4.7 - DISCLOSURE PRACTICES OF THE DISTRICT OF UTAH

INTRODUCTION

The disclosure practices of the U.S. Attorney's Office for the District of Utah are set forth below, and follow a January 4, 2010 memorandum from Deputy Attorney General Ogden entitled, "Guidance for Prosecutors Regarding Criminal Discovery" and an accompanying memorandum directing that USAOs establish or update written discovery policies in accordance with the guidance. This document addresses the Department's guidance and disclosure responsibilities for prosecutors[1] at this office.[2]

To satisfy all of their disclosure responsibilities, prosecutors are responsible for knowing the disclosure obligations in the following authority: Rules 16 and 26.2 of the Federal Rules of Criminal Procedure, 18 U.S.C. § 3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), USAM 9-5.001, *Guidance for Prosecutors Regarding Criminal Discovery*, Criminal Resource Manual 165, and precedent and local rules in the Tenth Circuit and the District of Utah.

The disclosure practices are premised on the office's philosophy and experience that early and expanded disclosure promotes open communication and resolution of cases, the pursuit of justice, respect from the court and the community, and most importantly, the fulfillment of a prosecutor's ethical responsibilities. The disclosure practices referenced here cannot cover every issue. Prosecutors should be mindful of the references above, should refer to the references regularly, and should consult with a supervisor as questions and concerns arise.

This document is organized as follows. To provide a foundation for the office's practices, Part I contains the background for a prosecutor's disclosure responsibilities and is organized as follows:

A. Rule 16
B. *Brady* Material
C. *Giglio* Material
D. USAM 9-5.001: Department Policy About *Brady* and *Giglio* Material
E. Department Policy About Discoverable Information in the Possession of the Intelligence Community or Military
F. Jencks and Rule 26.2 Material
G. Other Disclosure Responsibilities

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[1]The term "prosecutors" throughout the disclosure practices includes Assistant United States Attorneys, Special Assistant United States Attorneys, Department of Justice attorneys, and any other attorneys who handle any criminal case in this office.

[2] The policy is subject to legal precedent, court orders, and local rules. It provides prospective guidance only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits. *See United States v. Caceres*, 440 U.S. 741 (1979).

Part II of this document provides direction for carrying out disclosure responsibilities, and the topics follow the organization in the Department's *Guidance for Prosecutors Regarding Criminal Discovery*, as follows:

A. Gathering and Reviewing Discoverable Information
B. Conducting the Review
C. Making the Disclosures
D. Making a Record

I. A Prosecutor's Disclosure Responsibilities Under Rule 16, *Brady*, *Giglio*, USAM 9-5.001, Rule 26.2 and the Jencks Act, and Other Areas

To ensure discovery obligations are met, prosecutors should be knowledgeable of all relevant provisions.

> The Department's disclosure obligations are generally set forth in Fed.R.Crim.P. 16 and 26.2, 18 U.S.C. § 3500 (the Jencks Act), *Brady*, and *Giglio*.... Prosecutors must familiarize themselves with each of these provisions and controlling case law that interprets these provisions. In addition, prosecutors should be aware that USAM 9-5.001 details the Department's policy regarding the disclosure of exculpatory and impeachment information and provides for broader disclosures than required by *Brady* and *Giglio*.

Criminal Resource Manual 165 at Step 3.

A. Rule 16

Rule 16(a) sets forth the government's basic discovery obligations. Under Rule 16(a), the government is required to disclose:

- the substance of any relevant oral statements made by the defendant in response to interrogation by a person the defendant knew was a government agent if the governments intends to use the statement at trial;
- written or recorded statements of the defendant or a person legally able to bind the defendant;
- the defendant's criminal history;
- all documents or other tangible evidence the government plans to introduce in its case-in-chief, which is material to the defense, or was obtained from or belongs to the defendant;
- reports of physical, mental, or scientific examinations (such as handwriting analysis, drug analysis, fingerprint reports, etc.) to be introduced by the government in its case-in-chief or which are material to the defense; and
- expert witness disclosures and summaries.

As outlined in section II(C)(1) below, the office uses an expanded discovery practice in most cases. Pursuant to the expanded discovery practice, a defendant is not required to make requests

for Rule 16(a) discovery, and summaries of witness interviews are disclosed even though Rule 16(a)(2) exempts them from disclosure.

Rule 16(b) sets forth a defendant's reciprocal discovery obligations. Experience has shown that unless prosecutors are vigilant about holding the defense to those obligations, reciprocal discovery very well may not be provided. When Rule 16(b) is implicated, a defendant must allow the government, upon request, to inspect and copy or photograph all documents or other tangible evidence, any physical or mental examination, any scientific test, and all written summaries of the testimony of any expert that are within the defendant's possession, custody, or control and that the defense intends to use in its case-in-chief. A defendant's Rule 16(b) responsibilities are implicated in one of two ways. First, under the District Court's local rule, when the government uses open file discovery in a case, a defendant must comply with all of the reciprocal discovery obligations in Rule 16(b). The office's expanded discovery practice is what the local rule envisions and thereby invokes a defendant's reciprocal discovery responsibilities. In the limited cases when the expanded discovery practice is not used, Rule 16(b) takes effect only if a defendant makes certain discovery requests of the government and the government complies.

B. ***Brady*** **Material**

Brady material refers to evidence or information that could be used by a defendant to make his/her conviction less likely or a lower sentence more likely. It is impossible to list all of the different kinds of evidence that the government might be required to disclose under *Brady*. However, the following general categories describe most *Brady* material:

- Evidence tending to show that someone else committed the criminal act;
- Evidence tending to show that the defendant did not have the requisite knowledge or intent;
- Evidence tending to show the absence of any element of the offense, or which is inconsistent with any element of the offense (e.g., evidence showing that an alleged interstate wire transfer was actually an intrastate wire transfer);[3]
- Evidence that either casts a substantive doubt upon the accuracy of evidence including but not limited to witness testimony the prosecutor intends to rely on to prove an element of any crime charged, or which may have a significant bearing on the admissibility of prosecution's evidence. *See* USAM 9-5.001(C);
- Evidence tending to show the existence of an affirmative defense, such as entrapment or duress; and
- Evidence tending to show the existence of past or present circumstances that might reduce the defendant's sentence in ways such as reducing the guideline range, diminishing the applicability of an adjustment, providing a basis for the defendant to achieve a favorable adjustment such as minor or minimal participant, supporting a request for a sentence at the low end of the guideline range or for a

[3]Prosecutors must disclose this information even if they do not believe such information will make the difference between conviction and acquittal for a charged crime. *See* USAM 9-5.001(C).

downward departure, or making inapplicable to the defendant a mandatory minimum sentence.

C. *Giglio* Material

Giglio material refers to evidence or information that could be used by a defendant to impeach a government witness or affiant.[4] To decide what evidence is covered by *Giglio*, a prosecutor should be alert to any basis for impeachment, including the following.

