendant's need to know the informant's identity outweighs the government's interest in maintaining the anonymity of its source. The government has no duty to produce an informant at trial.

Disclosure is not required where the informant played only a minimal or passive role in the offense charged or the informant would be in personal danger and the potential testimony of the informant is not exculpatory.

D. Exculpatory and Impeachment material

1. *Brady v. Maryland*, 373 U.S. 83 (1963), is not a rule of discovery but rather one of fundamental fairness and due process. As prosecutors, we are constitutionally required to disclose exculpatory and impeachment information when such information is material to guilt or punishment, ***regardless of whether a defendant makes a request for such information***. Government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial. *Brady,* at *87; Giglio v. United States*, 405 U.S. 150, 154 (1972). Disclosure requirements apply to sentencing as well as to guilt/innocence determinations.

2. Importantly, however, DOJ policy set forth in USAM § 9-5.001 recognizes that a fair trial will often include examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal or, as is often colloquially expressed, make the difference between guilt and innocence. As a result, this policy requires disclosure by prosecutors of information beyond that which is "material" to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999). (USAM § 9-5.001)

   a. Additionally, 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. (USAM § 9-5.001)

   b. 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. (USAM § 9.5-001).

   c. The South Carolina Rules of Professional Conduct, Rule 3.8 sets out rules relating to special responsibilities of prosecutors. With respect to discovery, Rule 3.8(d) states that a prosecutor shall “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is

relieved of this responsibility by a protective order of the tribunal." The office discovery policy is designed, in part, to assure that all AUSAs act in a way that is fully consistent with this requirement.

AUSAs should be aware that the ABA has issued a formal opinion interpreting Model Rule 3.8(d), Formal Opinion 9-454 (2009) which maintains that, *inter alia*, a prosecutor has a duty to disclose exculpatory and impeachment information to a defendant *prior* to entry of a guilty plea. That is not the policy of the Department of Justice or of the USAO for the District of South Carolina. Any AUSA confronting an argument relying on Model Rule 3.8(d) and Opinion 9-454 should consult with their supervisor in formulating a response. Where deemed appropriate, they should also consult the Professional Responsibility Officer and the Department of Justice Professional Responsibility Advisory Office (PRAO), which can be reached at 202-514-0458 or by email at doj.prao@usdoj.gov.

E. *Jencks* Act (18 U.S.C. §3500) and Rules 26.2, 12(i) and 5.1, Fed. R. Crim. P.:

1. Due process requires production of prior statements of a witness in the possession of the United States which relate to the events to which the witness testifies to be produced upon request after the witness testifies. *Jencks v. United States*, 353 U.S. 657 (1957); codified at 18 U.S.C. §3500. "Witness statements include writings that the witness has made, signed, or adopted; recordings of the witness; substantially verbatim written recordings by a person interviewing the witness; and grand jury transcripts. While a court cannot order production until after a witness has testified, waiting until that point requires supervisory approval.

2. Rule 26.2 requires the government and defense, on motion of the party who did not call the witness, to make the statements of a witness (other than the defendant) available to the party who did not call the witness, after the witness

has testified on direct examination. Witness statements include writings that the witness made and signed or otherwise adopted and approved; a substantially verbatim, contemporaneously made recording or transcript of a witness's oral statement; and grand jury transcripts. Only statements that relate to the subject matter of the witness's testimony must be produced. The rule overlaps substantially with 18 U.S.C. § 3500 and the requirements set forth in *Jencks*.

3. Hyperlink Rule 12(i) applies Rule 26.2 to suppression hearings and Hyperlink Rule 5.1 applies Rule 26.2 to preliminary hearings. At such hearings, a law enforcement officer shall be deemed a witness called by the government. Privileged material shall be excised. Pursuant to Rule 5.1, if the government fails to produce *Jencks* material, the magistrate cannot consider the testimony from that witness.

F. Trial Preparation Witness Interviews

In a witness prep session, generally an agent should take notes only to record inconsistencies between what the witness said in previous meetings and what the witness says during the prep session. If an AUSA takes notes during any witness interview, the AUSA must review them for *Brady* and *Giglio* material. Finally, if an AUSA's notes deviate from those taken by the agent, the inconsistencies may need to be disclosed as potential impeachment material.

V. Other discovery issues

A. Mandatory redaction of certain information filed with the court

1. Rule 49.1 requires that, unless otherwise ordered by the court, we are required to redact certain categories of information filed with the court. Categories of information that must be redacted include:

(a) social security numbers - use last four digits

(b) taxpayer identification numbers - use last four digits

(c) birth dates - use year

(d) names of individuals known to be minors - initials only (see also, 18 U.S.C. § 3509 (d) (2))

(e) financial account numbers - use last four digits

(f) home address of individuals - city and state only

2. Categories of documents exempt from the redaction requirement are set forth in Rule 49.1(b).

B. Classified Material

1. The Classified Information Procedures Act ("CIPA"), Title 18, United States Code, Appendix 3, controls the disclosure of classified information in discovery.

