

# Discovery Policy For Criminal Cases In the Northern District of New York

October 13, 2010

As required by a memorandum from then-Deputy Attorney General David W. Ogden dated January 4, 2010, entitled “Requirement for Office Discovery Policies in Criminal Matters,” this document sets out the policy of the Criminal Division of the United States Attorney’s Office [“USAO”] for the Northern District of New York [“NDNY”] regarding the government’s “disclosure obligations” (a term that is defined below) in criminal prosecutions.

This is an internal USAO NDNY office policy. It does not have the force of law and does not create any enforceable rights, privileges, or benefits for any persons or entities. See *United States v. Caceres*, 440 U.S. 741 (1979).

This document does not set out law governing discovery or DOJ policy regarding discovery. It assumes that NDNY Criminal Division AUSAs are familiar with both. Instead, this document provides guidance concerning the manner in which AUSAs in this Office should apply that law and those policies to criminal cases prosecuted in this District. This policy covers four general duties that AUSAs have with respect to their disclosure obligations. Specifically, it describes:

- The duty to be familiar with the existing and evolving law and DOJ policy describing disclosure obligations;
- The duty to gather and retain case-related evidence and information so that it can be analyzed to determine whether to produce or withhold it. In some instances, this duty encompasses an obligation to “create” documents that may have to be produced to criminal defendants, such as agent reports of witness interviews;
- The duty to review and analyze gathered evidence and information to determine whether it must be produced to a criminal defendant; can be produced; or should not be produced, and to make disclosure determinations, including the timing of disclosure, accordingly;
- The duty to document the evidence and information that has been disclosed and that which has been withheld.

## 1. The Duty to Be Familiar with the Existing and Developing Law and DOJ Policies Describing Government Disclosure Obligations

NDNY AUSAs are obligated to be familiar with the law and DOJ policies governing their disclosure obligations. Specifically, every AUSA in the Criminal Division of the USAO for the NDNY is required to read and be familiar with the following rules, statutes, policies, and memoranda:

- a. **Federal Rule of Criminal Procedure [“F.R.Crim.P.”] 16(a)(1)** regarding the government’s obligation to produce certain categories of evidence to criminal defendants;
- b. **18 U.S.C. § 3500** [the so-called “Jencks Act”] and **F.R.Crim.P. 26.2** regarding the government’s obligation to produce to the defense the statements of those witnesses who testify at detention hearings, suppression hearings, trials, sentencing, and other specified proceedings;
- c. **NDNY Local Rule 14.1** governing pretrial discovery in this District, which is set out in the standard “NDNY Criminal Pretrial Order” issued in every criminal matter in this District. [Attached as Exhibit A];
- d. **United States Attorney’s Manual [“USAM”] §9-5.001**, setting out the DOJ “Policy Regarding Disclosure of Exculpatory and Impeachment Information.” [Attached as Exhibit B];
- e. **USAM §9-5.100**, setting out the DOJ “Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses (‘Giglio Policy’).” [Attached as Exhibit C];
- f. **The NDNY Brady/Giglio Plan**, which is located as S:\000 Legal Forms\Approval Forms\Brady Giglio Policy.wpd. [Attached as Exhibit D];
- g. **The January 4, 2010 memorandum by then-Deputy Attorney General David W. Ogden entitled “Guidance for Prosecutors Regarding Criminal Discovery.”** [hereinafter, the “Ogden memorandum”] [Attached as Exhibit E and also available at Criminal Resource Manual § 165]; and

- h. **Rule 3.8(b) of New York Rules of Professional Conduct**, which provides that “[a] prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to a defendant who has no counsel of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal.”<sup>1</sup>

In addition, every AUSA in the Criminal Division of the USAO for the NDNY should be generally familiar with and keep abreast of the following:

- a. Decisions of the United States Supreme Court, the Court of Appeals for the Second Circuit, and the District Court for the NDNY describing prosecutors’ constitutional obligations to disclose to the defense:
- i. Evidence and information favorable to the defense on issues of guilt and punishment, as required by ***Brady v. Maryland, 373 U.S. 83 (1963)*** and its progeny (the so-called “***Brady rule***”); and
  - ii. Evidence and information that could be used to impeach the government’s trial witnesses, as well as out-of-court declarants whose hearsay statements the government introduces at trial, all as required by ***Giglio v. United States, 405 U.S. 150 (1972)*** (the so-called “***Giglio rule***”);
- b. Decisions of the United States Supreme Court, the Court of Appeals for the Second Circuit, and the District Court for the NDNY interpreting ***Roviaro v. United States, 353 U. S. 53 (1957)***, which describes the government’s obligation to disclose informant-related information as well as the government’s privilege to sometimes withhold such information.
- c. Decisions of the United States Supreme Court, the Court of Appeals for the Second Circuit, and the District Court for the NDNY interpreting F.R.Crim.P. 16(a)(1) and 18 U.S.C. § 3500.

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<sup>1</sup> In addition, in cases in which they apply, NDNY AUSAs should read and be familiar with F.R.Crim.P. 12.1(b), regarding the government’s disclosure obligations in cases involving alibi defenses, and F.R.Crim.P. 12.3(a)(4)(C), regarding the government’s disclosure obligations in cases involving public authority defenses.

In this document, all of the above-described caselaw, statutes, rules, policies, memoranda, and other sources of obligations will be referred to collectively as the government's "disclosure obligations." The term "disclosure" encompasses various means of making materials available to the defense, including production of paper or digital copies and making the materials available for inspection and copying.

AUSAs in the Criminal Division of the NDNY are expected to be fully familiar with these disclosure obligations and are expected to fully comply with these obligations in all cases.<sup>2</sup> When in doubt, NDNY AUSAs are expected to either construe their disclosure obligations liberally, meaning in a manner that favors more complete disclosure, or, in the alternative, seek and follow the guidance of a team leader, or other Criminal Division supervisor. Simply put, when in doubt, either produce or seek guidance. In no case should an AUSA resolve uncertainty by refraining from making production.

