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U.S. Department of Justice
United States Attorney
District of Arizona

POLICIES AND PROCEDURES -ALL CRIMINAL DIVISIONS

Criminal Case Discovery Policy

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I. Preface

This is a comprehensive discovery policy drafted to implement the January 4, 2010, directive of the Deputy Attorney General, encompassing and building on the general Department discovery policies set forth in his memorandum authored the same day, entitled "Guidance for Prosecutors Regarding Criminal Discovery" (DAG Discovery Guidance Memo) This Office's policy does not create or confer any rights, privileges, or benefits on any person. *See United States v. Caceres*, 440 U.S. 741 (1979).

Several sources inform the discovery obligations of AUSAs in this District, including 1) Federal Rules of Criminal Procedure 12 and 16; 2) *Brady v. Maryland*,,373 U.S. 83 (11963), *Giglio v. United States*, 405 U.S. 150 (1972), and Department policy interpreting the duty to disclose exculpatory and impeachment information as set forth in those cases (USAM 9-5.001 and 9-5.100, DAG Discovery Guidance Memo); 3) the Jencks Act (18 U.S.C. 3500); and 4) the rules governing professional conduct. To be sure, prosecutors in this Office will comply with each of these laws and rules.

Office policy, however, requires prosecutors to go beyond mere adherence to the minimum requirements of the law. Our goal in every prosecution is to seek a just and fair result, and that includes protecting the rights of the accused. In light of that goal and our ethical duties as prosecutors, this policy strongly encourages each prosecutor, subject to the needs of the individual case, to *provide expansive discovery,*[1] *beyond what the rules, statutes, and case law mandate, and to err on the side of disclosure when there is any doubt as to the relevance, usefulness or relatedness of a particular piece of information.*

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[1] AUSAs should ***not*** refer to the expansive discovery practice as "open file discovery," as that is usually an inaccurate, and therefore potentially deceptive, descriptor for our practice. Our files are not and should not ever be completely open, to preserve attorney-client privileged information and the work product doctrine, and there may be times when another government agency who is part of the prosecution team might have some material or information of which you are not aware despite your good faith efforts to identify the universe fo case-related information. Please refer to the office practice, when you employ it, as expansive discovery.

The decision in any particular case on whether, how much, and when to provide materials in excess of that which is required will rest with the lead prosecutor in a case. There may well be good reason for withholding something that does not have to be disclosed, such as the need to protect a witness, to safeguard investigations of other people or other crimes committed by the defendant, or to preserve a legitimate trial strategy. AUSAs should remember, though, that expansive discovery may facilitate plea negotiations or otherwise expedite litigation. Most importantly, over the long term, expansive discovery will reinforce the USAO's valued reputation with the court and defense bar for candor and fair dealing.

The responsibility to produce all discoverable information in a criminal case lies with the AUSA(s)[2] assigned to the case. To fulfill this responsibility, AUSAs should consider several matters:

- Each of the policies, rules, statutes and case law that define what must be produced and when it must be produced (Section II below);
- The scope of membership on the "prosecution team," as defined in Supreme Court case law and as broadly interpreted by department policy (Section III);
- The identification, location and review of all discoverable information, in light of who is on the "prosecution team" in the instant case (Section IV); and
- Production, tracking and documentation of all discovery produced (Section V).

Any deviation from this policy requires supervisory approval.

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

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[2] As used in this policy, "AUSA" or "prosecutor" includes SAUSAs and DOJ Trial Attorneys working on a case in the District of Arizona.

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

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

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

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

- Other significant cases involving international suspects and targets; and

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

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

Additional guidance on all related discovery topics may be found in the Department's new on-line Discovery Blue Book , advance chapters of which may be found at this link.

