

# Criminal Discovery

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# Introduction to the Criminal Discovery Issue of the USA Bulletin

*The Hon. James M. Cole  
Deputy Attorney General of the United States  
United States Department of Justice*

It is with great pleasure that I introduce this edition of the United States Attorneys' Bulletin devoted to such a significant subject as criminal discovery. As you all know, over the past three years, the Department of Justice has taken major strides to ensure that federal prosecutors throughout the nation have the supervision, guidance, and training necessary to meet our disclosure obligations in criminal cases. And we have been transparent to the judiciary, the Criminal Rules Committee, the defense bar, and Congress in carrying out this objective.

During my tenure as Deputy Attorney General, I have been directly involved in various facets of this effort, ranging from issuing several important memoranda concerning criminal discovery to testifying before the Senate Judiciary Committee in June 2012 at a hearing entitled, "Ensuring that Federal Prosecutors Meet Discovery Obligations."

In complying with our disclosure responsibilities in criminal cases, prosecutors must ensure that a defendant's constitutional rights are protected. Yet, we must discharge this important responsibility while simultaneously ensuring that the criminal trial process reaches timely and just results, protects victims and witnesses from retaliation or intimidation, safeguards ongoing criminal investigations, and protects critical national security interests.

The articles in this Bulletin will help prosecutors achieve these goals by providing topical guidance on a wide array of issues. They are interesting to read, highly instructive, and offer practical advice. The articles also complement one another in many ways. The Bulletin contains articles concerning: the new Criminal ESI Protocol—a topic I discussed at the Georgetown Law Center in April 2012; the importance of "materiality" for prosecutors' day-to-day responsibilities; potential *Giglio* information for law enforcement witnesses; *Brady* and *Giglio* implications of Federal Rule of Evidence 806 relating to hearsay declarants; scope of the prosecution team, particularly where there are parallel proceedings; the potential conflict between *Brady* and the attorney-client privilege; and discovery implications of the Crime Victims' Rights Act. Collectively, these articles will be an important resource for prosecutors now and for many years to come.

This edition of the United States Attorneys' Bulletin is the latest resource the Department has made available to federal prosecutors on the subject of criminal discovery. In March of this year, the Attorney General issued a memorandum entitled "Criminal Discovery Resources and Training," summarizing the Department's most significant criminal discovery efforts over the past three years.

One of my top priorities as Deputy Attorney General is to ensure that all prosecutors are prepared to meet the challenges presented by criminal discovery. Each United States Attorney's office and Main Justice criminal component has one or more Criminal Discovery Coordinators who are responsible for providing guidance to prosecutors on discovery-related topics. In addition, in November 2011, the Department moved the National Criminal Discovery Coordinator position into my office and made it a permanent position. I encourage you to discuss discovery-related issues with supervisors and

the Criminal Discovery Coordinators in your office, and—if it would be helpful—to reach out to Andrew Goldsmith, the current National Criminal Discovery Coordinator, as well, at [Andrew.Goldsmith@usdoj.gov](mailto:Andrew.Goldsmith@usdoj.gov).

Thank you for all you do to make sure our pursuit of justice is done fairly and effectively.

The Hon. James M. Cole  
Deputy Attorney General  
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# The New Criminal ESI Discovery Protocol: What Prosecutors Need to Know

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## I. Introduction

Criminal cases are built increasingly upon electronically stored information (ESI). Today, the key evidence is just as likely to be the defendant's emails to co-conspirators, a bank's electronic records of money laundering transactions, or digital video surveillance of a bank robbery, as it is the defendant's fingerprints or his confession. Managing electronic information means jumping into a new world of technology that changes rapidly. Every day brings new hardware and operating systems for smart phones and computers; new developments for Facebook, Twitter, and other commercial services; and new strategies for managing and searching for information described by terms such as "predictive coding" and "computer-assisted searching." In order to help prosecutors meet these challenges when it comes to disclosing ESI in criminal cases, the Department of Justice has developed a ground-breaking protocol containing a comprehensive set of best practices.

## II. Illustrative Cases: *Briggs* and *Stirling*

Two recent cases illustrate the new discovery challenges posed by ESI for prosecutors. The first of these cases, *United States v. Briggs*, 2011 WL 4017886 (W.D.N.Y. Sept. 8, 2011) and 831 F. Supp. 2d 623 (W.D.N.Y. 2011) (partial reconsideration), involves a multi-defendant drug conspiracy currently pending in Buffalo, New York. In *Briggs*, the prosecutors produced wiretap data from the DEA's Voicebox software and other discovery using IPRO, a suite of software products commonly used by United States Attorneys' offices in most cases. The defendants disputed the use of IPRO, arguing that IPRO's TIFF images ("tagged image file format") could not be sorted or searched. The defendants claimed they were entitled to production in different file formats that would give them more extensive electronic searching, sorting, and tagging features. In particular, the defendants argued they were entitled to the Voicebox data in a fully functional Excel spreadsheet. The government responded that concerns about redaction of informant information from the original "native files," server space, and cost limited what it could provide.

Although the Magistrate Judge rejected wholesale adoption of the Federal Rules of Civil Procedure as the standard for production of criminal ESI, he borrowed one of its principles:

For purposes of the motion *in this case*, the standard of Federal Rule of Civil Procedure 34(b)(2)(E)(ii) *should apply here*, that is the Government produces this ESI "in a reasonably

usable form or forms.” While Rule 34(b)(2)(E) notes options for production as documents “are kept in the usual course of business,” Fed.R.Civ.P. 34(b)(2)(E)(i), here that would lead either to producing these materials in their native formats (with the redaction issues discussed above) or via IPRO with its limited search capabilities (since IPRO is the Government’s usual course of business to present such quantities of information for trial). That rule also states that “a party need not produce the same electronically stored information in more than one form,” *id.*, R. 34(b)(2)(E)(iii). But here the Government is ordered to replace the production by IPRO and produce it in another way.

2011 WL 4017886 at \*8 (emphasis in original).

The Magistrate Judge determined that “as between the Government and defense, the Government is in the better position to organize this mass of information and re-present it in a manner that is searchable by the defense,” and that the government must choose “a reasonably usable form,” but that the defendants could not dictate which electronic form the government must use. According to the court, native files or searchable PDF files were acceptable. *Id.* Subsequent to the government’s original response to the discovery motion, it was determined that the Voicebox data could be provided in searchable PDF format without causing a server space issue. After the data was provided as searchable PDF files, the defendants objected to this format as not allowing for the same searching and sorting as Excel files. The government objected to providing the data in Excel as the integrity of the data could not be insured. The Magistrate Judge issued an order supporting the government’s decision to provide the Voicebox data in searchable PDF format. In July 2012, the District Court upheld this order.

Another new case illustrates additional challenges in dealing with ESI. In *United States v. Stirling*, Case No. 1:11-cr-20792-CMA (S.D. Fla. June 5, 2012), the government seized the defendant’s computer pursuant to a search warrant and provided the defendant with a forensic copy of the hard drive. Before trial, an FBI analyst performed a forensic examination of the hard drive, determined that the defendant had “chatted” with his co-defendants via Skype, extracted that information from the hard drive, and converted it into text format, which totaled 214 pages. According to the court, this information was “not readily available by opening the folders appearing on the hard drive.” The government did not provide the Skype evidence to the defendant before trial in text format and did not use it in its case-in-chief. It did, however, notify the defendant that there was evidence on the hard drive that it would use to impeach him if he testified. The defendant testified, and in rebuttal the government used the text-format Skype chat log to impeach his testimony. In the court’s view, “[p]roduction of something in a manner which is unintelligible is really not production,” noting that the log “had a devastating impact” and “irreparably damaged [defendant’s] credibility and his duress defense.” *Id.* at 2. Following the jury’s guilty verdict, the court granted a new trial under Rule 33 “in the interest of justice.”

The court cited *Briggs* for the principle that, “while the Federal Rules of Civil Procedure need not be adopted as the standard for production of criminal ESI, the standard of Federal Rule of Civil Procedure 34(b)(2)(E)(ii) should apply and the Government be required to produce ESI in a reasonably usable form.” (citing to *Briggs*, 2011 WL 4017886, at \*8). According to the *Stirling* court:

If, in order to view ESI, an indigent defendant such as *Stirling* needs to hire a computer forensics expert and obtain a program to retrieve information not apparent by reading what appears in a disk or hard drive, then such a defendant should so be informed by the Government, which knows of the existence of the non-apparent information. In such instance, and without the information or advice to search metadata or apply additional programs to the disk or hard drive, production has not been made in a reasonably usable form.

*Id.* at 4-5. The court concluded that simply providing the forensic image—when the government knew of the Skype chat log—did not satisfy Rule 16(a)(1)(B)(i)’s requirement that the government disclose any relevant written or recorded statement by the defendant if the statement is within the government’s possession, custody, or control, and the attorney for the government knows it exists.

The significance of *Stirling* remains to be seen. Defense attorneys and law professors quickly hailed the decision. *See, e.g., New Trial Ordered for ESI Discovery Violation - Electronic Evidence Must be Usable*, WHITE COLLAR CRIME PROF. BLOG, June 6, 2012 (“In light of the prevalence of ESI discovery in white collar cases it is ironic that an important principle regarding electronic discovery is developed for us in an indigent’s drug smuggling case. But, we’ll take it!”), *available at* [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2012/06/new-trial-ordered-for-discovery-violation-document-dumps-do-not-work.html](http://lawprofessors.typepad.com/whitecollarcrime_blog/2012/06/new-trial-ordered-for-discovery-violation-document-dumps-do-not-work.html). On the one hand, the court’s ruling seems to require the government to identify incriminating evidence for the defendant so he can structure his testimony in a way that conforms to the evidence. On the other hand, *Stirling* is probably limited to its unique facts and circumstances: in other words, in cases involving indigent defendants and particularly complex ESI, some courts may interpret Rule 16(a)(1)(B)(i) broadly.

### III. The New ESI Discovery Protocol

To help prosecutors and defense attorneys cope with the new challenges of electronic information, the Department of Justice developed a set of best practices for ESI discovery management in collaboration with the Office of Defender Services (ODS), Federal Defender Organizations (FDO), private attorneys who accept Criminal Justice Act (CJA) appointments, representatives of the Administrative Office of United States Courts, and liaisons from the United States Judiciary. On February 13, 2012, the new Criminal ESI Discovery Protocol (Protocol) was simultaneously issued by Deputy Attorney General James Cole on behalf of the Department, and representatives of ODS, FDO, CJA, as well as the federal judiciary. DEP’T OF JUSTICE AND ADMIN. OFFICE OF THE U.S. COURTS JOINT WORKING GRP. ON ELEC. TECH. IN THE CRIMINAL JUSTICE SYS., *Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases* (2012), *available at* <http://www.fd.org/docs/litigation-support/final-esi-protocol.pdf>.

The Protocol quickly received attention in media reports (*see, e.g., Eric Topor, Joint Federal Criminal E-Discovery Protocol Places Cooperation Above Motion Filings*, BLOOMBERG BNA: DIGITAL DISCOVERY & E-EVIDENCE, Mar. 1, 2012); garnered praise from the judiciary and defense bar; and became the main topic of a wide variety of conferences and programs. For example, in April 2012, representatives from the Department, ODS, PDO, and CJA, who were directly responsible for developing the Protocol, participated in a program at Georgetown University Law Center entitled “The New Criminal ESI Protocol: What Judges and Practitioners Need to Know,” at which Deputy Attorney General James Cole delivered the opening remarks. Consistent with the Department’s long-term commitment in this area, every prosecutor will receive training on the Protocol this year. The Department will also be assisting the Federal Judicial Center in training members of the federal bench.

The Protocol has several goals: efficient management of post-indictment discovery between the government and criminal defendants, reducing costs for the government and defendants, fostering communication between prosecutors and defense counsel about ESI discovery issues, avoiding unnecessary pretrial litigation over ESI discovery, promoting uniform best practices for recurring issues, and protecting the security of sensitive information produced as discovery.

The Protocol consists of four parts:

- 10 core principles that guide the best practices, which contain hyperlinks to other parts of the Protocol
- “Recommendations” for ESI discovery that provide the general framework for managing ESI, including planning, production, transmission, dispute resolution, and security
- “Strategies and commentary” that provide technical and more particularized guidance for implementing the recommendations, as well as definitions of common ESI terms
- A one-page checklist for addressing ESI production issues.

#### IV. The 10 guiding principles

The 10 guiding principles borrow from common sense, the developing e-discovery case law, accepted practices, and the desire to encourage discussion rather than litigation:

- **Principle 1:** Lawyers have a responsibility to have an adequate understanding of electronic discovery.
- **Principle 2:** In the process of planning, producing, and resolving disputes about ESI discovery, the parties should include individuals with sufficient technical knowledge and experience regarding ESI.
- **Principle 3:** At the outset of a case, the parties should meet and confer about the nature, volume, and mechanics of producing ESI discovery. Where the ESI discovery is particularly complex or produced on a rolling basis, a continuing dialogue may be helpful.
- **Principle 4:** The parties should discuss what formats of production are possible and appropriate, and what formats can be generated. Any format selected for producing discovery should maintain the ESI’s integrity, allow for reasonable usability, reasonably limit costs, and, if possible, conform to industry standards for the format.
- **Principle 5:** When producing ESI discovery, a party should not be required to take on substantial additional processing or format conversion costs and burdens beyond what the party has already done or would do for its own case preparation or discovery production.
- **Principle 6:** Following the meet and confer, the parties should notify the court of ESI discovery production issues or problems that they reasonably anticipate will significantly affect the handling of the case.
- **Principle 7:** The parties should discuss ESI discovery transmission methods and media that promote efficiency, security, and reduced costs. The producing party should provide a general description and maintain a record of what was transmitted.
- **Principle 8:** In multi-defendant cases, the defendants should authorize one or more counsel to act as the discovery coordinator(s) or seek appointment of a Coordinating Discovery Attorney.
- **Principle 9:** The parties should make good faith efforts to discuss and resolve disputes over ESI discovery, involving those with the requisite technical knowledge when



necessary, and they should consult with a supervisor, or obtain supervisory authorization, before seeking judicial resolution of an ESI discovery dispute or alleging misconduct, abuse, or neglect concerning the production of ESI.

- **Principle 10:** All parties should limit dissemination of ESI discovery to members of their litigation team who need and are approved for access, and they should also take reasonable and appropriate measures to secure ESI discovery against unauthorized access or disclosure.

Principle 1 is the linchpin. In the past, many prosecutors and defense lawyers took a hands-off approach to e-discovery, believing it was something for their IT staffs to address and solve. Today, management of electronic information is often front and center in litigation, and courts rightfully expect the lawyers to understand and solve—with help—their e-discovery issues. Principle 2 is also critically important because the technology of e-discovery is changing so quickly that specialized knowledge is important to address e-discovery issues.

## V. Scope of the Protocol and its limitations

There is no “one-size-fits-all” approach to ESI discovery, and the Protocol recognizes that by stating it only applies to cases where the volume and/or nature of the ESI produced as discovery significantly increases the complexity of the case. Discovery in smaller, less complex cases can be managed adequately without the Protocol and/or by using paper copies.

The Protocol does not alter any party’s substantive legal discovery obligations, which arise under *Brady v. Maryland*, *Giglio v. United States*, the Jencks Act, and Federal Rule of Criminal Procedure 16. Nor does it apply to ESI that is contraband (for example, child pornography) or in cases involving classified information.

In pretrial litigation around the country, some defense attorneys have attempted to seize upon particular phrases to argue that the government has not complied with the Protocol. This approach misapprehends the nature and structure of the Protocol. Instead, the Protocol prominently states that it sets forth “a collaborative approach to ESI discovery involving mutual and interdependent responsibilities.” Protocol, at 3. Also, its recommendations “may not serve as a basis for allegations of misconduct or claims for relief and they do not create any rights or privileges for any party.” *Id.* at 5. In essence, the Protocol describes a set of best practices that form the steps of a process, and not a set of rules for the parties to flourish like swords.

## VI. Highlights of the Protocol

### A. Involving people with technical knowledge

With e-discovery, there are many ways for the train to become derailed. E-discovery savvy technicians can help anticipate and solve technical and strategic e-discovery issues, so the Protocol recommends that “each party should involve individuals with sufficient technical knowledge and experience to understand, communicate about, and plan for the orderly exchange of ESI discovery.” *Id.* Two central issues in the *Briggs* case were technical—the matter of searchable text in the government’s initial production and how the Voicebox data would be produced. These are examples of issues where early participation by e-discovery technicians could assist prosecutors. Solving technical issues early can help avoid the repetitive discovery productions ordered in *Briggs*.

## **B. The producing party decides how to produce discovery**

One of the Protocol's key provisions is that the receiving party does not get to dictate how the producing party's discovery will be produced: "the producing party is not obligated to undertake additional processing desired by the receiving party that is not part of the producing party's own case preparation or discovery production." *Id.* at 4. The Protocol seeks to strike a balance, and the corollary recommendation is:

Nonetheless, with the understanding that in certain instances the results of processing ESI may constitute work product not subject to discovery, these recommendations operate on the general principle that where a producing party elects to engage in processing of ESI, the results of that processing should, unless they constitute work product, be produced in discovery along with the underlying ESI so as to save the receiving party the expense of replicating the work.

*Id.* at 6-7.

One goal of the Protocol is to save the parties' money by reducing unnecessary duplication of processing. Thus, for example, if the government receives business records in PDF and uses the PDF files for its own case preparation, then it is not obliged to undertake additional processing of the files to create TIFF images and OCR text simply because the defendant wants that. If the government processed the PDF files to create TIFF and OCR text for its case preparation, however, then it should produce the TIFF/text files upon the defendant's request to save the defendant the unnecessary expense of replicating the government's processing.

## **C. Meet-and-confer**

The Protocol recommends a "meet-and-confer" session in complex ESI cases, a procedural step borrowed from civil practice. The goal of a meet-and-confer should be to identify and solve ESI discovery issues shortly after arraignment in order to move efficiently to a trial or plea. The Protocol suggests possible topics to address at the meet-and-confer session: the types and contents of ESI discovery produced; electronic forms of production; proprietary or legacy data in non-industry standard formats; privileged or work product information; confidential or personal information; incarcerated defendants; ESI discovery volume; naming conventions and logistics; software or hardware limitations; ESI from hard drives, cell phones, or other storage devices; a schedule for producing and reviewing ESI; protective orders and claw-back agreements; memorializing the parties' agreements; notice to the court of anticipated delays in producing discovery; and security of ESI discovery.

A particularly difficult discovery challenge results when the government seizes ESI storage devices from multiple defendants. This seizure could include computer hard drives, smart phones, or other devices. If these storage devices contain information outside the terms of a search warrant (which is common and often leads to a filter team review) or privileged information, the challenge of unwinding each device's owner's privacy or privilege issues becomes even more complicated. *See* Vincent J. Falvo, Jr., *When Discovery Under Brady May Conflict With the Attorney-Client Privilege*, in this issue. Although the government may desire to access whatever it is authorized to look at, each device's owner wants to assert privacy interests or privileges against both the government and the co-defendants. In one case, the government's failure to complete a filter team review of multiple storage devices within 15 months of the arraignment led the court to find an unreasonable search and suppress any evidence from the devices. *United States v. Metter*, 2012 WL 1744251 (E.D.N.Y. May 17, 2012). A good time to start grappling with such convoluted ESI discovery challenges is the meet-and-confer.

