DISCOVERY POLICY
FOR CRIMINAL CASES

UNITED STATES ATTORNEY'S OFFICE
WESTERN DISTRICT OF TEXAS

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The guidance contained in this policy is subject to legal precedent, court orders, and local rules. This policy 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).

October 15, 2010

In accordance with the memorandum of the Deputy Attorney General dated January 4, 2010,[1] this document sets forth the policy of the U.S. Attorney's Office for the Western District of Texas governing discovery in criminal cases. Discovery rules governing criminal cases, including disclosure obligations under Rule 16, Fed.R.Crim.P., *Brady v. Maryland*, *United States v. Giglio*, 18 U.S.C. § 3500, Rule 26.2, Fed.R.Crim.P., and other authorities, are highly complex and no policy can be tailored to address all possible discovery issues. Every AUSA has an obligation to be familiar with the requirements of statutes, rules, court decisions, court orders, and Department of Justice policy. This policy is intended to set forth an office approach to discovery, generally, and to serve as a guide or checklist to satisfy the government's discovery and other disclosure obligations.[2]

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[1] Available at: Requirement for Office Discovery Policies in Crm. Matters.PDF

[2] 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 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

As a matter of office policy, AUSAs must comply with applicable rules, statutes, caselaw, and court orders. In most cases, broad and early discovery is encouraged. But in all cases, AUSAs are expected to exercise professional judgment, tailoring and timing discovery to encourage prompt resolution of cases; promote efficient disposition of cases; minimize discovery disputes in the courts; ensure that all *Brady* and *Giglio* information is timely disclosed; and taking steps necessary (including seeking protective orders) to protect witnesses and victims and to maintain the integrity of the criminal process. While broad discovery is encouraged in most cases, the office does not have an "open file" practice. This term should be avoided so as not to inadvertently mislead defendants or the courts about the scope of discovery.

In any case or circumstance in which there is a question about the timing or scope of discovery, including any case in which an AUSA seeks to deviate from this policy, he or she should consult with a supervisor. The purpose of this policy is to ensure consistent compliance and practice concerning discovery obligations. **This policy does not create any rights or entitlements for defendants or others.**

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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 through NSD a request that the pertinent IC element conduct a prudential search. If neither the prosecutor, nor any other member of the prosecution team, has a reason to believe that an element of the IC possesses discoverable material, then a prudential search generally is not necessary.

I. NOTICE

In addition to the obligation to disclose information, documents, tangible objects, etc., several rules and other provisions require the Government to provide the defense with notice of intent to use certain evidence. At a minimum, notice should be provided in accordance with any court order. As a general practice, notice of intent to use evidence under Fed.R.Cr.P. 12(b)(4), or Fed.R.Evid. 404(b) should be provided as soon as practical after arraignment.

A. Rule 12(b)(4), Fed.R.Cr.P., Notice

AUSAs should provide written notice of intent to use evidence that might be the subject of a motion to suppress in all appropriate cases as soon as practical after arraignment, but should be within the limits imposed by applicable court order. (In San Antonio and Del Rio, routine discovery orders require notice 20 days after arraignment.)

B. Rule 404(b), Fed.R.Evid.

AUSAs should provide notice of intent to use 404(b) evidence as soon as practical after arraignment, but in no event later than the limits imposed by the various court orders, absent good cause. (The standard discovery order in San Antonio requires that Rule 404(b) notice be given 15 days before the last scheduled trial date; Del Rio requires notice 10 days before trial begins; the order for Midland and Pecos requires disclosure upon request by the defendant).

C. Rule 807, Fed.R.Evid.

The required notice under the residual hearsay exception should be provided as soon as practical after arraignment, and generally, should be provided at least 5 days before trial.

D. Notice of Involvement of Confidential Informants

As a general policy, this office does not reveal the identity of non-testifying confidential informants unless ordered to do so by the court, and concurred in by the agency that made the promise of confidentiality to the informant.

