

Discovery Plan
Office of the United States Attorney
Northern District of Ohio

October 15, 2010

This office has a proud tradition of robust and ethical conduct in its litigation efforts, including discovery in criminal cases. However, there has not heretofore been a single document providing guidance and memorializing best practices for a district discovery plan. The following discovery plan is designed to guide Assistant United States Attorneys (AUSAs) on the best practices for conducting discovery to insure compliance with the Constitution of the United States, applicable laws, and Department of Justice policy.¹ No guidance can anticipate every issue that may arise. By providing a single plan for discovery, though, this office seeks to reduce intraoffice disparities in discovery practices that result not from different case-related concerns (which are legitimate) but instead from differing customs and habits of individual AUSAs. In addition, when faced with difficult discovery issues, AUSAs should understand that they are not alone. AUSAs are encouraged to consult their unit chiefs, office management, and the Brady/Giglio officer for advice.

This discovery plan is not intended to and does not create any substantive rights on behalf of any person appearing in the courts of the United States.²

I. General Principles

In general, AUSAs should strive to provide broad discovery to defense counsel in criminal cases consistent with the interests of the United States. As early as possible, even before charges are sought, AUSAs should discuss any discovery with the case agent on the investigation. That discussion should include: 1) gathering information that is likely to be discoverable; 2) possible *Brady* or *Giglio* issues that could affect investigative or litigation strategy; 3) electronic discovery; 4) the possible review of informant files where applicable; 5) a plan for the review of potential discoverable materials; and 6) any other potential discovery

¹Pursuant to the memorandum of Acting Deputy Attorney General Gary Grindler of March 26, 2010, this is the draft of this District's discovery plan being submitted for review. This document is, therefore, deliberative and predecisional in nature.

²This draft discovery plan is not intended to supplant or alter legal precedent, court orders, and local rules. It provides prospective guidance only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits. See *United States v. Caceres*, 440 U.S. 741 (1979). If defense counsel cites this guidance, or the January 4, 2010 Department of Justice guidance memorandum in support of an argument for additional discovery, AUSAs should advise their unit supervisor and the Brady/Giglio Officer before responding.

issues. To the extent possible, these matters should be addressed and a plan adopted before an Indictment is sought.

The discovery obligations of AUSAs are generally established by Federal Rules of Criminal Procedure 16 and 26.2, 18 U.S.C. §3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) and their progeny. In addition, the United States Attorney's Manual describes the Department's policy for disclosure of exculpatory and impeachment information. See USAM §9-5.001. Other sources of information include The Professional Responsibility Advisory Office July 2008 monograph entitled "A Prosecutor's Duty to Disclose;" the Department's guidance memorandum dated January 4, 2010; and other training materials including the Department's Discovery "Blue Book" to be issued in the near future.

The USAM § 9-5.001(B) provides:

Government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). The law requires the disclosure of exculpatory and impeachment evidence when such evidence is material to guilt or punishment. *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 154. Because they are Constitutional obligations, *Brady* and *Giglio* evidence must be disclosed regardless of whether the defendant makes a request for exculpatory or impeachment evidence. *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995). Neither the Constitution nor this policy, however, creates a general discovery right for trial preparation or plea negotiations. *United States v. Ruiz*, 536 U.S. 622, 629 (2002); *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

In *United States v. Bagley*, 475 U.S. 667, 676 (1985), the Court held that evidence is material if there is a reasonable probability that had the evidence been disclosed, the result would have been different. A reasonable probability does not mean that it was more likely the defendant would have been acquitted. A "reasonable probability" means a probability sufficient to undermine confidence in the outcome.

USAM § 9-5.001(B)1 states in part:

Recognizing that it is sometimes difficult to assess the materiality of evidence before trial, AUSAs generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence (emphasis added). *Kyles*, 514 U.S. at 439. While ordinarily evidence that would not be admissible at trial need not be disclosed, this policy encourages AUSAs to err on the side of disclosure if admissibility is a close question.

Thus, Departmental policy strongly encourages AUSAs to disclose all potential *Brady* and *Giglio* material, whether or not it is material.

