POLICY AND GUIDELINES-SOUTHERN DISTRICT OF TEXAS

Meeting Discovery and Other Obligations Under Rules 16 and 26.2, Fed.R.Crim.Pro., The *Jencks* Act, *Brady v. Maryland*, and *Giglio v. United States*

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INTRODUCTION - GENERAL PRINCIPLES

The discovery obligations of federal prosecutors are generally established by Fed.R.Crim.Pro. 16. Additional obligations arise under Fed.R.Crim.Pro. 26.2, Title 18, United

States Code, § 3500 (the *Jencks* Act), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). All such obligations are collectively referred to herein as "discovery obligations," unless otherwise noted. AUSAs should also be aware that USAM § 9-5.001 recites DOJ policy regarding disclosure of exculpatory and impeachment information and provides for broader and more comprehensive disclosure than required by *Brady* and *Giglio*. Further, AUSAs should always be mindful of the Local Rules of Court for the Southern District of Texas.

This Discovery Policy (the Policy) is intended to establish only the minimum requirements. It is not intended as an exclusive or exhaustive treatment of discovery obligations that may arise. Indeed, although different cases often present common discovery challenges, the challenges are by no means uniform from case to case. AUSAs are encouraged to provide discovery broader and more comprehensive than required by procedural rule, statute, case law, DOJ policy, or local court rule. This approach often promotes the truth-seeking mission of the government and fosters a speedy resolution of many cases. Further, expansive discovery may foster or support our USAO's reputation for candor and fair dealing. It is equally recognized, however, that more expansive discovery may lead to undesirable results, such as the unwarranted risk to a witness's safety or the integrity of investigations of other people or other crimes committed by the defendant. In any event, **the Policy provides prospective guidance only and it is not intended to have the force of law or to create or confer any rights, privileges, or benefits on any person or organization**. *See United States v. Caceres*, 440 U.S. 741 (1979).

Further, and in keeping with the guidance contained in the January 4, 2010, Memorandum of the Deputy Attorney General, **AUSAs should never describe the discovery being provided as "open file discovery."** Even if the AUSA intends to provide expansive discovery beyond that required by procedural rule, statute, case law, DOJ policy, or local court rule, it is always possible that something will be inadvertently omitted from production, and the AUSA will then have unintentionally misrepresented the scope of materials provided. Furthermore, because the concept of the "file" is imprecise, such a representation exposes the AUSA to broader disclosure requirements than intended or to sanctions for failure to disclose documents, e.g., agent notes or internal memos, that the court may deem to have been part of the "file."

The Policy that follows provides further guidance but does not and cannot answer all questions for all cases. Further, the Southern District of Texas (SDTX) is comprised of a large geographical area with multiple Divisional Offices requiring appearances in courts presided over by a very diverse group of judicial philosophies. Consequently, what may be the standard in one Division may not be the standard in another. This Policy is not disseminated under any naive wish to achieve ideal uniformity. However, and no matter where the AUSA may be prosecuting cases, the best guard against potential discovery violations is a comprehensive awareness and familiarity of the relevant rules, statutes, and case law. With the additional guidance herein provided, it is hoped that a fair and just result will be achieved in every case.

THE WRITTEN POLICY IS CONFIDENTIAL

This Policy is confidential and is for internal use only. Copies of the Policy should not be

distributed to anyone outside the USAO-SDTX. As stated in the second (2nd) paragraph of page one (1), above, the Policy provides prospective guidance only and it is not intended to have the force of law or to create or confer any rights, privileges, or benefits on any person or organization. It is conceivable defense attorneys and law enforcement agencies will learn of the existence of the Policy. It is likewise conceivable defense attorneys may represent in open court that such a policy exists and, e.g., demand compliance therewith, demand that a copy be provided to them, or make such other demand for production to which they are equally unentitled. **The Policy is for AUSA prospective guidance only**.

Of course, nothing stated herein should be interpreted as a 'quasi-gag order' on USAO discovery policy in general. In reality, we have always followed an office policy – but, not one that had been reduced to writing. The substance of the Policy is free to be disclosed, when and if necessary. However, the written product should not be disseminated outside the USAO.

WHERE TO LOOK FOR DISCOVERY - THE PROSECUTION TEAM CONCEPT

For purposes of discussion, the usage "discovery" includes materials subject to Rules 16 and 26.2, Fed.R.Crim.Pro., the *Jencks* Act, and *Brady* and *Giglio*. As stated in USAM § 9-5.001, the prosecution team includes federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the case. In most cases the "prosecution team" will include the agents and law enforcement officers within the relevant district. In multi-district investigations and parallel criminal and civil proceedings, this definition will necessarily be adjusted to fit the circumstances. Further, in complex cases involving parallel proceedings with regulatory agencies or other non-criminal investigative or intelligence agencies, the AUSA should consider whether the relationship is close enough for inclusion within the prosecution team (e.g., SEC, FDIC, EPA, etc.). Further, many cases originate from multi-agency task forces, oftentimes involving state law enforcement agencies. Factors to consider are: (1) whether state or local agents are working on behalf or under the control of the AUSA; (2) the extent to which state and federal agents are participating in a joint investigation or are sharing resources; and (3) the degree to which the AUSA has ready access to the evidence. AUSAs are encouraged to err on the side of inclusiveness when identifying members of the prosecution team for discovery purposes.

