Criminal Practice and Trial Procedure

A. **ATTORNEY CONFERENCE AND DISCLOSURE**

Within ten (10) days of the date of arraignment, government and defense counsel shall meet and confer for the purpose of resolving or minimizing the issues in controversy, or government counsel shall file the Discovery Notice attached to E.D. Mich. Administrative Order No. 03-AO-027.

Upon the request of defense counsel, government counsel shall:

> (A) provide defense counsel with the information described in Federal Rule of Criminal Procedure 16(a)(1); and
>
> (B) permit defense counsel to inspect and copy or photograph any exculpatory/impeachment evidence within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Agurs*, 427 U.S. 97 (1976), and Giglio v. United States, 405 U.S. 150 (1972).

A list of such evidence shall be prepared and signed by all counsel. Copies of the items which have been disclosed shall be initialed or otherwise marked.

B. **DISCLOSURE DECLINED**

If, in the judgment of government counsel, it would be detrimental to the government's interests to make any of the disclosures set forth in the paragraph above, the government shall file a motion within the ten-day period seeking relief from this Order and setting forth the specific reasons for its request.

C. **CONTINUING DUTY**

The duty to disclose is continuing, even throughout trial.

D. **DISCOVERY BY THE GOVERNMENT**

Nothing in these procedures is designed to preclude discovery by the government under the Federal Rules of Criminal Procedure, nor to alter the Defendant's obligation, if any, under Rule 16(b).

E. **EARLY DISCLOSURE OF JENCKS MATERIAL**

The Court encourages the government to disclose *Jencks* Act (18 U.S.C. § 3500) materials well in advance of the trial. In the event that some *Jencks* Act materials are not disclosed sufficiently in advance of a government witness' testimony, the Court will allow a reasonable amount of additional time during trial for the defense to prepare before proceeding.

F. **PRESENCE OF THE DEFENDANT**

The defendant must be present at all court hearings unless the Court has granted prior approval for the defendant's absence. If a writ is required, it must be submitted four (4) weeks before the court date.

G. **PRE-TRIAL MOTIONS**

Before any pre-trial motion is filed, compliance with Local Criminal Rule 12.1 must be

observed.

H. **EXHIBITS**

1. **Agreement as to Admissibility:** Counsel for the government is urged to make reasonable efforts to reach agreement with counsel for the defense concerning the admissibility of each intended physical exhibit prior to trial. In the event such agreement is reached, a list of such exhibits is to be prepared by government counsel for entry at the opening of trial, and the exhibits will be considered admitted at the outset.
2. **Marking of Exhibits:** Counsel are required to mark all proposed exhibits in advance of trial. The Government's exhibits shall use numbers and Defendant's exhibits shall use letters. A consecutive numbering and lettering system should be used by each party.
3. **List of Exhibits:** A list of proposed exhibits shall be submitted directly to Judge Davis's chambers by each of the parties by the deadline established at the final pretrial conference.

   However, no later than one (1) week before the final pretrial conference, each party shall make available for inspection all exhibits which that party will introduce at trial. This provision shall not extend the time for disclosure and inspection of material previously ordered herein.

I. **Foundation issues and Motions in Limine:** Motions in limine and any notices of intent to contest foundation, chain-of-custody, or scientific analysis shall be filed at or before the final pre-trial conference. Unless the items or exhibits are unusually voluminous, any notice of intent to contest foundation, chain-of-custody, or scientific analysis shall provide a brief item-by-item or exhibit-by-exhibit description of the good faith basis for any objection.

J. **Objections to Exhibits:** These guidelines shall not affect the right of a party to object at the time of trial to the introduction of an exhibit other than on the basis of authentication and foundation.

K. **Custody and Record of Admitted Exhibits:** Counsel should refer to and comply with the Standing Order of Discovery for this District.

L. **Presentation of Exhibits During Trial:** The Court encourages parties to use electronic projection to present exhibits during trial in a manner that allows the jury, court, attorneys, and parties to view the exhibit simultaneously. If photographs and documentary exhibits are not presented electronically, then the party must prepare exhibit books for the court and each juror. Whether or not exhibits are presented electronically, a separate exhibit book should be prepared and made available to a witness who is to be questioned about an exhibit.

M. **Preparing Exhibits for Jury Deliberation:** Counsel must confer and purge from one set of binders or files all exhibits not admitted during the course of trial. Originals of all exhibits admitted at trial should be ready to be turned over to the jury foreperson prior to closing jury instructions so that jury deliberations are not delayed.