The following is a non-exclusive list of examples of *Brady* material:

- Evidence tending to show that someone else committed the criminal act.
- Evidence tending to show that the defendant did not have the requisite knowledge or intent.
- Evidence tending to show the absence of any element of the offense, or which is inconsistent with any element of the offense (e.g., evidence showing that an alleged interstate wire transfer was actually an intrastate wire transfer).³
- Evidence that casts a substantive doubt upon the accuracy of evidence including but not limited to witness testimony the AUSA intends to rely on to prove an element of any crime charged, or which may have a significant bearing on the admissibility of the prosecution's evidence. USAM 9-5.001©.
- Evidence tending to show the existence of an affirmative defense, such as entrapment or duress.
- Evidence tending to show the existence of past or present circumstances that might reduce the defendant's guideline range under the federal Sentencing Guidelines, support a request for a sentence at the low end of the guideline range or for a downward departure or variance, or make inapplicable to the defendant a mandatory minimum sentence.

II. Assistant U.S. Attorneys' Obligations

In order to meet discovery obligations in a given case, AUSAs should be familiar with the authorities mentioned above and with the judicial interpretations that discuss or address the application of these authorities to particular facts. Rules of Professional Conduct in most jurisdictions also impose ethical obligations on AUSAs regarding discovery in criminal cases. In addition, it is important for AUSAs to consider thoroughly how to meet their discovery obligations in each case. Toward that end, the United States Attorney's Office for the Northern District of Ohio (USAO) has drafted this guidance for AUSAs regarding criminal discovery. This discovery plan is intended to establish a methodical approach to the consideration of discovery obligations that AUSAs should follow to avoid lapses that can result in consequences adverse to the Department's pursuit of justice and the AUSA's professional standing as well as encouraging a uniform approach to discovery issues.

By following the steps described below and being familiar with laws and policies regarding discovery obligations, AUSAs are more likely to meet all legal requirements, to make consistent and considered decisions about disclosures in a particular case, and to achieve a just result in every case. AUSAs are primarily responsible for providing discovery in their cases. However, the USAO and the Department of Justice make available a wide array of resources to assist AUSAs in this process. Unit Chiefs, the Criminal Division Chief, office management, and

³The AUSA must disclose this information even if he or she does not believe such information will make the difference between conviction and acquittal for a charged crime. USAM § 9-5.0001(C).

the USAO's Brady/Giglio Officer are all available to help and to provide assistance to AUSAs if discovery disputes arise between AUSAs, agents or defense counsel. In addition, the Department's Professional Responsibility Advisory Office (PRAO) is also available to provide guidance to AUSAs on certain discovery and other matters. AUSAs are encouraged to make use of all available resources when difficult discovery issues arise.

III. Guidance for Assistant U.S. Attorneys Regarding Criminal Discovery

Step 1: Gathering and Retrieving Potentially Discoverable Information⁴

A. Where to Look-The Prosecution Team

Department policy states:

It is the obligation of AUSAs, in preparing for trial to seek all exculpatory and impeachment information from all members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant.

USAM § 9-5.001. This duty to search also extends to information AUSAs are required to disclose under Federal Rules of Criminal Procedure 16 and 26.2 and the Jencks Act.

In most cases, "the prosecution team" will include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant. In multi-district investigations, investigations that include both AUSAs and prosecutors from a Department litigating component or other USAOs, and parallel criminal and civil proceedings, this definition will necessarily be adjusted to fit the circumstances. In addition, in complex cases that involve parallel proceedings with regulatory agencies (SEC, FDIC, EPA, etc.), or other non-criminal investigative or intelligence agencies, the AUSA should consider whether the relationship with the other agency is close enough to make it part of the prosecution team for discovery purposes. AUSAs must use diligent and good faith efforts to obtain potentially discoverable materials.

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

- Whether or not the AUSA and the agency conducted a joint investigation or shared resources related to investigating the case;

⁴ For the purposes of this memorandum, "discovery" or "discoverable information" includes information required to be disclosed by Fed.R.Crim.P. 16 and 26.2, the Jencks Act, *Brady*, *Giglio*, and additional information disclosable pursuant to USAM § 9-5.001.

