DISCOVERY POLICY
EASTERN DISTRICT OF NEW YORK

1. INTRODUCTION

This memorandum sets forth the Office's policy on compliance with the government's discovery obligations pursuant to Rules 16 and 26.2 of the Federal Rules of Criminal Procedure, *Brady v. Maryland*,[1] *Giglio v. United States*,[2] 18 U.S.C. § 3500 (the Jencks Act), and related discovery cases, statutes, and rules. It is intended to provide only internal office guidance and is not intended to, nor does it, create or confer any rights, privileges or benefits on prospective or actual defendants or other parties. It does not place any limitation on otherwise lawful litigative prerogatives, nor is it intended to have the force of law or a Department of Justice directive. *See United States v. Caceras,* 440 U.S. 741 (1979).[3]

This policy supplements the wealth of information currently available to you, as well as the Office's continuous training programs on disclosure obligations. Some of the other resources available include: the *Brady* PowerPoint presentation from January 2010 which is available on Justlearn; the David James lecture and handout on *Brady/Giglio* updated yearly; the General Crimes orientation lecture you received when you begin your practice in the EDNY; and the continuing education lecture on disclosure and *Brady/Giglio* obligations delivered yearly.[4] In addition, there are sample documents available for your review, including Rule 16, *Giglio* and

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[1] 373 U.S. 83 (1963).

[2] 405 U.S. 150 (1972).

[3] As discussed further on page 2 of this document, this policy does not apply to National Security cases. For guidance on disclosing information in National Security cases see the September 29, 2010 memorandum of Acting Deputy Attorney General Gary G. Grindler, attached hereto as Exhibit A, and incorporated herein by reference.

[4] These items are incorporated herein by reference. *See also* drafts of five chapters of the Federal Criminal Discovery bluebook available online at USA Book.

Brady disclosure letters, which can be found on the Office's "S" drive under General Crimes.

The EDNY practice of disclosure is very forward leaning.[5] The floor of our disclosure obligations is determined by statute, case law and the United States Attorneys' Manual (USAM), but our practice far exceeds those minimums. You must take your disclosure obligations extremely seriously. Failure to do so could, among other things, cause you to lose credibility with the bench, opposing counsel and your colleagues and may seriously harm your ability to effectively practice in the district. Given the critical role that AUSAs play in our justice system, our discovery and disclosure obligations are significant and form the cornerstone of the fairness and integrity of the criminal justice process. You, and by extension, the Office and the Department are the guardians of that process, and your credibility as well as the credibility of the institution that you represent, are often judged by how we comply with our discovery and disclosure obligations. Accordingly, as the Supreme Court noted in *Kyles v. Whitley*, 514 U.S. 419, 439 (1995), we should not "tack[] too close to the wind" on discovery questions, and the Office practice – which has served us well – strongly encourages disclosure.

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

[5] See separate discussion in the following paragraph regarding cases involving national security.

Criminal Investigations." A copy of the September 29, 2010 memorandum is attached to this policy as Exhibit A, and incorporated herein by reference. Prosecutors should review that memorandum and then consult with their supervisors and the National Security Coordinator, the ATAC Coordinator, or VCT supervisors regarding discovery obligations relating to classified or other sensitive national security information. As a general rule, in those cases where the prosecutor, in consultation with the direct and VCT supervisors and 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 work with VCT supervisors to consult 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.

All AUSAs should keep in mind that 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 or witnesses 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 his or her supervisor and the National Security Coordinator, the ATAC Coordinator, or the VCT supervisors. Those persons, in turn, will 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.

2. DEFINITIONS AND DISCLOSURE REQUIREMENTS

The government's disclosure obligations are generally set forth in Federal Rules of Criminal Procedure 16 and 26.2, 18 U.S.C. § 3500, as well as developed pursuant to *Brady* and *Giglio.* The USAM details the Department's policy regarding the disclosure of exculpatory and impeachment information. *See USAM 9-5.001.* Below we discuss the statutory requirements, USAM requirements, and the Office's practice with regard to your discovery obligations.

a. **RULE 16**

While Rule 16 specifies that its obligations are triggered upon the request of the defendant, the practice in the Office is to disclose Rule 16 material by the first status conference, regardless of whether you obtain a request from the defendant. Be mindful, however, that the government is only entitled to reciprocal discovery if the defendant requests disclosure from the government. Therefore, as a practical matter, you should get the defense to state on the record in open court or in writing that they are requesting discovery, thereby triggering the defendant's obligation to provide you with same, if requested. Rule 16(b).

One category of cases for which we do not disclose Rule 16 material before the first status conference is courier cases where the defendants arrive in the United States at JFK Airport. Pursuant to the Office's authorized "fast track" program (which has to be re-authorized each year), in exchange for a plea to a lesser included offense and a reduction for minimal role, the defendant agrees to forego discovery and motions. If, however, the courier declines the plea offer to the lesser included offense, you must provide Rule 16 discovery immediately.[6]

i. THE GOVERNMENT'S RULE 16 DISCLOSURE OBLIGATIONS

There are several categories of documents that are subject to Rule 16 disclosure. They include the defendant's oral statements, the defendant's written or recorded statements, the defendant's prior criminal record, documents and objects, reports of examinations and tests, and expert witnesses. In reviewing documents you plan to disclose, review them carefully to

[6] In some of the illegal reentry cases handled in General Crimes the defense attorney will inform the prosecutor that the defendant intends to plead guilty and will request the disclosure of the defendant's criminal history report only. It is acceptable not to disclose Rule 16 material under these circumstances. If, however, the defendant does not plead guilty promptly, you must comply with your disclosure obligations and supplement your production of Rule 16 material.

determine whether they contain information that should be redacted.[7]

(1) Defendant's Oral Statements (Rule 16(a)(1)(A)). The government is required to disclose the substance of any relevant oral statement made by the defendant in response to interrogation by someone the defendant knew was a government agent, if the government intends to use the statement at trial. Note that the Office's practice goes beyond the requirements of the rule to disclose the statement even if we do not plan to use the statement at trial.[8] You should notify defense counsel if you do not intend to use the statement at trial.

(2) Defendant's Written or Recorded Statements (Rule 16(a)(1)(B)). The government is required to disclose and make available for inspection, copying or photographing (a) any relevant written or recorded statement by the defendant if the statement is within the government's possession, custody, or control, or the attorney for the government knows or through diligence could know that the statement existed,[9] (b) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and (c) the defendant's recorded testimony before a grand jury relating to the

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[7] Consider identity and/or identifying information of the questioner. For example, some CBP reports contain the preparer's social security number as an identification number, which must be redacted. In addition, make sure you are complying with Rule 49.1, discussed below.

[8] Be aware that defendants often make additional statements to agents or police officers during arrest or processing. It is a good practice to ask the agents and officers whether the defendant said anything else that is not memorialized in a report.

[9] Be mindful that this section of the rule is not limited to statements made to law enforcement officers. However, an agent's report memorializing oral statements made by a defendant to an undercover or a confidential informant is not discoverable as a "written statement of the defendant" under Rule 16(a)(1)(B)(i). *See United States v. Siraj*, 533 F.3d 99 (2d Cir. 2008).

charged offense.

(3) Organizational Defendant (Rule 16(a)(1)(C)). If the defendant is an organization, the government must disclose statements described in Rule 16(a)(1)(A) and (B) if the person making the statement (a) was legally able to bind the defendant because of that person's position as the director, officer, employee or agent, OR (b) was personally involved in the conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of the person's position as a director, officer, employee, or agent.[10]

(4) Defendant's Prior Criminal Record (Rule 16(a)(1)(D)). You are required to disclose all of the defendant's prior criminal record. Note that the rule requires disclosure not only of what is in the government's possession, custody or control, but also what the government could learn through the exercise of due diligence.[11]

(5) Documents and Objects (Rule 16(a)(1)(E)). You must permit the defendant to inspect, copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if within the government's possession, custody, or control and (a) the item is material to preparing the defense, (b) the government intends to use the item in its case-in-chief at trial, or (c) the item was obtained from or belongs to the defendant.

The Office's practice is to provide copies of these items unless it is impractical to

[10] Note that in practice, in the prosecution of an organizational defendant, these categories are often extremely broad.

[11] Accordingly, if you have reason to believe that there may be additional information that should be on the defendant's criminal history report, such as entries included in a pretrial services report, you are obligated to conduct a further investigation.

do so.[12] We also tend to disclose all relevant material without regard for whether we intend to introduce it at trial or whether it is material to the defense, largely due to the fact that such assessments are difficult to make at the early date that discovery is produced. Broader production ensures that we will be able to use those items as exhibits at trial should they later prove relevant, and avoids the need to guess as to what the defense may be or what may later turn out to be material.

(6) Reports of Examinations and Tests (Rule 16(a)(1)(F)). You must permit the defendant to inspect and copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if (a) the item is within the government's possession, custody, or control, (b) the attorney for the government knows or through due diligence could know that the item exists, and (c) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.

The Office's practice is to copy the expert's reports and send them to the defense unless there are specific reasons not to do so.

