U.S. Department of Justice
Environment and Natural Resources Division
Environmental Crimes Section

CRIMINAL DISCOVERY POLICY AND GUIDANCE[1]

Effective Date: October 15, 2010

This policy sets out discovery requirements and guidance for Environmental Crimes Section (ECS) attorneys.[2] These requirements and guidance are designed to facilitate ECS attorneys' compliance with disclosure obligations, to familiarize ECS attorneys with a core set of discovery topics, and to ensure that ECS attorneys have adequate resources and guidance available to make all appropriate disclosures, either on their own or in consultation with ECS and/or Environment and Natural Resources Division (ENRD) leadership. In general, this policy encourages, and sometimes requires, earlier and more liberal disclosure by ECS attorneys than is required by law and/or the U.S. Attorneys' Manual (USAM).

This policy is designed to be flexible enough to give attorneys discretion where permitted by law and to account for a practice that spans many jurisdictions, with varying discovery rules and practices. ENRD will review this policy annually in light of attorneys' experiences. You are encouraged to provide comments and suggestions to ECS's Senior Litigation Counsel.

The policy is broken down into six main topics. The first topic addresses how this policy interacts with policies adopted by U.S. Attorneys' Offices. As directed by the Deputy Attorney General, local policies—which reflect local law and practice—will usually control. Second, the policy considers five core topics that are universally applicable in federal criminal discovery; they are Brady, Giglio, the Jencks Act, Rule 16, and the Scope of the Prosecution Team. The policy presumes a fundamental understanding of these core concepts and an ability to quickly determine how local policies address them. Third, the policy addresses the investigative phase of a case because that is when the groundwork for successful discovery is laid. Fourth, the policy sets forth a set of steps to be taken immediately prior to indictment. Fifth, it discusses procedures for successfully providing disclosures to the defense during the discovery phase of a

[1] The Environmental Crimes Section Discovery Policy and Guidance was developed by Counsel Thomas T. Ballantine and Senior Litigation Counsel Howard Stewart.

[2] This document is intended to satisfy the January 4, 2010, directive from the Deputy Attorney General to develop a discovery policy that ECS prosecutors must follow. See Memorandum from David W. Ogden, Deputy Attorney General (Jan. 4, 2010) available at http://www.justice.gov/dag/dag-to-usas-component-heads html. The guidance is subject to legal precedent, court orders, and local rules. The guidance, which is solely prospective, is for internal ECS use only and does not create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party, or witness in any administrative, civil, or criminal matter.

case, as well as making a record of those disclosures. Sixth and finally, the policy considers the continuing duty to provide discovery during trial; how to manage discovery related to trial preparation meetings with witnesses; and discovery prior to sentencing.

Should you have any questions regarding these topics or any aspect of discovery, ECS's Senior Litigation Counsel has had special training on discovery practice and is available for consultation. Most importantly, consult with your supervisor early and often regarding any discovery questions.

I. Choice of Policy

Prosecutors from ECS routinely practice in U.S. Attorneys' Offices across the country. Each U.S. Attorney's Office has a criminal discovery policy (the "District policy") that should cover most of the topics addressed herein. Whenever you open a criminal matter in a District, you must[3] obtain and review the District policy, placing a copy in the case file. Attorneys with fewer than five years of prosecuting experience must review the District policy with their supervisors, as should attorneys who are new to ECS. Senior litigators and supervisors should make a record of any differences between District policy and ECS policy and make that record available to the rest of ECS.

For any given discovery topic:

A) If District policy favors more/earlier disclosure than ECS policy, abide by the District policy.

B) If ECS policy favors more/earlier disclosure than District policy, consult a supervisor about the topic. Generally:

   1) Abide by the U.S. Attorney's Office policy unless its rule is inconsistent with a statute, rule, local rule, or precedential case, or unless you and your Assistant United States Attorney (AUSA) partner agree, with supervisory approval from both offices, that ECS policy is preferable.

   2) You must have supervisory approval before substituting an ECS discovery practice for local practice, even when ECS policy is preferable. Inform a supervisor about disagreements regarding discovery policy raised by AUSA partners, investigating agents, or cooperating agencies. The ECS Section Chief will resolve disagreements regarding District practices, in consultation with the U.S. Attorney's Office.

   3) Special Litigation Counsels, at U.S. Attorneys' Offices and at ECS, are specially trained regarding discovery practice and should also be consulted when questions arise.

[3] Where this document says that attorneys "must" act in a certain way, it expresses an imperative stemming from the law or Department of Justice policy. Where it says attorneys "normally should" act in a certain way, it means that doing otherwise should first be discussed with a supervisor. Where it says attorneys "should consider" a certain action, it means that such action is generally encouraged but not always appropriate. The attorney should consider the action and make appropriate decisions, with or without supervisory consultation.

C) If, after supervisory consultation, it is ever necessary to deviate from a requirement contained in either this policy or District policy (whichever is applicable, per sections I.A and B, above), that deviation must be memorialized in a memo to the file, copying your supervisor.

II. Core Concepts

In addition to the above Choice of Policy requirements, which require you to review the District policy and compare it to this one, you also must ensure that, in each District where you practice, you are familiar with circuit precedent, local rules, and local practice regarding the following core concepts:

A) Brady[4] / Exculpatory Evidence (and Information). Brady is shorthand used to refer to a defendant's Constitutional right to receive material, exculpatory evidence, whether he or she asks for it or not. The right to such information is a trial right, fulfilled through discovery. After indictment, the USAM requires disclosure of exculpatory information "reasonably promptly after it is discovered." USAM 9-5.001(D)(4). Note that Department policy requires disclosure of exculpatory information, which goes beyond the Brady requirement that exculpatory evidence be disclosed. USAM 9-5.001(C)(1). Every ECS prosecutor must have a thorough understanding of USAM 9-5.001 as well as Criminal Resource Manual § 165, which addresses Brady and other important discovery topics. A useful rule of thumb is that Brady is evidence or information—other than Giglio material [discussed next]—that could be used by a defendant to make conviction less likely or a lower sentence more likely. Note that Brady information is not limited to material that is documented. If you or anyone on the prosecution team becomes aware of exculpatory information that is not documented, you must ensure that it is reduced to a writing that can be produced in discovery. Because exculpatory material represents the core of a Constitutional right, and because Department policy is very strict regarding disclosure of exculpatory information, there should be little variation among Districts regarding this type of disclosure. In looking for differences among Districts, you should focus on:

1) **Knowledge with which You Are Charged.** Be familiar with how the scope and composition of the prosecution team is defined in the jurisdiction. Where you must look for Brady, beyond the evidence gathered by the grand jury and your investigators, varies slightly by jurisdiction. This concept is addressed in more detail below, at II.E. The National Security Division has prepared a memorandum that serves as a useful starting point for this assessment. See Attachment A.