II. RULE 16 DISCOVERY

A. Timing of Disclosure

Rule 16 requires the Government to produce for inspection and copying specific categories of information "upon a defendant's request." The District Courts routinely order or expect the Government to produce Rule 16 information without a specific request by the defendant. Because few defendants produce anything meaningful as reciprocal discovery, and because the courts expect

us to disclose information in all cases, the office will produce Rule 16 materials without request in accordance with the applicable order of the District Court. In most cases, this means Rule 16 materials available to the prosecutor will be produced or offered to the defense 14 to 20 days after arraignment. If no order is entered, and if the court has no standing practice, Rule 16 materials should be offered to the defense within 20 days of arraignment.

B. Continuing Obligation

The duty to disclose Rule 16 material is a continuing one. AUSAs should tender additional Rule 16 material to the defense "promptly" after it is discovered or obtained, ordinarily within 5 working days.

C. Protective Orders

If, for any reason an AUSA believes that specific material falling within Rule 16 should not be disclosed to the defendant, the AUSA should file a motion for a protective order with the court at the time Rule 16 disclosure should be made, or the material is later obtained. The motion should be filed ex parte, in camera under seal. The proposed order should seek appropriate relief, which may include delaying disclosure until a time closer to trial, authorizing redaction of sensitive information, limiting the use and any subsequent copying and disclosure of the material to the persons necessary to prepare and present the defense, requiring the return of the information upon the completion of the prosecution, and requiring that any submission of the material in a proceeding be done under seal or only with the prior approval of the court.

D. Rule 16 Material subject to disclosure

1. Defendant's Statements

a. Defendant's Oral Statements: This includes:
The substance of an oral statement of the defendant that is
Relevant,
Was made in response to interrogation,
By a person the defendant knew was government agent, and
Which the Government intends to use at trial.

b. Defendant's Written or Recorded Statements: This includes:
Any written or recorded statement made by the defendant that is
Relevant,
That is within Government's possession, control or custody, or that
The Government attorney knows or could know that the statement exists.

c. Portion of Written Record of Substance of Defendant's Oral

Statement. This includes:
The portion of a report recounting the defendant's statement, which is Relevant,
Was made in response to interrogation,
By a person the defendant knew was government agent.

2. Defendant's Grand Jury Testimony

This is an exception to the general secrecy requirement of Fed.R.Cr.P. 6(e). It is rare that a defendant has testified in grand jury. Additionally, the USAM sets forth specific policies governing the appearance of targets before a grand jury.

3. Organizational Defendant's Statements

Any statements in the categories above made by a person legally able to bind the defendant regarding subject of statement because of person's position in organization; or

by a person who was involved in the alleged conduct constituting the offense and was legally able to bind the organization because of their position in organization.

4. Defendant's Prior Criminal Record

As a general rule, this will include the defendant's FBI (NCIC) record. However, state and local agencies may have separate databases. If those officers were involved in the investigation, criminal histories from those agencies' databases should be obtained and provided (e.g., TCIC, SAPD, etc.). Because Pretrial Services is adept at obtaining criminal history information early in a case, it is advisable to review their report for additional criminal history information.

5. Documents and Objects

Items in possession, custody or control of the Government that:
Are material to preparing defense;
The government intends to use in case-in-chief at trial; or
Was obtained from or belongs to the defendant.

6. Reports of Examinations and Tests

Reports or results of any physical, mental examination or scientific test or experiment if:

The item tested is within Government's possession, custody or control;
The attorney for Government knows or could know the item exists; and

The item is material to the defense; or
The Government intends to use item in its case-in-chief at trial.

7. Expert Witnesses

The Government must provide a written summary of any testimony under Fed.R.Evid. 702, 703, 705, that the Government intends to use in its case-in-chief at trial. Summary must describe witness' opinions, the bases and reasons for those opinions, and the witness' qualifications.

8. Items not subject to disclosure

Rule 16(a)(2) provides that the following are not subject to disclosure: reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case; statements made by prospective government witnesses except as provided by 18 U.S.C. § 3500 (the *Jencks* Act).