1. Bias

A witness can be impeached with evidence (including extrinsic evidence) that he/she has a bias against the defendant or in favor of the government. *See United States v. Abel*, 469 U.S. 45 (1984). The sources of such bias are too numerous and varied to catalogue, but here are a few illustrations:

- A witness might dislike the defendant because of some unrelated previous encounter between the two or because of the defendant's race.
- A witness who has some actual or potential exposure to criminal penalties arising from the subject matter of the prosecution may have a pro-government bias resulting from obtaining some form of leniency from the government, which may take many forms, such as a plea agreement reducing the witness's potential sentence, an agreement not to seek forfeiture of property, a decision to place the person in the witness security program, or a decision to grant the witness full transactional immunity. Pro-government bias can also be shown when the United States gives the witness money, gifts, or any other thing of value, or participates in the witness's transfer to a more comfortable facility or receipt of special jailhouse privileges.
- A witness may have a pro-government bias resulting from the government's favorable treatment of a relative or friend who has criminal exposure.
- A witness may have a pro-government bias because he/she fears unfavorable treatment in a related or unrelated proceeding pending before another government agency or court, or because he/she fears that such a proceeding will be instituted.
- A witness may have a pro-government bias because of a social relationship with a member of the prosecution team.

2. Specific Instances of Misconduct Involving Dishonesty

A witness can be impeached through cross examination, but not by extrinsic evidence, of a prior act of misconduct involving dishonesty, even if it has not resulted in a criminal charge or conviction. *See* Fed. R. Evid. 608(b). Examples of such prior misconduct include lying (or failing to disclose material facts) on a job application, tax return, or search warrant affidavit; lying to criminal investigators or in a court proceeding; stealing or otherwise misappropriating property (in certain circumstances); or using an alias.

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[4]Prosecutors should remember that *Giglio* also applies to affiants.

3. Criminal Conviction

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

4. Prior Inconsistent Statements

A witness can be impeached with evidence (including extrinsic evidence in most situations) of prior inconsistent statements. *See* Fed. R. Evid. 613.

5. Untruthful Character

A witness can be impeached by the testimony of a second witness that he/she has a reputation in the community for being untruthful. Similarly, a witness can be impeached by the testimony of a second witness that in the opinion of the second witness, based on the second witness's dealings with and observations of the witness, the witness is generally untruthful. *See* Fed. R. Evid. 608(a).

6. Issues in Perception and Recollection

A witness can be impeached with evidence (including extrinsic evidence in most situations) of defects in his/her physical or mental capacities at the time of the offense or when he/she testifies at a hearing or trial. *See* 1 McCormick on Evidence § 44 (4th ed. 1992). An example of a physical incapacity is the poor eyesight of an eyewitness to a bank robbery. Examples of mental incapacity are the drunken fog through which an inebriated eyewitness to a bank robbery observed the crime, the sluggishness caused by a witness's use or abuse of controlled substances at the time of the event or trial, and a witness's mental disease or defect.

7. Contradiction

A witness can be impeached with evidence (including extrinsic evidence in most situations) of facts that contradict the witness's testimony. *See* 1 McCormick on Evidence § 45 (4th ed. 1992).

Giglio does not apply to non-testifying witnesses other than non-testifying declarants whose hearsay statements are introduced at trial. *See* Fed. R. Evid. 806.

D. USAM 9-5.001: Department Policy About *Brady* and *Giglio* Material

Prosecutors are responsible for knowing and fully complying with Department policy regarding disclosure of *Brady* and *Giglio* material.

Pertinent portions of the USAM follow:

(B)1. Materiality and Admissibility. Exculpatory and impeachment evidence is material to a finding of guilt – and thus the Constitution requires disclosure – when there is a reasonable probability that effective use of the evidence will result in an acquittal. *United States v. Bagley*, 475 U.S. 667, 676 (1985). Recognizing that it is sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence. *Kyles*, 514 U.S. at 439. While ordinarily, evidence that would not be admissible at trial need not be disclosed, this policy encourages prosecutors to err on the side of disclosure if admissibility is a close question.

....

[B. The Brady/Giglio obligations, are referenced in substance above, and are omitted here. The reader is referred directly to the USAM.]

C. Disclosure of exculpatory and impeachment information beyond that which is constitutionally and legally required. Department policy recognizes that a fair trial will often include examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal or, as is often colloquially expressed, make the difference between guilt and innocence. As a result, this policy requires disclosure by prosecutors of information beyond that which is "material" to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999). The policy recognizes, however, that a trial should not involve the consideration of information which is irrelevant or not significantly probative of the issues before the court and should not involve spurious issues or arguments which serve to divert the trial process from examining the genuine issues. Information that goes only to such matters does not advance the purpose of a trial and thus is not subject to disclosure.

1. Additional exculpatory information that must be disclosed. A prosecutor must disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime.

2. Additional impeachment information that must be disclosed. A prosecutor must disclose information that either casts a substantial doubt upon the accuracy of any evidence – including but not limited to witness testimony – the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information must be disclosed regardless of whether it is likely to make the difference between conviction and acquittal of the defendant for a charged crime.

3. Information. Unlike the requirements of *Brady* and its progeny, which focus on evidence, the disclosure requirement of this section applies to information regardless of whether the information subject to disclosure would itself constitute admissible evidence.

4. Cumulative impact of items of information. While items of information viewed in isolation may not reasonably be seen as meeting the standards outlined in paragraphs

1 and 2 above, several items together can have such an effect. If this is the case, all such items must be disclosed.

D. Timing of disclosure. Due process requires that disclosure of exculpatory and impeachment evidence material to guilt or innocence be made in sufficient time to permit the defendant to make effective use of that information at trial. *See*, *e.g. Weatherford v. Bursey*, 429 U.S. 545, 559 (1997); *United States v. Farley*, 2 F.3d 645, 654 (6th Cir. 1993). In most cases, the disclosures required by the Constitution and this policy will be made in advance of trial.

1. Exculpatory information. Exculpatory information must be disclosed reasonably promptly after it is discovered. This policy recognizes that exculpatory information that includes classified or otherwise sensitive national security material may require certain protective measures that may cause disclosure to be delayed or restricted (*e.g.* pursuant to the Classified Information Procedures Act).

2. Impeachment information. Impeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. In some cases, however, a prosecutor may have to balance the goals of early disclosure against other significant interests – such as witness security and national security – and may conclude that it is not appropriate to provide early disclosure. In such cases, required disclosures may be made at a time and in a manner consistent with the policy embodied in the Jencks Act, 18 U.S.C. § 3500.

3. Exculpatory or impeachment information casting doubt upon sentencing factors. Exculpatory and impeachment information that casts doubt upon proof of an aggravating factor at sentencing, but that does not relate to proof of guilt, must be disclosed no later than the court's initial presentence investigation.

