EASTERN DISTRICT OF TEXAS
UNITED STATES ATTORNEY'S OFFICE
DISCOVERY POLICY

This Discovery Policy is a guide for all federal prosecutors in the Eastern District of Texas. All Assistant and Special Assistant United States Attorneys ("AUSAs") are expected to be familiar with this Discovery Policy. No policy can effectively cover every issue that may arise complying with discovery obligations, and this Policy is intended only as a framework of preferred practices. The Discovery Coordinator, Supervisory AUSAs, and Mentors are available to assist in properly meeting discovery obligations. The guidance is subject to legal precedent court orders, and local rules. It provides prospective guidance only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits.[1] Amendments to this policy will be made regularly to reflect the District's vigilance in fulfilling its obligations, and such amendments should be viewed as a change in substantive law or policy. Likewise, decisions made pursuant to the Discovery Policy are not precedential and do not establish standard levels of entitlements to similar discovery in other cases.

The Government's principal, disclosure obligations are set forth in Fed. R. Crim. P., R. 16 and R.26.2, 18 U.S.C. § 3500 (*Jencks* Act), *Brady v. Maryland*,[2] and *United States v. Giglio*.[3] AUSAs should be aware that USAM Section 9-5.001 details DOJ policy regarding disclosure of exculpatory and impeachment information and provides for broader and more comprehensive disclosure than required by *Brady* and *Giglio*.

A. Timing of Disclosures

1. Discovery – The preferred practice for production of discovery to defense counsel is immediately following the Arraignment. Often, AUSAs will not be able to produce discovery material to defense counsel at that time, because of logistical, security, or other concerns. In such cases, AUSAs should make discovery available as soon as reasonably possible. AUSAs should not wait for a formal request from the defense or Order from the Court. AUSAs should consider documenting an acknowledgment of our obligation under Rule 16 and setting forth a timetable for disclosure.

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[1] *See* United States v. Caceres, 440 U.S. 741 (1979).

[2] *Brady v. Maryland*, 373 U.S. 83 (1963) followed by *U.S. v. Bagley*, 473 U.S. 667, 682 (1985) and *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (prosecutors have a duty to learn of any favorable evidence known to others acting on the Government's behalf in the case), explain the Government's duty to disclose evidence favorable to an accused and material to guilt or punishment.

[3] *Giglio v. United States*, 405 U.S. 150 (1972).

a. Exculpatory information (including information which the defense may assert is exculpatory) must be disclosed promptly after such material comes into the AUSAs' possession and after the AUSA is aware that such material may be exculpatory. *Brady* requires disclosure of fact-based impeachment materials or material witness inconsistencies. **Note:** *Brady* is a rule of disclosure not admissibility.

b. Impeachment information contemplated by the *Giglio* rule will typically be disclosed at a reasonable time prior to trial depending on the prosecutor's decision on who will be called as witnesses which generally is not known until immediately before trial.

AUSAs should always consider security concerns of victims and witnesses when making discovery timing decisions as well as protecting ongoing investigations, preventing obstruction of justice, investigative agency concerns and other strategic considerations that improve our chances of reaching a just result in our cases. To this end, AUSAs should consider appropriate procedures to protect victims and witnesses, ranging from redacting identifying information to filing *ex parte, in camera* motions for protective orders.[4] AUSAs who conclude that security concerns merit delayed or limited production of discovery materials should address this conclusion with the Discovery Coordinator or supervisory AUSAs, or if appropriate, with the Court.

It is not uncommon that additional evidence and additional witnesses come to light after initial discovery disclosures have been made. Our duty to disclose is a continuing one.

B. Disclosure of Reports of Interview for Testifying/Non-Testifying Witnesses

Reports of Interview (ROI's) such as FBI 302's and DEA 6's are not considered *Jencks* material unless the ROI contains a verbatim statement of the witness or the witness has adopted it. Therefore, the general policy is that ROI's are not turned over to the defense in discovery.[5]

Exceptions may apply where an ROI contains impeachment or exculpatory information. In that situation, consideration should be given whether to provide the ROI itself or instead compose a letter to the defense containing the impeachment/exculpatory information.

An agent's ROI is *Jencks* if the agent is going to testify about the subject matter contained in the ROI. Therefore, you must disclose the ROI as the *Jencks* material of the testifying agent.

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[4] Fed. R. Crim. P. 16(d).

[5] *United States v. Flores*, 63 F.3d 1342, 1365 (5th Cir. 1995).

C. Providing Disclosure Beyond the Requirements of R. 16, R. 26.2, *Brady, Giglio* and *Jencks*

In many cases, AUSAs should consider giving broader and earlier discovery than required by statute or case law or recommended by this Policy, as it promotes our truth-seeking mission and our efficiency when the defendants and defense counsel realize the overwhelming nature of our evidence. This practice also provides AUSAs with a margin of error where, in good faith, we may have erroneously overlooked something discoverable.