2) **Specific Information.** If you find yourself in disagreement with a partner AUSA about whether a particular item must be disclosed as exculpatory information, you must bring it to the attention of your supervisor immediately and make a record of any resolution that does not result in reasonably prompt disclosure.

[4] See Brady v. Maryland, 373 U.S. 83 (1963).

B) **Giglio**[5] **/ Impeachment Evidence (and Information).** Giglio refers to the impeachment subspecies of Brady material and has a similar Constitutional source. It is information that either "[1] casts a substantial doubt upon the accuracy of any evidence—including but not limited to witness testimony—[that] the prosecutor intends to rely on to prove an element of any crime charged, or [2] might have a significant bearing on the admissibility of prosecution evidence." USAM 9-5.001(C)(2). Note that Giglio information is not limited to material that is documented. If you or anyone on the prosecution team becomes aware of impeachment information that is not documented, you must ensure that it is reduced to a writing that can be produced in discovery. In contrast to the management of exculpatory material, there is some variation in the way U.S. Attorneys' Offices handle Giglio. In looking for differences, focus on:

1) **Knowledge with which You Are Charged (Who).** Be familiar with how the scope and composition of the prosecution team is defined in the jurisdiction. In particular, there is significant variation in what you are assumed to know about local, state, and regulatory officials working on or in parallel with your investigation. This concept is addressed in more detail below, at II.E. The National Security Division has prepared a memorandum that serves as a useful starting point for this assessment. See Attachment A.

2) **Knowledge with which You Are Charged (What).** Be familiar with local practice regarding searching criminal information databases regarding civilian witnesses and other common sources of impeachment material. You normally should have your case agent run all of your witnesses through NCIC and other criminal history databases. Remember that you are charged with all impeachment information in the possession of the prosecution team, so you must inquire of all members of the prosecution team to ensure that you have uncovered that information. Finally, you must review the non-exhaustive list of potential sources of impeachment information at Criminal Resource Manual § 165(B)(7) as to each witness. Pay special attention to information regarding a witness's bias.

3) **Timing of Disclosures of Impeachment Information (When).** Impeachment information must be gathered and provided in time for the defense to make use of it. According to Department of Justice policy, it is to be provided at a "reasonable time before trial [or another testimonial proceeding] to allow the trial to proceed efficiently." USAM 9-5.001(D)(2). Timing of such disclosures as part of regular discovery is addressed below. Keep in mind that you are obligated to provide impeachment information to the defense prior to calling witnesses at a suppression hearing, and therefore you may need to provide it for those witnesses before it is due for trial witnesses. Also, keep impeachment in mind when considering search warrant affidavits. An agent with impeachment problems may not be your best search warrant affiant.

4) **Local Practice Regarding Testifying Government Agents (and Employees).** You must familiarize yourself with the local practice regarding Giglio for testifying government agents. The Department's "Giglio Policy," USAM 9-5.100, requires that "requesting officials" make all written requests for an agency's review of its files for

[5] See Giglio v. United States, 405 U.S. 150 (1972).

impeachment information about an agent. In determining whether program officials, other witnesses who are federal employees, or state/local law enforcement officials should also be the subject of a Giglio request, consult the scope of the prosecution team section below, at II.E. You must familiarize yourself with USAM 9-5.100 and discuss the local practice with your partner AUSA. Although the Giglio policy allows you to request impeachment information orally from each testifying agent, you normally should use a written request, sometimes referred to as a "Henthorne letter," which will be sent by the requesting official at the U.S. Attorney's Office or by one of ECS's Professional Responsibility Officers. If such a request reveals negative information that should not be admitted, the information is often presented to the court, ex parte and in camera, for an assessment of whether it must be disclosed. In any event, you must not release impeachment information about an agent to a court or the defense without first giving the relevant agency an opportunity to be heard regarding the disclosure. When disclosing such information to the defense, you normally should consider whether to file a motion in limine and/or seek a protective order regarding it. USAM 9-5.100(5)&(6) describe the scope of what agencies must provide regarding their agents in response to a Giglio request. The ECS request letter, available from the section's Professional Responsibility Officers, parallels these sections.

C) Jencks Act Statements. Jencks refers to the only way for one side in a criminal case to compel production of the other side's records of prior witness statements, unless those statements contain Brady or Giglio information (in which case the Brady and Giglio requirements of the applicable law and discovery policy control production). The Jencks Act, 18 U.S.C. § 3500, was made applicable to defense witnesses through Rule 26.2 of the Federal Rules of Criminal Procedure, so you may use that rule to try to obtain statements of defense witnesses. At its core, the Jencks Act and the implementing regulations are very restrictive, requiring the production of verbatim or adopted records of a testifying witness's prior statements (including grand jury testimony) only after he or she has testified on direct. In practice, Jencks statements are produced earlier than that in every federal District, with significantly different practices among the U.S. Attorneys' Offices. In looking for differences, focus on:

1) **Whether Prior Statements of Interviewees Other than Testifying Witnesses Are Produced.** In every investigation, more people are interviewed than testify. In some Districts, it is routine to turn over statements of "nontestifying witnesses." Determine the practice in the District where your case is being tried. If nontestifying witness statements are produced, some Districts may not include grand jury testimony because the authority to provide grand jury statements applies only to "witnesses," such that there is no exception to Rule 6(e)'s secrecy requirement. As discussed below, you normally should produce statements of nontestifying witnesses.

2) **What, Beyond the Jencks Act Definition of "Statement," Is Produced by the U.S. Attorney's Office in Your District.** Memoranda of Interview, FBI 302s, DEA-6s, or other reports of interview (collectively, "MOIs"), without more, do not meet the Jencks Act definition of "statement." Nevertheless, MOIs are routinely produced together with actual Jencks statements in many Districts. Learn what is produced in the District where your case is being tried, beyond strict "statements." For instance, some Districts treat an

MOI as if it were a witness's statement, while other Districts treat an MOI as a statement of the reporting agent.

3) **When Jencks Statements Are Turned Over to the Defense.** The timing of Jencks Act production is different in many Districts. Learn when such statements are produced in the District where your case is being tried.

D) Rule 16 Discovery. Rule 16 Discovery refers to your remaining discovery obligations,[6] including oral and written statements of the defendant, statements of organizational defendants, the defendant's criminal record, documents and objects that are "material" to preparing the defense, documents and objects that the government intends to use in its case-in-chief, reports of examinations and tests, and expert disclosure. Failure to produce items covered by Rule 16 may result in that item being excluded from the government's case or some other sanction. Rule 16 discovery practices vary by District and by prosecutor, as there is more room for individual preference under Rule 16. Consult with your partner AUSA early and establish a plan for providing Rule 16 discovery. You must provide your supervisor with an outline of your Rule 16 discovery plans at the time you prepare for the ECS prosecution review meeting.