II. Laws, Rules and Policy Governing the Production of Discoverable Information (What Must Be Produced and When?)

AUSAs must produce all discoverable information in accordance with federal law, the local rules, any discovery orders in criminal cases and DOJ policy. For the purposes of this memorandum, "discovery" or "discoverable information" is not limited to Federal Rule of Criminal Procedure 16 information, but includes all information and materials the government must disclose to the defendant pursuant to Federal Rules of Criminal Procedure 12 and 16; the Jencks Act and Federal Rule of Criminal Procedure 26.2; Federal Rules of Evidence 404(b) and 413-414; *Brady*, *Giglio*, USAM 9-5.001 and 9-5.100; and applicable local rules.

A. Disclosure Under Fed. R. Crim. Pr. Rule 16

There is no substitute for consulting the full text of Rule 16, but in brief, an AUSA is required to disclose under Rule 16 the following:

i. Defendant's oral statements made to law enforcement in response to interrogation by a person the defendant knew was law enforcement;

***SUGGESTED BEST PRACTICE**: Ask all law enforcement officers who had any contact or dealings with the defendant to disclose to you all statements, **verbal and non-verbal**, made by the defendant at any time. Ask them to plumb the depths of their memories. Ask them again. And again. And finally, ask again. You do not want to learn about a relevant statement for the first time on the eve of trial or during the trial itself. An agent may not realize or understand the relevance of a seemingly off-the-cuff comment made by a defendant until trial preparation. Where we learn of such a statement late in the game, we run the risk of suppression of the evidence. Thus, the repeated admonition to ask agents, again and again, for statements of the defendant.*

2. Defendant's written or recorded statements, including grand jury testimony;

3. Statements by an organizational defendant;

4. Defendant's prior criminal record;

5. Documents and objects for use in the government's case-in-chief or which are material to preparing the defense;

6. Reports of examinations and tests; and

7. Expert witnesses - summary of opinion, bases and reasons, qualifications.

B. Disclosure of *Brady/Giglio*

The constitutional guarantee to a fair trial, as interpreted by *Brady* and *Giglio* and their progeny, requires an AUSA to disclose to the defense any evidence that is material to guilt or punishment. *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 154. *Brady* and *Giglio* information must be disclosed to the defense regardless of whether the defense makes a request for such information. In USAM § 9-5.001, the Department "requires AUSAs to go beyond the minimum obligations required by the Constitution and establishes broader standards for disclosure of exculpatory and impeachment information." The policy requires disclosure of "information beyond that which is 'material' to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995)," and encourages AUSAs to "err on the side of disclosure." This policy requires the prosecution team to produce "information," not just "evidence," and counsels that the assigned AUSA(s) must consider the cumulative impact of items of information.

1. Exculpatory Information

All exculpatory information known to or in the possession of the prosecution team, regardless of whether the information is memorialized, should be disclosed to the defendant reasonably promptly after its discovery. In accordance with the directives of USAM 9-5.001, AUSAs should go beyond the Constitutional requirements and take a broad view of materiality when determining what must be disclosed:

> A prosecutor must disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime.

USAM 9-5.001 (C)(1). This includes, but is not limited to, exculpatory information contained in interview memoranda of testifying and non-testifying witnesses and in internal emails, memos, and other reports. The exculpatory information need not be provided in its original form, *e.g.*, it is sufficient to send a letter to defense counsel advising of the exculpatory information in lieu of providing a copy of the original source document or recording, etc, which could be an email, letter, or other document or source.

2. Impeachment Information

Giglio v. United States, 405 U.S. 150 (1972), and its progeny, require the Government to turn over to the defendant anything known to the Government which would adversely impact the outcome of a trial in a material way. USAM 9-5.001 goes beyond *Giglio's* requirements and requires AUSAs to disclose anything that is material to the witness's credibility, or "that casts a substantial doubt upon the accuracy of any evidence ... the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence." USAM 9-5.001. The information should be disclosed "regardless of whether the information ... would itself constitute admissible evidence." USAM 9-5.001.