In cases where there is documentary evidence too voluminous to review completely, an AUSA should consider providing the defense access to all of it lest there be a later inadvertent discovery by the AUSA of something that could arguably be material, or impeachment/exculpatory and it was not disclosed.

AUSAs should never refer to the Discovery Policy or their practice as "open file" discovery. "Open file" is not a term of art, and connotes different understandings to different practitioners. Such representations may inaccurately convey the scope of discovery, the scope of discoverable documents collected or created during an investigation, or the scope of review to which defense counsel is entitled.

Departmental or Office policies, internal committee decisions, privileged communications and work product is not discoverable and should not be produced to defendants.

D. Scope of Team

AUSAs are obliged to seek all exculpatory and impeachment information from members of the Prosecution Team. Generally, the Prosecution Team includes federal agents, state and local law enforcement officers and other government officials actively and substantially participating in the investigation. In determining who should be considered part of the Prosecution Team, an AUSA must determine whether the relationship is close and substantial enough to warrant inclusion for discovery purposes. When in doubt, consult with your supervisors and/or the Discovery Coordinator. Examples are:

1. Multi-district investigations: The Prosecution Team may include the AUSAs and agents from the other districts, depending on the level of involvement in the investigation.

2. Regulatory agencies: The Prosecution Team may include employees from non-criminal, investigative agencies such as SEC, FDIC, or the United States Trustee.

3. State/local agencies – A police officer is a part of the Prosecution Team if the investigation is a multi-agency task force and the AUSA is directing the officer's actions in any way; or if the officer/trooper substantially participated in the investigation or gathered evidence that ultimately led to criminal charges.

Considerations in determining whether an agency or district should be considered part of the Prosecution Team:

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

b. Whether the other agency/district played an active role in the AUSA's case;

c. The degree to which decisions have been made jointly regarding the other district's or agency's investigation and yours;

d. Whether the AUSA has ready access to the other entity's evidence; and

e. Whether the AUSA has control over or has directed action by the other entity.

E. What to Review Once It Is Determined Who Is Part of the Prosecution Team and Therefore Which Material Is In the Custody or Control of the AUSA

1. The investigative agency's file – the AUSA should consider personally reviewing the agent's file to include all the ROI's, e-mails, etc.

2. Confidential Informant (Testifying Witness) – the AUSA should review the entire file, not just the part relating to the current case.

3. Confidential Informant (Non-Testifying Witness) – in exceptional circumstances, the AUSA may need to review these files. For example, if it comes to the attention of the AUSA that a non-testifying witness has material, exculpatory information, the AUSA should review that information.

4. Evidence – an AUSA must review all evidence obtained in the course of investigating a case including information obtained as the result of search warrants and subpoenas.

5. Regulatory Agency/DOJ Civil attorney files – the AUSA should request all information relating to the case if the regulatory agency or DOJ Civil unit substantially participated in the investigation.

F. Case-related Communications Through Electronic Medium Such as Email

Because of the duty imposed upon AUSAs to disclose material, documents and information falling with the ambit of the Rules 16, 26.2 of the Federal Rules of Criminal Procedure, Title 18

United States Code, Section 3500, *Giglio*, *Brady*, *Kyles v. Whitley*, and *Bagley*, AUSAs should limit communicating with agents, through any electronic means, where those communications involve trial or investigative strategy, witness statements, witness credibility or trial exhibits. Except in extraordinary circumstances, AUSAs should avoid communicating with witnesses and victims by electronic means. Any AUSA who does communicate through these mediums should be mindful that those communications may be discoverable and disclosable to the defense and the courts. Such mediums should only be used when the AUSA has no other means of communication available and immediate communication is essential. Keep in mind that electronic records must be printed and stored in the agent/AUSA file just as any other written records would need to be preserved.

G. Obtaining *Giglio* Information from Local Law Enforcement Agencies

Giglio Policy (Law Enforcement Witnesses)

1. Overview

   It is expected that an AUSA will be familiar with the District's Giglio plan and obtain all potential impeachment information directly from agency witnesses. To formalize this process, the office has a designated Requesting Official concerning *Giglio/Brady* material. In this capacity, the Requesting Official coordinates all formal requests from the U.S. Attorney's Office to covered law enforcement agencies, to search for impeachment information on potential witnesses. Local law enforcement agencies are included in this policy.

2. Requesting the Information

   Once an AUSA determines a law enforcement agency employee will be a witness, a written request to the Requesting Official should be timely submitted. The request should include the name of the agents and case, the nature of the charges, and the expected role of the witness in the case. Timeliness is essential in order to get the information required in time for the testimony. Many agency requests must be routed through headquarters and thus as much lead time as possible is preferred.

3. Submission of Request to Agency

   Once the formal request to the agency is made, the agency official will advise the U.S. Attorney's Office of any information pertaining to:

   a. A finding of misconduct or similar adjudication that reflects upon the truthfulness or possible bias of the employee including a finding of lack of candor during an administrative inquiry;

   b. Any past/pending criminal charge; and

c. Any credible allegation of misconduct that reflects upon the truthfulness or possible bias of the employee.