E) Scope of the Prosecution Team.

1) 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 Rule 26.2 (implementing the Jencks Act and addressing material in the government's "possession") and Rule 16 (addressing material in the government's "possession, custody, or control").

2) 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 Department litigating component or another U.S. Attorney's Office, 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 to make it part of the prosecution team for discovery purposes.

3) Many cases arise out of investigations conducted by multi-agency task forces or otherwise involving state law enforcement agencies. Courts will generally evaluate the role of a state or local law enforcement agency on a case-by-case basis. Therefore, ECS attorneys should make sure they understand the law in the circuit and the practice of the

[6] This policy does not address notice issues, such as those surrounding Rules 404(b) or 902(11) of the Federal Rules of Evidence and Rules 12(b)(4), 12.1, and 12.2 of the Federal Rules of Criminal Procedure.

U.S. Attorney's Office in the District regarding discovery in cases in which a state or local agency participated in the investigation or on a task force that conducted the investigation.

4) Some factors[7] to be considered in determining whether to collect and review potentially discoverable information from another federal, state, or local agency include:

   a) Whether the prosecutor and the agency conducted a joint investigation or shared resources related to investigating the case;[8]

   b) Whether the agency played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in targeting discussions, or otherwise acting as a team member;

   c) Whether the prosecutor knows of and has access to discoverable information held by the agency;

   d) Whether the prosecutor has obtained other information and/or evidence from the agency;

   e) The degree to which information gathered by the prosecutor has been shared with the agency;

   f) Whether a member of an agency has been made a Special Assistant United States Attorney;

   g) The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges;

   h) The degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party;

   i) Whether an agency acted on behalf of the prosecutor or under the prosecutor's control (compare active cooperation by a state agency that volunteers useful documents from the permit file against the rare instance when documents are obtained by subpoena from that agency);

   j) Whether a local, state, or federal agency is working as a member of task force or joint investigation;

[7] Many of these factors were drawn from the USAM, Criminal Resource Manual § 165, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.htm.

[8] One court directed expansive discovery from an agency named in a charging document as the target of a conspiracy to defraud the United States, under 18 U.S.C. § 371, even though that agency was not involved in the ensuing investigation.

k) Whether you are likely to include an agency in a press release announcing indictment or conviction, which would tend to indicate that the agency is part of the prosecution team; and

l) Whether prosecutors or agents have ready access to information maintained by the agency, i.e., connections to databases, ability to direct queries of databases, open access to files.

5) You are encouraged to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes. Carefully considered efforts to locate discoverable information are more likely to avoid litigation over Brady and Giglio issues and to avoid surprises at trial. The National Security Division has prepared a circuit by circuit memorandum, dated September 14, 2009, summarizing the legal standards that define the prosecution team. See Attachment A.

6) Regardless of the makeup of the prosecution team, you will likely be charged with knowledge of exculpatory and impeachment information when you have reason to believe that the information exists. Thus, you should normally seek and collect such information, particularly in the following circumstances:

a) If a witness or defense attorney articulates a reasonable basis to believe that there is exculpatory information available from a source that you can obtain without unreasonable effort, you must obtain that information. You must document your efforts to obtain that information, including efforts that return no such information. If the defense has equal access to the information, i.e., if the information is available from a public source, this obligation is lifted. As a matter of trial strategy, however, you normally should gather the information to avoid surprise.

b) If you review another entity's files for incriminating evidence regarding a target, you should review those files for exculpatory information as well.

7) The FBI, ATF, DEA, and other agencies have formal, detailed files about informants that are a special source of exculpatory and impeachment information. If you work a case involving informants, you will be charged with knowledge of the contents of those files. You must consult with your supervisor and seek the most current information regarding how a given investigating agency tracks its interaction with informants. Because ECS's practice does not frequently involve these kinds of witnesses, this policy requires that you seek out current, best practices on a case-by-case basis.

F) National Security Cases. 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:

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

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

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

4) Other significant cases involving international suspects and targets; and

5) 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.

III. Planning for Discovery During the Investigative Phase

Agents from any investigative agency should generally be aware of the items discussed in this section, which reflect good investigative practices and the expectations of the courts. When you are involved at the outset of an investigation, you normally should confirm that your agents are aware of these practices and policies. When you join an ongoing investigation, you should consider consulting with your AUSA partner about whether to look for and eliminate deviations from these practices.

A) Discovery File. You must create and maintain a discovery file at the outset of an investigation. As issues arise during the investigation that could have an impact on discovery in the case, you must maintain a record of those issues in the discovery file.

B) Interaction with Agents. Investigating agents have varied training and experience. Thus, in the context of building a good working relationship, you must discuss discovery with the agents early in the investigation. You must address: the standard discovery practices that are required by this policy and the District policy; the division of responsibility for the work of discovery; and the definitions of Brady, Giglio, and Jencks Act statements. You should consider whether to confirm these discussions by letter. In addition, early in an investigation, you should normally discuss with your agents whether they know of any impeachment information (Giglio) about themselves that will affect their role in the case.

C) Preparation of Affidavits. Affidavits in support of search warrants, arrest warrants, criminal complaints, seizure warrants, or Title III's, should normally disclose substantial exculpatory information. Such affidavits should also include any impeachment information relating to the affiant (or relating to anyone on whom the affiant relied), if that information would be sufficient to undermine a court's confidence in the statement of probable cause contained in the affidavit.

D) Collection of State or Local Regulatory Records. ECS cases often require the collection of regulatory documents of state or local agencies. When you or your agent(s) seek such documents informally, you may be making a record of cooperation that brings the state or local regulatory agency within the scope of the prosecution team. See the core concept, "Scope of the Prosecution Team," section II.E, above. With that in mind, you should consider obtaining such information formally, through a grand jury subpoena or other arms-length transaction. This may be a delicate undertaking since some regulators consider subpoenas to be "hostile." You should address such concerns with the agency's counsel and explain that maintaining separation between the agency and the prosecution team may prevent more disruptive discovery practice later in the case.

E) Witness Interview Practices. The following are interview practices that you should normally discuss with the agents working on your case.

1) Agents are to retain rough notes of interviews, even if notes are written up in a final MOI. If agency policy calls the destruction of rough notes, you must determine whether the law in your circuit requires that they be retained. If so, you must direct the agents to retain their rough notes, notwithstanding agency policy or practice. You must alert your supervisor to any issues regarding the destruction of rough notes.

2) Notes should not be taken on pre-typed outlines of questions (which tend to reveal the investigator's and/or prosecutor's thought process) or other documents that may be inappropriate to provide to the defense. The reason for this is that, despite appropriate efforts to resist production of rough notes, courts do order their disclosure from time to time.

3) Only one agent should take notes during each interview.