- Whether or not 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 or not the AUSA knows of and has access to discoverable information held by the agency;
- Whether or not the AUSA has obtained other information and/or evidence from the agency;
- The degree to which information gathered by the AUSA has been shared with the agency;
- Whether or not a member of an agency has been made a Special Assistant United States Attorney and is assigned as a member of the prosecution team;
- 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. While such groups can be of invaluable assistance to law enforcement, task forces and multi-jurisdictional investigations also can create significant challenges in the discovery context. In these situations, it is important for the AUSA to determine which of the member agencies are part of the prosecution team. In such cases, AUSAs should consider (1) whether state or local agents are working on behalf of the prosecutor or are under the AUSA's control; (2) the extent to which state and federal governments are part of a team, are participating in joint investigation, or are sharing resources; and (3) whether the AUSA has ready access to the evidence. Courts will generally evaluate the role of a state or local law enforcement agency on a case-by-case basis.⁵

⁵*Compare United States v. Morris*, 80 F.3d 1151, 1169-70 (7th Cir. 1996) (“Because [the OTS, SEC, and IRS] were [not] part of the team that investigated this case or participated in its prosecution,” materials in their possession were not subject to *Brady*. “*Kyles*. . . can[not] be read as imposing a duty on the prosecutor’s office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue.”), *with United States v. Wood*, 57 F.3d 733, 737 (9th Cir. 1995) (Defendant convicted of obstructing lawful function of FDA; “[f]or *Brady* purposes, the FDA and the prosecutor were one. We need not decide how far the unity of the government extends

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

B. What to Review

To ensure that all discovery is disclosed on a timely basis, generally all potentially discoverable material within the custody or control of the prosecution team should be reviewed. The review process should cover the materials gathered, including the following areas:

1. The Investigative Agency's Files: With respect to Department law enforcement agencies, with limited exceptions,⁶ the AUSA should be granted access to the substantive case files and any other file or document the prosecutor has reason to believe may contain discoverable information related to the matter being prosecuted.⁷ Therefore, the prosecutor can personally review the file or documents or may choose to request production of potentially discoverable materials from the case agents. With respect to outside agencies, the prosecutor should request access to files and/or production of all potentially discoverable material. If reasonable access is not granted, an AUSA should notify his or her supervisor. The investigative agency's entire investigative file should be reviewed for discoverable information. If such information is contained in a document that the agency deems to be an "internal" document, it may not be necessary to produce the internal document, but it will be necessary to produce all of the discoverable information contained in it. AUSAs should also discuss with the investigative agency whether files from other investigations or non-investigative files, such as confidential source files, might contain discoverable information. Those additional files or relevant portions

under the *Brady* rule. We hold only that under *Brady* the agency charged with administration of the statute, which has consulted with the prosecutor in the steps leading to prosecution, is to be considered as part of the prosecution in determining what information must be made available to the defendant charged with violation of the statute.”). *See also, Kyles v. Whitley*, 514 U.S. 419,437 (1995) (prosecution team includes “others acting on the government’s behalf on this case.”); *Maldowan v. City of Warren*, 578 F.3rd 351, 379 (6th Cir. 2009)(prosecution team includes all law enforcement personnel directly involved in the investigation or prosecution of a case.); *United States v. Lochmondy*, 890 F.2d 817, 823-24 (6th Cir. 1989)(where prosecutor did not have witness’s tax return on file with the IRS, *Brady* did not apply because IRS not involved in investigation.); *United States v. Graham*, 484 F.3d 413,417 (6th Cir.2007)(rejecting defense claim that (late-arriving) information possessed by cooperating witness was imputed to government, holding that the government did not have sufficient control over CW so as “to transform him into an agent of the prosecution.”).

⁶Exceptions to an AUSA’s access to Department law enforcement agencies’ files are documented in agency policy, and may include, for example, access to a non-testifying source’s files.

⁷ Nothing in this guidance alters the Department's Policy Regarding the Disclosure to AUSAs of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses contained in USAM § 9-5.100.

thereof should also be reviewed as necessary.

2. Confidential Informant (CI)/Witness (CW)/Human Source (CHS)/Source (CS) Files: AUSAs should seek access to the agency file for each testifying CI, CW, CHS, or CS. AUSAs should make a diligent and good faith effort to obtain and review those files for discoverable information and make copies of relevant portions for discovery purposes. The entire informant/source file, not just the portion relating to the current case, including all proffer, immunity and other agreements, validation assessments, payment information, and other potential witness impeachment information, should be included within this review. The timing of the AUSA's request for review of the informant's file is important. Although an early request for a source file review is the safest course of conduct given the fact that the informant file may be in another district, and/or that review may be time consuming, AUSAs should consider whether a plea is likely or whether it is likely the source will testify. If it is unlikely the source will testify, an AUSA can delay the review but, in any event, the review must be done sufficiently in advance of trial such that any required disclosures can be used effectively by the defense. In some cases, where the testimony is critical or an investigative strategy might be affected, AUSAs should consider a pre-indictment review of source files.