4. Supervisory approval and notice to the defendant. A prosecutor must obtain supervisory approval not to disclose impeachment information before trial or not to disclose exculpatory information reasonably promptly because of its classified nature. Upon such approval, notice must be provided to the defendant of the time and manner by which disclosure of the exculpatory or impeachment information will be made.

USAM 9-5.000(B)(1), (C)-(D).

E. Department Policy About Discoverable Information in the Possession of the Intelligence Community or Military

Cases involving national security, including terrorism, espionage, counterintelligence, and export enforcement, can present unique and difficult criminal discovery issues. The Department of Justice has developed special guidance for those cases, which is contained in Acting Deputy Attorney General Gary G. Grindler's September 29, 2010, memorandum, "Policy and Procedures Regarding the Government's Duty To Search for Discoverable Information in the Possession of the Intelligence Community or Military in Criminal Investigations." Prosecutors should consult that memorandum and their supervisors regarding discovery obligations relating

to classified or other sensitive national security information. As a general rule, in those cases where the prosecutor, after conferring with other members of the prosecution team, has a specific reason to believe that one or more elements of the Intelligence Community (IC) possess discoverable material, he or she should consult the National Security Division (NSD) regarding whether to request a prudential search of the pertinent IC element(s). All prudential search requests and other discovery requests of the IC must be coordinated through NSD.

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

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

F. Jencks and Rule 26.2 Material

The Jencks Act (18 U.S.C. § 3500) and Fed. R. Crim. P. 26.2 require disclosure of a witness's statements that relate to the subject matter of the witness's testimony at trial or a hearing. Both the Jencks Act and Rule 26.2 define "statement" similarly. Specifically, a statement includes:

- A written statement that the witness makes and signs or otherwise adopts and approves;

- A substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording; and
- Grand jury testimony.

The Jencks Act applies to trials. Rule 26.2 applies to trials, suppression hearings, preliminary hearings, detention hearings, sentencing hearings, hearings to consider revocation of probation or supervised release, and § 2255 hearings.

Prosecutors should remember that Rule 26.2 is equally applicable to defense witnesses, other than the defendant. The office's form Statement of Discovery Protocol serves as the required request for Rule 26.2 statements of defense witnesses. Prior to any hearing or trial where the defense is expected to call witnesses, prosecutors should remind defense counsel of their obligation to disclose Rule 26.2 statements of those witnesses and involve the court if necessary.

Prosecutors should also remember that if a witness has not adopted the report of the witness's interview, the defense attorney should not be able to cross examine the witness as if it were the witness's statement.

The office's expanded discovery practice eliminates the need for the defendant to request Jencks and Rule 26.2 material.

G. Other Disclosure Responsibilities

Prosecutors should also be mindful of their disclosure responsibilities in the following contexts.

Grand Jury

Exculpatory Information: Although the Supreme Court has held that 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 prosecutors to disclose to the grand jury "substantial evidence that directly negates the guilt of a subject of the investigation."

Exemption 5 - Attorney Work Product

[redacted]

Guilty Pleas

The Supreme Court has held that there is no constitutional requirement that the government disclose impeachment information prior to a guilty plea. *See United States v. Ruiz*, 536 U.S. 622 (2002). Exemption 5 - Attorney Work Product

Exemption 5 - Attorney Work Product

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Confidential Informants

Roviaro v. United States, 353 U.S. 53 (1957), and its progeny mandate the disclosure of the identity of government informants under a narrow set of circumstances. As a general rule, the government is not required to disclose the identity of an informant unless the informant has relevant information that is helpful to the defense, i.e., he or she was an eyewitness to the charged offense. Informants who merely act as tipsters are never disclosed.

Rules 404(b), 413, and 414 of the Federal Rules of Evidence

Rule 404(b) of the Federal Rules of Evidence requires reasonable pretrial notice of other crimes or bad act evidence to be offered by the United States. Similar notice obligations exist for introduction of evidence in sexual abuse cases. Rule 413 authorized introduction of evidence of similar crimes in sexual assault cases and Rule 414 allows introduction of similar evidence in child molestation cases.

Both Rules 413 and 414 mandate that the government must give notice of its intention to offer such evidence and disclose the evidence to the defendant at least 15 days prior to trial, and prosecutors must comply with this requirement. Rule 404(b) mandates reasonable notice without a specific deadline. However, in many cases judges set a specific deadline for disclosure of 404(b)-type evidence. Prosecutors should disclose Rule 404(b) evidence in compliance with a pre-trial order but in the absence of such an order, within a sufficient time prior to trial so as not to jeopardize its admission.

Rule 12

It is the practice of the district to turn over Rule 12 material (e.g., search warrants, reports of search and seizure and arrests, and witness identification) to the defense with the Rule 16 material. It is in our interest to provide evidence that may be the subject of a motion to suppress as soon as possible.

Rule 12.1

If, in response to a government request pursuant to Rule 12.1(a)(1), the defendant provides specific notice to the government of an intention to assert an alibi defense, the government is required within 14 days after the defendant's notice, and no later than 14 days before trial, to give the defendant in writing:

a. the name, address and telephone number of each witness the government will rely on to establish that the defendant was present; and

b. each government rebuttal witness to the defendant's alibi defense.

In view of the government's obligation to disclose certain information about its witnesses if the defendant responds to the government's request, consideration should be given to making this request closer to trial rather than earlier in the prosecution.

Presentence Reports

If there is a witness who is or was a defendant in federal court, in most cases there will be a Presentence Report (PSR) relating to that witness. The PSR may contain Jencks, *Brady*, or *Giglio* material that may need to be disclosed at the appropriate time. Prosecutors should obtain and review the PSR, and if there is any Jencks, *Brady*, or *Giglio* material that should be disclosed, and that information has not been disclosed elsewhere and is not readily available from another source, a disclosure motion and order requesting either an *in camera* review or disclosure should be filed.

With regard to Jencks material, the case law is clear that a testifying witness's entire PSR is not the witness's Jencks material. That is, failing to object to the PSR is not equivalent to the witness's adoption of the entire PSR as a statement under the Jencks Act. However, the testifying witness's PSR may contain Jencks material and it is most likely to appear in the defendant's version of the offense. Prosecutors should examine the defendant's version of the offense to determine: (a) if it falls within the Jencks Act definition of statement–was it written by the defendant, a quote, or a substantially verbatim recital of an oral statement; and (b) if it relates to the subject matter of the witness's testimony. Of course, even if it is not Jencks, it may still be subject to disclosure as *Brady* or *Giglio* material.

