

DISCOVERY POLICY FOR THE DISTRICT OF NEW MEXICO

Criminal Discovery Policy of the District of New Mexico.¹

I. Introduction

One of a prosecutor's difficult tasks is to balance the competing interests that weigh in the criminal discovery process. In performing this task, federal prosecutors have always had at their disposal the general principles that define their function. While all federal prosecutors know that they must strike hard but fair blows, pursue justice, and place truth above victory, these general truths do not provide specific guidance on discovery issues. This policy is designed to provide more specific guidance to AUSAs in the District of New Mexico. No policy or rule, however, can anticipate every situation and blanket rules often fail to account for various situations that can arise. Thus, when AUSAs find themselves in a situation not covered by a specific policy or rule, they should be guided by their overarching duties to be fair, render justice, and seek the truth.

In 2006, the Department revised United States Attorney's Manual ("USAM") provisions addressing discovery. Although AUSAs should thoroughly familiarize themselves with all requirements set forth in USAM 9-5.001, certain parts of the discovery provisions warrant emphasis. The Department's policy "requires AUSAs to go beyond the minimum obligations required by the Constitution and establishes broader standards for disclosure of exculpatory and impeachment information." USAM 9-5.001. The Department's policy thus mandates disclosure of "information beyond that which is 'material' to guilt as articulated in Kyles v. Whitley, 514 U.S. 419 (1995)," while encouraging AUSAs to "err on the side of disclosure if admissibility is a close question." USAM 9-5.001B and C. The policy also makes clear that, "[u]nlike the requirements of Brady [v. Maryland, 373 U.S. 83 (1963)] and its progeny, which focus on evidence, the [Department's] disclosure requirement ... applies to information regardless of whether the information subject to disclosure would itself constitute admissible evidence." USAM 9-5.001C. In addition, the Department's policy states that AUSAs must not merely view items of information in isolation when deciding whether items should be disclosed, but must also take into account the possible cumulative impact of information. *Id.* This is consistent with applicable law. See also, Banks v Reynolds, 545 F.3d 1508, 1518 (10th Cir. 1995), citing Kyles v. Whitley, at 514 U.S. at 434-440.

The Department's policy, of course, also recognizes that justifiable reasons exist not to

¹This policy is strictly for internal use. It is not intended for distribution outside the Department. No part of this policy is 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). As discussed in more detail below, this discovery 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.

disclose certain material prosecutors have no legal duty to provide and to delay disclosing certain material prosecutors do have a legal duty to provide. Overly broad disclosure may have the potential to endanger witnesses or provide private information about third persons to defendants who may misuse that information. Too early disclosure can sometimes interfere with a prosecutor's duty to seek justice by providing a defendant an unfair opportunity to use the government's discovery to fabricate whatever story best defends against what the government has provided. Prosecutors are also often justified in seeking protective orders that allow them not to disclose certain material, or that forbid defendants and defense attorneys from further distributing certain material.

Deputy Attorney General Ogden recognized the competing concerns of discovery on January 4, 2010 when he stated:

As representatives of the United States, our duty is to seek justice. In many cases, broad and early disclosures might lead to a speedy resolution and preserve limited resources for the pursuit of additional cases. In other cases, disclosures beyond those required by relevant statutes, rules and policies may risk harm to victims or witnesses, obstruction of justice, or other ramifications contrary to our mission of justice.

Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group at 2. To assist in striking the appropriate balance, DAG Ogden issued a separate January 4, 2010 memorandum entitled "Guidance for Prosecutors Regarding Criminal Discovery" ("DAG Ogden's Criminal Discovery Guidance"). DAG Ogden's memorandum provides guidance to prosecutors with regard to gathering, reviewing, and disclosing discoverable information. As stated in a third January 4, 2010 memorandum, however, "[t]his guidance is not intended to establish new disclosure obligations. Those obligations are already set forth in Fed. R. Crim. P. 16 and 26.2, Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), and 18 U.S.C. § 3500 (the Jencks Act)." Requirement for Office Discovery Policies in Criminal Matters (DAG Ogden's Requirement for Discovery Policies) at 1.

Although comprehensive, the DAG's January 4, 2010 guidance anticipates variances as a result of local rules, local practice, and local district court precedent. Thus, DAG Ogden directed each USAO office to supplement his January 4, 2010 guidelines with a local discovery policy. The present document is the District of New Mexico's criminal discovery policy. This local policy adopts the framework of the DAG's January 4, 2010 guidance and, where necessary, supplements this framework to account for local rules and practice.

Like the DAG's January 4, 2010 guidance, the District of New Mexico's criminal discovery policy is not intended to establish any new disclosure obligations. Neither does the policy provide a broad overview on the law of discovery. Instead, this policy is intended to provide guidance on gathering, reviewing, producing, and tracking discovery in accordance with disclosure obligations to which we are already subject. Prosecutors who wish to review a

summary of legal authority on the topic of criminal discovery may review materials provided by the Department of Justice and this office at any time, including during yearly training on the topic. Prosecutors may also consult with the office's Discovery Coordinator, Professional Responsibility Officer (PRO), *Brady-Giglio* Compliance Officers/Giglio Requesting Officials: Sasha Siemel and Richard Williams as of October 15, 2010 regarding available updated summaries. Finally, DAG Ogden has stated that the Department intends to create an online directory of resources pertaining to discovery issues that will be available to all prosecutors from their desktop as well as a "Handbook on Discovery and Case Management" in a form similar to the Department's Grand Jury Manual.