In addition, NDNY AUSAs are expected to be familiar with their obligation to safeguard evidence and information that should not be disclosed to defense counsel, such as evidence or information that could jeopardize the safety of a victim, witness, or law enforcement official; threaten an active criminal investigation; or risk damage to national security.

Cases involving national security, including terrorism, espionage, counterintelligence, and export enforcement, can present unique and difficult criminal discovery issues. The Department of Justice has developed special guidance for those cases, which is contained in Acting Deputy Attorney General Gary G. Grindler's September 29, 2010, memorandum, "Policy and Procedures Regarding the Government's Duty To Search for Discoverable Information in the Possession of the Intelligence Community or Military in Criminal Investigations." Prosecutors should consult that memorandum and their supervisors regarding discovery obligations relating to classified or other sensitive national security information. As a general rule, in those cases where the prosecutor, after conferring with other members of the prosecution team, has a specific reason to believe that one or more elements of the Intelligence Community (IC) possess discoverable material, he or she should consult the Department of Justice National Security Division (NSD) regarding whether to request a prudential search of the pertinent IC

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<sup>2</sup> AUSAs in the Criminal Division of the NDNY also should be familiar with and comply with rules requiring the government to give notice to the defense of its intent to use certain evidence. See F.R.Crim.P. 12(b)(4) (requiring the government to provide notice to the defense of its intent to use evidence that the defendant may move to suppress); Federal Rule of Evidence ["F.R.E."] 404(b) (requiring the government to provide notice to the defense of its intent to offer "other act" evidence); and F.R.E. 609(b) (requiring the government to give notice of its intent to offer certain prior convictions).

element(s). All prudential search requests and other discovery requests of the IC must be coordinated through NSD.

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

- i. Those targeting corrupt or fraudulent practices by middle or upper officials of a foreign government;
- ii. Those involving alleged violations of the Arms Export Control Act or the International Emergency Economic Powers Act;
- iii. Those involving trading with the enemy, international terrorism, or significant international narcotics trafficking, especially if they involve foreign government or military personnel;
- iv. Other significant cases involving international suspects and targets; and
- v. Cases in which one or more targets are, or have previously been, associated with an intelligence agency.

For these cases, or for any other case in which the prosecutors, case agents, or supervisors making actual decisions on an investigation or case have a specific reason to believe that an element of the IC possesses discoverable material, the prosecutor should consult with NSD regarding whether to make through NSD a request that the pertinent IC element conduct a prudential search. If neither the prosecutor, nor any other member of the prosecution team, has a reason to believe that an element of the IC possesses discoverable material, then a prudential search generally is not necessary.

In addition to the above duties, every AUSA in the Criminal Division of the USAO for the NDNY should be generally familiar with the availability of resources describing these disclosure obligations in detail. Those resources include, but are not limited to the following:

- a. <http://10.173.2.12/useo/eousa/ole/usabook/disc/index.htm> [the DOJ Discovery Handbook (Blue Book)]
- b. <http://10.173.2.12/usao/eousa/ole/tables/subject/brady.htm> [USA Book page on *Brady/Giglio* issues, including links to other resources]
- c. <http://10.173.2.12/usao/eousa/ole/usabook/recu/03recu.htm> [USA Book Section on “Disclosure Issues”]
- d. <http://dojnet.doj.gov/prao/legalnews/memos.htm> [DOJ Professional Responsibility Advisory Office website and instructions for obtaining PRAO memorandum on “Prosecutors’ Duty of Disclosure (July 2008)”]
- e. <http://10.173.2.12/usao/eousa/ole/usabook/bgig/bgig.pdf> [The December 2009 version of the Dan Gillogly “*Brady* and *Giglio* Issues” memorandum, which is very comprehensive]

All AUSAs are expected to participate in all DOJ and Office-wide training related to disclosure obligations.

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## **2. The Duty to Gather and Retain Case-Related Evidence and Information**

Obviously, as part of obligations both to thoroughly investigate a case and to disclose evidence and information, AUSAs should make diligent and thorough efforts to gather and retain evidence and information potentially relevant to any case they are responsible for prosecuting. As decisions interpreting our *Brady* and *Giglio* obligations make clear, mere production of evidence that is in possession of the USAO is not sufficient to satisfy our constitutional obligations. Rather, we must seek to obtain evidence that may be in the possession of other government agencies. That obligation applies, of course, to files and materials in the possession of the federal agency or agencies involved in the investigation and prosecution of the case. Depending on the nature of the case and investigation, as well as our level of interaction with other agencies, that obligation may include a duty to seek evidence and information from state or local agencies, as well as agencies involved in civil or regulatory enforcement.

### **Some specific guidance follows:**

- a. **Meeting with case agent to cover disclosure issues.** Early in every investigation, NDNY Criminal Division AUSAs should meet with the

case agent to discuss the following topics:

- i. The identity of all federal, state, and local law enforcement agencies that may possess files relevant to the investigation, including files concerning any informants, sources, cooperating witnesses, or cooperating defendants [hereinafter “informants”]. The AUSA should determine, as soon as possible, whether any such agencies are unwilling or reluctant to make their full files available to the AUSA for review. The AUSA should make clear that AUSA “review” of a file does not equal “disclosure.”
  - (1) If the AUSA determines that certain potentially relevant files will not be made available for AUSA review or that certain evidence cannot be disclosed to the defense under any circumstances, the AUSA should discuss the matter with the assigned team leader to determine whether to discontinue or modify the investigation;
- ii. Whether the case agent or any other law enforcement official who may be required to testify or swear to an affidavit was ever the subject of complaints, investigations, or disciplinary actions; allegations of findings of misconduct; or arrests or convictions, and whether his or her personnel file has any documentation that could be used for impeachment purposes. Note that a negative answer does not absolve the AUSA of the obligation to comply with the NDNY *Brady/Giglio* plan and USAM §9-5.100, which set out the process by which the NDNY requests access to potential impeachment information in agent personnel files. Early discussion with the case agent may provide guidance about whether to structure the investigation to avoid the agent serving as an affiant or a potential witness at trial or in a detention or motions hearing.
  - (1) As the case proceeds, the AUSA should make similar inquiry of any agent or other law enforcement official who may be asked to testify.
  - (2) When adopting cases state cases, AUSAs should make appropriate inquiry to determine whether critical witnesses or law enforcement personnel who have served as affiants in connection with applications for search warrants or

court-ordered interception of communications have ever been the subject of complaints, investigations, or disciplinary actions; allegations of findings of misconduct; or arrests or convictions, and whether their personnel files have any documentation that could be used for impeachment purposes.