II. The Office's Disclosure Practices

A. Gathering and Reviewing Discoverable Information

1. Where to Look – The Prosecution Team

In *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995), the Supreme Court held that a defendant is entitled to the disclosure of all *Brady* and *Giglio* material known to any member of the prosecution team. Thus, if any member of the prosecution team knows of any *Brady* or *Giglio* material, the prosecutor will be held legally responsible for disclosing that evidence to the defendant, whether or not the prosecutor actually knows about the evidence.

Consistent with *Kyles*, Department policy states:

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

USAM 9-5.001. "This search duty also extends to information prosecutors are required to disclose under Federal Rules of Criminal Procedure 16 and 26.2 and the Jencks Act." Criminal Resource Manual 165 at Step 1A.

Defining the prosecution team is therefore paramount in fulfilling a prosecutor's disclosure responsibilities. Prosecutors should follow the Department's guidance about determining the prosecution team:

> In most cases, "the prosecution team" will include the agents and law enforcement officers within the relevant district working on the case. In multi-district investigations, investigations that include both Assistant United States Attorneys and prosecutors from a Department litigating component or other United States Attorney's Office (USAO), and parallel criminal and civil proceedings, this definition will necessarily be adjusted to fit the circumstances. In addition, in complex cases that involve parallel proceedings with regulatory agencies (SEC, FDIC, EPA, etc.), or other non-criminal investigative or intelligence agencies, the prosecutor should consider whether the relationship with the other agency is close enough to make it part of the prosecution team for discovery purposes.
>
> Some factors to be considered in determining whether to review potentially discoverable information from another federal agency include:
>
> - Whether the prosecutor and the agency conducted a joint investigation or shared resources related to investigating the case;
> - Whether the agency played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in targeting discussions, or otherwise acting as part of the prosecution team;
> - Whether the prosecutor knows of and has access to discoverable information held by the agency;
> - Whether the prosecutor has obtained other information and/or evidence from the agency;
> - The degree to which information gathered by the prosecutor has been shared with the agency;
> - Whether a member of an agency has been made a Special Assistant United States Attorney;
> - The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges; and
> - The degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party.
>
> Many cases arise out of investigations conducted by multi-agency task forces or otherwise involving state law enforcement agencies. In such cases, prosecutors should consider (1) whether state or local agents are working on behalf of the prosecutor or are under the prosecutor's control; (2) the extent to which state and federal governments are part of a team, are participating in a joint investigation, or

> are sharing resources; and (3) whether the prosecutor has ready access to the evidence. Courts will generally evaluate the role of a state or local law enforcement agency on a case-by-case basis. Therefore, prosecutors should make sure they understand the law in their circuit and their office's practice regarding discovery in cases in which a state or local agency participated in the investigation or on a task force that conducted the investigation.
>
> Prosecutors are encouraged to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes. Carefully considered efforts to locate discoverable information are more likely to avoid future litigation over *Brady* and *Giglio* issues and avoid surprises at trial.
>
> Although the considerations set forth above generally apply in the context of national security investigations and prosecutions, special complexities arise in that context. Accordingly, the Department expects to issue additional guidance for such cases.[5] Prosecutors should begin considering potential discovery obligations early in an investigation that has national security implications and should also carefully evaluate their discovery obligations prior to filing charges. This evaluation should consider circuit and district precedent and include consultation with national security experts in their own offices and in the National Security Division.

Criminal Resource Manual 165 at Step 1A.

Prosecutors should also be mindful that agencies could become part of the prosecution team by appearing at the office's press conferences regarding the case.

Practice to Define the Prosecution Team

EXEMPTION 5 - Attorney Work Product

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Exemption 5 - Attorney Work Product

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[5]This guidance was issues 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."

Exemption 5 - Attorney Work Product

[redacted]

2. What to Review

Prosecutors should take an active role in ensuring that all potential discovery and disclosable material within the custody or control of the prosecution team is reviewed. While it is often most efficient and effective for the case agent to take primary responsibility for reviewing potential sources for discovery and disclosure, the prosecutor is ultimately responsible.

Prosecutors should follow the Department's guidance about the sources that should be reviewed and how to conduct the review. The office's form Disclosure Letter for case agents contains the same guidance. The Department directs that the following potential sources should be reviewed:

- The investigative agency files;
- Confidential informant (CI)/witness (CW)/human source (CHS)/source (CS) files;
- Evidence and information gathered during the investigation;
- Documents or evidence gathered by civil attorneys and/or regulatory agency in parallel civil investigations;
- Substantive case-related communications;
- Potential *Giglio* information relating to law enforcement witnesses;
- Potential *Giglio* information relating to non-law enforcement witnesses and Fed. R. Evid. 806 declarants; and
- Information obtained in witness interviews.

See Criminal Resource Manual 165, Step 1B.

The Department's guidance about each potential source, with office policies, practices, and guidance interspersed throughout, is set forth as follows.

> To ensure that all discovery is disclosed on a timely basis, generally all potentially discoverable material within the custody or control of the prosecution team should be reviewed. The review process should cover the following areas:
>
> 1. The Investigative Agency's Files: With respect to Department of Justice law enforcement agencies, with limited exceptions, the prosecutor should be granted access to the substantive case file and any other file or document the prosecutor has

reason to believe may contain discoverable information related to the matter being prosecuted. Therefore, the prosecutor can personally review the file or documents or may choose to request production of potentially discoverable materials from the case agents. With respect to outside agencies, the prosecutor should request access to files and/or production of all potentially discoverable material. The investigative agency's entire investigative file, including documents such as FBI Electronic Communications (ECs), inserts, emails, etc. should be reviewed for discoverable information. If such information is contained in a document that the agency deems to be an "internal" document such as an email, an insert, an administrative document, or an EC, it may not be necessary to produce the internal document, but it will be necessary to produce all of the discoverable information contained in it. Prosecutors should also discuss with the investigative agency whether files from other investigations or non-investigative files such as confidential source files might contain discoverable information. Those additional files or relevant portions thereof should also be reviewed as necessary.

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, prosecutors are entitled to access to the agency file for each testifying CI, CW, CHS, or CS. Those files should be reviewed for discoverable information and copies made of relevant portions for discovery purposes. The entire informant/source file, not just the portion relating to the current case, including all proffer, immunity, and other agreements, validation assessments, payment information, and other potential witness impeachment information should be included within this review.

If a prosecutor believes that the circumstances of the case warrant review of a non-testifying source's file, the prosecutor should follow the agency's procedures for requesting the review of such a file.

Prosecutors should take steps to protect non-discoverable, sensitive information found within a CI, CW, CHS, or CS file. Further, prosecutors should consider whether discovery obligations arising from the review of CI, CW, CHS, and CS files may be fully discharged while better protecting government or witness interests such as security or privacy via a summary letter to defense counsel rather than producing the record in its entirety.

Prosecutors must always be mindful of security issues that may arise with respect to disclosures from confidential source files. Prior to disclosure, prosecutors should consult with the investigative agency to evaluate any such risks and to develop a strategy for addressing those risks or minimizing them as much as possible, consistent with discovery obligations.

