OFFICE OF THE UNITED STATES ATTORNEY FOR THE DISTRICT OF MAINE
DISCOVERY POLICY

Introduction

This policy has two parts. Part 1 addresses the process of gathering and reviewing potentially discoverable information. Part 2 addresses the process of disclosing discoverable information, including the scope and timing of such disclosures.

Federal prosecutors' disclosure obligations are generally set forth in Fed. R. Crim. P. 16 and 26.2, 18 U.S.C. §3500 (the Jencks Act), *Brady*, and *Giglio* (collectively referred to herein as "discovery obligations"). AUSAs must familiarize themselves with each of these provisions and controlling case law that interprets these provisions. In addition, AUSAs should be aware that USAM §9-5.001 details the Department's policy regarding the disclosure of exculpatory and impeachment information.

Part 1: Gathering and Reviewing Discoverable Information

A. Where to look—The Prosecution Team

Department policy states:

> It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant.

USAM §9-5.001. This search duty also extends to information prosecutors are required to disclose under Federal Rules of Criminal Procedure 16 and 26.2 and the Jencks Act.

In most cases, "the prosecution team" will include the agents and law enforcement officers within the District of Maine working on the case. In multi-district investigations, investigations that include both Assistant United States Attorneys and prosecutors from a Department litigating component or other United States Attorney's Office (USAO), and parallel criminal and civil proceedings, this definition will necessarily be adjusted to fit the circumstances.

Many cases arise out of investigations conducted by multi-agency task forces or otherwise involving state law enforcement agencies. In such cases, AUSAs should consider (1) whether state or local agents are working on behalf of the AUSA or are under the AUSA's control; (2) the extent to which state and federal governments are part of a team, are participating in a joint investigation, or are sharing resources; and (3) whether the AUSA has ready access to the evidence. Carefully considered efforts to locate discoverable information are more likely to

avoid future litigation over *Brady* and *Giglio* issues and avoid surprises at trial.

B. What to Review

To ensure that all discovery is disclosed on a timely basis, generally all potentially discoverable material within the custody or control of the prosecution team should be reviewed.[1] The review process should cover the following areas:

1. The Investigative Agency's Files: With respect to Department of Justice law enforcement agencies, with limited exceptions,[2] the AUSA should be granted access to the substantive case file and any other file or document the AUSA has reason to believe may contain discoverable information related to the matter being prosecuted.[3] Therefore, the AUSA can personally review the file or documents or may choose to request production of potentially discoverable materials from the case agents. The investigative agency's entire investigative file, including documents such as FBI Electronic Communications (ECs), inserts, emails, etc., should be reviewed for discoverable information. If such information is contained in a document that the agency deems to be an "internal" document such as an email, an insert, an administrative document, or an EC, it may not be necessary to produce the internal document, but it will be necessary to produce all of the discoverable information contained in it. AUSAs should also discuss with the investigative agency whether files from other investigations or non-investigative files such as confidential source files might contain discoverable information. Those additional files or relevant portions thereof also should be reviewed as necessary. With respect to non-DOJ federal agencies and state and local law enforcement agencies, the AUSA should request access to files and/or production of all potentially discoverable material and should proceed in a manner consistent with this paragraph to the extent possible.

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[1]How to conduct the review, and by whom it will be conducted, is discussed below. It is understood that compliance with this portion of the policy will require the cooperation of the various investigative agencies. In the event of a disagreement between the AUSA and an investigative agency, the AUSA should consult his or her supervisor in order to resolve the disagreement.

[2]Exceptions to a prosecutor's access to Department law enforcement agencies' files are documented in agency policy, and may include, for example, access to a non-testifying source's files.

[3]Nothing in this guidance alters the Department's Policy Regarding the Disclosure to AUSAs of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses contained in USAM §9-5.100.

2. Confidential Informant (CI)/Witness (CW)/Human Source (CHS)/Source (CS) Files: The credibility of cooperating witnesses or informants will always be at issue if they testify during a trial. Therefore, AUSAs are entitled to access to the agency file for each testifying CI, CW, CHS, or CS. Those files should be reviewed for discoverable information and copies made of relevant portions for discovery purposes. The entire informant/source file, not just the portion relating to the current case, including all proffer, immunity, and other agreements, validation assessments, payment information, and other potential witness impeachment information should be included within this review. If an AUSA believes that the circumstances of the case warrant review of a non-testifying source's file, the AUSA should follow the agency's procedures for requesting the review of such a file.