- iii. The agent's use of electronic mail, text messaging, correspondence, memoranda, or other means of text communication. The AUSA should explain to the agent that such communications can fall within the disclosure obligations described in *Brady* and *Giglio* and their progeny, as well as 18 U.S.C. § 3500 and should discourage the agent from using electronic mail or text messaging as a means of communicating substantive information about the case with the AUSA, other law enforcement agents within or outside the agent's agency, including supervisors, and witnesses. The AUSA should explain that all such communications may be subject to disclosure. The AUSA should encourage the agent to limit substantive communications by electronic mail to situations in which the agent includes a final version of an official agency report, which has been subject to the agency's own internal quality control processes, as an attachment.

- (1) The AUSA should determine if there already have been any such communications possibly subject to a disclosure obligation.

- iv. The AUSA should advise the agent to retain all rough notes of witness interviews. NDNY Local Rule 14.1(f) requires preservation of all rough notes after an indictment has been returned. ("The government shall advise all government agents and officers involved in the action to preserve all rough notes.").

**b. AUSA Retention of Evidence**

- i. NDNY AUSAs should avoid maintaining possession of any original evidence or original documents in any case;
- ii. In cases involving use of grand jury subpoenas, if the NDNY AUSA gives a subpoena recipient the option of making advance

production by mail, the subpoena recipient should be told that they can make advance production to the United States Attorney's Office, not directly to the agent.<sup>3</sup> The AUSA should set up a system by which the AUSA's administrative assistant logs in the receipt of all such produced material (and processes any paperwork necessary for payment to the subpoena recipient) and then transfers the material to the assigned case agent for retention and analysis. The AUSA should confirm that appropriate procedures are in place for the proper handling and storage of that material by the case agent.

- iii. If an AUSA receives from an agent or a witness a substantive electronic mail message related to a case that may be the subject of the AUSA's disclosure obligations, the AUSA must retain a copy of the message in either electronic or paper form that links the message to the case. For example, printouts of the messages should be placed in the AUSA's case file. Alternatively, substantive electronic mail messages should be retained in digital form and stored in a folder labeled with a name that enables the AUSA to link it to the case so that all stored messages can be retrieved for review as part of the discovery process.
- iv. NDNY AUSAs should retain AUSA notes made during all contacts with witnesses and defense attorneys.

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Exemption 5 - Attorney Work Product



**c. AUSA Gathering and Review of Evidence Subject to Possible Disclosure**

- i. AUSAs should gather and review evidence and information obtained from the sources listed below. They should be familiar with the detailed discussion in the Ogden memorandum concerning gathering and reviewing such material.
  - (1) The assigned investigative agency's files;
  - (2) The files of other involved investigative agencies, including state and local agencies;
  - (3) Informant files;
  - (4) Evidence obtained through search warrant execution, warrantless searches, voluntary production, and grand jury or administrative or agency subpoena;
  - (5) Evidence obtained from other agencies conducting parallel civil or regulatory investigations or proceedings. (Note that we do not have an obligation to obtain or produce such materials in all cases or all of the materials that a regulatory agency may have in its file. The Ogden memorandum describes factors to consider when deciding when we are obligated to seek out and produce such materials);
  - (6) Substantive case-related communications set out in electronic mail messages, notes, or memoranda;
  - (7) Potential impeachment information concerning law enforcement witnesses;
  - (8) Potential impeachment information concerning non-law enforcement witnesses and hearsay declarants;
  - (9) Documentation of witness statements during interview and trial preparation sessions.
- ii. With respect to agency files:
  - (1) Whenever practicable, NDNY AUSAs should personally review all relevant agency files, with the exception of agent personnel files, to determine whether the file contains evidence and/or information subject to the government's disclosure obligations. This duty to personally review files and materials applies to all informant files as well as case files. AUSAs may delegate to a federal agent the responsibility of reviewing

voluminous materials so that the agent can summarize for the AUSA the nature of those materials. NDNY AUSAs should never delegate to an agent the responsibility for determining whether evidence or information is subject to the government's disclosure obligations.

- (2) This AUSA review obligation does not apply to voluminous materials obtained by use of grand jury subpoena, such as records subpoenaed from financial institutions or communications service providers, or obtained by search warrant, when the AUSA makes such materials available to the defense for inspection and copying.
  - (3) If an agency refuses to permit an AUSA to gain access to its investigative or informant files, the AUSA should notify a team leader as soon as possible.
  - (4) NDNY AUSAs should be aware that all materials in agency files are potentially subject to the government's disclosure obligations, not just "case reports," "FD-302s," "DEA-6's," and "MOIs." For example, FBI Electronic Communications ["E.C.s"], inserts, and the like also may have to be produced.
- iii. NDNY AUSAs have an obligation to seek out and obtain all substantive case-related communications set out in electronic mail messages, voice-mail messages, notes, or memoranda. This includes, for example, communications that an agent may have had with a witness or another law enforcement official by use of a personal digital communication device and/or a personal electronic mail account.
- (1) Similarly, substantive case-related communications set out in electronic mail messages, voice-mail messages, notes, or memoranda may have involved employees of the USAO NDNY, such as the AUSA, the AUSA's administrative assistant, and/or the victim-witness unit. AUSAs have an obligation to seek out and obtain all such