If an AUSA believes that the circumstances of the case warrant review of a non-testifying source's file, the AUSA should follow the agency's procedures for requesting the review of such a file. If such efforts are presenting difficulties, an AUSA should consult with his or her supervisor.

AUSAs should take steps to protect the non-discoverable, sensitive information found within a CI, CW, CHS, or CS file. Further, AUSAs should consider whether discovery obligations arising from the review of CI, CW, CHS, and CS files may be fully discharged while better protecting government or witness interests, such as security or privacy, via a summary letter to defense counsel rather than producing the record in its entirety. AUSAs must be mindful of security issues that may arise with respect to disclosures from confidential source files. Prior to disclosure, AUSAs should consult with the investigative agency to evaluate any such risks and to develop a strategy for addressing those risks or minimizing them as much as possible, consistent with their discovery obligations.

3. Evidence and Information Gathered During the Investigation: Generally, all evidence and information gathered during the investigation should be reviewed, including anything obtained during searches or via subpoenas, etc. As discussed more fully below in Step 2, in cases involving a large volume of potentially discoverable information, AUSAs may elect to fulfill their disclosure obligations by choosing to make the voluminous information available to the defense.

4. Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agencies in Parallel Civil Investigations: If an AUSA has determined that a regulatory agency such as the SEC is a member of the prosecution team for purposes of defining discovery obligations, that agency's files should be reviewed. Of course, if a regulatory agency is not part of the

prosecution team but is conducting an administrative investigation or proceeding involving the same subject matter as a criminal investigation, AUSAs may want to ensure that those files are reviewed not only to locate discoverable information but to locate inculpatory information that may advance the criminal case. Where there is an ongoing parallel civil proceeding in which Civil Department or USAO attorneys are participating, the civil case files should also be reviewed.⁸

5. Substantive Case-Related Communications: “Substantive” case-related communications may contain discoverable information. Those communications, including any communications with an AUSA that contain discoverable information should be maintained in the case file or otherwise preserved in a manner that associates them with the case or investigation. “Substantive” case-related communications are most likely to occur (1) between AUSAs and agents, (2) between AUSAs and/or agents and witnesses and/or victims, and (3) between victim-witness coordinators and witnesses and/or victims. Such communications may be memorialized in emails, memoranda, or notes. “Substantive” communications include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility. Communications involving case impressions or investigative or prosecutive strategies without more would not ordinarily be considered discoverable, but substantive case-related communications should be reviewed carefully to determine whether all or part of a communication (or the information contained therein) should be disclosed. All such communications should be reviewed for privilege as well as to determine if they contain substantive discovery material.

AUSAs should also remember that with few exceptions (*see, e.g.*, Fed.R.Crim.P. 16(a)(1)(B)(ii)), the format of the information does not determine whether it is discoverable. For example, material exculpatory information that the prosecutor receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email. When the discoverable information contained in an email or other communication is fully memorialized elsewhere, such as in a report of interview or other document(s), then the disclosure of the report of interview or other document(s) will ordinarily satisfy the disclosure obligation.

6. Potential Giglio Information Relating to Law Enforcement Witnesses: As early in an investigation as possible, AUSAs should have candid conversations with the agents with whom they work regarding any potential *Giglio* issues, and they should follow the procedure established in USAM § 9-5.100 whenever necessary before calling the law enforcement employee as a witness or utilizing the law enforcement as an affiant. The following procedures for obtaining and disclosing impeachment about law enforcement witnesses relies heavily on USAM § 9-5.100.

⁸Note that where a *qui tam* case is still under seal, any materials that indicate the existence of a *qui tam* cannot be released to defense counsel until the civil attorneys obtain a court order partially unsealing the case for that purpose. The parties receiving unsealed materials should be cautioned not to disclose the existence of the *qui tam* beyond the scope of the unsealing order.

