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

OFFICE POLICIES AND PROCEDURES

Criminal Discovery Policy
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Policy Summary and Background

On January 4, 2010, Deputy Attorney General David Ogden issued a memorandum entitled "Guidance for Prosecutors Regarding Criminal Discovery" ("DAG Ogden Criminal Discovery Guidance." That same date, he directed all U.S. Attorneys' Offices to promulgate discovery policies governing several enumerated issues. The draft comprehensive discovery policy which appears below implements the directives of the Deputy Attorney General. The guidance is subject to legal precedent, court orders, and local rules. This document is deliberative and pre-decisional, 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).

National Security Matters

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 with the National Security Division, (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.

GENERAL DISCOVERY PRINCIPLES

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, the Jencks Act, (18 U.S.C. § 3500), Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972), 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 progression 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 never 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. It is important to advise the court, however, if you intend to offer expansive discovery beyond that required by Rule 16. A suggested response to the "open file" inquiry might be: "No, we are not adopting an open file, however, copies of all investigative reports will be provided to the defense."

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.

THE SOURCES OF OUR DISCOVERY OBLIGATIONS

Discovery obligations in criminal cases are created by statute, rule, and case law. Information on various requirements related to discovery in criminal cases can be found in USABook under the topic Criminal Discovery.

Detailed procedural requirements for discovery in criminal cases are specified in the local rules promulgated by the United States District Court for the District of Nebraska. Those rules are found at NECrimR 16.1 which reads as follows:

The local rule creates a presumption that the defendant has requested all the

materials described in Federal Rule of Criminal Procedure 16, unless the defendant files a notice stating that discovery is not requested within two days of arraignment. Although rare in practice, the local rules contemplate that a defendant might request only partial Rule 16 discovery[1], (i.e., that found at Rule 16(a)(1)(A)-(D)), and NOT other types evidence covered by Rule 16, (i.e., that found at Rule 16(E),(F) and(G)). Please note that if Rule 16 discovery is ordered you are required to provide ALL Rule 16 materials unless the defendant, by notice, has specifically identified the type of Rule 16 material he is NOT requesting.

DISCOVERY MATERIALS - WHAT IS DISCOVERABLE?

The starting point for any discussion of a federal prosecutor's discovery obligations is Fed.R.Crim.P. 16. Rule 16 requires the prosecutor to turn over the following materials:

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

[1]A defendant might not request certain types of Rule 16 material because he or she does not want to trigger reciprocal discovery obligations.

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.
  A statement of an organizational defendant is one that is made by someone whom the government contends was legally able to bind the defendant organization regarding the subject of the statement or was personally involved in the conduct constituting the offense and the government maintains he or she was legally able to bind the defendant organization regarding that conduct.

- Defendant's prior record.

- Documents and objects for use in our case-in-chief, are material to preparing the defense or were obtained from, or belonged to, the defendant.

- 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.*

  You should also get in the habit of asking for summary reports and a curriculum vitae from expert witnesses early in your case preparations. Oftentimes expert opinion reports contain only the ultimate conclusions of the expert with no description of the "bases and reasons for the opinion"

and no discussion of the witness's qualifications. A report reflecting only the ultimate opinion of the expert is not compliant with Rule 16 and if that is all you have disclosed you run the risk of having the evidence excluded for failure to comply with your discovery obligations.

Witnesses' Statements - Jencks Act and Rule 26.2

In addition to the requirement of disclosing materials described in Rule 16, we may also have an obligation to turn over statements of government witnesses. The obligation to turn over such statements is grounded in the Jencks Act, (18 U.S.C. § 3500), Rule 26.2 of the Federal Rules of Criminal Procedure and the varying interpretations given to those provisions by the Judges in this district. Each of these provisions will be discussed below.

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:

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. United States v. Bolden, 545 F.3d 609, 623 (8th Cir. 2008), cert. denied, 130 S.Ct. 796 (2009). 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.*
>
> ***CAVEAT*****:** *Make sure you are aware of the judge's interpretation of the Jencks Act and/or Rule 26.2 before deciding to withhold an agent's report of interview. Notwithstanding the clear language of these provisions and the case law interpreting the same, some judges DO interpret the Jencks Act and Rule 26.2 as covering agent reports of interview. Consult with your supervisor for guidance if you believe your plans for disclosure are at odds with the Court's expectations.*

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

EMAILS

Substantive communications about cases between an AUSA and a case agent may become discoverable depending on the contents. Such communications may be deemed

to contain *Brady* or *Giglio* information or may, instead, be viewed as Jencks material when the agent testifies. Just because communications are contained in an email does not make that information any more, nor less, discoverable than it would have been if presented in some other format.

