DISCOVERY POLICY

United States Attorney's Office
Eastern District of Missouri

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PROTECTED INFORMATION

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UNITED STATES ATTORNEY'S OFFICE
EASTERN DISTRICT OF MISSOURI

DISCOVERY POLICY

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General Principles for Discovery

This document sets forth the Office's policy on discovery in criminal cases. The Outline that follows is intended to provide a checklist and general guidance. The Office's policy and the Outline do not create or confer any rights, privileges, or benefits on any person. *See United States v. Caceres*, 440 U.S. 741 (1979).

The discovery obligations of federal prosecutors in this District are established by the Federal Rules of Criminal Procedure, 18 U.S.C. § 3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), and relevant case law, the Department of Justice's policy on the disclosure of exculpatory and impeachment information, the Local Rules of Criminal Procedure, the Arraignment Orders entered in particular cases, and the rules governing professional conduct. We must comply with the authorities set forth above. Thus, the first principle in the discovery policy for this Office is **"obey all rules."**

Second, as a general matter and allowing for the exercise of prosecutorial discretion and subject to the needs of individual cases, **prosecutors in this District are encouraged to provide discovery beyond what the rules, statutes, and case law mandate** ("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 or safeguard investigations of other people or other crimes committed by the defendant, or to preserve a legitimate trial strategy. Keep in mind, however, that expansive discovery may facilitate plea negotiations or otherwise expedite litigation. In the long term, moreover, expansive discovery may foster or support our Office's reputation for candor and fair dealing.

Finally, if you decide to adopt expansive discovery in a case, **do NOT refer to the expansive discovery practice as "open file discovery."** Our files 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 might have some material or information of which you are not aware. The use of the term "open file" is therefore inexact and potentially misleading.

These three general principles provide the basic foundation for this Office's discovery policy. The Outline that follows provides further guidance. The Outline does not and could not answer every question that may arise in a particular case. There is no substitute for being intimately familiar with the rules, statutes, and case law. Compliance with the governing legal authorities and this Office's policy on discovery will help to achieve a fair and just result in every case, which is our singular goal in pursuing a criminal prosecution.

I. DISCOVERY MATERIALS - WHAT IS DISCOVERABLE?

A. Rule 16 Materials

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

  ***PRACTICE TIP**: 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.*

  Why? 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.

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

- Statements by organizational defendant.

- Defendant's prior record.

- Documents and objects for use in our case-in-chief or which are material to preparing the defense.

- Reports of examinations and tests.

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

  ***PRACTICE TIP**: Give serious thought to what actually may be considered "expert testimony." Under Rule 702 of the Federal Rules of Evidence, expert testimony includes not only anything of a scientific or technical nature, but also anything requiring specialized knowledge. It would include, for example, testimony by a police officer, based on his experience, about drug prices in his beat or what drug quantities are consistent with personal use versus distribution. **Don't make the mistake of thinking that expert testimony is only given by Ph.Ds or only consists of testimony that includes an opinion**. Failure to follow proper discovery procedures regarding expert testimony might result in suppression of an important part of your case.*

B. Exculpatory and Impeachment Material

1. *Brady* and *Giglio*.

We have constitutional obligations, as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), and other case law, to disclose exculpatory and impeachment information when such information is material to guilt or punishment, **regardless of whether a defendant makes a request for such information**. Exculpatory and impeachment information is deemed material to a finding of guilt when there is a reasonable probability that effective use of that information will result in an acquittal. (DOJ policy, however, demands broader disclosure. See below.) Prosecutors must take a broad view of materiality and err of the side of disclosure. For an extensive discussion of cases interpreting *Brady* and *Giglio*, see USA Book, "Brady & Giglio Issues" (http://10.173.2.12/usao/eousa/ole/usabook/bgig/bgig.pdf).

2. DOJ Policy.

The Department of Justice has adopted a policy that requires us to go beyond even the strict requirements of *Brady* and *Giglio* and other relevant case law. Specifically:

- Exculpatory information - information that is inconsistent with any element of the crime or which establishes a recognized affirmative defense, regardless of whether the prosecutor believes the information is admissible evidence or will make a difference between conviction or acquittal.