(7) Expert Witness (Rule 16(a)(1)(G)). You are required to give a written summary of any testimony you intend to use under FRE 702, 703 or 705 during your case in chief. The summary must describe the witness's opinions, the bases and reasons for

[12] If the disclosure is more than minimal, it should be sent to an outside, secure copy service. You should first determine the current contractor and send that company a set of the documents that are to be provided to defense counsel, with Bates number. Along with the documents, you should provide the copy service a letter detailing the names and addresses of the defense counsel who are entitled to obtain copies of the documents. When sending your discovery letter to counsel, provide the name and number of the copy service to them. Please note that unless the court orders otherwise, defense counsel is required to pay for their own copies of the documents.

those opinions, and the witness's qualifications. We also disclose the expert's curriculum vitae and any prior testimony we may have in our possession. In addition, you should disclose any correspondence or e-mails with the expert and a list or summary of the materials or evidence the expert reviewed or relied upon in reaching his or her opinion.

ii INFORMATION NOT SUBJECT TO DISCLOSURE UNDER RULE 16

There are several categories of documents that are not subject to disclosure pursuant to Rule 16. They include reports, memoranda, or other internal government documents made by an attorney for the government or other government agent while investigating or prosecuting the case. In addition, Rule 16 does not authorize the discovery or inspection of 3500 material. Most importantly, most information requested by the defense from third parties pursuant to Rule 17(c) subpoenas are also not authorized pursuant to Rule 16. If a defendant subpoenas documents pursuant to Rule 17(c), you may consider making a motion to quash the subpoena on the grounds that it improperly seeks impeachment or discovery material. Rule 17(c) cannot be used as a fishing expedition. In order to obtain information pursuant to a 17(c) subpoena, a defendant must show relevancy of the material, admissibility, and specificity. *See United States v. Nixon,* 418 U.S. 683, 700 (1974). In addition, the defendant is required to obtain the court's permission to serve the subpoena if the return date on the subpoena is in advance of the trial date.

If you do not oppose a defense request for Rule 17(c) subpoenas, you should insist that the defendant produce the items he or she receives in response to a Rule 17(c) subpoena to you at the same time he or she receives them.

iii. OTHER INFORMATION COMMONLY DISCLOSED WITH RULE 16 MATERIAL

You should bear in mind that the underlying purpose of Rule 16, in addition to helping the defendant prepare for trial, is to allow the defendant to decide whether to file any suppression motions. Accordingly, while not technically falling within a subdivision of Rule 16, the Office also provides defendants with discovery of a number of other items, such as identification procedures, lineups, show-ups, wiretap and electronic surveillance applications, potential 404(b) material, search warrants, arrest warrants, or information which gives rise to *Bruton* issues, which are often the subject of pretrial litigation.[13]

iv. THE DEFENDANT'S RULE 16 DISCLOSURE OBLIGATIONS (Rule 16(b))

The defendant has reciprocal disclosure obligations, including the obligation to disclose documents and objects, reports of examinations and tests and expert witness information. This obligation is triggered when a defendant makes a discovery request to the government. Thus, it is important that you confirm that a defendant has done so, even if it is done orally. A defendant's failure to comply or delay complying with this obligation does not relieve us of our disclosure obligations.

(1) Documents and Objects. (Rule 16(b)(1)(A)). The defendant is obligated to disclose documents and objects to the government ONLY IF the defendant requested disclosure from the government pursuant to Rule 16(a)(1)(E) (documents and objects) and the government responded to that request. (*See* Rule 16(b)(1)(A)). If the defendant

[13] Note, however, that items such as wiretap tapes or photographic arrays will commonly fall within other provisions of Rule 16. *See*, *eg.*, Rule 16(a)(1)(B) and (a)(1)(E).

requested and obtained disclosure from the government, the defendant must permit the government to inspect, copy or photograph documents and objects if they are within defendant's possession, custody or control, and the defendant intends to use them in his or her case-in-chief. Documents and objects include books, papers, documents, data, photographs, tangible objects, buildings or places.

(2) Reports of Examination and Tests (Rule 16(b)(1)(B)). The defendant is also obligated to disclose reports of examinations and tests ONLY IF the defendant requested disclosure from the government under Rule 16(a)(1)(F) and the government complied. Under these circumstances the defendant must permit the government to inspect and copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment, if the item is within the defendant's possession, custody or control, and the defendant intends to use the item in his or her case-in-chief at trial, or intends to call a witness who prepared the report and the report relates to the witness's testimony.

(3) Expert Witnesses (Rule 16(b)(1)(C)). Upon the government's request, the defendant must give the government a written summary of any testimony the defendant intends to use it under Rules 702, 703, or 705 as evidence at trial ONLY IF the defendant requested disclosure of government's expert witness and the government complied, or the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony of the defendant's mental condition.

v. DEFENDANT NOT REQUIRED TO DISCLOSE CERTAIN DOCUMENTS (Rule 16(b)(2))

Other than scientific or medical reports, Rule 16 does not require the defendant to disclose (a) reports, memoranda, or other documents made by the defendant, or the defendant's

attorney or agent, during the case's investigation or defense, or (b) a statement made to the defendant, or the defendant's attorney or agent, by the defendant, a government or defense witness, or a prospective government or defense witness. (Such witness statement disclosures, at least for third parties or government witnesses, may be triggered later pursuant to Rule 26.2).

vi. CONTINUING DUTY TO DISCLOSE (RULE 16(c)).

The rule imposes a continuing duty on both the government and defense to promptly disclose to the other party evidence that is discovered before or during trial, if the evidence or material is subject to discovery or inspection under Rule 16 and the other party previously requested, or the court ordered, its production. The Office's practice is to disclose evidence on a continuing basis, even if the defendant does not make such a request.

vii. DISCLOSURE WHERE THERE IS A FIREWALL/FILTER TEAM.

If there is a filter/taint team in place, make sure that a filter team AUSA is providing discoverable "untainted" information to the prosecution team. You are still required to comply with all discovery obligations even if a firewall team is in place. Consider designating a filter team AUSA to take charge of providing discovery to the prosecution team. In addition, in some cases, the firewall team may make disclosures directly to the defendant without providing it to the prosecution team. It is advisable for both the firewall and prosecution teams to be cognizant of the government's discovery obligations as the case progresses.

viii. REGULATING DISCOVERY (RULE 16(d)(1))

While it is important to promptly disclose evidence in accordance with your Rule 16 discovery obligations, for security or other reasons, you may need to limit or delay disclosure. In such cases, you must consult with a supervisor and may consider obtaining a protective or

modification order. Upon a showing of good cause, the court may deny, restrict, or defer discovery or inspection or grant other appropriate relief. You can demonstrate good cause by submitting a written statement to the court *ex parte.* Keep in mind however, that in this district, all *ex parte* submissions must be accompanied by a notice filed electronically to all parties indicating that an *ex parte* filing was made to the court.

ix. PENALTIES FOR FAILURE TO COMPLY (Rule 16(d)(2)).

There are penalties for failure to comply with our disclosure obligations. The court may (a) order a party to permit discovery or inspection and specify its time, place, and manner, and prescribe other just terms and conditions, (b) grant a continuance, (c) prohibit a party from introducing the undisclosed evidence, or (d) enter any other order that is just under the circumstances.

x. DISCOVERY DEMANDS FROM DEFENSE COUNSEL

We oftentimes receive boilerplate letters from defense counsel demanding discovery. Do not ignore these letters. Although some of the information requested is not subject to disclosure pursuant to Rule 16, you should respond by providing any information that is discoverable and explain why the other requests are improper. You should also use this boilerplate letter as a checklist to confirm that you have gathered all the information that you are required to disclose whether pursuant to Rule 16, *Brady*, *Giglio*, or 18 U.S.C. § 3500. As discussed in section 3(e) below, it is the Office's practice to document all disclosures with a letter that details the information and/or documents being provided to defense counsel and the Bates stamped numbers of those documents. The letter, but not the documents, should be filed with the court by ECF. When providing supplemental discovery, your letter should indicate that

it supplements the government's earlier disclosures and specify the dates and Bates number ranges of the earlier disclosures.

xi. CONFERENCES WITH DEFENSE COUNSEL.

Local Criminal Rule 16.1 requires that parties conference with each other and attempt to resolve disclosure issues before filing any motions with the court. It is strongly recommended that you consider having an informal dialogue with defense counsel on a regular basis, whether in person or by telephone, to discuss all disclosure issues. Such regular dialogues will serve our interest in ensuring that we are providing all discovery material to defense counsel. It will also give us an opportunity to address concerns of the defense that we may not be fully complying with our obligations, thereby potentially avoiding litigation on the issue. You should be comfortable with the disclosure parameters required by Rule 16, the USAM, *Brady, Giglio*, 18 U.S.C. § 3500, and the Office practice, so that you can provide an appropriate degree of information yet resist overly broad defense inquiries.