4) The agent's MOI should be based upon his or her own notes, and not those of any prosecutor present during the interview.

5) Agents should prepare final MOIs that follow agency guidance and that:

   a) Identify any documents used during the interview and either include them as attachments to the MOI or, in the case of oversized or voluminous documents, give adequate descriptions of the documents, including Bates numbers if possible;

   b) Document any promises or inducements to witnesses to obtain cooperation or statements made to the witness regarding the interviewee's status in the investigation (such as witness, subject, or target);

   c) Document any materially different statements that the interviewee makes about the same subject over the course of the interview, for instance when confronted with a document or when recollection is refreshed.

6) MOIs need not discuss questions posed to interviewee, only information communicated by the interviewee. Questions may be recorded for context.

7) You should normally review draft MOIs for accuracy in light of your own memory, any notes you have, or other accounts available to you. Discuss any differences with the agent by phone or in person, but not in writing (because written statements regarding the interview could become Jencks for the agent).

   a) Conflicts (between agents or between an agent and a prosecutor) regarding what a witness said must be addressed in person or by telephone, which may resolve the matter. If not, the agent may contact the interviewee to address the question. That follow-up contact must be memorialized as an addendum to the original MOI.

   b) If there is a continuing conflict about what a witness said, the agent's final MOI must reflect his or her own memory. The conflicting memory must be noted in the discovery file as an issue to be addressed and the facts regarding the conflicting recollections must be disclosed to the defense in a letter at the appropriate time.

8) As discussed below, prosecutor and agent rough notes should also be reviewed prior to indictment.

F) Communications with Witnesses (Other than Interviews). You and all other prosecution team members must preserve all substantive communications with witnesses and potential witnesses, including e-mail messages and voicemail messages (which may be transcribed).

G) E-mail Practices. You must emphasize with agents working your cases that e-mail is discoverable and you must undertake the following practices:

1) All substantive correspondence, including e-mail communications, relating to an investigation must be retained for the duration of the prosecution and any subsequent

appeal.[9] Both you and your agents must follow this directive. Purely ministerial communications (such as meeting requests) may be deleted.

2) Case agents should not use e-mail to communicate with anyone (prosecutor, SAC, partner agent) about the substance of the investigation, except that e-mail may be used to transmit a formal, final MOI or other investigatory document that has been approved by the agency.

3) E-mail may be used to coordinate meetings or calls or for other ministerial tasks.

H) Intake/Receipt of Investigatory Material. Upon joining an investigation you must assure yourself that you can be certain where every document and object obtained during the investigation will be found when discovery begins.

1) Special attention must be paid to the chain of custody for seized documents and other unnumbered originals. If you receive documents that are not Bates numbered you normally should direct the agent or a paralegal to number them. Until documents are numbered, copied, and can be tracked, no document should be pulled from an unnumbered collection unless it can be reliably traced to its source. You normally should consult with litigation support and develop a plan for managing case documents. Typically, case documents are scanned, electronically numbered, and linked to a Concordance database.

2) Seized electronically stored information (ESI) and/or seized images (forensic copies) of ESI must be maintained by an investigative agency, which must follow its chain of custody procedures regarding that evidence. Your work will typically involve only the results of searches of the ESI that specialized agents perform. You will deal with the seized data directly only if the defense seeks access to the ESI, in the form in which it was seized. Consult with the ENRD's litigation support team, the computer forensics lab for the agency with which you are working, and the Criminal Division's Computer Crimes and Intellectual Property Section (CCIPS) to address how discovery of such information should be managed.

I) Review of Investigatory Material. You should review the investigatory material (documents and physical objects) collected over the course of the investigation, both for its value in pursuing the target(s) and in anticipation of discovery. In a small case you should normally read every document. In a large case, that will almost certainly be impossible. In delegating document review, discuss Brady and Giglio in detail and direct those working on the case to alert you if they find exculpatory and/or impeachment information. You should inspect all records collected in the investigation, wherever they are maintained, to satisfy yourself that you know the discovery landscape. You should consider personally inspecting materials in the agents' working files as well.

[9] You must also consider subsequent collateral attacks and the document retention requirements of the Federal Records Act, 44 U.S.C. §§ 3101-07.

J) Obligations with Respect to Filter Teams. If your case has a filter team associated with it, you must ensure that the filter team passes on any discoverable information, particularly exculpatory or impeachment information. If that information is subject to the privilege or other condition that is the focus of the filter team's work, then the filter team attorney should consult a Professional Responsibility Officer or the Professional Responsibility Advisory Office to address the discovery and privilege issues.

K) Interaction with Experts. Expert witnesses are subject to disclosure requirements under Rule 16(a)(1)(G) because of the nature of their testimony, but they are also subject to Brady, Giglio, and the Jencks Act simply because they are testifying. You must plan ahead, during the investigative phase of your case, to successfully present your expert's testimony.

1) Types of Experts. Rule 702 of the Federal Rules of Evidence reads: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise . . . ."

a) You should normally assess your case in light of this definition and determine whether your "fact" witnesses may also provide testimony that would fall under Rule 702. For instance, the testimony of a witness familiar with a factory's process from having been trained on it and having worked at the factory for fifteen years may stray into territory covered by Rule 702. Typically, your interaction with such a witness will be similar to your interaction with other fact witnesses, but you may want to provide a Rule 16(a)(1)(G) summary of his or her testimony to guard against a claim that he or she should only be permitted to testify about what he or she observed during periods covered by the charges, i.e., that his or her underlying knowledge of the plant's process is inadmissible expert testimony.

b) Environmental crimes cases also frequently involve testimony by outside experts[10] who are not fact witnesses. Determine the nature and extent of outside expert testimony needed to support your prosecution as early as possible.

2) Rule 16(a)(1)(G) Supplements the General Discovery Rules. Information exchange with experts is governed by the same rules that govern information exchange with other witnesses. Thus, you must maintain all communications from an expert as Jencks Act statements, must record variations in an expert's opinion over time as possible Giglio, and record any exculpatory opinions or statements by an expert as Brady. Moreover, all other sources of impeachment information, including any fees paid to the expert for his or her work, must be recorded. Ultimately, much, if not all, of this information will be discoverable. At the appropriate time, you must assess whether the items must be disclosed.

a) In particular, you may need to disclose draft expert reports:

[10] Here, "outside experts" refers to people who were not involved with the case until sought out by the prosecutor. They may work inside the government or they may be retained experts, hired to support the case.