To ensure that you are meeting your obligations of disclosure it is important that you take steps to collect and store substantive communications contained in emails. You can accomplish collection and storage by printing emails and placing them in the case file, saving emails to the appropriate case-specific directory, or by conducting email searches using the archive search function that is available to everyone in the office. The bottom line is that email communications have to be considered, and may have to be disclosed, when meeting your disclosure obligations.

TIMING OF DISCLOSURES PURSUANT TO THE JENCKS ACT AND RULE 26.2

Both the Jencks Act and Rule 26.2 state that witness statements only have to be turned over on motion of the party who did not call the witness and only AFTER the witness has testified on direct examination. The Court of Appeals for the Eighth Circuit has followed the plain language of the provisions and held that witness statements only have to be turned over after direct examination. (e.g., United States v. Williams, 165 F.3d 1193, 1196 n.4 (8th Cir. 1999)). However, be aware that many judges have a strong preference for early disclosure of witness statements and may direct you to turn over such statements over before trial so as to not slow down the trial. Bear in mind, that your

decision to withhold disclosure of the statement until after direct examination may result in a recess while defense counsel reviews the statement.

AGENTS' AND PROSECUTORS' NOTES

In the Eighth Circuit, the Jencks Act has not been interpreted to require the maintenance of interview notes after preparation of a formal report. As a corollary, the Jencks Act does not require disclosure of agent notes of interview. United States v. Shyres, 898 F.2d 647, 657 (8th Cir.), cert. denied, 498 U.S. 821 (1990); United States v. Bolden, 545 F.3d 609, 623 (8th Cir. 2008), cert. denied, 130 S.Ct. 796 (2009). Similarly, at least one district court in the Eighth Circuit has held that prosecutor notes of interview are also outside the reach of the Jencks Act. United States v. Jordan, 2000 WL 34030966 (2009), (unpublished), ("In any event, the prosecutor's notes of a government witness do not need to be turned over under the Jencks Act"). Notwithstanding the above holdings, the better practice is to encourage case agents to maintain their interview notes even after completion of a formal report. The Eighth Circuit, even while holding that agent notes are not within the Jencks Act, has stated "the more prudent and expeditious route would have been for the government to provide the handwritten notes." United States v. Grunewald, 987 F.2d 531, 535 (8th Cir. 1993). Where notes have been destroyed the court may conduct an inquiry into whether the agent acted in good faith, whether the notes may have materially varied from the final report, and the likelihood that the defendant was prejudiced by the destruction. Id.. Lastly, the case law in other circuits

may be trending towards a requirement that prosecutors disclose their own interview notes. As such, an AUSA participating in an interview with a witness may want to consider limiting note taking after arranging for the agent to document the interview.

The cases holding that interview notes are not covered by the Jencks Act do not apply when those notes contain *Brady* or *Giglio* information. Further, 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. In fact, one of the reasons for the dismissal of the charges in the case against Sen. Stevens of Alaska was the discovery of certain exculpatory information in notes, (these were notes of the prosecuting attorneys, not the agents), that had not been included in any more formal documents disclosed to the defense.

> ***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. You should 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.*

EXCULPATORY AND IMPEACHMENT INFORMATION

BRADY AND GIGLIO

Prosecutors 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.

DEPARTMENT OF JUSTICE 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. The Department of Justice policies on disclosure include the following:

- 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 should be disclosed.

- 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 should be disclosed. This is so regardless 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 requirements apply 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 for disclosure.

See United States Attorney's Manual sections 9-5.001.

The Department of Justice has numerous publications discussing an AUSA's obligations under Brady and Giglio. The Overview of Ethical Issues for Prosecutors has sections which outline the Brady and Giglio obligations of AUSAs. USABook also contains an index of various publications which address Brady/Giglio issues. This index includes a Brady and Giglio Outline prepared by Dan Gillogly, AUSA, N.D. Illinois, as well as discussions of Brady requirements found in the Violent Crimes Manual and in the Recurring Trial Problems Manual. In addition to USABook, the USAM and the Criminal Resource Manual describe further requirements related to the Giglio policy of DOJ at USAM 9-5.100 and USAM 9-27.650. AUSAs' obligations under the Henthorne[2] line of cases are fully discussed in the Violent Crimes Manual prepared by the Department of Justice.

[2]Henthorne concerns the review of agents' personnel files for potential impeachment information.