RULE 16 MATERIALS - GENERALLY

Under Rule 16, Fed.R.Crim.Pro., the obligation to provide discoverable materials is triggered by the defendant's request. However, it is customary to begin preparation of discovery immediately following the return of an indictment. Indeed, AUSAs are encouraged to provide early discovery without awaiting the filing of a defense motion for discovery. It is noted, however, that certain reciprocal discovery obligations of the defendant are triggered by the defendant's request and the government's compliance with such request. Specifically, if the defendant requests discovery under Rule 16(a)(1)(E) and (F) (relating to "Documents and Objects" and "Reports of Examinations and Tests") and the government complies, then upon the government's request the defendant must reciprocate. It is the "request" that sets the discovery process in motion. It is recognized that a

formal motion may be the most objective indicia of the request, but insistence upon a motion is not necessary. It is equally recognized that in practice the defense's reciprocal discovery obligations are seldom enforced by SDTX Courts with as much 'ferocity' as the government's. But, AUSAs should nonetheless pursue reciprocal discovery obligations according to rule. Generally, the items covered under Rule 16 are as follows:

1. Defendant's Oral Statement(s) - substance of any relevant oral statement made in response to interrogation by person known to be government agent;

2. Defendant's Written/Recorded Statement:

- relevant written or recorded statement;
- portion of any written record containing the substance of any relevant oral statement;
- grand jury testimony relating to charged offense(s);

3. Statement of Organizational Defendant:

- by person legally able to bind defendant-organization; or
- by person involved in the alleged criminal conduct and legally able to bind defendant-organization;

4. Defendant's Prior [Criminal] Record

5. Documents and Objects - defendant permitted to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings, or places...if within government's possession, custody, or control and:

- the item is material to defense preparation;
- government intends to use in its case-in-chief; or
- the item was obtained from or belongs to defendant;

6. Reports of Examination and Tests - defendant permitted to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

- the item is within government's possession, custody, or control;
- government's attorney knows – or through due diligence could know – the item exists; and
- the item is material to defense preparation - or - government intends to use item in it case-in-chief;

7. Expert Witnesses - summary of expert testimony under Fed.R.Evid. 702, 703, or 705 the government intends to use in its case-in-chief.

EXCULPATORY AND IMPEACHMENT MATERIAL - GENERALLY

1. *Brady-Giglio* Information: In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court announced:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused...violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

Nine (9) years later, in *Giglio v. United States*, 405 U.S. 150 (1972), the Supreme Court held that *Brady* material includes material that might be used to impeach key government witnesses, stating:

> "When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting [the witness's] credibility falls within th[e] general rule [of *Brady*]."

In *United States v. Bagley*, 473 U.S. 667, 676 (1985), the Supreme Court explained that *Giglio* material is merely one form of *Brady* material, thusly:

> "In *Brady*...the prosecutor failed to disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest...Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule. Such evidence is "evidence favorable to an accused," so that, if disclosed and used effectively, it may make the difference between conviction and acquittal."

However, it is sometimes helpful to think of these obligations separately, as requiring disclosure of two (2) kinds of evidence or material. "*Giglio* material" is the usage for *impeachment evidence*, and "*Brady* material" denotes every other kind of evidence potentially or actually helpful to the defendant's efforts to create a reasonable doubt (*exculpatory evidence*) or receive a lower sentence (*mitigating circumstances*). But, the AUSA's duties under *Giglio*, i.e., with respect to *law enforcement* witnesses, are somewhat different from and more complicated than the duties under *Brady* (which are more particularly described below).

2. The AUSA's Responsibility Under *Brady*: The AUSA is ultimately responsible for deciding what evidence or information falls under the *Brady* disclosure obligations. The defendant is entitled to disclosure of all *Brady* material known to the government, even if it is "known only to police investigators and not to the prosecutor." *Kyles v. Whitley*, 514 U.S. 419 (1985). Therefore, the AUSA must ask the case agent if he or any other member of the prosecution team knows of the existence of any *Brady* material. It would be wise to repeat this inquiry verbally before all suppression hearings, trials, and sentencing hearings. The AUSA should be sure the case agent and

every other member of the prosecution team understands that *Brady* material includes evidence which may not be admissible at trial. Admissibility is not the threshold determinative factor. Examples of *Brady* material may include, but are not limited to, the following:

- Evidence tending to show someone else committed the criminal act;

- Evidence tending to show 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);

- Evidence that either casts a substantive doubt upon the accuracy of evidence including but not limited to witness testimony on which the AUSA intends to rely to prove an element of any crime charged, or which may have a significant bearing on the admissibility of prosecution's evidence (See also USAM 9-5.001(C));

- Evidence tending to show the existence of an affirmative defense, such as entrapment or duress; or

- 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 make inapplicable to the defendant a mandatory minimum sentence.

The government is required only to disclose the *Brady* material that the prosecution team knows about. The prosecution team is not required to look for unknown *Brady* material. That's the defendant's job. Indeed, in many cases there will be no *Brady* material for anyone to find.

3. The AUSA's Responsibility Under *Giglio*: The government's constitutional duty to disclose evidence favorable to the defendant includes "evidence affecting [the] credibility" of key government witnesses. *Giglio v. United States*, 405 U.S. 150, 154 (1972). This duty exists with respect to key government witnesses at suppression hearings, trials, and sentencing hearings. As with *Brady* material, the AUSA is constitutionally required to disclose all *Giglio* material of which he or any other member of the prosecution team is aware. The AUSA, consequently, "has a duty to learn of any [*Giglio* material] known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, supra. Accordingly, the AUSA should ask the case agent if he or any other member of the prosecution team knows of any *Giglio* material pertaining to any government witness. Again, it would be wise to repeat this inquiry verbally before all suppression hearings, trials, and sentencing hearings. Examples of *Giglio* material may include, but are not limited to, the following:

- Bias - A witness can be impeached with evidence that he has a bias against the defendant or in favor of the government. *United States v. Abel*, 469 U.S. 45 (1984). The bases for such bias are numerous and varied.

