

## **Revised District Discovery Policy Provisions ton Criminal Division Manual Implemented 8-6-10**

### **8. PRETRIAL DISCOVERY AND PROCEEDINGS**

#### **8-1.00 DISCOVERY**

The discovery obligations of federal prosecutors in this District are established by the Federal Rules of Criminal Procedure, 18 U.S.C. § 3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), and relevant case law, the Department of Justice’s policy on the disclosure of exculpatory and impeachment information, the Local Rules, and Orders entered in particular cases. AUSAs are expected to follow these rules, DOJ policy and relevant case law.

AUSAs are encouraged to provide discovery beyond what the rules, statutes, and case law mandate and provide expansive discovery, however, AUSAs are authorized to exercise prosecutorial discretion subject to the needs of individual cases. The decision in any particular case on whether, how much, and when to provide materials in excess of that which is required will rest with AUSA. There may be good reason for withholding something that does not have to be disclosed, such as the need to protect victims and witnesses, ongoing investigations, national security, preserving legal and evidentiary privileges and insisting on reciprocal discovery by defendants. Keep in mind, however, that expansive discovery may facilitate plea negotiations or otherwise expedite litigation.

Criminal AUSAs in the District are directed to review, and comply with, the directives set forth the January 4, 2010 Memorandum from Deputy Attorney General David W. Ogden entitled “Guidance for Prosecutors Regarding Criminal Discovery” which is attached appendix \_\_\_\_\_ to the Criminal Division Manual. As noted in this guidance:

The discovery obligations of federal prosecutors are generally established by Federal Rules of Criminal Procedure 16 and 26.2, 18 U.S.C. §3500 (the Jencks Act), *Brady v. Maryland* 373 U.S. 83 (1963). and *Giglio v. United States*, 405 U.S. 150 (1972). In addition, the United States Attorney's Manual describes the Department's policy for disclosure of exculpatory and impeachment information. *See* USAM §9-5.001 In order to meet discovery obligations in a given case, Federal prosecutors must be familiar with these authorities and with the judicial interpretations and local rules that discuss or address the application of these authorities to particular facts. In addition, it is important for prosecutors to consider thoroughly how to meet their discovery obligations in each case.

Prior to providing discovery, the AUSA should require defense counsel to sign the standard discovery stipulation or send a discovery letter which sets forth the conditions under which discovery is being provided. The stipulation provides:

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the above-named defendant and counsel for the United States of America that the Court may enter the following Order concerning the handling and disposition of discovery materials turned over to the defense.

O R D E R

Upon the foregoing Stipulation and for good cause shown,

IT IS HEREBY ORDERED that any discovery materials, including but not limited to statements and summaries of interviews of witnesses furnished by the prosecution to the defense, shall not be used by the defendant or his/her attorney for any other purpose other than in direct relationship to this case and no further disclosure should be made of these items. Defense counsel shall not photocopy the materials, shall keep the items furnished in his/her possession, and the materials shall not be given to the defendant or anyone else without the Court's permission. Defense counsel may allow the defendant to read the discovery materials but only in the presence of defense counsel.

IT IS FURTHER ORDERED that said documents shall be immediately returned to attorneys for the United States of America upon disposition of the case.

A discovery letter should include, at a minimum these same conditions. The AUSA should monitor defense counsel's compliance with the stipulation and report any violations to the Criminal Chief.

AUSAs should consult the following together with relevant case law in making discovery determinations.

**Federal Rules of Criminal Procedure**

**RULE 16**

**(A) STATUTORY REQUIREMENT**

- (1) Obligation triggered upon request (have defense counsel request in writing by letter or motion);
- (2) Obligation continues up and during trial

**(B) GOVERNMENT'S DISCLOSURE REQUIREMENTS**

- (1) Defendant's Oral Statements(16(a)(1)(A))
  - (a) required to disclose the substance of any relevant oral statement

- (b) statement must be in response to interrogation by someone the defendant knew was a government agent
- (c) if the government intended to use it at trial
- (d) Best practice is to disclose to defense even if you don't intend to use it.

(1) Defendant's Written or Recorded Statements (16(a)(1)(B))

- (a) disclose and make available for inspection, copying or photographing, all of the following
  - (i) ANY relevant written or recorded statement by the defendant IF
    - 1) the statement is within the government's possession, custody, or control; AND
    - 2) the attorney for the government knows or through diligence could know that the statement existed (**not limited to statements made to law enforcement**)
  - (ii) the portion of any written record containing the substance of any relevant 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
  - (iii) the defendant's recorded testimony before a grand jury relating to the charged offense

(2) Organizational Defendant (16(a)(1)(C))