Exceptions: Information contained in such non-discoverable documents may tend to exculpate the defendant or may be relevant to impeach a government witness. AUSAs should make efforts to review these materials for *Brady* and *Giglio* materials, regardless of materiality. Ordinarily, the report, memorandum or internal document should not be disclosed; rather, the information should be disclosed in the form of a letter to counsel or other writing that communicates the substance of the relevant information. **Timing**: AUSAs must ensure that the information is disclosed in some form (such as a letter to counsel) in sufficient time for the defense to make use of the information. As a general rule, impeachment information should be disclosed at the time of jury selection or one day before the government witness testifies (unless the information is of such nature that the defense needs additional time to investigate to make effective use of the information). *Brady* material should be disclosed promptly, either contemporaneously with the disclosure of Rule 16 materials, or promptly after the AUSA learns of the information (usually not more than 5 business days), unless there is reason to seek a protective order to delay or limit disclosure.

9. Reciprocal Discovery

It is recommended that AUSAs request reciprocal discovery from a defendant, in writing, at the time Rule 16 material is first disclosed. While most defendants do not timely produce information of any significance, the government should preserve its ability to demonstrate the defendant's recalcitrance in response to any defense claims that the government has failed to provide discoverable material.

III. WITNESS STATEMENTS

As a general rule, the Government is not required to disclose the identity of witnesses before

jury selection. There are two uncommon exceptions to this general rule: (1) The identity of a confidential informant should be disclosed only if ordered by the court, subject to the concurrence of the agency. (2) The identity of testifying coconspirators or accomplices should be disclosed only if ordered by the District Court.

The *Jencks* Act, 18 U.S.C. § 3500, Rule 26.2, and *Giglio v. United States*, require the Government to disclose witnesses' prior statements. The *Jencks* Act and Rule 26.2 are very precise in defining the term "statements," and in fixing the timing of disclosure. Under both provisions, the Government is required to provide prior statements of a witness only upon request and upon completion of the witness' testimony on direct examination. The *Jencks* Act applies only to the Government's witnesses at trial. Rule 26.2 applies to witnesses called by the Government *and the defense* (other than the defendant) at trial, suppression hearings, preliminary examination hearings, sentencing, hearings on motion to revoke or modify probation or supervised release, detention hearings, and hearings on motions pursuant to 28 U.S.C. § 2255. *See* Rule 26.2; 12, 5.1, 32(i)(2), 32.1(e), 46(j), and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255. *Giglio* requires disclosure of material impeachment information, which may include a government witness's statement as defined by the statute and rule. Generally, disclosure consistent with the 3500/26.2 will satisfy *Giglio*, however, there may be circumstances in which the two do not overlap. For example, a prior witness statement might not be relevant to the subject matter of his or her direct testimony, and thus not subject to disclosure under *Jencks*, but might still have impeachment value. Similarly, it is possible that a statement might require an earlier disclosure than the *Jencks* Act dictates in order for the defendant to make effective use of the information. As discussed below, Department of Justice policy requires broader disclosure than the constitutional standard of materiality defined in the *Brady* line of cases.

A. Witness Statement Defined:

For purposes of 3500 and Rule 26.2, a statement means:

> (1) a written statement that the witness makes and signs, or otherwise adopts or approves;
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> (2) a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording;

NOTE: This may include any manner of electronically recorded statements of the witness, including undercover recordings, as well as word for word transcription of an oral statement, including portions or segments of the oral statement. Phrases or sentences in quotation, as well as accurate shorthand transcriptions fall within this definition.

> (3) the witness's statement to a grand jury, however taken or recorded, or a transcription of such a statement.

Statements subject to production are only those that relate to the subject matter of the witness's

testimony.