2. If your case involves or implicates classified information, contact the Office's National Security Coordinator at the earliest possible juncture.

C. Disclosure of tax information

Section 6103 of the Internal Revenue Code Hyperlink governs disclosure of tax information the government has obtained from the Internal Revenue Service ("IRS"). Under § 6103(i)(4), returns or return information "may be disclosed in any judicial or administrative proceeding pertaining to the enforcement of a specifically designated federal criminal statute or related civil forfeiture to which the United States or a federal agency is a party" upon a finding that the information is probative of a matter in issue relevant to the commission of a crime, or of the guilt or liability of a party. Disclosure may also be made pursuant to the Jencks Act or Fed.R.Crim.P. 16.

Note that § 6103 applies only to materials obtained from the IRS. Section 6103 does not apply if the government acquired the tax

information from a source other than the IRS, such as returns obtained from tax preparers pursuant to grand jury subpoena. Such disclosures are then governed by Rule 6(e) of the Federal Rules of Criminal Procedure.

In any event, before producing the tax material to the defense, an AUSA should ensure that identifiers are redacted consistent with the Local Rules and Office practice.

D. Discovery in large document cases

In cases where there is documentary evidence that is too voluminous to review completely, an AUSA should consider providing the defense access to all of it to avoid inadvertently failing to disclose information that could be characterized as *Brady* or *Giglio* material. As a general rule, the government is not obligated to identify exculpatory parts of materials that have been disclosed. That is usually considered part of the defendant's "reasonable diligence" requirement. Courts, however, are more likely to find that the government has complied with its *Brady* obligations without requiring it to locate and point out specific exculpatory material if the AUSA has turned over discovery with enough time for the defense to make effective use of it (i.e., early on), has provided discovery in a format that can be searched electronically, and/or has identified a set of "hot documents." If a large number of documents are provided to the defense, whether in hard copy or electronically, consider having the documents Bates stamped to make it easier to keep track of what has been produced.

E. Child pornography cases

In child pornography cases, 18 U.S.C. § 3509(m) Hyperlink specifically provides that a court cannot order the copying or reproduction of any child pornography or material containing child pornography, including the duplication of the hard drives of computers and electronic storage media, provided the government furnishes the defense with a reasonable opportunity to inspect, view, and examine the material in government offices. The statute also provides that this material must remain in government care, custody, and control.

In cases where child pornography has been found on a computer belonging to or otherwise used by the defendant, and the defense requests to examine the evidence with his own expert, the best practice is to provide a "mirror image" of the digital evidence for use by the defense in a government facility. The defendant's expert should be provided a private room for the analysis, but an agent should remain outside the room to monitor the expert's movement into and out of the room and to ensure that the expert does not remove any material containing child pornography. The agent should also either conduct an image scan or wipe the expert's computer to ensure that contraband does not leave the premises. The mirror image remains in the custody of law enforcement and can be accessed by the defense only in government offices. Providing the defense with the ability to secure that mirror image and their examination equipment in the government facility while conducting the examination ensures defense access to the evidence without disclosing the nature of the defense's analysis and the focus of its examination or otherwise revealing the defense strategy. In the event the court orders a mirror image to be provided to the defense outside of government facilities, a protective order must be obtained.

F. Capital cases

Capital cases present two additional discovery considerations. First, under 18 U.S.C. § 3432, Hyperlink the government must provide a witness list to the defense at least three days before trial that includes the names and "place of abode" of the witnesses to be produced to "prove the indictment." The court may allow for an exception if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person.

Second, the scope of what constitutes *Brady* material for sentencing purposes is expanded to include any potential mitigating factor (i.e., reasons that a defendant should not be sentenced to death) and should be disclosed promptly. Statutory mitigating factors are set forth in 18 U.S.C. § 3592(a) and any evidence that tends to prove any of these mitigating factors constitutes *Brady* material in this context. Moreover, any evidence that would support a non-statutory mitigating factor (i.e., a reason

that the defendant should not be sentenced to death that is not set forth in the statute) would also constitute *Brady* material. Often this material consists of evidence of mistreatment in the defendant's past or a defendant's mental health problems. Before deciding what evidence constitutes *Brady* material in a capital sentencing, AUSAs should consult with the district's Capital Case Coordinator.

G. Electronic discovery

Nearly every criminal case involves some form of electronic evidence such as bank and telephone records, wire transfer receipts, e-mails, and text messages. Both material received electronically and items obtained in hard copy format may be provided to the defense electronically on discs. As noted above, in large-document cases, that is often the most efficient method of production and, because electronic documents may be downloaded easily and quickly into Sanctions or a similar program, the most efficient method of presentation at trial. Documents should be prepared for discovery in IPRO, as this will ensure a consistent format for delivery and make discovery accessible to AUSAs and support throughout the District. IPRO prepared evidence should be set up to optical character recognition ("OCR") which will allow the documents to be searched for particular words or terms. This will not only streamline a search for documents relevant to a particular issue or witness but will also facilitate a search for *Brady* and information.