Any allegation that was not substantiated, not credible, or resulted in exoneration need not be provided by the agency unless:

a. The court issued an order or decision requiring disclosure;

b. The allegation was made by a federal prosecutor or judge.

c. The allegation received publicity;

d. Disclosure is otherwise deemed appropriate.

4. If Potential Impeachment Exists

The requesting official will immediately provide any negative information to the AUSA. The information must be treated as sensitive for purposes of storage and access. The AUSA handling the case will be responsible for determining the extent to which disclosure to the court and defense counsel is warranted. Where appropriate, the AUSA should seek an ex parte in camera review by the court regarding whether the information must be disclosed. Protective orders should be sought where possible.

H. Disclosure Questions Relating to Trial Preparation Witness Interviews

AUSAs have a duty to interview all trial witnesses prior to calling them to testify. This duty includes, but is not limited to, reviewing all previous statements rendered by the witness either made under oath or during an interview with investigators. Moreover, trial witnesses should be shown the trial exhibits they will sponsor, authenticate, or introduce during their testimony.

If, however, during the pre-trial interview, the AUSA learns that any part of the pre-trial interview is materially different from prior statement rendered by the witness, regardless of how or when made, the AUSA must disclose the information. When considering disclosure, AUSAs may consider seeking an *in camera* review by the Court to assess the differences and have the Court determine the materiality of the difference.

I. Disclosure of Agent's Notes

Interview notes of agents are not discoverable pursuant to Rule 16 of the Federal Rules of Criminal Procedure and are not *Jencks* material.[6] If the agent's notes are a faithful representation

[6] See *United States v. Brown,* 303 F.3d. 582 (2002).

of what is contained in their formal report (ROI), AUSAs have no duty to disclose the interview notes. Conversely, if the notes depart materially from what is contained in the formal report, disclosure should be considered after consultation with an AUSA's supervisor and the Discovery Coordinator. When deciding whether to charge a defendant with making false statement to an agent as a count in violation of 18 U.S.C. § 1001, an AUSA should consider reviewing the agent's notes to determine whether they are consistent with the formal ROI.

J. Maintaining Records of Disclosure

Faithful adherence to the discovery and disclosure duties imposed on AUSAs should be documented. Accordingly, AUSAs are encouraged to draft records, receipts or correspondence inventorying all documents, statements, reports, or exhibits produced to defense counsel. A receipt may be signed by the AUSA and defense counsel. AUSAs should retain an exact copy of the discovery given to the defense for later reference.

K. Electronic vs. Paper Discovery

AUSAs should strongly consider requesting, preserving and producing documents electronically. Electronic versions fo documents are cost-effective, efficient, and easily preserved, produced, searched, copied and stored. In investigations involving voluminous documents, AUSAs should coordinate with the Litigation Support Group early in the investigation and in advance of presenting an Indictment to the Grand Jury.

L. Discovery in National Security Matters

Cases involving national security, including terrorism, espionage, counterintelligence, and export enforcement, can present unique and difficult criminal discovery issues. The Department of Justice has developed special guidance for those cases, which is contained in Acting Deputy Attorney General Gary G. Grindler's September 29, 2010, memorandum, "Policy and Procedures Regarding the Government's Duty To Search for Discoverable Information in the Possession of the Intelligence Community or Military in Criminal Investigations." Prosecutors should consult that memorandum and their supervisors regarding discovery obligations relating to classified or other sensitive national security information. As a general rule, in those cases where the prosecutor, after conferring with other members of the prosecution team, has a specific reason to believe that one or more elements of the Intelligence Community (IC) possess discoverable material, he or she should consult NSD regarding whether to request a prudential search of the pertinent IC element(s). All prudential search requests and other discovery requests of the IC must be coordinated through NSD.

Although discovery issues relating to classified information are most likely to arise in national security cases, they may also arise in a variety of other criminal cases, including narcotics cases, human trafficking cases, money laundering cases, and organized crime cases. In particular, it is important to determine whether the prosecutor, or another member of the prosecution team, has specific reason to believe that one or more elements of the IC possess discoverable material in the following kinds of criminal cases:

- Those targeting corrupt or fraudulent practices by middle or upper officials of a foreign government;

- Those involving alleged violations of the Arms Export Control Act or the International Emergency Economic Powers Act;

- Those involving trading with the enemy, international terrorism, or significant international narcotics trafficking, especially if they involve foreign government or military personnel;

- Other significant cases involving international suspects and targets; and

- Cases in which one or more targets are, or have previously been, associated with an intelligence agency.

For these cases, or for any other case in which the prosecutors, case agents, or supervisors making actual decisions on an investigation or case have a specific reason to believe that an element of the IC possesses discoverable material, the prosecutor should consult with NSD regarding whether to make through NSD a request that the pertinent IC element conduct a prudential search. If neither the prosecutor, nor any other member of the prosecution team, has a reason to believe that an element of the IC possesses discoverable material, then a prudential search generally is not necessary.