Giglio extended the principle of *Brady* to impeachment information, requiring the government to disclose material impeaching information under the same due process principle. As mentioned above, the *Brady* principle requires disclosure in sufficient time for the defense to make use of the information. Obviously, there can be overlap between *Giglio* and § 3500/26.2 statements. As a general rule, to the extent there is overlap, disclosure of 3500/26.2 statements in accordance with those authorities satisfies the requirement under *Giglio*.

B. Disclosure of interview reports and debriefing reports

As discussed, neither section 3500 nor Rule 26.2 by their terms require the disclosure of interview reports (302's) or debriefing reports of witnesses. The rules implicitly recognize that reports written by an interviewer should not be used to cross-examine the person interviewed; non-disclosure ensures that courts will not allow counsel to misuse a report to unfairly cross-examine the witness with a document she did not write and has never seen. However, there are cases and circumstances in which it may be preferable or advantageous to disclose these reports, even though disclosure is not required. For example, it is common practice throughout the District to disclose reports in most cases involving immigration violations. Disclosure expedites discovery and disposition of these cases. Also, disclosure of the reports ensures that the defense will receive any impeaching, contradictory or exculpatory information they might contain; adhering to the rule creates a risk that information favorable to the defense may not be disclosed. In other cases, disclosure may be ill-advised for a number of reasons: some criminal organizations seek reports to identify and retaliate against witnesses and sources and the reports provide the confirmation the organization requires before taking violent action; some reports may include information relevant to on-going or related investigations, disclosure of which may jeopardize those other investigations. It is difficult to set a hard and fast rule or single policy regarding disclosure. As a general rule, this office encourages the disclosure of debriefing reports except to the extent other considerations discussed above suggest otherwise. AUSAs should discuss the decision not to disclose reports with a supervisor if disclosure is not otherwise required by section 3500 or Rule 26.2. Of course, AUSAs must disclose all information required by *Brady* and *Giglio* and their progeny.

1. Timing: Although the statute and the rule do not require the government to produce 3500/26.2 statements until completion of the witness's testimony on direct, Courts expect us to disclose statements before then to avoid disrupting trial. Accordingly, it is office policy to produce statements pursuant to 3500/26.2 at least one day before the witness testifies on direct examination. Depending on the amount of material, there may be occasions when it is appropriate to produce the statements even earlier.

2. Redaction: Carefully review statements and reports before providing them to the defense. In some instances, documents may contain privacy information, such as home addresses, social security numbers, dates of birth, financial account numbers, which should be redacted pursuant to Rule 49.1. In other instances, parts of the

statement may not relate to the subject matter of the witness's testimony.

3. Protective Orders: In some cases it may be appropriate to limit further dissemination of witness statements (or investigative reports). Some criminal enterprises seek out official reports to identify cooperating witnesses and sources, placing those persons in serious risk of harm. Accordingly, before releasing statements or copies of reports, AUSAs should evaluate whether to seek from the court an order limiting the use, copying, and dissemination of the documents, and where justified, requiring the defense to return all copies of the reports to the Government at the conclusion of the proceeding or trial.

IV. OTHER IMPEACHMENT INFORMATION

The law governing impeachment of witnesses is complex and cannot be comprehensively incorporated into this policy. The Government's discovery or disclosure obligation in this area pertains to information that might be relevant to impeaching witnesses called by the Government. As discussed above, this encompasses witness statements under the Jencks Act and Rule 26.2, which statements may be inconsistent with or contradict a witness' testimony at a trial or hearing. The disclosure obligation also applies to a variety of information, beyond prior statements or assertions, that is relevant to a witness's motive for testifying, bias for or against one of the parties, interest in the outcome of the litigation, ability to perceive, recall, and recount events, and character for truthfulness. The disclosure obligation in this area arises from several sources, including: the Jencks Act and Rule 26.2, as already discussed; *Giglio*, which extended the due process principle of *Brady* to impeaching information; and a defendant's right to fully confront and cross-examine witnesses against her.

A. Witnesses.

In locating and determining what must be disclosed as impeachment information, it is helpful to put witnesses into several categories. The nature of impeachment information may differ depending on the type of witness involved.