(1) Pursuant to the Jencks Act if, under applicable Circuit precedent, a draft report qualifies as a statement that has been "adopted or approved" by the expert witness; and/or

(2) Pursuant to Brady or Giglio if there are material differences between the draft and the final report.[11]

b) If the expert must use grand jury material, it must be provided in compliance with Rule 6(e)(3)(A)(ii), for government personnel, or Rule 6(e)(3)(E)(i), for outside experts.

c) In addition, you will be obligated to summarize the expert's opinions, the bases and reasons for those opinions, and the witness's qualifications under Rule 16(a)(1)(G). Information you provide to the expert, including facts you ask the expert to assume and any data or evidence you provide, are likely to form part of the bases for the expert's opinion. As such, you may need to provide that information to the defense.

3) **Information Exchange with Experts.** In light of the above, you must give due consideration to what materials to provide for the expert's review. You must consider how to ask the expert to develop opinions, what information he or she will use to formulate opinions, and how those opinions will be communicated to you. You should determine whether a written report from the expert will be required and how the expert should maintain, manage, monitor, and develop evidence that feeds his or her opinions. All of this must be carefully tracked so that it may be produced in discovery.

4) **Use of Consulting Experts.** Because the Jencks Act and other considerations can make it difficult for you to get expert advice through unfiltered discussions with a testifying expert, you may consider working with a separate consulting expert. You must bear in mind that the consulting expert may also uncover information that is discoverable, either because it is exculpatory, or under another theory. Note that Rule 26 of the Federal Rules of Civil Procedure is scheduled to undergo a major overhaul in December 2010 that would extend work-product protections to communications with experts, other than communications about fees, facts and data to be analyzed, and assumptions the expert is directed to use.[12] You should track the impact these rules changes have on criminal discovery, if any.

5) **Expert Witnesses May Be Part of the Prosecution Team.** You must research circuit case law and consult with your partner AUSA to determine if outside expert witnesses are

[11] See, e.g., Benn v. Lambert, 283 F.3d 1040, 1060-62 (9th Cir.) (concluding that the prosecution's failure to disclose its experts' determination that the fire was accidental constituted a Brady violation), cert. denied, 537 U.S. 942 (2002); Paradise v. Arave, 130 F.3d 385, 393 (9th Cir. 1997) (finding a Brady violation when prosecutor withheld notes revealing that prosecution's expert "appear[ed] initially to have held an opinion in square conflict with his later in-court testimony").

[12] Judicial Conference Committee on Rules of Practice and Procedure, "Report of the Judicial Conference Committee on Rules of Practice and Procedure" 9-14, Sep. 2009.

considered part of the prosecution team. See, e.g., United States v. Stewart, 433 F.3d 273, 297-99 (2d Cir. 2006) (expert not part of prosecution team despite broad role, including testimony). If experts are deemed part of the prosecution team, you must address that fact early and put the expert on notice that, beyond what is addressed above, he or she will have to provide the government with all case-related materials and any other information in his or her possession that could be exculpatory or impeachment material, whatever its source.

L) Litigation Hold. As soon as it appears that an agency's records (permit files, regulatory files, etc.) could be relevant to either the prosecution or the defense of a case, you must issue a litigation hold for that information, including ESI. Because ENRD's civil litigators have developed expertise and have designated contacts at their client agencies regarding this topic, you must contact ECS's representative to ENRD's E-Discovery Working Group to consult about issuing a litigation hold. Members of the working group can be invaluable in helping you determine how to handle issues like the scope of the hold, how often it should be refreshed, and how it will address ESI.

IV. Pre-Indictment Procedures

Especially in a complex case, you must prepare for discovery prior to charging the case. Under the Speedy Trial Act, 18 U.S.C. § 3161, defendants may seek a trial date within months of indictment. Rushed discovery can lead to problems. Thus, this policy contemplates a number of steps that must be taken once it appears that indictment is likely.

A) Letter to Agent. Thirty days or more before indictment, and after getting the concurrence of your partner AUSA, you should normally send a letter to the lead case agent, copying all investigators, that requests all discovery materials discussed herein and addresses the team's discovery obligations. If you do not intend to send such a letter, or there is disagreement about it, you must discuss that situation with your supervisor.

B) Supplemental Review of Rough Notes. As the investigation approaches an indictment date, you and the agent should normally review all MOIs a second time against any notes taken during the underlying interviews. In light of subsequent investigation, information in notes may have taken on new relevance, allowing you to identify incriminating, exculpatory, impeaching, or inconsistent information that was not clear when the MOI was first drafted. If you or the agent undertake such a review, inconsistencies between notes and final MOIs, exculpatory information, or impeachment information must be noted for production in discovery after indictment.

1) You must review an agent's notes personally if:

   a) You have reason to believe the notes are materially different from the final MOI;

   b) A written MOI was not prepared;

   c) The precise words used by a witness are particularly important; or

d) The witness disputes the agent's account of the interview.

2) You must inform the defense, after indictment, if a prosecutor's or agent's notes are inconsistent with the final MOI, and that inconsistency is not resolved. This may be done by letter, or by providing the defense with a copy of the rough notes.

3) You must review your own notes of witness interviews to ensure all necessary disclosures are made.

C) Communication with Victim/Witness Coordinator. Before indictment, you should normally communicate with the Victim/Witness Coordinator in the District to determine whether he or she knows of any discoverable information that may have been generated by any victims in the case. This is also a good time to review your obligations to victims under the Crime Victims' Rights Act and the 2005 Attorney General Guidelines for Victim and Witness Assistance. Coordinators may be aware of a victim's written or oral statements that could be discoverable. For example, a victim might have told the coordinator a fact that is exculpatory (e.g., "I think the plant foreman was hiding things from the general manager") or that could be used for impeachment (e.g., "witness Smith regularly showed up for work drunk"). In addition, the coordinator may know things about victim-witnesses that could be independently discoverable. For instance, the coordinator may have observed that a victim was intoxicated during a meeting. If you encounter an issue like this, you must discuss it with your supervisor. Always be mindful of a victim's "right to be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a)(8).

D) Prosecution Review. Around the time of the prosecution review for a case, you should normally prepare a memo for your supervisor outlining what your discovery strategy will be if the case is indicted.

E) Review the Discovery File. During the investigation of a case, you should have maintained a discovery file that identified specific items to be addressed in discovery. Review this file prior to indictment and be certain you have solutions to any problems identified therein.

V. Production and Inspection

If the steps outlined in the previous two sections are followed, the work of providing the defense with discovery should be greatly simplified. One of the most important aspects of production and/or inspection is to record what you have done in a way that will, if necessary, satisfy a reviewing court. As addressed above, the general ECS policy is one of disclosure, which increases the volume of discovery but may avoid litigation regarding specific items.

A) Responsibility for Discovery. The prosecutors on a case always bear the responsibility for proper disclosure. Although you will necessarily delegate discovery work to agents, paralegals, and legal assistants, any failures are imputed to you. You must have a procedure in place that allows you to be reasonably certain that discovery will be complete. If you believe that you do not have the resources to adequately comply with your discovery obligations in a timely manner, inform your supervisor immediately.