## D. Table of contents

That the Preface to this year's *Georgetown Law Journal Annual Review of Criminal Procedure*, 41 GEO. L.J. ANN. REV. CRIM. PROC. (2012), which was written by Attorney General Holder, addresses creation of a table of contents in cases involving ESI speaks to the significance of this topic. In the Preface, entitled *In the Digital Age, Ensuring That the Department Does Justice*, the Attorney General discusses how federal prosecutors strive to exceed what the constitution requires when it comes to disclosure in criminal cases, how the ESI Protocol will enable prosecutors to address criminal discovery in the digital age, and why a table of contents is critical in cases involving large quantities of ESI.

As explicitly stated in the Protocol, a table of contents has several key benefits in complex cases involving large quantities of ESI:

If the producing party has not created a table of contents prior to commencing ESI discovery production, it should consider creating one describing the general categories of information available as ESI discovery. In complex discovery cases, a table of contents to the available discovery materials can help expedite the opposing party's review of discovery, promote early settlement, and avoid discovery disputes, unnecessary expense, and undue delay.

Protocol, Strategies and Commentary at 2.

The Protocol then specifically references *United States v. Skilling*, 554 F.3d 529, 577 (5th Cir. 2009), *vacated in part on other grounds*, 130 S. Ct. 2896 (2011), where the Fifth Circuit analyzed the government's *Brady* obligations in the context of an ESI database that was several hundred million pages. In *Skilling*, although the government's discovery production was massive, it was electronic and searchable. Further, the government produced a set of "hot documents" and indices. The court rejected Skilling's claim that the government should have located and turned over exculpatory evidence within the voluminous discovery, finding that "the government was in no better position to locate any potentially exculpatory evidence than was Skilling." *Id.* at 577. Other courts have reached similar conclusions where the government provided searchable ESI discovery materials. *See, e.g., United States v. Warshak*, 631 F.3d 266, 297 (6th Cir. 2010); *United States v. Ohle*, 2011 WL 651849, at \*4 (S.D.N.Y. Feb. 7, 2011). The *Skilling* court went on to state "it should go without saying that the government may not hide *Brady* material of which it is actually aware in a huge open file in the hope that the defendant will never find it." 554 F.3d at 577.

The purpose of creating a table of contents is *not* to require a detailed, item-by-item index; rather, it is designed to be a general guide to the organization of the materials produced. The Protocol recognizes that no single table of contents is appropriate for every case, and the producing party may devise a table of contents that is suited to the materials it provides in discovery, its resources, and other considerations.

## E. Forms of production

The Protocol recommends that ESI received from third parties (for example, banks, mortgage companies, and telecommunications providers) be produced in the form it was received or in a "reasonably usable form," language that is similar to Federal Rule of Civil Procedure 34(b)(2)(E)(ii). For example, emails received as native files can be produced as native files or in another format, such as searchable PDFs or as TIFF images and OCR text with a "load file." As defined in the Protocol, a load file is a "file used to import images or data into databases. . . . Load files must be obtained and provided

in software-specific formats to ensure they can be used by the receiving party.” Protocol, at 21. The meet-and-confer should address what alternatives work best for both parties. ESI received from a party’s own business records should be produced in the format(s) in which it was maintained or in a reasonably usable form or forms. Discovery productions should be in industry standard formats.

Information received on paper can be produced as paper, made available for inspection, or, if it has already been converted to digital format, produced as electronic files that can be viewed and searched. However, the Protocol recommends that information received as ESI should not be printed to paper and produced unless agreed to by the parties.

Both investigative reports and witness interviews are treated separately. They can be produced on paper if they were received that way, or they can be converted to digital format. Absent particular issues such as redactions or substantial costs or burdens of additional processing, electronic versions of investigative reports and witness interviews should be produced in a searchable text format (such as ASCII text, OCR text, or plain text (.txt)) in order to avoid the expense of reprocessing the files.

#### **F. Receiving party’s new obligation**

Both parties have responsibilities under the Protocol. With e-discovery there are bound to be issues, whether from technical glitches, compatibility problems, or ignorance. To identify snags before they seriously delay the process, the Protocol recommends that the receiving party (usually the defense) “should be pro-active about testing the accessibility of ESI discovery *when it is received.*” *Id.* at 13 (emphasis in original). Hopefully, over time, judges will come to expect early identification of e-discovery problems and take a dim view of any attorney who shortly before trial requests a continuance or seeks other relief to address an e-discovery snafu.

#### **G. Transmitting ESI discovery**

ESI discovery should be transmitted on electronic media of sufficient size to hold the entire production, for example, a CD, DVD, or thumb drive. Media should be clearly labeled with the case name and number, the producing party, a unique identifier for the media, and a production date. The Protocol recommends three categories for email transmission of discovery based upon the sensitivity of the information: (1) not appropriate for email transmission (for example, grand jury transcripts, materials affecting witness safety, or classified information); (2) encrypted email transmission (personal identifying information or information subject to protective orders; and (3) unencrypted email transmission (other information). *Id.* at 19.

#### **H. Informal resolution of ESI discovery matters**

The Protocol encourages the parties to resolve ESI discovery disputes, whenever possible, with good faith discussions and without litigation:

Before filing any motion addressing an ESI discovery issue, the moving party should confer with opposing counsel in a good-faith effort to resolve the dispute. If resolution of the dispute requires technical knowledge, the parties should involve individuals with sufficient knowledge to understand the technical issues, clearly communicate the problem(s) leading to the dispute, and either implement a proposed resolution or explain why a proposed resolution will not solve the dispute.

*Id.* at 7.

To implement this approach, the Protocol recommends that prosecutors and federal defender offices:

should institute procedures that require line prosecutors and defenders to: (1) consult with a supervisory attorney before filing a motion seeking judicial resolution of an ESI discovery dispute, and (2) obtain authorization from a supervisory attorney before suggesting in a pleading that opposing counsel has engaged in any misconduct, abuse, or neglect concerning production of ESI.

*Id.* at 8.

Furthermore: “Any motion addressing an ESI discovery dispute . . . should include a statement” of the movant, stating that after consultation with the opposing party, the parties have been unable to resolve their dispute. *Id.*

### **I. Security — protecting sensitive ESI discovery from unauthorized access or disclosure**

Recent events around the world have demonstrated the vulnerability of ESI to motivated hackers, with headlines recounting stories of commercial or governmental accounts that were hacked. ESI discovery produced in some criminal cases could be attractive to rival drug gangs, terrorist groups, commercial competitors, the news media, or hackers. At the same time, prosecutors and defense attorneys may seek to take advantage of the Internet to disseminate and share ESI discovery efficiently. Recently, the Office of Defender Services entered into a contract with Summation with the expectation of creating shared databases containing criminal discovery on the Internet to facilitate sharing and review with clients and co-defendants. CJA counsel and private defense attorneys are moving in the same direction. As a result, prosecutors have new concerns about what to produce, when to produce it, and whether the ESI discovery they produce is vulnerable to outsiders.

The Protocol recognizes that “[t]he parties’ willingness to produce early, accessible, and usable ESI discovery will be enhanced by safeguards that protect sensitive information from unauthorized access or disclosure.” *Id.* at 8. The Protocol recommends that the parties address security concerns and practices at the meet-and-confer, and if the producing party—usually the prosecutor—concludes that the security measures for the particular case are inadequate, then the producing party should seek a protective order from the court addressing handling of ESI discovery.

### **J. Coordinating discovery attorney**

The Administrative Office for United States Courts has hired three full-time attorneys to help resolve e-discovery issues in complex criminal cases. The Protocol encourages federal defenders and CJA counsel to avail themselves of this new resource, or, alternatively, in a multi-defendant case, to designate one or more defense counsel as the discovery coordinator to accept the government’s discovery on behalf of all defendants and manage its dissemination to the remaining defendants.

### **K. ESI discovery production checklist**

The Protocol includes a one-page checklist covering the key recommendations. It is suitable for use during a meet-and-confer session between the parties, at arraignment, or a discovery planning conference with the court. The checklist should prove to be a handy, easy reference guide for prosecutors and defense counsel—and the court, in certain circumstances—to ensure that each important topic is covered during the various stages of criminal discovery. *Id.* at 22.

## VII. Conclusion

The process of gathering evidence for criminal cases, producing discovery to defendants, presenting evidence in court, and managing the record on appeal, is rapidly moving from paper format to electronic systems. This technological advance holds great promise for improved efficiency and reduced costs for prosecutors, defendants, and courts. As we move from paper to digital systems, however, we may be in for a bumpy ride. The turbulence can be smoothed slightly by accepting that we have to master the technology, the terminology, and the strategies for effectively managing case information during the investigation, discovery phase, and trial. The new ESI Discovery Protocol is a collection of best practices to help anticipate, understand, and resolve the inevitable issues involved in complex ESI cases. Will it prevent all problems in dealing with disclosure of ESI, such as those encountered in the *Briggs* and *Stirling* cases described earlier? Probably not. But the Protocol will certainly reduce the number of problems, minimize their potential impact, and provide a predictable framework for resolving disputes when they do arise. ❖

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# Getting a Clue: How Materiality Continues to Play a Critical Role in Guiding Prosecutors' Discovery Obligations

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Agatha Christie's fictional detective, Hercule Poirot, was a master of perception. The significance of the charred remains of a hotel receipt, overlooked by Inspector Japp and his subordinates, was never lost on the Belgian sleuth. Such minor details usually held the key to solving the mystery and identifying the true killer. Moreover, the killer was always someone the police never suspected. Such fictional accounts, unfortunately, form the basis for many a criminal defense attorney's concern that materiality ought not to rest in the hands of the prosecution team. Yet the criminal discovery rules and case law still support the basic precept that the prosecution has an obligation to produce material, potentially exculpatory evidence to the defense, and yes, the prosecution team makes that call. The Supreme Court has stated that the "defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the [Government's] files." *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987) (citations omitted). The government is typically the "sole judge of what evidence in its possession is subject to disclosure." *United States v. Presser*, 844 F.2d 1275, 1282 (6th Cir. 1988).



While department policy and the USAM direct that prosecutors take a broad view of our discovery obligations, *Brady* material is and should remain uniquely limited to evidence that is either exculpatory or impeaching of a key witness. See Memorandum from Deputy Attorney General David Ogden, "Guidance for Prosecutors Regarding Criminal Discovery" (Jan. 4, 2010), available at [http://dojnet.doj.gov/usao/eousa/ole/usabook/memo/ogden\\_memo.pdf](http://dojnet.doj.gov/usao/eousa/ole/usabook/memo/ogden_memo.pdf) (Ogden Memo). Litigation efforts to expand the definition of *Brady* to include anything favorable to the defense— regardless of materiality— should be resisted. As Deputy Attorney General James M. Cole recently explained to the Senate Judiciary Committee, expanding criminal discovery to eliminate or dilute the materiality

requirement threatens to undermine other key aspects of the criminal process, including the need to protect the privacy and security of victims and witnesses, and national security. Witnesses have, unfortunately, been threatened or killed based upon information produced in discovery. Statement of Deputy Attorney General James M. Cole before the Senate Judiciary Committee (June 6, 2012), *available at* <http://www.justice.gov/iso/opa/dag/speeches/2012/dag-speech-120606.html>.

Prosecutors, who are intimately familiar with the facts and particular security risks associated with their cases, are in the best position to manage both the culling and timing of discovery. And courts are well-equipped to assess when and whether prosecutors misstep. But while it is well-established *who* must first determine whether a report, statement, or tangible item is material, judges who must ultimately decide *whether* we have made the correct call are often confronted with a myriad of interpretations for what constitutes “material” material. The materiality requirement appears in *Brady v. Maryland*, 373 U.S. 83 (1963), and although the wording of the test for materiality is sometimes phrased in different ways by different courts, the test generally refers to information that would “put the whole case in . . . a different light . . . .” *Kyles v. Whitley*, 514 U.S. 419, 435 (1995); *see also United States v. Ferguson*, 2012 WL 511489, at \*16 (E.D. Mich. Feb. 16, 2012) (explaining that *Brady* material refers to information relevant to guilt or innocence, and it does not encompass anything and everything that might aid a defendant’s trial preparation). Since *Kyles v. Whitley*, the Court has consistently described the test for a constitutional violation as whether the information at issue is of such significance that its nondisclosure “undermines confidence in the outcome of the trial.” *Whitley*, 514 U.S. at 434 (quoting *United States v. Bagley*, 473 U.S. 667 (1985)). “[The] touchstone of materiality is a ‘reasonable probability’ of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Id.* Any effort to require a lesser showing by a defendant who argues that undisclosed information rendered his trial unfair should be vigorously opposed as a clear and unwarranted departure from the Court’s teaching. “[S]trictly speaking, there is never a real ‘Brady violation’ unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.” *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

Materiality is among the most litigated issues when it comes to determining whether the government has satisfied its obligations under *Brady*. *Compare Smith v. Almada*, 640 F. 3d 931, 940 (9th Cir. 2011) (holding that an officer’s failure to disclose a witness’s false account was immaterial because that witness’s testimony was not “crucial” at trial), *with United States v. Kohring*, 637 F.3d 895, 902 (9th Cir. 2011) (holding that additional impeachment material regarding a key government witness was material). The Supreme Court recently addressed the materiality element of *Brady* in *Smith v. Cain*, 132 S.Ct. 627 (2012), and during oral argument several of the justices made clear their view that *Brady* and disclosure have two different aspects depending upon whether one views the obligation prospectively or retrospectively. Deputy Attorney General Cole also addressed this issue in his recent testimony before Congress. When asked whether the *Brady* standard was too vague and subjective, DAG Cole explained that while the *Brady* prejudice standard was used for appellate review,

going into trial, looking at it prospectively, that’s not the standard we use in the Justice Department . . . . [O]ur standard is any evidence that is inconsistent with any element of any crime charged against the defendant, turn it over; any information that casts doubt upon the accuracy of any evidence, including but not limited to witnesses’ testimony, turn it over; and that we tell people, err on the side of disclosure.

Statement of Deputy Attorney General James M. Cole before the Senate Judiciary Committee (June 6, 2012), *available at* <http://www.justice.gov/iso/opa/dag/speeches/2012/dag-speech-120606.html>.



*Brady* was a death penalty case in which there was no dispute that Brady and a compatriot robbed and killed a merchant. What the prosecution failed to reveal at the death penalty phase of Brady's trial was that the co-defendant had confessed that he, and not Brady, was the actual shooter. The evidence was immaterial to guilt or innocence under the felony-murder rule but was highly relevant to the question of punishment. Thus, the *Brady* case itself involved undisclosed evidence that was unquestionably relevant and material to punishment. Prosecutors and courts have struggled with the line-drawing ever since. What forms the contours of materiality for purposes of *Brady* is still being debated 40 years later, even in the Supreme Court.

In the recent Supreme Court case of *Smith v. Cain*, 132 S.Ct. 627 (2012), the crime involved an armed raid on a stash house that resulted in the death of five of the home's occupants. Of the three survivors, only one was able to positively identify Smith as one of the shooters. The prosecutors had police reports that included statements from the surviving victim, taken while he was still at the scene, that stated he could not identify any of the shooters and that he would not recognize any of them if he saw them again. Later that same night at the police station, the victim told an officer that one of the shooters (the one who pointed a gun in his face) had a sloping haircut and a gold "grill" (gold teeth). The victim's trial testimony about the gun that he saw also became more specific at trial—he told the officers at the scene only that he had seen a gun, but at trial he testified that it was a 9mm, which happened to correspond to the testimony of the state's ballistics expert.

During oral argument for *Smith v. Cain*, the Court was incredulous when the state's attorney attempted to argue that the victim's initial statement to the police was not "material." Justice Ginsberg asked, "But how could it not be material? Here is the only eyewitness . . . , and we have inconsistent statements. Are you really urging that the prior statements were immaterial?" Transcript of Oral Argument at 29, *Smith v. Cain*, 132 S.Ct. 627 (2012) (No. 10-8145), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-8145.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-8145.pdf). Justice Kennedy also expressed surprise at the state's position: "And you say that's immaterial. I find that just incredible." *Id.* at 33. Justice Scalia added to the pile-on: "[M]ay I suggest that . . . you stop fighting as to whether it should be turned over? Of course, it should have been turned over. I think the case you're making is that it wouldn't have made a difference." *Id.* at 51-52. Justice Breyer commented that the report was facially exculpatory, and Justice Kagan pointedly asked the lawyer if her office had ever considered conceding the point. Justice Sotomayor commented that *Brady* has two distinct components: "Should they [the reports] have been turned over? And if they had, is there a reasonable probability of a different outcome?" *Id.* at 46. Justice Kennedy emphasized this point when he stated: "I think you mis-spoke when you . . . were asked what is the test for when Brady material must be turned over. And you said whether or not there's a reasonable probability . . . that the result would have been different. That's the test for when there has been a *Brady* violation. You don't determine your *Brady* obligation by the test for the *Brady* violation. You're transposing two very different things." *Id.* at 49.

The Court reiterated the *Kyles* test of whether favorable information undisclosed and unknown to the defendant merits relief: would the undisclosed information have placed the case in such a different light as to undermine confidence in the outcome of trial? Ultimately, Louisiana was unable to convince the Court that the failure to disclose the material was not prejudicial, and the state lost this case 8-1. Like *Brady*, the exculpatory value of the undisclosed evidence was readily apparent— so much so that one might even say that a defense attorney who possessed such a report would be considered deficient for failing to use it when cross-examining the victim. But this still leaves an open question: if the test for *Brady* production differs from the test for *Brady* violation as Justices Sotomayor and Kennedy affirmatively stated, what is that preliminary test?

Cases like *Brady* and *Smith* provide some guidance to prosecutors tasked with reviewing the products of an investigation with a view towards disclosure, but that guidance is limited by its retrospective (if not omniscient) viewpoint. The Court in those cases had the benefit of an entire trial record by which they could comfortably make an educated guess about the probable effect of non-disclosure. It does not take a lot of creativity to imagine what a reasonably competent defense attorney would have done with the police reports in the *Smith* case: he would have cross-examined the victim extensively about both his prior claim that he could not identify the shooter and his failure to provide specifics about the gun, and the defense attorney would have emphatically argued to the jury that this one eyewitness to the events in question could not be trusted, given his shifting accounts. Regarding it as speculation as to which version a jury might believe, the majority declined to engage in the dissent's analysis that continued beyond the unremarkable conclusion that the undisclosed witness statement had impeachment value to the defendant. The dissent went on to assess in some detail the likely impact of the impeachment considering other evidence, including other statements the witness made close in time. What factors are properly considered in determining the materiality of undisclosed information present another question for another article, but the fact of post-trial litigation itself emphasizes the point that prosecutors are almost always better served dealing with information before or at trial, rather than afterwards.

