

**E.D.VA. DISCOVERY GUIDE**<sup>1</sup>

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## **I. INTRODUCTION**

This guide sets forth the policy of the United States Attorney's Office for the Eastern District of Virginia as to the production of discovery in criminal cases. While it does not undertake to address every issue an AUSA will confront when making discovery decisions, it is designed to familiarize attorneys with their disclosure obligations, provide guidance, and identify potential issues. Supervisors, along with the Office's discovery coordinator, are available to assist in satisfying discovery obligations.

This guide is also intended to help fulfill the special responsibility of the United States Attorney as articulated famously by the Supreme Court in 1935:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and definite sense the servant of the law, the twofold aim of which is that guilty shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed he ought to do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935).

## **II. WHAT MUST BE PRODUCED AND DISCLOSED**

### **A. Overview of Discovery Obligations**

The authority for the government's production and disclosure obligations derives from four general sources: (1) Federal Rules of Criminal Procedure, specifically Rules 16, 26.2, and 12(b)(4); (2) statute – 18 U.S.C. § 3500, which is also known as the Jencks Act; (3) caselaw; and (4) the Virginia Rules of Professional Conduct. In addition, the Office uses a standard discovery order, which, by agreement with defense counsel, establishes deadlines for the production of certain items.

#### **1. Federal Rules of Criminal Procedure**

##### **a. Rule 16**

Rule 16(a) sets forth the government's basic post-indictment discovery obligations. Under the rule, the government must disclose written or recorded statements of the defendant; the substance of any oral statements made by the defendant to any government agent; the defendant's criminal history; all documents or other tangible evidence the government plans to

introduce in its case-in-chief or that are material to the defense; 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 that are material to the defense; and expert witness disclosures and summaries. Rule 16 explicitly excludes from disclosure witness statements and internal reports written by government agents or attorneys in connection with the investigation or prosecution of the case. Nonetheless, AUSAs must review documents for Brady material (described in more detail, below) and, if such material is found, disclose it consistent with Brady disclosure requirements. In addition, as discussed below, prior statements of testifying witnesses must be produced consistent with the production requirements of Jencks materials.

AUSAs should ask all agents who had any contact or dealings with the defendant to report all statements, verbal and non-verbal, made by the defendant to any law enforcement officer. If a defendant made a statement to a law enforcement officer that is not captured in a report, the substance of the statement must be disclosed to the defense.

Also, it is important to note that under Rule 702 of the Federal Rules of Evidence, expert testimony includes not only anything of a scientific or technical nature, but also anything requiring specialized knowledge. It would include, for example, testimony by a police officer, based on his experience, about drug prices in his beat or what drug quantities are consistent with personal use as opposed to distribution.

***Timing:*** Rule 16 makes the government's discovery obligations under the rule contingent upon the defendant's request. Beyond that, there are no timing requirements under the rule. The district's standard discovery order, however, requires the disclosure of Rule 16 materials no later than seven calendar days before trial, and AUSAs should provide such discovery within ten business days of the arraignment or as soon as practicable. The best practice is to assemble this discovery before indictment. In addition, bear in mind that the district's standard discovery order calls for the production of expert notice by the close of business ten business days prior to trial or, by court order for good cause shown, some other time period.

b. Rule 26.2

Rule 26.2 requires the government, on motion of the defense, to make the statements of a witness (other than the defendant) available to the defense after the witness has testified on direct examination. Witness statements include writings that the witness made and signed or otherwise adopted and approved; a substantially verbatim, contemporaneously made recording or transcript of a witness's oral statement; and grand jury transcripts. Only statements that relate to the subject matter of the witness's testimony must be produced. The rule overlaps substantially with 18 U.S.C. § 3500 and the requirements set forth in Jencks v. United States, 353 U.S. 657 (1957), both discussed in more detail below.