- Specific Instances of Misconduct Involving Dishonesty - A witness can be impeached with evidence of a prior act of misconduct involving dishonesty, even if it has not resulted in a criminal charge or conviction (e.g., lying on a job application, tax return, or search warrant affidavit; lying to criminal investigators or in a court proceeding; stealing or otherwise misappropriating property; and using an alias). Fed.R.Evid.608(b).

- Criminal Conviction - A witness can be impeached with evidence (including extrinsic evidence) of a prior felony conviction. Fed.R.Evid.609(a)(1). He can also be impeached with a prior misdemeanor conviction involving false statement or any other form of dishonesty. *See generally* Fed.R.Evid. 609(a)(2).

- Prior Inconsistent Statements - A witness can be impeached with evidence (including extrinsic evidence in most situations) of prior inconsistent statements. Fed.R.Evid.613.

- Untruthful Character - A witness can be impeached by the testimony of a second witness that he 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. Fed.R.Evid.608(a).

- Incapacity - A witness can be impeached with evidence (including extrinsic evidence in most situations) of defects in his physical or mental capacities at the time of the offense or when he testifies at a hearing or trial (e.g., the myopia of an eyewitness to a bank robbery; the drunken 'fog' through which an inebriated eyewitness observed the crime; the sluggishness caused by a witness's use or abuse of controlled substances at the time of trial; and a witness's mental disease or defect).

- Contradiction - A witness can be impeached with evidence (including extrinsic evidence in most situations) of facts that contradict the witness's testimony.

4. *Giglio* Information About Prosecution Team Members: AUSAs are obligated to seek out potential impeachment information about law enforcement agents and other members of the prosecution team who are expected to testify. Oftentimes the agency may require a written formal request, or "*Giglio* Letter." The most common scenario predicating such a formal request is an admission or other exchange between the AUSA and an agency representative, whether it be the case agent or other testifying agent. The AUSA should always, at a minimum, ask the case agent whether there is any *Giglio* information of which the AUSA should be aware.

(a) Predication and Procedure For *Giglio* Letter:

(1) The AUSA should advise his or her direct supervisor, i.e., the relevant Deputy Criminal Chief, of the need for a formal *Giglio* Letter. The Dep. Crim. Chief and the AUSA should next alert, in the following order: (a) the Executive Asst. U.S. Attorney-Professional Responsibility Officer (EAUSA); or (b) if the EAUSA is unavailable, they should next advise the Chief of the Criminal Division.

(2) The EAUSA (or Crim. Chief) should send a formal written request to the appropriate agency official or point-of-contact.

(3) Upon receipt from the agency of the requested material, if any, the EAUSA and/or Crim. Chief should next consult with the AUSA for review of the information and a determination whether such information is subject to disclosure and the method by which disclosure is made, either to the Court *in camera* and/or to the defense.

(b) Nothing in this Policy is meant to suggest that a *Giglio* letter should be sent before every trial, hearing, or other event contemplating testimony from agent-witnesses. To require all AUSAs to send *Giglio* letters before every agent-testifying event would be too overcautious. This approach is always subject to re-analysis, depending on whether events occur leading AUSAs to question the credibility of the initial exchange between the AUSA and the case agent or for any other reason suggesting a need to inquire further.

5. Timing of Disclosure of *Brady-Giglio* Information: The following examples may be of assistance in determining the timing of disclosure of *Brady-Giglio* information, to-wit:

(a) Pre-Charge Disclosures:

(1) Grand Jury: Although there is no constitutional requirement that the government disclose exculpatory evidence to the grand jury, *see United States v. Williams*, 504 U.S. 36, 52-54 (1992), USAM 9-11.233 requires AUSAs to disclose to the grand jury "substantial evidence that directly negates the guilt of a subject of the investigation." With respect to impeachment information, again there is no duty to present the same to the grand jury. But, if an AUSA is aware of significant impeachment information relating to a testifying witness, the AUSA should consider disclosing it to the grand jury, taking into account the witness' role in the case and the nature of the impeaching information.

(2) Affidavits: Substantial exculpatory information of which the AUSA is aware should be disclosed in an affidavit in support of a search warrant, complaint, seizure warrant, or Title III wiretap application. The same is true with respect to impeachment information relating to a confidential informant

or other person relied upon in the affidavit and that is sufficient to undermine the court's confidence in the probable cause contained in the affidavit.

(b) Post-Charge Disclosures:

(1) Exculpatory Information: After a defendant is charged, exculpatory information should be disclosed reasonably promptly upon its discovery (*see* USAM 9-5.001 D 1). As regarding *Brady* information, all should agree that evidence negating or tending to negate the defendant's guilt, or mitigating or tending to mitigate guilt, should be disclosed promptly.