WHERE TO LOOK FOR EXCULPATORY INFORMATION

The "prosecution team"

The Deputy Attorney General has emphasized that our obligation to disclose information may go well beyond what the AUSA personally knows. 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. The duty to search 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 relevant district 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. In addition, in complex cases that involve parallel proceedings with regulatory agencies (SEC, FDIC, EPA, etc.), or other non-criminal investigative or intelligence agencies, the prosecutor should consider whether the relationship with the

other agency is close enough to make it part of the prosecution team for discovery purposes.

The Department of Justice has identified several factors to be considered in determining whether to review potentially discoverable information in the possession of another federal agency. Those factors include the following:

- Whether the prosecutor and the agency conducted a joint investigation or shared resources related to investigating the case;

- Whether the agency played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in targeting discussions, or otherwise acting as part of the prosecution team;

- Whether the prosecutor knows of and has access to discoverable information held by the agency;

- Whether the prosecutor has obtained other information and/or evidence from the agency;

- The degree to which information gathered by the prosecutor has been shared with the agency;

- Whether a member of an agency has been made a Special Assistant United States Attorney;

- The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges; and

- The degree to which the interest's of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party.

Many cases arise out of investigations conducted by multi-agency task forces or otherwise involving state law enforcement agencies. In such cases, prosecutors should consider:

(1) whether state or local agents are working on behalf of the prosecutor or are under the prosecutor'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 prosecutor has ready access to the evidence.

AUSAs are encouraged to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes. Carefully considered efforts to locate discoverable information are more likely to avoid future litigation over *Brady* and *Giglio* issues and avoid surprises at trial.

WHAT SHOULD YOU EXAMINE?

Your search for 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 thorough and include every place where discoverable information might be kept. 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 one of its 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.

IMPEACHMENT OF LAW ENFORCEMENT AGENTS

On occasion a defendant will demand to see, or request that the prosecutor review, a law enforcement agent's personnel records to determine if any potential impeachment information is contained therein. It is the policy of this office to oppose such requests because of their highly intrusive nature. It is not appropriate to conduct a "fishing expedition" through an agent's personnel file absent some showing that impeachment information is likely to be found in the agent's records.

Notwithstanding our general stance on such requests, however, there are times when it is not only appropriate, but REQUIRED, that we conduct such an inquiry. We are required

to conduct such an inquiry under the provisions of this office's *Giglio* plan. The plan is set forth in its entirety in the Criminal Manual on the office intranet. Specifically, if we have reason to believe, (based upon, among other things, our own experiences with the agent, disclosures made by the agent, a showing by the defense, or criticism by a judge), that the agent may have something in his or her past evidencing bias or dishonesty, then we have a duty to investigate further.

No AUSA shall personally conduct a review of an agent's personnel file. An AUSA who believes that further inquiry is appropriate shall immediately bring the matter to the attention of the office's *Giglio* officer. The *Giglio* officer, (currently the Criminal Chief), shall follow the procedures set forth in the office *Giglio* plan in submitting a request to the agency and making any required disclosures.

DISCOVERY ON CONFIDENTIAL WITNESSES

To avoid any misinterpretation on how an agency identifies its sources, this section refers to confidential witnesses, confidential sources and confidential human sources collectively as CW. The credibility of testifying CWs who have been informants will always be material.

Rovario v. United States, U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), and its progeny mandate the disclosure of the identity of government informants under a narrow set of circumstances. As a general rule, the government does not have to disclose the identity of an informant unless the informant has relevant information that is helpful to the defense, *i.e.*, he or she was an eyewitness to the charged offense.

Informants who merely act as tipsters should never be disclosed. For example, assume narcotics officers use a confidential informant to make a buy from a drug dealer at the dealers' home, and based upon the buy, the officers obtains a search warrant. They find drugs in the house, and the dealer is arrested and prosecuted on charges pertaining to the drugs discovered during the search. The government is not obligated to disclose the informant who made the buy that provided probable cause for the search. If the dealer is charged for the buy made by the informant, however, the government would have to disclose the informant as he is now an eyewitness to the transaction at issue.

Obviously, disclosure of an informant may very well endanger the safety of that informant and circumvent investigations in which they are involved. For these reasons, we resist disclosure of government informants, and only make such disclosures when ordered by a court.

The prosecutor should review the information file for every CW anticipated to testify. If a prosecutor believes that the circumstances of the case warrant review of a non-testifying source's file, the prosecutor should follow the agency's procedures for requesting review of such files. The prosecutor should review the file relating to the current case and all proffer, immunity, and other agreements, payment information, validation assessments, and other potential witness impeachment information. The file should be reviewed for potential *Giglio* information and relevant portions should be copied for discovery purposes, or otherwise memorialized for production.