At the pre-trial stage, assessing materiality is a greater challenge, and, as a consequence, some trial courts have conflated the approach that appears in the DOJ policy and ABA standards with the constitutional standard governing materiality under *Brady*. In *United States v. Mohamud*, 3:10-cr-475-KI (D. Or. Nov. 26, 2010), the district court recently adopted a pretrial disclosure standard under the auspices of *Brady* that encompassed all evidence “favorable to the defense.” See also *United States v. Phair*, No. CR 12-16RAJ (W. D. Wash. June 19, 2012) (requiring disclosure of all evidence favorable to the defense or likely to lead to favorable, admissible evidence); *United States v. Zinnel*, 2011 WL 5593109 (E.D. Cal. Nov. 16, 2011) (rejecting materiality as a factor governing disclosure obligation and concluding that prosecutor is obliged to turn over anything exculpatory or impeaching); *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005) (holding that prosecutor should not view his discovery obligation “through the end of the telescope” that an appellate court would use, but instead must disclose what is “favorable”); *Boyd v. United States*, 908 A.2d 39, 60 (D.C. Cir. 2006) (interpreting *Strickler v. Greene*, 527 U.S. 263, for the proposition that a prosecutor has a duty to disclose even when information turns out not to be material). While the *Strickler* Court refers to a “broad duty” of disclosure, it cites nothing in support of that proposition, and the Second Circuit vacated a district court order requiring disclosure of all impeaching and exculpatory information without regard to materiality. *United States v. Coppa*, 267 F.3d 132, 142-44 (2d Cir. 2001). The Department of Justice, as a matter of policy, requires a broad view of materiality (USAM 9-5.001), but our policy position should be viewed as just that—guidance designed to facilitate effective discharge of the constitutional obligation—and should not be confused or conflated with the obligation itself. This approach by some trial court judges may be a result of a judge's philosophy about discovery or an attempt to formulate a bright line rule intended to eliminate discovery disputes; yet such conflation does not reflect the constitutional rule or typify the prevailing practice. See, e.g., *United States v. Ruiz*, 536 U. S. 622, 629 (2002) (rejecting a defense claim to entitlement to impeachment material before entering a guilty plea, noting that “the Constitution does not require the prosecutor to share all useful information with the defendant”). In addition to the guidance set forth in the Ogden Memo, this article offers some tips that prosecutors should keep in mind when responding to overly broad and unduly burdensome discovery requests that range far beyond the scope of *Brady*, Rule 16, and the critical requirement of materiality:

1. The Defendant is responsible for establishing the materiality of his request by making a prima facie showing. See *United States v. Stevens*, 985 F.2d 1175, 1180 (2d Cir. 1993); *United States v.*

*Mandel*, 914 F.2d 1215, 1219 (9th Cir. 1990) (Rule 16); *United States v. Cadet*, 727 F.2d 1453, 1468 (9th Cir. 1984); *United States v. Messina*, 2011 WL 3471511, at \*2 (E.D.N.Y. Aug. 8, 2011); and *United States v. Pottorf*, 769 F. Supp. 1176, 1178-79 (D. Kan. 1991); see also *United States v. Gatewood*, 2012 WL 2286999, at \*2 (D. Ariz. June 18, 2012) (rejecting a defense request for social security numbers, addresses, and phone numbers of witnesses based upon absence of proof any of this information was material to the defense, noting that defendant has “no general right to unredacted discovery”). As a consequence, prosecutors should resist requests that are vague or seemingly disconnected from the issues in the case and demand that the requester explain his theory of how and why the documents he seeks are material. While the *Brady* disclosure requirement is self-executing for those bits of evidence that are readily recognized as exculpatory (for example, someone else confessed), by analogy to Rule 16 cases, some courts require a prima facie showing for everything else. See *United States v. Agurs*, 427 U.S. 97, 110 (1976); see, e.g., *United States v. Fiel*, 2010 WL 3291826, at \*2 (E.D. Va. Aug. 19, 2010) (rejecting defense requests that appeared in the form of interrogatories, noting that many of the requests were facially irrelevant). Thus if a prosecutor is pursuing an arson charge against a rancher and that defendant demands copies of every National Environmental Policy Act impact statement ever issued in the state for any prescribed burn permit, the prosecutor may and should demand an explanation for how and whether such documents bear any relevance to any claim or defense in the case. See, e.g., *United States v. Reese*, 2010 WL 2606280, at \*20-21 (N.D. Ohio June 25, 2010) (denying a *Brady* demand for ATF guidelines because defendant’s request was based on speculation and lacked a specific purpose); *United States v. Beard*, 2005 WL 3262545, at \*3 (E.D. Mich. Nov. 30, 2005) (holding that internal Project Safe Neighborhoods program guidelines were not material to preparing the defense under Rule 16 or to guilt or punishment under *Brady*). Courts have made clear that the *Brady* rule is not a lever to crack open the government’s files, and the judiciary has rejected defense discovery requests deemed to be “fishing expeditions,” “utter speculation,” or “shots in the dark.” *United States v. Marshall*, 532 F.2d 1279, 1285 (9th Cir. 1976); *United States v. Rodriguez-Rivera*, 473 F.3d 21, 26 (1st Cir. 2007); *United States v. Sloan*, 381 F. App’x. 606, 608-09 (7th Cir. 2010); see also *Gray v. Netherland*, 518 U.S. 152, 168 (1996) (“ ‘[T]here is no general constitutional right to discovery in a criminal case, and *Brady*,’ which addressed only exculpatory evidence, ‘did not create one.’ ”) (quoting *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)).

2. Defendants must be reasonably specific. Document requests must be “framed in sufficiently specific terms to show the government what it must produce.” *Marshall*, 532 F.2d at 1285 (quoting *United States v. Ross*, 511 F.2d 757, 763 (5th Cir. 1975)). When a defendant makes only a general demand for “all potentially exculpatory material,” the prosecutor properly decides what must be disclosed, and absent a more specific request, the prosecutor’s decision is final. *United States v. DeCologero*, 530 F.3d 36, 75 (1st Cir. 2008). The Supreme Court has recognized that the specificity of the defense request is relevant to an assessment of whether the prosecutor has an obligation to disclose the information. See *United States v. Bagley*, 473 U.S. 667, 680-83 (1985); *Agurs*, 427 U.S. at 103-08. If the defense fails to request information or if the request is general, the prosecutor is expected to produce evidence when the exculpatory nature of such evidence is “obvious.” “[W]hen the prosecution receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.” *Bagley*, 473 U.S. at 682 (quoting *Agurs*, 427 U.S. at 106). Specific requests give prosecutors notice of the value of certain items of evidence, and courts have observed that a defense attorney may reasonably assume that a prosecutor’s failure to respond to a specific request means that no such evidence exists. See *id.*

3. Be wary of the “star witness” designation. Nothing makes a witness more critical to a prosecution than undisclosed potential impeachment evidence. Prosecutors should (and generally do) handle obviously key or critical witnesses with particular care when it comes to gathering, reviewing, and producing evidence that may be relevant to impeach such witnesses. But not every witness on the

government's list is properly subject to such rigor, and courts have recognized this practical reality. *See, e.g., United States v. Blanco*, 392 F.3d 382, 387 (9th Cir. 2004) (observing that *Brady* encompasses impeachment information that undermines a "significant" witness). Once a judge or the facts of the case pin a star on a witness's lapel, however, our obligations are heightened. Consequently, it is important to resist the label when it really is not appropriate because the witness relates to a collateral point. Key factors in the determination of whether a witness has a starring or supporting role include whether the witness's testimony related to an element of the offense and whether that witness was the only witness who testified about an essential element of the offense. *Compare Smith v. Cain*, 132 S.Ct. at 630 ("[Witness's] testimony was the *only* evidence linking Smith to the crime. And [witness's] undisclosed statements directly contradict his testimony . . . ." (emphasis in original)), *with United States v. Bland*, 517 F.3d 930, 934 (7th Cir. 2008) ("[Witness's] testimony played such a small role in the trial that it was immaterial whether the jury might have discredited it based on evidence from the misconduct investigation.").

4. Be wary of the "thousand cuts." In contrast with most law enforcement, bank tellers, records custodians, and parish priests, just about every cooperating witness has baggage. Examining the bad stuff about a witness in isolation may lead to misjudgments about the total package. When an appellate court reviews the record on the back-end, it will view impeachment material about our star witnesses collectively. *See, e.g., United States v. Kohring*, 637 F.3d 895, 902 (9th Cir. 2011).

5. Consider submitting material to the district court for *ex parte* review. If your case agent was arrested in college 17 years ago for using his roommate's identification to get into a bar, or if a witness has an eight-year-old misdemeanor DUI, you should consider this option to avoid unnecessary embarrassment to your witnesses. Remote evidence that a defense attorney might be anxious to use, but which would be inadmissible for impeachment purposes, may be reviewed preliminarily by a trial court judge should there be any question about the need for disclosure. *See, e.g., United States v. Allen*, 416 F. App'x 875, 879 (11th Cir. 2011) ("The prosecutor may mark potential *Brady* material as a court exhibit and submit it to the court for an *in camera* inspection if its qualification as *Brady* material is debatable."); *United States v. Blackman*, 407 F. App'x 591, 596 (3d Cir. 2011) (affirming trial court's *ex parte* decision that certain information concerning local police officer witnesses, which the government had submitted "in an abundance of caution," need not be disclosed to defendants).

In addition to these practice tips, it will be important going forward to assure trial courts that we are fulfilling our legal and ethical obligations to provide relevant, material discovery to the defense. By complying with department policy, we should handily meet any prospective definition of materiality regardless of how the trial court defines that term. Meeting the more expansive standard should neither dilute the constitutional principle nor chill our ability to protect victims and witnesses. Materiality should mean that the item of evidence actually matters—that is, it relates to a real and important issue at trial, and its absence could well change the jury's view of the case. Cumulative evidence, impeachment evidence regarding collateral witnesses, and evidence that "might," but does not lead to evidence relevant to the development of a defense should never be considered *Brady* material simply because a defendant thinks it "might" be helpful to his case. But while the "cumulative" impeachment rule is alive and well, be attentive to information that provides a defendant with a new or different line of impeachment. *See, e.g., Gonzales v. Wong*, 667 F.3d 965, 684 (9th Cir. 2011) (noting that "impeachment evidence does not become immaterial merely because there is some other impeachment of the witness at trial. Where the withheld evidence opens up new avenues for impeachment, it can be argued that it is still material"); *United States v. Wilson*, 481 F.3d 475, 481 (7th Cir. 2007) ("evidence that provides a new basis for impeachment is not cumulative"). The bottom line is that our production should be consonant with basic fairness and consistent with the *Kyles* test for materiality. As Justice Kennedy observed during the oral

argument in *Smith*, there is a difference between an obligation for production of exculpatory or impeachment information and the determination of whether the failure to produce such evidence constitutes a *Brady* violation.

The latter formulation comes into play when an appellate court decides whether a defendant is entitled to any relief. By the same token, the different views do not and should not alter the basic premise that what falls within the definition of *Brady* evidence must be both material and exculpatory. Thus, before the charred remains of the hotel receipt that Poirot salvaged from the ashes of a fireplace may be deemed *Brady* material, the defense must reveal its reasoning and prove, in a substantive way, that the withheld evidence actually changes the landscape of the case. If prosecutors use their little gray cells and take the broad view of materiality urged by department policy, there should be no surprise endings.❖

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# Assessing Potential Impeachment Information Relating to Law Enforcement Witnesses: Life After the Candid Conversation

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## I. Introduction

I have noticed a trend. In the days following our district’s criminal discovery training of law enforcement agents on our obligation to produce potential impeachment information, the phone rings either on my desk or on the desk of another prosecutor in the office. A nervous agent is calling. He has heard the *Giglio* presentation. He now fears he has a *Giglio* issue and wants to talk in person. At the appointed date and time, the agent appears in my doorway. His eyes, his hands, and the sheen of sweat on his face betray his uncertainty and nervousness. Unlike most other encounters, the agent spends little time on casual chit-chat. He finally gets up the nerve to describe the event that he thinks might have marred his record, and waits for my diagnosis of how bad the problem is. Of course, being a lawyer, I am compelled to ask more questions, and being familiar with *Giglio* case law and the difficulty of predicting with much certainty how a particular judge would view the information, I know that there are many variables and few black and white answers. This fact makes both of us wring our hands a bit and wipe the sweat from our brows.

Of course, not all encounters (“candid conversations”) between federal prosecutors and agents about *Giglio* are this intense. However, because all *Giglio*-related encounters require multiple layers of analysis, the final decision about how we should handle potential impeachment information can be difficult. This article focuses on the analysis of potential impeachment information once it has been disclosed to the prosecutor, and not on USAM 9-5.100, known as “the *Giglio* policy,” which addresses agents’ obligation to disclose potential impeachment information to prosecutors and the mechanism by which prosecutors are able to make a formal request for potential impeachment information from Department of Justice and Treasury law enforcement agencies.

Truth be told, gathering, assessing, analyzing, and producing potential impeachment information relating to law enforcement witnesses is probably among the least favorite responsibilities that prosecutors and law enforcement agents must fulfill. This low popularity rating is due to a number of factors, including the negative impact that the *Giglio* conversation and the resulting disclosures can have on the professional working relationship between the prosecutor and agent-witness and the reputation and career of the agent-witness. The unpredictability of how the defense will try to use the information and how judges will permit the information to be used in court drag the popularity rating even lower.

## II. The impact of DOJ's discovery policy: USAM 9-5.001

The standard that prosecutors use to analyze potential impeachment information has shifted over the last six years. Historically, prosecutors looked to the case law that interpreted the Constitution to guide their decisions on what potential impeachment information should be disclosed to the defense. The prosecutor's decision whether to disclose potential impeachment information was tethered to the case law definition of materiality and the admissibility of the information under evidence law. When the Department of Justice issued USAM 9-5.001 in 2006, the new policy required prosecutors to disclose more impeachment information (and exculpatory information, but that is not the focus of this article) than the Constitution and case law required. This mandate was reinforced in the memoranda issued by Deputy Attorney General Ogden in January 2010. As the prosecutors across the country have applied this new broad disclosure requirement in practice over the last nearly six years, the angst and tension already felt by many prosecutors and agents has increased.

The reason for this angst is not because prosecutors and agents have a desire to conceal scandalous information that the defense would be entitled to use on cross-examination. The angst exists because USAM 9-5.001, which requires broad disclosure of discoverable information, frequently results in prosecutors providing information to the defense that may not be admissible to impeach, but that could damage the reputations and careers of agents. Compounding this situation is the knowledge that a prosecutor could find herself on the receiving end of an Office of Professional Responsibility investigation if she is accused of violating DOJ policy or the law.

The point of this article is this: DOJ's broad disclosure mandate is a valid and laudable recognition that it is difficult to assess the materiality of potential exculpatory and impeachment information before trial. However, it should not be interpreted as a mandate to ignore the Federal Rules of Evidence (FRE), the case law that defines proper impeachment, or approved methods of protecting information from disclosure or limiting access. Under the current DOJ mandate, in some cases prosecutors will find themselves in the position of making disclosures to the defense and then arguing that the information is not admissible and not the proper subject of cross-examination. We owe law enforcement witnesses careful assessment and well-reasoned advocacy every step of the way.

## III. The assessment of potential impeachment information

In every case, justice requires that we carefully assess potential impeachment information relating to our law enforcement agent-witnesses. The number of variables that must be considered can make the analysis quite complex and even messy. Case law reflects that the route that courts take to reach a decision regarding what is proper impeachment of law enforcement agent-witnesses is not always clear. Frequently, court decisions regarding what may be used to impeach a law enforcement agent-witness do not include a careful analysis of admissibility under the Federal Rules of Evidence. Reading between the lines, one could conclude that the courts allow far more latitude in the impeachment of law enforcement agent-witnesses because they hold law enforcement agent-witnesses to a higher standard. This higher standard is something we should expect.

With those towering cumulonimbus thunder clouds on the horizon, a prosecutor could be tempted to disclose all potential impeachment information relating to law enforcement witnesses to the defense and be done with it: no request for *ex parte* review, no motion *in limine* to exclude the information as inadmissible, and no request for a protective order to limit the circulation of sensitive information. The defense bar would probably applaud such an approach. Thankfully, not many prosecutors have adopted this approach, nor should they.



## A. Consider case-specific factors

Prosecutors should consider many things when evaluating potential impeachment information to determine whether it should be disclosed to the defense. After assessing the potential impeachment information itself (that is, the nature of the agent's misconduct or alleged misconduct, the reliability of the information that the misconduct actually occurred, and the past history of disclosures relating to the misconduct or alleged misconduct), the prosecutor should then review the potential impeachment information in the light of various case-specific factors. These case-specific factors include the charges pending against the defendant, the underlying facts, known or anticipated defenses, the law enforcement witness's role in the case, and the assigned judge's history for ruling on similar matters. Each of these factors and the nature of the misconduct or alleged misconduct itself is critical to assessing relevancy, admissibility, and disclosure issues. Misconduct or alleged misconduct could be admissible in one case and not another, depending on the witness's role, the anticipated defenses, the assigned judge's expectations and previous rulings, and other case-specific factors. Similarly, DOJ's broad disclosure policy may require a prosecutor to disclose misconduct information in one case, but not in another because the witness's role or the defense changed.

## B. Consider evidence law

With these case-specific factors in mind, we should then evaluate the potential impeachment information for relevance and admissibility. Is the information admissible or could it lead to admissible evidence? Unfortunately, time and space only permit the briefest overview of this critical area. It is important to note that because of the broad disclosure requirements of USAM 9-5.001 and the Ogden Memo, our analysis cannot end here. As will be discussed when we address the third stage of the analysis, DOJ policy recognizes the importance of admissibility and materiality in assessing information, but it requires more of prosecutors.

Simply put, not all agent misconduct is relevant for impeachment purposes. Most courts limit impeachment to matters relating to truthfulness and bias, many of which are addressed in the FRE:

- The witness is incompetent to testify because he or she does not understand the nature of the oath or the duty it imposes to tell the truth; the witness is not a first-hand witness to the events; or the witness has memory issues. *See* FED. R. EVID. 601, 602, and case law.
- The witness suffers from bias, prejudice, sympathy, interest, or corruption. *See United States v. Abel*, 469 U.S. 45, 52 (1984); *Davis v. Alaska*, 415 U.S. 308, 316 (1974).
- The witness has made prior inconsistent statements. *See* FED. R. EVID. 613.
- The witness has a prior conviction, especially crimes that have, as an element, proof of a dishonest act or statement. *See* FED. R. EVID. 609.
- The witness has engaged in acts suggesting untruthfulness. *See* FED. R. EVID. 404(a)(3) and 608(b).
- The witness has a reputation for untruthfulness, or someone has the opinion that the witness's character for truthfulness is bad. *See* FED. R. EVID. 608(a).

If the potential impeachment information fits into one of the accepted categories of impeachment, we should evaluate it for "relevance" as defined by FRE 401 and tempered by FRE 403: Does the potential impeachment evidence tend to prove something at issue in this case? That is, is it relevant to the credibility of a witness? Even if the court determines that the information is relevant,

under FRE 403, the court can exclude it “if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” FED. R. EVID. 403.

Arguably, when determining the relevance of particular misconduct for impeachment, the more removed in time and relationship to the pending case it is, the less probative force it would have, and the less relevant it would be. “[Rule 608(b)] does not require or imply that every negative bit of evidence existing concerning a witness may be dragged into a case no matter how remote or minor the alleged misconduct.” *United States v. Lafayette*, 983 F.2d 1102, 1106 (D.C. Cir. 1993). Does the act of dishonesty or untruthfulness relate to the pending case, or did it occur or allegedly occur in the context of another case, or day-to-day work of the law enforcement witness? How long ago did the misconduct occur — last month or ten years ago? See *United States v. Baldwin*, 2010 WL 4511102 (D.Colo. Nov. 2, 2010) (magistrate judge looked to Rules 404, 608, and 609 in determining whether any information in officer’s 10-year-old divorce case was *Brady* or *Giglio* material, and found that nothing within the file was a basis for material, admissible impeachment).