Criminal Resource Manual 165 at Step 1B, 1-2.

Policy that Agents Must Notify the Prosecutor About Informants

It is the policy of this office that agents and officers must tell the prosecutor about informants and cooperating witnesses that have been involved with the case in any way. Because of the legal issues in this area, prosecutors should personally review the agency files whenever an informant or cooperating witness is part of the case. The review should be conducted at the agency.

Practice to Thoroughly Investigate Informants and Cooperators

Prosecutors should investigate a confidential informant, or a witness who has agreed to cooperate pursuant to a plea or immunity agreement, very thoroughly. Among other things, prosecutors should investigate and disclose any information obtained in the following areas when a confidential informant or cooperating witness will testify at trial or a hearing:

- the witness's relationship with the defendant;
- the witness's motivation for cooperating/testifying;
- drug and alcohol problems;
- all benefits the witness is receiving, including:
  - monetary payments–how are they calculated?
  - expenses, costs and housing–is anyone paying?
  - immigration status for the witness and/or family members
  - arrests–intervention by law enforcement?
  - taxes–has the witness paid taxes on informant payments?
- any notes, diaries, journals, emails, letters, or other writings by the witness;
- prison files, tape recordings of telephone calls, and emails, if the informant is in custody; and
- criminal history–the prosecutor should review the criminal history with the potential witness to ensure completeness.

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

4. Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agency in Parallel Civil Investigations: If a prosecutor has determined that a regulatory agency such as the SEC is a member of the prosecution team for purposes of defining discovery obligations, that agency's files should be reviewed. Of course, if a regulatory agency is not part of the prosecution team but is conducting an administrative investigation or proceeding involving the same subject matter as a criminal investigation, prosecutors may very well want to ensure that those files are reviewed not only to locate discoverable information but to locate inculpatory information that may advance the criminal case. Where there is an ongoing parallel civil proceeding in which Department civil attorneys are participating, such as a qui tam case, the civil case files should also be reviewed.

> 5. Substantive Case-Related Communications: "Substantive" case-related communications may contain discoverable information. Those communications that contain discoverable information should be maintained in the case file or otherwise preserved in a manner that associates them with the case or investigation. "Substantive" case-related communications are most likely to occur (1) among prosecutors and/or agents, (2) between prosecutors and/or agents and witnesses and/or victims, and (3) between victim/witness coordinators and witnesses and/or victims. Such communications may be memorialized in emails, memoranda, or notes. "Substantive" communications include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility. Communications involving case impressions or investigative or prosecutive strategies without more would not ordinarily be considered discoverable, but substantive case-related communications should be reviewed carefully to determine whether all or part of a communication (or the information contained therein) should be disclosed.
>
> Prosecutors should also remember that with few exceptions (see, e.g., Fed.R.Crim.P. 16(a)(1)(B)(ii)), the format of the information does not determine whether it is discoverable. For example, material exculpatory information that the prosecutor receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email. When the discoverable information contained in an email or other communication is fully memorialized elsewhere, such as in a report of interview or other document(s), then the disclosure of the report of interview or other document(s) will ordinarily satisfy the disclosure obligation.

Criminal Resource Manual 165 at Step 1B, 3-5.

Practice Regarding the Use of Recorded Communications for Substantive Communications

Most case-related communications that are contained in emails, voice mails, text messages, or other recorded mediums (collectively referred to as "recorded communications") are: (1) generally privileged communications; (2) substantive communications; or (3) purely logistical communications. Generally privileged communications include attorney-client privileged, deliberative, and work product communications: (a) between prosecutors and other USAO personnel on matters that require supervisory approval or legal advice, *e.g.*, prosecution memoranda, *Touhy* approval requests, *Giglio* requests, etc., and involving case strategy discussions; (b) between prosecutors and other USAO personnel on case-related matters, including but not limited to organization, tasks that need to be accomplished, research, and analysis; (c) between prosecutors and agency counsel on legal issues relating to criminal cases such as *Giglio* and *Touhy* requests; and (d) from the prosecutor to an agent giving legal advice or requesting investigation of certain matters in anticipation of litigation. Such recorded communications are seldom discoverable. Prosecutors may use their discretion to transmit these types of recorded communications. Prosecutors should be aware, however, that privileged communications may point to *Brady*, *Giglio*, or Rule 16 information that is not in, or obvious in, the case file.

Substantive communications include reports about investigative activity, discussions of the relative merits of evidence, characterizations of potential testimony, interviews of or interactions with witnesses/victims, and issues relating to credibility. Prosecutors, other USAO personnel, and agents should avoid using recorded communications about substantive case-related information in criminal and parallel criminal/civil cases whenever possible. This precaution is meant to avoid creating communications that are often incomplete or not the product of appropriate reflection and deliberation and can be misconstrued. Any recorded communications regarding substantive case-related matters must be preserved. The office's form Disclosure Letter to the case agent covers these issues.

Prosecutors and any USAO personnel who interact with victims and witnesses should typically limit recorded communication exchanges to non-substantive matters such as the scheduling of interviews or notification of dates and times of hearings. Similarly, prosecutors should strongly encourage agents to limit recorded communication exchanges with victims or witnesses to non-substantive matters. Any substantive information received from a victim or witness should be reviewed for potential *Jencks Act* material and also maintained for *Brady*/*Giglio* review. If USAO personnel other than the prosecutor receives a substantive recorded communication from a victim or witness, such recorded communication should be forwarded to the prosecutor(s) assigned to the investigation or case.

Purely logistical communications include recorded communications which only contain items such as travel information, or dates and times of hearings or meetings. Recorded communications may be used to convey purely logistical information and to send formal investigative reports as attachments, or to communicate efficiently regarding non-substantive issues such as scheduling meetings, interviews, and court appearances. Again, however, prosecutors who send purely logistical recorded communications to agents should be aware that the agents' response may go beyond purely logistical matters and thereby become discoverable.

Regardless of the type of recorded communication sent, prosecutors should be careful not to use unprofessional language or engage in unprofessional dialogue. Particularly with respect to "substantive" recorded communications, prosecutors should be vigilant that neither they nor those with whom they are communicating use slang or other language that may deemed unprofessional to a jury or the public.