substantive case-related communications as well.<sup>4</sup>

- iv. With respect to potential impeachment information concerning law enforcement witnesses, NDNY AUSAs should be familiar with and comply with the plan set out at S:\000 Legal Forms\Approval Forms\Brady Giglio Policy.wpd and make requests to the appropriate official on the NDNY Approval Table in a timely manner using the form located at S\000 Legal forms\Approval forms\Giglio Request Form.wpd.
- v. With respect to informant files:
  - (1) NDNY AUSAs should review the entire informant file, not merely that portion of the file that relates to the case that the AUSA is prosecuting, in order to determine if other portions of the file reflect payments and promises to and/or conduct of the informant that may be subject to the government's disclosure obligations. If an agent or agency refuses to give an AUSA access to an informant file for purposes of discovery review, the AUSA should notify a team leader or other Criminal Division supervisor.
  - (2) NDNY AUSAs should keep in mind that informant files may contain sensitive information and the improper disclosure of such information may jeopardize the viability and safety of the informant. In some cases, it may be appropriate to disclose the substance of information in informant files without producing the source documentation from the file that contains the information.
- vi. With respect to witness interviews:
  - (1) As a general matter, agents should generate a report of the initial interview and significant follow-up interviews of witnesses that occur during an investigation, consistent with agency policies. In addition, agents should document and material changes in a witness's version of events that the witness provides in later interviews. AUSAs should

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<sup>4</sup> For AUSAs whose practices involve frequent telephone contact with civilian victims, it may be advisable to include in the AUSA's standard message on the voice-mail system an advisement that witnesses should not leave case-related substantive messages on the recording system.

confirm that agents are preparing reports of witness interviews and should not tell agents to refrain from writing reports of such witness interviews. If there is a case-specific reason to avoid documenting a witness interview as described above, the AUSA should speak to their team leader and obtain authorization from the Chief or Deputy Chief of the Criminal Division (or, in their absence, the First Assistant United States Attorney) before giving such instruction to an agent. This obligation does not apply to follow-up interviews that cover the same topics as earlier interviews, or interviews done for purposes of grand jury or trial preparation (unless material differences in the witness's version of events emerge).

- (2) No NDNY AUSA should have substantive conversations with a witness outside the presence of a law enforcement agent who is participating in or listening to the conversation and will be able to testify about the conversation if necessary. In an exigent situation in which no agent is available and the meeting or interview cannot be postponed, an AUSA can task another employee of the USAO NDNY to witness and take notes of a meeting between the AUSA and a witness.
- (3) Each AUSA should ensure that there is a written or digital record, whether in the form of reports, agent or AUSA notes, or otherwise, of every instance in which a witness meets with the AUSA.
- (4) AUSAs should be mindful that although the obligations in 18 U.S.C. § 3500 apply only to written or recorded versions of a witness's statements, the *Brady/Giglio* disclosure obligation applies whether or not the exculpatory or impeaching statements have been documented. In other words, if a witness makes a statement that can be construed as exculpatory or impeaching such that it is subject to the *Brady/Giglio* disclosure obligation, the substance of that statement must be made known to the defendant in writing in a timely manner whether or not it is documented in an agent's notes or report or an AUSA's notes. Accordingly,

AUSAs are encouraged to have an agent document or document themselves any such statements to ensure that the AUSA will have a record of the statement when there is a duty to make disclosure.

- vii. With respect to our obligation to gather impeachment information, it is useful to consider the following typically-cited means of witness impeachment and determine whether any such information exists with respect to government witnesses:
  - (1) Prior inconsistent statements
    - (a) Note that there may be a material inconsistency between a statement that is documented in a report, a transcript of testimony, or agent or AUSA notes and another statement that is not documented, such as one made in a pretrial preparation session. NDNY AUSAs must disclose such material inconsistencies.
    - (b) Note also that a statement that a witness makes to a non-law enforcement person may be inconsistent with a statement made to a law enforcement official in an interview. Thus a report of an interview of witness A, in which witness A recounts a statement that witness B made to him, may be evidence of a prior inconsistent statement of witness B if witness B later says something materially different to an agent than what witness A reported him to have said. NDNY AUSAs have an obligation to disclose such inconsistencies if they are material.
  - (2) Contradictory evidence
    - (a) This includes evidence in any form that tends to undercut the anticipated testimony or statements of a government witness.
  - (3) Bias, prejudice, or motive to falsify
    - (a) Among other things, this includes circumstances that would create an incentive for any government witness to curry favor with the government.
  - (4) Reputation or opinion evidence that the government witness is dishonest
    - (a) See F.R.E. 608(a)
  - (5) Specific instances of conduct that tend to show

untruthfulness

(a) See F.R.E. 608(b)

(b) As a general matter, it is a good practice for AUSAs to ask potential trial witnesses whether they were involved in uncharged criminal conduct bearing on credibility. If the witness acknowledged having engaged in such conduct, it should be made known to defense counsel.

(6) Prior convictions

(a) See F.R.E. 609

(b) Note, however, that you should obtain and disclose prior convictions of government witness even if they may not be admissible under F.R.E. 609 to impeach.

(7) Use of drugs or alcohol.

viii. With respect to victims and witnesses: AUSAs should keep in mind that victims and witnesses may have contact with USAO staff members, including the Victim-Witness Coordinator, administrative assistants, and paralegals. Although those staff members should not have substantive communications with victims or witnesses, it may be advisable for AUSAs to check to ensure that such staff members have not received substantive or impeaching communications from victims or potential witnesses.

d. NDNY AUSAs should never refrain from conducting investigation for fear that it will disclose potential exculpatory or impeachment information. They can, however, in the exercise of their discretion, refrain from conducting investigation that they fear may generate false exculpatory or false impeachment information.