1. Confidential Informants, (CIs), Cooperating Witnesses (CWs), Confidential Human Sources (CHS), Confidential Sources (CSs), Cooperating Defendants

The Government should disclose the following information relating to these witnesses **if they are called to testify**:

a. The witness's criminal history. Seek FBI (NCIC) criminal history, as well as history reflected in other relevant agency databases. Include pending charges, even if in another jurisdiction.

b. Witness inducements. These may include: Plea agreements, payments, moiety

agreements (bounty); dismissed charges, expectations about pending charges against witness, etc.

c. Relationships. These may include information about the witness' relationship to others that might imply animosity to the defendant.

d. IRS issues.

e. Communications with the witness by government representatives.

f. **Contradictory/inconsistent information**. Although not technically "statements" under Rule 26.2 or the Jencks Act, information provided by cooperating defendants and similar witnesses may be contained in agency investigative reports, notes, presentence reports, factual bases to guilty pleas, sentencing hearings, revocation hearings, and others. Because they are not "statements," the actual document containing the witness' prior assertions are not subject to disclosure. However, the contradictory or inconsistent information must be disclosed in some form.

2. Law Enforcement Agents

In addition to agents' reports, notes, prior testimony, and other forms of statements, the Government may possess information with which law enforcement agents may be impeached. Referred to as *Giglio* material or *Henthorn*, material, it is most commonly contained within agents' personnel files.

The office's policy on obtaining and reviewing *Giglio* information is contained in the *Giglio* policy in the Criminal Handbook. Most of the federal agencies have agreed with the Department of Justice that upon written request from a U.S. Attorney's Office, some official in the agency will review personnel files for identified agents and provide potential information to the USAO. The Criminal Chief is the requesting official for this purpose.

State and local law enforcement agencies are not signatories to the Department policy, and accordingly, AUSAs must deal with each local agency on a case by case basis.

Keep in mind the distinction between whether potential impeachment information must be disclosed to the defense and whether the defense may properly use it to cross examine a witness during a proceeding. Some information may be so clearly irrelevant that the court can determine that the information need not be disclosed to the defense. (E.g., information that an agent was disciplined for misusing a government vehicle may not even require disclosure because it has no bearing on bias, motive, etc.). On the other hand, some information might be of such nature that its admissibility or use may not be clear until the facts are developed at trial. (E.g., information that an agent used excessive force in a prior arrest may have some relevance to a defense claim that a confession was involuntary.) In those cases, the court may order disclosure but resolve later whether the defense may

properly use the information.

In dealing with agent impeachment information, please keep in mind that agents have a privacy interest in the matters contained in their personnel files. We should take reasonable steps to protect their privacy, including refraining from disseminating to persons without a need to know. The fact is that most agent misconduct, when it occurs, is not relevant to the agent's credibility or character for truthfulness. An AUSA should discuss with the Criminal Chief or a supervisor information disclosed by the agency before making any disclosure to the defense. In all but the most unusual case, the AUSA should submit the information to the court for in camera review before disclosure, and request a protective order limiting the use and dissemination of the information by the defense. The order should provide that the information should not be disclosed to anyone except persons preparing and presenting the defense, that it should be presented to the court under seal if it is relevant to any pleading, and that the person seeking to offer or inquire about a matter should seek leave of court before raising it in open court.

3. Expert Witnesses

In addition to disclosing the expert's opinions, the basis for those opinions, and qualifications, review and provide other relevant impeaching information.

4. Other Witnesses

Other witnesses may include victims of crime, records custodians, by-standers and similar persons who are neither law enforcement officers or accomplices. We have no obligation to investigate these witnesses for adverse information. However, if they have given inconsistent or conflicting statements, or if they reveal they have been convicted of an offense or have engaged in conduct relevant to character for truthfulness, or if they have some interest in the litigation, relation to the defendant, or other circumstance suggesting bias, these circumstances must be disclosed to the defendant.