AUSAs should take steps to protect non-discoverable, sensitive information found within a CI, CW, CHS, or CS file. Further, AUSAs should consider whether discovery obligations arising from the review of CI, CW, CHS, and CS files may be fully discharged while better protecting government or witness interests such as security or privacy via a summary letter to defense counsel rather than producing the record in its entirety.

AUSAs must always be mindful of security issues that may arise with respect to disclosures from confidential source files. Prior to disclosure, AUSAs should consult with the investigative agency to evaluate any such risks and to develop a strategy for addressing those risks or minimizing them as much as possible, consistent with discovery obligations.

3. Evidence and Information Gathered During the Investigation: Generally, all evidence and information gathered during the investigation should be reviewed, including anything obtained during searches or via subpoenas, etc.

4. Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agency in Parallel Civil Investigations: If an AUSA has determined that a regulatory agency is a member of the prosecution team for purposes of defining discovery obligations, that agency's files should be reviewed. Where there is an ongoing parallel civil proceeding in which Department civil attorneys are participating, such as a *qui tam* case, appropriate access to the civil case files should be requested.

5. Substantive Case-Related Electronic Communications: "Substantive" case-related communications, including e-mails, may contain discoverable information. Although substantive communications within e-mails should be avoided where possible, those communications that do contain discoverable information should be maintained in the case file or otherwise preserved in a manner that associates them with the case or investigation. "Substantive" case-related communications are most likely to occur (1) among AUSAs and/or agents, (2) between AUSAs and/or agents and witnesses and/or victims, (3) between victim-witness coordinators and witnesses and/or victims, and (4) between one agent and another

agent.[4] "Substantive" communications include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility. Communications involving case impressions or investigative or prosecutive strategies without more would not ordinarily be considered discoverable, but substantive case-related communications should be reviewed carefully to determine whether all or part of a communication (or the information contained therein) should be disclosed.

AUSAs should also remember that with few exceptions (*see, e.g.*, Fed.R.Crim.P. 16(a)(1)(B)(ii)), the format of the information does not determine whether it is discoverable. For example, material exculpatory information that the AUSA receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email. When the discoverable information contained in an email or other communication is fully memorialized elsewhere, such as in a report of interview or other document(s), then the disclosure of the report of interview or other document(s) will ordinarily satisfy the disclosure obligation.

6. Potential *Giglio* Information Relating to Law Enforcement Witnesses: The Office's "Plan to Implement the Attorney General's Policy Regarding the Disclosure of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses" dated December 11, 2007, (LEO Giglio Policy) sets forth the Office Policy regarding law enforcement impeachment information. AUSAs should have candid conversations with the federal agents with whom they work regarding any potential *Giglio* issues, using the prescribed form for such conversations that appears in the office forms directory.

7. Potential *Giglio* Information Relating to Non-Law Enforcement Witnesses and Fed.R.Evid. 806 Declarants: All potential *Giglio* information known by or in the possession of the prosecution team relating to non-law enforcement witnesses should be gathered and reviewed. That information includes, but is not limited to:

- •Prior inconsistent statements
- •Statements or reports reflecting witness statement variations (see below)
- •Benefits provided to witnesses including:
  - Dropped or reduced charges
  - Immunity
  - Expectations of downward departures or motions for reduction of sentence
  - Assistance in a state or local criminal proceeding
  - Considerations regarding forfeiture of assets

[4]E-mails containing substantive information that are either sent to or by USAO personnel should be printed and filed in the appropriate case file. Agents should similarly be encouraged to print and retain substantive e-mails. Primary reliance on e-mail archive retrieval processes as a method of storing substantive e-mails is to be discouraged.