As discussed below in section 3(a) discussing where to look for disclosure information, you should keep an internal list of all the places you have searched for information, to ensure that you have not overlooked areas that should be searched. This will serve as an internal checklist and will prove helpful if the case is ever reassigned. Note that defense counsel may suggest that you search the files of a particular agency. While it is appropriate to listen to defense requests, and embark on such reviews when you believe it is appropriate because of the circumstances of your case, you should resist being tasked by defense counsel unless counsel provides you with an adequate explanation as to why he or she believes such agency may have relevant disclosure information.

b. **RULE 12.1 NOTICE OF ALIBI DEFENSE**.

Rule 12.1 allows the government to make a demand on the defendant to obtain any alibi defense. The rule obligates the defendant to provide the government with notice of his alibi defense within 14 days of the government's request. The notice from the defendant must include (a) each place where the defendant claims he or she was at the time of the offense, and (b) name, address and telephone number of each alibi witness.

If the defendant provides the above notice to the government, the government is then required within 14 days after the defendant's notice, and no later than 14 days before trial, to give the defendant in writing (a) the name, address and telephone number of each witness the government will rely on to establish that the defendant was present, except that the government is not required to disclose the address and telephone number of a victim, unless ordered by the court, and (b) each government rebuttal witness to the defendant's alibi defense.

Because of the government's obligation to disclose certain information about its witnesses if the defendant provides alibi notice, you should carefully consider when to make a demand for alibi notice. You probably would not want to include such a demand in your initial discovery letter. Instead, you may want to make this request closer to trial when disclosing the identity of the witnesses you may use to counter the defense will be less problematic, or alternatively forgo making such a request all together, depending upon the situation.

i. CONTINUING DUTY TO DISCLOSE (Rule 12.1(c)). As with Rule 16, the parties have a continuing duty, up to and during trial, to disclose the name, address and telephone number of each additional defense or government alibi witness, other than a victim.

ii. FAILURE TO COMPLY (Rule 12.1(e)). If a party fails to comply with the requirements of this rule, the court may exclude testimony of any undisclosed witness regarding the defendant's alibi.

c. RULE 12.2 NOTICE OF AN INSANITY DEFENSE; MENTAL EXAMINATION

Rule 12.2 requires a defendant who intends to assert an insanity defense or introduce expert evidence relating to a mental disease or defect or any mental condition of the defendant bearing on the issue of guilt or the issue of punishment in a capital case, to notify the government in writing within the time provided for pre-trial motions, or as ordered by the court, and to file a copy of the notice with the clerk. For good cause, the court may allow the defendant to file the notice late, grant additional time for trial preparation, or make other appropriate orders.

The court may order the defendant to submit to a competency examination pursuant to 18 U.S.C. § 4241. If the defendant provides notice of an insanity defense upon the government's request, however, the court MUST order the defendant to be examined under 18 U.S.C. § 4242.[14] If the defendant provides notice to introduce expert evidence relating to a mental disease, defect or other mental condition bearing on the issue of guilt or the issue of punishment in a capital case, the court may order that the defendant be examined upon the government's request.[15]

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[14] Consider requesting a special verdict if the defendant raises the issue of insanity. *See* 18 U.S.C. § 4242.

[15] If your defendant raises these issues, you should read Rule 12.2 which specifies under what circumstances the results and reports of examination may be disclosed to the government and the inadmissibility of statements made by the defendant during the course of any

If the defendant fails to give notice or to submit to the examination when ordered by the court, the court may exclude expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any mental condition bearing on the defendant's guilt or the issue of punishment in a capital case.

d. **RULE 12.3 NOTICE OF A PUBLIC-AUTHORITY DEFENSE**

If the defendant intends to assert a defense of actual or believed exercise of public authority on behalf of a law enforcement agency or federal intelligence agency at the time of the offense, the defendant must notify the government in advance. The notice must be in writing and filed with the clerk within the time for filing pretrial motions, as ordered by the court, and must identify the law enforcement agency or federal intelligence agency involved, the agency member on whose behalf the defendant claims to have acted, and the time during which the defendant claims to have acted with public authority. In addition, the notice must be filed under seal if it identifies a federal intelligence agency as the source of public authority.

If the defendant serves the government with the above notice, the government is required to serve a written response within 14 days after receiving the defendant's notice, but no later than 21 days before trial. The government's response must admit or deny that the defendant exercised the public authority identified in the defendant's notice. The government can also request from the defendant, in writing, the name, address, and telephone number of each witness the defendant intends to rely on to establish a public authority defense. The government may serve such a request when it serves its response to the defendant's notice, or later, but no later than 21 days before trial. If the government serves the request upon the defendant for the names,

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examination pursuant to the rule.

addresses and telephone numbers of the witnesses, the defendant must provide a written statement with the requested information within 14 days of receiving the government's request. The government must then serve the defendant with a written statement of the name, address, and telephone number of each witness the government intends to rely on to oppose the defendant's public authority defense within 14 days of receiving the defendant's statement.

As with the alibi notice demand under Rule 12.1, you may want to consider making this demand closer to trial to avoid having to disclose the identity of your witnesses early in the litigation process.

i. CONTINUING DUTY TO DISCLOSE (Rule 12.3(b))

The parties have a continuing duty to disclose information required under this rule up to and during trial.

ii. FAILURE TO COMPLY (Rule 12.3(c))

If a party fails to comply with the provisions of this rule, the court may exclude the testimony of any undisclosed witness regarding the public authority defense.

e. ***BRADY/GIGLIO***

i. INTRODUCTION

Our minimum *Brady/Giglio* obligations have been established and clarified over time by case law, including a series of Supreme Court cases. As discussed below, the USAM and the EDNY practice, however, expand upon those foundations and require us to make a much broader disclosure beyond that required by *Brady*. This avoids the need to litigate the issue pre- and post- trial and garners valuable credibility with the court and opposing counsel. In the words of the Supreme Court, it is best not to "tack[] too close to the wind" on this issue. *Kyles v.*

Whitley, 514 U.S. 419, 439 (1995).

ii. *BRADY* DISCLOSURE OBLIGATION

Brady v. Maryland, 373 U.S. 83 (1963), requires us to disclose evidence that is favorable to the accused and material to the determination of guilt or the appropriate punishment. Thus, *Brady* applies both to questions of guilt as well as sentencing. There are several other Supreme Court *Brady* "progeny" cases with which you should be familiar. *See United States v. Agurs*, 427 U.S. 97 (1976) (no violation unless evidence is material, and defense request unnecessary to trigger *Brady* obligation); *United States v. Bagley*, 473 U.S. 667, 682 (1985) (definition of materiality); *Kyles*, 514 U.S. 419 (consider totality of violations; not a sufficiency of the evidence test); *Strickler v. Greene*, 527 U.S. 263 (1999) (elements of *Brady* violation); *United States v. Ruiz*, 536 U.S. 622 (2002) (no right to impeachment evidence at guilty plea).[16]

iii. *GIGLIO* DISCLOSURE OBLIGATION

Giglio v. United States, 405 U.S. 150 (1972), extends *Brady* principles to evidence affecting the credibility of government witnesses, including whether the witness has any motive to shade his or her testimony in favor of the government or against the defendant. *Giglio* material is one form of *Brady* material. *Bagley*, 473 U.S. at 676.

iv. ELEMENTS OF THE *BRADY* TEST

In order to determine whether a *Brady* violation has occurred, the court will examine (a) whether evidence was favorable to defense (exculpatory or impeaching), (b) whether the government suppressed evidence, (*i.e.*, information was known to government but unknown

[16] But see discussion below regarding Second Circuit case law requiring the government to disclose exculpatory and impeachment material in advance of a guilty plea, and the Office's practice.

to defense), and (c) whether the suppressed evidence was material. Keep in mind that *Brady* material includes exculpatory and impeachment material. Impeachment material is oftentimes referred to as *Giglio* material. Also keep in mind that a prosecutor's good faith or bad faith is technically irrelevant in a *Brady* analysis. *Brady*, 373 U.S. at 87; *see also Agurs*, 427 U.S. at 110.

The distinction as to the type of *Brady* material, i.e., exculpatory or impeachment, is important with respect to the timing of disclosure and obligations at guilty pleas. If the material is exculpatory, it must be disclosed promptly after it is discovered. Exculpatory information that includes classified or otherwise sensitive national security material may require certain protective measures to delay or restrict the nature of a disclosure, although disclosure in an appropriate manner as promptly as reasonably possible is still required.[17]

If the material is impeachment, it must be disclosed in sufficient time for the defense to have an opportunity to make effective use of the material at trial. It is the policy of the Department and the practice of the Office, discussed in detail below, to disclose impeachment material at a reasonable time before trial, but be mindful that the material must be turned over in sufficient time for the defense to make effective use of that material. However, we need to balance the goal of early disclosure against other significant interests such as witness or national security. In such cases, you may choose to disclose at a later time, but in a manner consistent with the Constitutional requirement. If you would like to delay disclosure you must

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obtain supervisory approval to do so. Upon such approval you must provide notice to the defendant as to the time and manner by which disclosure of the exculpatory and impeachment information will be made. USAM 9-5001 C(4). You may also consider making partial or rolling disclosures as to some witnesses as trial progresses.