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 possess discoverable material, he or she should consult National Security Division (NSD) regarding whether to request a prudential search of the pertinent Intelligence Community element(s). All prudential search requests and other discovery requests of the Intelligence Community 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 Intelligence Community possesses discoverable material, the prosecutor should consult with NSD regarding whether to make through NSD a request that the pertinent Intelligence Community 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 Intelligence Community possesses discoverable material, then a prudential search generally is not necessary.

For purposes of this memorandum, the term "discovery" or "discoverable information" is not limited to Fed. R. Crim. P. 16 information, but includes all information and materials that the government must disclose to a defendant pursuant to such diverse sources as Fed. R. Crim. P. 12 and 16; *Brady* and *Giglio v. United States*, 405 U.S. 150 (1972) and their progeny;18 U.S.C. § 3500 (the Jencks Act) and Fed. R. Crim. P. 26.2; USAM 9-5.001 and 9-5.100; Fed. R. Evid. 404(b) and 413-414; the Local Criminal Rules of the United States District Court for the District of New Mexico (the "local rules"), the district court's standing discovery order and the New Mexico Rules of Professional Conduct.²

By following the steps described below and being familiar with laws and policies regarding discovery obligations, prosecutors are more likely to meet all legal requirements, to

The prosecutor in a criminal case shall: make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense and, in connection with sentencing, disclose to the defense and to the tribunal all reasonably relevant mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

New Mexico Rule of Professional Conduct 16-308 D Comment [3] states:

The exception in paragraph (D) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

²"Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations." *Cone v. Bell*, 129 S.Ct. 1769, 1783 n.15 (2009), *citing Kyles*, 514 U.S. at 437. New Mexico Rule of Professional Conduct 16-308D states:

make considered decisions about disclosures in a particular case, and to achieve a just result in every case. AUSAs are encouraged to consult with their line supervisor, the office's criminal discovery coordinator, the office's PROs, and the office's *Brady-Giglio* Compliance Officers if questions arise about the scope of their discovery obligations. The office and the Department recognize that "specific, case-related considerations may warrant a departure from the uniform discovery practices of the office." DAG Ogden's Requirement for Discovery Policies at 2. However, before deviating from this policy AUSAs³ must first obtain permission from their line supervisor and memorialize in writing via memorandum or e-mail the basis for the decision to deviate. The memorandum or e-mail memorializing the line supervisor's approval to deviate should be retained as a permanent part of the case file.

II. Gathering 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(B)(2) and the New Mexico Rules of Professional Conduct. This search duty also extends to information prosecutors are required to disclose under Fed. R. Crim. P. 16 and 26.2 and the Jencks Act.

In most cases, "the prosecution team" will include the agents and law enforcement officers within our district who are 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 USAO, and parallel criminal and civil proceedings, this definition will necessarily need to be expanded 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, AUSAs should consider whether the relationship with the other agency is close enough to make it part of the prosecution team for discovery purposes.

Some factors to be considered in determining whether to review potentially discoverable information from another federal agency include:

³ As used in this policy, "AUSA" includes Special Assistant U.S. Attorneys and DOJ prosecutors working on a case in this district.

- Whether the AUSA 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 AUSA knows of and has access to such potentially discoverable information held by the agency;
- Whether the AUSA has obtained other information and/or evidence from the agency;
- The degree to which information gathered by the AUSA 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
- As to parallel proceedings, the degree to which the interests of the United States as to the criminal and non-criminal aspects diverge such that information gathered by or for the criminal aspects are not relevant to the non-criminal aspects, and vice-versa.

Many cases arise out of investigations conducted by multi-agency task forces or otherwise involve state law enforcement agencies. In such cases, AUSAs 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 AUSA has ready access to the evidence. Courts will generally evaluate the role of a state or local law enforcement agency on a case-by-case basis. AUSAs will almost always be responsible for information in the possession of task force officers who are assigned to work with a federal task force or agency. In the Tenth Circuit, "[i]t is an open question . . . as to whether the federal prosecutor has a duty to learn of favorable evidence in state files where there is a joint investigation by federal and state officials." United States v. Lujan, 530 F.Supp.2d 1224, 1248, 1249 (D.N.M. 2008) (J. Brack). As Judge Brack noted, however, "[i]n light of the uncertainty in this circuit, it would behoove the Government to broadly construe its duty to learn of favorable evidence in personnel files of any state officials participating in a joint investigation." *Id.* at 1249. As a result, when a state or local law enforcement agency conducts a joint investigation with a federal agency, or acts as the lead agency in a case our office prosecutes, AUSAs should

heed Judge Brack's admonitions.

AUSAs are also 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.

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. The review process should cover the following areas:

1. The Investigative Agency's Files

With respect to Department of Justice law enforcement agencies, DAG Odgen's Criminal Discovery Guidance unambiguously makes clear that, with limited exceptions, 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. Therefore, the AUSA can personally review the file or documents or may choose to request production of potentially discoverable materials from the case agents. With respect to outside agencies, the AUSA should request access to files and/or production of all potentially discoverable material.

The investigative agency's entire investigative file, including documents such as FBI Electronic Communications (ECs), inserts, e-mails, 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 e-mail, 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 opinions thereof should also be reviewed as necessary.

2. <u>Confidential Informant (CI) / Confidential Witness (CW) / Confidential Human Source (CHS) / Confidential Source (CS) Files</u>

The credibility of cooperating witnesses or informants will always be at issue if they testify during a trial. Therefore, prosecutors 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. Prosecutors may also consult with the office's CHS Point of Contact (James Braun as of October 15, 2010) regarding confidential human sources.