Obligation to Disclose Potential Impeachment Information. Under current Department policy, it is expected that an AUSA generally will be able to obtain all potential impeachment information directly from potential agency witnesses and/or affiants. Toward that end, AUSAs should ask any potential law enforcement witness or affiant whether he or she has any impeachment information that should be disclosed. Although the USAM instructs that it is the agent's responsibility to voluntarily advise the AUSA of any potential impeachment information, AUSAs should address the matter early and prior to the agent providing a sworn statement or testimony in any criminal investigation or case. Thus, AUSAs should ask agent(s) the following questions at the earliest possible stage:

- 1) *Have the agent's past or present employers made any findings of misconduct or lack of candor arising from complaints or disciplinary proceedings?*
- 2) *Is the agent aware of any pending complaints or disciplinary proceedings concerning the agent's performance of official duties?*
- 3) *Has the agent been the subject of any allegations or findings of untruthfulness, bias, or lack of candor, whether by a court, prosecutor or other public official?*
- 4) *Has the agent been convicted of any crime?*
- 5) *Are there any criminal charges pending against the agent?*

A positive response to any of the above questions should trigger a consultation between the AUSA and his or her unit supervisor and/or the Brady/Giglio officer. USAM § 9-5.100 sets out the Department's Giglio Policy and is set forth below, modified to fit the structure of the USAO:

Agency Officials. Each of the investigative agencies has designated an appropriate official to serve as the point of contact concerning Department of Justice employees' potential impeachment information ("the Agency Official").

Requesting Official. The USAO's Brady/Giglio Officer is the Requesting Official for the Northern District of Ohio.

Request to Agency Officials. When an AUSA determines that it is necessary to request potential impeachment information from an Agency Official relating to an agency employee identified as a potential witness or affiant ("the employee") in a specific criminal case or investigation, the AUSA should notify the Brady/Giglio Officer. Upon receiving such notification, the Brady/Giglio Officer may request potential impeachment information relating to the employee from the employing Agency Official and the designated Agency Official in the Department of Justice Office of the Inspector General (OIG) and the Department of Justice Office of Professional Responsibility (DOJ-OPR).

Agency Review and Disclosure. Upon receiving the request described above, the Agency Official from the employing agency, the OIG and DOJ-OPR shall each conduct a review, in accordance with its respective agency plan, for potential impeachment information regarding the identified employee. The employing Agency Official, the OIG and DOJ-OPR shall advise the Brady/Giglio Officer of (a) any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during an administrative inquiry; (b) any past or pending criminal charge brought against the employee; and (c) any credible allegation of misconduct that reflects upon the truthfulness or possible bias of the employee that is the subject of a pending investigation.

Treatment of Allegations Which Are Unsubstantiated, Not Credible, or Have Resulted in Exoneration. Allegations that cannot be substantiated, are not credible, or have resulted in the exoneration of an employee generally are not considered to be potential impeachment information. Upon request, such information which reflects upon the truthfulness or bias of the employee, to the extent maintained by the agency, will be provided to the USAO under the following circumstances: (a) when the Requesting Official advises the Agency Official that it is required by a Court decision; (b) when: (I) the allegation was made by a federal prosecutor, magistrate judge, or judge; or (ii) the allegation received publicity; (c) when the Requesting Official and the Agency Official agree that such disclosure is appropriate, based upon exceptional circumstances involving the nature of the case or the role of the agency witness; or (d) when disclosure is otherwise deemed appropriate by the agency. The agency is responsible for advising the USAO, to the extent determined, whether any aforementioned allegation is unsubstantiated, not credible, or resulted in the employee's exoneration.

Obligation of Civil and Criminal AUSAs. AUSAs, whether civil or criminal, who become aware of impeaching information about any law enforcement witness or potential law enforcement witness must notify the USAO's Brady/Giglio Officer.

8. Potential Giglio Information Relating to Non-Law Enforcement Witnesses and Fed.R.Evid. 608 Declarants: All potential *Giglio* information known by or in the possession of the prosecution team relating to non-law enforcement witnesses should be reviewed. That information includes but is not limited to:

- Bias. A witness can be impeached with evidence (including extrinsic evidence) that he or she has a bias against the defendant or in favor of the government. See generally, *United States v. Abel*, 469 U.S. 45 (1984).
- Prior inconsistent statements (possibly including inconsistent attorney proffers, See *United States v. Triumph Capital Group*, 544 F.3d 149 (2d Cir. 2008).)
- Statements or reports reflecting witness statement variations.
- Benefits provided to witnesses including:
 - Proffer letters
 - Benefits to relatives, friends or business partners of the witness