***Timing:*** The statements must be produced on motion of the defense. Beyond that, there are no timing requirements under the rule, and, as a matter of law, a court cannot order the government to disclose witness statements before the witness has testified at trial. Of course, in those cases where an agreed discovery order has not been entered, waiting until after the witness has testified to turn over the prior statements would likely yield a reprimand from the court and an adjournment of the proceedings to allow defense counsel to review the materials before beginning cross-examination. Accordingly, the Office’s policy is to provide prior statements of witnesses to the defense five calendar days before trial as set forth in the standard discovery order, discussed in more detail below.

AUSAs may, and often do, produce the statements to the defense earlier in exchange for concessions such as stipulations. AUSAs may also work out a later production date in appropriate instances, such as those in which witness security is an issue. Note, however, that supervisory approval is required for production that is more than five business days or less than five calendar days before trial.

c. Rule 12(b)(4)

Rule 12(b)(4) provides that the government may notify the defendant at arraignment or soon thereafter of its intention to use specific evidence at trial to afford the defendant the opportunity to move to suppress that evidence before trial. Examples of this type of evidence include admissions made in response to questioning and evidence seized during the execution of a search warrant.

***Timing:*** While there are no timing requirements set forth in the rule, consider turning over such evidence well in advance of trial so that a suppression issue may be litigated before trial. If you provide the defense with this evidence pretrial and they fail to file a motion to suppress it, the defendant is deemed to have waived the suppression issue. Fed. R. Crim. P. 12(b)(3) & (e). In the event the government loses on a pretrial suppression motion that relates to material evidence, you may seek an interlocutory appeal. If, however, the government fails to turn over the evidence in a timely manner and the court allows the defense to raise a suppression motion at trial, we have no appellate remedy because jeopardy has attached. If a suppression issue is pending, an AUSA should press the court to rule on it before jury selection to preserve the government’s right to appeal. Under Rule 12(d), a court cannot defer ruling on a pretrial motion if doing so adversely affects a party’s appellate rights.

2. 18 U.S.C. § 3500

Title 18, United States Code, Section 3500, the Jencks Act, requires the government to produce “witness statements” to the defense after the witness has testified on direct examination. (As noted above, Rule 26.2 imposes the same requirement on the defense for all witnesses other than the defendant.) “Witness statements” include writings that the witness has made, signed, or adopted; recordings of the witness; substantially verbatim written recordings by a person interviewing the witness; and grand jury transcripts.

**Timing:** As noted above, usually AUSAs in this Office disclose witness statements five calendar days before the start of evidence in accord with the terms of the standard discovery order. See § II(A)(5) below. As discussed in more detail above, AUSAs may choose to produce the statements earlier in return for concessions from the defense. Also, while a court cannot order production until after a witness has testified, see 18 U.S.C. § 3500(a) (“In any criminal prosecution brought by the United States, no statement or report in the possession of the United States [that] was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.”), waiting until that point requires supervisory approval and is strongly discouraged.

3. Caselaw

a. Brady and Giglio

In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court announced:

[T]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Id. at 87.

The Supreme Court extended its decision in that case to conclude in Giglio v. United States, 405 U.S. 150 (1972), that Brady material includes information that might be used to impeach government witnesses, rather than simply direct evidence of guilt or innocence.

When the “reliability of a given witness may well be determinative of guilt or innocence,” nondisclosure of evidence affecting credibility falls within this general [Brady] rule.

Id. at 154 (citation omitted).

**Timing:** Although Brady and Giglio materials must be disclosed whether or not the defense requests them, technically, Brady and Giglio are not discovery obligations. Instead, they merely preclude the government from concealing exculpatory evidence from the defense. As such, the cases themselves do not include any requirement as to the timing of the disclosure. The Fourth Circuit, however, requires disclosure to be made in time for the defense “to reasonably and effectively use it at trial.” United States v. Jeffers, 570 F.3d 557, 573 (4th Cir. 2009). Accordingly, AUSAs have an obligation to identify and disclose this information promptly. In addition, the standard discovery order calls for the production of Giglio five calendar days prior to trial.