(2) Impeaching Information: As regarding *Giglio* information, the timing of the disclosure is subject to debate. Most agree, as general rule (oversimplified for purpose of discussion), disclosure of impeaching information can await a determination whether the trial of the defendant will proceed as scheduled. However, such information should be disclosed sufficiently and reasonably in advance of trial or the witness'/witnesses' testimony so as to enable effective defense review and preparation. However, the lines between *Brady* and *Giglio* cannot always be so distinctly drawn. As stated by the Supreme Court in *Giglio* and *Bagley*, respectively, "the reliability of a given witness may well be determinative of guilt or innocence," and "it may make the difference between conviction and acquittal." So, traditional *Giglio* information may also constitute *Brady* information. AUSAs are encouraged to consult their supervisor(s) for further guidance as these case-by-case situations arise. Generally, AUSAs should adhere to the following principles:

-a- Pre-Trial Hearings: Impeachment information relating to government witnesses who will testify at a preliminary/detention hearing, motion to suppress, or other pre-trial hearing should be disclosed sufficiently in advance of the hearing to allow it to proceed efficiently.

-b- Guilty Pleas: Although subject to debate, most interpret the Supreme Court case of *United States v. Ruiz*, 536 U.S. 622 (2002), as holding there is no constitutional requirement that the government disclose impeaching information prior to a guilty plea. This reasoning is further supported in *United States v. Conroy*, 567 F.3d 174 (5th Cir. 2009). However, if the AUSA is aware of impeaching information so significant it undermines the AUSA's confidence in the defendant's guilt, the AUSA should disclose the information.

-c- Trial: Impeachment information should be disclosed at a reasonable time before trial to allow the trial to proceed efficiently (*see* USAM

9-5.001 D 2).

-d- Sentencing: USAM 9-5.001 D 3 requires exculpatory and impeachment information that casts doubt upon proof of an aggravating factor at sentencing, but that does not relate to proof of guilt, should be disclosed no later than the court's initial presentence investigation.

(c) Conclusion/Summary: Examples of all possibly encountered future scenarios cannot reasonably be anticipated in any academic treatment of this issue. All evidence or material traditionally believed to implicate *Giglio* concerns only (e.g., bias, misconduct involving dishonesty, criminal conviction, prior inconsistent statements, untruthful character, incapacity, etc., as discussed above on p. 6) should be assessed for *Brady* potential. The experiences of your supervisor(s) and colleagues are invaluable. Further, we all know or heard of instances in which SDTX courts have allowed defense counsel to make use of previously disclosed material clearly beyond that permitted by law. Indeed, stories of the court allowing the defense to impeach a witness with an unadjudicated arrest, e.g., which had been disclosed to the court under seal, are not uncommon. Events like these should not, even in the so-called "close call" situations, discourage AUSAs from erring on the side of disclosure. The ever-increasing nationwide micromanagement of or 'assault' on prosecutors' decisions is reason to err on the side of early disclosure, either to defense counsel or to the court under seal when in doubt. Our obligations are not only constitutional, but ethical as well.

WITNESS STATEMENTS - *JENCKS* ACT and FED.R.CRIM.PRO. 26.2

1. The Requirement - What is a Statement?: A witness's statement, under Title 18, United States Code, § 3500 (the *Jencks* Act), and Rule 26.2, Fed.R.Crim.Pro, can be one (1) of the following three (3) types:

- written statement the witness makes and signs, or otherwise adopts or approves;
- substantially verbatim, contemporaneously recorded recital of oral statement contained in a recording or any transcription of a recording; or
- witness's statement to a grand jury (however taken or recorded) or a transcription of such a statement.

When a witness other than the defendant has testified on direct examination, the statement of that witness shall be provided to the party who did not call the witness to testify. However, as a practical matter, strict adherence to this timing of production is seldom consistent with a smooth administration of the trial, and virtually no district court judge will tolerate such practice. This

Policy does not intend to establish a uniform deadline for production of *Jencks* material applicable to every case. Each case will define its own demands for trial preparation. Depending on the complexity of the case, or lack thereof, SDTX Courts have commonly ordered production of *Jencks* material, e.g., two (2) weeks before trial, one (1) week before trial, the Friday before trial begins Monday, or the evening before the day on which the witness will be called to testify. AUSAs are strongly encouraged to provide *Jencks* material at a time sufficiently in advance of trial to enable reasonable review and preparation by opposing counsel. Just what is 'sufficiently in advance' will depend on the nature of the case. Oftentimes courts refer to defendants' and witnesses' statements interchangeably. However, Rule 16, Fed.R.Crim.Pro., governs the provision of defendants' statements, whereas Rule 26.2, Fed.R.Crim.Pro., and the *Jencks* Act govern the provision of witnesses' statements. How much an AUSA may wish to argue and emphasize this distinction to the court will depend on the nature of the case.

2. What is Not a Statement?: Generally, an agent's report of interview, or ROI (e.g., FBI-302, DEA-6, ICE ROI, IRS MOI) is not a statement of the witness who was interviewed. However, be mindful that many SDTX District Courts generally treat agent reports of witness interviews as witness statements and will require disclosure accordingly. Further, an ROI may be considered a witness's statement if it is a substantially verbatim, contemporaneously recorded recital of that witness's oral statement or has been otherwise adopted and approved by the witness. A witness may be deemed to have adopted the ROI where the agent orally recites the ROI to the witness to check its accuracy.

3. Scope of Rule 26.2, Fed.R.Crim.Pro. - vs.- the *Jencks* Act: AUSAs should always remember that while the *Jencks* Act applies only to trials, Rule 26.2, Fed.R.Crim.Pro. applies at trial, suppression hearings, preliminary hearings, detention hearings, sentencings, revocations, and proceedings under Title 28, United States Code, § 2255.