With respect to the government's obligation to disclose exculpatory and impeachment material in advance of a guilty plea, the Second Circuit has held in several cases that we are obligated to disclose both types of material prior to a guilty plea. *See United States v. Persico*, 164 F.3d 796, 805 (2d Cir. 1999); *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998); *Tate v. Wood*, 963 F.2d 20, 24 (2d Cir. 1992); *Miller v. Angliker*, 848 F.2d 1312, 1320-23 (2d Cir. 1988).

The Second Circuit's precedent has been overruled in part, however, by *United States v. Ruiz*, 536 U.S. 622 (2002). In *Ruiz* the Supreme Court held that a defendant has no right to disclosure of impeachment material prior to a guilty plea. Although there is no obligation to disclose impeachment material prior to a guilty plea pursuant to *Ruiz*, you should consider doing so prior to a guilty plea depending on the facts and circumstances of your case, and, in particular, in cases where the witness is the only witness or the key witness to the event at issue.

However, *Ruiz* addressed the subject of impeachment material and did not decide whether there is a right to exculpatory information prior to a plea. You should assume, however, that the Second Circuit will continue to recognize such a right.[18] Thus, if you find exculpatory

[18] *But see Friedman v. Rehal*, 08-0297, 2010 WL 3211054 (2d Cir. Aug. 16, 2010) (the court held that the state court did not unreasonably interpret *Ruiz* as applying to both impeachment and exculpatory information).

material prior to a guilty plea, you should disclose it promptly. Do not delay disclosure of exculpatory material to ensure that the defendant will plead guilty.

As for sentencing issues, exculpatory and impeachment information that casts doubt upon proof of an aggravating factor, or which serves to establish a mitigating fact, at sentencing, but not related to proof of guilt, must be disclosed no later than the initial presentence investigation report. Pay particular attention to this issue since the bulk of our cases involve guilty pleas and therefore are litigated at sentencing, especially after *Booker*, *Gall*, and *Kimbrough*, and with regard to the language of 18 U.S.C. § 3553(a). Our plea agreement waiver provisions require the defendant to waive his or her right to additional disclosure from the government when he or she pleads guilty. This provision, however, IS NOT a waiver of the defendant's right to exculpatory and impeachment information pertinent to sentencing issues.

Be mindful that the obligation to provide exculpatory, 3500 material and impeachment information also applies to removal proceedings, violation hearings, suppression hearings, etc., and that in such proceedings, information bearing on the issue under litigation, such as identity or consent, is of particular relevance.

Keep in mind that *Brady* material may not be purely exculpatory. It could have some incriminating aspects. In addition, a determination as to what is "inclupatory" and "exculpatory" may change as the case develops, particularly as you learn more about the defense. Because a determination of what is *Brady* depends on the defense being offered, it can be helpful to state on the record in court that in order to fully comply with your *Brady* obligations, it would be helpful for the government to know the defense. This is also another reason for being over-inclusive in your disclosure as facts that at first appear irrelevant or

inculpatory may later appear exculpatory as the case progresses or the defense evolves.

v. MATERIALITY STANDARD

As discussed above, *Brady* requires us to disclose evidence that is favorable to the accused and *material* to the determination of guilt or to the appropriate punishment. The standard for determining what is material under *Brady* is whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. Keep in mind that where the government knew or should have known a government witness was committing perjury at trial, the materiality standard is more favorable to the defense. *See United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991) (materiality standard: is there "any reasonable likelihood that the false testimony could have affected the judgment of the jury."); *see also United States v. Vozzella*, 124 F.3d 389, 392-93 (2d Cir. 1997).

The *Brady* standard includes the materiality prong, which holds that the government's obligation under *Brady* extends only to information that is material. *See Agurs*, 427 U.S. at 108; *In re United States*, 267 F.3d 132, 142 (2d Cir. 2001). Once a true *Brady* violation is shown, there is no harmless error inquiry. *See Strickler*, 527 U.S. at 281 ("strictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."). Thus, unless we actually conclude that there is a reasonable probability that the suppressed evidence would have produced a different verdict, we should not conceded that we have failed to turn over *Brady* material. Instead, we argue in such cases that the information should have been turned over pursuant to our office practice, but that the information was not

material under *Brady*, and thus disclosure was not constitutionally required.

Given the hindsight nature of the "materiality" test, our pre-trial disclosure practice is far broader than required under the rules that have developed to analyze post-trial *Brady* challenges. As noted previously, the "prudent prosecutor," *Agurs*, 427 U.S. at 208, will not "tack[] too close to the wind." *Kyles*, 514 U.S. at 439.

Moreover, DOJ Policy (USAM § 9-5.001) requires more than the constitutional *Brady* doctrine of materiality. DOJ policy *dispenses with the materiality requirement* in making disclosure decisions and requires disclosure beyond information that is material to guilt as set forth in *Kyles* and *Strickler* 527 U.S. at 280-81. The USAM requires us to disclose "relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not . . . make the difference between guilt and innocence." USAM § 9-5.001C. Specifically, it requires us to disclose (a) "information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense", and (b) impeachment information that "either casts a substantial doubt upon the accuracy of any evidence . . . the prosecution intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence." USAM § 9-5.001C(1) and (2). The USAM disclosure obligations are not limited to admissible evidence but apply to information regardless of whether the information itself constitutes admissible evidence.

As with the USAM, other authorities argue for broader disclosure than the materiality requirement. For example, the proposed ABA amendment to Rule 16 would eliminate the materiality requirement and require the disclosure of "all exculpatory information

to the defense." You should also be aware of the *ABA Model Rule of Professional Conduct* 3.8(d) (adopted by NY State last winter), which requires a prosecutor to disclose "all evidence or information known to the prosecutor that tends to negate the guilt of the accused" unless relieved of that obligation by the court.

vi. DISCLOSURE OF EXCULPATORY MATERIAL TO GRAND JURY (USAM 9-11.233)

DOJ policy requires that if a prosecutor conducting a grand jury investigation is personally aware of substantial evidence that directly negates the guilt of a subject of an investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against that person. Failure to comply with this requirement will not ordinarily result in dismissal of the indictment but could result in referrals by the courts to the Office of Professional Responsibility. *See United States v. Williams*, 504 U.S. 36 (1992) (courts cannot dismiss indictments based on our failure to disclose exculpatory information to the grand jury).

vii ENCOURAGING DISCLOSURE AND THE CONSEQUENCES OF NONDISCLOSURE

As a practical matter, if you are considering whether or not an item is *Brady* information subject to disclosure, it is a virtual certainty that you should disclose the information promptly. It is not worth the risks of choosing not to disclose. If you do have legitimate safety or security concerns, the appropriate approach is not to forgo disclosure, but instead to seek to delay or restrict access to the information by requesting an *in camera* review, protective order, or disclose a partial or redacted version of the document or information after consultation with a supervisor.

You never want to be in the position of not disclosing information that should have been disclosed. There are severe consequences if you fail to disclose *Brady/Giglio* information. They include reversal of convictions, granting a new trial, dismissal of the indictment, referral to Office of Professional Responsibility, State Bar disciplinary proceedings, publication of the AUSA's name in a published opinion, award of attorney's fees, indictment of the AUSA, and a civil suit against investigators and prosecutors.

In sum, if there is a question as to whether or not to disclose information, err on the side of disclosure. Do not be afraid to do so since at the end of the day, it helps more than it hurts. There are tangible benefits to disclosing and to doing so promptly, including maintaining your credibility with the court, fronting difficult issues and avoiding preventable litigation.

f. **3500 MATERIAL AND RULE 26.2**

Title 18, U.S.C., § 3500 requires the government to disclose to a defendant after a witness testifies on direct examination at trial statements and reports in the government's possession which were made by a government witness or prospective government witness. Keep in mind that this statute also applies when a witness testifies at a hearing of any kind.[19] The term statements or reports includes (a) a written statement made by the witness and signed or otherwise adopted or approved by him or her, (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement

[19] Rule 12(h) provides that Rule 26.2 applies at a suppression hearing and holds that, at such a hearing, "a law enforcement officer is considered a government witness." The advisory notes to that section (which are from 1983 when the subsection was numbered as 12(i)), explain that the provision requires the government to turn over statements of law enforcement witnesses who testify at a suppression hearing regardless of whether the officer is called by the government or the defense.

made by said witness and recorded contemporaneously with the making of such oral statement, and (c) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury. 18 U.S.C. § 3500.

The statute requires that if the defendant makes a motion, the court must order the government to disclose the statement or report of the witness in the possession of the government AFTER the witness has testified on direct examination. The government is only required to disclose the statements which relate to the subject matter of the witness's testimony.[20] The court, however, can order an *in camera* inspection of the statements if the government claims that portions of the statement do not relate to the subject matter of the testimony. If the court excises portions of the statement over defense objection, you must maintain the entire statement for purposes of appeal. Failure to comply with the court order to disclose a statement can result in the court striking the witness's testimony or declaring a mistrial.