AUSAs should take steps to protect the 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. In cases involving a large volume of potentially discoverable information, AUSAs may discharge their disclosure obligations by choosing to make the voluminous information available to the defense. However, prosecutors should keep in mind that large volume discovery has potential to create discovery issues. *See*, *e.g.*, Roth, Spivack and Golden, Memo to Prosecutors: DOJ Focuses on Discovery Obligations, January 4, 2010, Memoranda Address Recent Failures to Disclose Exculpatory Evidence (ABA, 2010) which, in addressing the DAG's January 4, 2010 memos, says what the government's making what the authors call "open file" discovery, "while certainly maximizing disclosure, effectively shifts the burden of document review from the government to defense counsel."

4. <u>Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agency in Parallel Civil Investigations</u>

If an AUSA has determined that a regulatory agency such as the SEC is a member of the prosecution team for purposes of defining discovery obligations then that agency's files should be reviewed. Of course, if a regulatory agency is not part of the prosecution team but is conducting an administrative investigation or proceeding involving the same subject matter as a criminal investigation, AUSAs may very well want to ensure that those files are reviewed not only to locate discoverable information but to locate inculpatory information that may advance the criminal case. Where there is an ongoing parallel civil proceeding in which Department civil attorneys are participating, such as a *qui tam* case, the civil case files should also be reviewed.

5. Substantive Case-Related Communications

"Substantive" case-related communications may contain discoverable information. Those communications that 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 prosecutors and/or agents; (2) between prosecutors and/or agents and witnesses and/or victims; and (3) between victim-witness coordinators and witnesses and/or victims. Such communications may be memorialized in e-mails, memoranda, or notes.

"Substantive" communications include factual reports about investigative activity, factual discussions of the relative merits of evidence when these facts have not otherwise been disclosed, factual information obtained during interviews or interactions with witnesses/victims, and factual discussions regarding 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 informationcontained 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 e-mail. When the discoverable information contained in an e-mail 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. E-Mail Use

As noted in the section above, the fact that a substantive communication is contained in an e-mail⁴ does not alter policies or law related to the disclosure of that substantive communication. Concerns with respect to how e-mail communications have been and should be treated, however, necessitate a separate section in this policy dedicated to the use and discovery of e-mail communications. Moreover, e-mails sent to others, particularly to multiple recipients, may be inadvertently or intentionally disseminated outside the office. For these reasons, you should be circumspect and professional in what you write in an e-mail message and you should not include anything that you would not want to see on the front page of the newspaper the

⁴ In this policy, the term "e-mail" includes any form of written electronic messaging using devices such as computers, telephones, and blackberrys, including, but not limited to, e-mails, text messaging, instant messages, tweets, and voice mail messages that are automatically converted to text (*e.g.*, Google voice, Spinvox, etc.).

following day or sometime later in court.

Most case-related e-mails are either: (1) generally privileged communications; (2) substantive communications; or (3) purely logistical communications. "Generally privileged" e-mails include "attorney-client privileged," "deliberative," and "work product" communications: (a) between AUSAs and other USAO personnel on matters that require supervisory approval or legal advice, *e.g.*, prosecution memoranda, *Touhy* approval requests, *Giglio* requests, etc., and involving case strategy discussions; (b) between AUSAs and other USAO personnel on case-related matters, including but not limited to organization, tasks that need to be accomplished, research, and analysis; (c) between AUSAs and agency counsel on legal issues relating to criminal cases such as *Giglio* and *Touhy* requests; and (d) from the AUSA to an agent giving legal advice or requesting investigation of certain matters in anticipation of litigation ("to-do" list). Whether such e-mails are discoverable is a matter which may be the subject of disputes between the litigating parties. AUSAs may use their discretion to transmit these types of e-mails.

"Substantive" communications include reports about investigative activity, discussions of the relative merits of evidence, factual characterizations of potential testimony, interviews of or interactions with witnesses/victims, when these facts have not otherwise been disclosed and issues relating to credibility. AUSAs, other USAO personnel, and agents should avoid using email to communicate substantive case-related information in criminal and parallel criminal/civil cases whenever possible. Because e-mail communications from agents may not be as complete as investigative reports, and may have the unintended effect of circumventing the investigative agency's established procedures for writing and reviewing reports, AUSAs should advise investigative agents that, unless circumstances dictate otherwise, substantive written communications from agents about cases should be in the form of a formal investigative report, rather than an e-mail. Thus, AUSAs who send agents "to-do" lists via e-mail should inform the agents that any substantive information obtained as a result of the "to-do" should not be conveyed by way of a responsive e-mail.

AUSAs and any USAO personnel who interact with victims and witnesses should typically limit e-mail exchanges to non-substantive matters such as the scheduling of interviews or notification of dates and times of hearings. Similarly, AUSAs should strongly encourage agents to limit e-mail exchanges with victims or witnesses to non-substantive matters. Any substantive information received from a victim or witness should be reviewed for potential *Jencks Act* material and also maintained for *Brady/Giglio* review. If USAO personnel other than the AUSA receives a substantive e-mail from a victim or witness, such e-mail should be forwarded to the AUSA(s) assigned to the investigation or case.

"Purely logistical" communications include e-mails which only contain items such as travel information, or dates and times of hearings or meetings. E-mail may be used to communicate purely logistical information and to send formal investigative reports as attachments, or to communicate efficiently regarding non-substantive issues such as scheduling meetings, interviews, and court appearances. Again, however, AUSAs who send purely logistical e-mails to agents should be aware that the agents' response may go beyond purely

logistical matters and thereby become more likely to be subjected to claims that they are discoverable.