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### **3. The Duty to Analyze All Gathered Evidence and Information**

With some exceptions, this policy does not set out hard-and-fast rules regarding when NDNY AUSAs should disclose evidence and information to the defense (other than to make clear that there is a duty to comply with our disclosure obligations). Rather, in recognition that this is an office of AUSAs who are cognizant of their legal and ethical obligations, and that different approaches to disclosure may be desirable in different kinds of cases, this policy permits variation between AUSAs as long as all of those variations fully comply with constitutional, statutory, DOJ-

mandated, and ethical disclosure obligations.

As noted above, when in doubt, AUSAs should err on the side of disclosure and are encouraged to seek input from a team leader or other Criminal Division supervisor. Often, there is no downside to producing more in discovery than we are legally obligated to provide. NDNY AUSAs should be cognizant that any violations of our disclosure obligations can cause significant damage to the reputation of the AUSA and the Office.

That said, AUSAs must be cognizant that their responsibility to provide effective representation for the United States sometimes requires that they refrain from making disclosures, so long as such conduct does not violate their disclosure obligations. Among other things, we have obligations to safeguard sensitive information and documents concerning victims, witnesses, informants, grand jury matters, pending investigations, and national security. In addition, in some cases, unnecessary disclosure can increase the risk of obstruction of justice or have other ramifications that undermine the mission of the Department of Justice. Similarly, NDNY AUSAs may refrain from making disclosure when there is no obligation to disclose and the retained evidence can be used to combat or foreclose a false defense at trial.

As a general matter, case-related evidence and information falls into three categories: (a) that which **must be disclosed** pursuant to our discovery obligations (such as materially exculpatory or impeaching information, defendants' written statements, and items that we will introduce in our case-in-chief); (b) that which we are not legally obligated to disclose but **may choose to disclose**, either to comply with District-wide custom and practice, to minimize the risk of claims of discovery or *Brady/Giglio* violations, or for other prudential reasons (such as non-verbatim agent or AUSA rough notes of witness interviews that do not contain *Brady* or *Giglio* information and transcripts of the grand jury testimony of people who will not be government trial witnesses); and (c) that which we are not obligated to disclose and **should not disclose** (such as the identity of tipsters and filing, routing, and NADDIS information on Drug Enforcement Administration reports). All AUSAs have an obligation to analyze all case-related evidence and information to determine whether each piece of evidence and information must be produced, can be produced, or must be withheld from discovery.

With respect to the first category – evidence and information that must be produced – AUSAs must make timely production of that evidence and information even if there are case-related or general policy reasons for withholding it. In other words, if our disclosure obligations require production, we must make production in

a timely manner despite any concern that we have about the consequences of such production. In such cases, NDNY AUSAs should keep in mind that there are means to limit access to such information to defense counsel alone. See F.R.Crim.P. 16(d)(1) (describing protective and modifying orders). In addition, NDNY AUSAs should be mindful of procedures such as *ex parte* filings and CIPA procedures that can be used to help safeguard sensitive evidence and information that must be disclosed.

With respect to the second category – evidence and information that can be produced but which law, DOJ policy, and ethical rules do not require be produced – NDNY AUSAs typically should consider making production unless there is a sound reason not to do so. Agent summary reports of witness interviews, such as FBI 302s and IRS Reports of Interview, are an example of documents in this category. Assuming that such a report does not contain *Brady* or *Giglio* information, and is not a substantially verbatim account of the witness’s statements and has not been adopted by the witness, it is not a statement that 18 U.S.C. § 3500 requires that we disclose. That said, because local practice so dictates, absent compelling countervailing circumstances (such as witness safety) and consultation with a team leader and approval from the Chief or Deputy Chief of the Criminal Division (or, in their absence, the First Assistant United States Attorney), NDNY AUSAs should produce such reports as if they were § 3500 statements.

When disclosing evidence or information beyond that required by the government’s disclosure obligations, NDNY AUSAs should avoid describing their disclosure as legally obligated by any controlling law or rule when, in fact, the law or rule does not require disclosure. Thus, for example, when disclosing a report of a witness interview that is not substantially verbatim or adopted by a witness, an AUSA should not describe the production as “pursuant to the Jencks Act” or “pursuant to 18 U.S.C. § 3500.” Such erroneous description of the government’s discovery obligations can create an unfortunate record that will be used against the government in the same case or other cases.

With respect to the third category – evidence and information that we are not obligated to disclose and should not disclose – NDNY AUSAs should be cognizant that as much as our ethical obligations as federal prosecutors sometimes require disclosure, at other times equally compelling ethical obligations may require that we refrain from disclosure and that production of sensitive information can jeopardize the safety of victims, witnesses, and informants, can undermine active investigations, and can harm national security.

## Guidance regarding disclosure obligations:

- a. NDNY AUSAs should consider all sources of disclosure obligations when determining whether a piece of evidence or information must be produced to the defense. To put it differently, a single document may implicate multiple obligations to disclose. For example, there may be an obligation to produce an agent's rough notes of a witness interview (a) as a § 3500 statement of the witness if the notes are a substantially verbatim account of the interview or have been adopted by the witness; or (b) as a § 3500 statement of the agent if the agent is going to testify as a government witness at trial about the witness interview. In addition, if the witness disclosed exculpatory information about the defendant or impeaching information about a government witness, the government likely is obligated to produce either the notes or the substance of such information under *Brady* or *Giglio*, as well as DOJ policy. Further, if the rough notes reflect an inconsistency with another statement by the same witness, the government likely is obligated to produce the notes, or the substance of the witness's inconsistent statement, under *Giglio* and DOJ policy.
- b. As the preceding example suggests, it is not enough to simply conclude that agent rough notes "are not Jencks Act material." NDNY AUSAs must consider the content of the notes, the circumstances under which the notes were made, and the relationship of the notes to other evidence in the case to determine whether they must be produced pursuant to the government's disclosure obligations. The same kind of analysis is required for all case-related evidence and information.
- c. As noted above, *information* may be subject to the government's disclosure obligations – particularly the government's *Brady* and *Giglio* obligations – *whether or not it is documented*. Thus, if a witness makes an oral statement that is exculpatory or impeaching, the government is obligated to disclose the substance of the statement whether or not the statement has been documented in notes or a report. To put it differently, the government's disclosure obligations extend beyond the production of physical items such as documents, physical evidence, digital evidence, and the like and include, in some instances, information even if it is not documented in any physical form. Specifically, we are obligated to produce *Brady/Giglio* information even if there is no report or record documenting that information. In such circumstances, AUSAs have a duty to create a document setting out

that information. Such document can be in the form of a letter to defense counsel.