Not all false statements are relevant for impeachment purposes; otherwise, we may need to consider asking our agents about all the lies they told their mothers or their teachers in junior high school. As with any misconduct, the more removed in time and relationship the misconduct is, the more we should consider asking the court to exclude it from the case as being more prejudicial than probative under FRE 403. In assessing relevancy, courts have considered what the false statement was and the motivation behind the false statement. See *United States v. Alston*, 626 F.3d 397, 404 (8th Cir. 2010) (The court compared the motivation behind an alleged false statement to an officer’s supervisor in the past and the motivation behind an alleged fabrication of a complex confession by the defendant in the pending case, and stated, “The difference in motive is clear, and that difference lowers the probative value of the evidence. . . . In addition to having only limited probative value, the proffered cross-examination would have created a danger of unfair prejudice.”).

Two cases, among many, that discuss what factors a court should consider when determining whether a prior judicial finding of untruthfulness is admissible to impeach are *United States v. Cedeño*, 644 F.3d 79, 83 (2d Cir. 2011) (listing five factors in addition to those considered by the district court, including: whether the lie was under oath, whether the lie was about a significant matter, how much time had elapsed since the lie, the motivation for the lie, and whether the witness had offered an explanation for the lie), and *United States v. Dawson*, 425 F.3d 389, 396 (7th Cir. 2005), *on reh’g*, 434 F.3d 956, 959 (7th Cir. 2006) (asking whether a judge in another proceeding finding the witness not credible violated FRE 608(b)’s prohibition of “extrinsic evidence,” but pointing out that trial court retained authority to control cross-examination and could exercise discretion to preclude such questioning “when the witness had testified frequently and been disbelieved in only one case or where it was unclear whether and why the witness’s testimony had been rejected.”). In sum, prosecutors would do well to examine false statements and prior negative judicial credibility findings under FRE 403 for unfair prejudicial impact, and not just concede relevancy because the false statement or judicial finding appears on first blush to be permissible 608(b) impeachment.

More could be written about defense arguments and court sympathy to the idea that past misconduct by a law enforcement witness unrelated to truthfulness is “favorable to defense,” but time and space do not permit. See *United States v. Rubio-Lara*, 2011 WL 3502480 (N.D. Cal. Aug. 10, 2011).

### C. Consider the mandate of USAM 9-5.001

Finally, whether potential impeachment information is admissible or could lead to admissible evidence is important, but even when the answer is “no” to both questions, it is possible that we may have to disclose information to the defense because of DOJ’s broader disclosure requirement found in USAM 9-5.001. DOJ policy requires us to disclose information beyond that which courts have found material, that is, information that casts a substantial doubt on the accuracy of any evidence or that has a significant bearing on the admissibility of any evidence. Consider, for example, an agent-witness who was disciplined for coercion, excessive force, or abuse of authority in a previous investigation. The agent took a confession from the instant defendant who is now challenging the voluntariness of the confession. The misconduct information does not fit within any impeachment category listed above and will likely not be admissible under FRE 404(b), except in very limited circumstances. Nevertheless, it is the type of information that a prudent prosecutor, following the mandate of USAM 9-5.001, would be well-advised to submit to the court for *ex parte* review or provide to the defense and move the court to prohibit cross-examination.

### IV. Ex parte reviews, motions in limine, and protective orders

If prosecutors are required to make broad disclosures of potential impeachment information, does this mean that our analysis of evidence law in stage two is a waste of time? No. Disclosure is one thing, admissibility is another. We can use our analysis under evidence law to formulate and make our best argument to the court that either we should not be required to disclose the information to the defense at all, or that the court should not permit the defense to use the information to impeach the agent-witness. There will be times when a prosecutor should present sensitive information—particularly information relating to pending investigations of allegations of misconduct—to the court for review and, if the court orders the disclosure of the information, should seek a protective order limiting the use and circulation of the information. The more complex the analysis, and the more we wrestle with the admissibility of particular potential impeachment information or whether we should disclose a particular piece of potential impeachment information to the defense, the more likely it is that the prudent course of action is to provide the information to the court for an *ex parte* review, at the very least, or to provide it to both the court and defense counsel, and then argue against its admissibility.

Although our obligation to disclose impeachment information trumps an agent-witness’s privacy rights in cases involving substantiated and relevant credibility or bias findings, the reputation and privacy of an agent is a countervailing factor that should be considered when an investigation of alleged misconduct of a law enforcement witness is not yet complete. It is entirely possible that the investigation will be resolved in favor of the agent. If, however, information about the pending investigation is disclosed to the defense before the conclusion of the investigation, that agent’s reputation will have suffered. If you live in a district or circuit that permits cross-examination for bias if a law enforcement witness is under investigation, you should consider submitting the information to the court and asking the court to limit the information that you are required to disclose to the defense. In *United States v. Wilson*, 605 F.3d 985, 1006 (D.C. Cir. 2010), the district court limited cross-examination of a police officer who was the subject of a pending investigation, recognizing that “the prejudice to this officer given the uncertainty of the [allegations] is quite high, [and] the prejudice to her career is quite high.” *See also* FED. R. EVID. 403; FED. R. CRIM. P. 16(d). Although the redactions in *Wilson* make the case a bit difficult to fully understand, one principle that can be gleaned from it is that the court recognized the serious damage that could be done by providing too much information about a pending matter. *See also United States v. Novaton*, 271 F.3d 968, 1004-07 (11th Cir. 2001) (excluding cross-examination of officer’s

involvement in prior complaint because it was unproven and pending, and thus would be substantially more prejudicial than probative).

## V. Conclusion

DOJ's mandate to provide broad and early discovery is a recognition that the identification of potential impeachment (and exculpatory) information, and the decision about what to disclose, can be quite complex. There is great peril if we attempt to navigate these waters without consulting with our supervisors and other prosecutors who are experts in *Brady/Giglio* and evidence law when we encounter difficult situations. There is even greater peril in attempting to serve as both the prosecutor and the judge. In the end, we do justice by engaging in careful, informed analysis and making appropriate, measured disclosures of potential impeachment information relating to our law enforcement witnesses. ❖

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*With thanks to my colleagues and friends, Stew Walz and Dan Gillogly, for their invaluable input.*

# Federal Rule of Evidence 806 and its Discovery Obligations

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The scene: the United States Attorney's Office. Present: a two-person trial team preparing for trial in a narcotics distribution case. The conversation goes like this:

*John Senior: That cooperating co-defendant we have in this case surely has a lot of Giglio baggage. Every person who knows him thinks he is a liar sufficient to rival Jim Carrey in that movie. He has two perjury convictions along with his drug convictions, not to mention all the fibs he told about his scholastic and job history. But those statements that he made when he and our defendant, who is going to trial, were out selling the dope are great. We have to get those in. Lucky for us, all of those statements were made while his buddy was present. We can call the buddy because co-conspirator declarations can be related by someone other than the declarant. If we don't call the cooperator, we don't have to disclose all of the impeaching material on the cooperator, just the stuff on the buddy, who is relatively clean.*

*Jill Junior: Not so fast, John. I just returned from a great evidence class at the National Advocacy Center, and the instructors talked about Rule 806. If I heard them correctly, I think we have to turn over all of the impeaching material on the cooperator if we plan on introducing his statements under 801(d)(2)(E). I think according to Rule 806 he is subject to impeachment just as if he took the stand.*

*John: Really? I have never read past Rule 804. Let's see what Rule 806 has to say.*

**Rule 806. Attacking and Supporting Credibility of Declarant.** When a hearsay statement – or a statement described in Rule 801(d)(2)(C), (D), or (E) – has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

FED. R. EVID. 806.

*John: I guess we better rethink our strategy. I think the cooperator would be an ideal witness for you to cut your teeth on in your first trial.*

In the discovery context, the important point for prosecutors to remember is that Rule 806 expands the government's *Brady/Giglio* obligation because impeaching information of the hearsay declarant must be disclosed. *United States v. Jackson*, 345 F.3d 59, 71 (2d Cir. 2003). The source of the obligation is the due process clause and the prosecutor's obligation to disclose *Brady/Giglio* information. *United States v. Shyne*, 617 F.3d 103, 107-08 (2d Cir. 2010). But, the declarant is not a witness for

purposes of the Jencks Act, so Rule 806 does not mandate disclosure of the declarant's Jencks statements. *Id.*; *United States v. Williams-Davis*, 90 F.3d 490, 513 (D.C. Cir. 1996).

As indicated in the trial team's conversation above, Rule 806 will be most frequently applied in situations where the United States introduces a co-conspirator declaration of a non-testifying declarant through another witness. However, that will certainly not be the only situation that will trigger application of the Rule. Admissions by a defendant's representative, for example, a tax defendant's accountant to the Internal Revenue Service, or a businessman's salesman, may bring the Rule into play. The introduction of hearsay statements by a non-testifying declarant in the form of excited utterances, present sense impressions, or statements for the purpose of medical diagnosis or treatment, will also call for application of the Rule. Thus, in order for a prosecutor to comply with the discovery obligation engendered by the Rule, he or she must undertake careful analysis of out-of-court statements the government may offer at trial.

Because the Rule provides that the non-testifying declarant may be impeached just as if he testified at trial, all available methods of impeachment that would exist if the declarant had testified are available to the adverse party. A slightly modified list of Irving Younger's methods of impeachment is helpful in categorizing impeaching information that may need to be disclosed to the defendant:

- Defects in first hand knowledge, generally perception (Rule 602)
- The inability to testify truthfully (Rule 603)
- Defects in memory
- The inability to communicate
- The declarant is biased, prejudiced, has an interest in the case, or is corrupt
- The declarant has been convicted of certain crimes (Rule 609)
- The declarant has made statements that are inconsistent with the hearsay declaration
- The declarant has committed acts that adversely affect his character for truthfulness
- The witness has a bad character for truthfulness (Rule 608(a))

Additionally, any evidence that contradicts the declarant's statements must also be turned over. *See also United States v. King*, 73 F.3d 1564, 1571 (11th Cir. 1996). It is likely that such contradictory evidence should be disclosed under *Brady* anyway as it frequently will counter an important aspect of the government's case.

Department of Justice guidance for prosecutors, as set forth in the Memorandum from Deputy Attorney General Ogden, gives a more specific list of potentially impeaching material. Memorandum from Deputy Attorney General David Ogden, "Guidance for Prosecutors Regarding Criminal Discovery" (Jan. 4, 2010), *available at* [http://dojnet.doj.gov/usao/eousa/ole/usabook/memo/ogden\\_memo.pdf](http://dojnet.doj.gov/usao/eousa/ole/usabook/memo/ogden_memo.pdf) (Ogden Memo). Given that the Department's discovery policy as set forth in section 9-5.001 of the United States Attorneys' Manual, *available at* [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/5mcrm.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm), requires broader disclosure than that required by *Brady* and *Giglio*, prosecutors should take an expansive view in deciding what material should be disclosed under Rule 806.

The potential impact of mishandling Rule 806 is illustrated in *United States v. Moody*, 903 F.2d 321, 327-30 (5th Cir. 1990), where the defendant was not allowed to introduce adverse character evidence pertaining to two fugitives whose statements were introduced as declarations of co-conspirators. The court held it was reversible error to prohibit the proffered impeachment, saying the trial judge "harbored the misconception, reinforced by the government, that hearsay declarants cannot be impeached if they fail to testify at trial." *Id.* at 328. In fact, the circuit court was "dismay[ed]" that the United States failed to acknowledge the applicability of Rule 806 to the case. *Id.* at 329.

It is important to remember that even if the declarant is available for the other side to call, it is the introduction of a statement described in Rule 806 that triggers the ability to impeach, and therefore the government's disclosure obligation. In *United States v. Wali*, 860 F.2d 588, 591 (3d Cir. 1988), the government argued, unsuccessfully, that because the defendant did not seek to depose the hearsay declarant, he should not be permitted to utilize Rule 806 to impeach the declarant.

For the opposing party to utilize Rule 806 to admit impeaching evidence, the credibility of the declarant must be in issue: that is, the declarant's statement must be offered for the truth of the matter asserted. For example, in *United States v. Becerra*, 992 F.2d 960, 965 (9th Cir. 1993), the statement of an informant to a law enforcement officer was not offered for the truth, but rather to provide the basis for the officer's and the defendant's conversation about cocaine; therefore, Rule 806 was not available to impeach the informant. Similarly, in *United States v. Zagari*, 111 F.3d 307, 317-18 (2d Cir. 1997), a declarant's statements were introduced for the effect on the defendants' scienter, not for their truth, so Rule 806 did not apply. *See also, United States v. Paulino*, 445 F.3d 211, 217 (2d Cir. 2006); *United States v. Stefonek*, 179 F.3d 1030, 1036-37 (7th Cir. 1999). Accordingly, if the statement is not offered for the truth, there is no obligation to disclose impeaching material about the declarant because his credibility is not an issue in the trial. Of course, the credibility of the witness relating the statement is at issue, and any impeaching material about that witness must be disclosed. (As a practice tip, when the prosecution introduces a statement of an absent declarant for a non-hearsay purpose, it is good practice to request a limiting instruction to that effect. That will prevent the defense from utilizing Rule 806. This was not done in *United States v. Burton*, 937 F.2d 324, 327-28 (7th Cir. 1991). *See also Zagari*, 111 F.3d 307).

Strategic decisions on whether to call the impeachable witness will impact the government's discovery obligations. As seen in the conversation reported above, the trial team's conundrum is whether to call the cooperator and suffer through extensive impeaching cross examination, or not call him and suffer through impeachment but not cross examination. Because the cooperator has a cooperation agreement, if he testifies he will be subject to bias cross examination on the agreement. Therefore, the agreement and his benefits thereunder must be disclosed. On the other hand, if the cooperator is not called and his coconspirator declarations are admitted through another witness, the cooperator's arrangement with the government should not need to be disclosed because his later acquired bias could not have influenced the truth of the statement he made in furtherance of the conspiracy.

Rule 806 does not make admissible the evidence that is excluded by another rule; the rules that govern impeachment still apply. *United States v. Finley*, 934 F.2d 837, 839 (7th Cir. 1991). In order to use prior convictions to impeach, the requirements of Rule 609 must be met. For example, generally more than 10 years must not have elapsed from the date of the conviction or the release from imprisonment for it to be used to impeach the declarant. *See* FED. R. EVID. 609(b). Or, if the impeaching party wants to utilize a witness to say the declarant has a bad character for truthfulness, the witness must testify in the form of an opinion or about the declarant's reputation; testimony about specific instances of conduct would not be permissible. *See* FED. R. EVID. 405(a). However, given that Department policy mandates that "information that casts a substantial doubt upon the accuracy of any evidence" be disclosed, a prosecutor should give serious consideration to disclosing material that may not be in "admissible form," and then argue that it is inadmissible at the appropriate time. *See* Dep't of Justice, UNITED STATES ATTORNEYS' MANUAL 9-5.001(C)(2) (2008), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/5mcrm.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm).

The statement offered under Rule 806 must be for impeachment and not for the truth of the statement. Where the probative value of the purported impeaching statement actually is dependent upon its truth, Rule 806 is inapposite. In *United States v. Dent*, 984 F.2d 1453, 1460 (7th Cir. 1993), *abrogated*

on other grounds, *United States v. Gilbert*, 391 F.3d 882 (7th Cir. 2004), the district court prevented the use of Rule 806 when it found that the defendant really wanted to use a statement to his lawyer that was contrary to his state court guilty plea as substantive evidence of innocence and not to “impeach” his plea. In *United States v. Maliszewski*, 161 F.3d 992, 1011 (6th Cir. 1998), one defendant wanted to introduce another defendant’s statement to prove who picked up a package of drugs. Since the statement was offered against the United States, it could not be admitted as a declaration of a co-conspirator, and because it was really being offered as substantive rather than impeaching evidence, Rule 806 was of no help to the defendant. Once again, however, even if Rule 806 does not provide for use of the information at trial, information such as described in these two cases would be favorable to the defense under *Brady*.

As mentioned, Rule 806 allows for impeachment in any recognized manner. Some are relatively straightforward, such as evidence of a lack of knowledge or impeachment by conviction. Two bear special mention because they pose wrinkles in the discovery arena.

Rule 806 poses an interesting impeachment conundrum relative to Rule 608(b), which allows for impeachment through cross examination about acts that adversely affect the declarant’s character for truthfulness. How does a defendant impeach a non-testifying hearsay declarant under Rule 608(b) where instances of dishonesty may be inquired into on cross-examination but no extrinsic evidence is allowed? In *United States v. Saada*, 212 F.3d 210, 221 (3d Cir. 2000) and *United States v. White*, 116 F.3d 903, 920 (D.C. Cir. 1997), the courts indicated that a witness could be asked if he knew of the prior misconduct of the declarant, but no extrinsic evidence could be introduced. The court in *United States v. Friedman*, 854 F.2d 535, 570 n.8 (2d Cir. 1988), stated that “resort to extrinsic evidence may be the only means of presenting such evidence to the jury.” The point relevant to this article is that acts that may be inquired of under Rule 608(b) must be disclosed even though the impeaching party will not be able to introduce them in the normal way, through cross examination.

The second issue bearing further discussion is the impeachment through prior inconsistent statements under Rule 613. Deciding if the declarant has been inconsistent in his declarations is a fact intensive question. Statements are inconsistent “when two statements, one made at trial and one made previously, are irreconcilably at odds.” *United States v. Winchenbach*, 197 F.3d 548, 558 (1st Cir. 1999). A broader definition of inconsistency is found in *United States v. Barile*, 286 F.3d 749, 755 (4th Cir. 2002) (quoting *United States v. Gravely*, 840 F.2d 1156, 1163 (4th Cir.1988)): “A prior statement is inconsistent if it, ‘taken as a whole, whether by what it says or what it omits to say affords some indication that the fact was different from the testimony of the witness whom it sought to contradict.’ “ Omissions in a prior statement are inconsistent “if it would have been ‘natural’ for the witness to include details in the earlier statement.” *United States v. Meserve*, 271 F.3d 314, 320-21 (1st Cir. 2001).

The “statements need not be diametrically opposed to be inconsistent.” *United States v. Denetclaw*, 96 F.3d 454, 458 (10th Cir. 1996) (quoting *United States v. Agajanian*, 852 F.2d 56, 58 (2d Cir.1988)). As the Supreme Court said in *Jencks v. United States*, 353 U.S. 657, 667 (1957):

Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness’ testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness’ trial testimony.

The courts have discretion to determine if a prior statement is in fact inconsistent. (The cases cited in this paragraph both arose in the Rule 806 context). In *United States v. Avants*, 367 F.3d 433, 447-48 (5th Cir. 2004), the statement of a deceased witness, whose preliminary hearing testimony was read at



trial, when questioned by the FBI, said that he knew nothing of the murder and would discuss the matter only in the presence of his attorney. This was determined not to be plainly inconsistent. The trial court took the statement to mean that he, the witness, did not wish to talk to the agents. In *United States v. Houlihan*, 92 F.3d 1271, 1284 (1st Cir. 1996) (quoting *United States v. Houlihan*, 887 F.Supp. 352, 368 (D. Mass. 1995)), the trial court ruling, affirmed by the First Circuit, was that portions of a deceased victim/witness' interviews were "too convoluted, collateral, or cumulative to be admitted."