Examples of what must be turned over include inconsistent statements, promises of leniency or immunity made to a witness, plea/cooperation agreements entered into with a witness, any benefit provided to the witness by the Government[3], payments to a witness, any information that may be indicative of the witness's bias including, but not limited to, the witness's incarceration, probation, or supervised release status, the prior criminal record ("rap" sheet) of a witness, and other prior material acts of misconduct of a witness.

For a fuller discussion of inconsistent statements *see* D. Witness Interviews, "*Brady* and *Giglio* in Interviews of Testifying and Non-testifying Witnesses," and "Interviews of Non-testifying Individuals," below.

3. Timing of Disclosure

The following outlines either the required or suggested timing for disclosure of information during different phases of an investigation or prosecution.

a. Disclosures Necessary in Pre-Charge Phase.

(1) Grand Jury:

Exculpatory Information: Although the Supreme Court has held that there is no constitutional requirement that the government disclose exculpatory evidence to the grand jury, *see United States v. Williams*,504 U.S. 36, 54 (1992), USAM 9-11.233 requires AUSAs to disclose to the grand jury "substantial evidence that directly negates the guilt of a subject of the investigation."

Impeachment Information: Although there is no legal duty to seek out

[3] Such benefits include a promise to be lenient toward, or not bring charges against, a cooperating witness's family member or other person of significance to the cooperator.

impeachment information from the prosecution team or present impeachment information to a grand jury, if an AUSA is aware of significant impeachment information relating to a testifying witness, the AUSA should consider disclosing it to the grand jury, taking into account the witness's role in the case and nature of the impeachment information, among other things.

(2) Affidavits:

Exculpatory Information: If an AUSA is aware of substantial exculpatory information at the time he or she is preparing an affidavit in support of a search warrant, complaint, seizure warrant, or TIII, the AUSA should disclose the information in the affidavit unless the AUSA obtains supervisory approval not to do so.

Impeachment Information: If at the time an AUSA is preparing an affidavit in support of a search warrant, complaint, seizure warrant or TIII, the AUSA is aware of impeachment information relating to the affiant or other person relied upon in the affidavit such as a confidential informant, and that impeachment information is sufficient to undermine the court's confidence in the probable cause contained in the affidavit, the AUSA should disclose the information in the affidavit unless the AUSA obtains supervisory approval not to do so. A prior judicial finding of a lack of credibility of an affiant or person relied upon in the affidavit should be disclosed in the affidavit.

b. Disclosures Necessary Post- Charge:

(1) Exculpatory Information: After a defendant is charged, exculpatory information should be disclosed "reasonably promptly upon its discovery." USAM 9-5.001(D)(1). If an AUSA discovers exculpatory information after conviction, sentencing and appeal, the AUSA should discuss the proper way to handle the matter with a supervisor, in light of a prosecutor's obligations under ER3.8.

(2) Impeachment information should be disclosed as follows:

(a) Pre-Trial Hearings: Impeachment information relating to government witnesses who will testify at a preliminary/detention hearing, motion to suppress, or other pre-trial hearing should be disclosed sufficiently in advance of the hearing to allow the hearing to proceed efficiently.

(**b) Guilty Pleas**: The Supreme Court has held that there is no

constitutional requirement that the government disclose impeachment information prior to a guilty plea. *United States v. Ruiz*, 536 U.S. 622 (2002). Nonetheless, if the AUSA is aware of impeachment information so significant that it undermines the AUSA's confidence in the defendant's guilt, the AUSA should disclose the information to the defense and advise their supervisor.

© **Trial**: Impeachment information should be disclosed "at a reasonable time before trial to allow the trial to proceed efficiently." USAM 9-5.001 (D)(2).

(**d) Sentencing**: USAM 9-5.001 (D)(3) requires: "Exculpatory and impeachment information that casts doubt upon proof of an aggravating factor at sentencing, but that does not relate to proof of guilt, should be disclosed no later than the court's initial presentence investigation." Thus, AUSAs should disclose such information no later than the date the court issues its preliminary presentence (PSIR) investigation. If additional favorable information becomes apparent after the initial PSIR is issued, it should be disclosed promptly.

