



U.S. Department of Justice  
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

May 26, 2006

MEMORANDUM FOR HEADS OF DEPARTMENT COMPONENTS  
UNITED STATES ATTORNEYS

FROM: Paul J. McNulty *PJM*  
Deputy Attorney General

SUBJECT: Guidance for Acceptance of Assistance and Gifts from  
Private Parties for Use in Connection with Investigations and Litigation

This Memorandum provides guidance to Department of Justice personnel regarding the solicitation and acceptance of gifts and assistance from private parties for use in connection with criminal and civil investigations, prosecutions, and civil litigation.<sup>1</sup> Traditionally, law enforcement agencies have relied heavily on the support and cooperation of private citizens willing to assist in the investigation of criminal activity. It is widely recognized that assisting public agencies in carrying out their essential functions is a responsibility of citizenship. However, offers of assistance in investigations and litigation have increased in scope, variety, and monetary value. In order to maximize the public's cooperation with the Department in its enforcement duties and to maintain the Department's independence and impartiality, the guidance set forth below addresses what constitutes appropriate assistance and the propriety of accepting donated resources from private parties in the context of criminal and civil investigations, prosecutions, and civil litigation. The guidance also addresses what constitutes permissible gifts, and the Department's procedures to accept such gifts.

An offer of donated resources generally raises three separate but related issues. The first issue is whether the donation of resources is permitted by laws, regulations and Department directives limiting the acceptance of gifts. This issue most often will turn on whether the offered resources constitute a gift or the type of assistance traditionally provided by victims of crime, their related parties, and third parties. The second issue is whether the assistance is permitted by applicable rules of professional conduct. This issue does not necessarily depend on whether the offered resources are considered to be gifts or assistance. The third issue is whether the

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<sup>1</sup>This Memorandum does not address the solicitation or acceptance of gifts from governmental sources, which include federal, state, local, tribal, and foreign governments; and the prohibition on the solicitation of gifts, and the limited allowance for acceptance of gifts, by Departmental employees for personal use. See 5 C.F.R. 2635.201-205.

assistance will have an adverse impact on the prosecution, even if permissible under gift restrictions and the rules of professional conduct. All three issues are addressed below.

*I. Gift Issues*

*A. Applicable Law*

The Attorney General has authority "to accept, hold, administer, and use gifts, devises, and bequests of any property or services for the purpose of aiding or facilitating the work of the Department of Justice." 28 U.S.C. § 524(d)(1). Gifts of money (including money derived from property) must be deposited in the Treasury for the benefit of the Department and may be distributed by order of the Attorney General. 28 U.S.C. § 524(d)(2).

In 1997, the Attorney General issued Department of Justice Order 2400.2, which "set[s] forth the Department's policies and procedures regarding the solicitation and acceptance of gifts, devises and bequests of property of all kinds." The Order states that no Departmental employee may solicit a gift unless he or she has obtained the prior approval of the Attorney General or the Deputy Attorney General. Order 2400.2, 3.a.(1). Solicitations are rare and approved in only extraordinary circumstances.

In addition, the Assistant Attorney General for Administration (AAG/A) has the exclusive authority to accept "gifts made to the Department" or any component. *Id.*, 3.b.(1). Before accepting any gift, the AAG/A must consider: (1) whether the gift is appropriate for use; (2) what conditions, if any, the donor has placed on acceptance or use are "acceptable"; (3) whether any employee solicited the gift, and if so, whether approval was obtained; and (4) whether acceptance is "appropriate and advisable," in light of conflict of interest and ethics guidelines, including whether acceptance would "create the appearance of impropriety." *Id.*, 3.b.(2).

In conjunction with this memorandum, the AAG/A is delegating additional authority to component heads to determine whether to accept certain case-specific gifts from private parties in criminal and civil investigations, prosecutions, and civil litigation that have a value of \$50,000 or less. This delegation is consistent with both prudent oversight and efficient administration. The component head may accept the first offer from a source up to \$50,000. A second or subsequent offer in the same fiscal year from the same source must be submitted to the Assistant AAG/A for approval when the combined value with the first gift exceeds \$50,000. Gifts that are not case-specific, gifts of cash, gifts valued above \$50,000, and extraordinary case-specific gifts will continue to require approval by the AAG/A.

*B. Distinction Between "Assistance" and "Gifts"*

Historically, the Department has distinguished a gift from traditional forms of assistance provided by citizens during a criminal or civil investigation, prosecution, or civil litigation. This distinction remains in force: matters that constitute "assistance" are *not* gifts and, accordingly, are *not* subject to the procedures applicable to gifts.<sup>2</sup>

Law enforcement agencies routinely receive wide ranging aid from private parties in the investigation and prosecution of federal crimes. Such aid has played an important and accepted role in the criminal process. *See, e.g., Commonwealth v. Ellis*, 708 N.E.2d 644, 651 (Mass. 1999) ("It is in the public interest that victims and others expend their time, efforts, and resources to aid public prosecutors."); *see also Wilson v. Layne*, 526 U.S. 603, 611-12 (1999) (noting that the use of third parties during the execution of a warrant to identify stolen property "has long been approved by this Court and our common-law tradition"). Victims and other private parties are often in a unique position to provide information and other aid in an investigation and litigation. Such private cooperation not only is desirable but often is critical to law enforcement and the government's mission. In this vein, the vast majority of *case-specific* aid from private parties, particularly from victims and related parties, constitutes assistance, and is not a gift.

A victim provides assistance when it offers services, equipment, or logistical support that enhances the efficiency of the government's efforts in relation to a case. Apart from cost savings, an offer of assistance enhances the Department's efficiency when the offer gives an added benefit that is unique because of the victim or related party's involvement. The assistance generally will be distinguishable in some way from what the Department may obtain through commercial obligations. For example, use of a victim company's office space to conduct interviews of witnesses constitutes assistance since that location, as compared to a hotel or other location, provides accessibility to staff that would not be possible in another location. On the other hand, a victim company's offer to Departmental employees of its fleet of cars for local transportation, even if made in the course of a case, provides only a convenience that is no different than what the Department would obtain on the commercial rental market, and should not be accepted.