In instances where Brady information is found within Jencks material, the substance of the Brady information should be disclosed promptly. See United States v. Beckford, 962 F. Supp. 780, 795 (E.D. Va. 1997). In the alternative, the material in the statement that is not Brady information may be redacted before the statement is produced.

b. Jencks Material

In 1957, the Supreme Court issued an opinion that triggered what is now a multi-source requirement to produce the prior statements of witnesses. In the landmark case of Jencks v. United States, 353 U.S. 657 (1957), the Court held that the defendant was entitled to inspect all written reports in the government’s possession reflecting prior statements of witnesses “touching the events and activities as to which they testified at the trial.” Id. at 668. As noted above, that holding has been incorporated into the Federal Rules of Criminal Procedure and codified at 18 U.S.C. § 3500.

4. Virginia Rules of Professional Conduct

In 1998, Congress enacted a statute known as the McDade Act that provides that Department attorneys “shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as attorneys in that State.” 18 U.S.C. § 530B(a). Accordingly, the Virginia Rules of Professional Conduct apply to AUSAs practicing in the Eastern District of Virginia.<sup>2</sup> Those rules impose requirements regarding exculpatory and impeachment material. Rule 3.8(d) states:

The prosecutor in a criminal case shall . . . 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, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when a prosecutor is relieved of this responsibility by a protective order of the tribunal.

See Rule 3.8(d), Virginia Rules of Professional Conduct.<sup>3</sup>

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<sup>2</sup> Note also that Local Criminal Rule 57.4(I) adopts the Virginia Rules of Professional Conduct as the ethical standards that apply to criminal cases.

<sup>3</sup> Many AUSAs are members of the bars of other jurisdictions. While AUSAs are bound by the Virginia Rules of Professional Conduct, they are also subject to the ethics rules of any other jurisdiction(s) in which they are admitted. Nonetheless, state bars’ choice of law provisions typically direct attorneys to apply the rules of professional conduct applicable in the jurisdiction where the case is pending either directly by including an express requirement to do so (e.g., the District of Columbia) or indirectly by including a provision directing the application

## 5. Standard Discovery Order

To facilitate the requests that trigger the production of Rule 16 discovery and to establish deadlines for the production or disclosure of certain other discovery by both parties, the Office, in consultation with the Office of the Federal Public Defender, has developed a standard discovery order. This agreed order may be found on the Office's intranet site. It tracks the language of Rule 16 for purposes of making formal requests for reciprocal discovery under the rule and orders the government to produce Rule 16 discovery seven calendar days before trial. It also sets forth deadlines for the production or disclosure of expert notice (ten business days before trial or, by court order for good cause shown, a different time period), Jencks and Giglio materials (five calendar days before trial), and notice under Fed. R. Evid. 404(b) (seven calendar days before trial). Expert notice may be provided five business days before trial if the expert testimony is to be offered in response to a previously-noticed defense expert. Also, as noted above, while an AUSA may modify the standard discovery order to provide for the earlier production of Jencks materials in exchange for concessions such as stipulations, advance supervisory approval is required for disclosure of such materials earlier than five business days before trial.

The use of the standard discovery order is mandatory in cases where defense counsel agrees to the entry of a discovery order. In unusual or complex cases, an AUSA may modify the order after receiving the approval of both the unit supervisor and either the Chief or Deputy Chief of the Criminal Division.

### **B. Brady and Giglio: What Must Be Disclosed**

#### 1. General

Brady and its progeny prohibit the government from concealing exculpatory evidence, i.e., evidence that is "favorable to the accused," when such evidence is "material to guilt or punishment." Brady, 373 U.S. at 87. The standard for materiality is whether "there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). The requirement applies not only to trials but also sentencing hearings.