- (a) must disclose statements described in Rule 16(a)(1)(A) and
- (b) if the person making the statement
  - (i) was legally able to bind the defendant because of that person's position as the director, officer, employee or agent; OR
  - (ii) was personally involved in the conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of the person's position as a director, officer, employee, or

agent

- (3) Defendant's Prior Record (Rule 16(a)(1)(D))
- (4) Documents and Objects (Rule 16(a)(1)(E))
  - (a) must permit defendant to inspect, copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if within the government's possession, custody, or control:
    - (i) the item is material to preparing the defense
    - (ii) the government intends to use the item in its case-in-chief at trial; OR
    - (iii) the item was obtained from or belongs to the defendant
- (5) Reports of Examinations and Tests (Rule 16(a)(1)(F))
  - (a) must permit the defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:
    - (i) the item is within the government's possession, custody, or control
    - (ii) the attorney for the government knows or through due diligence could know that the item exists; and
    - (iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial
- (6) Expert Witness
  - (a) must give written summary of any testimony you intend to use under FRE 702, 703 or 705 during your case in chief
  - (b) summary must describe
    - (i) the witness's opinions,
    - (ii) the bases and reasons for those opinions,
    - (iii) and the witness's qualifications

(C) INFORMATION NOT SUBJECT TO DISCLOSURE (Rule 16(a)(2)(3))

- (1) Reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case
- (2) Does not authorize the discovery or inspection of statements 3500 material
- (3) Grand Jury Transcripts except as provided in Rules 6,12(h),16(a) and 26.2.

(D) DEFENDANT'S DISCLOSURE REQUIREMENTS

- (1) Defendant's disclosure obligations triggered ONLY IF defendant requested disclosure from the government pursuant to Rule 16(A)(1)(E). See Rule 16(b)(1)(A)
- (2) If defendant made disclosure request, defendant must permit government to inspect, copy or photograph
  - (a) Documents and objects if they are within defendant's possession, custody or control AND defendant intends to use them in his case in chief documents and objects include:

Books, papers, documents, data, photographs, tangible objects, buildings or places
  - (b) Reports of Examination and Tests if:

within the defendant's possession, custody or control AND

the defendant intends to use the item in his case in chief at trial OR

intends to call a witness who prepared the report and the report relates to the witness's testimony
  - (c) Expert Witnesses: must give government, upon government's request, a written summary of any 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
- (3) Defendant Not Required to Disclose

Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery of inspection of:

- (1) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; OR
- (2) a statement made to the defendant, or the defendant's attorney or agent, by:
  - (a) the defendant
  - (b) a government or defense witness; or
  - (c) a prospective government or defense witness

(E) CONTINUING DUTY TO DISCLOSE (RULE 16(c))

If additional evidence is discovered before or during trial, must promptly disclose to the other party or the court if:

the evidence or material is subject to discovery or inspection under Rule 16; and

the other party previously requested, or the court ordered, its production.

(F) REGULATING DISCOVERY (RULE 16(d))

(1) Protective or Modifying Orders

if good cause is shown, the court may deny, restrict, or defer discovery or inspection, or grant other appropriate relief

good cause can be shown by a written statement that the court will inspect ex parte

If relief is granted, the court must preserve the entire text of the party's statement under seal

(2) Penalties for Failure to Comply: if a party fails to comply with Rule 16 the court may:

- (a) order that party to permit discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;
- (b) grant a continuance

- (c) prohibit that party from introducing the undisclosed evidence; OR
- (d) enter any other order that is just under the circumstances

**RULE 26.2**

- (A) Similar to 18 U.S.C. § 3500 (Jencks Act) EXCEPT it applies to the government *and the defense* unlike 18 U.S.C. § 3500 which applies only to the government.
- (B) Requires the disclosure of witness statements that relate to the subject matter of the witness's testimony, (except it does not apply if the defendant testifies)
- (C) Requires the court to order production if a request is made by either party
- (D) Provides for in camera inspection if either side claims privilege or information that does not relate to the subject matter of the testimony
- (E) Failure to obey a court order to produce or deliver a statement requires the court to strike the testimony of the witness from the record
- (F) If the government disobeys a court order to produce a statement the court must declare a mistrial is justice so requires.
- (G) Statement is defined similarly to the definition in 18 U.S.C. § 3500

**JENCKS ACT (18 U.S.C. § 3500) MATERIAL**

- (A). What is Jencks Act material?

(18 U.S.C. § 3500(c) Includes statement or report in government's possession

- (1) written statement made by witness and signed or otherwise adopted or approved by him
- (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantial verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement, OR
- (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury

- (B). Potential Jencks Act Material

- (1) prior testimony (grand jury; prior trial etc.)
- (2) law enforcement reports are generally not Jencks Act material of witness interviewed, but may be of agent who wrote report if agent testifies *United States v. Price*, 542 F.3d 617, 621 (8<sup>th</sup> Cir. 2008)
- (3) recordings (including jail tapes)
- (4) handwritten statements

- (5) agent notes - generally it is office practice not to disclose agent notes unless ordered by the court to do so. Many agents destroy their rough notes after a report is prepared. The Eighth Circuit has held that agent notes need not be produced when the FBI 302 is provided, absent some showing that exculpatory material was contained in the notes. *United States v. Greatwalker*, 356 F.3d 908, 911, (8<sup>th</sup> Cir. 2003); *United States v. Grunewald*, 987 F.2d 531, 535, (8<sup>th</sup> Cir. 1993).
  - (6) emails
  - (7) text messages
  - (8) consider all documents signed or endorsed by the witness or that contain information provided by the witness (even if not technically 3500 material)
- (C) Statutory requirements
- (1) If defendant makes a motion the court must order government to disclose statement or report of witness in the possession of the government AFTER the witness has testified on direct examination
    - (a) limited to subject matter of the testimony if government argues that statements or portions thereof are not the same subject matter, court can order in camera inspection and excise portions of statement which do not relate to the subject matter of the testimony of the witnesses
    - (b) if court excises portions of the statement over defense objection, government must maintain entire statement for purposes of appeal
    - (c) if government fails to comply with court order to disclose statement, court can strike witness's testimony or declare a mistrial