It may be difficult to distinguish an offer that is case related and enhances efficiency, and accordingly is assistance, from an offer of services or equipment that provides a convenience that

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<sup>2</sup> Consistent with this traditional understanding, receipt of assistance under this Memorandum is not an unlawful augmentation of appropriations. Additionally, because the Department has express statutory authority to accept gifts, gifts accepted under the procedures of this guidance will not violate the anti-augmentation principles of appropriations law. *See generally* 2 Office of the General Counsel, General Accounting Office, Principles of Federal Appropriations Law ch. 6, pts. C & E (2d ed. 1992); *see also* Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General, 4B Op. O.L.C. 684, 687 (1980).

supplants the Department's operational costs, and is a gift. Accordingly, except as provided in this Guidance, employees must consult with an attorney assigned to the matter (or the component's counsel) and the employee or attorney's Deputy Designated Agency Ethics Official (DDAEO) to assess and confirm whether an offer constitutes assistance or a gift. When the offer constitutes a gift, employees must follow the procedures set forth in Section C.

*1. Assistance from Victims and Related Parties*

Aid provided by a victim will generally be classified as assistance, rather than a gift. Examples of matters that constitute assistance when provided by a victim include:

- providing factual or expert information in an investigation or fact or expert testimony at trial;
- turning over the fruits of an internal investigation (*e.g.*, collecting and analyzing financial or transactional data);
- consulting with employees during the investigation, including sharing one's expertise or technical knowledge (*e.g.*, reviewing seized evidence to distinguish legitimate copyrighted works from forgeries, identifying proprietary information in a theft of trade secrets prosecution, or instructing professional staff and contractors to respond to queries from Departmental employees regarding technical subjects);
- permitting agents to use equipment, services or logistical support in circumstances where such assistance provides a unique benefit not available on the commercial market, such as the use of office space for employee interviews, surveillance or document review; and
- providing certain goods or services for use in the investigation or a related undercover operation (*e.g.*, a bank providing credit card accounts in a credit card fraud investigation involving that bank).

Aid provided by a party that is related to the victim ("related party") also generally will constitute assistance. Related parties for purposes of this Memorandum are those parties that have a close association with the victim and a shared interest with the victim in providing the particular assistance. Related parties can include a victim's immediate family or an individual who has a personal relationship with the victim, a fellow employee or board member, an industry association, or agents or contractors hired by the victim. For example, if a corporation hired a computer security firm to monitor its computer network, the security firm would be a related

party in a case that involved the corporation's computer network.

In certain circumstances, an entity may be an "indirect victim" of a crime and also be in a unique position to offer assistance. For example, an owner of an apartment building would be an indirect victim of a tenant's use of his rental apartment for the sale and delivery of controlled substances. In addition, a package delivery company that is used by alleged suspects to transport and deliver illegal goods is also an indirect victim. Aid offered by an indirect victim generally will be considered assistance. For example, a landlord provides assistance with free use of an apartment for surveillance. In addition, a package delivery company provides assistance through the use of its truck and uniform for an undercover agent to make a controlled delivery. However, depending on the value of the aid offered, and the potential appearance of impropriety that correlates to the value of the offer, an indirect victim's offer may cross the line from being permissible assistance to a gift that requires specific consideration before acceptance. For example, a landlord's offer of free use of an apartment for one year that has a market value of \$25,000 in rent constitutes a gift.

## 2. *Private Investigators*

Corporate victims and trade associations often retain private investigators to gather evidence to be used in a civil lawsuit or for referral to law enforcement authorities. Private investigators are in the class of "related parties" that may provide assistance to the Department. The owners of intellectual property often outsource security and investigative responsibilities to other entities on an ongoing basis. In these cases especially, private investigators regularly turn up evidence of criminality and share it with law enforcement. Moreover, their investigative responsibilities do not end with the referral to authorities, as their clients expect them to continue to uncover evidence in related or separate matters, especially where the infringement or theft is committed by organized groups and individuals.

Several principles should guide the acceptance of assistance from private investigators. First, prosecutors, agents, and other Departmental employees may not direct or advise an entity or individual in its private investigation before a referral is made to law enforcement authorities.<sup>3</sup> Second, prosecutors, agents, and employees may not delegate investigative responsibilities to private investigators after the Department has initiated an investigation. Employees may not delegate their government responsibilities and functions to the private sector. Third, if the private investigator continues (post-referral) to investigate the case or related matters and turns up additional evidence or information, employees may accept the continued assistance, but

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<sup>3</sup> Prosecutors and agents should understand that apart from issues regarding the acceptance of gifts versus assistance, activity by a private investigator may be imputed to the government for Fourth Amendment, entrapment or other purposes depending on the extent to which officials exercise control over those activities.

should be careful to avoid the appearance of implicit approval or direction. In fact, attorneys and other employees should evaluate whether the parallel private investigation would interfere with the criminal matter and, if so, whether the victim and private investigator should be asked to immediately cease any further investigation after the referral is made. Providing information to an investigator may implicate professional responsibility disclosure issues, as set forth more fully in Section II of this Memorandum.

Unlike situations where a victim entity or its hired investigator investigates independently and without direction from the Department, there may be instances when a private investigator is in a unique position to assist the Department. If the investigator's assistance is within the scope of the work for which he was originally retained by the victim, the government may accept his assistance while he remains employed by the victim, and without payment from the Department. For example, if a private investigator has developed expertise in identifying the victim's property, or genuine products, he may assist in examining materials to determine whether they have been stolen from the victim or are counterfeit. If a private investigator made controlled buys of counterfeit products from a suspect prior to referring the case to a federal agency, and the Department believes a federally-supervised controlled transaction is warranted, the private investigator may continue to assist the Department at the victim's expense if his involvement is needed to conduct the transaction and it is within the scope of the work for which he was originally retained.