- Impeachment information - information that either casts a substantial doubt on the accuracy of any evidence the prosecutor intends to rely on to establish an element (including but not limited to witness testimony) or which might have a significant bearing on the admissibility of prosecution evidence. This is regardless of whether the prosecutor believes the information is admissible as evidence or will make a difference between conviction and acquittal.

- Admissibility of the exculpatory or impeachment information - our disclosure requirement applies even when the information subject to disclosure is not itself admissible evidence.

- Cumulative impact - if the cumulative impact of several pieces of information meets the disclosure requirements, disclose all of the information even if the pieces, considered separately, do not meet the requirements.

See United States Attorney's Manual sections 9-5.001 (http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm).

3. Office Policy.

It is the policy of this office, pursuant to Giglio v. United States, 405 U.S. 150 (1972), that disclosure of favorable or impeaching evidence related to law enforcement personnel shall be provided in a manner consistent with the directives of the Department of Justice. In order to facilitate this process, a method for keeping records of such information within this office shall be established. This method of record keeping shall be as follows:

A. Upon an appropriate request for impeaching or favorable evidence by a defendant in a pending case relative to law enforcement personnel conduct which affects that person's credibility or character for truthfulness, for opinion evidence about such person's reputation for truthfulness, prior inconsistent statements of such person or information to show that such person is biased against the defendant, the Assistant United States Attorney receiving said request shall contact this office's Requesting Official (Hal Goldsmith). This office's Requesting Official will then contact the law enforcement agency employing said person (as well as the designated agency officials from the Department of Justice - Office of Inspector General and Department of Justice - Office of Professional Responsibility) and shall request notice of whether such information exists. The request shall be specific enough to allow the law enforcement agency to make an adequate search of its records for the requested information.

B. Upon receipt of information from the law enforcement agency that evidence responsive to the request exists, the requesting Assistant United States Attorney and this office's Requesting Official shall meet with a representative of the law enforcement agency to discuss what material exists which may be disclosed pursuant to Giglio and to discuss how the disclosure of said material shall be made. The law enforcement agency shall be give a full opportunity to express its views on whether the materials should be disclosed, and the method(s) of disclosure. If part of the information relates to unsubstantiated allegations, allegations which are not credible or allegations which have resulted in exoneration, this office will take special care to insure that such information is kept confidential and will protect the privacy interests and reputations of those employees. Further, at the conclusion of the matter for which such allegations have been received, this office will return all the information received from the agency.

C. In a case where the law enforcement agency and the office of the United States Attorney disagree on whether disclosure should be made or upon how disclosure should be made, the matter shall be referred to the United State Attorney for a final decision. Before any decision is made, the United States Attorney shall give representatives of the law enforcement agency the opportunity to personally present their views to the United States Attorney.

D. Upon receipt by the office of the United States Attorney of materials called for by Giglio, they shall be placed in the custody of the Giglio Requesting Official who shall store them in a secure location within the office of the United States Attorney. Access to these materials shall be limited to the United States Attorney or his or her designee, the Giglio Requesting Official and the Assistant United States Attorney who has requested the material. Such materials shall not be kept in any criminal case file, but instead shall be kept as a separate category of records within the office. The materials shall not be altered in any way, and the original copy of said materials shall be kept in the files. Only copies shall be provided to the requesting Assistant United States Attorney. Regardless of whether these materials have been disclosed to the court or a defendant in a case, these materials shall be kept in a file system which does not allow them to be accessed by the identity of the employee to whom they relate, but instead shall be filed by agency name and subject matter. The requesting Assistant United States Attorney shall return the copies of such materials to the Giglio Requesting Officer at the conclusion of the trial and shall not allow the defendant or his representatives to copy such materials. In the place of making copies, the defendant or his representative shall be allowed access to the materials and may take notes. Copies of the materials shall be made available to the defendant or his representative for purposes of cross-examination in the courtroom, only if the law enforcement personnel deny the content of the material. After such use, the materials must be immediately returned to the Assistant United States Attorney.