- Dropped or reduced charges
- Immunity
- Expectations of downward departures or motions for reduction of sentence
- Assistance in a state or local criminal proceeding
- Considerations regarding forfeiture of assets
- Stays of deportation or other immigration status considerations
- S-Visas
- Monetary benefits
- Non-prosecution agreements
- Letters to other law enforcement officials (*e.g.* state prosecutors, parole boards) setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf
- Relocation assistance
- Consideration or benefits to culpable or at risk third-parties
- Other known conditions that could affect the witness's bias such as:
 - Relationship with prosecutor or agent
 - Favorable treatment of the witness's relative or friend with criminal exposure
 - Financial relationship with another witness or victim
 - Animosity toward defendant
 - Animosity toward a group of which the defendant is a member or with which the defendant is affiliated
 - Relationship with victim
 - Known but uncharged criminal conduct (that may provide an incentive to curry favor with a prosecutor)
- Prior acts and specific instances of misconduct involving dishonesty under Fed.R.Evid. 608
- Prior convictions under Fed.R.Evid. 609
- Known substance abuse or mental health issues or other issues that could affect the witness's ability to perceive and recall events
- Contradiction. A witness can be impeached with evidence of facts that contradict the witness's testimony.
- Untruthful character. A witness can be impeached by the testimony of a second witness that he or she has a reputation in the community for being untruthful. Similarly, a witness can be impeached by the testimony of a second witness that, in the opinion of the second witness, based on the second witness's dealings with and observations of the witness, the witness is generally untruthful. See generally, Fed. R. Evid. 608(a).
- Incapacity
- Double dealing by witness

9. Information Obtained in Witness Interviews:⁹ Generally speaking, witness interviews should be memorialized by the agent.¹⁰ Agents and AUSAs' notes and any original recordings should be preserved, and AUSAs should confirm with agents that substantive interviews should be memorialized. When a prosecutor participates in an interview with an investigative agent, the prosecutor and agent should discuss note-taking responsibilities and memorialization before the interview begins (unless the prosecutor and the agent have established an understanding through a prior course of dealing). Whenever possible, AUSAs should not conduct an interview without an agent present to avoid the risk of making themselves a witness to a statement. If exigent circumstances make it impossible to secure the presence of an agent during an interview, AUSAs should try to have another office employee present. Interview memoranda of witnesses expected to testify, and of individuals who provided relevant information but are not expected to testify, should be reviewed.

It is the presumption that AUSAs will produce relevant investigative reports memorializing interviews of testifying witnesses in discovery. These reports include, as an example, FBI 302s and DEA 6s. An AUSA who intends not to produce an investigative report memorializing the interview of a testifying witness should seek approval from his or her Unit Chief.

a. Witness Statement Variations: Some witnesses' statements will vary during the course of an interview or investigation. For example, they may initially deny involvement in criminal activity, and the information they provide may broaden or change considerably over the course of time, especially if there are a series of debriefings that occur over several days or weeks. Material variances in a witness's statements should be memorialized, even if they are within the same interview. AUSAs should instruct their case agents accordingly, particularly because AUSAs may not be present during most witness interviews.

b. Trial Preparation Meetings with Witnesses: Sessions involving the preparation of witnesses for upcoming testimony generally need not be memorialized. However, AUSAs should be particularly attuned to new or inconsistent information disclosed by the witness during a pre-testimony witness preparation session. New information that is exculpatory or that constitutes impeachment information should be disclosed consistent with the provisions of USAM § 9-5.001 even if the information is first disclosed in a witness preparation session. Similarly, if the new information represents a variance from the witness's prior statements, AUSAs should consider whether memorialization and disclosure is necessary consistent with the provisions of subparagraph (a) above.

c. Agent Notes: Agents' notes should be reviewed if there is a reason to believe that the

⁹ Reports of interviews conducted in preparation for a witness' upcoming testimony are discussed separately below.

¹⁰In those instances in which an interview was audio or video recorded, further memorialization generally will not be necessary.

notes are materially different from the memorandum, if a written memorandum was not prepared (excluding preparation for upcoming testimony as described above), or if the witness disputes the agent's account of the interview. AUSAs should pay particular attention to agent notes generated during an interview of the defendant or an individual whose statement may be attributed to a corporate defendant. In the Sixth Circuit, AUSAs must turn over the agent's notes of an interview of the defendant(s) as well as the memorandum created from the interview. Failure to turn over the memorandum and the agent's notes of an interview of a defendant can be a violation of Rule 16 (a)(1)(B)(ii). See, e.g., *United States v. Clark*, 385 F.3d 609, 619-20 (6th Cir. 2004) and *United States v. Vallee*, 380 F.Supp.2d 11, 12-14 (D. Mass. 2005). However, AUSAs are not required to turn over agents' notes of interviews of cooperating co-defendants who may testify for the government at trial.