On the other hand, some courts have held that the government may not limit impeachment under Rule 806 by limiting the direct examination so the testimony is not literally contradicted by a prior statement. In *United States v. Wali*, 860 F.2d 588, 591 (3d Cir. 1988), a conviction was reversed because the government introduced a co-conspirator's statements establishing the existence of a conspiracy to import drugs. Even though the statements did not say that the defendant was the same person as one named in the conspiracy, the impeaching statements that the defendant was not involved in drug dealing were inconsistent with the 801(d)(2)(E) statements and should have been admitted. In *United States v. Grant*, 256 F.3d 1146, 1154 (11th Cir. 2001) the court stated, "The test is whether the out-of-court statement would have been admissible for impeachment purposes had the co-conspirator statements been delivered from the witness stand by the co-conspirator himself, not as hearsay about what he said during the conspiracy but as contemporaneous in-court statements." There the facts are similar to those in *Wali*. The government introduced a co-conspirator's statements that, among other things, he had a partner in Jamaica. The defense lawyer obtained an affidavit from the conspirator that he had no partner and that he had lied about other statements about the defendant. The court held these statements were inconsistent with the evidence the government introduced, even though the government had not elicited testimony on direct examination that the defendant was the partner. It seems that the courts may allow impeaching evidence that is contrary to the government's theory of participation by the defendant even if the testimony and the alleged inconsistent statement are not precisely at odds. Perhaps in a Rule 806 context, because the declarant is not on the stand and the opponent cannot conduct a full cross-examination, courts will give greater latitude to the definition of inconsistency. Thus, under the Department's expansive view of our discovery obligation, evidence at odds with the *spirit* of the hearsay statement, even if not its *letter*, should be disclosed. Whether it is admissible under Rule 806 can be argued after disclosure.

As you can see, interesting questions arise when a rule that governs the admissibility of evidence creates a disclosure obligation that is narrower than the Department's discovery policy. Thorough knowledge of the substance and relevance of the out-of-court statements to be offered is the starting point, followed by analysis of the potential impeaching information pertaining to the declarant and the information that contradicts the statement. Then a prosecutor can determine whether Rule 806, with its inherent disclosure obligation, and the Department's disclosure policies, require providing discovery to the defense.❖

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# Avoiding a State of Paralysis: Limits on the Scope of the Prosecution Team for Purposes of Criminal Discovery

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## I. Introduction

In all criminal cases, the scope of a federal prosecutor's discovery obligations depends in part on the scope of the "prosecution team," that is, those individuals and agencies who are so closely aligned with the prosecution that documents and data in their possession are "in the possession, custody, or control" of the government for purposes of discovery. In many cases, determining the scope of the prosecution team is easy. For example, the prosecution team includes the law enforcement officer who investigated the government's case. *See Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006). On the other hand, the prosecution team generally does not include private organizations. *See United States v. Lekhtman*, 2009 WL 5095379, at \*7 (E.D.N.Y. Dec. 15, 2009).

Determining the scope of the prosecution team can be more challenging in cases involving parallel criminal and civil regulatory proceedings or those involving federal investigative agencies with separate civil arms. In recent years, defense counsel have made efforts to expand the definition of the prosecution team and require prosecutors to disclose information from an ever-increasing array of federal agencies. *See, e.g.,* Audrey Strauss, "Brady" *Obligation Extends Beyond Prosecutor's Office*, N.Y. L.J., (Nov. 5, 2009); Daniel L. Zelenko, *Responding to the Ogden Memo: New Challenges and Opportunities for Defense Attorneys*, 2011 WL 190334, at \*1-7 (ASTAPORE Jan. 2011); Per Ramfjord, *DOJ's New Discovery Policies: Will They Make a Difference?*, 2011 WL 190333, at \*1-12 (ASTAPORE Jan. 2011). This article focuses on the limits courts have placed on which agencies qualify as members of the prosecution team whose files must be reviewed for potential discovery materials.

It is well established that "[t]he government has no affirmative duty to take action to discover information which it does not possess," *United States v. Jones*, 34 F.3d 569, 599 (8th Cir. 1994) (quoting *United States v. Tierney*, 947 F.2d 854, 864 (8th Cir. 1991)), and a significant body of case law limits the reach of the government's "possession, custody, or control" of information. The January 4, 2010 Memorandum from Deputy Attorney General David W. Ogden, "Guidance for Prosecutors Regarding Criminal Discovery," available at [http://dojnet.doj.gov/usao/eousa/ole/usabook/memo/ogden\\_memo.pdf](http://dojnet.doj.gov/usao/eousa/ole/usabook/memo/ogden_memo.pdf) (Ogden Memo), sets forth factors for use in determining whether a particular federal agency qualifies as part of the prosecution team and closely tracks this case law. Careful consideration of the factors set forth in the Ogden Memo during the investigative stage of a criminal case should enable prosecutors to avoid having to scour the files of a host of agencies as part of their disclosure obligations.

## II. Rules and guidance for identifying members of the “prosecution team”

A federal prosecutor’s disclosure obligations arise from a number of sources, including the Federal Rules of Criminal Procedure, the Jencks Act (18 U.S.C. § 3500), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). Federal Rule of Criminal Procedure 16(a)(1)(E) requires prosecutors to disclose specific items including documents and data “within the government’s possession, custody, or control” where:

- (i) the item is material to preparing the defense;
- (ii) the government intends to use the item in its case-in-chief at trial; or
- (iii) the item was obtained from or belongs to the defendant.

FED. R. CRIM. P. 16(a)(1)(E).

Pursuant to *Brady*, the prosecutor has a Constitutional duty to produce “evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment . . .” 373 U.S. at 87. “Impeachment evidence, . . . as well as exculpatory evidence, falls within the *Brady* rule.” *United States v. Bagley*, 473 U.S. 667, 676 (1985) (citing *Giglio*, 405 U.S. at 154). Department of Justice policies require even broader disclosures than the Constitution. United States Attorneys’ Manual (USAM) 9-5.001 and 9-5.100. In order to fulfill a prosecutor’s disclosure obligations, “the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf in the case, including the police.” *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

This determination can be particularly difficult in cases involving parallel criminal and civil proceedings or multiple federal agencies. The Ogden Memo sets forth factors to consider in determining whether a federal agency qualifies as part of the prosecution team whose materials should be reviewed for potential disclosure:

- Whether the prosecutor and the agency conducted a joint investigation or shared resources related to investigating the case;
- 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 part of the prosecution team;
- Whether the prosecutor knows of and has access to discoverable information held by the agency;
- Whether the prosecutor has obtained other information and/or evidence from the agency;
- The degree to which information gathered by the prosecutor has been shared with the agency;
- Whether a member of an agency has been made a Special Assistant United States Attorney;
- The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges; and
- 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.

Although every case must be evaluated on its facts, the guidance set forth in the Ogden Memo is consistent with the reasonable limits most courts place on the scope of the prosecution team whose files the prosecutor must review for possible disclosure under *Brady*, *Giglio*, Rule 16, or the Jencks Act.

### **III. The government's obligation to review and disclose evidence from federal agency files is limited to members of the "prosecution team"**

Federal courts have long recognized that "the imposition of an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor's office on the case in question would inappropriately require [courts] to adopt a monolithic view of government that would condemn the prosecution of criminal cases to a state of paralysis." *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) (quoting *United States v. Gambino*, 835 F.Supp. 74, 95 (E.D.N.Y.1993)); see also, e.g., *United States v. Pelullo*, 399 F.3d 197, 217 (3d Cir. 2005); *United States v. Beers*, 189 F.3d 1297, 1304 (10th Cir. 1999). For this reason, prosecutors are not obligated to search for exculpatory evidence in other government offices or agencies that, while tangentially associated with a matter, are not working together with the government in the investigation and prosecution of the criminal case. See, e.g., *Pelullo*, 399 F.3d at 216-19 (district court erred in concluding that government's *Brady* obligation extended to documents in the possession of a civil division of the United States Department of Labor (DOL), even though criminal case utilized criminal agents from DOL; under the facts and circumstances of the case, civil arm of agency was not part of "prosecution team"); *United States v. Morris*, 80 F.3d 1151, 1169-70 (7th Cir. 1996) (district court properly concluded that *Brady* did not require the government to seek out potentially exculpatory information in hands of IRS and other federal agencies because they were not "part of the team that investigated this case or participated in its prosecution").

Although "*Brady* and its progeny have recognized a duty on the part of the prosecutor to disclose material evidence that is favorable to the defendant over which the prosecution team has control," courts also recognize that "*Brady* clearly does not impose an affirmative duty upon the government to take action to discover information it does not possess." *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007) (holding no *Brady* violation where government's cooperating witness failed to disclose potentially exculpatory evidence until three weeks into trial) (internal quotation marks and citation omitted). Thus, *Brady*'s progeny "cannot be read as imposing a duty upon the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue." *Pelullo*, 399 F.3d at 216.

In determining whether documents and data are within the government's possession, custody, or control, courts "have typically required the prosecution to disclose under Rule 16 documents material to the defense that: (1) it has actually reviewed, or (2) are in the possession, custody, or control of a government agency so closely aligned with the prosecution so as to be considered part of the prosecution team." *United States v. Finnerty*, 411 F. Supp. 2d 428, 432-33 (S.D.N.Y. 2006) (collecting cases). In determining whether an agency is so closely aligned as to be part of the prosecution team, courts examine whether the investigation and prosecution of the alleged offenses was a jointly-undertaken endeavor between the prosecution and the entity at issue. See, e.g., *id.*; *United States v. Brodnik*, 710 F. Supp. 2d 526, 544-45 (S.D. W. Va. 2010). Although the government's disclosure obligations arise from both Rule 16 and *Brady*, courts disagree with respect to whether the scope of the prosecution team differs for purposes of these two rules. Compare *United States v. Chalmers*, 410 F. Supp. 2d 278, 289 (S.D.N.Y. 2006) ("[T]he Court is not persuaded that the 'government' for purposes of Rule 16 should be any broader than the 'prosecution team' standard that has been adopted in the *Brady* line of cases."), with *United States v. Norris*, 753 F. Supp. 2d 492, 530 n.21 (E.D. Pa. 2010), *aff'd* 419 F. App'x. 190 (2011),

*cert. denied*, 132 S.Ct. 250 (2011) (doubting that the “constructive possession” aspect of “possession of the government” that applies as to *Brady* applies to Rule 16).

For example, in a criminal tax case, “[o]nly the criminal investigation side of the IRS involved in th[e] investigation is the government . . . ; the vast administrative arm of the IRS, i.e., ordinary tax collection, is not.” *United States v. Zinnel*, 2011 WL 5593109, at \*3 (E.D. Cal. Nov. 16, 2011) (*request for reconsideration granted on other grounds*, 2011 WL 6825684 (E.D. Cal. Dec. 28, 2011)). This is because “when the prosecution desires to obtain tax files for a criminal investigation, it does not simply ‘access’ the files, but must petition the court demonstrating precise criteria before any access is permitted.” *Id.* (citing 26 U.S.C. § 6103 (i)). Therefore, unless the tax information has already been disclosed to the prosecutor or the Criminal Investigation Division of the IRS, materials in the possession of the civil side of the IRS are not subject to disclosure. *See id.*; *see also United States v. Bibby*, 752 F.2d 1116, 1124-25 (6th Cir. 1985) (prosecutor in tax case was not obligated under *Brady* or *Giglio* to obtain the IRS’s civil audit file on one of its witnesses); *United States v. Landron-Class*, 714 F. Supp. 2d 278, 282-83 (D.P.R. 2010) (rejecting defendant’s request that government be compelled to obtain additional tax returns not in its possession because the tax returns “would not fall under the government’s duty to produce” and would be cumulative of other evidence to be introduced at trial); *United States v. Dawes*, 1990 WL 171074, at \*3 (D. Kan. Oct. 15, 1990) (collecting IRS cases regarding obligation to disclose witness tax returns in prosecution’s possession). *But see United States v. Prokop*, 2012 WL 2375001, at \*2 (D. Nev. June 22, 2012) (ordering production of 4,487 tax files held to be in government’s possession, custody, and control in tax fraud case where prosecution represented that Criminal and Civil Investigation Divisions of IRS participated in the investigation).

Indeed, courts generally hold that agencies that must be “subjected to formal processes to obtain information” are not within the control of the government for purposes of the government’s disclosure obligations. *See United States v. Salyer*, 271 F.R.D. 148, 156 (E.D. Cal. 2010) (declining defendant’s request to treat United States Trustee, Office of Inspector General, and all other agencies of the United States as part of prosecution team, and noting that “[t]he prosecution does not become the FOIA (Freedom of Information Act) agent for the defense”). “The need for formal process in the acquisition of documents is the antithesis of ‘access’ as defined by the [case law].” *Id.*; *see also Zinnel*, 2011 WL 5593109, at \*3 (“The requirement to obtain an order before access of tax records is authorized stands as the antithesis of constructive possession.”) (citing *United States v. Lochmondy*, 890 F.2d 817, 823 (6th Cir. 1989)).

Similarly, the contention that the participation of one arm of a federal agency in a criminal prosecution automatically makes the entire agency part of the prosecution team was considered and rejected by the Third Circuit in *Pelullo*, 399 F.3d at 210. In *Pelullo*, one arm of the DOL, the Labor Racketeering Office, had agents participating in a criminal investigation of a defendant’s actions with respect to an employee benefit plan. *Id.* at 209. Simultaneously, a separate civil arm of the DOL, the Pension and Welfare Benefits Administration (PWBA), was monitoring a civil case to which the defendant was a party and that involved the same employee benefit plan. *Id.* The PWBA had collected documents exchanged by the litigants in the civil matter, *id.*, and the defendant argued that the government’s *Brady* obligation extended to the content of the documents possessed by the PWBA. *Id.* at 216.

The Third Circuit reversed the district court and held that the PWBA was not part of the prosecution team and thus the PWBA documents were not subject to disclosure under *Brady*. *Id.* at 216-19. The court reviewed authority from a variety of jurisdictions establishing the general principle that “the prosecution is only obligated to disclose information known to others acting on the government’s

behalf in a particular case.” *Id.* at 218. Applying that principle to the PWBA documents, the Third Circuit held that the PWBA was not part of the prosecution team for discovery purposes:

There is no indication that the prosecution and PWBA engaged in a joint investigation or otherwise shared labor and resources. Nor is there any indication that the prosecution had any sort of control over the PWBA officials who were collecting documents. And Pelullo’s arguments to the contrary notwithstanding, that other agents in the DOL participated in this investigation does not mean that the entire DOL is properly considered part of the prosecution team, even though it was known to investigators drawn from the same agency as the prosecution team. Likewise here, the PWBA civil investigators who possessed the documents at issue played no role in this criminal case.

*Id.* at 218 (internal citation and parenthetical omitted); *see also United States v. Merlino*, 349 F.3d 144, 155 (3d Cir. 2003) (holding that audio tapes of witness statements known to be in possession of Bureau of Prisons were not under the control of the prosecution because Bureau of Prisons was not involved in investigation or prosecution of defendants).

Finally, there is some indication in the case law that courts do not view favorably defense efforts to expand the prosecution team where such efforts “generate[] the aroma of a tactical maneuver.” *United States v. Labovitz*, 1997 WL 289732, at \*3 (D. Mass. May 30, 1997); *cf. United States v. Darwich*, 2011 WL 2518914, at \*1 (E.D. Mich. June 24, 2011) (denying defense pretrial motions for “a staggering degree of discovery”); *United States v. Wardell*, 2009 WL 1011316, at \*1 (D. Colo. Apr. 15, 2009) (denying defense discovery motion where “[n]othing other than defendant’s own completely unsubstantiated supposition supports a conclusion that the prosecutors in this case had possession of or access to” the requested materials).

In *Labovitz*, a bank fraud defendant sought disclosure of documents in the possession of the FDIC, which had taken over the victim bank. 1997 WL 289732, at \*1. The district court found that the prosecutors “lack[ed] the power to compel the FDIC to produce documents to anyone,” *id.* at \*3, and noted that “at least as regards FDIC documents, the defendant [had] received generous discovery and ha[d] not been prejudiced in any way.” *Id.* at \*6. The court denied the defendant’s motion, stating, “What, it seems, defendant does want to do is conduct a broad fishing expedition (to use this overworked metaphor) into the files of the FDIC in search of any document that might be considered ‘material’ in the broadest sense, despite any assertion of privilege.” *Id.* at \*4; *see also United States v. Cerna*, 633 F. Supp. 2d 1053, 1061 (N.D. Cal. 2009) (rejecting the assertion that *Brady* requires the government “to unearth from an agency, even an agency involved in the investigation, every random scrap of paper of possible defense use”). However, “Rule 16 does not permit this kind of rummaging even in the files of the Government itself.” *Labovitz*, 1997 WL 289732, at \*4.

#### **IV. Under limited circumstances, courts require review of agency files for discoverable information**

In general, courts appear more likely to order disclosure of documents and data in agency files if the agency has previously shared information related to the case with the prosecutor. For example, the district court in the *W.R. Grace* case ordered the government to search the files of myriad federal environmental agencies for evidence favorable to the defense. *United States v. W.R. Grace*, 401 F. Supp. 2d 1069, 1077-78 (D. Mont. 2005). In the court’s view, the Ninth Circuit had rejected the “prosecution team” concept, and instead held that “[t]he prosecution is in possession of information held by any government agency provided the prosecution has knowledge of and access to the information . . . regardless of whether the agency holding the information participated in the

investigation.” *Id.* at 1078 (citing *United States v. Santiago*, 46 F.3d 885, 894 (9th Cir. 1995) (holding government had “possession and control” of Bureau of Prisons files where defendant was charged with committing murder in a BOP facility and BOP “actually contributed to the investigation”)).

The court reasoned that the government had previously obtained information from each of the agencies at issue, stating, “It is insufficient for *Brady* purposes for the prosecution to produce only that information from other agencies that has found its way into the physical possession of the prosecutor. The prosecution may not simply ask for information it wants while leaving behind other, potentially exculpatory information within agency files.” *Id.* at 1079. Because the agencies previously provided requested information to the prosecution, exculpatory information in the agencies’ files was “within the prosecution’s ‘possession and control’ for *Brady* purposes,” and the government was required to review the agency’s files for evidence favorable to the defendants. *Id.* at 1079-80 (stating that “the government has levied a broad and complex Indictment and has consulted with a number of federal agencies in gathering evidence against the accused,” so the Constitution “requires that the prosecution’s search for evidence favorable to the accused be as far-reaching as the search for evidence against him”).

In the Seventh Circuit, “if a government agency is charged with the administration of a statute and has consulted with the prosecution in the case, the agency will be considered part of the prosecution and its knowledge of *Brady* material will be imputed to the prosecution.” *United States v. Bhutani*, 175 F.3d 572, 577 (7th Cir. 1999) (citing, *inter alia*, *United States v. Wood*, 57 F.3d 733, 737 (9th Cir. 1995) (“The government cannot with its right hand say it has nothing while its left hand holds what is of value.”)). Therefore, in a case in which the defendants were charged with offenses related to adulterated pharmaceuticals, information held by the FDA could be “imputed to the prosecution.” *Id.* (finding no *Brady* violation because the FDA data at issue “was not published until well after the trial had ended” and was therefore “not within the possession of the government”).