### 3. Cash

A direct contribution of money to the government to help fund the costs of law enforcement activities or civil litigation, either generally or in a particular case or cases, will almost always be a gift, not assistance. The private funding of federal law enforcement activities traditionally has not been considered assistance, and such direct funding raises serious ethical and other concerns, and would *not* be accepted by the Department, with one exception. *See, e.g., People v. Eubanks*, 927 P.2d 310 (Cal. 1996) (victim paying cost of experts working for the district attorney's office created an actual conflict of interest); *see also Commonwealth v. Ellis*, 708 N.E.2d 644 (Mass. 1999) (funding of prosecution costs by insurance association permitted because authorized by statute). To the extent cash supplants mission-related functions, the Department may not augment its resources in this manner. *See note 2, infra.*

There is one exception to the principle that a direct contribution of money is an impermissible gift. When the government serves as a conduit for funds from the victim (or a related party) that are used for the purchase of the victim's stolen property, payment of ransom, or a similar demand, the government's receipt of those funds does not constitute a gift. Accordingly, when funds are provided to a Departmental employee by a victim or a related party to purchase the victim's stolen property or pirated goods, the government is serving as a conduit

for the funds and the funds are considered assistance. In these circumstances, the goods must be returned to the victim after completion of the government's case. Similarly, the government serves as a conduit when it uses funds from a victim or a related party to pay ransom or extortion on behalf of the victim. The Department has an established practice of accepting funds in these circumstances, and such funds have not traditionally been considered a gift.<sup>4</sup>

4. *Storage Costs in Counterfeit or Infringing Products Cases*

A company victimized by the trafficking of counterfeit or infringing products has a significant independent interest in keeping the bogus goods out of the stream of commerce. In cases where federal law enforcement has seized offending products, it is likely that the victim would seek to impound and destroy the offending articles even if prosecution were declined. See 15 U.S.C. §§ 1116(d)(1)(A) and 1118 (allowing for court-authorized seizure and destruction of trademark-infringing articles at the rights holder's request); 17 U.S.C. § 503 (court may authorize the impounding and destruction of copyright-infringing articles and instrumentalities). When a victim has sought a court's approval to seize and retain counterfeit or infringing products and chooses to do so, the Department may accept the offer of "assistance" to store offending articles that also may be relevant to the Department's investigation.

There also may be instances where the victim does not choose to seek court approval of authority to retain and destroy illegal goods, yet offers the Department free storage at its facilities, or elsewhere, during the pendency of the Department's case. It generally is permissible to accept such an offer. However, depending on the amount of time and space used for storage, the company's offer to pay for storage may cross the line from being permissible assistance to an impermissible gift because the market value of the storage space is so exorbitant that continuing acceptance of free storage could raise a question of an appearance of impropriety. An employee should consult with the assigned attorney and the employee or attorney's DDAEO to assess whether continued acceptance of free storage is consistent with this Guidance.

5. *Resources Donated For Ongoing Use by Law Enforcement*

Resources provided by a victim or related party will generally be considered to be a gift if its use is *not* restricted to the investigation(s), prosecution(s), or litigation in which the provider is a victim or related party. For example, a car rental company that gives the government free use

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<sup>4</sup> The requirement that the government must serve only as a conduit in order for the aid to constitute assistance applies exclusively to money; it does not apply when the case-specific aid consists of services or property other than money. Nevertheless, when a victim or a related party provides property or services to be sold as part of, for example, an undercover operation, it would be inappropriate for the government to retain the funds generated by that sale. Rather, those funds must be returned to the party that provided the property or services once the case is completed.

of one of its car fleet for an undercover operation to investigate the hijacking of its cars provides assistance. In contrast, the company's offer to the government of free use of its cars for any undercover operation, regardless of the subject matter of the investigation, constitutes a gift. Similarly, a computer company that provides computers for the government to use in investigating and prosecuting the theft of trade secrets from that company gives assistance. But if the company permits the government to use those computers for additional purposes not related to that case, either for continued use after its conclusion or for an unrelated matter, the computers become a gift.

As a general rule, "assistance" is provided by a victim or related party for use in an investigation or litigation involving that person or entity. However, there may be limited circumstances where a third party provides aid that is unique and not available on the open market in much the same way as a victim or related party's assistance. For example, the DEA and FBI have longstanding, ongoing relationships with private package delivery companies that are akin to assistance. During an investigation, the FBI and DEA may do controlled deliveries of packages that contain illegal goods.<sup>5</sup> Given safety, evidentiary, and other concerns, an agent will utilize the company's truck and uniform to deliver a package rather than have the package delivery company and its employee perform this task. Of course, the delivery company uniforms and vehicles are not available on the open market. Yet their appearance is what is expected by the recipient, and it, therefore, provides the Department unique access to and identification of the intended recipient. The agent (in the package delivery uniform) may need to arrest the recipient of the package at the time of delivery. Given these unique and multiple factors, this type of aid is considered assistance.<sup>6</sup>

#### 6. *Assistance from Private Third Parties*

The distinction between "assistance" and "gift" is also critical in cases involving resources donated by a private third party – which for purposes of this Memorandum is any person or entity that is neither a victim nor a related party. If the assistance provided by the third party is uniquely necessary to provide relevant information to the investigators, grand jury, judge,

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<sup>5</sup> Note in Section I.B.1 that a package delivery company may be an indirect victim, such as when co-conspirators utilize the company's services without the knowing involvement of the delivery company, and the component arranges for a controlled delivery. In another circumstance, the component may have an informant arrange for a controlled delivery by a private delivery service to a suspect. This arrangement for use of a company's truck and uniform is longstanding with certain delivery companies, and permission for solicitation in this scenario is authorized by the Deputy Attorney General consistent with this guidance.