Giglio and its progeny extend Brady to all material information that might be used to impeach a government witness, such as a plea agreement between the witness and the government, an immunity order (of which the witness is aware), the witness's criminal record, payments to an informant who will testify, a witness's prior inconsistent statements, or favorable treatment of an incarcerated witness such as transfer to a more comfortable facility or even buying an inmate lunch during a prep session.

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of a sufficient contacts or greatest interest test, which examines where the conduct, investigation, and prosecution takes place (e.g., Kentucky).



As the Supreme Court has explained, Brady material and Giglio material are not two distinct kinds of evidence under the Constitution, but rather, Giglio material is a subset of Brady material:

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

Bagley, 473 U.S. at 676.

Nonetheless, Brady and Giglio should be kept analytically distinct. “Brady material” refers to evidence or information (other than Giglio material) that a defendant could use to increase the odds of an acquittal or a lower sentence. “Giglio material,” by contrast, refers to evidence or information the defendant could use to impeach a government witness.

## 2. Expansive Interpretation – USAM § 9-5.001

While there is an abundance of case law interpreting Brady and Giglio, often it is unclear whether evidence is exculpatory. Section 9-5.001 of the United States Attorneys Manual (“USAM”), “Policy Regarding Disclosure of Exculpatory and Impeachment Information,” directs AUSAs to interpret the constitutional requirements of these cases broadly. “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.” If an AUSA has any doubt whether a piece of evidence is exculpatory, the evidence should be disclosed.

USAM § 9-5.001 also dispenses with Brady’s materiality requirement and requires disclosure beyond what is material to guilt. Under this Department policy, the government must disclose:

- (1) information inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, and
- (2) impeachment information that either casts a substantial doubt upon the accuracy of any evidence on which the prosecution intends to rely to prove an element of any crime charged or might have a significant bearing on the admissibility of the government’s evidence. The policy applies to information (not just evidence) regardless of whether the information itself would constitute admissible evidence.

USAM § 9-5.001 also directs the disclosure of items of information that, while viewed in isolation may not meet the standards of the policy, taken together can have such an effect.

### 3. Prosecution Team Concept

AUSAs must seek all exculpatory and impeachment information—and Jencks material—from members of the “prosecution team.” Under USAM § 9-5.001, the prosecution team generally includes federal agents, state and local law enforcement officers and other government officials participating in the investigation. AUSAs are deemed to have knowledge of all material in the files of the agencies and police departments that have taken part in the investigation. See Kyles v. Whitley, 514 U.S. 419 (1995). Accordingly, AUSAs should adopt an expansive view in deciding who should be considered part of the prosecution team and, therefore, from whom the AUSA seeks potential discovery or disclosure information.

In determining who should be considered part of the prosecution team, an AUSA must consider whether the relationship is close enough to warrant inclusion for discovery purposes. Factors to consider include: (1) whether the AUSA/case agent conducted a joint investigation or shared resources relating to the investigation with the other district or regulatory agency; (2) whether the other agency/district played an active role in the prosecution’s case; (3) the degree to which decisions have been made jointly regarding the other district’s or agency’s investigation and the AUSA’s; (4) whether the AUSA has ready access to the other entity’s evidence; and (5) whether the AUSA has control over, or has directed, action by the other entity.

For example, in multi-district investigations, the prosecution team could encompass the prosecutors and agents from the other district(s). In the case of parallel investigations with the Civil Division or non-criminal regulatory authorities, the prosecution team could include civil AUSAs or trial attorneys or employees from agencies such as the U.S. Securities and Exchange Commission, the FDIC, and the United States Trustee. With respect to state and local agencies, a police officer would be considered part of the prosecution team if a multi-agency task force is conducting the investigation and the AUSA is directing the officer’s actions in any way, or if the officer participated in the investigation or gathered evidence that led ultimately to the charges in the federal case.

**At the end of the day, however, the AUSA is ultimately responsible for the review and production of discovery.** For that reason, AUSAs are encouraged to err on the side of inclusiveness in determining who is a member of the prosecution team for purposes of fulfilling discovery obligations.