E. Recognizing the sensitivity of such materials and the unjustified damage which might occur to the character or reputation of a law enforcement official by the unwarranted dissemination of such materials, before disclosure is made to the requesting defendant, the Assistant United States Attorney and the Giglio Requesting Official shall consider:

1. Whether an ex parte, in camera examination of such materials by the District Court should be sought to determine whether disclosure is required;

2. Whether protective Orders should be sought to limit the use, disclosure and dissemination of such materials by the defendant,

defendant's counsel(s) and any party who receives access to such materials pursuant to the defendant's request; and

3. The method of disclosure which will cause the least harm to the law enforcement agency and its personnel.

This office will retain the right to keep and retain motions, memoranda, court orders, internal office memoranda or correspondence and supporting documents which relate to disclosed impeachment materials in the criminal case file.

F. Once the Assistant United States Attorney and the Giglio Requesting Official have determined that such materials must be disclosed and have determined the method of disclosure, they shall, before disclosure is made, again contact the law enforcement agency and inform the agency of their determinations. They shall inquire of the agency the present status of the information to be disclosed, and upon receiving such additional information, it will be added to this office's system of records maintained with this information. Further, the agency shall be given the opportunity to voice its objections and opinions on the determination to make disclosure and on the method to be used to make the disclosure. Once disclosure of such information is made to either a court or to a defendant, the Requesting Official in this office shall give notice of the disclosure to the agency. This disclosure shall include any orders of the court and related pleadings and the exact contents of the disclosure made.

G. As Brady requests are normally made well in advance of trial, the office of the United States Attorney shall make every effort to effectuate the policies set forth above in an expeditious manner to give all parties adequate time to make decisions and to voice their views. When such requests arise close to or during trials, the office of the United States Attorney shall make every effort to follow all of the policies above, but if the requirements of Brady and Giglio require immediate action in a case, the Assistant United States Attorney or the Giglio Requesting Officer shall inform the law enforcement agency and the United States Attorney of the need for an immediate resolution of the issue, and the United States Attorney may authorize disclosure without following all of the policies set forth above. In such a case and as soon as possible after the trial of the case, the Assistant United States Attorney, the Giglio Requesting Officer, representative of the law enforcement agency and the United States Attorney shall meet to discuss the disclosure and any issues which arose from the disclosure.

H. The Requesting Official in this office will inform the relevant agency officials in this District of federal decisions and practices which affect or govern the definition and disclosure of impeachment information.

I. The Requesting Official in this office will inform the agency which has provided potential impeachment information of the termination of an investigation, the judgement in a case or of declinations of matters.

J. Upon receiving information from an agency that an employee has retired, has moved to another office outside of this District or has been assigned to a position in which they will no longer be a witness or affiant in any case or investigation, all information received about the employee will be removed from this office's system of records which may be accessed by the identify of the employee.

C. Witnesses' Statements - Jencks Act and Rule 26.2

1. What is a statement?

The Jencks Act (18 U.S.C. § 3500) and Fed. R. Crim. P. 26.2 require disclosure of a witness's statements that relate to the subject matter of the witness's testimony at trial or a hearing. Both the Jencks Act and Rule 26.2 define "statement" similarly. Specifically, a statement includes:

- a **written** statement that the witness makes and signs or otherwise adopts and approves.

- a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording.

  PRACTICE TIP*: This may include relevant portions of a report of, or notes from, an interview of a witness, if the report or notes contain a substantially verbatim recitation of the witness's oral statement. Remember, "substantially verbatim" does not mean "precisely verbatim." See subsection I.D.4 below regarding notes of interviews.*

- grand jury testimony.

2. What is not a statement?

Generally, an agent's report of interview (e.g., FBI "302" or "DEA-6"), is not considered a statement of the witness who was interviewed, unless, as noted above, the report contains a substantially verbatim recital of the witness's statement, or the witness reviews and adopts the report. A witness may be deemed to have adopted the report or notes that were taken during an interview if the witness agrees with an agent's oral recitation of his notes or report to see if the notes or report is correct.

***PRACTICE TIP**: Generally, we disclose reports of interview to defense counsel, in the exercise of an expansive discovery practice. Remember, even though a report of interview is not generally a statement of the witness interviewed, it is a statement of the agent who prepared the report. The report must be disclosed if that agent will be a witness and the report relates to the subject matter of the agent's testimony.*

If you decide to disclose an agent's report of interview that under the law is not a witness's statement, discuss your intention with the agent before making the disclosure.