<sup>6</sup> It is important to emphasize that the circumstances of when a third party may provide assistance rather than a gift are few, and an employee should not reach this conclusion in other situations without first consulting a DDAEO.

or jury, then it should generally be treated as assistance. If not, then it should generally be treated as a gift.

In many cases this determination will be simple. The most fundamental and traditional types of aid that citizens have always provided in criminal investigations and prosecutions – such as answering agents' and prosecutors' questions, identifying suspects, and providing factual information and testimony – constitute assistance. This includes not only factual information gathered from individual citizens but also information that corporations and others provide from their records and databases. For example, an airline might provide information from passenger manifests, or a credit history service might provide credit information. Even though these activities may involve a cost to the third party in terms of time, effort, and expense and may provide a material benefit to the government, no one would suggest that such cooperation constitutes a gift; it is simply one of the responsibilities of citizenship.<sup>7</sup>

In dealing with assistance provided by third parties, it may be helpful to consider whether the assistance could be obtained by compulsory process. For example, if the information could be obtained by grand jury subpoena without cost, it should not be considered to be a gift merely because the cooperating third party elects to volunteer the required information rather than be compelled by legal process to produce it.

Some not-for-profit entities exist in part to provide assistance to law enforcement and receive funds for this purpose from, or have partnerships with, federal, state, or local government. Examples include the National White Collar Crime Center, the National Center for Missing and Exploited Children (NCMEC), and non-government organizations (NGOs) that assist victims of human trafficking. At times, the services provided by these entities are akin to that of a witness; they may report allegations of criminal activity or provide other information that may assist an investigation. For example, a recent victim of trafficking who is receiving housing or counseling from an NGO may share additional information regarding her prior situation. Based on its position in the community, the NGO may be able to identify added or particular significance regarding the victim's statements, and share that information with the Department. Alternatively, the degree of aid may go beyond reporting a tip of criminal activity, yet be a form of assistance rather than a gift. For example, NCMEC, which is funded in part by the Department, provides assistance when it uses its resources to help the Department disseminate information regarding a particular matter to the community at large, or to the law

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<sup>7</sup> The Department has not traditionally considered the provision or donation of product samples or product information to be used in the forensic analysis of evidence (such as the product samples or formulas in the FBI crime lab's tennis shoe print library, tire tread library, or paint chip library), to be gifts. Further, because this assistance generally involves products or information for which there are a small number of suppliers and does not present any obvious economic benefit to the supplier, it does not tend to raise the same ethical or appearance concerns as other types of aid from private third parties.

enforcement community. As in the other contexts discussed here, attorneys and employees should remember that a source providing assistance may also offer services that, because of their nature, have to be evaluated as a gift.

The Department also may receive offers of free or reduced-fee consultation and testimony by experts or consultants. Individuals may be interested in sharing their expertise without a fee for a variety of reasons. Some experts or consultants may see the opportunity to testify on behalf of the United States, and be qualified as an expert, as a substantial benefit to their curriculum vitae or resume. In addition, an expert may charge a rate for his services to the general public that the Department cannot afford, and therefore, the expert may offer services for a reduced fee.

The Department may accept free expert or consultative services under its gift acceptance authority, 28 U.S.C. § 524(d), or 5 U.S.C. § 3109. Both statutes provide separate mechanisms to accept these services. Neither statute, however, obviates the necessity for Departmental attorneys and staff to assess whether it is *appropriate* to accept the services for free. The same issues that govern the propriety of acceptance of items apply to the offer of consultative services and testimony. An attorney in consultation with an agent or other employee and the DDAEO must decide whether free expert services are appropriate to accept, and whether the government's impartiality may or will be questioned in these circumstances.

*C. Departmental Procedures For The Solicitation And Acceptance Of Gifts And Assistance*

*1. Consultative Process For Acceptance Of Assistance*

A law enforcement officer or Departmental employee who receives any offer of assistance by a victim, related party, or witness beyond traditional assistance or access to company records should consult with the AUSA or Main Justice attorney who is assigned to the case or, if none, agency counsel, and the DDAEO who provides advice either to the law enforcement officer (or employee's) component or the attorney's office and component. The agent or employee in consultation with the appropriate counsel and DDAEO may determine that the offer is one of assistance (rather than a gift), and acceptance is appropriate. Disagreement among employees regarding these determinations should be submitted to the relevant component head(s) or designee and the Departmental Ethics Office, Justice Management Division (DEO) for resolution.

*2. Solicitation Of Gifts*

No Department employee may solicit gifts or encourage the solicitation of gifts to the Department unless the solicitation has been approved in advance by the Attorney General or the

Deputy Attorney General. Solicitations will rarely be appropriate and accordingly, rarely approved. There may, however, be unusual circumstances in which it would be appropriate to solicit a gift to the Department in connection with a particular investigation, prosecution, or litigation. In that instance, the appropriate office first should consult with the DEO and then present the matter to the Office of the Deputy Attorney General for a determination.

### 3. *Acceptance Of Gifts*

Any gift of goods or services accepted from a private party in connection with a criminal or civil investigation, prosecution, or litigation must be approved in accordance with procedures set forth below. Except in extraordinary circumstances, that approval must be obtained before the gift is accepted. If approval cannot be obtained before the gift is accepted, approval must be obtained no later than seven days after acceptance.

*Certain gifts may be accepted only by the AAG/A.* Only the AAG/A may approve acceptance of a gift of goods or services that is valued in excess of \$50,000. If a component or office is uncertain whether a gift is valued in excess of \$50,000, it may consult with the DEO regarding the reasonable value of the gift. If an office cannot determine adequately whether a gift exceeds \$50,000 in value, approval must be obtained from the AAG/A.