#### 4. Law Enforcement Witnesses

In the case of a law enforcement witness, Giglio material includes a finding of misconduct or similar adjudication that reflects upon the truthfulness or possible bias of the witness, including a finding of lack of candor during an administrative inquiry; any past/pending criminal charge; and any credible allegation of misconduct that reflects upon the truthfulness or possible bias of the employee. Allegations that have not been substantiated, are not credible, or resulted in exoneration need not be disclosed unless the court issued an order or decision requiring disclosure, the allegation was made by a prosecutor or judge, the allegation received publicity, or disclosure is otherwise deemed appropriate.

Note that an AUSA is deemed to have knowledge of potential impeachment material in the personnel files of agents and police officers who are prospective government witnesses. While it is not necessary to make a request for such Giglio materials to the law enforcement agency in each and every case, if an AUSA knows, or has reason to believe, that an agent or officer may have been subject to disciplinary action in the past, the AUSA should request and review the personnel file of that individual. See E.D.Va.'s Giglio Implementation Plan. Note that each case file includes a Giglio Inquiry Form that includes a checklist of questions AUSAs should ask testifying agents.

When appropriate in a case where disclosure is made, an AUSA should seek a protective order from the court to limit the use and dissemination of potential impeachment information by defense counsel and others.

#### 5. Confidential Informants and Cooperating Witnesses

The credibility of confidential informants, cooperators, and immunized witnesses will always be at issue when they testify, and, accordingly, AUSAs should investigate these witnesses thoroughly. Look for — and, if found, disclose — impeachment information relating to such circumstances as the witness's relationship with the defendant, the witness's motivation for cooperating and/or testifying; drug and alcohol problems; benefits the witness is receiving such as monetary payments, expenses, costs, or housing; the immigration status of the witness and/or family members; intervention by law enforcement in connection with arrests or other legal entanglements; taxes paid on informant payments; notes, diaries, journals, e-mails, letters, or other writings by the witness; prison files, tape recordings of telephone calls, and e-mails, if the witness is in custody; and, of course, criminal history.

#### 6. Requirement of Disclosure Not Production

Because Brady and Giglio are rules of disclosure, the materials need not be produced to the defense in the way that other discovery must. In other words, the substance of the information falling within the category of Brady and Giglio material must be disclosed to the defense but not necessarily physically handed over (or made available for inspection).

Nonetheless, AUSAs often will find it easier to simply make copies of things like plea agreements and immunity orders, and then provide them to the defense.

### **C. Jencks: What Must Be Produced**

#### **1. General**

As noted above, Fed. R. Crim. P. 26.2 and the Jencks Act (18 U.S.C. § 3500) require the government to make “witness statements” that relate to the subject matter of the witness’s anticipated testimony available to the defense after the witness has testified on direct examination, whether at a trial or at another proceeding, including a sentencing hearing. Both Rule 26.2 and the Jencks Act define “statement” similarly. Specifically, a statement includes: (1) a written statement that the witness makes and signs or otherwise adopts and approves, and (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. This includes transcripts of prior testimony before the grand jury, at a pretrial hearing or other earlier trial (whether in the same case or a different case), and in a deposition, as well as documents and notes that are read back to a witness and that the witness affirms.

Bear in mind that there is no obligation to order the transcript of prior testimony, other than grand jury testimony, that has not yet been transcribed. If an AUSA is aware of prior testimony, notifying the defense of the witness’s name, the date and location of the testimony, and the general nature of the testimony is sufficient. Grand jury transcripts, however, must be produced as defense counsel otherwise does not have access to those statements. Nevertheless, if a witness has provided prior testimony about a subject as to which he is expected to testify in the future, the best practice, of course, is to order the transcript for your own benefit and, once in your possession, provide the defense with a copy or an opportunity to examine it.