3. Redaction of statements.

Rule 26.2(c) provides that where a statement of a witness contains some material that is relevant to the case, but other material that is either privileged or does not relate to the subject matter of the witness's testimony, the government may call upon the trial court to review in camera the statement in its entirety and excise any privileged or unrelated portions of the statement before it is disclosed to the defense. This implies that the government may not excise such a statement on its own.

***PRACTICE TIP:** This rule is one good reason to take separate statements from a single witness for separate investigations or cases.*

4. Notes of interview (agents and prosecutors)

If an agent's notes contain *Brady* or *Giglio* material that is not included in the agent's formal summary of the interview, the notes remain relevant and the *Brady/Giglio* material must be disclosed. Similarly, **a prosecutor's notes** of a witness interview (as opposed to notes containing mental impressions, personal beliefs, trial strategy and legal conclusions) may have to be disclosed, or the relevant information contained therein, if the notes reflect exculpatory or impeachment information.

Also, the government may **not** limit its obligation to disclose exculpatory or impeachment evidence of which it is aware either by simply declining to make a written record of the information in the first place or by omitting the information in a final draft of the memorandum of interview and destroying the notes that contain that information. The substantive demands of *Brady* and *Giglio* are not thwarted by the manner in which the government treats or packages exculpatory information.

***PRACTICE TIP**: It is highly recommended that you emphasize with all members of the prosecution team that exculpatory and impeachment information must be disclosed, regardless of whether we make a formal record of it.*

It is recommended that you explain to the agents working on the case that they may not destroy their informal notes unless and until everything exculpatory or impeaching in them has been fairly included in a formal memorandum of the interview. Such a warning, regularly given, should help to dispel any notion that the duty to disclose exculpatory or impeachment material may be controlled or limited by the manner in which that information is recorded or treated. Moreover, demanding that agents review their notes against their final, formal memoranda to insure that all impeaching or exculpatory information has been disclosed is perhaps one way to forestall that task eventually falling to AUSAs.

5. Applicability of the Jencks Act and Rule 26.2.

The Jencks Act applies to trials. Rule 26.2 applies to:

- preliminary hearings
- detention hearings
- suppression hearings
- sentencing hearings
- hearings to consider revocation of probation or supervised release
- 2255 hearings

See Section IV below regarding the timing of disclosure.

D. Materials NOT Subject to Disclosure Requirements

Rule 16 generally does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or by an agent in connection with the investigation or prosecution of a case. See Fed. R. Crim. P. 16(a)(2).

***PRACTICE TIP**: An agent's report, however, may contain information favorable to the defendant. It may also contain information that might be deemed a "statement" for purposes of the Jencks Act or Rule 26.2. That is, to the extent it relates to the subject matter of the agent's testimony, or contains a substantially verbatim recital of another witness's oral statements, the relevant portions of the report may be subject to disclosure.*

Again, under an expansive discovery practice, you may wish to consider disclosing the agent's report, regardless of whether the law and the rules would require disclosure. Discuss this with the agent before making the disclosure.

II. GATHERING DISCOVERY MATERIALS

A. Where to Look - the Prosecution Team

We must locate and disclose all discoverable materials noted above in Section I, including information that is exculpatory and/or impeaching of a prosecution witness, that is within the possession of the "prosecution team." This team includes the agents and law enforcement officers who helped to develop the case or worked with or under the supervision of the prosecutor during the investigation. The "prosecution team," however, may at times include other agencies. For a more complete discussion of who might be included in the "prosecution team" for discovery purposes, see pages 2-3 of the Deputy Attorney General's January 4, 2010 "Guidance For Prosecutors" memo.

B. What to Review/Request

All evidence and other potentially discoverable material gathered during the investigation, whether in our custody or the custody or control of the other members of the prosecution team, should be reviewed. Special care should be given to gathering exculpatory/impeachment information and witnesses' statements, as discussed above in Section I. Specifically, you should review, or cause to be reviewed by someone intimately familiar with the law and DOJ policy on the disclosure of exculpatory and impeachment information, the following:

- ***All*** of the agency's investigative files.

- ***All*** of the CI/CW/CHS/CS files, by whatever name the agency labels these. Agencies who make use of confidential informants and cooperating individuals have their own established procedures for retaining information about those witnesses. The agencies may keep multiple files containing different types of records or information. Thus, inquiries to agencies about informants should include a review of every kind of file that might contain information about the individual.