The AAG/A also must approve gifts of cash and gifts that are not case-specific, including gifts that will be used by the Department for purposes *in addition to* or after the conclusion of a particular investigation, prosecution, or litigation.

*Concurrent with this memorandum, the AAG/A has delegated his authority to accept gifts from private parties for use by the Department in connection with a criminal or civil investigation, prosecution, or litigation.* Component heads are delegated authority to approve for their components the acceptance of a gift from a private party to be used in connection with a criminal or civil investigation, prosecution, or litigation that is (1) case-specific and (2) has a value of \$50,000 or less.<sup>8</sup> Component heads may further delegate this authority to one other

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<sup>8</sup> See DOJ Order 1200.1, ch. 11 (defining component head). Accordingly, the Director of the Executive Office For United States Attorneys and his designee will have approval authority with regard to gifts offered to a United States Attorney's Office. The Assistant Attorney General for the Criminal Division and her designee will have that authority for matters that are handled by the sections within the Criminal Division. The Administrator of the Drug Enforcement Administration (DEA) will have that authority for all DEA agents.

individual at the Deputy Assistant Attorney General (or equivalent) level within his or her component.<sup>9</sup>

*Approval of acceptance must be coordinated among the relevant offices.* If a law enforcement agent or other non-attorney employee receives an offer of a gift, that employee must notify and consult with an attorney, if any, who is assigned to the matter. The attorney, in conjunction with his or her component head, will determine whether to accept the offer. If no attorney has been assigned, the investigating component may decide whether to accept the offer of the gift. If an attorney from more than one office, Board, or Division is assigned a matter (e.g., an AUSA and attorney in the Criminal Division), both relevant component heads (or designees) must concur in the recommendation to accept a gift before it may be accepted. Disagreement among component heads may be resolved, upon request, by the AAG/A.

Component heads must ensure that a Gift Donation Form and a Gift Acceptance Form are completed for each gift acceptance approved by their respective component. The completed forms must be forwarded to Property Management Services, Facilities and Administration Services Staff, Justice Management Division.

Any questions regarding this guidance on gift issues should be directed to the Departmental Ethics Office, Justice Management Division.

## *II. Professional Responsibility Issues*

Several specific professional responsibility rules are implicated when the government accepts either assistance or gifts from outside parties. First, an attorney represents the United States and has a duty of confidentiality to that client. Rule 1.6(a)<sup>10</sup> requires a lawyer to protect confidential client information and prohibits disclosure of such information unless impliedly authorized, or the client consents, or some other enumerated exception applies. The prohibition applies to privileged information, "matters communicated in confidence by the client [and] also to all information relating to the representation, whatever its source." Rule 1.6, Comment [3]. In cases where an investigator is hired or paid for by a victim to assist on a case and working with

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<sup>9</sup> This delegation is in addition to and in no way limits the AAG/A's prior delegation of authority to component heads to accept gifts of property valued at no more than \$150 for use or display in their respective components. See Memorandum for Heads of Departmental Components from Stephen R. Colgate, Assistant Attorney General for Administration, Re: Gift Acceptance Delegation, July 9, 1999.

<sup>10</sup> For ease of discussion of professional conduct issues, this memorandum refers to the ABA Model Rules of Professional Conduct, but note that a different set of professional conduct rules may apply, depending on the circumstances of each case and the rules in the attorney's state of licensure.

government agents, the privately paid investigator might reasonably expect to obtain information from the government in return for information he or she has disclosed to the government. But the rules of professional conduct impose confidentiality obligations on the attorney. A prosecutor must limit the disclosures made about the case by him or herself and by the agents. *See* Rule 5.3(b) and (c) (lawyer must take reasonable steps to ensure that the conduct of non-lawyer assistants is compatible with the professional obligations of the lawyer and will be held responsible for the noncompliance of non-lawyer assistants in some circumstances). Some disclosures may be impliedly authorized while others would require the consent of the client; in most instances the United States Attorney or the Assistant Attorney General (or his or her designee) would provide the necessary consent for the United States. Of course, there are other limits on sharing of confidential information under Fed. R. Crim. P. 6(e).

When an attorney plans to disclose confidential information to the persons providing assistance or gifts, the attorney should seek written agreement from the person that he or she will not use or disclose the information except in relation to the case without the express written consent of the appropriate official within the Department of Justice. Also, the attorney should consider whether the sharing of privileged information with a volunteer waives the privilege.

The rules may require that assistance by third parties be disclosed to the court and/or to the defense, either to ensure that all representations to the court are accurate and complete, Rule 3.3, Candor Toward the Tribunal, or where the assistance or gifts provided by a private party may be seen as affecting the credibility of an important government witness, Rule 3.8(d), Special Responsibilities of a Prosecutor.

Moreover, there may be conflict of interest issues to resolve under Rule 1.7(a)(2). The rule recognizes that a lawyer may have a conflict of interest if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a third person or by a personal interest of the lawyer." In these circumstances, a lawyer may nevertheless represent the client if the client gives informed written consent. The United States Attorney or the Assistant Attorney General (or his or her designee) would have the authority to provide consent to the attorney's work on a case notwithstanding the conflict. One could imagine a scenario where a continuing relationship with a victim/witness who is providing assistance in one case may raise concerns about the lawyer's representation of the United States in that or another case, particularly one involving the victim/witness.

Other professional conduct issues may arise because of assistance and gifts provided to the government. Each issue will require individual analysis, and questions may be directed to the Professional Responsibility Officer (PRO) in each office or to the Professional Responsibility Advisory Office (PRAO).