(e) Post-conviction evidentiary hearings: (probation/supervised release revocations, habeas actions) Impeachment information should be disclosed at a reasonable time before the hearing to allow the hearing to proceed efficiently.

C. Impeachment Information Relating to Law Enforcement Witnesses (Department's *Giglio* Policy per USAM 9-5.001)

In some cases AUSAs may encounter *Giglio* issues with respect to law enforcement witnesses who will be the affiant or a witness at a hearing or trial. For example, an agent may have been found to have committed misconduct, or may be the subject of a pending internal or criminal investigation. USAM 9-5.100 contains the Department's policy on obtaining and disclosing *Giglio* information relating to law enforcement witnesses. This office has a *Giglio/Henthorn* coordinator in Phoenix and Tucson to assist AUSAs with *Giglio/Henthorn* requests relating to law enforcement witnesses, and a Henthorn review panel in each of those offices to address the evaluation and disclosure of responsive material received, according to the procedures set forth below.

All potential impeachment information obtained from a law enforcement witness or the witness's agency should be carefully protected and only disclosed to those with a need to know.

1. *Giglio* Questionnaire for Law Enforcement Witnesses. In every case, the AUSA should ask each potential law enforcement affiant/witness the preliminary

interview questions on the attached Giglio Form. That interview form should be completed sufficiently in advance of a hearing or trial to permit enough time for a formal *Giglio* request to be made to the agency, and for the agency to respond to the request prior to trial. **Note:** The form itself is an internal report constituting attorney work product and should not be given to the law enforcement witness to complete, shown to the law enforcement witness, or produced in discovery.

The AUSA should complete the form and maintain it in the case file in a manner to prevent disclosure either through discovery or FOIA request, that is, in a marked and sealed yellow envelope. If an agent answers "yes" to one or more of the questions, the AUSA should provide a copy of the form to their *Giglio/Henthorn* coordinator for further use as set forth below.

2. Requesting and Reviewing Personnel and Disciplinary Files. The case AUSA will request all *Henthorn* information from the affiant/witness's agency. In those cases where an agent answered "yes" to one or more of the questions, the AUSA will use the information the agent gave to help identify for the agency's searching official the specific conduct in question. If it is a federal agency, the agency official will conduct a review of the agent's personnel and disciplinary files and disclose any impeaching information from the file to the requestor. If it is a state, local or tribal agency that does not have a person qualified to conduct *Giglio/Henthorn* reviews, the agency will likely be asked to produce the records to the *Giglio/Henthorn coordinator* for review.[4] Because gathering and reviewing *Henthorn* records takes time, AUSAs should complete the form sufficiently in advance of the witness's anticipated testimony to allow the process to be completed before the witness testifies. If a request has been made but not responded to before trial begins, the AUSA should advise the court.

3. **Review of Potential Impeachment Information; Disclosure to the Court or Defense Counsel.** This Office has promulgated a separate policy setting forth its procedures for review and disclosure of *Henthorn* material; see the District's October 18, 2010 policy memorandum, *Treatment and Evaluation of Potential Henthorn Material Within The Possession of the USAO*.

4. Protective Orders. AUSAs should seek protective orders of sensitive potential impeachment information in appropriate cases to prohibit disclosures by defense counsel or the defendant to third parties not involved in the case.

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[4] The Ninth Circuit does not require the government to examine the personnel files fo state or local police officers, even when they will be witnesses for the government, because those files are deemed "material not under its control." *United States v. Dominguez-Villa*, 954 F.2d 562, 565-66 (9th Cir, 1992); *see also United States v. Origel*, 2010WL1654134 (D.Ariz.).