**District of South Dakota Practice on Jencks Act materials**

- (A) Some of our Judges in the scheduling order require production no later than the Friday prior to trial, others simply require production, but are silent on timing.
- (B) Standard practice is to provide early production absent witness security/tampering concerns.
- (C) Law enforcement reports which include statements made by a witness are technically not statements of the witness, but it is generally the practice of the office to produce such reports, absent witness security/tampering concerns.

**BRADY/GIGLIO**

(A) BRADY OBLIGATION. *Brady v. Maryland*, 373 U.S. 83 (1963)

disclose evidence that is favorable to the accused and material to the determination of guilt or to the appropriate punishment  
applies to guilt and sentencing phases

(B) GIGLIO OBLIGATION. *Giglio v. United States*, 405 U.S. 150 (1972)

Extends Brady principles to evidence affecting the credibility of government witnesses.

Giglio material is one form of Brady material. *US v. Bagley*. 473 U.S. 667 (1985)

(C) ELEMENTS OF THE BRADY TEST

whether evidence was favorable to defense (exculpatory or impeaching)

whether the government suppressed evidence – info known to government, unknown to defense whether the suppressed evidence was material

(D) BRADY MATERIAL INCLUDES EXCULPATORY AND IMPEACHMENT MATERIAL

impeachment material sometimes referred to as Giglio material  
distinction important with respect:

- (1) timing of disclosure
- (2) if Brady (exculpatory) – disclose promptly
- (3) if Giglio (impeachment) — no constitutional or statutory obligation to disclose before trial but see USAM

(E) MATERIALITY STANDARD –

whether “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”

(F) DOJ Policy (USAM 9-5.001)

- (1) requires disclosure beyond what is constitutionally required
- (2) dispenses with materiality requirement and requires disclosure

beyond information that is material to guilt as set forth in *Kyles v. Whitley*, 514 U.S. 419 (1995) and *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999)

- (3) must disclose info inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense
- (4) must disclose impeachment information that either
  - (a) casts a substantial doubt upon the accuracy of any evidence the prosecution intends to rely on to prove an element of any crime charged
  - (c) or might have a significant bearing on the admissibility of prosecution evidence
  - (d) applies to information (not just evidence) regardless of whether the information itself constitute admissible evidence

(G) Timing of disclosure of Brady/Giglo material

- (1) exculpatory information must be disclosed reasonably promptly after it is discovered
- (2) impeachment information typically disclosed at a reasonable time before trial

(H) District Brady/Giglo policy on Justice Department Law Enforcement Officials controls the process for reviewing personnel records of Agents employed by Justice Department Law Enforcement Agencies. That policy is included in this Manual as Appendix \_\_\_\_\_

## **DELIVERY OF DISCOVERY**

### **Timing of Disclosures**

Timely disclosure aids in the speedy resolution of cases. In addressing discovery disputes, courts often focus on whether the government's disclosure of discovery was made in a reasonably prompt manner. Therefore, AUSAs should generally have discovery ready for disclosure at the time of arraignment. When new discovery is obtained, it should be provided as soon as possible to defense counsel.

## **Form of Disclosures**

When practical, AUSAs should endeavor to provide defense counsel with discovery in electronic form. When documents are provided they preferably should be Bates-stamped. Whether discovery is provided in paper or electronic form, a cover letter should accompany the discovery itemizing what is being provided. The letter should also emphasize that all copies should be returned to the U.S. Attorney's Office after the case is over.

## **Documentation of Discovery**

It is important that AUSAs document what is being provided in discovery. This can be accomplished by means of an index that identifies the information provided or it can be accomplished by means of Bates numbers. When new information is provided a record should be made of exactly what has been sent (again, preferably by reference to Bates numbers), and when the materials were delivered, a letter should accompany the disclosure. That letter should identify with specificity (preferably by reference to Bates numbers) the information being produced to defense counsel. Another means of documenting what is produced to defendants is to create and retain a copy of those materials (either in paper form or on disc) indicating the date of the production.

## **Discovery Disputes**

Local Rule of Criminal Practice 47.1A provides that before filing a motion concerning discovery disputes, parties must meet and attempt to "resolve their differences." The party filing an **8-2.10** motion must describe the informal efforts of the parties to resolve the dispute.

## **A Final Note**

The judges in our District set a very high standard for pretrial discovery by the United States and have shown very little tolerance for even unintentional failures to meet that standard. Every AUSA is encouraged to take pretrial discovery obligations seriously, plan ahead for meeting these obligations, and carefully document all disclosures made.