- Stays of deportation or other immigration status considerations
- S-Visas
- Monetary benefits
- Non-prosecution agreements
- Letters to other law enforcement officials (*e.g.*, state prosecutors, parole boards) setting forth the extent of a witness' assistance or making substantive recommendations on the witness' behalf
- Relocation assistance
- Consideration or benefits to culpable or at risk third-parties

•Other known conditions that could affect the witness' bias such as:

- Animosity toward defendant
- Animosity toward a group of which the defendant is a member or with which the defendant is affiliated
- Relationship with victim
- Known but uncharged criminal conduct (that may provide an incentive to curry favor with an AUSA)

•Prior acts under Fed.R.Evid. 608

•Prior convictions under Fed.R.Evid. 609

•Known substance abuse or mental health issues or other issues that could affect the witness' ability to perceive and recall events

8. Information Obtained in Witness Interviews: Although not required by law, generally speaking, witness interviews[5] should be memorialized by the agent.[6] When an AUSA participates in an interview with an investigative agent, the AUSA and agent should discuss note-taking responsibilities and memorialization before the interview begins (unless the AUSA and the agent have established an understanding through prior course of dealing). Whenever possible, AUSAs should not conduct an interview without an agent present to avoid the risk of making themselves a witness to a statement and being disqualified from handling the case if the statement becomes an issue. If exigent circumstances make it impossible to secure the presence of an agent during an interview, AUSAs should try to have another office employee present.

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[5]"Interview" as used herein refers to a formal question and answer session with a potential witness conducted for the purpose of obtaining information pertinent to a matter or case. It does not include conversations with a potential witness for the purpose of scheduling or attending to other ministerial matters. Potential witnesses may provide substantive information outside of a formal interview, however. Substantive, case-related communications are addressed above.

[6]In those instances in which an interview was audio or video recorded, further memorialization will generally not be necessary. AUSAs should encourage investigative agents to make a separate report of each interview session and should discourage the practice of writing a “rolling report” containing a summary of multiple interview sessions.

Interview memoranda of witnesses expected to testify, and of individuals who provided relevant information but are not expected to testify, should be reviewed.

a. Witness Statement Variations and the Duty to Disclose: Some witnesses' statements will vary during the course of an interview or investigation. For example, they may initially deny involvement in criminal activity, and the information they provide may broaden or change considerably over the course of time, especially if there are a series of debriefings that occur over several days or weeks. Material variances in a witness' statements should be memorialized, even if they are within the same interview, and they should be provided to the defense as *Giglio* information.

b. Trial Preparation Meetings with Witnesses: Trial preparation meetings with witnesses generally need not be memorialized. However, AUSAs should be particularly attuned to new or inconsistent information disclosed by the witness during a pretrial witness preparation session. New information that is exculpatory or impeachment information should be disclosed consistent with the provisions of USAM §9-5.001 even if the information is first disclosed in a witness preparation session. Similarly, if the new information represents a variance from the witness' prior statements, AUSAs should memorialize and disclose as necessary.

c. Agent Notes: It is not the policy of this office to produce as a matter of course in discovery the rough notes of agents or AUSAs. Be aware that the First Circuit Court of Appeals has cautioned the Government that rough interview notes should be preserved even when the notes are subsequently incorporated into a more formal report. *See* United States v. Colon-Diaz, 521 F.3d 29, 40 n.8 (1st Cir. 2008). Accordingly, agent notes should be reviewed if there is a reason to believe that the notes are materially different from the memorandum, if a written memorandum was not prepared, if the precise words used by the witness are significant, or if the witness disputes the agent's account of the interview. AUSAs should pay particular attention to agent notes generated during an interview of the defendant or an individual whose statement may be attributed to a corporate defendant. Such notes may contain information that must be disclosed pursuant to Fed.R.Crim.P. 16(a)(1)(A)-(C) or may themselves be discoverable under Fed.R.Crim.P. 16(a)(1)(B). *See also*, United States v. Clark, 385 F.3d 609, 619-20 (6th Cir. 2004) and United States v. Vallee, 380 F.Supp.2d 11, 12-14 (D. Mass. 2005).

d. Reports of Interviews: Reports of interviews (ROI), including FBI 302's, DEA 6's and the like, of testifying witnesses are technically not Jencks material of the interviewee unless the report reflects the statement of the witness substantially verbatim or the witness has adopted it. However, such ROI's may contain information that must be disclosed pursuant to Fed.R. Crim.P. 16(a)(1)(A)-(C). They may contain inconsistencies with the witness' trial testimony or may otherwise contain *Giglio* material

relating to the witness. Failure to provide ROI's as discovery thus creates risks of inadvertent discovery violations. Therefore, ROI's should normally be treated as Jencks Act material relating to the testifying witness for discovery purposes. Keep in mind that reports of interview of non-testifying witnesses may contain discoverable information including *Brady* and *Giglio* material.