- d. As an analogue to the above-described obligation to produce the substance of certain kinds of information, NDNY AUSAs should be aware that absent a duty to disclose a particular type of document – such as a witness statement pursuant to 18 U.S.C. § 3500 or the defendant’s grand jury testimony, if any, pursuant to F.R.Crim.P. 16(a)(1)(B)(iii) – it may be sufficient to disclose the substance of the information and withhold the source document.
- e. NDNY AUSAs should be mindful that there may be information in agency files that must be redacted before disclosure is made, or should be disclosed in substance, rather than production of the document in the agency file. NDNY AUSAs should not disclose sensitive materials in agency or informant files without first seeking the approval of the involved agency. Disputes should be discussed with the AUSA’s team leader and brought to the attention of the Chief or Deputy Chief of the Criminal Division (or, in their absence, the First Assistant United States Attorney). NDNY AUSAs should keep in mind that an agency’s reluctance or refusal to permit production does not absolve the AUSA of his or her disclosure obligations.
- f. An increased area of concern for DOJ and for this District involves electronic communications – which typically will be electronic mail messages, but may also be voice-mail messages or in some other form – involving AUSAs, agents, and/or witnesses. NDNY AUSAs should review all case-related communications in whatever form, including electronic communications, to determine if they (or the substance of such communications) must be disclosed in whole or in part under either 18 U.S.C. § 3500 or the government’s *Brady* and/or *Giglio* disclosure obligations.
- g. Sometimes, agents transmit reports, spreadsheets, or other case-related, agent-created documents in digital format. If an NDNY AUSA decides to produce such documents to the defendant in digital format, the AUSA should not produce them in their native format without first taking steps to remove all “metadata” (information that is digitally stored with the documents about their creation but does not appear on the face of the document). Such metadata can include, for example, the most recent changes and any comments or edits made to the

document. The easiest way to avoid the inadvertent disclosure of metadata in a digital document is to convert the document into .pdf format. (Note that there may be cases in which metadata is itself subject to a government disclosure obligation. If so, it must be produced.)

- h. AUSAs have no obligation to “flag” *Brady* information or § 3500 statements or other categories of materials subject to the government’s disclosure obligations. Thus, there is no need to describe to a criminal defendant why the AUSA has produced any particular piece of evidence or information or to specifically highlight evidence or information as favorable. Similarly, AUSAs are not obligated to categorize the particular disclosure obligation that prompted production of a document or information. The production alone is sufficient.
- i. If there is a filter team used in a case, bear in mind that the government may be obliged to produce all documents and information that are subject to its disclosure obligations whether or not those documents are passed through the filter and on to the trial team. In cases in which a filter team is used, it is the responsibility of the trial team AUSA to make disclosure decisions with respect to all evidence and information that is passed through the filter and on to the trial team. If the filter AUSA decides that there is a piece of evidence or information that must be “filtered” (not passed on to the trial team because of the existence of privilege or whatever other basis there is for the filter), and that the evidence or information should be disclosed to one or more defendants in the case, the filter team AUSA should consult with a team leader or other Criminal Division supervisor and, if appropriate, the Office Professional Responsibility Officer (PRO) and/or the DOJ Professional Responsibility Advisory Office [PRAO] before making disclosure.
- j. AUSAs should refrain from describing their discovery practice as “open file discovery,” even if they produce most or all of the documents related to a case that are in the government’s possession. Such a broad description may prove inaccurate and result in accusations that the AUSA misled the defense or the court.

**Guidance regarding F.R.Crim.P. 16 disclosure obligations:**

- k. F.R.Crim.P. 16(a)(1)(A): A Defendant’s Oral Statement: This rule obligates the government to disclose to a defendant his or her own oral

statement if:

- i. The statement is “relevant” to the case;
- ii. The statement was made before or after arrest to a person the defendant knew to be a law enforcement official; and
- iii. The government intends to introduce the statement at trial.

Note that F.R.Crim.P. 16(a)(1)(A) typically does not obligate the government to produce a defendant’s oral statement made to a person the defendant did not know was a law enforcement official (this includes both non-law enforcement witnesses and undercover operatives, for example) or one that we will not introduce at trial. That said, such statements, if exculpatory, may have to be disclosed pursuant to the government’s *Brady* obligation.

- I. F.R.Crim.P. 16(a)(1)(B): A Defendant’s Written or Recorded Statement: This rule obligates the government to disclose to a defendant his or her own written statement if:
  - i. The statement is “relevant” to the case; and
  - ii. The statement is either within the government’s control and the government attorney knows, or should know through use of due diligence, that the statement exists;

The government also must disclose both:

- iii. 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
  - iv. The defendant’s recorded testimony before a grand jury relating to the charged offense.
- m. Note that F.R.Crim.P. 16(a)(1)(B) requires the government to disclose a written or recorded statement of a defendant *whether or not we intend to use the statement at trial* so long as the written or recorded statement is either relevant or made during testimony in the grand jury’s investigation of the case. It is common for the government to obtain recordings from detention facilities of conversations between an incarcerated defendant and his family members, friends, or associates. NDNY AUSAs must disclose such recordings pursuant to F.R.Crim.P. 16(a)(1)(B) if they are in our possession and are relevant to the charges even if we do not intend to use them in our case-in-chief at trial. If the recordings are sufficiently related to the case that they may be used in

rebuttal or to cross-examine defense witnesses, they are likely “relevant” and should be produced.