JENCKS ACT MATERIALS - COPIES TO DEFENSE vs. REVIEW ONLY

1. Background: This is an aspect of the discovery process over which there are many differing viewpoints in the SDTX. This is not surprising given the large geographical and very diverse prosecution and judicial philosophies among the various Divisions of the SDTX. Beginning in and around 2003, the SDTX policy was to provide the defense with the opportunity for review only of FBI-302s, DEA-6s, ICE ROIs, IRS MOIs, other witnesses' statements, including grand jury testimony, if any, etc. In other words, AUSAs were *not* to provide copies of the same to the defense. This approach was developed for security reasons. In the past, when copies were handed over to the defense attorney(s), in some instances we learned through subsequent debriefings of prisoner-witnesses and other sources that certain FBI-302s or DEA-6s, or other similar *Jencks* Act materials had been passed around or circulated among the prisoner population, presumably in an effort to alert everyone to the identities of 'snitches.' Similarly, we heard stories of various DEA-6s (or similar equivalents) being 'posted' within border area cantinas or other establishments at which known drug traffickers were known to frequent. The security risks inherent to such activities is obvious. This shocking level of dissemination could only have been the result of a commonly encountered scenario, i.e., a defense lawyer's provision of the copied documents to his defendant-client. Indeed,

all of us know defense lawyers who, either from laziness, time shortages, or otherwise, simply hand over the stack of copies (or disc) to the defendant for his or her review. The defendant then identifies the 'snitches' and circulates the damaging evidence.

2. Differing Nature of Prosecutions - Differing Risks: Some prosecutions pose greater risks to witnesses' security than others. The scenarios discussed in paragraph one (1), page eight (8), above, more often arise in cases involving organized narcotics trafficking, firearms trafficking, human trafficking, alien hostage-taking, and other illegal alien smuggling, gang activities, bulk cash smuggling and money laundering, and other such offenses. The membership of these organizations is usually comprised of more dangerous individuals. Additionally, in border- area Divisions of the SDTX-USAO, the likelihood that copied documents may wind up in the wrong hands beyond the defendant-client is greater. Therefore, adherence to the 'review-only' principle is more sound. Yet, in other prosecutions involving, for example, tax fraud, bank fraud, securities violations, mortgage fraud, and other similarly organized white collar offenses, such risks *may* not be so prevalent. Further, investigations and prosecutions of these offenses often generate huge volumes of *Jencks* Act material such that requiring defense lawyers to schedule multiple appointments for review of the same at our office is infeasible. Further, defending this policy to district court judges is difficult at times. It is recognized that exceptions to these described 'trends' always arise.

3. Effectiveness of Review Only: Some have questioned the effectiveness of limiting a defense lawyer's exposure to a 'review-only' level of dissemination, inasmuch as the substance of the information is still disseminated. Some have questioned what is to prevent the defense lawyer from communicating the same information to his client. The answer is – nothing. However, the effort necessary to 'get the word out' to the organization at large is much greater. Further, the word of a defendant-client has less credibility than a circulated or posted agency report, even among the defendant-client's associates.

4. SDTX Policy - Discretionary: Because it is infeasible to create a district-wide policy that works in all (or even a majority of cases), this Policy does not mandate an absolute prohibition against providing copies of *Jencks* Act materials to defense lawyers. Further, the method of provision, whether as hard copies or contained on compact disc(s), is as deemed appropriate by the AUSA. AUSAs and their supervisors have the discretion to establish practices as defined by the nature and needs of the case and/or the Divisional Offices. AUSAs are advised to discuss this issue with their supervisor as the need arises. Further, all are strongly encouraged to err on the side of security and adhere to the 'review-opportunity-only' rule if there is any doubt. Even in review-only situations, copies of the document(s) in questions are still provided for the defense's use in open court, after which they should be retrieved. In those instances where *Jencks* Act materials are voluminous to the extent that review-only adherence is infeasible, but yet appreciable security issues exist, AUSAs should consider motions for protective orders limiting the degree to which the defense may disclose the existence of such materials. Such limitations are by court order. Presumably, the defense lawyer will be less cavalier about violating a court's restrictions on dissemination.

WHAT TO REVIEW

Again, the usage "discovery" includes materials subject to Rules 16 and 26.2, Fed.R.Crim.Pro., the *Jencks* Act, and *Brady* and *Giglio*.

1. Investigative Agency's Files: The investigative agency's file, including documents such as FBI Electronic Communications (often referred to as "ECs"), inserts, emails, etc., should all be reviewed for discoverable information. However, for such an 'internal' document, it is unnecessary to produce the actual document, but the discoverable information contained therein should be disclosed. The method of production can be in whatever format or media deemed appropriate, such as in a letter from the AUSA on USAO letterhead. However, if information contained in an EC, internal memorandum, intelligence document, or otherwise, is also contained in another document disclosed to the defense (e.g., the *Jencks* Act materials referenced above) then separate disclosure of the internal document is unnecessary. For example, if an FBI-302 or DEA-6 reports all *Brady-Giglio* information otherwise contained in the agency internal document, then separate disclosure of the internal document is not required. Further, the restated information need not be a verbatim reproduction from the internal document to the agency report. However, if the AUSA has reason to believe he or she has not seen all of the documents in the agency investigative file, then the AUSA should insist on the opportunity for review. In other words, whether disclosed to the defense or not, the AUSA should make the decision whether the internal document contains *Brady-Giglio* information and the agency report adequately discloses it.