Rule 26.2 is similar to 18 U.S.C. § 3500, except that it applies to both the government and the defense. It similarly requires the disclosure of witness statements that relate to the subject matter of a witness's testimony, but does not apply if the defendant testifies.[21] It requires the court to order production if a request is made by either party and provides for *in camera* inspection if either side claims privilege or that the information does not relate to the subject matter of the testimony. It also provides for sanctions. Failure to obey a court order to

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[20] Technically, disclosure is limited to the scope of the witness's testimony. However, you should consider disclosing all of the witness's information that relates to the investigation or prosecution, even if the witness's testimony will be limited, especially if the witness is the case agent or a cooperating witness.

[21] "Statement" is defined similarly to the definition in 18 U.S.C. § 3500.

produce or deliver a statement requires the court to strike the testimony of the witness from the record. If the government disobeys a court order to produce a statement the court must declare a mistrial if justice so requires.

It is the Office's practice to disclose 3500 material a week before trial, with some exceptions, and we often make disclosures further in advance of trial if it is a more substantial disclosure. You should be flexible in deciding when to disclose 3500 material. If there are no security concerns, consider disclosing the material earlier than a week before trial. In white collar cases where the disclosure can be substantial and security issues are not significant, it should be made further in advance of trial. If there are security issues or concerns in your case, you can seek to disclose the information at a later date, such as in a rolling production during trial, or in compliance with the statute after the witness testifies on direct examination. You may also consider making a partial disclosure of 3500 material for witnesses who do not pose security issues.

If you plan to delay disclosure, you must have supervisory approval to do so under the USAM. Moreover, you should consider notifying the court and defense counsel before trial that you are doing so and file an *ex parte* letter to the court detailing why you are seeking to delay disclosure. Beware that if you provide disclosure after the witness's direct testimony, it could result in the delay of trial. You may also consider seeking a protective order in some cases to (a) prevent further dissemination of information , and (b) redact information of ongoing investigation.

Keep in mind that you are required to disclose *Giglio* material for hearsay declarants, even if they are not appearing in court. *See United States v. Jackson*, 345 F.3d 59,

70-71, 77 (2d Cir. 2003) (finding that we have a *Giglio* obligation regarding hearsay declarants). You do not, however, have to provide 3500 material for a hearsay declarant. As for witnesses who do not testify, usually you are not required to disclose 3500 material unless it contains *Brady* information or is otherwise discoverable. *See United States v.* Shyne, 617 F.3d 103, 107-108 (2d Cir. 2010) (finding that the Jenks Act does not apply to non-testifying declarants). Consider disclosing both 3500 and *Giglio* material for important non-testifying witnesses, however, to avoid a missing witness jury instruction, such as in the case of a cooperator or a key witness. By disclosing their 3500 material you may be able to argue to the court that the witnesses were equally available to the defense and thus a missing witness instruction would not be appropriate.

Unlike *Brady/Giglio* material, the court cannot order pre-trial disclosure of 3500 material. *See United States v. Coppa*, 267 F.3d 132, 145 (2d Cir. 2001); *United States v. Percevault*, 490 F.2d 126, 129 (2d Cir. 1974). However, consider (a) your credibility with the court – you do not want to damage it by not disclosing in a timely manner; (b) the appreciation of the court – you avoid the need to delay the trial for defense counsel to become familiar with the material; and (c) the EDNY practice which is to disclose at least a week in advance of trial, with some exceptions, and further in advance of trial in a more complicated case.

i. <u>CATEGORIES OF 3500 MATERIAL</u>

There are certain categories of items that could be considered to be 3500 material. They include:

- prior testimony (grand jury, prior trial, depositions, etc.)
- plea allocutions

- reports (technically 3500 of agent who wrote report, not witness whose statement was recorded, unless adopted by witness, but see Office's practice discussed below)
- recordings (including witness's prison calls, but only if in our possession)
- videotapes and pictures
- statements (including pedigree information)
- *Miranda* waivers
- consent forms
- notes, both agent's and AUSA's[22]
- e-mails
- text messages, tweets, facebook postings, YouTube uploads, and other social network postings
- information contained in Pretrial Services and Presentence Investigation Reports[23]

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[22] See discussion below regarding Office's practice not to disclose AUSA notes unless there is a reason to do so. But, you are always required to review AUSA notes for information that may be discoverable pursuant to *Brady*, *Giglio* or 18 U.S.C. § 3500.

[23] While we do not disclose Presentence Investigation Reports ("PSR"), you must review them to determine if they contain information that should be disclosed. If they do, consider *how* to disclose the information. Keep in mind that if you have a defendant who is cooperating, you may want to consider requesting from the court a delay of the preparation and/or disclosure of the PSR to avoid "tainting" your cooperator with "other" evidence. If the PSR is prepared and disclosed to your cooperator, he/she will become familiar with the government's evidence from other sources. Similarly, while we are not allowed to retain copies of the Pretrial Services report, we often make note of information contained in those reports. You should review the notes to determine whether any of the information provided by the witness to Pretrial Services is inconsistent with information provided to the government, or was omitted by the witness. Such information should be disclosed.

- plea and cooperation agreements
- informant agreements
- letters, including 5K letters and letters adjourning sentencing (technically *Giglio*)
- criminal history reports (technically *Giglio*)
- payment records (technically *Giglio*)
- relocation benefits or expenses
- witness security records
- human source and confidential informant files[24]
- consider all documents signed or endorsed by the witness or that contain information provided by the witness (even if not technically 3500 material).
- correspondence with the witness, especially with expert witnesses

While some of the above documents are not technically 3500 material, the Office takes a broad view of the parameters of 18 U.S.C. § 3500. It is the practice of the Office to label them as 3500 material and provide them in a binder with a 3500 List itemizing the documents that are being produced to the defense, and a copy to the court. In our Long Island office, the practice is to separately bind *Giglio* documents and provide them to counsel with a *Giglio* letter itemizing the documents that are being provided as *Giglio*, in addition to producing the 3500 material.

[24] You may need to review the human source and confidential informant agency files for *Giglio, Brady*, and 3500 material.

Keep in mind that while an agent's report that includes statements made by a witness is technically not 3500 material for the witness – unless adopted by the witness – but rather statements of the agent, the Office's practice is to disclose the agent's report as the witness's 3500 material. This makes locating and referring to the report at trial easier and faster. Moreover, the reports regarding the witness are still produced even if the agent does not testify.

In addition to agent reports, all notes written by the agent must be disclosed. While the reports and notes of the agent are not required to be copied twice, as 3500 material for the agent and again as 3500 material for the witness, your 3500 List should identify the reports and notes as 3500 for each witness. For convenience, consider including copies for each witness. Be mindful to oppose the admission into evidence of agent reports that are not technically 3500 material for other witnesses.

ii. AUSA NOTES

As discussed above, unlike the notes of agents which are routinely disclosed as 3500 material for the agent and for the witness whose statements are recorded in the notes (even though not technically 3500 material for the witness), we *do not* disclose AUSA notes routinely. You must, however, as a matter of routine, *review* all AUSA notes, including those of other AUSAs regarding your witness, in order to fully comply with your disclosure obligations. Those notes could contain *Brady*, *Giglio* or 3500 material. Your failure to review AUSA notes may result in your failure to comply with your *Brady* and *Giglio* obligations and could result in the dismissal of your indictment. *See United States v. Stevens,* 08-CR-231(EGS) (D.D.C.) (the government moved to set aside the jury verdict and dismiss the indictment with prejudice after attorneys failed to disclose the prosecutors' interview notes of the government's star witness,

which contradicted the witness' trial testimony).

Be especially mindful to review AUSA notes when you inherit a case from another AUSA. As a practical matter, all AUSAs should maintain a folder or binder in each case file with all AUSA notes. *See* additional discussion in section 3 (a)(i), discussing reassigned cases.

It is also advisable to gather your 3500 material as early as possible in the trial preparation process. Many AUSAs create a witness folder at the beginning of a case and collect 3500 material in that folder as the investigation progresses. Collecting 3500 material early will benefit you in many ways, including having it available to prepare your witness for direct and cross examination, being able to determine what information you may still need to obtain, and freeing up your time to prepare your witnesses in the weeks and days leading up to trial instead of focusing on trying to locate documents.

iii. E-MAILS. As with AUSA notes, you must review all e-mails to determine if they contain information that should be disclosed. You should try to avoid having substantive discussions about your case by e-mail, whether with agents, victims, witnesses, or defense attorneys. Such substantive e-mail discussions may trigger your obligations under Rules 16 and 26.2, section 3500, and/or *Brady/Giglio*.[25] Keep in mind that communication by e-mail may not be as complete and, as in the case of General Crimes AUSAs communicating with defense counsel, is not consistent with the established procedure that all documents must be reviewed by a supervisor. In addition, your agent may not be complying with his or her

[25] The term "e-mail" includes all forms of electronic messaging including traditional e-mail, text messages, instant messages, and tweets.

agency's established procedures for writing and reviewing reports if they communicate substantive information to you by e-mail. You should advise the agent that substantive written communications about cases should be in the form of a report, rather than an e-mail. Non-substantive e-mails between AUSAs and office personnel regarding case-related matters are potentially privileged communications and may be protected from disclosure as attorney-client privileged or work product communications. Do not use unprofessional language or engage in unprofessional dialogue in e-mails.