C. Persons Conducting the Review- Delegation to Agents and Paralegals

It is the responsibility of the AUSA to ensure that the above-described categories of material are reviewed to identify discoverable information. It would be preferable if AUSAs could review the information themselves in every case, but such review is not always feasible or necessary. The AUSA is ultimately responsible for compliance with discovery obligations. Accordingly, the AUSA should develop a process for review of pertinent information to ensure that discoverable information is identified. Because the responsibility for compliance with discovery obligations rests with the AUSA, the AUSA's decision about how to conduct this review is controlling. This process may involve agents, paralegals, agency counsel, and computerized searches. Although AUSAs may delegate the process and set forth criteria for identifying *potentially* discoverable information, AUSAs should not delegate the disclosure determination itself.

Part 2: Making the Disclosures

A. General Considerations

The District of Maine has no local rule which dictates the scope or timing of discovery. Instead, it is the practice of the Court to issue an Order in Respect to Discovery on the day of the defendant's arraignment. The standard order requires the prosecutor and the defendant's counsel to meet and confer within five days of the date of the order on all discovery and pretrial production matters in the case. The AUSA should ensure that this meeting takes place in accordance with the court order and should appropriately document the date of the meeting and of any failed attempts to arrange the meeting. During that meeting, the prosecutor should ensure that counsel discusses the production of discovery by the Government under Fed. R. Crim. P. 16 (including a discussion of making documents and objects available for inspection/copying) and the defendant's reciprocal discovery obligations under the rule. In particular, the AUSA should inform defense counsel of the Government's intentions regarding the timing of Jencks Act production and should discuss any conditions that will be imposed in return for early production of Jencks Act material. This Office's policy is consistent with DOJ policy of encouraging prompt discovery that is not unnecessarily restrictive in scope. Discovery obligations are continuing, and AUSAs should always be alert to developments occurring up to and through trial of the case that may impact their discovery obligations and require disclosure of information that previously was not disclosed.

Once the attorneys have conferred regarding discovery, the AUSA should document the discussions by writing and sending to defense counsel the standard discovery letter that appears

in the forms directory. That letter should set forth the government's position, and any agreements reached, regarding pretrial production. The letter should also document all materials that are being provided at that time. Similarly, any further disclosures that are made thereafter should be documented.

B. Scope and Timing of the Disclosures

1. General Rule

Providing discovery at an earlier point in a proceeding than is required by law often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases. It also provides a margin of error in case the AUSA's good faith determination of the scope of appropriate discovery is in error. Sometimes, a defense attorney cannot properly advise a defendant whether to enter a guilty plea until the attorney reads the Jencks Act material. It is often the case that providing Jencks Act material at an early stage of the proceedings results in the defendant pleading guilty. Therefore, AUSAs are encouraged to consider providing broad and early discovery when they can do so in a manner consistent with the countervailing considerations described below.

2. Countervailing considerations.

However, when providing discovery, AUSAs should always consider any appropriate countervailing concerns in the particular case, including, but not limited to the following:

- Protecting victims and witnesses from harassment or intimidation
- Protecting the privacy interests of witnesses
- Protecting privileged information
- Protecting the integrity of ongoing investigations
- Protecting the trial from efforts at obstruction
- Protecting national security interests
- Investigative agency concerns
- Enhancing the likelihood of receiving reciprocal discovery by defendants
- Any applicable legal or evidentiary privileges
- Other strategic considerations that enhance the likelihood of achieving a just result in a particular case

AUSAs should never describe the discovery being provided as "open file." Even if the AUSA intends to provide expansive discovery, it is always possible that something will be inadvertently omitted from production and the AUSA will then have unintentionally misrepresented the scope of materials provided. Furthermore, because the concept of the "file" is imprecise, such a representation exposes the AUSA to broader disclosure requirements than intended or to sanction for failure to disclose documents, *e.g.*, agent notes or internal memos, that the court may deem to have been part of the "file." When the disclosure obligations are not clear or when the considerations above conflict with the discovery obligations, AUSAs may seek

a protective order from the court addressing the scope, timing, and form of disclosures.