#### **2. E.D.Va. Policy Regarding Agent E-Mails**

E-mail messages from an agent to an AUSA may be considered Jencks material if they relate to the subject matter as to which the agent-witness will testify. Accordingly, the Office has developed a policy concerning the use and preservation of e-mails from agents. See Policy Regarding Emails from Agent-Witnesses (September 2, 2008) (“Agent Email Policy”).

Under the Agent Email Policy, AUSAs must preserve and produce all e-mail messages from agents that relate to the subject matter as to which the agent may be expected to testify. In addition, recognizing that e-mail communications may not be as complete as investigative reports and may have the unintended effect of circumventing an agency’s procedures for writing and reviewing reports, AUSAs are to ask agents to refrain from using e-mail messages for “substantive” communications about the facts of a case. Substantive communications include descriptions of investigative activity, discussions about the relative merits of evidence, characterizations of potential testimony, interactions with witnesses or victims, and issues relating to credibility. Instead, agents should speak with AUSAs by telephone or submit such

communications in the form of formal interview or investigative reports. Agents may continue to use e-mail to communicate with an AUSA about administrative matters such as when and where an interview or meeting will be held and to send electronic versions of interview or investigative reports. AUSAs must also discourage agents from using e-mail for substantive communications with witnesses and, if agents do use e-mail for that purpose, direct them to forward those messages so that the AUSA can preserve and produce them to the defense.

AUSAs should abide by the same restrictions imposed on agents under the Agent E-Mail Policy. In other words, AUSAs should refrain from using e-mail messages to convey substantive communications about the facts of a case.

### 3. Interview Reports

Interview reports such as FBI-302's and DEA-6's are not considered the Jencks material of the person interviewed unless they contain a verbatim statement of the witness or the witness has adopted it. See United States v. Roseboro, 87 F.3d 642, 645 (4th Cir. 1996) (in finding that a FBI-302 was not Jencks, the court held that “[w]hile a statement need not have been written or signed by the witness, if the statement is not the witness’[s] actual words, it must in some way have been adopted or approved by the witness to qualify as Jencks material.”). Bear in mind, however, that interview reports may be considered Jencks material as to the authoring agent should the agent take the stand to testify about what was said during the interview.

Even though interview reports are generally not Jencks material for the interviewed witness, the standard practice is to produce the reports to the defense, and that is certainly the safest course of conduct. However, an AUSA may decide not to produce the reports (if they have not been adopted by the witness) for legitimate security reasons. As an alternative to producing the reports, an AUSA may consider allowing defense counsel to review them and take notes.

Importantly, interview reports that do not constitute Jencks material may still contain Brady or Giglio material that is subject to disclosure. Thus, if an AUSA elects not to produce a report about a testifying witness because the report was not adopted by the witness (and, therefore, not Jencks material), the AUSA must still review the report for Brady and Giglio material. If the report contains either, the relevant content must be disclosed regardless of whether the report itself constitutes Jencks material and is produced. Moreover, AUSAs should be aware of the contents of the reports while the interviewed witness is testifying and should watch for inconsistencies between the reports and the testimony, which may trigger a disclosure obligation that did not exist previously.

If an AUSA produces the interview reports, instead of only allowing defense counsel to review them, personal identifiers within the reports such as home addresses, dates of birth, and social security numbers should be redacted in accordance with the standard redaction procedures that apply to court filings. Also, AUSAs should require that, when the case is over, defense counsel either return the interview reports or certify that they have been destroyed.

#### 4. Agent Rough Notes

Within the framework of the analysis above regarding the production of interview reports, an AUSA generally need not produce the rough notes that an agent takes during a witness interview. See United States v. Hinton, 719 F.2d 711, 722 (4th Cir. 1983) (“[T]he investigative notes of a government agent, made in the course of interviewing witnesses, which are later incorporated in the agent’s formal 302 report, are not statements within the meaning of Section 3500(e)(1).”).