- n. Co-defendant’s statements: Note that F.R.Crim.P. 16 does not require that the government produce to a defendant any statements of a co-defendant. Keep in mind, however, that a statement by a co-defendant or the substance of such statement may have to be produced to a defendant as exculpatory evidence. For example, if four defendants are charged with conspiracy and defendant A, in a pre- or post-arrest oral, written, or recorded statement or grand jury testimony denies the existence of the conspiracy, the substance of that denial should be disclosed to the other defendants under *Brady*.
- o. F.R.Crim.P. 16(a)(1)(E) obligates the government to disclose three categories of “books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items” that are “within the government’s possession, custody, or control”:
  - i. Items material to the preparation of the defense;
  - ii. Items the government intends to use in its case-in-chief at trial; and
  - iii. Items that were obtained from or belong to the defendant.
- p. As a general matter, pursuant to F.R.Crim.P. 16(a)(1)(E), NDNY prosecutors should, absent a compelling countervailing reason, make available or produce to the defense all of the documents and items that the grand jury has obtained during its investigation through use of its subpoena power, as well as all evidence seized from the defendant and co-conspirators, and from properties associated with them, during the investigation.
- q. Be aware that F.R.Crim.P. 16 cannot be used by the defense to circumvent the requirements in 18 U.S.C. § 3500. See F.R.Crim.P. 16(a)(2) & (3).
- r. Timing of F.R.Crim.P. 16 disclosure: Note that NDNY Local Rule 14.1 Standard Pretrial Order requires that the government produce all F.R.Crim.P. 16 material “[f]ourteen (14) days after arraignment, or on a date that the Court otherwise sets for good cause shown.” In complex cases in which additional time is necessary to assemble and produce discovery, AUSAs should make application to the Court for an extension of time within which to make such production.

**Guidance regarding 18 U.S.C. § 3500 and F.R.Crim.P. 26.2 disclosure obligations:**

- s. 18 U.S.C. § 3500 imposes only limited obligations on the government, in terms of both what must be disclosed and when it must be disclosed. The statute requires only that the government disclose those accounts of witness statements that are verbatim, substantially verbatim, recorded, or adopted or approved by the witness. Thus, if read strictly, § 3500 does not apply at all to narrative summaries of witness interviews. In addition, the rule only applies to the government's trial witnesses and obligates the government to make disclosure only after the witness completes his testimony on direct examination. Federal courts lack authority to require that the government disclose more information or produce it sooner. In this regard, it is noteworthy that NDNY Local Rule 14.1(e) only *requests* early disclosure of witness statements, it does not require them. It states: "The government . . . [is] requested to make materials and statements subject to Fed. R. Crim. P. 26.2 and 18 U.S.C. §3500 available . . . at a time earlier than rule or law requires, so as to avoid undue delay at trial or hearings."
  
- t. It is the custom and practice of the NDNY to not limit disclosure to that which 18 U.S.C. § 3500 (or its analogue on the Federal Rules, F.R.Crim.P. 26.2) literally requires. Rather, as a general matter, and absent compelling reasons to do otherwise:
  - i. AUSAs in the NDNY should produce law enforcement reports that summarize witness interviews, without regard to whether those reports are verbatim, substantially verbatim, or adopted by the witness, as if they were covered by § 3500. If a NDNY AUSA wishes to depart from this practice, he or she should first discuss this with a team leader and then seek approval from the Chief or Deputy Chief of the Criminal Division (or, in their absence, the First Assistant United States Attorney).
  
  - ii. Whether to disclose agents' rough notes or AUSA rough notes of witness interviews that are not verbatim, substantially verbatim, or adopted by the witness *as § 3500 statements of those witnesses* is left to the sound discretion of individual

AUSAs.<sup>5</sup> Keep in mind, however, as discussed above, those notes, or the information contained in them, may have to be produced for other reasons, for example, as the § 3500 statements of the agent, or as *Brady* or *Giglio* information, depending on the surrounding circumstances.

- (1) In order to ensure that NDNY AUSAs are fully complying with their disclosure obligations, they should review and analyze AUSA and agent rough notes of witness interviews to determine whether some or all of them have to be produced. Even in cases in which a NDNY AUSA is inclined to disclose all such AUSA and agent rough notes, the AUSA should first review them to determine whether any information should be redacted before disclosure is made.
  - (2) In cases in which NDNY AUSA's decide to not disclose some or all of the agents' or AUSA rough notes of witness interviews, they should keep in mind that later witness testimony may obligate them to produce some notes if the testimony is inconsistent with statements documented only in the notes.
- iii. Whether to disclose accounts of the statements of persons other than the government's trial witnesses – in the form of notes, reports, recordings, or grand jury transcripts – is left to the sound discretion of individual AUSAs. Keep in mind, however, as discussed above, those notes (or the information reflected in them) may have to be produced for other reasons, for example, as *Brady* or *Giglio* information, depending on the surrounding circumstances.

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<sup>5</sup> Selective use of quotation marks around isolated passages in notes of a witness interview do not render the notes a "substantially verbatim" account of the interview. See *United States v. Jordan*, 316 F.3d 1215, 1255 (11th Cir. 2003) ("As used in the Jencks Act, 'substantially verbatim' means using the nearly exact wording or phrasing the witness uttered during the interview; if only some of the exact wording is used, it is not Jencks material."); *United States v. Gross*, 961 F.2d 1097, 1105 (3d Cir. 1992) ("Although . . . the notes occasionally reflect precise phrases used by the witness, the presence of such brief quotations is inadequate to qualify the notes as Jencks material."); *United States v. Cole*, 634 F.2d 866, 867 (5th Cir. 1981) ("although the notes may have contained phrases or isolated sentences identical to the language used by the witness, they were not a 'substantially verbatim report' of the interview"); *United States v. Cruz*, 478 F.2d 408, 413 (5th Cir. 1973) ("The fact that investigators' notes contained occasional verbatim recitation of phrases used by the person interviewed did not make such notes Jencks Act material.").