Remember that our obligations are to preserve, review, and if necessary, disclose e-mails. Accordingly, (1) case related e-mails[26] should be preserved, either by printing them out or going to our two-year archive that is on everyone's desktop, (2) agents should be instructed to similarly preserve and produce case-related e-mail to you for review, and (3) ALL communications with witnesses via e-mail (whether case related or not), should be preserved for review and appropriate disclosure.

If you do have substantive e-mail communications or potentially privileged information, you are required by the *Federal Records Act*, 44 U.S.C. § 3301, and 36 C.F.R. 1234.2 to retain those e-mails. Additionally, they should be reviewed by you as potential discovery material.

g. **MANDATORY REDACTION OF CERTAIN INFORMATION FILED WITH THE COURT**

Rule 49.1(a) requires us to redact certain information from all documents filed with the court, unless otherwise ordered. The categories of information that must be redacted

[26] The definition of "case related" should be viewed expansively, both in terms of preservation and review, because cases and theories constantly evolve and change.

and the portion of the information that can be included in the court filing are (a) Social Security numbers – use last four digits, (b) taxpayer identification numbers – use last four digits, (c) birth dates – use year, (d) names of individuals known to be minors – initials only, (e) financial account numbers – use last four digits, and (f) home address of individuals – city and state only.

Recognizing that redaction of the above information is not practical in every case, the rule exempts certain categories of filings from the redaction requirement. The categories of filings that are exempt from redaction pursuant to 49.1(b) are: (1) in a forfeiture proceeding, the financial-account number or real property address that identifies the property subject to forfeiture; (2) the record of an administrative or agency proceeding; (3) the official record of a state court proceeding; (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed; (5) a filing made under seal (discussed below); (6) a *pro se* filing in an action brought pursuant to 28 U.S.C. §§ 2241, 2254, or 2255; (7) a court filing that is related to a criminal matter or investigation that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case; (8) an arrest or search warrant; and (9) a charging document and an affidavit filed in support of any charging document. Rule 49.1(b).

If you are filing a document under seal, Rule 49.1 applies but the court may order that a filing be made under seal without redaction. Recognize, however, that the court may later unseal this filing or could order you to file a redacted version for the public record. Rule 49.1(d). Similarly, Rule 49.1(f) provides that if you file a redacted document, you can file an unredacted copy of that filing under seal. If you would like to redact additional information beyond the rule's mandate, or limit a non-party's remote electronic access to a document, you

may apply for a protective order to seek redaction of the additional information by showing "good cause." Rule 49.1(e).

When you make a redacted filing, you may do so together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The reference list must be filed under seal. Rule 49.1(g). A person waives the protection of the rule as to the person's own information by filing it without redaction and not under seal.

Keep in mind that you are required to ensure that transcripts are redacted before they are filed publicly. You should enlist the court reporter to assist you with the redactions; for example, it is fairly easy for the court reporter to search and replace Social Security numbers, dates of birth and names of minors. This will require you to give the court reporter a list of the information to be changed and the changes to be made. Ultimately, however, it is your responsibility to confirm that all redactions are made in accordance with this rule.

As a practical matter, you should have two sets of documents at trial (including trial exhibits or 3500 material). Seek permission from the court to offer the redacted version into evidence unless it is necessary to offer the unredacted version. Make sure the redacted version is filed publicly. Be mindful that the trial transcript must also be redacted if it contains information that must be redacted pursuant to Rule 49.1.

h. **CLASSIFIED MATERIAL**

The Classified Information Procedures Act ("CIPA"), Title 18, United States Code, Appendix 3, controls the disclosure of classified information in discovery. If your case involves or implicates classified information, you should review the September 29, 2010

Grindler Memorandum, attached as exhibit A, and contact your line supervisor, the Office's National Security Coordinator, ATAC coordinator, or the VCT supervisors at the earliest possible juncture.

3. GATHERING AND REVIEWING DISCOVERABLE INFORMATION

After figuring out what information you should be looking for in order to comply with your disclosure obligations, you need to find the information. Not only are you required to search all the information that you have in your files, including AUSA notes, you are also obligated to search other locations for pertinent information. Remember also that you must continue to review the information available to you, especially as the case evolves. In this section we discuss where you need to search for certain information, including agency files, and who needs to make the determination as to whether information is discoverable.

a. WHERE TO LOOK

As the prosecutor assigned to a case, you are expected to have knowledge of all information known to the prosecution team in connection with the Office's investigation of the case, including information known to the investigative agencies. *See Kyles,* 514 U.S. at 438-39. This is true, regardless of whether you are the first or fifth prosecutor assigned to the case. This is particularly important with regard to *Brady* and *Giglio* information. You have "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *United States v. Avellino,* 136 F.3d 249, 255 (2d Cir. 1998). This means that in joint task force cases with the New York City Police Department (NYPD), you will likely be charged with knowledge of the NYPD files. If a cooperating witness has previously testified, make sure you review his or her prior testimony and *Giglio* disclosures.

i. THE “PROSECUTION TEAM”

In most cases, “the prosecution team” will include the prosecutors, agents, and law enforcement officers working directly on the case. In multi-district investigations, investigations that include both Assistant District Attorneys and AUSAs, 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, you 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:

- Whether you 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 you know of and have access to discoverable information held by the agency
- Whether you obtained other information and/or evidence from the agency
- The degree to which information gathered by you has been shared with the agency
- Whether a member of an agency has been made a Special Assistant United States

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- The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges, and
- The degree to which the interests 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, you should consider (1) whether state or local agents are working on behalf of the prosecutors or are under the prosecutors' 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 prosecutors have 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 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.

Although the considerations set forth above generally apply in the context of national security investigations and prosecutions, special complexities arise in that context, given the possible involvement of the IC. You should begin considering potential discovery obligations early in an investigation that has national security implications and should also carefully evaluate your discovery obligations prior to filing charges. This evaluation should consider circuit and district precedent, and include consultation with your line supervisor and the

Office's National Security Coordinator, the ATAC Coordinator, or the VCT supervisors.

ii. OFFICE'S FILES; CASE AGENT'S FILES; AGENCY FILES

You should check with all prosecutors on the case, including fellow AUSAs in your office and other USAOs, and/or DOJ lawyers, and any SAUSAs; case agents and other agents working on the case; federal, state and local law enforcement agencies participating in the investigation and prosecution; and other agencies, especially in parallel proceedings such as with the Securities and Exchange Commission, the Federal Trade Commission, or the Commodities Futures Trading Commission. Similarly, in situations including parallel civil or forfeiture proceedings brought by our office, you should also check with the civil division attorneys working on the matter.

DOJ policy (USAM 9-5.100) sets forth certain procedures for disclosing potential impeachment information relating to law enforcement witnesses. *See EDNY Federal Agency Giglio Implementation Plan revised January 2010*. The *Giglio* policy expects that we will obtain all impeachment material in the first order directly from witnesses and/or affiants. Agency employees are obligated to inform prosecutors of potential impeachment information as early as possible, and you should routinely ask about potential *Giglio* issues with all witnesses not only during trial preparation, but also if you plan to use the witness as an affiant or at a hearing. If, however, you decide you want to request potential impeachment information from the investigative agency, you must follow the procedures set forth in the *Giglio Implementation Plan*. The procedures require you to go to the Office's Requesting Official, Bill Muller. The Requesting Official (RO) will make a request to the Agency Official. If the RO obtains information from the agency, the RO will discuss the information with you and your supervisor,

and consult with the agency point of contact about the nature and extent of any disclosure of those materials. The confidentiality of material not disclosed, or disclosed under a protective order, must be safeguarded.