B. Timing of Disclosure

It is difficult to fix a specific time or deadline for disclosure of impeaching information. A number of considerations apply:

> Under *Brady* and *Giglio*, the Government must provide material and exculpatory information in sufficient time for the defense to make use of it. For some information, this can be satisfied just before and even during trial. For other information, that would lead to other material information, disclosure must be earlier.
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> Under Texas Disciplinary Rule of Professional Conduct 3.09, a prosecutor must make "timely disclosure" of information known to the prosecutor that tends to negate guilt or mitigate the offense.

Under 18 U.S.C. § 3500 and Rule 26.2, impeaching statements must be disclosed upon completion of the witness' direct examination. However, earlier disclosure is encouraged by the courts to avoid the need for taking recesses to allow counsel to review materials.

Generally, the government is not required to disclose the identity of witnesses before jury selection, with limited exceptions.

Given these various considerations, and the policy of disclosing section 3500 and Rule 26.2 statements at least one day before the witness testifies, the same general rule applies to other impeachment information. However, if impeachment information can be provided to the defense earlier without jeopardizing the safety of witnesses or the integrity of the proceeding, AUSAs are encouraged to make disclosure sooner.

C. Special Considerations: Agent Notes, AUSA Notes, EMAILS

1. Agent Notes

As discussed above, the Fifth Circuit does not require the prosecution to produce agents' notes, including notes of witness interviews, if those notes have been substantially incorporated into a final report. It is office policy to follow Fifth Circuit precedent. Agents' notes should not be produced to the defense except:

When the AUSA is aware that there is a discrepancy between the notes and the final report;

When a question arises during litigation, and the notes should be provided to the court for in camera inspection;

The court otherwise orders production of the notes and such order will not be challenged.

NOTE: The Court in Midland and Pecos requires preservation of agent notes pertaining to confidential informants. This is a local practice and AUSAs in those divisions should familiarize themselves with the court's intent and make sure they notify agents and agencies to preserve notes.

If an AUSA determines that an agent's notes contain information that contradicts the testimony of a witness, which contradiction is not reflected in an investigative report, the AUSA should disclose the information to the defense. The AUSA should consult with the agent before making disclosure, should seek to determine whether the contradiction is real or apparent, and as appropriate, object to improper use of the notes to cross examine a witness other than the person who took the notes.

2. AUSA Notes

It is generally assumed that notes taken by AUSAs during witness interviews are privileged work product and are not subject to disclosure to the defense. While the notes may enjoy some work product protection, exculpatory or impeaching *information* in the notes is not shielded from the requirements of *Brady* and *Giglio*.

It is office policy not to disclose AUSA interview notes unless ordered by the court for in camera review. However, all AUSAs should make it a practice to carefully review their notes of witness interviews for exculpatory and impeaching information. Where notes contain discrepancies in a witness' account of events, conflict with a witness's testimony, or contain other impeaching information, AUSAs should provide that information to the defendant in the form of a letter or other writing.

The same holds true for information obtained in any proffer from a witness/defendant, including information proffered by the defendant/witness' attorney.

3. VWC Notes, communications, memos

Communications between a Victim Witness Coordinator and witnesses (including victims who may be witnesses) may contain impeachment information. Communications may include emails, correspondence, or other writings or recordings (voice mails). Advice, referrals for assistance, substantive assistance in preparing forms for victim assistance (which may not be appropriate), and other encouragements or considerations, are or may be benefits to a witness about which cross examination would be appropriate. AUSAs should consult with VWCs about such communications and make appropriate disclosures of the information.