Finally, under some circumstances, courts order the production of specific, known documents from agency files and do not require prosecutors to search the agency’s entire file for potentially discoverable information. For example, in *United States v. Gupta*, 2012 WL 990830, at \*1 (S.D.N.Y. Mar. 26, 2012), the United States Attorney’s Office (USAO) criminally prosecuted a defendant for insider trading and the SEC brought a parallel civil enforcement action. *Id.* The USAO and the SEC conducted joint interviews of 44 witnesses, and the SEC separately conducted only two witness interviews. *Id.* On these facts, the court held that the prosecutor was required to “review the SEC’s memoranda and interview notes and disclose to defendant any ‘*Brady*’ material therein.” *Id.*

Similarly, in *United States v. Rigas*, 779 F. Supp. 2d 408, 414 (M.D. Pa. 2011), the court held that a prosecutor in the Middle District of Pennsylvania was required to turn over notes regarding the SEC’s interview with a particular witness. The court found that the SEC’s investigation was “jointly undertaken” with the USAO in the Southern District of New York and that the interview notes were readily accessible to the government. *Id.* at 414-15. Notably, the district court in the criminal case in the Southern District of New York had previously denied the defendant’s request for disclosure of notes of the SEC’s interviews, holding that the notes were not within the government’s “possession, custody, or control” because “there was no joint investigation with the SEC.” *United States v. Rigas*, 2008 WL 144824, at \*2 (S.D.N.Y. Jan. 15, 2008), *aff’d*, 583 F.3d 108, 125-26 (2d Cir. 2009).

Importantly, in both *Gupta* and the Middle District of Pennsylvania’s decision in *Rigas*, the prosecutor’s duty to review and disclose SEC material was limited to the specific documents the defendant requested and did not extend to the SEC’s entire file. The *Gupta* court noted that the prosecutor’s obligation was limited to reviewing the SEC’s interview notes because they were within the scope of the “joint investigation,” but pointed out that “[t]his does not mean that all of the documents the



SEC prepared and accumulated in its investigation of [the defendant] are part of the joint investigation.” 2012 WL 990830 at \*3; *see also Rigas*, 779 F. Supp. 2d at 414 (noting defendants “are seeking limited information from the SEC and are not asking that agency to open its entire file to them”).

## **V. Limitations on disclosure requirements within the “prosecution team”**

A determination that a particular federal agency or arm of a federal agency is part of the government’s prosecution team does not end the inquiry with respect to whether information in the agency’s files must be disclosed to the defendant in a criminal case. There are at least two important exceptions to such a disclosure requirement—the information must be material and it must not be privileged.

### **A. Materiality**

Rule 16(a)(1)(E) requires disclosure of certain documents and data that are “material to preparing the defense.” FED. R. CRIM. P. 16(a)(1)(E). For a thorough discussion of materiality, *see Kelly A. Zusman and Daniel Gillogly, Getting a Clue: How Materiality Continues to Play a Critical Role in Guiding Prosecutors’ Discovery Obligations*, in this issue. “A defendant must make a threshold showing of materiality, which requires a presentation of ‘facts which would tend to show that the Government is in possession of information helpful to the defense.’” *Santiago*, 46 F.3d at 894 (quoting *United States v. Mandel*, 914 F.2d 1215, 1219 (9th Cir. 1990)). Specifically, a document is material under Rule 16 if its pretrial disclosure will enable a defendant “significantly to alter the quantum of proof in his favor.” *United States v. Caro*, 597 F.3d 608, 621 and n.15 (4th Cir. 2010) (quoting *United States v. Ross*, 511 F.2d 757, 763 (5th Cir. 1975)); *see also United States v. Pesaturo*, 519 F. Supp. 2d 177, 190 (D. Mass. 2007) (reviewing Rule 16 materiality standards across jurisdictions).

In cases in which defendants seek open-ended discovery from a federal regulatory agency or the civil arm of the investigative agency involved in the case (if prosecutors have neither obtained nor disclosed information from the agency’s files), it is unlikely that defense counsel will be able to make more than a conclusory allegation that material information may be present in the agency’s files. In these situations, discovery should be denied, because “[n]either a general description of the information sought nor conclusory allegations of materiality suffice.” *Santiago*, 46 F.3d at 894 (quoting *Mandel*, 914 F.2d at 1219) (holding defendant’s assertion he needed to know whether any inmate witnesses were members of rival gangs insufficient to establish materiality of Bureau of Prisons files); *see also United States v. Krauth*, 769 F.2d 473, 476 (8th Cir. 1985) (quoting *United States v. Conder*, 423 F.2d 904, 910 (6th Cir. 1970)) (defendant’s materiality burden “not satisfied by a mere conclusory allegation that the requested information is material to the preparation of the defense”); *Finnerty*, 411 F. Supp. 2d at 431 (“Conclusory allegations are insufficient, however, to establish materiality, and the burden is on the defendants to make a prima facie showing that the documents sought are material to preparation of the defense.”) (citing *United States v. McGuinness*, 764 F.Supp. 888, 894 (S.D.N.Y. 1991)) (internal citations omitted).

### **B. Work product, attorney-client, and deliberative process privileges**

To the extent a defendant seeks disclosure of documents between and among prosecutors and agencies, particularly where those documents contain opinions and mental impressions of the case, such documents may be protected from disclosure by one or more applicable privileges. *See United States v. Kohring*, 637 F.3d 895, 907 (quoting *Morris v. Ylst*, 447 F.3d 735, 742 (9th Cir. 2006)) (“[I]n general, a

prosecutor's opinions and mental impressions of the case are not discoverable under *Brady*/[*Giglio*] unless they contain underlying exculpatory facts.”) (emphasis in original).

Rule 16(a)(2) protects from disclosure “reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case.” FED. R. CRIM. P. 16(a)(2). For example, in *United States v. Robinson*, 439 F.3d 777, 779-80 (8th Cir. 2006), the court held that the defendant in a tax evasion case was not entitled to discovery of “internal documents used by the government to calculate gross receipts.” Rule 16(a)(2) protected the documents from disclosure, even if the denial of such materials “made trial preparation extremely difficult.” *Id.*

In addition, it is well-established that “the work-product doctrine applies to criminal litigation as well as civil,” and it “protect[s] material prepared by agents for the attorney as well as those prepared by the attorney himself.” *United States v. Nobles*, 422 U.S. 225, 236, 238-39 (1975). Although materials such as an attorney's notes regarding witness interviews clearly qualify as protected work product, such protection can potentially be overcome by a defendant's substantial need for *Brady* material. *Gupta*, 2012 WL 990830, at \*4. *But see United States v. Wirth*, 2012 WL 1580991, at \*1-2 (D. Minn. May 4, 2012) (holding agent rough notes and draft summaries of interviews were protected from disclosure by the work-product doctrine). To the extent memoranda qualifying as work product contain “the prosecutor's opinions and mental impressions about the case, the memoranda themselves [do] not have to be disclosed; only the ‘underlying exculpatory facts’ in the memoranda [have] to be disclosed.” *Johnson v. United States*, 2012 WL 1836282, at \*149 (N.D. Iowa Mar. 22, 2012).

Finally, “[t]he attorney-client privilege covers conversations between prosecutors (as attorneys) and client agencies within the government,” and “[t]he deliberative-process privilege covers memoranda and discussions within the Executive Branch leading up to the formulation of an official position.” *United States v. Zingsheim*, 384 F.3d 867, 871-72 (7th Cir. 2004).

## VI. Conclusion

Issues involving which agencies are members of the “prosecution team” and whose files should be reviewed for potential discovery materials can be thorny. Defense counsel are increasingly attempting to chip away at divisions between agencies and treat the entire federal government as a single entity for purposes of prosecutors' discovery obligations. In reality, prosecutors' obligations are much more limited. Each case requires fact-specific analysis, but in general, a prosecutor who consults the guidance set forth in the Ogden Memo during the investigative stage will minimize the amount of resources necessary to comply with his or her discovery obligations during the course of the criminal prosecution. ❖

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# When Disclosure Under *Brady* May Conflict With the Attorney-Client Privilege

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## I. Introduction

The Government has indicted defendants Adam and Bravo, two former employees of the Corporation, for securities fraud. In the course of discovery, government investigators uncover a legal opinion in the Corporation's files. The legal opinion tends to exonerate defendant Adam, but further implicates defendant Bravo and an uncharged subject, Charlie, in the investigation. Defendant Adam requests disclosure of any internal memoranda pursuant to *Brady v. Maryland*, while defendant Bravo raises the issue of attorney-client privilege. The Corporation, fearing further criminal and civil liability, refuses to waive its privilege in the opinion.

The *Brady* doctrine directs the prosecutor to release the legal opinion in discovery to both defendants Adam and Bravo, though the prosecutor would violate the Corporation's and/or defendant Bravo's attorney-client privilege in doing so. But if the prosecutor preserves the secrecy of the legal opinion, the prosecutor may commit a reversible *Brady* violation with respect to defendant Adam. Even if she merely reviews the opinion, any further investigation and prosecution of subject Charlie may be tainted irrevocably.

A prosecutor's constitutional imperative to *disclose* exculpatory material under *Brady* may thus directly conflict with the duty to *withhold* the same material from another defendant pursuant to attorney-client privilege. This potential conflict has arisen in a small number of prosecutions, but federal courts have avoided holding that one doctrine trumps the other. Large quantities of electronically stored information (ESI), however, may transform this fringe concern into a substantial obstacle in criminal discovery more difficult for courts and prosecutors to avoid.

## II. Existing jurisprudence

In *Brady v. Maryland*, the Supreme Court held that government prosecutors are required by the Due Process Clause to provide material evidence favorable to an accused defendant upon request. 373 U.S. 83, 87 (1963). See *Giglio v. United States*, 405 U.S. 150, 154 (1972) (extending *Brady* obligation to evidence impeaching witnesses).

At the same time, the Supreme Court continues to reaffirm the attorney-client privilege as "one of the oldest recognized privileges for confidential communications. . . . intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). The Court accordingly

held that the privilege survived the death of the client and thus permitted the attorney of a deceased client to withhold his notes from a subpoena in a criminal investigation. *Id.* at 410-11.

The *Swidler* Court expressly declined, however, to address the broader issue of how the attorney-client privilege intersects with a defendant's constitutional rights:

Petitioners, while opposing wholesale abrogation of the privilege in criminal cases, concede that exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege. We do not, however, need to reach this issue, since such exceptional circumstances clearly are not presented here.

*Id.* at 408, n.3.

The Supreme Court's decision in *Swidler* stands in contrast to cases where it definitively resolved struggles between the demands of criminal discovery and recognized evidentiary privileges. *See United States v. Nixon*, 418 U.S. 683, 707, 713 (1974) (holding that executive privilege must yield to specific need for evidence in criminal prosecution); *Davis v. Alaska*, 415 U.S. 308, 319 (1974) (state privilege in protecting secrecy of juvenile offender records must yield to defendant's Sixth Amendment right to confront witnesses).

Notably, a three-justice dissent in *Swidler* found the conflict was squarely before the Court, and indicated that a defendant's right to due process outweighed a client's privilege:

[E]ven petitioners acknowledge that an exception may be appropriate where the constitutional rights of a criminal defendant are at stake.

....

Where the exoneration of an innocent criminal defendant or a compelling law enforcement interest is at stake, the harm of precluding critical evidence that is unavailable by any other means outweighs the potential disincentive to forthright communication.

524 U.S. at 413, 416 (O'Connor, J.) (dissenting).

Since *Swidler*, other federal courts have likewise declined to address whether the vindication of a defendant's rights under *Brady* supersedes the attorney-client privilege. Both the Eighth and Ninth Circuits, in fact, relied specifically upon the *Swidler* Court's demurrer to affirm denials of habeas corpus petitions from state defendants. *Newton v. Kemna*, 354 F.3d 776, 781-82 (8th Cir. 2004) ("[W]e are unable to discern any transcendental governing principles that foreshadow what the Supreme Court would do in the case before us."); *Murdoch v. Castro*, 609 F.3d 983, 993 (9th Cir. 2010) (en banc) (noting that the *Swidler* Court "would not consider the question whether the attorney-client privilege might yield in the face of constitutional rights").

Little jurisprudence exists, moreover, indicating what principles should guide trial courts faced with a direct contest between these doctrines. Prosecutors parsing the discovery demands of multiple defendants may assume that *Brady* rights, arising from the Due Process Clause in the Fifth Amendment, will naturally trump the attorney-client privilege. Response of Government at 6, *United States v. Carollo*, No. 10-00654 (S.D.N.Y. Nov. 14, 2011), ECF No. 77 ("The Government seriously doubts that the Privilege-Claimant is suggesting that the Government can withhold *Brady* information simply because that information is in an otherwise privileged document.").

Even when prosecutors regard both interests as equally compelling, they may naturally elevate immediate *Brady* demands over attorney-client secrecy due to risk aversion. Deliberate suppression of exculpatory material threatens the constitutional regularity of a case in which the prosecutor bears sole

professional responsibility. A breach of attorney-client secrecy, in contrast, may only affect civil liabilities or prosecutions of other individuals as yet, or never to be, indicted.

The primacy of *Brady* over attorney-client secrecy, however, is not predestined. Notwithstanding the dissent in *Swidler*, it is not certain that the Supreme Court would weaken attorney-client secrecy, an unshakeable pillar of the adversarial system, in favor of a defendant's access to arguably exculpatory evidence. The Court has previously ruled in favor of the confidentiality of a third party against a defendant's assertion of constitutional rights. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 52-53 (1987) (rejecting defendant's contention that he was entitled under Confrontation Clause to unfettered access to youth services file guaranteed confidential by state statute). See also *United States v. Shrader*, 716 F. Supp. 2d 464, 473 (S.D. W. Va. 2010) ("Any court would make short work of an argument that the attorney-client privilege can be overcome by a criminal defendant's cross-examination needs. The argument that the psychotherapist-patient privilege is only applicable when not inconvenient for a criminal defendant is similarly deficient.").

Under any view, a prosecutor transgresses the attorney-client privilege at considerable risk to his case and professional standing. Federal courts have long recognized that a prosecutor's egregious breach of the attorney-client privilege may take on constitutional dimensions under the Due Process and Self-Incrimination Clauses of the Fifth Amendment, as well as the right to counsel under the Sixth Amendment. See *United States v. Kennedy*, 225 F.3d 1187, 1194-95 (10th Cir. 2000); *United States v. Voigt*, 89 F.3d 1050, 1067 (3d Cir. 1996); *United States v. White*, 879 F.2d 1509, 1513 (7th Cir. 1989), and cited cases.

At a minimum, a prosecutor's improvident breach of the attorney-client privilege in discovery—even when ordered by the trial court—may justify interlocutory appeal and cause substantial delay. *United States v. Williams Cos., Inc.*, 562 F.3d 387, 397 (D.C. Cir. 2009) (discovery order subject to interlocutory appeal by intervenor claiming attorney-client privilege); *In re Lott*, 424 F.3d 446, 449-51 (6th Cir. 2005) (granting mandamus and reversing discovery order improperly directing petitioner to release communications with attorney); *United States v. Cuthbertson*, 651 F.2d 189, 193-95 (3d Cir. 1981) (holding discovery order subject to immediate appeal where it required release of interviews taken in *60 Minute* broadcast pursuant to *Brady*).

Regardless of the circumstances, the Supreme Court has cautioned that courts should refrain from "balancing" a defendant's *Brady* rights against another party's attorney-client privilege. In *Jaffee v. Redmond*, the Supreme Court explicitly rejected balancing of the demands of *Brady* and *Giglio* with recognized confidentiality privileges. 518 U.S. 1, 17-18 (1996) ("Making the promise of [patient] confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."). See *Swidler & Berlin*, 524 U.S. at 409 (rejecting balancing of privileges as introducing "substantial uncertainty into the privileges application").

### III. Avoidance and accommodation by trial courts

In the absence of clear guidance, federal trial courts faced with competing demands between *Brady* disclosure and attorney-client secrecy have simply avoided placing one doctrine above the other. For example, in *United States v. Williams Companies, Inc.*, an energy company intervened in a fraud prosecution of two of its former traders, opposing a discovery order compelling the government to disclose an internal report by the company's attorneys. The company argued that a deferred prosecution agreement that released the report to the government, coupled with the attorney-client privilege, superseded defendants' rights under *Brady*. 562 F.3d 387, 390-92 (D.C. Cir. 2009).

On interlocutory appeal, the District of Columbia Circuit declined to address the company's claim that attorney-client privilege foreclosed any disclosure of the report to the defendants. Instead, the court remanded the matter for additional findings regarding the guarantees of confidentiality and whether the report, in fact, contained material favorable to the defendants. *Id.* at 397. *See also United States v Bergonzi*, 216 F.R.D. 487, 492-93 (N.D. Cal. 2003) (determining attorney-client privilege did not apply to internal report provided pursuant to a disclosure agreement with SEC in prosecution of former employees), *aff'd*, 403 F.3d 1048, 1049-50 (9th Cir. 2005).

Both the trial and appellate courts similarly sidestepped the issue in *United States v. Defonte*, 2006 WL 559443 (S.D.N.Y. Mar. 6, 2006). Defonte, a federal prison guard accused of abusing prisoners, subpoenaed the journal entries of his alleged victim, which the victim claimed were protected by attorney-client privilege. The trial court determined that the privilege did not apply to the journal because, in part, the alleged victim kept it in her cell. *Id.* at \*1. On expedited review, the Second Circuit found that the trial court defined a prisoner's expectation of privacy too narrowly, but "did not decide that there were compelling or overwhelming Sixth Amendment concerns involved in its decision . . ." *United States v. DeFonte*, 441 F.3d 92, 95-96 (2d Cir. 2006) (remanding for further findings).

In *United States v. Carollo*, 2011 WL 6935292 (S.D.N.Y. Dec. 20, 2011), a panel of three district court judges— each presiding over a separate prosecution of price-fixing in bond auctions— considered a latent conflict between *Brady* and attorney-client privilege. The government moved to disclose recordings of two confidential informants pursuant to *Brady*. Both the defendants and the financial houses that employed them opposed the motion, arguing that the informants improperly steered conversations toward attorney-client communications and thus tainted the prosecution. The government countered that its *Brady* obligations unequivocally superseded any privileges in the recordings. *Id.* at \*2.

Following a hearing, the panel found that the defendants failed to carry their burden to demonstrate that the various prosecutions were prejudicially tainted by breaches of attorney-client privilege. The panel declined, however, to address the underlying issue of whether the intervening employers could suppress the privileged portion of the recordings, contrary to the Government's *Brady* obligations. *Id.* at \*3.

Finally, the pre-trial ruling in *United States v. Sattar*, 2003 WL 22137012 (S.D.N.Y. Sept. 15, 2003), illustrates the same reluctance to address this issue squarely, even where the privileged communication constitutes important evidence of the offenses charged. In *Sattar*, the government charged defendant Sattar with conspiring to provide material support to a terrorist organization based upon his relationship with Sheikh Omar Ahmad Ali Abdel Rahman. Rahman was convicted for the World Trade Center bombing in 1993. Defendants Yousry and Stewart, Rahman's translator and attorney respectively, were also indicted based on their prison conversations with Rahman that served as cover for his continued participation in terrorist activity. *Id.* at \*1-3.