Regardless of the type of e-mail sent, AUSAs should be careful not to use unprofessional language or engage in unprofessional dialogue in e-mails. Particularly with respect to "substantive" e-mails, AUSAs should be vigilant that neither they nor those with whom they are communicating use slang or other language that may deemed unprofessional to a jury or the public. Further, all e-mails related to a particular case should be printed and maintained in the case file or saved electronically in the case directory of the AUSA and/or support staff dealing with the case. Finally, as part of the discovery collection and review process, AUSAs should routinely ask USAO personnel and agents to provide them with copies of all e-mails that contain substantive case-related information. This includes, but is not limited to, communications between agents, and between agents, AUSAs, any USAO personnel, or anyone else, just as any formal reports would be collected and reviewed.

7. <u>Grand Jury Information</u>

If a witness who testifies before the grand jury testifies about the same subject matter at a later proceeding, the witness' grand jury testimony must be disclosed pursuant to the Jencks Act (18 U.S.C. § 3500) and Fed. R. Crim. P. 26.2, including at detention hearings that come soon after a witness has testified before the grand jury. *See* Fed. R. Crim. P. 26.2(g)(4) (Rule 26.2 applies to detention hearings). Therefore, AUSAs who intend to call the same person used to establish probable cause before the grand jury as a witness at a detention hearing to establish the weight of the evidence against a defendant must provide the defendant with a copy of the witness' grand jury transcript. Because detention hearings are frequently scheduled soon after a case is presented to the grand jury and because ordering transcripts on an expedited basis is expensive, AUSAs should seek an alternative to calling the witness who testified before the grand jury as a witness at the detention hearing (such as presenting the government's case for detention through a different witness). If no alternative exists, AUSAs must obtain the witness' grand jury transcript prior to the detention hearing. While the questions AUSAs and grand jurors ask witnesses generally do not need to be redacted from grand jury transcripts, AUSA and grand jury comments generally should be redacted from whatever transcript is provided to the defense.

8. Potential *Giglio* Information Relating to Law Enforcement Witnesses

AUSAs should have candid conversations with the federal, state and local law enforcement agents with whom they work regarding any potential *Giglio* issues. At minimum, the candid conversation should include the following questions:

 Are you aware of any sustained findings in relation to past complaints, investigations, or disciplinary actions concerning the performance of your official duties that you understand may be considered to be potential impeachment information?

- Are you aware of any pending complaints, investigations, or disciplinary actions relating to the performance of your official duties or to any off duty conduct?
- Are you aware whether any misconduct allegations against you relating to the performance of your official duties or any off duty conduct that have received publicity?
- Are you aware of any allegations or findings by a judge, magistrate judge, or prosecutor that reflect upon your truthfulness or bias, including a lack of candor or any conduct on your part that reflects on your truthfulness or bias/prejudice, regardless of findings or allegations?
- Have you ever been arrested, charged with, or convicted of a criminal offense or received a deferred or diverted prosecution or the like in relation to a criminal offense?
- Are you aware of any allegations or other information which the defense might be able to argue as an indication of bias or prejudice relevant to this case (even if it does not involve any issue related to truthfulness or untruthfulness on your part).

The Department's "Giglio Policy" is set forth in USAM 9-5.100 and discusses obtaining, reviewing, disclosing, and maintaining Giglio information from DOJ law enforcement agencies. AUSA's should be familiar with and follow these procedures when handling Giglio issues that involve DOJ law enforcement agencies. The USAO also has a local "Giglio Policy" that applies to DOJ and Department of Treasury law enforcement agencies. AUSAs also should be familiar with and follow this local policy (entitled "Revised Plan for Implementation of Policy Regarding Disclosure of Potential Information on a Law Enforcement Witness" and posted on the USAO's intranet web site).

Although the practice for obtaining *Giglio* information from state, tribal, and local law enforcement agencies can vary from agency to agency, when this office's Giglio Requesting Official send such agencies requests for Giglio information, the DOJ Giglio policy is routinely attached. In handling *Giglio* issues related to these agencies, AUSAs should consult with one of the office's *Brady-Giglio* Compliance Officers. In general, however, the procedures for disclosing *Giglio* information for all law enforcement officers typically should at least track the pertinent parts of sections 5, 6 and 7 of the USAO's Revised Plan for Implementation of Policy Regarding Disclosure of Potential Information on a Law Enforcement Witness. AUSAs should also always consult with their line supervisor and one of the office's *Brady-Giglio* Compliance Officers before seeking to disclose *Giglio* information concerning any federal, state, tribal or local law enforcement officers.

9. <u>Potential Giglio Information Relating to Non-Law Enforcement Witnesses</u> 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 (possibly including inconsistent attorney proffers, see United States v. Triumph Capital Group, 544 F.3d 149 (2d Cir. 2008))
- 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
 - Stays of deportation or other immigration status considerations
 - S-Visas
 - U-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's assistance or making substantive recommendations on the witness's behalf
 - Relocation assistance
 - Consideration or benefits to culpable or at risk third parties
- Other known conditions that could affect the witness's 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 a prosecutor)
- 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's ability to perceive and recall events.

Defense counsel often request prosecutors to provide the criminal histories of its witnesses. Prosecutors are advised to always provide criminal histories of witnesses that are within the possession of the prosecution team.