4. Emails

Email has become an invaluable tool in the investigation and prosecution of criminal cases. As a general rule, **emails to or from agents or witnesses that contain "substantive" information**, that is, information other than house-keeping matters, such as the time and place of scheduled meetings, notices of settings, expressions of the need to meet or to interview certain witnesses or acquire certain evidence, **should be discouraged and avoided**. In other words, **any matter that ordinarily would be included in an investigative report should not be communicated by email**. (E.g., a brief report on information revealed in the interview of a witness, source or cooperating defendant.) Such emails have the potential to undermine the agencies' procedures for writing accurate investigative reports because emails tend to be written on the spur of the moment, are not intended to be comprehensive, and are not subject to review and approval in the same way investigative reports are. Likewise, **emails should not communicate an opinion about the truthfulness of a witness or the accuracy of his or her information. Nor should emails encourage witnesses to testify in some particular manner, speculate about the impact of certain information on the defense, or otherwise include unprofessional, irrelevant, or unduly prejudicial information**.

Because email is such an effective communication tool, it is unlikely that a policy forbidding its use would be followed. Bearing in mind the distinction between "substantive" and non-substantive emails, the policy in this office regarding emails between AUSAs and agents, AUSAs and witnesses, and VWCs and witnesses or agents is as follows:

1. To the extent emails are used, refrain from including substantive case-related information in emails;
2. Assume that emails relating to cases will be disclosed to the court, the defendant and the public, and the writer or recipient will be questioned about it. If the information is of the type that will or should be included in a report or other routine document, refrain from including a rough or incomplete draft of that information in an email.
3. Advise and remind agents often about this policy.
4. Preserve all case-related emails in either electronic or printed form.
5. Review all emails for Rule 16 information, Jencks Act and Rule 26.2 statements of agents and witnesses, and *Brady* and *Giglio* materials.

V. *BRADY* AND *GIGLIO* OBLIGATIONS

A. *Brady* Obligation–As a matter of constitutional due process, the prosecution cannot suppress material, exculpatory or mitigating information. *Brady v. Maryland*, 373 U.S. 83 (1963). This rule applies to material information that affects the credibility of government witnesses–that is, impeaching information. *Giglio v. United States*, 405 U.S. 150 (1972).

Strictly speaking, *Brady* is a rule of fairness and not a discovery rule. If the prosecution team fails to disclose to a defendant information that exculpates, impeaches, or mitigates punishment, and that information is material in the sense that it undermines confidence in the outcome of a trial, a defendant's conviction (or sentence) must be set aside. Materiality is judged retrospectively, viewing the totality of the suppressed information in light of the record evidence. The prosecutor's intent or good faith in failing to disclose such information is irrelevant in determining materiality and the requirements of due process. The information must be provided in sufficient time for the defendant to make use of it. The duty to disclose is on-going, even if the information is discovered after conviction.

In practice, *Brady* works much like a discovery rule and the failure to produce *Brady* information raises questions of both fairness and professional misconduct by the prosecutor. Indeed, the misconduct issue arises whether or not the information is determined to be material. For purposes of our practice, *Brady* should be regarded as a discovery rule, and exculpatory and mitigating information generally should be provided concurrently with Rule 16 disclosures. Impeaching information should be provided concurrently with section 3500 (Jencks Act) or Rule 26.2 statements, unless the information is of such nature that the defendant may need the information earlier in order to make effective use of the information. As with Jencks Act statements, the timing of disclosure must be balanced against any potential threat that the defendant may harm or seek to influence witnesses, which must be evaluated on a case-by-case basis in consultation with a supervisor. In all cases, it must be

provided in sufficient time for the defendant to make use of it, which may include further investigation by the defense. If *Brady* information is discovered after Rule 16 discovery has been provided, it should be provided promptly to the defense. And all disclosures should be documented in writing with sufficient clarity that it can be determined what information was actually provided to the defense. For an extensive discussion of cases interpreting *Brady* and *Giglio*, see USA Book, "Brady & Giglio Issues" (http://10.173.2.12/usao/eousa/ole/usabook/bgig/bgig.pdf).

B. Impeachment Information relating to law enforcement witnesses.

The Department of Justice and the office have developed specific policies for obtaining impeachment information relating to law enforcement witnesses, both of which are included in the office's Criminal Handbook. See the discussion in IV.A.2, above.

C. Scope of Obligation. As indicated above, *Brady* technically applies only to *material* information that is exculpatory, mitigating, or impeaching. However, several authorities extend our disclosure obligation well beyond materiality.