VI. TIMING OF DISCLOSURE

A. DOJ Guidance:

1. "Providing broad and early discovery often promotes the truth·seeking mission of the Department and fosters a speedy resolution of many cases. It also provides a margin of error in case the prosecutor's good faith determination of the scope of appropriate discovery is in error. Prosecutors are encouraged to

provide broad and early discovery consistent with any countervailing considerations." Jan. 4, 2010 Guidance.

2. Countervailing concerns to early disclosure include, but are not limited to:

   (a) protecting victims and witnesses from harassment or intimidation;

   (b) protecting the privacy interests of witnesses;

   (c) protecting privileged information;

   (d) protecting the integrity of ongoing investigations;

   (e) protecting the trial from efforts at obstruction;

   (f) protecting national security interests;

   (g) investigative agency concerns;

   (h) enhancing the likelihood of receiving reciprocal discovery by defendants;

   (i) any applicable legal or evidentiary privileges; and

   (j) other strategic considerations that enhance the likelihood of achieving a just result in a particular case.

3. Absent any countervailing concerns above, Rule 16 Disclosure should be made at or as near the time of arraignment as possible but not later than any discovery date set by the Court. Disclosure at or before arraignment in routine cases is encouraged. Cases with voluminous documents may merit different considerations.

4. Discovery Conferences: In complex or large document cases, AUSAs are encouraged to meet with case agents in the pre-

Indictment phase to determine the universe of discovery in existence. The best methods of gathering, organizing and producing discovery, should be discussed. These conferences are a suggested tool and are by no means mandatory.

5. Exculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant reasonably promptly after discovery, per DOJ policy.[9] The constitution requires that it be given to the defense in time to make effective use of the material. It is the policy of this office that *Brady* material must be disclosed as soon as it is discovered.

6. *Giglio*/impeachment material must be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. (USAM §9-5.001).[10] There is no constitutional requirement that the government disclose impeachment information prior to a guilty plea. *United States v. Ruiz*, 536 U.S. 622 (2002). However, if the AUSA is aware of impeachment information so significant that it undermines the AUSA's confidence in the defendant's guilt, the AUSA should disclose the information to the defense immediately. ***Brady* and *Giglio* evidence must be disclosed regardless of whether the defendant makes a request for exculpatory or impeachment evidence.**

7. Exculpatory or impeachment information that casts doubt upon sentencing factors but does not relate to proof of guilt, must be disclosed no later than the court's initial presentence investigation. (USAM §9-5.001).

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[9]Exculpatory information that includes classified or otherwise sensitive national security material may require certain protective measures that may cause disclosure to be delayed or restricted (e.g. pursuant to the Classified Information Procedures Act). (USAM § 9.5-001)

[10]There is no constitutional requirement to disclose impeachment material before trial.

8. **A prosecutor must notify a USAO supervisor before any disclosure is made of any classified exculpatory or impeachment information.** Upon supervisory approval, notice will be provided to the defendant that classified information contains potential impeachment information and of the time and manner by which disclosure of the exculpatory or impeachment information will be made. (USAM § 9-5.001) Hyperlink

9. *Pro se* defendants will ordinarily not be accorded discovery pursuant to the District Discovery Policy, particularly if they are held without bond and disclosure would require their unsupervised possession of discovery materials. AUSAs shall consult their supervisor(s) and the Senior Litigation Counsel as to the most prudent method of discovery if a defendant is accorded *pro se* representation. AUSAs should seek a court order for the return of all discovery materials produced to defense counsel in the event a represented defendant is later granted permission to proceed *pro se.*

10. AUSAs who become aware of any violation of an order governing the dissemination of discovery should immediately notify a supervisor so that steps can be taken to ameliorate any harm or danger to witnesses, victims and cooperators.

11. If expanded file discovery is not permitted by USAO policy or under supervisory approval, AUSAs will arrange to comply with Fed. R. Crim. P. 16, and all other *Brady*, *Giglio* and *Jencks* Act disclosures through supervised inspections.

IV. Making A Record

A. AUSAs shall make a record of when and how information is provided or otherwise disclosed to defense counsel and/or the defendant:

1. Production cover letters generally should describe the information being provided and, where appropriate, list Bates

numbers of disclosed documents.

2. All telephone conversations or other oral communications with defense counsel describing discovery production, withholding of documents or discovery requests from either side should be documented, such as a memo to the file or a follow-up email with counsel.

B. Keeping accurate and contemporaneous records reduces subsequent litigation, including post-conviction actions.