Exemption 5 - Attorney Work Product



10. <u>Information Obtained in Witness Interviews</u>

Although not required by law, generally speaking, witness interviews⁵ should be memorialized by the agent.⁶ Agent and prosecutor notes and original recordings should be

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.

preserved, and prosecutors should confirm with agents that substantive interviews should be memorialized. When a prosecutor participates in an interview with an investigative agent, the prosecutor and agent should discuss note-taking responsibilities and memorialization before the interview begins (unless the prosecutor and the agent have established an understanding through prior course of dealing). Prosecutors should not conduct an interview without an agent present to avoid the risk of making themselves a witness to a statement and being limited in their advocacy role by, for instance, being disqualified from being the advocate attorney at the trial or other hearing at which the prosecutor testifies, if the statement becomes an issue. If exigent circumstances make it impossible to secure the presence of an agent during an interview, prosecutors should try to have another office employee present. 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 witness 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 witness statements should be memorialized, even if they are within the same interview, and they should be provided to the defense as *Giglio* information.

Although what constitutes a "material" variance can only be considered on a case-by-case basis, the Department "policy recognizes, however, that a trial should not involve the consideration of information which is irrelevant or not significantly probative of the issues before the court and should not involve spurious issues or arguments which serve to divert the trial process from examining the genuine issues. Information that goes only to such matters does not advance the purpose of a trial and thus is not subject to disclosure." USAM 9-5.001(C). Thus, while prosecutors should err on the side of caution, prosecutors need not disclose irrelevant variances in a witness' testimony. AUSAs who have a question as to whether a variance is material should consult with their line supervisor. The Brady-Giglio Compliance Officers and the Criminal Discovery Coordinator(s) are also available for consultation.

Further, if a defense lawyer provides a proffer for a client who later becomes a witness and that proffer is inconsistent with the witness' testimony, an AUSA should disclose the attorney's proffer. *See Spicer v. Roxbury Correctional Institute*, 194 F.3d 547 (4th Cir. 1999) (where witness' lawyer, in negotiating with the prosecutor, orally proffered to prosecutor that this client did not see the defendant on day of assault, and witness later testified that he did see defendant, *Brady* violation occurred when prosecutor failed to disclose proffer information to defendant). Once disclosed, the AUSA can file a motion in limine to preclude the defense from using the proffer on grounds that it is not a statement of the defendant.

b. <u>Trial Preparation Meetings with Witnesses</u>

Trial preparation meetings with witnesses generally need not be memorialized. However, prosecutors should be particularly attuned to new or inconsistent information disclosed by the witness during a pre-trial 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's prior statements, prosecutors should consider whether memorialization and disclosure is necessary consistent with the provisions of subparagraph (a) above.

AUSAs should be sensitive to the potential for inconsistent statements during these meetings, particularly if the witness has already been repeatedly interviewed by agents or the AUSA. If a witness initially denies or minimizes his knowledge of or involvement in criminal activity, and thereafter provides information that is materially broader or different, the fact that the witness provided materially different information should be memorialized, even if the variance occurs within the same meeting, and may need to be provided to the defense as *Giglio* information.

Agents may not plan on preparing ROIs in connection with pre-trial meetings and, as a result, may not take notes during these meetings. Therefore, AUSAs must be particularly attentive to inconsistences during these witness preparation sessions. If AUSAs become aware of any material inconsistencies during the course of a pre-trial meeting, they should request that an agent present at the meeting prepare a report that documents the inconsistency. Practically, it will often make sense to advise the agent, before the meeting, of the expectation of a report. Further, although the best practice is to have an agent, rather than the AUSA, document any inconsistencies, AUSAs are ultimately responsible for making sure that these inconsistencies are disclosed and so, on occasion, may have to document this information themselves so that they may then provide it to the defense. However, the AUSAs need to be careful about needlessly creating the opportunity for the defense to allege that the AUSA told the agent what to put in the agent's report.

c. Agent Notes

Although it is generally not necessary to produce an agent's handwritten notes as part of Rule 16 discovery or the Jencks Act, it is necessary that agents preserve them, as they sometimes can be discoverable. 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. Prosecutors 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)(8). See, e.g., 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).

11. <u>Presentence Reports</u>

If an AUSA has a witness who is or was a defendant in federal court, in most cases there will be a Presentence Report (PSR) relating to that witness. The PSR may contain Jencks, *Brady*, or *Giglio* that may need to be disclosed at the appropriate time. Before disclosing PSR information, however, AUSAs must first obtain the Court's consent. AUSAs who determine that they must disclose information contained in a PSR should notify and consult with a supervisor, and then follow this procedure:

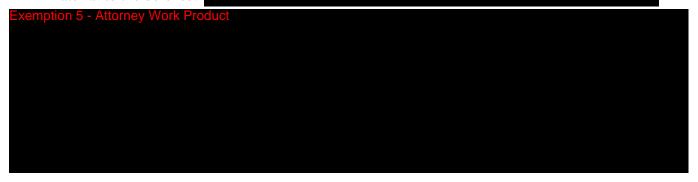
- a. Review the PSRs of witnesses for potential Jencks, *Brady* or *Giglio*. If the witness was a defendant in another district, the AUSA should contact the other district to get the PSR and seek any permission required by the court in that district to have the information disclosed.
- b. Identify what, if any, information in the PSR is arguably *Brady*, *Giglio*, or Jencks.
- c. If the AUSA identifies information that he or she believes should be disclosed and that information has not been disclosed elsewhere and is not readily available from another source, the AUSA should prepare an *ex parte* disclosure motion and order requesting either an *in camera* review or disclosure.
- d. Attach as Exhibit(s) to the *ex parte* disclosure motion the PSR(s) with the material we seek to disclose highlighted. We want the judge to have the entire PSR, but be able to easily discern what we believe should be disclosed.
- e. Prepare a separate motion and order to seal the disclosure motion and exhibits.
- f. File, *ex parte* and under seal, the disclosure motion and proposed order with the trial judge (not the sentencing judge) along with the motion and order to seal.
- g. When the disclosure order is signed, serve defense counsel with the material from the PSR covered by the order and serve a copy of the order on defense counsel. The order should be drafted so that it does not need to be sealed.