- (1) When deciding whether to disclose agent rough notes, AUSA rough notes, or grand jury transcripts of persons who will not testify at trial as government witnesses when there is no legal, policy, or ethical obligation to make such disclosure, AUSAs should take into account both the precedential effect on other matters in the NDNY of such liberal disclosure, as well as its impact on grand jury secrecy. For example, if an AUSA has assured a grand jury witness that the AUSA will keep his testimony secret if legally possible, the AUSA should not disclose the grand jury transcript unless legally obligated to do so.

iv. With respect to the timing of § 3500 disclosure:

- (1) NDNY AUSAs should, as a general matter, produce witness statements on the Friday before trial. AUSAs are free to produce such statements sooner if they wish.
- (2) If a NDNY AUSA has concerns about witness safety that are based on case-specific facts, the AUSA, after consultation with a team leader and with approval from the Chief or Deputy Chief of the Criminal Division (or, in their absence, the First Assistant United States Attorney) may delay disclosure of § 3500 witness statements. Similarly, if an AUSA has other case-specific reasons to delay disclosure, he or she may do so but only after consultation with a team leader and with advance approval from the Chief or Deputy Chief of the Criminal Division (or, in their absence, the First Assistant United States Attorney).
- (3) NDNY AUSAs can, in their sound discretion, condition early production of § 3500 statements on a criminal defendant's providing reciprocal discovery and his agreement to enter into routine stipulations about undisputed foundational facts, such as the admissibility of transactional records, (including telephone and bank records). In such cases, if the defendant does not comply with his discovery obligations or does not either enter the requested stipulations or explain why the fact(s) subject to stipulation is (are), in fact, reasonably disputed, the AUSA

may, without supervisory approval, delay disclosure of § 3500 statements until one calendar day before the witness testifies.

**Guidance regarding *Brady/Giglio* disclosure obligations:**

- u. NDNY AUSAs should keep in mind that the *Brady* and *Giglio* rules apply to *information*, not to documents. Thus, whether information is documented or not does not affect the government's obligation to disclose it.
- v. In addition, an AUSA's assessment of the truthfulness or reliability of any potential *Brady* or *Giglio* information does not affect the government's obligation to disclose it.
- w. Further, the inadmissibility of any evidence or information does not affect the government's obligation to disclose it.
- x. All material changes in a witness's version of events during the course of a single or multiple interviews, meetings, de-briefings, and trial preparation sessions, whether documented or not, should be disclosed to the defense as potential *Giglio* information.
- y. All payments, expenses, and other benefits, whether tangible or intangible, provided to or on behalf of a witness must be disclosed to the defense. This includes, for example, speaking to a state prosecutor to encourage a favorable sentence in the witness's state case, even if such a discussion did not necessarily affect the outcome of the state case. It also includes agreement to forego a federal prosecution in favor of a state prosecution if the latter is likely to result in a more lenient sentence.
- z. NDNY AUSAs should treat all evidence and information favorable to a criminal defendant's efforts to suppress physical evidence or statements as *Brady* information and make disclosure accordingly.
- aa. NDNY AUSAs should be mindful that the absence of evidence, such as the failure to locate a defendant's fingerprints on contraband after testing, can be considered to be exculpatory and should be disclosed.
- bb. NDNY AUSAs should be mindful that evidence and information that

they did not consider to be exculpatory before trial may have to be re-examined in light of a defense presented at trial.

- cc. NDNY AUSAs should be mindful that evidence favorable to a criminal defendant at sentencing must be disclosed under the *Brady* doctrine. Such information includes, for example, a criminal defendant's efforts to provide cooperation even if such efforts do not ultimately qualify for a departure motion under either U.S.S.G. §5K1.1 and/or 18 U.S.C. § 3500.
- dd. NDNY AUSAs should produce all evidence and information subject to the *Brady* disclosure obligation in advance of a defendant's guilty plea. There is no obligation to produce impeachment information before a guilty plea.
- ee. Timing of disclosure of *Brady* evidence and information: AUSAs should bear in mind that NDNY Local Rule 14.1(b)(2) provides that "All information and material that the government knows that may be favorable to the defendant on the issues of guilt or punishment, within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963)" must be produced within 14 days of arraignment "or on a date that the Court otherwise sets for good cause shown."
- ff. Timing of disclosure of *Giglio* evidence and information: AUSAs should bear in mind that NDNY Local Rule 14.1(d)(1) provides that "[t]he existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective witnesses, within the scope of *United States v. Giglio*, 405 U.S. 150 (1972)" must be produced "[n]o less than fourteen (14) days prior to the start of jury selection, or on a date the Court sets otherwise for good cause shown."

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#### **4. The duty to document the evidence and information that has been disclosed and that which has been withheld.**

NDNY AUSAs should document in written form all evidence and information produced to the defense. The preferred means of doing so is in a letter to defense counsel describing the documents produced, either by reference to the individual documents disclosed, by Bates-stamp number, or by other means. Whatever method an AUSA uses must be sufficient so that the AUSA can later readily recreate

exactly what has been produced to the defense. If documents have been redacted, NDNY AUSAs should keep copies of both the unredacted and the redacted versions in their files in order to be able to readily recreate what was produced. If evidence and/or information is withheld, NDNY AUSAs should be able to later identify those documents.

NDNY AUSAs may want to consider use of the standard NDNY discovery letter, which is located on the S drive. Some AUSAs file copies of all discovery letters with the Court to have a public records of the discovery made. Although permitted, this practice is not required.