*III. Strategic and Case-Related Issues*

Even if the resources offered by the victim or related parties are acceptable under both gift laws and policies and the rules of professional responsibility, an attorney must still consider whether accepting the assistance will adversely affect the case. Just because it may be permissible to accept an offer of either assistance or a gift does not make it advisable to do so in all instances. Depending on the scope, nature, or value of the assistance or gift, the public may question the Department's impartiality. Assistance that is extensive, unusual, or is, in fact or perception, of significant monetary value is more likely to raise questions about the Department's impartiality and independence than assistance or a gift that is more discreet, of modest value, and routine.<sup>11</sup>

The government must exercise independent and impartial judgment in the conduct of all criminal and civil matters. See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 803 (1987) ("An Assistant United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all") (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). When working with victims and other private parties, a Departmental employee must be aware that an entangled or intimate relationship with a private party can negatively affect a matter and the standing or respect accorded the Department. For example, a highly-paid, aggressive private investigator may be portrayed as a bounty hunter willing to entrap a defendant. The government may be portrayed as a pawn of wealthy corporate interests. The defense may claim that the victim's investigators were agents of the government and thereby seek to impute their conduct to the government for 4<sup>th</sup> Amendment or entrapment purposes. The defense may seek to dismiss the case based on a claim of prosecutorial misconduct or conflict of interest. These questions or doubts can affect the Department's ability to successfully prosecute or litigate a matter.

An employee should consider, *inter alia*, whether the offeror has an independent reason to offer the gift or assistance. As discussed above, victims may have available civil remedies. Especially in parallel civil and criminal investigations, the fact that the victim would prefer to pay for expenses deemed important to the victim in pursuit of its civil claim tends to reduce the likelihood that a conflict of interest will be found. See *Hambarian v. Superior Court*, 44 P.3d 102, 109 (Cal. 2002) (no conflict presented by prosecution's use of a victim-retained consultant where victim hired the consultant to support an anticipated civil suit).

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<sup>11</sup> Particularly when assistance from a third party is unusual, extensive, or otherwise may raise questions of independence, it is advisable to prepare a Memorandum of Understanding (MOU) with the offeror to delineate specifically the terms of the assistance. The MOU should state that the Department, at all times, will retain complete discretion and authority over all governmental decisions associated with the investigation and prosecution or litigation.

An employee also should consider the donor. If the donor is an industry leader, the employee should avoid actions that appear to create a competitive advantage for that entity. If the donor is a trade association or combination of affected entities that is involved in ongoing monitoring or investigation to protect the industry as a whole, the offer may be considered more impartial. *See Commonwealth v. Ellis*, 708 N.E.2d 644, 649 (Mass. 1999) (likelihood of influence on a prosecutor's charging decisions is reduced when the resources are devoted to investigating industry-related offenses rather than for the benefit of one particular victim).

The acceptance of donated resources is most problematic for courts when the resources are provided directly to the prosecutor or prosecutorial entity.<sup>12</sup> *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 803 (1987) (private counsel representing the beneficiary of a court order cannot be appointed to prosecute the defendant for violating the order); *People v. Eubanks*, 927 P.2d 310, 322 (Cal. 1997) (district attorney disqualified, and state attorney general substituted, where victim paid, among other expenses, an invoice submitted to the prosecutor for expert services). The less direct the benefit to the prosecution, the less likely the defendant will be able to obtain relief. *See Marshall v. Jerrico*, 446 U.S. 238 (1980) (no realistic possibility that prospect of institutional benefit would unfairly influence decision to impose civil penalties by a Department of Labor administrator functioning as a prosecutor); *Calderon v. Superior Court of the States of California*, 2001 WL 940904 (N.D. Cal. 2001) (victim's contribution of resources to police investigation unlikely to influence prosecutor's decisions).

While a court may distinguish when aid is offered directly to a prosecutor or prosecutorial entity, as compared to an investigator or law enforcement agent, this distinction is not determinative for purposes of assessing whether the offer should be accepted in the first instance. Agents or other non-attorneys should not consider these case citations as reason or authority to accept a gift without consultation with appropriate counsel in order to insulate their decision from challenge in court. All employees covered by this Guidance are members of the Department, and actions by one employee are imputed to the Department's efforts as a whole. The consultative process among investigators, counsel, ethics officers, and professional responsibility officers is a critical element of this guidance and in furtherance of the Department's mission.

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<sup>12</sup> Federal regulations governing Department of Justice employees prohibit participation in a criminal investigation or prosecution if the prosecutor has a personal or political relationship with any person or organization with a substantial interest that will be directly affected by the outcome of the case. 28 C.F.R. § 45.2; *see also* 28 C.F.R. § 45.1 (subjecting Department employees to the executive branch-wide Standards of Ethical Conduct set forth in 5 C.F.R. § 2635). The regulation defines a "personal relationship" to be "a close and substantial connection of the type normally viewed as likely to induce partiality." *Id.* Although a prosecutor working on a case in which the victim has offered assistance to the government clearly has no identifiable *personal interest*, that would not preclude the existence of a *personal relationship*, a broader concept.

In addition, the Department's acceptance of a single, extraordinary gift from a victim or related party may impact the public, or more specifically, a jury's, perception of the Department's motivations and activities. If it appears that the Department's actions are influenced heavily by a private party, the Department's litigating posture and the public's respect will be weakened. A jury may vote against the Department's position because it perceives the Department is acting on behalf of a private party rather than as a representative of the United States' interests. In extreme cases, a court may conclude that the Department's acceptance of a gift created a conflict of interest and impaired the prosecutor's independence. *Cf. Eubanks*, 927 P.2d at 322. Of course, the standard of appropriate behavior is not whether a matter will be dismissed, but whether the appearance of impropriety or the lack of independence outweighs the benefit of the proffered gift or assistance. It is imperative that the Department, by its actions, maintain the public's confidence in and respect for the criminal and civil process, and the Department's reputation for fairness generally.