As for obtaining *Giglio* material for NYPD officers, our practice is to ask NYPD officers (just as we do with federal agents) whether they have anything in their background of note. The categories of relevant materials include complaints before the Civilian Complaint Review Board (CCRB) and Internal Affairs Bureau (IAB) charges. We seek information from the CCRB and IAB if the officers identify anything relevant or give us reason to believe there might be additional information. CCRB information is available by faxing a letter request to the CCRB, 40 Rector St., 2nd Floor, New York, NY 10006. Fax: (212) 442-8800. Consult a supervisor regarding IAB information. In addition, as discussed below in section 5(b), you are required to inform the supervisory paralegal specialists whenever an NYPD officer is needed to testify at a suppression hearing or trial. In doing so, that notification will trigger a check of that officer's name against the Office's *Giglio* List. You will be told by the supervisory paralegal specialists if there is a file on the officer, which you can then obtain from the Chief of Public Integrity.

iii. INFORMATION OUTSIDE THE UNITED STATES

If your case involves an intelligence agency or any foreign conduct, you must send a prudential discovery letter to the IC to identify discoverable material. *See* pages 2 - 4 of this document and Exhibit A attached hereto. For assistance with drafting and circulating the letter, contact the Office's National Security Coordinator, ATAC coordinator or VCT supervisors at the earliest possible juncture to ensure timely disclosure. Note that this may arise

in many cases that involve international criminal activity, not just terrorism matters, and it is important to address this issue as early as possible.

iv. REASSIGNED CASES. When you inherit a case from another AUSA, particularly if it has been pending for a long time, be sure that all Rule 16 and *Brady* issues have been addressed. *See United States v. Spinelli*, 551 F.3d 159 (2d Cir. 2008); *Gil*, 297 F.3d 93. It is useful to review all discovery production, and, if in doubt, make a formal disclosure so that the record of production is clear. Case hand-offs are times when extra care should be taken to ensure disclosures are complete. AUSAs should, as a matter of routine, indicate in their supplemental disclosure letter the fact that the disclosure supplements the government's earlier disclosures, and should list the dates and Bates number ranges of the earlier disclosures. It is also advisable that AUSAs keep a discovery log in larger cases, similar to a subpoena log which all AUSAs are required to maintain within each file, listing each date of disclosure and the Bates number for the material disclosed.

If at all possible, meet with the AUSA whose case you are inheriting, especially if he or she is leaving the office. AUSAs who are reassigning cases are required to prepare a transfer memorandum, detailing, among other things, the disclosures that have been made to date, and all potential disclosure issues.

v. VICTIM/WITNESS STAFF. You should check with the Office's victim/witness coordinator, Lisa Foster, to determine whether she has information that should be disclosed. While our victim/witness coordinator is aware that information relevant to the investigation should be shared with you, you should nevertheless check with her to ensure that

all relevant information is being provided to you. Victims are informed that their conversations with the staff of the victim/witness program are not confidential.

b. **WHAT TO REVIEW**

In addition to reviewing all of the evidence and information gathered during the investigation contained in the Office's files, you should also review the files of the investigative agency; confidential informants, witness, human source files; documents or evidence gathered by civil attorneys and or regulatory agency in parallel civil investigations, such as SEC discovery documents (which should all be disclosed);[27] substantive case-related communications; potential *Giglio* information relating to law enforcement witnesses and Rule 806 declarants; information obtained in witness interviews;[28] agent notes; and AUSA notes. As discussed above, while it is not our practice to disclose AUSA notes, you must review these notes to determine if they contain information that should be disclosed. If they do, you must disclose the information. As a practice tip, make sure that your agents are taking notes in all meetings with witnesses. This is particularly true in the earlier stages of cooperation. In trial preparation meetings where much of the information is being repeated, note taking is not as essential. It is still important, however, for someone – preferably an agent – to note inconsistencies or new information. You should discuss the issue of note taking with your agents before any witness meeting.

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[27] In large complex while collar cases involving parallel SEC proceedings, it is often a good strategy to facilitate getting the defense access to the SEC's civil discovery materials, particularly documents and electronic evidence.

[28] Keep in mind that you have a duty to disclose variations in statements made by witnesses and new or inconsistent statements made during trial preparation.

c. **CONDUCTING THE REVIEW**

The collection of information that should be disclosed can be conducted by you, agents, paralegals, and agency counsel. You can also use computerized searches to identify potential discoverable information. However, the ultimate decision regarding what information should be disclosed must be made by you.

d. **MAKING THE DISCLOSURE**

The timing of the disclosure depends on what type of disclosure you are making. For ***Rule 16 disclosure***, you should disclose the information as soon as possible after the grand jury returns the indictment but no later than the first status conference after indictment. As discussed above, this duty is ongoing.

For ***Brady disclosure***, the constitutional requirement is that you should disclose in time to give the defense the opportunity to make effective use of the material. DOJ policy requires that you provide *Brady* information to the defense reasonably promptly after it is discovered. The Office's practice is to disclose *Brady* information immediately upon obtaining the information.

***Giglio* material** must also be disclosed in time for the defense to have an opportunity to make effective use of the material, *see In re United States*, 267 F.3d 132, 146 (2d Cir. 2001), though courts have held that *Giglio* material generally need not be produced before trial. *See United States v. Nixon*, 418 U.S. 683, 701 (1974); *United States v. Martinez-Perez*, 941 F.2d 295, 301 (5th Cir. 1991); *United States v. Presser*, 844 F.2d 1275, 1283 (6th Cir. 1988); *United States v. Yu*, 1998 WL 57079, at *5 (E.D.N.Y. 1998) ("*Brady* material of an impeachment nature, commonly referred to as *Giglio* material, is not required to be produced before trial.");

United States v. Velasquez, 1997 WL 414132, at *6 (S.D.N.Y. 1997) (same); *United States v. Perez*, 940 F. Supp. 540, 553 (S.D.N.Y. 1996) (same). DOJ policy requires that impeachment material be disclosed at a reasonable time before trial to allow the trial to proceed efficiently, unless there are significant countervailing concerns such as witness safety or national security. In such cases, disclosure may be delayed and made closer to or during trial, or in rare cases, consistent with 18 U.S.C. § 3500, so long as that provides sufficient time for the defendant to make effective use of the *Giglio* material. Such delays necessitate supervisory approval. *See* discussion above in Section 2 (f).

As with the disclosure of 3500 material, the Office's practice is to disclose *Giglio* material usually a week before trial, with some exceptions, and more than a week before trial where the disclosure is more substantial, as is typically the case in white collar prosecutions, or where the defense will need additional time to make effective use of the material. You may want to consider seeking a protective order in some cases to prevent further dissemination of the information.

The district court has broad discretion to set timetables for pre-trial disclosure of *Brady* and *Giglio* information. *See In re United States*, 267 F.3d 132, 146 & n.12 (2d Cir. 2001). If you have security concerns in revealing the identity of a witness before trial and need to delay disclosure, you should make an *in camera* motion to do so.

e. **MANNER/FORM OF DISCLOSURE**

i. ***Rule 16 disclosure***

Generally, Rule 16 disclosure is made by sending a discovery letter to defense counsel along with copies of the documents being provided. You should Bates stamp the

documents and keep a copy of the full disclosure for your file. Consider keeping a log of your discovery letters, similar to the subpoena log. You should also file the discovery letter only (not the enclosed documents) with the court by ECF. If the documents and items being disclosed are substantial, send the documents to a contracted copy company (always check with our administrative department to confirm the company since these contracts are determined by bids on a yearly basis). Send a discovery letter to defense counsel notifying him or her of the name, address, telephone number and point of contact at the copy company for him or her to contact and obtain the discovery at his or her expense. When sending documents to the copy service be sure to keep a complete set of the documents for yourself and to include a cover letter to the copy company explaining what documents are being transmitted and the names and addresses of the defense attorneys who can request the documents. You should also send a copy of your discovery letter to the copy company. Always get a record from the copy company that the documents were requested by defense counsel. Be mindful not to seek to determine which particular documents were copied by the defense. For electronic disclosure keep exact copies of the disks disclosed. You should either place a Bates stamp label or a number on each disk.

When providing supplemental disclosures be sure to indicate in your letter that the disclosure supplements the government's earlier disclosures and list the dates and Bates number ranges of the earlier disclosures.

Document Management Services (DMS) is a newly established arm of the Office's Information Technology Department. The goal of DMS is to establish and maintain an in-house system that will enable the Office to process all sorts of discovery data into searchable databases. It provides the following services: (1) data collection and storage, which includes the

import of CDs, DVDs, hard drives and flash media; (2) digital conversion digitization of paper documents by high speed scanners; (3) data processing – optical character recognition of converted documents; (4) organize data into a searchable database format; and (5) document review import data into USAO software for trial team review. You are encouraged to take advantage of this service in organizing your case files and investigations. You can contact DMS at 718 254-6789.

ii. ***Giglio Disclosure***

Giglio disclosure can be made several ways. You can write a *Giglio* letter to the court and defense counsel.[29] In addition, you can disclose the information as part of your 3500 material disclosure. You can also have the witness disclose the information during his or her direct examination, although this is not the preferred practice and should only be used rarely, and, depending on the nature of the information, this may be insufficient to meet your disclosure obligations. In order to avoid a defense claim that important impeachment information has been "buried" in a large amount of 3500 material, you should consider writing a *Giglio* letter highlighting any significant impeachment information.

iii. ***Brady Disclosure***

If a witness has *Brady* information (true also for *Giglio* information*),* you can usually satisfy your disclosure obligation by identifying the witness for the defendant. You usually will not have to turn over reports or grand jury testimony of that witness. This is an element to consider since it helps prevent the defendant from tailoring his or her testimony to the

[29] If you write a *Giglio* letter, you should take care to ensure that the full scope of pertinent information is provided.

testimony of the witness based on the "script" of the prior testimony or report. *See United States v. Grossman*, 843 F.2d 78, 85 (2d Cir. 1988); *United States v. Esposito*, 834 F.2d 272, 276 (2d Cir. 1987); *United States v. LeRoy*, 697 F.2d 610, 618-19 (2d Cir. 1982). There is a possible open issue as to whether this disclosure is adequate where the witness refuses to speak to defense counsel, however.[30] Keep in mind that "a disclosure made on the eve of trial (or after trial has begun) may be insufficient unless it is fuller and more thorough than may have been required if the disclosure had been made at an earlier stage." *Leka v. Portuondo*, 257 F.3d 89, 101 (2d Cir. 2001).