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

may still be subject to disclosure as Brady or Giglio.

12. Tax and Other Private Third Party Information

Sometimes a third person's tax, medical, financial, or other private information may be material to the defense.



III. Reviewing Information Gathered

Having gathered the information described above, prosecutors must ensure that the material is reviewed to identify discoverable information. It would be preferable if prosecutors could review the information themselves in every case, but such review is not always feasible or necessary. The prosecutor is ultimately responsible for compliance with discovery obligations. Accordingly, the prosecutor 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 prosecutor, the prosecutor's decision about how to conduct this review is controlling. This process may involve agents, paralegals, agency counsel, and computerized searches. Although prosecutors may delegate the process and set forth criteria for identifying *potentially* discoverable information, prosecutors should not delegate the disclosure determination itself. In cases involving voluminous evidence obtained from third parties, prosecutors should consider providing defense access to the voluminous documents to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence.

IV. Making the Disclosures

Prosecutors must familiarize themselves with the legal authority and Department policies referenced in this memorandum that relate to discovery. As mentioned, prosecutors are encouraged to provide discovery broader and more comprehensive than the discovery obligations. If a prosecutor chooses this course, the defense should be advised that the prosecutor is electing to produce discovery beyond what is required under the circumstances of the case, but is not committing to any discovery obligation beyond the discovery obligations set forth above.

A. Considerations Regarding the Scope and Timing of the Disclosures

Providing broad and early discovery 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 prosecutor's good faith determination of the scope of appropriate discovery is in error. Prosecutors are encouraged to provide broad and early discovery consistent with any countervailing considerations. But when considering providing discovery beyond that required by the discovery obligations or providing discovery sooner than required, prosecutors should always consider any appropriate countervailing concerns in the particular case, including, but not limited to: protecting victims and witnesses from harassment or intimidation; protecting the privacy interests of witnesses; 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 witnesses; any applicable legal or evidentiary privileges; and other strategic considerations that enhance the likelihood of achieving a just result in a particular case. Reports of Interview (ROIs) of testifying witnesses are not considered Jencks material unless the report reflects the statement of the witness substantially verbatim or the witness has adopted it. The District of New Mexico's general practice is to disclose all ROIs related to a case in advance of trial. However, some cases present circumstances where it would be inappropriate to disclose certain ROIs. As a result, to the extent that no legal duty of disclosure exists, the disclosure of ROIs is left to the discretion of individual AUSAs.

AUSAs should never promise "open file" discovery or describe the discovery being provided as "open file" discovery. Courts have construed a prosecutor's assurance of "open file discovery" very broadly. In several cases, courts have overturned convictions where prosecutors who promised "open file discovery" disclosed all that was required by law, but did not provide documents or information that could be viewed as part of the prosecution team's file. Further, a prosecutor who promises "open file discovery" and then inadvertently omits something from production will have unintentionally misrepresented the scope of materials provided, even if no legal duty existed to disclose that which was omitted. Thus, while AUSAs are generally encouraged to provide more than what the law requires, they should not represent that they will do so and should object to efforts to compel them to provide more than what the law requires.

Another reason not to promise "open file" discovery is that files often contain privileged information, internal memoranda, or work product materials to which defendants are not entitled. Because the concept of the "file" is imprecise, such a representation also exposes the prosecutor to broader disclosure requirements than the prosecutor may have intended or to sanction for failure to disclose documents that the court may later deem to have been part of the "file."

Prosecutors will also sometimes find themselves in a situation where their legal duty to disclose information conflicts with a compelling reason not to provide, or to delay providing, discovery (such as concerns that disclosure of certain information will result in the murder of a government witness). In such situations, AUSAs should seek a protective order from the court. This will most commonly be done through Fed. R. Crim. P. 16(d)(1) which states in relevant part that, "[a]t any time the court may, for good cause, deny, restrict, or defer discovery or inspection,

or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect *ex parte*."

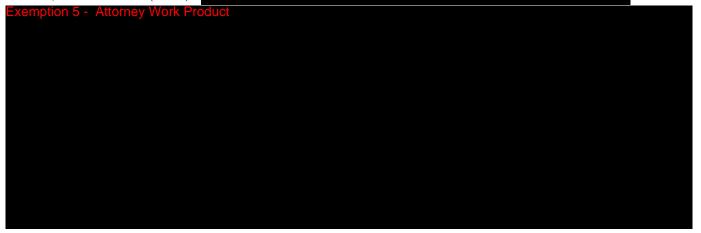
B. <u>Timing</u>

(1) Exculpatory Information

Exculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant reasonably promptly after discovery of the information. The Fed. R. Crim. P. require production of certain items which are potentially useable as impeachment. Additional information which may need to be disclosed based on its exculpatory nature includes matters which impeach government witnesses. Impeachment information should be disclosed as follows:

(a) Pre-Trial Hearings: Fed. R. Crim. P. 26.2, which requires AUSAs to produce statements of witnesses no later than after they testify on direct examination, applies to preliminary hearings, detention hearings, sentencings, and supervised release hearings as well as trials. Fed. R. Crim. P. 26.2(g). Although this rule does not require AUSAs to produce a witness' statement until after that witness has testified on direct examination, absent some compelling reason, AUSAs should disclose these statements and any other potentially impeaching information sufficiently in advance of the hearing to allow the hearing to proceed efficiently. When a testifying witness relies on the statement or report of another (which often occurs at a preliminary hearing), Rule 26.2 does not require the government to disclose that statement or report. United States v. Valdez Gutierrez, 249 F.R.D. 368, 373-75 (D.N.M. 2007) (amended 2008) (J. Parker) ("The Court concludes that Rule 26.2 does not require the production of a statement or report authored by a non-testifying person simply because a testifying witness, who was not involved in an underlying investigation and who played no role in preparing the statement or report, relies on the statement or report in providing testimony.)" The Court in Valdez-Gutierrez, however, stressed "the importance of voluntary production by the government of relevant, non-privileged material in appropriate cases." Id. at 369. Thus, when AUSAs have such reports at the hearing, they are encouraged to consider disclosing those reports to defense counsel or at least make them available for defense counsel to read. Of course, when the defense calls a defense investigator as a witness at a hearing or at trial, AUSAs, on cross-examination, may also want to ask whether they prepared a report, sent e-mails or prepared any other written communication in connection with their investigation. If they have, and the defense did not disclose that statement, the prosecutor can either demand a copy of the statement or move to strike that witness' testimony pursuant to Fed. R. Crim. P. 26.2(e). Matters which are not necessarily covered by Rule 26 include information which could be used to impeach a government witness (which is sometimes called Giglio information). As to witnesses who will testify at pre-trial hearings, including but not necessarily limited to suppression hearing, it is this office's practice to seek such information before such hearings, and then, to the extent the circumstances allow, to disclose at least several days before the hearing. Decisions not to make such disclosure of impeachment information should be made with supervisory approval and, when feasible, after consultation with the office's Criminal Discovery Coordinator(s).

(b) <u>Guilty Pleas</u>: The Supreme Court has held that there is no constitutional requirement that the government disclose impeachment information prior to a guilty plea. *United States v. Ruiz*, 536 U.S. 622 (2002).



- (c) <u>Trial</u>: Impeachment information should be disclosed "at a reasonable time before trial to proceed efficiently." USAM 9-5.001(D)(2).
- (d) <u>Sentencing</u>: USAM 9-5.001(D)(3) requires, "Exculpatory and impeachment information that casts doubt upon proof of an aggravating factor at sentencing, but that does not relate to proof of guilt, should be disclosed no later than the court's initial presentence investigation." Thus, Department policy advises AUSAs to disclose such information no later than the date the court issues its preliminary presentence (PSR) investigation. If additional favorable information becomes apparent after the initial PSR is issued, it should be disclosed promptly.

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. In deciding when and in what format to provide discovery, prosecutors should always consider security concerns and the other factors set forth in subparagraph (A) above.

The decision as to whether a specific piece of information is subject to disclosure to the defense is ultimately the decision of the prosecutor, subject, of course, to review by the court. Examples of information that often will be disclosed under *Brady* and/or *Giglio* include:

- (1) specific instances of conduct of a witness, for the purpose of attacking the witness' credibility or character for truthfulness;
- (2) evidence in the form of opinion or reputation as to a witness' character for truthfulness;
- (3) prior inconsistent statements;
- (4) information that may be used to suggest that a witness is biased;
- (5) payments to a witness, or provision of other tangible or intangible benefits to a

- witness or the witness' family or associates;
- (6) information about pending charges against a witness, which might suggest that the witness would "shade" his or her testimony in the hope of receiving leniency.

(2) Court's Standard Discovery Order

The district court's standard discovery order tracks Rule 16 and requires us to produce or make available to the witness within seven days after arraignment the following:

- (1) any statement by the witness, oral or written, to a person known to have been a law enforcement officer or before the grand jury;
- (2) any written or recorded statements made by the witness to anyone, including conversations between informants or undercover officers and the witness;
- (3) the witness's criminal record;
- (4) documents and tangible objects that are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the witness;
- (5) reports of physical or mental examinations or scientific tests or experiments that are material to the preparation of the defense or are intended for use by the government as evidence in chief at trial;
- (6) a written summary of the testimony of any expert witness that we intend to use in our case in chief at trial, including a summary of the witness' opinions, the basis and reasons for the opinions, and the witness' qualifications.

Because we prosecute such a high percentage of reactive cases, the seven-day deadline has often proven impossible to meet. Still, AUSAs should produce within the seven days all discoverable material in our possession and should notify the defense in writing if we anticipate receiving additional items subject to discovery. Materials that come into our possession after the discovery deadline should be disclosed to the defense as soon as possible after we receive them. Historically, in most instances, production of discoverable material as we receive it has been acceptable to the defense. However, AUSAs should anticipate possible problems and take steps to avoid later problems. For example, if witnesss seek an extension of the motions deadline because of incomplete discovery, AUSAs should seek to have a statement in the unopposed defense motion to the effect that we have provided everything in our possession and are making efforts to obtain the rest. Further, in cases where discovery will be ongoing and voluminous, AUSAs are encouraged to seek a relaxation of, or exemption from, the standard seven-day requirement, stating the reasons for the request in an appropriate motion. If the reason the AUSA cannot comply with the discovery deadline is that the agency has not provided the necessary reports or other materials, the AUSA should seek an extension of the deadline and notify the agency in writing of the deadline and the problems the agency's acts and omissions are causing in the case.