Exceptions to this general rule include instances where there are inconsistencies between the notes and the final interview report or there is no other means available to satisfy the government’s discovery obligations. Agents should be directed to review their rough notes to determine whether any inaccuracies or omissions exist within their written reports. An AUSA personally should review the rough notes if there is reason to believe there are inconsistencies, a written memorandum was never prepared, the precise words a witness used are important, or the witness disputes the agent’s account of the interview. If it turns out that there are inconsistencies between the notes and the final report, the government must produce the notes.

#### 5. Trial Preparation Witness Interviews

Before calling a witness to testify, an AUSA has a duty to review all previous statements the witness made about the subject matter of the testimony and to interview that witness. Accordingly, an AUSA should ask the witness for any notes or other writings the witness may have made concerning the subject matter the testimony. In addition, an AUSA should show witnesses the exhibits that they will sponsor or authenticate or that will be introduced during their testimony.

An AUSA should take part in a trial preparation session—and, for that matter, any other witness interview—only if an agent is present to avoid the risk that the AUSA will make himself a witness in the case if a witness’s statement becomes an issue. In witness interviews generally, the agent is responsible for memorializing the interview, but AUSAs may take notes for their own use. If there is more than one agent present, one should be designated as the note-taker. In witness prep sessions, generally an agent should take notes only to record inconsistencies between what the witness said in previous meetings and what the witness says during the prep session. If an AUSA takes notes during any witness interview, the AUSA must review them for Brady and Giglio material. Finally, if an AUSA’s notes deviate from those taken by the agent, the inconsistencies may need to be disclosed as potential impeachment material.

### **III. OTHER DISCOVERY ISSUES**

#### **A. Disclosure of Tax Information**

Section 6103 of the Internal Revenue Code governs disclosure of tax information the government has obtained from the Internal Revenue Service (“IRS”). Under § 6103(i)(4), returns or return information “may be disclosed in any judicial or administrative proceeding pertaining to the enforcement of a specifically designated federal criminal statute or related civil forfeiture to which the United States or a federal agency is a party” upon a finding that the information is probative of a matter in issue relevant to the commission of a crime, or of the guilt or liability of a party. Disclosure may also be made pursuant to the Jencks Act or Fed.R.Crim.P. 16.

Note that § 6103 applies only to materials obtained from the IRS. Section 6103 does not apply if the government acquired the tax information from a source other than the IRS, such as returns obtained from tax preparers pursuant to grand jury subpoena. Such disclosures are then governed by Rule 6(e) of the Federal Rules of Criminal Procedure.

In any event, before producing the tax material to the defense, an AUSA should ensure that identifiers are redacted consistent with the Local Rules and Office practice.

#### **B. Discovery in Large-Document Cases**

In cases where there is documentary evidence that is too voluminous to review completely, an AUSA should consider providing the defense access to all of it to avoid inadvertently failing to disclose information that could be characterized as Brady or Giglio material. As a general rule, the government is not obligated to identify exculpatory parts of materials that have been disclosed. That is usually considered part of the defendant’s “reasonable diligence” requirement. Courts, however, are more likely to find that the government has complied with its Brady obligations without requiring it to locate and point out specific exculpatory material if the AUSA has turned over discovery with enough time for the defense to make effective use of it (i.e., early on), has provided discovery in a format that can be searched electronically, and/or has identified a set of “hot documents.” If a large number of documents are provided to the defense, whether in hard copy or electronically, consider having the documents Bates stamped to make it easier to keep track of what has been produced. Be sure not to Bates stamp original documents.

AUSAs should avoid the practice of calling this expansive disclosure “open file” discovery, a term that is potentially misleading, to protect against the defense complaining that a misrepresentation was made about the scope of discovery if an inadvertent omission occurs or if an AUSA’s definition of “file” is different from defense counsel’s. Moreover, the government’s files should never be completely open in order to preserve attorney-client privileged information and items subject to the work product protection.