5. Securely Maintaining Sensitive Agency Material. All potential impeachment information received from an agency pursuant to a *Henthorn* request should be securely maintained and should not be shared with any person who does not have a need to know. The AUSA should keep a copy of all potential *Henthorn* information received from a *Giglio/Henthorn* officer in the case file. *Henthorn* material disclosed to the court or to defense should be clearly marked in the criminal case file, so it is clear what was disclosed to the court. Because *Henthorn* information is sensitive, it should be kept in a sealed and segregated manner when it is not in use. Refer to this Office's *Henthorn* review and disclosure policy referenced in subsection 3 above or consult your *Giglio/Henthorn* coordinator for more details on proper storage and security of *Henthorn* information.

D. Witness Interviews

1. Interviews of Testifying Witnesses

Absent unusual circumstances such as potential serious threats to witness safety, national security, or an ongoing criminal investigation, AUSAs should produce reports of testifying witness interviews and witness statements to the defense prior to the hearing or trial. Interview reports of testifying witnesses should be produced sufficiently in advance of the witness's testimony to permit defense counsel to make effective use of the information. AUSAs have discretion to determine how far in advance of the testimony the reports will be disclosed based upon the particular circumstances of their case and any reciprocal discovery agreements they may reach with defense counsel. AUSAs are encouraged to consider using a disclosure agreement like the one attached here, where appropriate.

Production of witness interview reports is required regardless of whether the reports qualify as statements as defined by the Jencks Act, contain *Brady* or *Giglio* information, or are discoverable under any other law, rule, or policy. District of Arizona policy strongly encourages earlier and broader production than is required by the Jencks Act.[5]

[5] Federal Rule of Criminal Procedure 26.2 and the Jencks Act do not require disclosure of witness statements until after the witness has testified on direct examination in a hearing or trial.

a. Jencks Act/Rule 26.2

Although this policy encourages broad and early production of reports of witness interviews, AUSAs should nonetheless be familiar with the law's requirements and be prepared to object to the improper use or treatment of such reports as "witness statements" to the extent that they do not qualify as statements under the Jencks Act.

(1) Take care to avoid characterizing a witness interview as a Jencks Act statement in discovery letters or court pleadings if the interview does not fit the Jencks Act definition of a witness statement.

(2) Because a witness interview report is not Jencks material unless the witness has adopted the report as his or her statement, AUSAs should continue to object to use of the report in cross examination as if it were the witness's statement.

The Jencks Act defines "witness statements" as ... "(1) a written statement made by [a] witness and signed or otherwise adopted or approved by him; (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by [the] witness and recorded contemporaneously with the making of such oral statement; or (3) a statement, however taken or recorded, or a transcription thereof, if any, made by [a] witness to a grand jury." 18 U.S.C. § 3500 (e).

b. *Brady* and *Giglio* in Interviews of Testifying Witnesses

This policy requires production of testifying witness interview reports regardless of whether they contain *Brady* or *Giglio*. Part of the rationale for early production is that *Brady* and *Giglio* material is not always readily identifiable, especially when the defense is not readily apparent. Indeed, it is sometimes only the cumulative effect that renders the information relevant in the context of *Brady* or *Giglio*.

Because AUSAs are sometimes required by the court to respond to defense requests that are specific to *Brady* and *Giglio*, AUSAs should review witness interviews for potential *Brady* or *Giglio*. A witness interview may contain information favorable to the defense if it relates that the witness will receive a benefit from cooperating, that indicates the witness has given materially conflicting information or information that materially conflicts with another witness statement, failed to tell the whole truth from the beginning, or failed to advise the interviewing agent of certain facts during an interview.

AUSAs should be particularly sensitive to the potential for inconsistent statements if the same potential witness has been interviewed repeatedly. Some cooperating witnesses may not tell all they know the first time they are interviewed. If a witness initially denies or minimizes his knowledge of or involvement in criminal

activity, and thereafter provides information that is materially broader or different, the fact that the witness provided materially different information should be memorialized, even if the variance occurs within the same interview, and should be provided to the defense as *Giglio* information.