In investigating a CW, the prosecutor should investigate and disclose any information obtained in the following areas when the CW is going to testify at a trial or 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:
    - monetary payments-how are the calculated?
    - expenses, costs and housing-is anyone paying?
    - immigration status for the witness and/or family members?
    - arrests-intervention by law enforcement?
    - 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.

Prosecutors should take steps to preserve and protect the non-discoverable, sensitive information found with a CW file. Further, prosecutors should consider whether production of discoverable information from a CW file can be produced via a summary letter to the defendant rather than producing the record in its entirety. Prosecutors should take steps to redact from discovery material personally identifiable information relating to the CW, including:

- address
- phone number
- employment
- social security number
- taxpayer ID number
- bank account number
- credit card number

- medical, psychological, drug and alcohol, and prescription drug use, and
- juvenile record

THE TIMING OF DISCLOSURE

Disclosing Exculpatory/Impeachment Information Before Indictment

In applying for a search warrant, we have a duty to disclose exculpatory or impeachment information if that information would defeat a finding of probable cause. This duty to disclose arises not from *Giglio*, but under Franks v. Delaware, 438 U.S. 154 (1978). This duty to disclose impeachment information would apply to any confidential informant on whose statements a search warrant affidavit was based. It would also apply, however, to the affiant as well. Again, the standard for measuring whether to disclose exculpatory or impeachment information, particularly about a law enforcement officer, is whether the exculpatory or impeachment information would defeat probable cause.

Case law does not require that the government disclose exculpatory or impeachment information to a grand jury. Department of Justice policy, however, mandates the presentation of evidence that substantially negates the target's guilt in any grand jury proceeding. See USAM 9-11.233.

> ***Practice Tip****: If you have impeachment information against an affiant law enforcement officer that is substantial enough to negate a finding of probable cause, you should seriously reconsider using that officer as the affiant or whether you should be applying for a search warrant at all. Similarly, if you are aware of evidence that substantially negates a target's guilt, you should give your case a second thought. Why should we present a case for indictment if there is substantial evidence negating guilt?*

General Post-Indictment Timing Requirements

Our obligations on when we have to disclose discovery, (as opposed to *Brady* or *Giglio* materials), are mostly governed by the demands of the Court. Progression orders issued by a Magistrate Judge or a trial order issued by the district judge will often set explicit deadlines which must be complied with by the government. Being cognizant of the timing requirements should spur us to *gather* the discovery materials as early as possible in the course of an investigation and any resulting prosecution.

Brady and *Giglio* disclosures may or may not be the subject of explicit deadlines set by the Court. However, the Constitution mandates that such disclosures be made "before it is too late for the defendant to make use of any benefits of the evidence." United States v. Jones, 101 F.3d 1263, 1272 (8th Cir. 1996). Department of Justice policy, as set forth by the Deputy Attorney General, is as follows:

> Exculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant reasonably promptly after discovery. Impeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. *See* USAM §9·5.001. Section 9·5.001 also notes, however, that witness security, national security, or other issues may require that disclosures of impeachment information be made at a time and in a manner consistent with the policy embodied in the Jencks Act. Prosecutors should be attentive to controlling law in their circuit and district governing disclosure obligations at various stages of litigation, such as pre-trial hearings, guilty pleas, and sentencing. Prosecutors should consult the local discovery rules for the district in which a case has been indicted.

Delayed Disclosure

Situations may arise where delayed disclosure of discovery materials may be justified. These situations may include instances where the integrity of an ongoing investigation may be compromised by a disclosure, the safety of a witness may be compromised, or national security interests may be implicated. In such situations, it may be prudent to delay disclosure of material for a reasonable time. You should consult with your supervisor if you wish to delay any disclosure of discovery materials that may otherwise be required by law, rule, or the arraignment order. Also, national security cases involving classified information may be subject to special litigation under the Classified Information Procedures Act (CIPA, 18 U.S.C. Appendix III).

THE FORM OF THE DISCLOSURE

It is important that we keep a record of all information disclosed to the defense. As such, a copy of ALL information turned over to the defense should be made and maintained with the case file. Documentary evidence or reports should be "Bates Stamped" before given to the defense. Any disk contained documentary evidence, photographs or other evidence should likewise be copied and maintained with the case file.

> ***Practice note:*** *Contraband, whether it be child pornography, narcotics or anything else, is* ***never*** *to be provided to the defense. Arrangements will need to be made by defense counsel to review such items in the presence of the lead case agent from the agency maintaining custody of the evidence.*