> 6. Potential *Giglio* Information Relating to Law Enforcement Witnesses: Prosecutors should have candid conversations with the federal agents with whom they work regarding any potential *Giglio* issues, and they should follow the procedure established in USAM 9-5.100 whenever necessary before calling the law enforcement employee as a witness. Prosecutors should be familiar with circuit and district court precedent and local practice regarding obtaining *Giglio* information from state and local law enforcement officers.
>
> 7. Potential *Giglio* Information Relating to Non-Law Enforcement Witnesses and Fed.R.Evid. 806 Declarants: All potential *Giglio* information known by or in the possession of the prosecution team relating to non-law enforcement witnesses should be gathered and reviewed. That information includes, but is not limited to:

- Prior inconsistent statements (possibly including inconsistent attorney proffers, *see United States v. Triumph Capital Group*, 544 F.3d 149 (2d Cir. 2008))

- Statements or reports reflecting witness statement variations (see below)

- Benefits provided to witnesses including:

    - Dropped or reduced charges
    - Immunity
    - Expectations of downward departures or motions for reduction of sentence
    - Assistance in a state or local criminal proceeding
    - Considerations regarding forfeiture of assets
    - Stays of deportation or other immigration status considerations
    - S-Visas
    - Monetary benefits
    - Non-prosecution agreements
    - Letters to other law enforcement officials (e.g. state prosecutors, parole boards) setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf
    - Relocation assistance
    - Consideration or benefits to culpable or at risk third-parties

- Other known conditions that could affect the witness's bias such as:

    - Animosity toward defendant
    - Animosity toward a group of which the defendant is a member or with which the defendant is affiliated
    - Relationship with victim
    - Known but uncharged criminal conduct (that may provide an incentive to curry favor with a prosecutor)
    - Prior acts under Fed.R.Evid. 608
    - Prior convictions under Fed.R.Evid. 609
    - Known substance abuse or mental health issues or other issues that could affect the witness's ability to perceive and recall events

Criminal Resource Manual 165 at Step 1B, 6-7.

<u>*Giglio* Responsibilities Differ for Law Enforcement and Non-Law Enforcement Witnesses</u>

A prosecutor's *Giglio* disclosure responsibilities differ depending on whether the witness or affiant (referred to collectively as witness) is from law enforcement or not. A law enforcement witness is an agent or officer who is part of the prosecution team. After conducting the analysis in Section II(A)(1) for defining the prosecution team, there may be certain government witnesses that do not fall within the prosecution team and thereby are non-law

enforcement witnesses. For example, a government records custodian or fingerprint expert who did not participate in the investigation is usually a non-law enforcement witness.

For law enforcement witnesses, based on *Kyles v. Whitley*, a prosecutor will be held legally responsible for disclosing all *Giglio* material, even if the prosecutor and the case agent have no idea that such material exists. Accordingly, it is the prosecutor's responsibility to ask every law enforcement affiant or testifying witness about *Giglio* material.[6] For non-law enforcement witnesses, the prosecution team is not required to look for unknown *Giglio* material.

Practice to Satisfy a Prosecutor's Law Enforcement *Giglio* Responsibilities

1. *Giglio* Questionnaire for Law Enforcement Witnesses. It is the prosecutor's responsibility to initially seek *Giglio* material from a law enforcement witness by asking the witness directly before the law enforcement witness signs an affidavit or testifies at any hearing[7] or trial. Exemption 5 - Attorney Work Product

Exemption 5 - Attorney Work Product

2. Requesting and Reviewing Personnel and Disciplinary Files. When requested by a prosecutor, the *Giglio* officer will request all *Giglio* information from the affiant/witness's agency. If it is a federal agency, the agency official will conduct a review of the agent's personnel and disciplinary files and disclose any impeaching information from the file to the requesting *Giglio* officer. If it is a state or local agency that does not have a person qualified to conduct *Giglio* reviews, the agency will likely be asked to produce the records to the *Giglio* officer for review. If a *Giglio* request has been made but not responded to before trial begins, the prosecutor should advise the court.

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[6]Federal agents to whom *Giglio* material relates have an obligation to inform the prosecutor about the material. *See* USAM 9-5.100. Nevertheless, because of the implications of *Kyles* and *Giglio* if such material is not disclosed, the office's practice is to ask all law enforcement affiants and witnesses about *Giglio* material.

[7]There is no legal duty to seek out impeachment information from the prosecution team or present impeachment information to a grand jury. Exemption 5 - Attorney Work Product

Exemption 5 - Attorney Work Product

3. Disclosure of Potential Impeachment Information to the Court or Defense Counsel. Once the agency discloses any *Giglio* information to the *Giglio* officer, the *Giglio* officer in consultation with the prosecutor will review the material to determine whether it should be disclosed to the court for an *ex parte, in camera* review or to defense counsel. The *Giglio* officer will disclose the materials to the prosecutor that appear to be potential *Brady* or *Giglio*. Before the prosecutor discloses any material either to the court for an *ex parte, in camera* review, or to defense counsel, the prosecutor should discuss the matter fully with the *Giglio* officer. If it is determined that disclosure should occur, the *Giglio* officer or prosecutor should notify the agent or agency[8] before disclosure occurs, and give them an opportunity to be fully heard on the matter.

If a prosecutor asks the court to conduct an *ex parte, in camera review* of potential *Giglio* information, the prosecutor should ensure that the prosecutor's *ex parte, in camera* presentation to the court, and the potential *Giglio* information reviewed by the court are made part of the court record, under seal if appropriate, so that it can be reviewed by the appellate court if necessary. The prosecutor should provide the *Giglio* officer and the law enforcement agency with any pleadings or documents that are filed with the court regarding a law enforcement witness's potential impeachment information, as well as with any court rulings on potential impeachment information so that the *Giglio* officer can handle the information in a consistent fashion in future cases.

4. Protective Orders. Prosecutors should seek protective orders of sensitive potential impeachment information in appropriate cases to prohibit disclosures by defense counsel or the defendant to third parties not involved in the case.

5. Securely Maintaining Sensitive Agency Material. All potential impeachment information received from an agency pursuant to a *Giglio* request should be securely maintained and should not be shared with any person who does not have a need to know. The prosecutor should keep a copy of all potential *Giglio* information received from the *Giglio* officer in the case file. *Giglio* material disclosed to the court or to defense should be clearly marked in the criminal case file, so it is clear what was disclosed to the court. Because *Giglio* information is sensitive, *Giglio* information in a criminal case file should be kept in a sealed yellow envelope when it is not in use. Consult the *Giglio* officer for more details on proper storage and security of *Giglio* information.

6. Requirement to Inform the *Giglio* officer of any Law Enforcement *Giglio* Material. The *Giglio* officer is the clearing house/gatekeeper in the district for all *Giglio* material on law enforcement witnesses. In that capacity, the *Giglio* officer is the repository of all *Giglio* materials on law enforcement witnesses in the district. Thus, the *Giglio* officer should be asked about, and may already know about, the existence of *Giglio* material on one or more of the prosecutor's law enforcement witnesses. And because the *Giglio* officer is the *Giglio* repository,

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[8]In some cases, an agent may be unaware that there is a pending investigation of their alleged misconduct. In such cases, the *Giglio* officer and the prosecutor should be careful to discuss the matter only with the agency, and not with the agent.

any prosecutor who becomes aware of *Giglio* material on a law enforcement witness, especially an explicit or implicit finding by a judicial officer that a law enforcement witness has made false or misleading statements in an affidavit or while testifying, must provide that information to the *Giglio* officer.