B) ECS Policies. The policies in this section control how production and inspection are to be managed if there is no input from your partner AUSA or the District policy. Refer to "Choice of Policy," sections I.A and B, above, to assess when to follow this policy versus the District policy.

C) Rule 6(e) Secrecy. Discovery typically involves the production of some grand jury material. Seek local guidance about how this issue is handled. In some cases, you must seek a court order, in other cases such discovery is covered by local rule. Grand jury transcripts of witnesses you do not intend to call at trial normally should be disclosed only if they contain exculpatory or impeachment information or are transcripts (statements) of employees of an organizational defendant and are binding on the organizational defendant, as addressed by Rule 16(a)(1)(C). Err on the side of disclosure if there is any conceivable basis for it, but be certain to comply with Rule 6(e).

D) Production of Documents and Objects. You normally should produce (or make available for inspection) <u>all</u> documents and objects that were collected during the investigation of the case. Refer to the core concept of "Scope of the Prosecution Team," section II.E, above, to assess what is in your "possession." You must not refer to this as "open file discovery" because you will always hold back some information. Nevertheless, the ECS default is disclosure, barring a specific reason to withhold that is both compelling and recognized by law.[13] You should normally be prepared to provide this discovery at or reasonably promptly after arraignment. Many districts have broad, automatic discovery rules that require Rule 16 materials to be produced without a request by the defendant and within a specified time frame, unless a court order has been entered delaying discovery, as is common in complex cases. This production would normally include:

1) Seized documents and objects;

2) Subpoenaed documents and objects;

3) All grand jury exhibits, which you must maintain and systematically track during your grand jury work;

4) Photographs or videos relevant to the investigation;

[13] According to the Criminal Resource Manual § 165: "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. But when considering providing discovery beyond that required by the discovery obligations or providing discovery sooner than required, prosecutors should always consider any appropriate countervailing concerns in the particular case, including, but not limited to: protecting victims and witnesses from harassment or intimidation; protecting the privacy interests of witnesses; protecting privileged information; protecting the integrity of ongoing investigations; protecting the trial from efforts at obstruction; protecting national security interests; investigative agency concerns; enhancing the likelihood of receiving reciprocal discovery by defendants; any applicable legal or evidentiary privileges; and other strategic considerations that enhance the likelihood of achieving a just result in a particular case. In most jurisdictions, reports of interview (ROIs) of testifying witnesses are not considered Jencks material unless the report reflects the statement of the witness substantially verbatim or the witness has adopted it. . . . Prosecutors should be familiar with and comply with the practice of their offices."

5) Results of permit reviews and/or certificates declaring the absence of a permit;

6) Documents and objects provided voluntarily by cooperators, witnesses, local agencies, state agencies, or federal agencies;

7) Documented "snapshots" of publicly available materials (such as websites) that may have changed over the course of the investigation.

If nothing is held back, the foregoing will satisfy your obligations under Rule 16(a)(1)(D), insofar as it will include all documents and objects that you will use in your case in chief, that are material to preparing the defense, or that were obtained from or belong to the defendant.

E) Production of Unexamined ESI Stored on Hard Drives or Similar Devices. When hard drives and other large capacity data storage devices are seized, collected, or mirrored in an investigation, there are legitimate reasons why the government may not review all of the ESI on those devices. For instance, the scope of a warrant may not encompass the entire device or the volume of stored material may make file-by-file review nearly impossible. In cases where there is unexamined ESI on a data storage device when you are producing discovery, you must consider the following:

1) Whether the right work has been done to ensure that the unexamined ESI does not contain *Brady*, *Giglio*, Jencks Act, or other information that the government is *required* to produce. If that work has not been done (*e.g.*, if you were not satisfied that keyword of the device would turn up all discoverable material), then you must consider whether to produce the unexamined ESI to avoid inadvertently suppressing information that the defense should receive. In that case, you would also consider:

2) Whether there is a legal reason not to produce the unexamined ESI. For instance, if portions of a device are deemed to be outside the scope of a search warrant, the government's position may be that it is not in legal possession of those portions and has no authority to produce or search them. Further,

3) If you conclude that you should produce the unexamined ESI, is there a reason and basis for seeking a protective order regarding that information? Where there is unexamined ESI, there is the risk that production of that information may be subject to the "countervailing considerations" addressed at §165 of the Criminal Resource Manual. See *supra*, note 13. These include privacy, privilege, witness protection, etc. A protective order from the court may reduce the risk that unexamined ESI will cause problems if placed in the hands of the defense.

4) Regardless, you must consult with your supervisor before either withholding unexamined ESI or producing unexamined ESI. When ESI from unexamined portions of a data storage device are held back, you should normally notify defense counsel of the non-disclosure and the basis for the non-disclosure.

F) Remainder of Rule 16 Discovery. You should normally be ready to produce the following, at or reasonably promptly after arraignment:

1) Statements of the defendant under Rule 16(a)(1)(A)&(B);

2) Statements of corporate defendants under Rule 16(a)(1)(C). Recognize that statements of corporate defendants will generally include:

   a) witness statements by an organization's director, officer, employee, or agent, if you plan to use those statements to bind the corporation; and

   b) witness statements by someone who 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 in the organization;

3) Reports of examinations and tests under Rule 16(a)(1)(E);

4) Expert disclosures under Rule 16(a)(1)(G). Your expert disclosure obligation is as follows: provide the defendant a "written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. . . . The summary provided . . . must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." In general, "criminal defendants do not have a constitutional right to discovery, absent a statute, rule of criminal procedure, or some other entitlement." United States v. Uzenski, 434 F.3d 690, 709 (4th Cir. 2006) (citing United States v. Johnson, 228 F.3d 920, 924 (8th Cir. 2000) (citing Weatherford v. Busey, 429 U.S. 545, 559 (1977))). For example, in a criminal case where the government has complied with its obligations under Fed. R. Crim. P. 16, the government is not obligated to provide further discovery regarding a witness's laboratory notes, absent a case, a statute, or rule of criminal procedure requiring additional discovery. Uzenski, 434 F.3d at 709.[14]

G) Witness Statements. You must be prepared to produce all Jencks Act statements, as described under the Jencks Act core concept, section II.C, above, soon after arraignment, although you may hold it back for later production in accordance with local practice. Remember that if there is a genuine reason, such as witness security, to provide Jencks Act statements later, there is room to do so under the law. You must consult with a supervisor before seeking to hold Jencks Act statements later than is usual under local practice.

1) Unless District policy differs, you should normally produce MOIs together with Jencks Act statements. Do not refer to MOIs as "Jencks," since they almost never meet the Jencks Act definition of "statements."