D. DOJ Policy

USAM 9-5.001 dispenses with the constitutional standard for materiality and requires disclosure of any information that is **inconsistent with any element of any crime**, and impeachment information that **casts a substantial doubt upon the accuracy of any evidence the prosecution intends to rely upon to prove an element of any crime charged; or might have a significant bearing on the admissibility of prosecution evidence.** Information must be disclosed whether or not it is admissible, and whether or not it is likely to make the difference between conviction and acquittal. See USAM § 9-5.001

E. Professional Responsibility

In addition to DOJ policy, Texas Disciplinary Rule of Professional Conduct 3.09 requires a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." This obligation, too, is broader than *Brady*'s constitutional standard of materiality. The District Courts for the Western District of Texas have incorporated this rule into the Local Court Rules, making it applicable to all AUSAs, regardless of which state holds their license.

F. Application

If *Brady* can be reduced to a simple rule, it is this: If the information might hurt the case–disclose it; if the information doesn't hurt the case–disclose it.

VI. WHERE TO LOOK FOR DISCOVERABLE INFORMATION

The memo of the Deputy Attorney General dated January 4, 2010, sets forth substantial guidance to prosecutors about looking for and obtaining discoverable information. It is available at: Guidance for Prosecutors Regarding Crm. Discovery.PDF . All AUSAs should review this guidance memo.

A non-exhaustive list of places to obtain discoverable information includes:

A. Prosecution Team Members

Those who may be included in the "prosecution team" will vary from case to case. At a minimum it will include investigative agents who actively participated in the investigation. Consult the Guidance Memo for a thorough discussion of the scope of the prosecution team.

B Investigative Agency Files

Reports of Investigation
Reports of Interview/302's
EC s (Electronic Communications)
Intra-agency or internal communications
Reports, receipts, etc., documenting chain of custody
Agent Notes
Emails

C. Files/Information re; Cooperating sources, CHS, cooperating defendants, etc.

Agency CI, CHS files
FBI–Delta files
DEA Source files
Payments
Validation assessments
Criminal History from various LEA databases
Other pending charges
Presentence Reports–inconsistent statements

D. Information/documents/objects obtained during investigation

All items obtained by search warrant; consensual searches
Documents, information obtained by subpoena–grand jury, trial, administrative
Information obtained by other process: 18:2703(d); pen register; cell site; Title III
Surveillance and other photos
Trash runs
Recordings: Audio and video
Chain of custody of evidence reports, receipts, etc.

E. In cases involving parallel proceedings/investigations

Depending on interaction and involvement, records, documents and other information collected by administrative or regulatory agency (SEC, etc.), agency interview reports and notes.

F. Substantive case-related communications

Emails–between agents, AUSAs, witnesses, victims, others, VWCs.

G. Brady/Impeachment information

See discussion above.

VII. DOCUMENTING DISCOVERY

AUSAs should document their discovery practice. This includes documenting the search for discoverable materials, the review of materials gathered, and disclosures.

There is no single method for doing this. The method will vary according to the type of case and the complexity of cases. Developing a checklist indicating how an AUSA attempted to obtain discoverable information and listing the type of information reviewed and disclosed, may be helpful. In many cases, it will be sufficient to keep a copy of the discoverable materials along with a cover letter to the defense in the case file. In other cases, especially very complex cases, it is prudent to number all documents, including reports (Bates stamp) and maintain an inventory by document number reflecting the nature of the documents and the date(s) disclosure was made. Digitizing the discovery (scanning records and storing them on disc) creates an excellent record of discovery, but depends upon ensuring that all information is collected and scanned. Obviously, a detailed inventory is not practical or necessary in all cases, and because such efforts require an enormous effort by support staff, it cannot be done in all cases. But AUSAs should maintain a record of all disclosures made to the defense in a manner that permits one to demonstrate at a later date whether and when a particular document, item or information was disclosed to the defense.