As discussed, the employee needs to balance the Department's need for, or importance of, the aid against any negative perception by a jury or the public that can influence adversely a particular case. In sum, employees need to evaluate whether the assistance or gift is likely to call into question their independence and impartiality, or create an appearance of impropriety. This analysis does not lend itself to clear or measured parameters. The decision whether to accept assistance or a gift often can involve difficult and nuanced issues. Given the potential ramifications, these decisions should be made through the consultative process among law enforcement personnel, other investigators, and attorneys before the matter is resolved. The trial attorney is in the best position to assess these concerns, and he must be consulted before any employee may accept an offer of resources. The assigned attorney also should consult with an ethics officer to determine whether the offer constitutes assistance or a gift that may be accepted under the gift procedures, and the offer is in conformance with the rules of professional responsibility.

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It is frequently both appropriate and desirable for law enforcement agencies to accept assistance from private citizens. At the same time, all Departmental employees need to recognize that accepting assistance can raise ethical and prosecutorial problems, and they need to evaluate those potential problems when deciding how best to proceed.<sup>13</sup> When working with

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<sup>13</sup> See generally *Commonwealth v. Ellis*, 708 N.E.2d 644, 650 (Mass. 1999):

The cooperation of victims is often indispensable in presenting a case. It is in the public interest that victims and others expend their time, efforts, and resources to aid public prosecutors. Many so-called white collar crimes are complicated transactions. Knowledgeable people are needed to detect and explain them. It would not serve the public interest to have a rule that inhibited close

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victims and other third parties, the government must be conscious of the risk that a relationship with any private party, if too close, could negatively affect the case and the standing or respect accorded the Department.

Each component (including each United States Attorney's Office) has qualified specialists to provide guidance, including a DDAEO who can provide advice on gift and assistance issues. Department employees also may seek guidance from the Departmental Ethics Office, Justice Management Division. Questions regarding professional conduct rules may be directed to the Professional Responsibility Officer in each office or to the Professional Responsibility Advisory Office.

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cooperation between prosecutors and victims. The important point is that, in the process, the prosecutor must retain total control over the course of the investigation and all discretionary decisions. A victim's direct funding of substantial expenses of a prosecutor's office would raise a question of control because, in such a case, the prosecutor may lose or appear to lose his impartiality because he may be beholden to the victim for assisting him.

## ADDENDUM

Set forth below are examples of what constitute traditional assistance or a gift. These examples highlight certain factors to consider and addresses the consultative process that should be followed. Please note that *not every factor* that should be considered is identified for each scenario. The examples are provided in order to highlight certain elements, but do not reflect the entire analysis.

1. **Scenario:** The Department has received information from a private investigator who has an ongoing contract with a motion picture association to investigate pirated and counterfeit goods, including pirated movie DVDs. The investigator provides information regarding websites and points of contact for persons/entities that may have a connection to the counterfeit materials.

**Analysis:** This information constitutes *traditional assistance*; no particular consultation is required before a Departmental employee may accept this information.

**Continuing Scenario:** The Department has initiated its own investigation based on the initial information provided by the association's private investigator. After the Department's investigation has begun, and without any further communications or direction from an FBI agent or the Criminal Division attorney assigned to the matter, the private investigator uncovers another source that appears to be involved with the counterfeit materials. The investigator reports this new information to the FBI agent.

**Analysis:** This information also constitutes *traditional assistance* that the FBI agent and attorney may accept. The attorney and agent may need to consult with each other to determine whether the investigator's efforts may interfere with the Department's activities, and whether the investigator should be advised to alter his activities in some manner in order to avoid any interference. Neither the agent nor attorney should advise the investigator what types of evidence are desired for the Department's investigation.

2. **Scenario:** A nationwide retail giant has its own security force and has spent considerable resources to set up its own forensics laboratory to fight shoplifting and other crimes against the company. The local FBI office is investigating a matter that has no connection to the retail company. The FBI office, however, believes that the equipment at the retail company's laboratory is superior to the Department's capabilities for enhancing photographs for identification. The FBI office solicits the retail giant for help, and the business readily agrees to provide forensic assistance without charge. The enhanced photograph allows the FBI to continue its investigation with greater efficiency.

**Analysis:** Initially, the FBI must obtain *prior approval* from the Deputy Attorney General or the Attorney General before any representative may contact the retail company to *seek* its services. The free forensic services constitute a *gift*. Since the value of these services is less than \$50,000, the agent and attorney must seek the component head's approval in order to accept these services for free. In considering this offer, the component head must

consider why the Department is seeking outside forensics aid. The Department may need a third party's gift because the Department does not own or have at its disposal the same equipment. In addition, the time-sensitive nature of the case might require immediate action, and the Department might not gain access to such equipment with the same speed as that offered as a gift. In this situation, with advance approval of the solicitation the Department may accept the gift.

3. Scenario: Consider the same facts set forth in Scenario #2, but assume that the retail giant informed the local FBI office that it had a forensics laboratory with equipment capable of performing a variety of functions, and that it was offering general access to its equipment and staff for investigative purposes any time that the Department determined the company's resources would benefit the Department.

Analysis: A retail giant's standing offer to allow the Department to use its forensic facilities, whether for case-specific matters or general investigative purposes, should be considered carefully. (Initially, this company's offer does not trigger the same considerations set forth in No. 2, where the Department *solicited* the gift.). As noted above, there may be instances when private industry has forensic resources that are not available to the Department, and the immediacy of the situation may warrant the Department's use of outside resources. However, the decision to *use* a third party's services is distinct from the decision to accept such services *free of cost*. In deciding whether to accept the services for free, counsel should consider whether there are any pending matters in the Department in which the retail giant is a party or could be affected directly by a particular matter.

One-time gifts of free assistance may be permissible. However, it is particularly important that the Department carefully scrutinize a third party's offer to use its services for free on *multiple occasions* or on a *periodic* basis for separate cases or matters (e.g., several times a year). The Department should be circumspect in accepting more than one gift from the same source within one fiscal year.

Again, while the donor may have resources unavailable to the Department, the Department should consider paying for the services provided. Even if the full cost is difficult to assess, the Department and a third party can identify a reasonable value for the unique services provided.