As alluded to in the discussion above about gathering discoverable information from

members of the prosecution team, as well as assuring that the investigatory agency's files are reviewed, another potentially troubling area of discovery is the possibility that discoverable information that is in the government's case file exists in other places. If the AUSA is aware of the existence of the material in the investigative agency's possession, the AUSA should consult with the agent about the best way to make the material available to the defense and provide written notice of the existence of the material and the procedure for the witness to review it.

Even more troublesome is the possible existence of discoverable material in the files of the investigating agency, or even a different law enforcement agency over which our office has no control, that is not brought to the attention of the AUSA. Again, the prosecution team concept is paramount. AUSAs therefore need to know that the trend in the case law is to attribute to the prosecutor knowledge of the existence of discoverable materials in the files of other agencies. It is important, therefore, that the AUSA be as exhaustive as reasonably possible in attempting to verify that all relevant material has been provided. If there is any doubt whatsoever, the AUSA should document in the file written requests for all reports, documents, or other physical evidence prepared by any law enforcement officer in any agency having any role in the investigation of the case.

Discovery obligations are continuing, and prosecutors 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 was previously not disclosed.

C. Form of Disclosure

Instances may occur when it is not advisable to turn over discoverable information in its original form, such as when the disclosure would create security concerns or when such information is contained in attorney notes, internal agency documents (including, but not limited to personnel files of law enforcement witnesses), 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, prosecutors should take great care to ensure that the full scope of pertinent information is provided to the witness.

AUSAs should also attempt to redact all personal identifiers from discovery before providing it to the defense. Personal identifiers include, but are not limited to, names of minors, dates of birth, social security numbers, taxpayer identification numbers, home street addresses, telephone numbers, Medicare or Medicaid ID numbers, financial account numbers, or any other identifier which may improperly disclose private or sensitive information. Fed. R. Crim. P. 49.1, which contains direction for redacting documents filed with the court, should also be used as a starting point for the redaction of documents that will be produced in discovery.

In addition, the United States District Court has issued local rules 57.5 through 57.7 and a privacy policy (posted on its web page and entitled "Amended Privacy Policy and Public Access to Electronic Files for the United States District Court") that address measures attorneys must take to protect private and sensitive information. This privacy policy forbids the inclusion of sensitive information in any document publicly filed, unless the inclusion of that information is necessary and relevant to the case. Both the privacy policy and the local rules require at least partial redaction of personal identifiers from any documents publicly filed. Although the privacy policy and local rules do not require AUSAs to redact documents prior to providing discovery, it makes it inevitable that redaction should occur before trial. If because of the volume of discovery the redaction process is so time-consuming that the production of discovery will be delayed, AUSAs may wish to consider seeking a protective order at the discovery stage. If the case goes to trial, the sensitive information should be redacted from exhibits prior to their introduction in accordance with the Court's policy. When the prosecutor sends out the discovery, it may also be a good idea to tell the defense that, to the extent personal information is not redacted, the defense is responsible for ensuring that information is not further distributed whether by publicly filing a document or through any other means.



V. Making a Record

One of the most important steps in the discovery process is keeping good records

regarding disclosures. Prosecutors should make a record of when and how information is disclosed or otherwise made available. While discovery matters are often the subject of litigation in criminal cases, keeping a record of the disclosures confines the litigation to substantive matters and avoids time-consuming disputes about what was disclosed. These records can also be critical when responding to petitions for post-conviction relief, which are often filed long after the trial of the case. Keeping accurate records of the evidence disclosed is no less important than the other steps discussed above, and poor records can negate all of the work that went into taking the first three steps.

AUSAs have the discretion to select the method of documentation they prefer. AUSAs must, however, ensure that the documentation of the disclosure is in the file. Over the past several years, the office has invested considerable time and resources into modernizing our record keeping procedures. Rather than Bates labeling documents by hand, documents can be mechanically Bates labeled with a copier or scanned into an electronic form and then electronically Bates labeled. Documents that are scanned into electronic form can also be converted to a format where information within the documents can be searched for electronically. Discovery can then be easily copied into a separate electronic folder and economically provided to the defense in the form of compact discs. In cases with a large volume of discovery, it is often most efficient to track discovery through the use of an electronic database such as Access. Numerous AUSAs and support staff have developed expertise with databases. AUSAs and support personnel are encouraged to make efforts to become familiar with and utilize modern tools that will facilitate the production, disbursement, and tracking of discovery.

VI. Conclusion

Compliance with discovery obligations is important for a number of reasons. First and foremost, however, such compliance is more likely to facilitate a fair and just result in every case, which is the Department's singular goal in pursuing a criminal prosecution. This guidance does not and could not answer every discovery question because those obligations are often fact specific. However, prosecutors have at their disposal an array of resources to assist them in evaluating their discovery obligations including supervisors, discovery coordinators, the Professional Responsibility Advisory's Office, and online resources available on the Department's Intranet website, not to mention the experienced career prosecutors throughout the Department. By evaluating discovery obligations pursuant to the methodical and thoughtful approach set forth in this guidance and taking advantage of available resources, prosecutors are more likely to meet their discovery obligations in every case and in so doing achieve a just and final result in every criminal prosecution.

⁷ Although some original evidence may continue to need to be Bates labeled by hand, the volume of this type of evidence is usually very limited.