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

a. Witness Statement Variations and the Duty to Disclose: Some witnesses' statements will vary during the course of an interview or investigation. For example, they may initially deny involvement in criminal activity, and the information they provide may broaden or change considerably over the course of time, especially if there are a series of debriefings that occur over several days or weeks. Material variances in a witness's statements should be memorialized, even if they are within the same interview, and they should be provided to the defense as *Giglio* information.

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

c. Agent Notes: Agent notes should be reviewed if there is a reason to believe that the notes are materially different from the memorandum, if a written memorandum was not prepared, if the precise words used by the witness are significant, or if the witness disputes the agent's account of the interview. Prosecutors should pay particular attention to agent notes generated during an interview of the defendant or an individual whose statement may be attributed to a corporate defendant. Such notes may contain information that must be disclosed pursuant to Fed.R.Crim.P. 16(a)(1)(A)-(C) or may themselves be discoverable under Fed.R.Crim.P. 16(a)(1)(B). *See, e.g., United States v. Clark*, 385 F.3d 609, 619-20 (6th Cir. 2004) and *United States v. Vaffee*, 380 F.Supp.2d 11, 12-14 (D. Mass. 2005).

Criminal Resource Manual 165 at Step 1B, 8.

Practice Regarding Jencks Statements

It is the prosecutor's obligation to seek all Jencks statements from the prosecution team. *See* Criminal Resource Manual 165 at Step 1A. The office's form Disclosure Letter reminds case agents of their duty to maintain and produce all Jencks statements. Obviously, the prosecutor is responsible for obtaining transcripts of grand jury testimony. Office practice is to seek a court order allowing the early release of tax material and evidence obtained by the grand jury and matters occurring before the grand jury.

Interviews Where the Prosecutor Is Present

It is office policy that an agent or other law enforcement officer must be present whenever a prosecutor has a substantive contact with a witness. Prior to all interviews where a prosecutor is present, the prosecutor should review all prior statements of the witness and know the case well so that the prosecutor will recognize any *Brady* or *Giglio* material.

Exemption 5 - Attorney Work Product [redacted] If any *Brady* or *Giglio* material arises, the prosecutor should verify that the agent or officer makes a note of it. The interview is generally not recorded. If the prosecutor takes notes, the notes should be preserved and should not be substantially verbatim or reviewed with a witness in a way that the witness would adopt them. Not recording the interview and being careful with notes is not meant to hide anything. As stated, the prosecutor has a duty to ensure that all *Brady* and *Giglio* material is memorialized and disclosed. The precautions are meant to prevent the prosecutor from becoming a witness in the case.

At all pre-trial and pre-hearing interviews, the prosecutor should especially watch for any statements the witness makes that are different from a prior statement. Material variances in a witness's statements and all *Brady* and *Giglio* material should be memorialized by the agent or officer and disclosed to the defense in writing (and a copy of the disclosure placed in the file). To avoid inconsistent statements based on the passage of time, it is advisable to give the witness a chance to review all recordings and reports (but not notes) of prior interviews (or at least summarize the key aspects of them if they are too lengthy).

Agent Notes

Because it is the prosecutor's ultimate decision to determine what constitutes *Brady* or *Giglio* material, this office expects agents and officers to maintain their notes of interviews even after a report of interview is written. The office's form Disclosure Letter reminds prosecution team members of this expectation.

It is not necessary for prosecutors to review agent notes related to each potential witness interview. However, prosecutors should review the agent's notes of critical interviews, including any interview of a defendant, and the notes relating to any report of interview of which the

defense has questioned the accuracy. If the notes contain favorable information that is not memorialized in a formal report or any information that is materially inconsistent with the formal report, the notes or the information should be produced.

B. Conducting the Review

Prosecutors should follow the Department's guidance about reviewing discovery:

> Having gathered [the relevant information,] prosecutors must ensure that the material is reviewed to identify discoverable information. It would be preferable if prosecutors could review the information themselves in every case, but such review is not always feasible or necessary. The prosecutor is ultimately responsible for compliance with discovery obligations. Accordingly, the prosecutor should develop a process for review of pertinent information to ensure that discoverable information is identified. Because the responsibility for compliance with discovery obligations rests with the prosecutor, the prosecutor's decision about how to conduct this review is controlling. This process may involve agents, paralegals, agency counsel, and computerized searches. Although prosecutors may delegate the process and set forth criteria for identifying potentially discoverable information, prosecutors should not delegate the disclosure determination itself. In cases involving voluminous evidence obtained from third parties, prosecutors should consider providing defense access to the voluminous documents to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence. Such broad disclosure may not be feasible in national security cases involving classified information.

Criminal Resource Manual 165 at Step 2.

C. Making the Disclosures

Prosecutors are also encouraged to provide broader and more comprehensive discovery than what is legally required.

> A. Considerations Regarding the Scope and Timing of the Disclosures: Providing broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases. It also provides a margin of error in case the prosecutor's good faith determination of the scope of appropriate discovery is in error. Prosecutors are encouraged to provide broad and early discovery consistent with any countervailing considerations. But when considering providing discovery beyond that required by the discovery obligations or providing discovery sooner than required, prosecutors should always consider any appropriate countervailing concerns in the particular case, including, but not limited to: protecting victims and witnesses from harassment or intimidation; protecting the privacy interests of witnesses; protecting privileged information; protecting the integrity of ongoing investigations; protecting the trial from efforts at obstruction: protecting national security interests; investigative agency concerns; enhancing the likelihood of receiving reciprocal discovery by defendants; any applicable legal or evidentiary privileges; and other strategic considerations that enhance the likelihood of achieving a just result in a particular case. . . .

> Prosecutors should never describe the discovery being provided as "open file." Even if the prosecutor intends to provide expansive discovery, it is always possible that something will be inadvertently omitted from production and the prosecutor will then have unintentionally misrepresented the scope of materials provided. Furthermore, because the concept of the "file" is imprecise, such a representation exposes the prosecutor to broader disclosure requirements than intended or to sanction for failure to disclose documents, e.g. agent notes or internal memos, that the court may deem to have been part of the "file." When the disclosure obligations are not clear or when the considerations above conflict with the discovery obligations, prosecutors may seek a protective order from the court addressing the scope, timing, and form of disclosures.

Criminal Resource Manual 165 at Step 3A.

1. <u>Practice to Generally Use Expanded Discovery</u>

Consistent with the guidance to provide broader and more comprehensive discovery than what is legally required, the office maintains in the routine or usual case an expanded discovery practice. It is not an open file practice, and prosecutors should not refer to it as such.