- Evidence/information obtained via subpoena, search warrants, or other legal process. With respect to electronically-stored evidence, including e-mails, sufficient time must be allotted for a search of hard drives, disks and other storage hardware. These searches may take a long time, so they should be undertaken well before indictment.

- Evidence/information gathered by civil or regulatory agencies in parallel investigations.

- Substantive communications/correspondence including e-mails, text

messages, and letters, between and among prosecutors, agents, witnesses, victims, victim-witness coordinators, etc.

- Potential *Giglio* information about non-law enforcement witnesses (including declarants whose hearsay statements the government might seek to introduce at trial). Ask the case agent to run a criminal history report on all non-law enforcement witnesses.

  ***PRACTICE TIP**: Anytime the government has reason to question a witness's credibility, the government has a duty to inquire. United States v. Osorio, 929 F.2d 753 (1st Cir. 1991).*

  Also, remember that when a declarant's hearsay statements are admitted into evidence, the credibility of the declarant may be attacked, and if attacked may be supported, as if the declarant testified as a witness. Fed. R. Evid. 806.

C. Confidential Informants/Witness Testifying Under Plea or Immunity Agreement

You should investigate a confidential informant, or a witness who has agreed to cooperate pursuant to a plea or immunity agreement, very thoroughly. Among other things, you should investigate and disclose any information obtained in the following areas when you are going to have a confidential informant or cooperating witness testify at trial or a hearing:

- the witness's relationship with the defendant
- the witness's motivation for cooperating/testifying
- drug and alcohol problems
- all benefits the witness is receiving, including:

  i. Monetary payments--how are they calculated?
  ii. Expenses, costs and housing--is anyone paying?
  iii. Immigration status for the witness and/or family members
  iv. Arrests--intervention by law enforcement
  v. Taxes--has the witness paid taxes on informant payments?

- any notes, diaries, journals, e-mails, letters, or other writings by the witness
- prison files, tape recordings of telephone calls, and e-mails, if the informant is in custody

- criminal history

***PRACTICE TIP**: You should request that the law enforcement agency on the case check not only the III database, but also the database of the states and municipalities where the witness is known to have lived. Why? Some states and municipalities may not have entered relevant information into national databases. Consequently, the III database may not contain relevant charges, including misdemeanor charges that are related to credibility, like bad check charges, or currently pending arrest warrants.*

You should also review the criminal history with the potential witness to ensure completeness.

Also see the "The Use of a Criminal as a Witness," by Senior United States Circuit Judge Stephen S. Trott, for an extensive discussion of the issues associated with using confidential informants and other cooperators (http://10.173.2.12/usao//eosua/ole/usabook/homi/07homi.htm).

D. Trial Preparation Interviews

When preparing a witness for a hearing or trial, be very aware of our continuing obligation to disclose information that might be exculpatory or have impeachment value. Thus, if a witness provides information that conflicts in material ways with information the witness has previously provided, or conflicts with material information provided by other witnesses, we should disclose that conflict to the defendant.

***PRACTICE TIP**: What is the standard? Measure any conflicting information provided by a witness against the standards set forth in the DOJ Policy, United States Attorney's Manual section 9-5.001, discussed above in Section I.C.2.*

III. PREPARING DISCOVERY MATERIALS FOR AND MAKING THE DISCLOSURE

A. Grand Jury Materials

1. Handling grand jury materials.

The Department of Justice has guidelines for obtaining and handling evidence pursuant to grand jury subpoena. See United States Attorney's Manual section 9-11.254; *Federal Grand Jury Practice Manual*, Chapter 6 (October 2008). Specific

points to remember:

- Identify a records custodian. Typically this is the agent on the case. This person must be familiar with and have the ability to comply with the security requirements for storing grand jury materials.

- Subpoena log. Maintain a log of subpoenas issued for documents and other objects. The log should record the date the subpoena was issued, the grand jury to which the documents or objects were subpoenaed, the date they were received, and the date they were returned to the grand jury.

- Make a return to the grand jury of the documents returned.

  PRACTICE TIP: Always "return," that is, physically present, the documents and objects to the grand jury in a timely fashion. (You may substitute a description of the documents for actual presentation, when the volume of the documents makes actual presentation impractical.)