Memorializing Favorable Information and the Duty to Disclose. The duty to disclose to the defendant the substance of what a witness has said during interviews, debriefings, or informal discussions cannot be avoided by failing to memorialize these events. If any such events occur that are not memorialized in an interview report, the AUSA should determine what the witness said during the session that is newly learned favorable information to the defense and not previously disclosed and disclose the content of the witness' statements to the defense. AUSAs should emphasize to agents the importance of memorializing all impeaching information.

c. *Brady* and *Giglio* in Agent Notes

Although it is not necessary to produce an agent's handwritten notes as part of Rule 16 discovery or the Jencks Act, it *is* necessary to preserve them in the event that the accuracy of the related formal report become an issue. *See United States v. Harris*, 543 F.2d 1247 (9th Cir. 1976)(holding that rough note are always potentially discoverable and *must be preserved* until the matter is final). It is not necessary for AUSAs to review agent notes related to each potential witness interview. However, AUSAs should review the agent's notes of critical interviews, including any interview of a defendant, any interviews where the precise words used by the witness are important, and the notes relating to any report of interview of which the defense has questioned the accuracy. If the notes contain favorable information that is not memorialized in a formal report or any information that is materially inconsistent with the formal report, the notes or the information should be produced.

d. The Duty to Disclose Material Inconsistencies Learned During Pre-trial Witness Interviews.

AUSAs should disclose information learned during pre-trial witness preparation that is materially inconsistent with information provided by the same or a different government witness. All new information learned during a pre-trial preparation session is not necessarily impeachment information. New information that qualifies as impeachment information may be disclosed through a report of the interview prepared by the agent, or through a letter from the AUSA to the defense. Regardless, the AUSA and the agent should reach a clear understanding on who will memorialize the information, and the AUSA should ensure that the inconsistency is disclosed to the defense in a timely manner. The best practice would be to have the agent memorialize the inconsistency.

The duty to disclose to the defendant the substance of what a witness has said during a pre-trial preparation session cannot be avoided by failing to memorialize it.

2. Interviews of Non-Testifying Individuals

Although reports of interviews of non-testifying individuals should be reviewed as a matter of sound case preparation, AUSAs are not required to produce interview reports of non-testifying individuals unless the reports contain exculpatory information or information inconsistent with or otherwise impeaching of a testifying witness or the government's theory of the case.

3. Supervisory Approval Required to Deviate from Policy

If an AUSA believes it is appropriate to deviate from this policy, the AUSA must seek supervisory approval.

E. Discoverability of Prosecutor's Notes

A prosecutor's notes of witness interviews are usually protected from discovery by privilege rules and Federal Rule of Criminal Procedure 16(a)(2). AUSAs should be mindful, however, that notes that contain substantially verbatim quotes of what a witness said during an interview (potential Jencks Act), or favorable information (*Brady/Giglio*), may contain information that is discoverable. If the discoverable information in the AUSA's notes is contained in other materials provided to the defense (ROIs, agent's notes, letter to defense), it will often suffice to provide the other materials to the defense. It is possible, however, that if the exact nature of the information contained in the notes becomes an issue in the case, the court may review the notes *in camera*, and the AUSA should seek such review rather than flatly turning such work product over directly to defense counsel.

SUGGESTED BEST PRACTICE: AUSAs should avoid having substantive interaction with witnesses without an agent or other person present who can serve as a witness to the exchange. If an issue arises in a case regarding the contents or discoverability of a prosecutor's notes, consult with a supervisor.

III. Who is Part of the Prosecution Team?: Gathering and Reviewing Potentially Discoverable Information

A. Prosecution Team

When gathering discoverable information, AUSAs should collect from the members of "the prosecution team" all information that is required to be produced as set forth above. In USAM 9-5.001, "prosecution team" is defined as including "federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant." The AUSA needs to know which agencies have played a role in the investigation, and then must make all reasonable inquiries to

ascertain what pertinent case information exists. When identifying members of the prosecution team, the AUSA should err on the side of inclusiveness, in accordance with DOJ guidance.