N. **Filing Exhibits:** It is the responsibility of the parties to ensure that the record is complete. All proposed jury instructions are to be filed in the record within five business days of the verdict.

O. **Full Disclosure:** Computer generated visual or animated evidence, together with underlying data, must be disclosed to opposing counsel at least one week before the start of trial.

P. **Penalty:** A party who does not abide by these provisions may be subject to sanctions, including preclusion of the introduction of exhibits at trial by the offending party.

- **WITNESS LISTS**

By the deadline established in the Scheduling Order, and to enable the Court to better estimate the length of trial, each party shall submit directly to Judge Davis's chambers a list of witnesses by name and agency (if appropriate), whom it reasonably anticipates it will call to testify at trial, noting the approximate amount of time the party anticipates will be needed for examination of

each such witness. The list must be served on opposing counsel; proof of service must be attached. This list and proof of service are NOT to be electronically filed or otherwise submitted to the Clerk's Office.

- **EARLY DISCLOSURE OF *JENCKS* MATERIAL**

The court urges the government to disclose Jencks materials well in advance of the trial, and in the event that some of the information is not disclosed pursuant to the Act until the witness testifies, the court allows a reasonable amount of additional time during trial for the defense to prepare before proceeding.

- **JURY INSTRUCTIONS**

The parties must meet and confer prior to trial to discuss jury instructions. By the deadline established in the Scheduling Order, the parties must submit directly to Judge Davis's chambers a single set of proposed, stipulated jury instructions. Counsel are responsible for submitting all instructions related to their specific claims or defenses, and special instructions relating to evidence.

All such instructions are to be submitted in typewritten form (double spaced) and on computer disk compatible with Microsoft Word or WordPerfect version 12.0; each instruction shall contain references to authority (e.g., "Devitt and Blackmar, Section 11.08"), and each instruction shall be on a separate page. In addition, each party must submit separately to Judge Davis's chambers all additional proposed instruction (in the same form) to which any other party objects. The parties must make a concerted, good faith effort to narrow the areas of dispute and to discuss each instruction with a view to reaching agreement as to an acceptable form. Disputes between the government and defense counsel regarding proposed jury instructions are initially settled at a hearing on the record.

The court has its own standard introductory and concluding instructions, and counsel are directed to concentrate on elements of the offense, the defense(s), etc. In criminal cases, the Court will usually instruct the jury using the Sixth Circuit's pattern jury instructions when available. The jury is charged before final argument

- **JURY SELECTION**

The Court uses a "struck jury" system for jury selection. In most cases, the government is allowed 6 peremptory challenges and the defendant is allowed 10 peremptory challenges. The Court will select twelve regular and two alternate jurors. Alternate jurors are not told they are alternates; they are dismissed by random draw at the conclusion of the proofs.

Voir dire will be conducted by the court. Counsel should submit proposed *voir dire* questions in writing at least three days in advance and will be permitted to submit additional questions to be asked by the court, as provided by Fed. R. Crim. P. 24(a).

- **NOTE TAKING AND JUROR INVOLVEMENT**

Jurors will be permitted to take notes during trial. The Court specifically instructs the jury in advance on this issue. Jurors who choose to take notes will be instructed that such notes are not themselves evidence but are merely aids to the juror's memory of the evidence presented at trial. The Court will consider, on a case by case basis, whether or not jurors will be permitted to question witnesses, either directly or through submission of questions to be asked by the Court.

- **MULTI-DEFENDANT OR MEGA TRIALS**

The Court does not have a general procedure for handling multi-defendant criminal "mega trials."

For multi-defendant criminal trials the court encourages attorneys to work out procedure for peremptory challenges among themselves. In such trials, if counsel cannot agree among themselves, the court will allocate peremptory challenges depending on the circumstances of the case.

- **CONTINUANCES**

  Continuances of trial dates or continuances during trial will not be granted because of unavailability of witnesses. Please notify the Court if Court intervention is necessary to secure witness attendance. Otherwise, witnesses will be expected to be available when called.

- **TRIAL BRIEFS ENCOURAGED**

  The Court encourages, but does not require, the submission of a criminal trial brief. If a trial brief is submitted, it should, among other things, inform the court about the party's proposed resolution of anticipated evidence problems.