Defendant Sattar sought disclosure of the recordings and notes of the prison conversations pursuant to *Brady*, but Rahman refused to waive his attorney-client privilege. The government prosecution team, which had not reviewed the recordings and notes, sought *in camera* review. Defendant Stewart moved for, among other remedies, appointment of a special master to assess the government's claims that it should have access to privileged materials for purposes of disclosure to Sattar. *Id.* at \*15-18.

In making its ruling, the district court noted that the government was "correct that the evidentiary privileges asserted by Stewart are not constitutional in nature," and that "[t]he attorney-client privilege . . . is itself based in policy, rather than in the Constitution . . ." *Id.* at \*17. Like the above courts, however, the district court in *Sattar* stopped short of ordering the release of the allegedly

privileged items in vindication of Sattar's constitutional rights. *Id.* at \*21-22 (directing government taint team to identify portions of recordings and notes purportedly containing privileged material for possible further review).

The disputes over disclosure of the recordings and notes in *Sattar* continued for an additional year under a protective order obligating Rahman to timely assert his privilege upon notice of a party's intention to use particular recordings. *United States v. Sattar*, 395 F. Supp. 2d 79 (S.D.N.Y. 2005), *aff'd*, *United States v. Stewart*, 590 F.3d 93 (2d Cir. 2009) (affirming convictions of Sattar, Yousry, and Stewart).

#### **IV. Complications of large quantities of electronically stored information (ESI)**

With large scale computerized recordkeeping, disputes over *Brady* obligations and preservation of attorney-secrecy may become prevalent and more difficult for trial courts to avoid. First, the sheer volume of computerized material that organizations produce—and that prosecutors must review for purposes of discovery—has grown enormously. The use of email for important communications, in particular, may spread privileged materials over a wide area of a business's computers, its employees' personal computers, and third-party service providers. An employee will sooner forward an email with legal advice attached to numerous recipients than retrieve, copy, and distribute a formal hard copy of legal advice.

Most important, outright seizure of a target's computer hard-drives or servers has become a preferred method of retrieving computerized evidence for criminal prosecution. Government agents may accordingly take custody of billions of documents and metadata in computerized form. *See* Response of Government in *United States v. Kim Dotcom*, No. 12-CR-003 (E.D.Va. June 8, 2012), ECF No. 99 (seizure of more than 1,100 servers, comprising 28 petabytes of information—equivalent to more than 500 million file cabinets).

As a result, the frequency with which government investigators know (or suspect) that they are in possession of materials subject to both disclosure under *Brady* and suppression under attorney-client privilege will increase. Neither the prosecutors nor potential targets, moreover, may be aware of all materials covered by the attorney-client privileges or how to locate them in the ocean of computerized information. In that new milieu, traditional discovery measures, such as privilege logs or *in camera* review, will simply be overwhelmed.

Nonetheless, once the government takes possession of undifferentiated computerized evidence, its obligations under *Brady* and the attorney-client privilege may attach, whether or not it has the opportunity or ability to review that information. *See* FED. R. CRIM. P. 16(a)(1)(E) (mandating disclosure of items "within the government's possession, custody, or control"). *Cf. Johnson v. Norris*, 537 F.3d 840, 847 (8th Cir. 2008) (no *Brady* violation with respect to witness's confidential psychiatric records where government never had possession).

Every investigation where the government takes possession of large caches of computerized data may render it susceptible to accusations of improper exposure to privileged information. For example, in *United States v. Warshak*, 631 F.3d 266, 292 (6th Cir. 2010), government investigators seized the contents of over 90 computers and servers of a herbal supplement company whose owner was being investigated for mail fraud. The company's computers contained over 60,000 emails either from or to the company's attorneys. The government isolated the emails in question and returned them to the defendant.

Despite return of the emails, the district court granted the company's motion for a *Kastigar*-type hearing to determine whether the Government's temporary access to them tainted the investigation. The district court determined that it did not, and on post-conviction appeal, the Sixth Circuit upheld the district court's conclusions. *Id.* at 292-95. The Sixth Circuit also rejected the defendant's argument that the government had "abdicated" its *Brady* obligations by simply returning undifferentiated computer files that were previously and continually in its possession. *Id.* at 295 (expressing doubt whether fruit-of-poisonous tree analogy applies to breaches of attorney-client privilege). See *United States v. Squillacote*, 221 F.3d 542, 558 (4th Cir. 2000) (finding *Kastigar*-type proceedings not applicable to breaches of evidentiary or testimonial privilege).

But the strategy of isolating and returning arguably privileged materials, successful in *Warshak*, may not work in every case. Assignment of a separate taint team to handle seized computer equipment may be prohibitively cumbersome or expensive, and prosecuting attorneys may still not be able to demonstrate that they have not viewed privileged materials. Simply returning arguably privileged materials to one defendant, of course, would not address the situation where a second defendant is entitled to disclosure of those materials under *Brady*.

Early submission to the trial court of materials potentially covered by both doctrines may not constitute a viable alternative. Most judges would agree to review a small number of documents if it would insure vindication of an important constitutional imperative. However, even the most committed jurist would likely decline to perform an initial review on entire computer servers to eliminate theoretical disputes between *Brady* and attorney-client secrecy. Cf. *McNelson v. McDaniel*, 2006 WL 1215169, \*1-2 (D. Nev. May 5, 2006) (negotiation between habeas corpus petitioner, citing *Brady*, and Las Vegas Police Department, citing attorney-client privilege, narrows scope of dispute to six sentences for *in camera* review).

In *United States v. Zolin*, 491 U.S. 554 (1989), the Supreme Court held that a trial court may elect to employ *in camera* review to determine applicability of the attorney-client privilege, where the moving party has demonstrated a good faith factual basis for invoking the crime-fraud exception. The *Zolin* Court cautioned, however, that under no circumstances, does any party hold a right to *in camera* review, and expressly identified the volume of evidence to be reviewed as a significant factor for trial courts when considering whether to conduct such a review. *Id.* at 568-72, 574 (holding decision whether to conduct *in camera* review subject to clearly erroneous standard).

Even with a willing judge, the wholesale review of computerized evidence for purposes of discovery may be viewed as participation in the prosecution of offenses and a breach of the court's impartiality.

There is also reason to be concerned about the possible due process implications of routine use of *in camera* proceedings. . . . [W]e cannot ignore the burdens *in camera* review places upon the district courts, which may well be required to evaluate large evidentiary records without open adversarial guidance by the parties.

*Id.* at 571-72.

Regardless of the approach taken, prosecutors may not have an unlimited amount of time to tackle computer servers filled with potential evidence. In *United States v. Metter*, 2012 WL 1744251 (E.D.N.Y. May 17, 2012), the defendant successfully moved to suppress the entire seizure of over 60 computer servers. The government had represented to the district court that a taint team would review the contents of the servers to determine whether the seized evidence was within the scope of the search warrant. *Id.* at \*5.



While the district court recognized that review of voluminous computerized data presented unique challenges, it nonetheless determined that a delay of 15 months to initiate that review rendered the search unreasonable under the Fourth Amendment. *Id.* at \*9 (“The government’s retention of *all* imaged electronic documents, including personal emails, without *any* review whatsoever to determine not only their relevance to this case, but also to determine whether any recognized legal privileges attached to them, is unreasonable and disturbing.”) (emphasis in original).

## V. Conclusion

The potential for direct conflicts between the *Brady* doctrine and the attorney-client privilege is easily recognized and likely to increase with large quantities of ESI. As of yet, however, the Supreme Court and lower federal courts have shown little inclination to resolve a conflict between those two doctrines. Under those circumstances, prosecutors should first isolate any possible privileged material in order to inoculate against any accusation of taint. Thereafter, prosecutors would do best to follow the lead of the trial courts and avoid or accommodate possible conflicts in any possible way. ❖

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# Discovery and the Crime Victims' Rights Act

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The Department of Justice's recent policy statements encouraging liberal discovery disclosures reflect the United States' vigilant commitment to ensuring a criminal defendant's right to a fair trial. As vital to the pursuit of justice as these disclosures to defendants may be, there is an equally compelling imperative that cannot be lost in the process—the obligation to protect the interests of crime victims and witnesses. As Deputy Attorney General Cole recently remarked:

Fair trials and just results ensure that the innocent are not wrongly convicted, and that the guilty do not go free. A fair and just criminal justice system should also ensure that other participants in the process—i.e., victims, law enforcement officers, and other witnesses—are not unnecessarily subjected to physical harm, harassment, public embarrassment or other prejudice, or the fear that they might be subjected to such consequences.

Deputy Attorney General James M. Cole, Remarks Before the Senate Judiciary Committee, June 6, 2012, available at <http://www.justice.gov/iso/opa/dag/speeches/2012/dag-speech-120606.html>.

There are many important interests that should be counterbalanced against discovery disclosures, including national security interests, maintaining the confidentiality and continued viability of law enforcement practices, and the protection of ongoing criminal investigations. This article will focus on the interplay between the discovery demands of the criminal justice system and the critical need to protect the privacy, dignity, and of course, safety of victims and witnesses. Those interests have been codified in the Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771 (2012).

## **I. What is the Crime Victims' Rights Act (CVRA)?**

The CVRA is a statutory scheme designed to protect victims' rights and ensure them the opportunity to be involved in the criminal justice process. *United States v. Moussaoui*, 483 F.3d 220, 234 (4th Cir. 2007); *Kenna v. United States Dist. Court*, 435 F.3d 1011, 1016 (9th Cir. 2006) (“The [CVRA] was enacted to make crime victims full participants in the criminal justice system.”); *Does v. United States*, 817 F. Supp.2d 1337 (S.D. Fla. 2011).

The statute enumerates the following eight rights:

- (1) The right to be reasonably protected from the accused
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused

- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding
- (5) The reasonable right to confer with the attorney for the Government in the case
- (6) The right to full and timely restitution as provided in law
- (7) The right to proceedings free from unreasonable delay
- (8) The right to be treated with fairness and with respect for the victim's dignity and privacy

18 U.S.C. § 3771(a) (2012).

The statute tasks both courts and prosecutors with the responsibility of protecting these rights. *See* § 3771(b)(1) (“[T]he court shall ensure that the crime victim is afforded the rights described in subsection (a).”); § 3771(c)(1) (“Officers and employees of the Department of Justice . . . shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).”); *Does v. United States*, 817 F. Supp. 2d at 1340-41. Importantly, the statute not only mandates that the district court “shall ensure” that crime victims are afforded these rights, but requires a court to state its reasons on the record for any decision denying relief under the CVRA. 18 U.S.C. §3771(b)(1) (2012) (“The reasons for any decision denying relief under [the CVRA] shall be clearly stated on the record.”).

## II. Legislative history of the CVRA

One Senate sponsor of the CVRA called it “the latest enactment in a forty-year civil rights movement” for victims’ rights. John Kyl et. al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act*, 9 LEWIS & CLARK L. REV. 581, 583 (2005). Senator Kyl also described a history of policy frustration over how to endow the criminal justice system with essential balance by strengthening rights and protections for innocent crime victims caught up in the process, when a series of federal statutes, such as the Victim and Witness Protection Act of 1982 (VWPA) and the Victims’ Rights and Restitution Act of 1990, proved ineffective at fully securing victims’ rights. *Id.* at 583-93. The CVRA was enacted “to transform the federal criminal justice system’s treatment of crime victims,” *id.* at 593, through the dual means of articulating and providing for enumerated substantive rights of victims, *see* 18 U.S.C. § 3771(a)(1) - (8), and prescribing that the crime victim may autonomously assert and litigate these rights, in limited fashion, in both the district court and court of appeals. *See id.* § 3771(d).

Several of the enumerated rights may be implicated by criminal procedures and rules calling for discovery by the government to the defendant. *See id.* § 3771(a)(1) (the “right to be reasonably protected from the accused”); *id.* § 3771(a)(8) (the “right to be treated with fairness and with respect of the victim’s dignity and privacy”). For instance, production of a victim’s address, financial data, medical, psychological, or sexual history to the defense all could involve interests identified in these provisions. Senator Kyl emphasized that the statute’s enumerations “are not intended to just be aspirational. . . . ‘It is not the intent of this bill that its significance be whittled down or marginalized by the courts or the executive branch. This legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process.’ “ *See* Kyl, at 613, 614 (quoting 150 Cong. Rec. S10911).

The Federal Rules of Criminal Procedure were amended to help implement provisions of the CVRA, and several of these amendments reinforce the means (and the need) to protect victim information from discovery. *See* FED. R. CRIM. P. 12.1(b) (exempting victim address and telephone information from alibi discovery); FED. R. CRIM. P. 17(c)(3) (requiring court order, following notice and opportunity to victim to litigate, before trial subpoena may issue for personal or confidential information about a victim). *See also* 18 U.S.C. § 3509(d) (2012) (special privacy protection for information and documents concerning child victims and child witnesses); *id.* § 3664(d)(4) (special privacy protection for restitution matters); *id.* § 3432 (requiring production of the list of government witnesses to defendant *in a capital case*) (emphasis added).

### III. The CVRA and discovery: dual duties

Federal prosecutors face a dual challenge: to fulfill both the Department of Justice's policies and judicial expectations for generous and broad criminal discovery and also the statutory and other responsibilities to safeguard victim rights and interests that may be impacted by criminal discovery. The need to achieve this sometimes difficult balance is recognized in Department of Justice policies and promulgations. *See, e.g.*, Memorandum from Deputy Attorney General David Ogden, "Guidance for Prosecutors Regarding Criminal Discovery" (Jan. 4, 2010), *available at* [http://dojnet.doj.gov/usao/eousa/ole/usabook/memo/ogden\\_memo.pdf](http://dojnet.doj.gov/usao/eousa/ole/usabook/memo/ogden_memo.pdf) (Ogden Memo):

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 . . . and other strategic considerations that enhance the likelihood of achieving a just result in a particular case.

In addition to this guidance, there is a prescribed disciplinary procedure with regard to victim complaints that Department of Justice employees, including prosecutors, have failed to comply with the CVRA. *See* 28 C.F.R. § 45.10 (2012). And while the CVRA does not itself create a cause of action against government employees for claimed violations, *see* 18 U.S.C. § 3771(d)(6) (2012), the Federal Tort Claims Act may reach action (or inaction) by an Assistant United States Attorney (AUSA) concerning victim rights that are not a discretionary function. *See Ochran v. United States*, 117 F.3d 495, 499 (11th Cir. 1997).

To avoid such problems and to fulfill the dual duty to provide correct, and often generous, criminal discovery, while also protecting victim rights, timely communication with victims (or, if they are represented, their counsel) is key. Victims should have the opportunity to understand what kind of material may need to be provided by the government in discovery and prosecutors should appreciate what privacy, dignity, or safety issues may be implicated by prospective discovery. In addition, communications with victims may result in material required to be produced under the Jencks Act or Federal Rule of Criminal Procedure 26.2, including electronic communications such as email, and this additional requirement should also be understood by victims, law enforcement agents, and victim-witness coordinators and staff.

## IV. Who is a “victim” under the CVRA?

Courts and the Department generally take a broad view of those to be classified as CVRA “victims.” Under the CVRA, a crime victim is defined as “a person directly and proximately harmed as a result of the commission of a Federal offense . . .” 18 U.S.C. § 3771(e) (2012). To qualify as a “crime victim” for purposes of the CVRA, an individual does not need to be identified in an indictment or be someone “whose identity constitutes an element of the offense.” *In re Stewart*, 552 F.3d 1285, 1289 (11th Cir. 2008). An individual “may qualify as a victim, even though [he] may not have been the target of the crime, as long as [he] suffers harm as a result of the crime’s commission.” *Id.* at 1289. In *Stewart*, for example, the court found that home purchasers were CVRA “crime victims” of a defendant who was charged with mortgage fraud-related wire fraud and money laundering in which a bank was the only named victim. *Id.* *But see In re Antrobus*, 519 F.3d 1123, 1125 (10th Cir. 2008) (affirming district court’s finding that the parents of deceased woman were not “directly and proximately harmed” by a defendant convicted of transferring a gun to a juvenile who later used the firearm in a rampage and murdered their daughter); *United States v. Atl. States Cast Iron Pipe Co.*, 612 F.Supp.2d 453, 503 (D.N.J. 2009) (finding definitions of “victim” under CVRA, MVRA, and VWPA are “aligned” and holding that six employees who were harmed before the offense of conviction were not CVRA victims); *United States v. Sharp*, 463 F. Supp.2d 556, 564 (E.D. Va. 2006) (tangential harm resulting from a drug offense does not suffice to confer victim status); *United States v. Guevara-Toloso*, 2005 WL 1210982, at \*3 (E.D.N.Y. May 23, 2005) (victims of federal offender’s prior state crimes are not crime victims under CVRA). A victim may be a person or an entity, and may be the representative of a child, or someone who is incapacitated or deceased. 1 U.S.C. § 1 (2012); 18 U.S.C. § 3771(e) (2012).

While the formal determination of who qualifies as a CVRA victim of a particular crime will depend on the facts of each case, the 2011 Attorney General Guidelines encourage Department personnel to provide assistance not only to direct victims of crimes but also to relevant-conduct victims, where appropriate. Many victim determinations may arise in regard to restitution issues that will be resolved only at the sentencing phase, whereas protection of victim interests as to discovery issues requires earlier action, further counseling a broad view of who is a victim at that earlier stage.

## V. Balancing discovery and victim rights

Certain steps can be taken both in individual cases and, with the participation of the courts, on a district-wide level, that can assist in balancing the privacy, dignity, and safety rights of victims with appropriate disclosures to defendants. Protections should be considered both in the dissemination of sensitive victim information to the press and the public, and to the defendant personally. Surprisingly, although the issues raised by the CVRA have been addressed by courts for decades, there are only a handful of cases to date that have directly balanced discovery rights in relation to the rights of victims under the CVRA.

### A. What type of discoverable victim/witness information may be protected?

A myriad of information may be subject to both disclosure in discovery and protection under the CVRA. The types of information include those which courts have traditionally looked to protect. As noted by the Second Circuit prior to enactment of the CVRA, “[f]inancial records of a wholly owned business, family affairs, illnesses, embarrassing conduct with no public ramifications, and similar matters will weigh more heavily against access than conduct affecting a substantial portion of the public.” *See United States v. Amodeo*, 71 F.3d 1044, 1051 (2d Cir. 1995). *See also id.* at 1050 (“The privacy interests of third parties . . . should weigh heavily in a court’s balancing equation.”). *See also United States v.*

*Mitchell*, 2010 WL 890078, at \*7 (D. Utah Mar. 8, 2010) (relying in part on the CVRA, court holds that “[i]n a case involving allegations of the sexual abuse of a minor, the court agrees with the government that there is a risk that broadcast and potentially re-broadcasts of the videos [of an interview of the victim] could essentially amount to revictimization”). As noted, *supra*, other statutes may provide additional protections as well.