  This is important! The use of the grand jury to obtain documents or other objects presupposes that the records were obtained for use **by the grand jury**. The return makes the grand jury aware of the existence of the records. Also, the Right to Financial Privacy Act **mandates** that records obtained from a financial institution be returned to the grand jury. See generally 12 U.S.C. §§ 3401-3422. (For a general outline of the Right to Financial Privacy Act, see the United States Attorney's Memorandum of September 4, 2008.)

B. Materials Seized by Search Warrant

If you have used a search warrant in the investigation, material related to the warrant, including affidavits, orders and the warrant itself, must be disclosed so that the defense can pursue a motion to challenge the constitutionality of the search and suppress evidence obtained in the search. Moreover, if the affiant is to be a witness at the trial, the affidavit is in all likelihood a Jenck's Act statement. Before disclosing a search warrant affidavit, be sure that it is not sealed.

If the affidavit has been sealed pursuant to our motion, you must apply for an order to unseal the affidavit before disclosing it to the defense. In those instances where the substance of the affidavit should not be made public -- as in where the affidavit may refer

to an ongoing, covert criminal investigation -- you may ask for an order allowing the limited release of the material to defense counsel, but prohibiting defense counsel from copying the material or making it public.

C. The Discovery Letter

AUSA's should use the office's standard discovery letter in providing discovery to the defendant.

IV. SPECIAL CONSIDERATIONS

A. Disclosing/Storing Impeachment Information About Agents

The Department of Justice's policy regarding the disclosure of exculpatory and impeachment information (see United States Attorney's Manual section 9-5.100) requires that we designate a "Requesting Official" to serve as a point of contact concerning potential impeachment information about an agent. The Requesting Official in this Office is our Senior Litigation Counsel, AUSA Hal Goldsmith. His duties include informing agency officials about Supreme Court and Eighth Circuit case law, district court rulings and practice governing the definition and disclosure of impeachment information. In addition, the Department's policy requires the following:

1. Disclosing impeachment information about an agent.

The disclosure of impeachment information about an agent requires special consideration. The following considerations apply to such information:

- Prior to making any disclosure of impeachment information on an agent, the AUSA or Requesting Official shall communicate with the agency concerned about our intentions, and allow the agency sufficient opportunity to express its views on whether such information should be disclosed to the court or to defense counsel.

- AUSAs shall preserve the security and confidentiality of potential impeachment information about agents through proper storage and restricted access in this Office. This means that such information shall be maintained in a folder marked "Limited Official Use." The folders shall be treated with the same level of sensitivity as tax return information, i.e., kept in a locked file cabinet.

- When appropriate, and after consultation with the Requesting Official and the agency concerned, AUSAs should seek *ex parte, in camera*

review and decision by the Court regarding whether potential impeachment information must be disclosed to defense counsel.

***PRACTICE TIP**: In instances where we have determined that disclosure of a particular item presents a "close call" and where there are bona fide considerations that mitigate against disclosure, it may be proper to submit the particular item to the court for a ruling. While we have no recent written opinions in this District related to this practice, recent experience suggests that the judges may take an expansive view of the right to disclosure in these instances. Remember, before submitting any potential information for ex parte, in camera examination, consult with the Requesting Official. You should also consult with your supervisor.*

- When appropriate, AUSAs should seek protective orders to limit the use and further dissemination of potential impeachment information by defense counsel.

- If any impeachment information is disclosed to the Court or defense counsel, the AUSA making the disclosure shall also provide a copy of the material that was disclosed, along with related pleadings and court orders, to the agency concerned. Also, the AUSA shall provide a copy of the aforementioned documents to the Requesting Official if any impeachment information is disclosed to defense counsel.

- At the conclusion of the case, or upon declination of a matter, AUSAs shall return to the agency any impeachment information provided by an agency about any of its officers. Our file should continue to maintain, however, all motions, responses, legal memoranda, court orders and internal office memoranda and correspondence in the relevant criminal case file.

2. Storage of impeachment information about an agent.

Unless impeachment information about a law enforcement agent is disclosed to defense counsel, this Office will **not** retain such information in a manner that can be accessed by the agent's identity. Such information shall be retained in individual case files, as discussed above in section V.A.1.