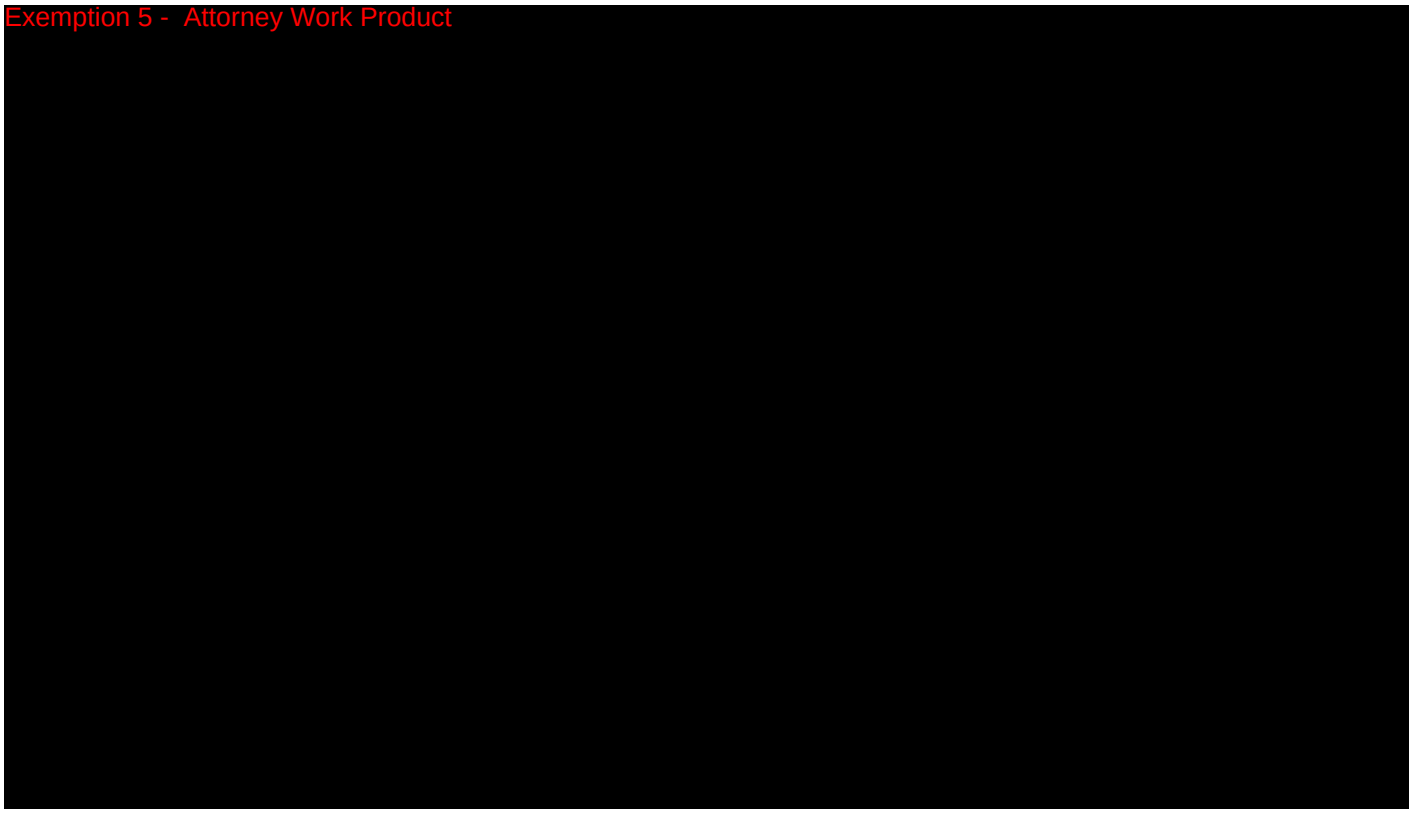
2) Unless District policy differs, you should consider producing written or recorded statements and MOIs of nontestifying witnesses, as a precaution against those statements

[14] This is in contrast to the more elaborate requirements for civil cases set forth in Fed. R. Civ. P. 26(a)(2)(B), which mandates a written report prepared and signed by the expert, including several specific items beyond the expert's statement of opinions.

supporting a defense theory that you have not guessed. Of course, if an MOI contains exculpatory or impeachment information, that information must be provided to the defense.

H) Impeachment Information. You must produce all impeachment material, as described under the Giglio core concept, section II.B, above. You should normally be prepared to produce this discovery soon after arraignment, although you may hold it back for later production in accordance with local practice.

I) Exculpatory Information. After indictment, you must produce all exculpatory information reasonably promptly after it is uncovered. For exculpatory information with which you are familiar at the time of indictment, reasonably promptly means that the exculpatory information should be some of the first material you produce. The expansive discovery laid out above will normally ensure production of exculpatory material, but you must be confident that you have provided the defense with all of it. Refer to the core concept "Brady/Exculpatory Evidence (and Information)," section II.A, above.



2) Although you are not required to identify important documents to the defense, such as hot documents or particular exculpatory documents, you may choose to do so. Regardless, you must never mislead the defense about the nature of disclosures.

3) When providing voluminous discovery, consider providing general descriptions (e.g., "search records," "bank records," "phone records," etc.).

4) Reasonable assistance to the defense is often looked at favorably by courts. See, e.g., United States v. Skilling, 554 F.3d 529 (5th Cir. 2009) (in a case where government voluntarily provided searchable e-discovery, indices and hot document list, the court stated: "As a general rule, the government is under no duty to direct a defendant to exculpatory evidence within a larger mass of disclosed evidence . . . .").

J) Information That Is Typically Not Produced. ECS does not have an open file discovery policy. The case file may contain material that is protected from disclosure by the work product doctrine, the deliberative process privilege, the attorney/client privilege, Rule 6(e), and other doctrines. In this light, the following material is not typically produced: internal prosecutorial memoranda, prosecutors' notes, agent rough notes where the relevant interview has been reduced to an MOI (these notes must be preserved), presentence reports of cooperators. Nevertheless, if any of the aforementioned materials contain impeachment information, exculpatory information, or witness statements, then the impeaching information must be produced to the defense. You must send a letter to the defense setting forth the information, but need not forward the specific document containing the information. Such discovery letters must describe the full context of the information as accurately and completely as possible, but should be drafted so as not to waive a privilege.

K) Representations Regarding Enhanced Discovery. The above standards will typically lead you to provide discovery that is more broad and comprehensive than what is strictly required. When your production exceeds what is required by law you should normally advise the defense that: (1) the production of some non-discoverable materials does not obligate the government to provide all non-discoverable materials; and (2) the production of certain non-discoverable materials should not be taken as a representation as to the existence or non-existence of other non-discoverable materials.

L) Managing Production, Disclosure, and Inspection. The mechanics of production, disclosure, and inspection may vary depending on attorney practice and the structure of the case. Discovery must be well-organized and reproducible—you must be able to show how the defense received each item provided through discovery.