C. Specific Time Frames

1. Rule 16 Material: Materials described in Rule 16(a)(1) should be provided as soon as practical following arraignment.

2. Brady Material: Exculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant reasonably promptly after it is discovered and in any event within a time so as to permit its effective use by the defense.

3. Impeachment Material: Impeachment information, which depends on the AUSA's decision on who is or may be called as a government witness, should be disclosed at a reasonable time before trial or hearing so as to permit its effective use and so as to allow the trial or hearing to proceed efficiently. Generally, routine *Giglio* material such as cooperation agreements, payments and other rewards, criminal records and prior inconsistent statements will be provided at the time that Jencks Act material is provided. If Jencks Act material is being provided by agreement in advance of the time required by law, then related routine *Giglio* material will not necessarily be provided at the same time. In any event, *Giglio* material is to be provided within a time so as to permit its appropriate use by the defense.

4. Jencks Act Material: Witness statements, grand jury transcripts and other materials that come within the Jencks Act should be produced at the earliest practical time taking into consideration the general rule and countervailing considerations discussed above. Normally, Jencks Act material should be disclosed no less than five business days before the evidentiary portion of the trial begins and a comparable period of time before any testimonial motion or sentencing hearing. If an AUSA believes that significant witness security issues prevent disclosure within this time frame, he or she shall consult with a supervisory AUSA before making a disclosure later than five days before trial.

5. Pre-Indictment Production: While Rule 16 does not apply to the pre-indictment phase of a criminal case, it is often advisable for the AUSA to disclose Rule 16 and Jencks material to the defense before an indictment is returned in order to facilitate a guilty plea to an information. When considering whether to make such a disclosure, the AUSA should apply the general rule and countervailing considerations discussed under B. above.

D. Form of Disclosure

All discovery materials should be provided in an appropriate searchable electronic format. In some cases, including small cases with a limited volume of material, the AUSA may

choose to provide discovery in paper format.[7] In any case in which there is an articulable concern about the security of discovery materials, before making a disclosure the AUSA should obtain defense counsel's agreement not to further copy the material and not to leave the material in the possession of the defendant. If necessary to prevent such further copying or disclosure, the AUSA should obtain an appropriate protective order. In such cases, each page of discovery provided to a defendant should be imprinted with a watermark containing that defendant's name.

Normally, materials will be provided in their original form, such as copies of witness statements, investigative reports and other documents. However, there are instances in which providing materials in their original form is prohibited or is otherwise not advisable, such as when the disclosure would create security concerns or when such information is contained in attorney notes, internal agency documents, confidential source documents, Suspicious Activity Reports, etc. If discoverable information is not provided in its original form and is instead provided in a letter to defense counsel, including particular language, where pertinent, AUSAs should take great care to ensure that the full scope of pertinent information is provided to the defendant.

E. Special Statutory Procedures

Congress has enacted special discovery procedures to deal with particular types of information and material that is subject to discovery in a criminal prosecution. For example, the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act) includes a provision limiting the availability of child pornography to the defense. The relevant provision of the Adam Walsh Act requires a court to deny "any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography (as defined by section 2256 of this title), so long as the Government makes the property or material reasonably available to the defendant." 18 U.S.C. § 3509(m). The statute compels the Government to provide a defendant, his attorney, and any expert for the defense "ample opportunity for inspection, viewing, and examination" of the material at a government facility. AUSAs should be familiar with any applicable statutory discovery requirements.

F. Cases involving national security issues

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."

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[7]If there are any materials that are not provided in either paper or electronic format, but rather are made available at the USAO for the defense to inspect, then the AUSA should make a record of having made those materials available and the fact that the defense inspected them.

Prosecutors should consult that memorandum and their supervisors regarding discovery obligations relating to classified or other sensitive national security information. As a general rule, in those cases where the prosecutor, after conferring with other members of the prosecution team, has a specific reason to believe that one or more elements of the Intelligence Community (IC) possess discoverable material, he or she should consult NSD regarding whether to request a prudential search of the pertinent IC element(s). All prudential search requests and other discovery requests of the IC must be coordinated through NSD.

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

- 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
- 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.

The policy is subject to legal precedent, court orders, and local rules. It provides prospective guidance only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits. *See United States v. Caceres*, 440 U.S. 741 (1979). This policy does not govern disclosure in cases involving terrorism and national security. Policy concerning these cases will be dependent on guidance currently being developed by the Department.

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