However, and as noted above in section V.A.1, if an AUSA discloses impeachment information about an agent to defense counsel, the AUSA should provide the Requesting Official with a copy of the information disclosed, along with related pleadings, court orders and correspondence. The Requesting Official shall maintain the information by the agent's identity, in a secure file. If, in a future case,

an AUSA desires to use or rely on the witness or evidence to which the impeaching information on file relates, the Requesting Official shall contact the agency concerned to determine the status of the information and whether there is additional information. The steps set forth in above in section V.A.1 shall again be followed prior to disclosure to defense counsel in the new case.

Upon being notified that an agent has retired, been transferred to another district, or been reassigned to a position that will no longer require the agent to serve as an affiant or witness, and if there are no pending cases involving the agent, the Requesting Official shall remove any records concerning that agent from his retained files.

B. Other General Considerations

1. Records of regularly conducted activity.

Notice of our intent to introduce records of regularly conducted activity pursuant to Fed. R. Evid. 902(11) (for domestic records) or 18 U.S.C. § 3505 (for foreign records). This may be accomplished as part of a formal discovery response.

2. Prior convictions older than ten years.

Notice of intent to introduce evidence of a prior conviction to impeach a witness, and that more than ten years has passed since the date of the conviction or the release of the witness from confinement (whichever is later), pursuant to Fed. R. Evid. 609(b).

3. Co-defendant statements and *Bruton*.

If you intend to introduce at trial statements by a defendant that have been redacted to eliminate references to co-defendants, pursuant to *Bruton v. United States*, 391 U.S. 123 (1968), submit the statements, with the proposed redactions highlighted, to the defense and the court, well before the pre-trial motions hearing. This will put the defense on notice of our intent, avoid surprise, and provide the court sufficient time to rule on any defense objections.

***PRACTICE TIP**: Bruton protects the right to confrontation under the Sixth Amendment. It does not apply to statements made by a co-conspirator that were made in furtherance of the conspiracy, or to non-testimonial statements.*

4. Notice of alibi.

A request for notice of alibi pursuant to Fed. R. Crim. P. 12.1. Our request will require the defendant to provide certain information, which will trigger our

obligation to respond with the names, addresses, and telephone numbers of witnesses who will testify that the defendant was at the scene of the crime and also the names of rebuttal witnesses to the defendant's alibi defense.

***PRACTICE TIP**: Requesting notice of alibi is highly recommended in any case where a defendant might claim that he was not present when the crime occurred. Be aware that after a defendant files a notice of alibi, the government will have to respond in ten days with the names of witnesses and other information listed in Fed. R. Crim. P. 12.1(b)(1). You may want to file your request for notice of alibi closer to trial, because of the timing and disclosure requirements, in order to protect the safety of your witnesses.*

5. Insanity and mental health.

Notice from the defendant of intent to assert an insanity defense, or intent to introduce expert evidence relating to mental disease, defect or other condition, pursuant to Fed. R. Crim. P. 12.2. The notice should be given by the time set for filing pre-trial motions, or a later time set by the court.

6. Public authority defense.

If a defendant intends to rely on the defense of actual or believed exercise of public authority on behalf of a law enforcement or intelligence agency, the defendant must provide timely notice pursuant to Fed. R. Crim. P. 12.3. The notice must be filed under seal if an intelligence agency is the purported source of public authority.

7. Organizations as victims.

If an organization is the victim of a charged federal crime, the government must file a statement identifying the victim-organization. If the victim-organization is a corporation, the statement must identify any parent corporation and any publicly held corporation that owns 10% or more of the victim-corporation's stock, or state that there is no such corporation. See Fed. R. Crim. P. 12.4.

8. Trial subpoenas.

Rule 17(c) of the Federal Rules of Criminal Procedure allows for the parties to subpoena documents or objects for use at trial. The parties may apply to the court for early production. Remember, production is to be made to the court (this usually translates to the Clerk's Office) prior to trial and the documents or objects are thereafter made available to all parties. That is, a Rule 17(c) subpoena is not a meant to get exclusive access to potential evidence. When the material subpoenaed

is disclosed, it is disclosed to all parties.

***Practice Tip**: Be alert to any attempt by the defense - it may be intentional or inadvertent - to have the subpoenaed items delivered to their offices rather than the court.*

9. 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." 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; 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.