1) At the outset, you may choose whether to provide the defense with electronic copies,[15] paper copies, or access to original documents. It is recommended that you consult with opposing counsel about the best way to produce discovery. The government is not obligated to pay for copying, although for modest projects, it often does. When documents are sent out for copying by a contractor, you must consult with your supervisor to ensure that the government maintains proper control over the production and to make certain that the documents being copied are properly protected while in the contractor's possession, particularly documents that are subject to Rule 6(e).

2) When there is voluminous discovery, particularly with respect to documents that do not appear (to you) to be material to the preparation of the defense, you may wish to allow

[15] Note that courts are familiar with ESI requirements in civil litigation, where Rules 16, 26, 33, 34, 37, and 45 of the Federal Rules of Civil Procedure were updated to reflect new electronic-age norms. Although the Rules of Criminal Procedure do not have analogous provisions yet, you should expect judges to apply some of their knowledge from civil litigation discovery to their criminal cases.

the defense inspection, rather than dedicate resources to prepping those materials for production.

a) Inspection usually occurs at an investigating agency office or at the prosecutor's office. Reasonable access to a photocopier is usually provided.

b) An agent or paralegal must be present when material is provided for inspection. He or she must track what the defense has had access to, although he or she must not track specific documents that the defense copies or studies. It is recommended that the agent get a signed acknowledgement from the reviewing attorney, setting out the Bates numbers of the documents offered for inspection.

3) When the government possesses large volumes of discoverable ESI, consult with your AUSA partner, ENRD's litigation support team, and your supervisor about the best approach to production in each particular case. Exemption 5 - Attorney Work Product t

Exemption 5 - Attorney Work Product

[redacted]

4) Be prepared to work with the defense to ensure it can review ESI. You may need to provide access to hardware, software, and/or technical assistance, especially if the defense lacks financial resources.

M) Recording Production, Disclosure, and Inspection. You must keep careful records of what is produced to the defense. Not doing so has been the basis for disciplinary action. Cover every production with a discovery letter and memorialize every inspection visit by the defendant with a note to the production file. During pre-trial hearings or even trial, you may occasionally need to produce material to the defense without a covering letter (*e.g.*, if a witness brings a new document to a trial prep session the night before she is to testify). If that happens, make a record of the production immediately afterwards and add that record to the production file. During trial, the best practice is almost always[16] to use Bates numbered versions of documents for exhibits. When an original document is preferred (usually because of its increased evidentiary value), have the Bates numbered version that was produced to the defense available alongside the original. Usually, there should be two records of what was produced to the defense:

1) Copies of the cover letters describing each production, disclosure, or inspection event, kept as a separate production file. This file should be in addition to your general correspondence file. Discovery correspondence must reference the Bates numbers of the

[16] An exception to this guidance is when the introduction of Bates labeled exhibits would show gaps in the Bates label sequence. Such gaps can leave jurors wondering about the missing pages. For instance, if the target's subpoena production included a Bates stamped take-out menu in the middle of a document, it would be best to prepare an exhibit that included neither the menu nor a gap in the number sequence where the menu used to be.

material provided in discovery (or offered for inspection) and the government should be able to access the referenced material quickly, by Bates number. When material is produced on electronic media (e.g., a DVD), a copy of that media should be kept with the correspondence;

2) An index, by Bates number, that refers to the dated cover letter for each production. Thus, when a question arises about any particular Bates numbered document, the index allows you to immediately identify the particular letter that covered its production;

N) Protective Orders for Personally Identifiable Information (PII)

1) You normally should seek protective orders banning use of PII found in disclosures for purposes other than trial or trial preparation. Such an order should cover addresses, phone numbers, employments, social security numbers, taxpayer identification numbers, bank account numbers, credit card numbers, medical records (including records of psychological counseling), records of drug use (both prescription and illicit), records of alcohol abuse, and records of juvenile convictions.

2) When possible and when such information has no bearing on the preparation of a defense, redact it. Note that some of the PII listed above would be impeachment material regarding a witness, which must be disclosed.

3) Note that courts have rules specifically forbidding the inclusion of PII in court filings.

VI. Trial and Sentencing

Discovery obligations are continuing obligations. The following policies address issues that arise during trial and after. Also, when trial is delayed after discovery is substantially complete or when trial extends over many months, you must address your continuing obligation by refreshing discovery in those areas where information may have changed, e.g., by updating criminal history reports regarding witnesses after an extended trial delay or resubmitting requests for discoverable information to regulatory agencies.

A) Memorialize Witness Preparation Meetings. Just before and during trial you will be meeting with witnesses to "prep" them for their testimony. It is not unusual for these meetings to involve "discoverable" events. To avoid trouble, you must ask an agent to create a record regarding every trial prep session. This record need not be an MOI, but it must record (a) all information that is substantively exculpatory and that has not been disclosed before and (b) all material variances from the witness's prior statements. Produce these records to the defense on an ongoing basis during trial, as Jencks, Brady, Giglio, or Rule 16 information, as appropriate. If the trial prep session involved an unsurprising recital of what the witnesses said before, the trial prep record should simply say so.

B) Review Discovery as Defenses Become Apparent. Since defendants have no obligation to provide previews of their defenses, you may learn defense theories for the first time during opening statements. At that time, if there are categories of information that were not produced or made available to the defense, you should review whether those materials are

likely to have any bearing on a theory the defense may espouse. For instance, if you decided not to produce certain voluminous sets of documents because they would not be "material to the preparation of the defense" under Rule 16, questions and arguments by the defense during trial may make you realize how those documents could, potentially, help the defendant's case. As of that moment, you are obligated to produce those materials.

1) The failure to produce such material is "suppression" and is a likely Brady violation. If discovered, that failure may be fatal to your case and damaging to your career. Courts are used to a certain amount of discovery occurring during trial, so produce without fear.

2) Good discovery records are essential in this circumstance, because those records will allow you to learn and assess what, if anything, has not been produced.

3) Because it is difficult to predict the defense theory one hundred percent of the time, many experienced prosecutors engage in "enhanced" discovery that includes all of the factual information in the case file that is not legitimately protected by a privilege.

C) Correct false testimony. If a witness provides false testimony, you have an affirmative responsibility to correct the falsity.

D) Sentencing. Exculpatory and impeachment information that casts doubt upon proof of an aggravating factor at sentencing, but that does not relate to proof of guilt, must be disclosed no later than the court's initial presentence investigation.

*** * ***

This policy addresses most discovery topics. Nevertheless, no document can substitute for judgment, legal research, common sense, and informed consultation. You should review this policy whenever a discovery issue arises and discuss any questions or issues early and often with your supervisor.

ATTACHMENT A:

National Security Division Scope of the Prosecution Team Memorandum