Step 2: Conducting the Review

Having gathered the information described above, AUSAs should arrange for the material to be reviewed to identify discoverable information. It would be preferable if AUSAs could review all of the information themselves in every case, but such review is not always feasible or necessary. The AUSA is ultimately responsible for compliance with discovery obligations. Accordingly, the AUSA should develop a process for review of pertinent information so that discoverable information is identified. Because the responsibility for compliance with discovery obligations rests with the AUSA, the AUSA's decision about how to conduct this review is controlling. This process may involve agents, paralegals, agency counsel, and/or computerized searches. Although AUSAs may delegate the responsibility for conducting the review and set forth criteria for identifying potentially discoverable information, AUSAs should not delegate the disclosure determination itself. AUSAs should ask every member of the prosecution team to search his or her agency's records for the types of information summarized above for every witness who is expected to testify.

In cases involving voluminous evidence obtained from third parties, AUSAs should seriously consider providing defense access to the voluminous documents (even if they are not all discoverable) to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence.

AUSAs should keep a record of all data that has been reviewed for *Brady* and *Giglio* compliance. In complex cases, in cases where substantial time elapses between indictment and trial, and in cases where AUSAs learn of new defense theories, reviews may be repeated and/or expanded so that nothing is missed. If an AUSA inherits a case from another AUSA, he or she is also responsible for compliance with discovery obligations.

Seeking a Court Order. With respect to potential *Brady* or *Giglio* information that is in a gray area and no valid reason for non-disclosure exists, the AUSA should err on the side of disclosure. Where there is potential *Brady* or *Giglio* information that is in a gray area and there is a valid reason to consider nondisclosure (such as concerns about the security of a witness, or the potential for public embarrassment of an uncharged party), the AUSA should consult with his or

her unit chief and/or the Brady/Giglio Officer as well as the investigative agency and consider requesting that the district judge decide the issue by submitting the matter *in camera*. In that situation, the AUSA should notify opposing counsel that such a procedure is being undertaken (without disclosing the contents of the material being presented to the court) and should follow the local rules regarding the filing of pleadings under seal. See *United States v. Minsky*, 963 F.2d 870, 874 (6th Cir. 1992)(“[A]n *in camera* review by the court was not only proper, but probably required.”); see also *United States v. Stotts*, 176 F.3d 880, 887 (6th Cir. 1999).

Step 3: Making the Disclosures

A. Considerations Regarding the Scope and Timing of the Disclosures: Providing broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases. It also provides a margin of error in case the prosecutor's good faith determination of the scope of appropriate discovery is in error. AUSAs are encouraged to provide broad and early discovery consistent with any countervailing considerations. But, when considering providing discovery beyond that required by the discovery obligations or providing discovery sooner than required, AUSAs should always consider any appropriate countervailing concerns in the particular case, including, but not limited to:

- 1) protecting victims and witnesses from harassment or intimidation;
- 2) protecting the privacy interests of witnesses;
- 3) protecting privileged information;
- 4) protecting the integrity of ongoing investigations;
- 5) protecting the trial from efforts at obstruction;
- 6) protecting national security interests;
- 7) legitimate investigative agency concerns;
- 8) enhancing the likelihood of receiving reciprocal discovery by defendants to which the government is entitled under law.

AUSAs should not describe the discovery being provided as “open file.” Even if the AUSA intends to provide expansive discovery, it is always possible that something will be inadvertently omitted from production and the prosecutor will then have unintentionally misrepresented the scope of materials provided. Furthermore, because the concept of the “file” is imprecise, such a representation exposes the prosecutor to misunderstandings or broader disclosure requirements than intended or to sanction for failure to disclose otherwise non-discoverable documents, *e.g.* agent notes or internal memos, that the court may deem to have been part of the “file” but the AUSA did not.

When the disclosure obligations are not clear or when the considerations above conflict with discovery obligations, AUSAs should consult with their unit chiefs, the Brady/ Giglio Officer and/or PRAO and may seek a protective order from the court addressing the scope, timing, and form of disclosures.