If you have borderline material, consider providing it to the Court *ex parte* and let the court make the decision as to whether or not it should be disclosed. Be mindful, however, that if you are asking the question of whether it is *Brady*, you should almost certainly turn it over. You should not take risks and disclosure is nearly always the prudent course of conduct. Remember that the defense theory may change, which could result in the need to disclose additional information. Re-evaluate your disclosure obligations as the case progresses. Keep in mind that in considering whether evidence constitutes *Brady* material, a defendant or court may come up with *Brady* theories after trial that are not obvious to you before trial. *See United States v. Rivas*, 377 F.3d 195 (2d Cir. 2004) and *United States v. Gil*, 297 F.3d 93 (2d Cir. 2002).

Be mindful to make and keep a record of all disclosures. Always memorialize disclosure by writing a letter stating what is being disclosed, how it is being disclosed and when it is being disclosed. It is not useful or helpful to make an undocumented disclosure. Remember

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[30] If the witness declines to speak with defense counsel you should consider a more complete disclosure as you likely will be obligated to disclose all the information provided by that witness.

that you have a continuing duty to disclose information, which continues up to and including trial.

4. **CATEGORIES OF DISCOVERY**

Below are some general categories of items that are discoverable as either Rule 16, *Brady* or *Giglio.* This list is not exhaustive.

a. **RULE 16**:

Statements of the defendant,

- recordings
- videos
- wiretaps
- e-mails
- text messages
- facebook postings
- YouTube uploads
- handwritten notes and confessions
- signed documents, e.g., *Miranda* waiver and consent to search forms
- prior testimony and depositions
- oral statements, whether or not memorialized in reports
- affidavits
- anything defendant said to agents or others
- excerpts from reports pertaining to statements

- pedigree information
- bonds
- financial statements and Pretrial Services reports,[31] and
- presentence investigation reports.[32]

The defendant's criminal history.

Documents and tangible evidence. Think broadly. Any item that you plan to use in your case-in-chief must be disclosed. In addition, all items seized from the defendant and all items material to the preparation of the defense must also be disclosed.

Lab Reports.

Expert notice.

Others/Miscellaneous items. Be sure to give reasonable notice in advance of trial if you intend to make a motion pursuant to 404(b), and disclose the evidence you intend to rely on as 404(b) evidence.[33] You may also be required to disclose all

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[31] You are not entitled to retain Pretrial Services reports, but you should note statements made by a defendant in those reports since they could become *Giglio* material if that defendant becomes a witness. You should inquire of witnesses during trial preparation whether they made contrary statements to the Pretrial Services officer.

[32] This is always a tricky issue. Keep in mind that while PRSs are not usually disclosed, you must review them for information that you may have to disclose and consider how to disclose the information.

[33] Courts in the Second Circuit have repeatedly interpreted the "reasonable notice in advance of trial" requirement of Rule 404(b) to require disclosure two weeks prior to trial. *See United States v. Heredia*, 2003 WL 21524008, *10 (S.D.N.Y) ("It has been the practice of courts in this circuit to deem notice afforded more than ten working days before trial as "reasonable" within the meaning of Rule 404(b)"); *United States v. Silberstein*, 2003 WL 21488024, *7 (S.D.N.Y.) (government to provide notice of its Rule 404(b) evidence no later than two weeks prior to the commencement of the trial in this matter.); *United States v. Kelly*, 2000 WL 145468,

search warrant affidavits, Title IIIs, surveillance reports, and identification procedures including photo arrays. The defendant should have the opportunity to move to challenge any of these documents or procedures. As discussed above, consider when to make a demand for alibi evidence. Moreover, consider whether there are privilege issues or any other matter that may require pre-trial litigation, such as co-conspirator statements and *Bruton* issues.

b. ***BRADY* and *GIGLIO***

You should consider the following categories of information when determining what should be disclosed as *Brady/Giglio* information:

- confession by another to the crime, even if you disbelieve it or it is implausible
- misidentification of and some failures to identify defendant by a witness
- records or information reflecting whether a witness or defendant was incarcerated at the time of the charged offense
- results of examinations favorable to the defense, example, no fingerprints on the murder weapon, or another's fingerprints on the murder weapon
- information that tends to implicate another in the crime or to exclude the defendant

*3 (S.D.N.Y.) (court approves of government's proposal to provide 404(b) material two weeks prior to commencement of trial, reserving the right to provide notice during trial in the event new 404(b) material arises and the Court excuses pretrial notice on good cause shown); *United States v. Tochelmann*, 1999 WL 294992, *10 (S.D.N.Y. May 11, 1999) (court orders disclosure of 404(b) evidence two weeks prior to trial).

- information that tends to establish an alibi
- information that tends to establish an *articulated* defense or an obvious defense even if not articulated
- information that tends to establish a legal defense
- benefits from the government to a witness including:
    - ✓ cooperation or non-prosecution agreements
    - ✓ 5K and Rule 35 motions
    - ✓ reduced or dismissed charges
    - ✓ monetary payments
    - ✓ immunity
    - ✓ visas or immigration benefits
    - ✓ expectations of a downward departure or sentence reduction
    - ✓ benefits to family or friends
    - ✓ assistance with a state or local prosecution
    - ✓ bail agreements
    - ✓ alterations or reductions in forfeiture amounts or monetary penalties
    - ✓ sentencing minutes
    - ✓ assistance in obtaining benefits
    - ✓ agreements with agents
    - ✓ letters to state and local authorities on the witness's behalf
    - ✓ witness protection benefits or relocation payments

- ✓ rewards
- ✓ sentencing adjournments,
- ✓ informant agreements

- FBI credibility assessments
- polygraph examinations, and
- other facts showing a motive to curry favor with the government, including anything done by agents to assist the witness, or anything *the witness* perceives as a benefit he or she is receiving from the government
- prior crimes[34]
- evidence of wrongdoing by the witness not directly involving criminal conduct such as:
  - ✓ security clearance issues
  - ✓ CCRB complaints
  - ✓ termination from employment
  - ✓ civil lawsuits, and
  - ✓ credit applications[35]
- lies, pre-or-post cooperation, including at proffer sessions, whether oral or embodied in a report, inconsistencies in a witness's account, whether or

[34] As to crimes you do not believe should be the subject of cross-examination, the usual practice is to disclose them to the defense and make an *in limine* motion to preclude cross-examination.

[35] As with criminal conduct, you may move *in limine* to preclude cross-examination on such matters.

not they show that the witness lied; material differences between the witness's account and other witnesses' accounts (even if you are not calling the other witnesses)

- memory problems
- drug use or alcohol abuse at the time of the events testified to
- psychiatric problems
- impeachment concerning hearsay declarants, including co-conspirators whose statements you are offering;[36]
- anything that indicates the witness may have a bias against the defendant (for example, if the witness has filed a civil suit for money damages against the defendant)

5. REPORTING REQUIREMENTS

a. REPORT TO SUPERVISORS, FRONT OFFICE AND CHIEF OF PUBLIC INTEGRITY

Certain court decisions about law enforcement agents, yourself or other AUSAs should be reported, and copies of the decision provided, to your supervisor, the front office, and the Chief of Public Integrity. These decisions include unfavorable credibility findings of agents, officers or any other law enforcement witness, and willful nondisclosure or noncompliance with a court order by you or any other AUSA. In addition, you should report inappropriate behavior by law enforcement witnesses, particularly if it bears on credibility issues. Certain conduct on

[36] Keep in mind that Fed. R. Evid. 806 allows impeachment of a hearsay declarant to the same extent as if the witness testified at trial. *See United States v. Jackson*, 345 F.3d 59, 70-71 (2d Cir. 2003).

the part of AUSAs may also be required to be reported to the Office of Professional Responsibility ("OPR").

b. SPECIAL PROCEDURES RELATING TO POLICE WITNESSES

We prosecute a large number of cases involving police officers as witnesses. Because of unique issues encountered by AUSAs when dealing with police officers, the Office has established certain procedures that you must follow when dealing with a police officer as a witness.

In advance of all hearings and trials (but not grand jury proceedings), you must notify the supervisory paralegal specialists, Sam Noel and Jeanette Gonzales, of the date of the upcoming hearing or trial. They will notify NYPD to ensure that the officers receive training before meeting with you in preparation for the hearing and trial. In addition to notifying NYPD, the supervisory paralegal specialists will also check the Office's *Giglio* list to determine whether there are any known problems or issues with the particular officer. If there are *Giglio* issues, they will notify you of that fact. You must then contact the Chief of Public Integrity to obtain the Office's file on that officer.

DISCOVERY POLICY

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