As soon as practical after counsel for the defendant enters an appearance, the office provides or makes available for inspection:

- statements of the defendant;
- the prior record of the defendant;
- documents and tangible objects the government intends to use as evidence in its case in chief at trial;
- reports of examinations and tests the government intends to use as evidence in its case in chief at trial;
- all tangible evidence, including documents, gathered by the investigating agencies, the United States Attorney's Office, and the grand jury from witnesses and potential witnesses during the investigation of the matter. Such items, including controlled substances, may be inspected by counsel by contacting the U.S. Attorney's Office to facilitate such arrangements with the investigative agency;
- a written summary of the testimony of any experts the government intends to use at trial under Federal Rules of Evidence 702, 703 and 705; and
- all reports of witness interviews (e.g., FD-302, DEA-6 etc.) prepared by investigative agencies in their investigation of the case.

The defendant is not required to file a request for discovery to obtain or inspect the foregoing evidence, or to make a written request for Jencks Act and Rule 26.2 material.

Any document, tangible object, and report of examination and test not listed above is provided or made available, if in existence and in possession of the United States, upon specific request and a showing of materiality by the defendant. If the parties are unable to agree on whether any item is material, the issue is presented to the Court.

Prosecutors should consider reasons to utilize a more restrictive discovery protocol, which include:

- protecting victims and witnesses from harassment or intimidation;
- protecting the privacy interests of witnesses;
- protecting privileged information;
- protecting the integrity of ongoing investigations;
- protecting the trial from efforts at obstruction;
- protecting national security interests;
- investigative agency concerns;
- enhancing the likelihood of receiving reciprocal discovery by defendants;
- any applicable legal or evidentiary privileges; and
- other strategic considerations that enhance the likelihood of achieving a just result in a particular case.

See Criminal Resource Manual 165 at Step 3A.

Prosecutors should consult with their Section Chief and the Criminal Chief if deviation from the expanded discovery practice is expected. Prosecutors should remember that reciprocal discovery is not triggered when the expanded discovery practice is not followed.

2. Timing

Prosecutors should adhere to the following guidance regarding the timing of disclosures.

> B. Timing: Exculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant reasonably promptly after discovery. Impeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. See USAM 9-5.001. Section 9-5.001 also notes, however, that witness security, national security, or other issues may require that disclosures of impeachment information be made at a time and in a manner consistent with the policy embodied in the Jencks Act. Prosecutors should be attentive to controlling law in their circuit and district governing disclosure obligations at various stages of litigation, such as pre-trial hearings, guilty pleas, and sentencing.
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> ....
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> [P]rosecutors should consider making Rule 16 materials available as soon as is reasonably practical but must make disclosure no later than a reasonable time before trial. In deciding when and in what format to provide discovery, prosecutors should always consider security concerns and the other factors set forth in subparagraph (A) above. Prosecutors should also ensure that they disclose Fed.R.Crim.P. 16(a)(1)(E) materials in a manner that triggers the reciprocal discovery obligations in Fcd.R.Crim.P. 16(b)(1).
>
> Discovery obligations are continuing, and prosecutors should always be alert to developments occurring up to and through trial of the case that may impact their

> discovery obligations and require disclosure of information that was previously not disclosed.

Criminal Resource Manual 165 at Step 3B.

The practice in this district is that at the initial appearance or arraignment, the magistrate judge imposes a discovery cutoff date. Prosecutors should make clear that they will provide everything they have as the initial disclosure, but that as additional discoverable material comes available, such material will be provided within a reasonable amount of time.

3. Practice for Providing Discovery

Most discovery includes private or sensitive information. Such information must be protected either by obtaining a protective order or through redactions. In large volume cases, a protective order should be considered.

The following are general guidelines for redacting private and sensitive information. 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. Federal Rule of Criminal Procedure 49.1, which contains direction for redacting documents filed with the court, should also be used as a starting point for redacting documents that will be produced in discovery.

All documentary evidence should be bates numbered. Generally, discoverable documents should be scanned and produced electronically in a format that allows the documents to be searched by a word or name. Disks containing electronic data should be well labeled so that they can readily be identified.

In cases with voluminous discovery, the prosecutor should plan well in advance of indictment how discovery will be produced. If the decision is for all or a large part of the discovery to be scanned, prosecutors should remember that the office has limited paralegal resources and that one large discovery project could take weeks to complete. Accordingly, whenever possible, large discovery projects should be planned to provide enough time to send them to the NAC or IRS Litigation Support Centers. If the large discovery project must be handled in the office, the agency is required to organize the discovery so that all discovery in electronic format is sent on disk, not paper, to organize and prepare for scanning the paper discovery, and to provide resources to assist with scanning whenever possible. The prosecutor should request a reasonable initial disclosure/discovery cutoff date and request an extension if necessary. It should be the rare exception for a large discovery project to be submitted late for scanning.

In cases with high volume or sensitive[9] discovery, prosecutors may choose to make the discovery available to the defense for inspection and copying, and record when the discovery

[9]Checks in an identity theft case are an example of sensitive discovery.

was made available and when the defense reviewed the discovery. However, any discovery that is scanned for purposes of the prosecution should be provided to the defense in the scanned format.

4. Practice When Discovery Is Not Disclosed in Original Form

If content of a document should be disclosed but there are safety, privacy or other concerns about providing the document in its original form, prosecutors may consider disclosing the content by letter or other form.

> C. Form of Disclosure: There may be instances when it is not advisable to turn over discoverable information in its original form, such as when the disclosure would create security concerns or when such information is contained in attorney notes, internal agency documents, confidential source documents, Suspicious Activity Reports, etc. If discoverable information is not provided in its original form and is instead provided in a letter to defense counsel, including particular language, where pertinent, prosecutors should take great care to ensure that the full scope of pertinent information is provided to the defendant.

Criminal Resource Manual at Step 3C: Making the Disclosures.

Prosecutors should consult with a supervisor before disclosing discoverable information in something other than its original form.

D. Making a Record

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

Criminal Resource Manual at Step 4: Making a Record.

A record of all discovery provided to the defense must be kept. The office's form Statement of Discovery Protocol and Record of Production (Statement and Record) should be filed by the initial disclosure/discovery cutoff date. The Statement and Record is essential because it establishes a record of what discovery has been provided, states the office's protocol for handling discovery in the case, serves as a request for reciprocal discovery and Rule 26.2 statements, clarifies what will not be provided, and recognizes the prosecutor's disclosure obligations. Prosecutors are expected to know what the Statement and Record contains and abide by its provisions.

When a joint decision has been made to deviate from the general expanded discovery practice, the Statement and Record should be modified to state how discovery will be provided in compliance with Rule 16. If discovery includes evidence obtained by the grand jury, matters occurring before the grand jury, or tax materials, the prosecutor should file a motion and order authorizing the release of such material.

The office's standard form Record of Compliance should be filed whenever supplemental discovery is provided.