B. Discovery Conference. As soon as possible after an indictment is returned, AUSAs

should initiate an informal discovery conference with defense counsel. During this conference, AUSAs should discuss and try to work out a reasonable discovery schedule for both the government and the defense. The AUSA also should discuss with defense counsel the form of discovery, identify any unusual discovery issues, and make reasonable efforts to resolve any discovery disputes without the need for litigation. AUSAs should consider memorializing the results of any agreements reached during this conference or, if appropriate, making them part of the record in the case.

C. Timing: Exculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant reasonably promptly after discovery. Impeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. *See* USAM § 9-5.001. Section 9-5.001 also notes however, that witness security, national security, or other issues may require that disclosures of impeachment information be made at a time and in a manner consistent with the policy embodied in the Jencks Act. *See* Paragraph A (above). AUSAs should be attentive to Sixth Circuit law and district rules and practices governing disclosure obligations at various stages of litigation, such as pre-trial hearings, guilty pleas, and sentencing.

AUSAs should consider making Rule 16 materials available as soon as is reasonably practical, but must make disclosure no later than a reasonable time before trial. In deciding when and in what format to provide discovery, AUSAs should consider security concerns and the other factors set forth in subparagraph (A) above. AUSAs also should consider seeking written assurances from the defense or court orders assuring that discovery materials will not be disseminated or otherwise used improperly. AUSAs should disclose Fed.R.Crim.P. 16(a)(1)(E) materials in a manner that triggers the reciprocal discovery obligations in Fed.R.Crim.P. 16(b)(1) and should advocate vigorously for such material to be disclosed to the government.

With respect to Jencks Act disclosures governed by Title 18, United States Code, Section 3500, AUSAs should strongly consider providing such material sufficiently in advance of a witness's testimony to allow the defense to make appropriate use of the material ahead of time. Where appropriate, providing Jencks Act material in advance of trial often permits the trial to proceed in a more efficient manner. However, AUSAs must also consider any legitimate law enforcement concerns resulting from the early disclosure of Jencks Act material.

Discovery obligations are continuing, and AUSAs should be aware of developments occurring up to and through trial and sentencing of the case that may influence their discovery obligations and require disclosure of information that was previously not disclosed.

D. Form of Disclosure: There may be instances when it is not advisable to turn over discoverable information in its original form, such as when the disclosure would create security concerns or when such information is contained in attorney notes, internal agency documents, confidential source documents, Suspicious Activity Reports, etc. If discoverable information is not provided in its original form and is instead provided in a letter to defense counsel, AUSAs

should take great care to ensure that the full scope of pertinent information is provided to the defendant.

Step 4: Making a Record

One of the most important steps in the discovery process is keeping good records regarding disclosures. AUSAs should make a record of any agreements reached, discovery disputes and, most importantly, when and how information is actually disclosed or otherwise made available.¹¹ While discovery matters are often the subject of litigation in criminal cases, keeping a record of the disclosures confines the litigation to substantive matters and avoids time-consuming disputes about what was disclosed. These records can also be critical when responding to petitions for post-conviction relief, which are often filed long after the trial of the case. Keeping accurate records of the evidence disclosed is no less important than the other steps discussed above, and poor records can negate all of the work that went into taking the first three steps.

IV. Guidance for National Security Cases

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

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

- Those targeting corrupt or fraudulent practices by middle or upper officials

¹¹ As noted above, AUSAs should also make a record of the materials they have reviewed for *Brady* and *Giglio* material.

of a foreign government;

- Those involving alleged violations of the Arms Export Control Act or the International Emergency Economic Powers Act;
- Those involving trading with the enemy, international terrorism, or significant international narcotics trafficking, especially if they involve foreign government or military personnel;
- Other significant cases involving international suspects and targets; and
- Cases in which one or more targets are, or have previously been, associated with an intelligence agency.

For these cases, or for any other case in which the prosecutors, case agents, or supervisors making actual decisions on an investigation or case have a specific reason to believe that an element of the IC possesses discoverable material, the prosecutor should consult with NSD regarding whether to make a request through NSD 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.

Conclusion

Compliance with discovery obligations is important for a number of reasons. First and foremost, such compliance will facilitate a fair and just result in every case, which is the USAO's singular goal in pursuing a criminal prosecution. This guidance does not and could not answer every discovery question because those obligations are often fact specific. However, AUSAs have at their disposal an array of resources intended to assist them in evaluating their discovery obligations including supervisors, the Brady/Giglio Officer, the Professional Responsibility Advisory Office, and online resources available on the Department's intranet website. AUSAs should also liberally consult with their supervisors and other experienced career AUSAs throughout the USAO.