One reason for the Department's disinclination to accept multiple offers from one source is that the costs of pursuing the Department's mission must be fully identified and presented as part of its budget for Congress to accept or reject. Accepting free services that are critical to the Department's performance of its mission on a frequent or regular basis masks the actual costs of its annual operations. Second, periodic or regular acceptance of free services from an entity can raise an appearance of a conflict of interest, particularly if any matter later arises involving that donor.

The component head may accept the first offer from a source up to \$50,000. A second or subsequent offer in the same fiscal year from the same source must be submitted to the Assistant Attorney General for Administration (AAG/A) for approval when the value combined with the first gift exceeds \$50,000.

4. Scenario: A corporation's products are being counterfeited and its computer network infiltrated. The corporation has hired a computer security firm to evaluate the extent of the computer breach and to recommend modifications to its system. The corporation has told Departmental attorneys and investigators that it may speak with its employees and the computer security firm's personnel about the breach, and utilize their expertise as necessary. The corporation is paying for the computer security firm's services throughout the Department's investigation, including time spent meeting with Department employees. One computer firm employee has particular proficiency in computer programming, and he would be an expert witness in any litigation against the defendant to discuss the unauthorized access and damage to the corporation's security and computer privacy. The victim corporation also has provided office space for Departmental employees to interview corporate staff and the computer firm employees.

Analysis: The corporation is a victim. The computer firm is a 'related party' because it is retained by the corporation. Access to both companies' personnel during the investigation is *traditional assistance* that does not warrant any formal approval process. The corporate and security firm employees are in a unique position to provide useful information on behalf of their employer/contractor. The agent and attorney should consult with each other, and potentially with the Professional Responsibility Officer (PRO) and the Deputy Designated Agency Ethics Official (DDAEO), to determine the extent to which they will accept the corporation's offers. Using corporate space for interviews does not raise any particular concerns. The computer security expert who assessed the damage to the corporation has distinct advantages over another computer expert who was not involved in the assessment. Despite this favorable position, the trial attorney should determine that the potential appearance of the corporation's self-interest in paying for the expert witness' testimony does not outweigh the benefit of this expert's testimony before accepting the services.

5. Scenario: The DEA is investigating a suspect for selling and delivering drugs from his apartment. In order to enhance its surveillance and consistent with its investigative procedures, DEA wants to rent an apartment in the building where the suspect lives. DEA approaches the owner of the building and offers to pay market rent for an apartment. The owner has a vacant apartment in a desirable location to conduct surveillance in the building. The owner is supportive of the DEA's efforts and offers the apartment to DEA for three months free of charge. The fair market value of the vacant apartment is \$1,500/month.

Analysis: The owner is an *indirect victim* since the suspect's illegal activities have an adverse affect on the owner's property. Offers of aid from an indirect victim generally

constitute *assistance*, although the value of the offer may be such that it should be considered a gift. Given the short time frame (three months) and the value involved (\$4500), this offer constitutes assistance, and an agent in consultation with an attorney may decide to accept the offer. However, if the owner offered the DEA agent free use of the apartment for nine months and that amount of time (or longer) was necessary for a more complex investigation, the agent and attorney should seek approval to accept the offer as a gift. Given that the owner is taking the apartment off the market for an extended period of time, the offer is more substantial than before, and higher level approval (by the component head for a gift) is warranted. There is no clear line defining when assistance becomes a gift because of the financial value or imposition involved. For offers that exceed three months, an attorney should consult with the DDAEO to determine whether the offer may be accepted as assistance, or considered a gift.

6. Scenario: The Criminal Division is investigating a highly technical computer crimes case. A university professor has conducted research in the narrow field at issue. A Criminal Division attorney contacted the professor for general background information on this issue, saying that the Department is willing to pay for his consultative services. The professor is willing to provide advice, assistance, and testimony in federal court for free. Although the professor has no prior experience as a witness, the attorney intends to proffer the professor as an expert.

Analysis: The professor is a third party and he has offered the attorney a *gift*. Assuming that the number of hours to prepare and present testimony is limited, the value of the professor's services will be below \$50,000. Although the Department (and component's budget) will always benefit from no-cost expert services, it is not always appropriate to accept this type of offer. While the professor will benefit professionally from his 'expert' qualification, this intangible benefit does not necessarily mean the Department should avoid the costs of payment. The attorney should consult with the PRO and DDAEO to determine the appropriate course of action.

7. Scenario: The FBI is investigating the sale of counterfeit goods. The corporate maker of the true product has offered to give the FBI \$1 million to purchase the counterfeit goods from an identified broker. The FBI, in consultation with the local United States Attorney's Office, accepts the offer, and makes arrangements with the corporation to provide the \$1 million. The counterfeit goods are purchased. The corporation arranged for the goods to be transported and stored in its warehouse pending its initiation of a civil proceeding.

Analysis: Because the Department is serving as the conduit for cash to recover counterfeit materials, the Department may accept the victim's offer of funds for this particular purpose. The agent should seek approval from the AUSA prior to accepting the victim's funds. Because the cost of storage to the company at its own facilities is minimal, the Department may accept the company's offer to store the goods at the victim's expense.

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8. Scenario: An industry leader in the computer field has developed a software program that can meld various databases and enhance search capabilities for the law enforcement community. The company has offered this program to the Department. While it is not available for sale to the public, the program (including the technical support to assist its operations) is valued over \$800,000.

Analysis: Given the high value, this offer must be submitted to the AAG/A for acceptance. Moreover, more concerns arise because this program would enhance the Department's general capabilities, and not just be used for a specific case investigation. Again, there are appearance issues in accepting resources of such significant value from an entity that may be the subject of Department action in another arena. This type of offer also directly impacts the Department's operations and mission. However, the company is also offering a capability that is unparalleled. Given the magnitude of this offer, high-level attention to determine whether this offer may be accepted is warranted.