2. Confidential Informant (CI), Witness (CW), Human Source (CHS), Source (CS) Files: The credibility of cooperating witnesses or informants will always be at issue if they testify during a trial. Therefore, AUSAs should obtain access to the agency file for each *testifying* CI, CW, CHS, or CS. If discoverable information is contained in such file, AUSAs should disseminate the information via a summary letter to defense counsel, as opposed to producing the file or documents in their entirety. Such a method preserves and protects sensitive information and lessens any perceived security risks.

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.

4. Documents or Evidence Gathered By Civil Attorneys and/or Regulatorv Agency in Parallel Civil Investigations: If an AUSA has determined 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 very well want to review the files 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 DOJ civil attorneys are participating, such as a *qui tam* case, the civil case files should also be reviewed.

5. Statements Provided to Victim-Witness Coordinator: AUSAs should seek from the USAO Victim-Witness Coordinator any and all statements the victims may have made about the

offense(s).

6. Potential *Giglio* Information Relating to Law Enforcement Witnesses: [See discussion above].

7. Potential *Giglio* Information Relating to Non-Law Enforcement Witnesses: [See discussion above]. Examples include, but are not limited to, the following:

- Prior inconsistent statements (including inconsistent proffers);
- Witness statement variations
- Benefits provided to witnesses, e.g.:
  - dropped or reduced charges
  - immunity
  - expectations of leniency (5Ks, reductions of sentence)
  - assistance in state/local criminal proceeding
  - considerations regarding forfeitures of assets
  - stays of deportation or other immigration status considerations (e.g., S-Visas)
  - monetary benefits
  - non-prosecution agreements
  - relocation assistance
- Other known conditions affecting witness's bias:
  - animosity toward defendant or group of which defendant is a member
  - relationship with victim
  - known but uncharged criminal conduct
- Prior acts under Fed.R.Evid. 608
- Prior convictions under Fed.R.Evid. 609
- Known substance abuse/mental health issues affecting witness's ability to perceive and recall events

ELECTRONIC COMMUNICATIONS

1. Relationship Between the Government's Discovery Obligations, Department of Justice Discovery Policies, and This Policy: The term "e-communications" includes emails, text messages, SMS (short message service), instant messaging, voice mail, pin-to-pin communications, social networking sites, bulletin boards, blogs, and similar means of electronic communication. This Policy also provides recommendations as to how e-communications should and should not be used during the investigation and prosecution of a federal criminal case. A failure to comply with the guidance and recommendations contained herein may result in delay, expense, and other consequences prejudicial to a prosecution, but it does not necessarily mean there has been or will be a violation of a legal or other disclosure obligation.

2. Benefits and Hazards of E-Communications: E-communications offer substantial benefits, including speed, sharing, and efficiency. E-communications also present substantial

hazards. Because e-communications frequently are prepared and sent quickly and without supervisory review, they can contain incomplete or inaccurate information. Additionally, e-communications may be intended as jests, but appear to a third party to be conveying factual information. These hazards can be particularly problematic in criminal prosecutions because, depending upon its *content,* an e-communication maybe discoverable under federal law. Prosecution team personnel should exercise the same care in generating case-related e-communications that they exercise when drafting more formal reports. In court, material inconsistencies, omissions, errors, incomplete statements, or jokes in e-communications may be used by opposing counsel to impeach the credibility of a witness. All prosecution team personnel need to understand the hazards of e-communications, the necessity to comply with agency rules regarding documentation and record-keeping during an investigation, the importance of careful and professional communication, and the obligation to preserve and produce such communications when appropriate. Thus, by their nature, e-communications are appropriate for some criminal case-related communications and inappropriate for others. Specifically, e-communications are inappropriate for transmitting "substantive communications" about a case or investigation except when, to meet critical operational needs, intra-agency or inter-agency e-communications are the only effective means of communication, as explained below.

3. Categories of E-Communications: Case-related e-communications generally fall into four categories:

(a) Substantive communications: "Substantive communications" include:

-1- *factual* information about investigative activity;

-2- *factual* information obtained during interviews or interactions with witnesses (including victims), potential witnesses, experts, informants, or cooperators;

-3- *factual* discussions related to the merits of evidence;

-4- *factual* information relating to credibility, including *factual* information or opinions about the credibility or bias of informants and potential witnesses.

-a- Opinions about a witness's credibility raise certain legal issues. Although they are not subject to discovery under Rule 16, *see* Rule 16(a)(2), they *may* be subject to disclosure under *Brady* or *Giglio* principles. As a general rule, full and frank discussions and differing opinions among members of the prosecution team about witness credibility are core work-product, are to be encouraged, and need not be disclosed in discovery. Good judgment and clear communication are critical in this area, and e-communications may not be the best medium for those discussions. And, of course, it is always important to communicate – whether orally or in writing – in a professional way, *i.e.,* avoid profanity, sarcasm, and exaggeration. If a negative

opinion about credibility is based on particular underlying *facts*, it is essential that prosecutors and agents ensure that those underlying *facts* have been provided in discovery so that the defense has the same factual basis for forming its own opinions. For example, if a prosecutor or agent opines that an informant will make a "bad" witness because the informant has prior inconsistent statements, the opinion itself is core work product that need not be disclosed to the defense, but the prior statements must be disclosed if the informant testifies at trial. Further, if an agent expresses a negative opinion of an informant's credibility based upon the reports of other agents who have worked with the informant, the opinion itself *may* need to be disclosed under *Giglio* if it would be potentially admissible under Fed. R. Evid. 608(a).