In some instances, the disclosure of even the name of a victim may be subject to protection. As one court considering the CVRA noted,

The government chooses to be a litigant in each case it prosecutes, and the defendant is permissibly forced into that role upon a showing of probable cause. *But individuals covered by the CVRA have done nothing that warrants unwanted intrusion into their lives, and they may have good reason either to be concerned about the public listing of their names and contact information or simply to prefer not to be reminded of their victimization each time the court schedules a proceeding.*

*United States v. Turner*, 367 F. Supp.2d 319, 328-29 (E.D.N.Y. 2005) (emphasis added). Obvious cases where protection of victim names should be considered include those in which publicizing the names of sexual abuse victims may cause undue embarrassment and psychological hardship. *United States v. Robinson*, 2009 WL 137319, at \*3 (D. Mass. Jan. 20, 2009) (relying on CVRA in denying newspaper’s Motion to Compel identity of victim of sex-for-fee scheme); *United States v. Clark*, 335 F. App’x 181, 183 (3d Cir. 2009) (relying on CVRA in redacting names of child pornography victims in sentencing victim impact statements). Cases involving safety issues of confidential informants may also warrant identity protection. *United States v. Barbeito*, 2010 WL 1439510, at \*1 (S.D. W. Va. Apr. 8, 2010); *United States v. Gangi*, 1998 WL 226196, at \*1 (S.D.N.Y. May 4, 1998). *But see United States v. Stone*, 2012 WL 137746 (E.D. Mich. Jan. 18, 2012). Neither the Constitution nor Federal Rule of Criminal Procedure 16 requires production of a government witness list to a defendant in a non-capital case. *See United States v. Napue*, 834 F.2d 1311, 1318 (7th Cir. 1987); *United States v. Fischel*, 686 F.2d 1082, 1090 (5th Cir. 1982) (discovery in criminal cases is narrowly limited and makes no provision for disclosure of witness names or addresses).

CVRA considerations may also come into play in deciding whether to protect the names or other identifying information (such as account numbers and financial profiles) of victims in financial fraud cases. In addition to the CVRA, the rules of restitution procedure also require heightened court awareness of victim privacy. *See* 18 U.S.C. § 3664(d)(4) (2012) (“The privacy of [restitution] records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.”). Publicizing even the names of financial fraud victims may cause them severe embarrassment and mental distress, impacting not only their privacy but their dignity as well. Disclosure to their peers and the public that they have fallen prey to a scheme, as well as a public acknowledgment of their financial losses, may only serve to increase their victimization. In *United States v. Madoff*, 626 F. Supp. 2d 420 (S.D.N.Y. 2009), for example, certain victims made clear that they did not want their names made public. Examples of the distress posed by disclosure voiced by the victims included:

- (1) “This has already cost me and my family dearly and the pain is immeasurable. Having the press contact us will only serve to reopen wounds that will take years to heal.”;
- (2) “I do NOT consent for the safety of my family. More public information is a security issue.”;
- and (3) “I do NOT consent and do NOT want my correspondence or personal information released. That would be a huge invasion of privacy. I have already been through a lot due to the Madoff fraud and the release of this would certainly cause additional duress.”

*Id.* at 426. See also Michael Levi, *Suite Revenge?: The Shaping of Folk Devils and Moral Panic about White-Collar Crimes*, 49 BRITISH J. OF CRIM. 48, 60 (2009).

Protection of victims of financial crimes may also be warranted in light of concerns about their economic security. See, e.g., *United States v. Jackson*, 95 F.3d 500, 508 (7th Cir. 1996) (noting, in holding that a vulnerable victim enhancement applied to telemarketers who targeted individuals who had previously been defrauded, that “[w]hether these people are described as gullible, overly trusting, or just naive . . . , their readiness to fall for the telemarketing rip-off, not once but *twice* . . . demonstrated that their personalities made them vulnerable in a way and to a degree not typical of the general population”) (emphasis in original); see also *United States v. Ciccone*, 219 F.3d 1078 (9th Cir. 2000); *United States v. Brawner*, 173 F.3d 966 (6th Cir. 1999); *United States v. Randall*, 162 F.3d 557 (9th Cir. 1998); Creola Johnson, *Stealing the American Dream: Can Foreclosure-Rescue Companies Circumvent New Laws Designed to Protect Homeowners From Equity Theft?*, 2007 WIS. L. REV. 649, 662-63 (2007) (observing that “[v]ulnerability to fraud strongly correlates to the quality of the consumer’s recent life experiences. . . . [and that a recent study] reported that victims of investment and lottery fraud experienced a greater number of negative life events than nonvictims”). Great care should be taken prior to publication of any identifiers of fraud victims as doing so may lead future fraudsters to individuals who are most vulnerable to their schemes, thus compromising the victims’ financial security.

## B. Protective orders

Protective orders can be a useful tool in limiting or placing conditions on the dissemination and use of victim and witness information both to the public and, particularly where safety is an issue, to the defendant. Federal Rule of Criminal Procedure 16(d)(1) permits a court to deny, restrict, or defer pre-trial discovery when a party can demonstrate the need for these types of actions: “At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief.” FED. R. CRIM. P. 16(d)(1). Although most Circuits have not defined “good cause,” at least in the Third Circuit, “good cause” under this criminal discovery Rule mirrors “good cause” under the Rules of Civil Procedure:

“Good cause is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning do not support a good cause showing. . . .” The good cause determination must also balance the public’s interest in the information against the injuries that disclosure would cause.

*United States v. Wecht*, 484 F.3d 194, 211 (3d Cir. 2007) (quoting *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994)); but see *United States v. Patkar*, 2008 WL 233062, at \*4 (D. Haw. Jan. 28, 2008) (“This Court is not convinced that the Ninth Circuit would apply these civil standards to protective orders in criminal actions.”).

To date, there are no published decisions that have specifically opined on whether “good cause” for a Rule 16 protective order may be found in upholding the mandatory dictates of the CVRA. At least two courts have issued unpublished opinions, however, in which the CVRA was considered in determining whether “good cause” existed for protective orders. *United States v. Kaufman*, 2005 WL 2648070 (D. Kan. Oct. 17, 2005); *United States v. Patkar*, 2008 WL 233062 (D. Haw. Jan. 28, 2008). In both cases, the court found “good cause” for a protective order. Given the statute’s requirement that courts put on the record their reasons for denying CVRA relief, see 18 U.S.C. § 3771(b)(1) (2012), the CVRA may provide a potent argument in favor of protection.



Protective orders may include provisions to hold counsel, as well as the defendant, in contempt for unauthorized disclosures. A trial court “can and should, where appropriate, place a defendant and his counsel under enforceable orders against unwarranted disclosure of the material which they may be entitled to inspect.” *Alderman v. United States*, 394 U.S. 165, 185 (1969). It is appropriate for a protective order to admonish the parties that the purpose of discovery is trial preparation and that sensitive information provided within the scope of the protective order is to be used only for that purpose. *See United States v. Salemme*, 978 F. Supp. 386, 390 (D. Mass. 1997) (requiring government to make certain disclosures and ordering that those disclosures be used “solely for the purpose of litigating matters in this case”); *United States v. Gangi*, 1998 WL 226196, at \*4 (S.D.N.Y. May 4, 1998) (ordering that information disclosed under protective order “[s]hall be used only by defendants and their counsel solely for purposes of this action”).

**Protective Orders (Press):** Particularly in high profile cases, motions from the press to obtain discovery are common. Protective orders have been an effective tool to allow liberal disclosure to defendants while maintaining the privacy and dignity of victims from unwelcome intrusions by the media.

Traditionally, courts have found that “discovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation.” *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986); *see also Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 396 (1979) (Burger, C.J., concurring) (“[I]t has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants.”); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) (“[R]estrictions placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.”); *United States v. Smith*, 776 F.2d 1104, 1111 (3d Cir. 1985) (because Rule 16 materials must be furnished by the Government to the defendant, no presumption in favor of public access applies to those materials); *In re Gannett News Serv., Inc.*, 772 F.2d 113, 116 (5th Cir. 1985) (“temporary denial of access [to evidence not yet ruled admissible] . . . constitutes no form of prior restraint”); *United States v. Carriles*, 654 F. Supp. 2d 557 (W.D. Tex. 2009) (restrictions on defendant’s dissemination of discovery materials to press does not violate the First Amendment). As long as the underlying discovery material is not filed with the court, courts rarely find that either the First Amendment or the common law right of access to judicial proceedings are implicated. *See, e.g., Carriles*, 654 F. Supp. 2d at 572-73.

Tensions arise in some cases when discovery documents are filed with the court. *Wecht*, 484 F.3d at 211 (where discovery documents were filed under seal and *in camera* with the court for ruling, district court did not abuse discretion in finding documents were not subject to protective order); *Patkar*, 2008 WL 233062, at \*4 (distinguishing *Wecht* because documents were not filed with the court). There may also be difficulties in limiting the dissemination of information through pretrial filings. *Carriles*, 654 F. Supp. 2d at 570. Department policy limiting a prosecutor’s ability to request the closure of judicial proceedings to the press and the public may also be a consideration. 28 C.F.R. § 50.9 (2012); USAM 9-5.150 (There is a “strong presumption” against closing proceedings, and “[g]overnment attorneys may not move for or consent to the closure of any criminal proceeding without the express prior authorization of the Deputy Attorney General.”). Prosecutors should be strategic in counterbalancing the potential need to make a record that discovery has been provided, versus specifying or describing discovery material to a degree that intrudes on victim interests.

**Protective Orders (Defendant):** It may be appropriate to seek protective orders limiting a defendant’s personal access to victim materials and information, particularly when there is a potential danger to victims and witnesses. *See, e.g. United States v. Pray*, 764 F. Supp. 2d 184, 190 (D.D.C. 2011) (“In sum, one plain principle runs through the cases: a criminal defendant’s discovery rights—even a

defendant facing the possibility of a death sentence—are constrained when there are realistic fears for the safety of witnesses.”). Common restrictions in violent crime cases, as well as cases involving cooperators and confidential informants, allow the defendant personal access to materials only in the presence of defense counsel and her staff. *See, e.g., United States v. Rafaela-Ramirez*, 2009 WL 1537648, at \*1 (D. Colo. May 29, 2009) (ordering that Jencks Act material not be left in the exclusive custody of the defendant, citing concerns for witness safety and the fact that the burden on the defense is “not extensive”). Indeed, in some jurisdictions, such provisions are standard in *all* cases. *See, e.g., In re Bragg*, 2012 WL 566958, at \*3 (W.D. Va. Feb. 21, 2012) (finding criminal defense attorney in contempt of court for failing to abide by *standard* discovery order that prohibited the removal of any discoverable material from the office of defense counsel unless kept in the personal possession of defense counsel at all times, and that prohibited a defendant’s possession of discoverable material unless in the presence of defense counsel). Other restrictions include having counsel maintain a log of all disseminations. In cases where victim safety may be significantly compromised by disclosure, defense counsel alone may be given access to discovery materials. *See, e.g., United States v. Shryock*, 342 F.3d 948, 983 (9th Cir. 2003).

There may also be occasion to limit a defendant’s access to personal items of a victim simply based upon concerns regarding the victim’s privacy and dignity. The invasion by an accused into a victim’s intimate, private effects must be carefully balanced with a defendant’s constitutional and statutory discovery rights. *United States v. Rand*, 2011 WL 4949695, at \*4 (S.D. Fla. Oct. 18, 2011) (denying defendant’s motion to review victim’s phone for non-contraband images of herself and her family). Restrictions allowing defense review while retaining governmental custody of sensitive items may provide the necessary balance in certain instances. Prosecutors should make sure that agents or other government personnel who administer discovery production or access are fully aware and compliant with any specially ordered discovery procedures.

### **C. Court orders/local rules**

A number of jurisdictions have enacted local rules limiting dissemination of information for purposes other than litigation. Many jurisdictions have local rules limiting extra-judicial statements of the parties in matters. Other jurisdictions, including the Western District of Virginia, have enforceable contempt orders included in their Standing Discovery Order that prevent defense counsel from disseminating information not only to the press, but to their clients when not in counsel’s presence. *See, e.g., In re Bragg*, 2012 WL 566958, at \*3 (referencing *standard* discovery order prohibiting the removal of discoverable material from the office of defense counsel unless in the personal possession of defense counsel). Seeking enforcement of these rules and orders may assist in meeting the goals of the CVRA.

### **D. Redactions and non-disclosure**

The redaction and non-disclosure of non-discoverable matters is a time-honored tool for the protection of sensitive information. Redactions are of particular importance in an electronic age, where a single unauthorized disclosure may result in private information being published and forever available on the Internet: “If an electronic copy of [personal] evidence is taken outside government control, there is no ability to ensure what may happen to those images, whether they may be altered in some manner or duplicated or used in any manner to harass the victim.” *Rand*, 2011 WL 4949695, at \*4. Indeed, in their own rules and procedures, federal courts have recognized the need to exercise great care with personal information that may be subject to electronic dissemination. *See, e.g., FED. R. CRIM. P. 49.1; Case Management Electronic Case Filing: Administrative Procedures*, Southern District of Florida, at 19, available at [56](http://www.flsd.uscourts.gov/wp-content/uploads/2011/04/FINAL-2011-Administrative-</a></p></div><div data-bbox=)

Procedures.pdf (“[F]ilers should *exercise caution* when filing documents that contain . . . [i]ndividual financial information [or] [i]nformation regarding the victim of any criminal activity.”) (emphasis in original); U.S. COURTS, Judicial Conference Policy On Privacy and Public Access to Electronic Case Files (Mar. 2008), *available at* [http://www.privacy.uscourts.gov/privacypolicy\\_Mar2008Revised.htm](http://www.privacy.uscourts.gov/privacypolicy_Mar2008Revised.htm).

Prosecutors should take care that all non-disclosed material is, in fact, non-discoverable. Particular care should be taken with redactions, which the defense may seek to have the court review. In fact, with respect to Jencks statements, all redactions from a Jencks-*produced* statement must be reviewed by the court. *See* FED. R. CRIM. P. 26.2(c) (“If the party who called the witness claims that the [Jencks] statement contains information that is privileged or does not relate to the subject matter of the witness’s testimony, the court must inspect the statement *in camera*.”). Redaction should be done in a transparent way, that is, in such a manner so that the party receiving redacted material is fairly on notice that a document has been redacted. Similarly, if certain items are not to be disclosed in their entirety, defense counsel may be given a listing of the types of undisclosed information so that an appropriate record is made. Significant questions about the discoverability of materials that the government does not intend to disclose may be brought to the attention of the court for *in camera* review. *See* USAM 9-5.001(F) (“Where it is unclear whether evidence or information should be disclosed, prosecutors are encouraged to reveal such information to defendants or to the court for inspection *in camera* and, where applicable, seek a protective order from the Court.”).

### **E. Delayed disclosure**

Another procedure routinely used to assist in the protection of victims is the delay of disclosure of otherwise discoverable information. While the Department’s policy and good practice generally encourage early turnover of discovery, delayed disclosure may be appropriate and effective in those cases where significant victim privacy, dignity, and safety concerns are at play. *See* Ogden Memo, *supra*:

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.

Ogden Memo (emphasis added). The CVRA’s directives to consider these issues may bolster a prosecutor’s decision to hold off on turning sensitive material over to defense counsel.

Of course, prosecutors must be mindful of both constitutional and statutory directives about the timing of disclosure, including those contained in local Standing Discovery Orders. Most statutes, however, allow for leeway in the timing of disclosure. Neither Rule 16 nor *Brady* contain specific timing requirements, although both have been interpreted to require reasonable time for the defense to be able to make use of the material. *See, e.g. Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *United States v. Farley*, 2 F.3d 645, 654 (6th Cir. 1993). The statute and rule governing Jencks material provide that its production may not be required until after the direct examination of the witness; however, most prosecutors voluntarily produce the material earlier. Similarly, *Giglio* information is witness-specific and must only be turned over after determinations have been made as to whether the particular individual at issue will be called as a witness:

Impeachment information, which depends on the prosecutor’s decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. In some cases, however, a prosecutor may have to balance the goals of early disclosure against other significant interests—such as witness security and national security—and may conclude that it is not appropriate to provide early disclosure. In such

cases, required disclosures may be made at a time and in a manner consistent with the policy embodied in the Jencks Act, 18 U.S.C. § 3500.

USAM 9-5.001(D)(2).

In those cases where delayed disclosure may be questioned, seeking court approval, with reference to the CVRA, may be prudent. USAM 9-5.001(F). In those districts that have Standing Discovery Orders that accelerate or prescribe a timetable for production of *Brady* and *Giglio* material, delayed disclosure requires court permission.

### **F. Motions *in limine***

There may be instances where sensitive victim information is available to the defense either through discovery or their own investigation. Where the information is not otherwise admissible, prosecutors may consider bringing motions *in limine* to exclude reference to the information. Although there are no published cases in which the admissibility of victim information was limited pursuant to the CVRA, it may nonetheless provide a basis for such rulings. *But see United States v. Pinke*, 2009 WL 4432669, at \*2 (E.D. Ky. Dec. 2, 2009) (“To the extent [the CVRA] might allow a victim to avoid testifying in a criminal trial—no court opinion to my knowledge has considered the possibility—that right must yield to the defendant’s right to compel the testimony of witnesses in his favor.”). There may be other steps that can be taken in order to preserve the privacy and dignity of victims, including limiting the public exposure of sensitive evidence. *See, e.g., United States v. Kaufman*, 2005 WL 2648070, at \*2 (D. Kan. Oct. 17, 2005) (holding that videos of sexual misconduct of defendants toward their mentally ill patients being shown only to jury and not visible to people seated in the gallery does not violate First Amendment rights of local media).

### **G. Defense subpoenas**

In further support of victim rights, in 2008 Congress amended Federal Rule of Criminal Procedure 17(c)(3) to implement the Crime Victims’ Rights Act and to “provide a protective mechanism when the defense subpoenas a third party to provide personal or confidential information about a victim.” FED. R. CRIM. P. 17, Advisory Committee Notes, 2008 Amendments. Such subpoenas now require prior judicial approval, notice, and an opportunity for the victim to move to modify or quash the subpoena:

After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

FED. R. CRIM. P. 17(c)(3).

Rule 17 subpoenas are not intended to be brought *ex parte* or to supplement discovery. *United States v. Bradley*, 2011 WL 1102837, at \*1 (S.D. Ill. Mar. 23, 2011). Courts have consistently held that Rule 17 subpoenas are not intended to be used as a “general ‘fishing expedition.’” *United States v. Cuthbertson*, 630 F.2d 139, 144 (3d Cir. 1980). Vigorous enforcement of the requirements of Rule 17 is consistent with the mandates of the CVRA.

## VI. Conclusion

It is frequently noted that

[t]he 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; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

*Berger v. United States*, 295 U.S. 78, 88 (1935). This saying is almost always invoked in case law to emphasize the duty of prosecutors to ensure that a defendant receives due process. But in light of the CVRA and the progressing movement to secure and enforce the rights of victims in the criminal justice process, it takes on added meaning: Prosecutors have the duty also to ensure that innocent victims not suffer, through the criminal discovery process, in ways that the law may prevent. In a climate of judicial vigilance and congressional oversight of the rights of defendants to receive all the discovery to which they are entitled, fulfilling this dual duty can be a challenge for prosecutors. However, the CVRA, its legislative history, and the Federal Rules of Criminal Procedure provide the tools for the proper balance to be struck, and for prosecutors to help implement justice both for defendants and for victims in the criminal discovery process.❖

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