In complex cases involving task forces, multi-district investigations, parallel proceedings, or other non-criminal investigative or regulatory agencies, the AUSA should examine the relationship of all entities to determine "whether the relationship with the other agency is close enough to make it part of the prosecution team for discovery purposes." *See* January 4, 2010 DAG Criminal Discovery Guidance Memo for factors that may aid in determining whether an entity should be considered part of the prosecution team.

B. Obligation of AUSA to Review Potentially Discoverable Information

When practical, the AUSA should make every effort to personally review all discoverable information before it is produced, even if the information is gathered and organized by others working on the case including legal assistants, paralegals, agents, analysts, or other law enforcement personnel. In cases involving voluminous documents or computerized information, personal review by the AUSA may be impossible. In such instances, the AUSA is advised to meet with those who will be assisting in gathering discovery to develop a discovery gathering plan and should thereafter oversee the gathering and production of discovery to ensure that all discoverable information is identified and produced, or made available to the defense for inspection and copying. Ultimate responsibility for the production of all discoverable information lies with the AUSA(s) assigned to the case.

IV. Potential Sources of Discoverable Information

The AUSA should seek out discoverable information from the prosecution team. The gathering process should include a review of the following potential sources of discoverable information:

A. Investigative Agency's Files. All substantive case-related information in the possession of an agent who is part of the investigative team should be reviewed by the AUSA to determine whether it should be disclosed as part of discovery. The search for information should not be limited to formal investigative reports such as FBI 302s, DEA-6s, and IRS MOIs.[6] The investigative agency may also have substantive case-related information in other formats or

[6] It is the policy of this District that documents in agency files that are prospective or forward looking and do not relate the facts of a specific investigation, such as operational plans, are not substantive, but rather logistical, and therefore ordinarily are not discoverable or subject to detailed review by the AUSA. It is therefore important that AUSAs continue to counsel agents not to include within their "ops plans" and other agency internal documents discussions of the facts of a case or investigation, and to the extent that they must, that such discussions be *ver batim* copies of previously created written statements, such as ROIs or 302s which will themselves be disclosed to the defense in any event.

locations that an agent may not consider to be part of the "investigative" file, such as electronic communications (ECs), searchable electronic databases, inserts, emails, or other forms of electronic communications. It may not be necessary to disclose the information in its original format, but AUSAs should review the information in its original format, whenever possible.

B. Confidential Informant (CI)/Witness (CW)/Human Source (CHS) Files. These files likely will contain *Giglio* information which should be disclosed to the defense or to the court for a ruling on whether it should be disclosed to the defense. AUSAs should make arrangements with the investigative agency possessing the file(s) to review the file(s) personally, whenever possible. If the file is located outside the District of Arizona, AUSAs may consider asking an AUSA in the district where the file is located for assistance in reviewing the file.

C. Evidence and Information Gathered During the Investigation. AUSAs should review all evidence and information gathered during the course of the investigation, including, but not limited to, information and evidence gathered via search warrant, subpoena (grand jury, administrative, inspector general, etc), Title III wiretaps, consensual /monitoring, surveillance, and witness interviews. If the volume of evidence makes it impractical for the AUSA to review all the evidence, this obligation may be satisfied by making the evidence available to the defense for inspection and copying.

D. Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agencies in Parallel Civil Investigations. If civil attorneys and/or regulatory agencies involved in parallel civil investigations are deemed to be part of the prosecution team, AUSAs should also gather and review any and all information and evidence from them that could be discoverable using the criteria set forth in the DAG's January 4, 2010 Criminal Discovery Guidance Memo.

E. Substantive Case-Related Communications (emails, tweets, text messages, memoranda, notes). Substantive case-related communications should be reviewed and disclosed in accordance with this Office's June 29, 2009 Policy on Email Use in Criminal Cases. AUSAs also should review the Department-wide June 16, 2010, draft policy on preservation and disclosure of electronic communications, found here.