(b) <u>Logistical Communications</u>: "Logistical communications" include e-communications which contain travel information, or dates, times and locations of hearings or meetings. Generally, logistical communications are not discoverable.

(c) <u>Privileged or Protected communications</u>: "Privileged communications" include attorney-client privileged communications and attorney work product communications. "Protected communications" are those covered by Fed.R.Crim.Pro. 16(a)(2). With very few exceptions, these are not discoverable. Examples of these communications include:

-1- Between prosecutors on matters that require supervisory approval or legal advice, *e.g.*, prosecution memoranda, *Touhy* approval requests, *Giglio* requests, wire tap applications and reviews, etc., and involving case strategy discussions;

-2- Between prosecutors and other prosecuting office personnel on case-related matters, including but not limited to organization, tasks that need to be accomplished, research, and analysis;

-3- Between prosecutors and agency counsel on legal issues relating to criminal cases, including, but not limited to, *Giglio* and *Touhy* requests; and

-4- From the prosecutor to an agent, other agency personnel, or prosecuting office personnel giving legal advice or requesting investigation of certain matters in anticipation of litigation ("to-do" list).

(d) <u>Mixed Communications</u>: A communication that contains a mix of the categories above may be partially discoverable and may need to be redacted by a prosecutor or reviewed by a court before a final determination is made as to whether it must be disclosed in discovery.

4. Recommendations for Using E-Communications:

(a) Do not use e-communications for substantive communications regarding an investigation or trial *unless* exceptional circumstances justify intra-agency or inter-agency e-communications. In exceptional circumstances, intra-agency or inter-agency e-communications that contain substantive communications may be the best method to timely convey significant case developments. Examples include where operational imperatives require intra-agency or inter-agency e-communications, or where agents are located in different countries or time zones. In these instances, the sender should observe the recommendations set forth in Section II - C of this guidance. In situations that do not present such exceptional circumstances, such as e-communications with non-law enforcement personnel, the standard recommendation remains: do not use e-communications for substantive communications regarding an investigation or trial.

(b) Do not use e-communication when a telephonic or face-to-face conversation would be a better way of ensuring accurate communication or of clarifying a matter.

(c) Assume your e-communications will be made public. **Only write and send e-communications that you would feel comfortable being displayed to the jury in court or in the media.** Think of e-communications as talking into a tape recorder.

(d) E-communications, like formal reports, should state facts accurately and completely and be professional in tone. Avoid witticism, over-familiarity, or careless commentary or opinion.

(e) Substantive e-communications with witnesses (including victims) should be avoided whenever possible.

(f) Prosecution team members are encouraged to inform other people involved in the case, including victims and witnesses, that e-communications are a preserved record that might be disclosed to the defendant and used for impeachment in court like any other written record.

(g) Use e-communications for logistical matters, for example: to schedule meetings with witnesses, agents, prosecutors, or other members of the prosecution team.

(h) Do not use e-communications which duplicate information that must be incorporated into a formal agency report, especially with regard to witness interviews or other communications containing a witness's or agent's factual recitations. If for some reason substantive case-related information must be contained in an e-communication, ensure that the information is accurate and is included in any formal report required by agency policies. Material inconsistencies between an e-communication and a formal report, or omissions, errors, or incomplete statements

in e-communications, may be impeachment information and may become the subject of cross-examination in court proceedings.

(I) Limit the subject matter of an e-communication to a single case at a time to make it easier to segregate e-communications by case.

(j) Do not use personally-owned electronic communication devices, personal email accounts, social networking sites, or similar accounts to transmit or post case-related information.

(k) Do not post case-related or sensitive agency information on a non-agency website or social networking site. Information posted on publically accessible websites or social networking sites may be used to impeach the author.

(l) E-communications should be sent only to those who have a need to know. Limit cc's (carbon copies) and bcc's (blind carbon copies) appropriately.

5. Preservation of E-Communications: There are three (3) steps to proper handling of e-communications in criminal cases: preservation, review, and disclosure. The number of e-communications preserved and reviewed likely will be greater than what ultimately is produced as discovery.

(a) Who is Responsible for Preserving E-Communications?

-1- Alternative 1: Every potentially discoverable e-communication should be preserved by each member of the prosecution team who creates or receives it. While this practice will lead to preserving multiple copies of the same e-communication, it will ensure preservation.

-2- Alternative 2: With respect to e-communications among prosecution team members or agency personnel that need to be preserved for later review, each prosecution team member is responsible for preserving e-communications he/she sent, but not those *received from* other prosecution team members. In this way, duplication should be minimized.

(b) When Should E-Communications be Preserved? To ensure that e-communications are properly preserved, users should move and/or copy potentially discoverable e-communications from the user's e-communication account(s) and place them in a secure permanent or semi-permanent storage location associated with the investigation and prosecution, or print and place them with the criminal case file as soon as possible. Users should ensure that such preservation occurs before the e-communication is automatically deleted by agency computer systems because of storage limitations or retention policies. Because hard-drives can fail, desktop and laptop hard-drives alone usually are not adequate storage locations for e-

communications.

(c) Which E-Communications Should be Preserved for Later Review? During the investigative stage, it is difficult to know which e-communications may be discoverable if the case is charged. Therefore, members of the prosecution team should err on the side of preservation when deciding which e-communications to preserve for review. The following e-communications must be preserved for later review:

-1- Substantive e-communications created or received in the course of an investigation and prosecution must be preserved and made available to the prosecutor for review and possible disclosure to the defendant.