F. Personnel and Disciplinary Files that May Contain Potential *Brady or Giglio* Information Relating to Law Enforcement Witnesses. AUSAs should determine whether each potential law enforcement witness has on or off duty instances of misconduct, including pending investigations, that may qualify as potential impeachment or exculpatory information. *See* discussion in section II C, above.

G. Handwritten Notes of Agents. AUSAs should review the agent's notes of critical interviews, which would include any interview of a defendant, other witnesses whose exact words are important, notes for interviews that were not converted into formal reports, and the notes relating to any report of interview the accuracy of which the defense has questioned. *See also* II D above.

H. Presentence Reports

If an AUSA has a witness who is or was a defendant in federal court, in most cases there will be a Presentence Investigation Report (PSIR) relating to that witness. The PSIR may contain Jencks, *Brady*, or *Giglio* that may need to be disclosed at the appropriate time. Because the PSIR is the property of the court and carries certain confidentiality requirements, the following procedure is recommended:

1. Review the PSIRs of witnesses for potential Jencks, *Brady* or *Giglio*. If the witness was a defendant in another district, the AUSA should contact the other district to get the PSIR.

2. Identify what, if any, information in the PSIR is arguably *Brady/Giglio* or Jencks.

3. If the AUSA identifies information that he or she believes should be disclosed and that information has not been disclosed elsewhere and is not readily available from another source, the AUSA should prepare a disclosure motion and order requesting either an *in camera* review or disclosure.

4. Attach as Exhibit(s) to the motion the PSIR(s) with the material we seek to disclose highlighted. We want the judge to have the entire PSIR, but be able to easily discern what we believe should be disclosed. File under seal.

With regard to Jencks material, the case law is clear that a testifying witness's entire PSIR is NOT the witness's Jencks material. That is, failing to object to the PSIR is not equivalent to the witness's adoption of the entire PSIR as a statement under the Jencks Act. However, the testifying witness's PSIR may contain Jencks material and it is most likely to appear in the defendant's version of the offense. AUSAs should examine the defendant's version of the offense to determine: (a) if it falls within the Jencks Act definition of statement--was it written by the defendant, a quote, or a substantially verbatim recital of an oral statement; and (b) if it relates to the subject matter of the witness's testimony. Even if it is not Jencks, it may still be subject to disclosure as *Brady* or *Giglio*.

V. Manner of Production and Record-Keeping

A. Manner of Production

1. Documents: AUSAs should maintain a record of discovery provided to the defense. Generally, all documentary evidence should be Bates numbered. Whenever possible, discoverable documents should be scanned and produced electronically in a format that allows the documents to be searched by a word or name. Disks containing

electronic data should be well-labeled so that they can readily be identified. If the discoverable documents in a case are too voluminous to be scanned, the documents should be made available to the defense for inspection and copying, and a record should be made of when the documents were made available and when the defense reviewed the documents.

2. Non-documentary evidence should be made available to the defense for inspection and photographing.

3. Video and Audio Recorded Conversations should be duplicated and produced to the defense.

B. Record Keeping

AUSAs should keep a written record in the criminal case file of all discovery produced to the defense and all evidence made available for inspection and copying. When discovery is provided or made available by an AUSA, the AUSA should use a discovery production letter to memorialize in detail the discovery that was provided or the items or material that was made available for inspection or copying. All production letters should be maintained in the criminal case file.

C. Privacy Protection: Redacting Documents

All personal identifiers should be redacted in whole or in part from discovery, including, but not limited to, names of minors, dates of birth, social security numbers, taxpayer identification numbers, home street addresses, telephone numbers, Medicare or Medicaid ID numbers, financial account numbers, or any other identifier which may improperly disclose private or sensitive information. Federal Rule of Criminal Procedure 49.1, which contains direction for redacting documents filed with the court, should also be used as a starting point for the redaction of documents that will be produced in discovery.

If the volume of discovery renders the redaction process so time-consuming that the production of discovery will be delayed, the AUSA may wish to consider seeking a protective order at the discovery stage. If the case goes to trial, the sensitive information should be redacted from exhibits prior to their introduction.