-2- All e-communications sent to or received from non-law enforcement lay witnesses regardless of content.

-3- E-communications that contain both potentially privileged and substantive information.

(d) Which E-Communications Do Not Need to be Preserved for Later Review? Logistical communications, *e.g.,* scheduling meetings or assigning tasks, generally do not need to be preserved and made available to the prosecutor for review because they are not discoverable – *unless* something unusual in their content suggests they should be disclosed under *Brady*, *Giglio*, Jencks or Rule 16.

(e) How Should E-Communications be Preserved? When possible, e-communications should be preserved in their native electronic format to enable efficient discovery review. Otherwise, they should be printed out and preserved E-communications that cannot be printed should be preserved in some other fashion, *e.g.,* a narrative report.

(f) Parallel Civil or Administrative Investigations/Proceeding: The best practices for parallel criminal, civil, and administrative proceedings vary from case-to-case. Consult with the lawyers handling the cases for guidance.

6. Reviewing and Producing Discoverable E-Communications to the Defendant

(a) Responsibilities of the Prosecutor: It is the prosecutor's responsibility to oversee the gathering, review and production of discovery. In determining what will be disclosed in discovery, the prosecutor will ensure that each e-communication is evaluated, taking into consideration, among other things, what facts are reported, the author, whether the author will be a witness, whether it is inconsistent with other e-communications or formal reports, whether it reflects bias, contains impeachment information, or any information (regardless of credibility or admissibility) that appears inconsistent with any element of the offense or the government's theory of

the case. If the e-communication contains sensitive information, the prosecutor should consider whether to file a motion for a protective order, seek supervisory approval to delay disclosure (in accordance with USAM § 9-5.001), make appropriate redactions, summarize the substance of an e-communication in a letter rather than disclosing the e-communication itself, or take other safeguarding measures.

(b) Responsibilities of the Prosecution Team: It is the responsibility of each member of the prosecution team to make available to the prosecutor all potentially discoverable e-communications so that the prosecutor can review them to determine what must be produced in discovery. The discovery obligation continues throughout the case. *See* Fed.R.Crim.Pro. 16(c). All members of the prosecution team should be particularly cautious in any e-communications with potential lay witnesses. Prosecution team members who submit e-communications to the prosecutor as potential discovery should call to the prosecutor's attention e-communications which are particularly sensitive because:

- the e-communication could affect the safety of any person,
- the e-communication could disclose sensitive investigative techniques,
- the e-communication could compromise the integrity of another investigation,
- the e-communication contains Jencks Act statements made by a government witness, including law enforcement personnel and confidential sources, who may testify, or
- if for any other reason they deserve especially careful scrutiny by the prosecutor.

PRIVACY PROTECTION - REDACTING DOCUMENTS

1. All personal identifiers should be redacted in whole or in part from discovery, including, but not limited to, names of minors, dates of birth, social security numbers, taxpayer identification numbers, home street addresses, telephone numbers, Medicare or Medicaid ID numbers, financial account numbers, or any other identifier which may improperly disclose private or sensitive information. Rule 49.1, Fed.R.Crim.Pro., which contains directions for redacting documents filed with the court, should also be used as a starting point for the redaction of documents that will be produced in discovery.

COUNTER-TERRORISM and NATIONAL SECURITY MATTERS

1. 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 entitled *"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 (N.D.) 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 N.D.

2. 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:

(a) Those targeting corrupt or fraudulent practices by middle or upper officials of a foreign government;

(b) Those involving alleged violations of the Arms Export Control Act or the International Emergency Economic Powers Act;

(c) Those involving trading with the enemy, international terrorism, or significant international narcotics trafficking, especially if they involve foreign government or military personnel;

(d) Other significant cases involving international suspects and targets; and

(e) Cases in which one or more targets are, or have previously been, associated with an intelligence agency.

3. For these above-referenced 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 N.D. regarding whether to make through N.D. 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.

CONCLUSION

The above Policy is intended as a set of guidelines to assist the AUSA in the process of determining and executing discovery decisions and strategies. **As advised by the Deputy Attorney General (DAG), all prosecutors are encouraged to provide early and expansive discovery (again, cautioning against the usage "open file policy")**. **This Policy provides prospective guidance only and is not intended, as stated in the Introduction, 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). All USAOs were mandated by the Office of the DAG to develop and submit a policy relating to discovery obligations and other obligations arising under Rules 16 and 26.2, Fed.R.Crim.Pro., Title 18, United States Code, § 3500, i.e., the *Jencks* Act, *Brady v. Maryland* and *Giglio v. United States.* This mandate grew out of a recommendation of a working group of experienced attorneys with expertise regarding criminal discovery, which group was comprised of attorneys from the Office of the DAG, various USAOs, DOJ-Criminal Division, and the National Security Division.

Yet, it is understood that no policy can be so comprehensive that all possible questions can be answered. AUSAs are encouraged to follow the guidelines herein. By doing so, and by being familiar with laws and DOJ policies regarding discovery obligations, AUSAs are that much more likely to make informed, considered, and sound decisions. Nonetheless, AUSAs are also encouraged to consult with their direct supervisors and/or the Professional Development Section of our USAO. As previously stated, our District covers a large area and is comprised of courts that have developed long-standing practices and standards. To say that overall these standards may not necessarily be uniformly applied is an understatement. Such realities are acknowledged herein and understood. Discovery obligations are very often court and fact specific. Our foremost goal is to achieve a just and fair result in every criminal prosecution. Thank you all for your efforts to achieve these obligations.