### **C. Recording the Manner of Production**

AUSAs should maintain a record of discovery provided to the defense by Bates-stamping documents and maintaining a copy set, providing documents on a disc and maintaining a copy of the disc, or, in smaller cases, using a cover letter that indexes the production. If discovery is provided by making documents available to the defense for inspection and copying, a record should be made of when the documents were made available and when the defense reviewed them.

### **D. Title III Cases**

Once a case involving a wire tap has been charged, the government is obligated to disclose certain materials pertaining to the wire tap. 18 U.S.C. § 2517 governs the disclosure of the contents of wire, oral, or electronic communications intercepted pursuant to a court order. AUSAs should review this section carefully upon obtaining the court authorization for the interception and before making any disclosures.

An AUSA must provide the defense with a recording of the all of the intercepted conversations as well as the final version of the application, affidavit, and order authorizing electronic surveillance and any and all extensions thereof; of pen register orders and pleadings; of pleadings and orders obtained under 18 U.S.C. § 2703; of sealing applications and orders; and of notices of inventory. Once transcripts of the conversations are finalized, an AUSA should disclose those to the defense as well. An AUSA should disclose to the defense the progress reports the government submitted to the court during the course of the wire tap.

Before producing Title III discovery to the defense, an AUSA should obtain, either on consent of counsel or otherwise, a protective order that prevents disclosure of wire tap material beyond defense counsel and counsel's associates. The order should direct counsel that copies of the discovery provided cannot leave their custody or control, or the control of designated prison personnel who agree to give detained defendants controlled access. Defendants can have access only through their attorneys or counselors. Such an order will limit, to the extent possible, dissemination of sensitive Title III material and provide recourse for the government if such dissemination occurs.

Before using intercepted communications at a detention hearing or preliminary hearing, an AUSA must, at least ten days before the hearing, serve the defense with a copy of the interception application and the court's authorization order. Failure to comply with the ten-day rule will result in the exclusion of the intercepted communications. Note, however, that the court can waive the ten-day disclosure requirement. See 18 U.S.C. § 2518(9).



#### **E. Child Pornography Cases**

In child pornography cases, 18 U.S.C. § 3509(m) specifically provides that a court cannot order the copying or reproduction of any child pornography or material containing child pornography, including the duplication of the hard drives of computers and electronic storage media, provided the government furnishes the defense with a reasonable opportunity to inspect, view, and examine the material in government offices. The statute also provides that this material must remain in government care, custody, and control.

In cases where child pornography has been found on a computer belonging to or otherwise used by the defendant, and the defense requests to examine the evidence with his own expert, the best practice is to provide a “mirror image” of the digital evidence for use by the defense in a government facility. The defendant’s expert should be provided a private room for the analysis, but an agent should remain outside the room to monitor the expert’s movement into and out of the room and to ensure that the expert does not remove any material containing child pornography. The agent should also either conduct an image scan or wipe the expert’s computer to ensure that contraband does not leave the premises. The mirror image remains in the custody of law enforcement and can be accessed by the defense only in government offices. Providing the defense with the ability to secure that mirror image and their examination equipment in the government facility while conducting the examination ensures defense access to the evidence without disclosing the nature of the defense’s analysis and the focus of its examination or otherwise revealing the defense strategy. In the event the court orders a mirror image to be provided to the defense outside of government facilities, a protective order must be obtained.

#### **F. Capital Cases**

Capital cases present two additional discovery considerations. First, under 18 U.S.C. § 3432, the government must provide a witness list to the defense at least three days before trial that includes the names and “place of abode” of the witnesses to be produced to “prove the indictment.” The court may allow for an exception if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person.

Second, the scope of what constitutes Brady material for sentencing purposes is expanded to include any potential mitigating factor (i.e., reasons that a defendant should not be sentenced to death) and should be disclosed promptly. Statutory mitigating factors are set forth in 18 U.S.C. § 3592(a) and any evidence that tends to prove any of these mitigating factors constitutes Brady material in this context. Moreover, any evidence that would support a non-statutory mitigating factor (i.e., a reason that the defendant should not be sentenced to death that is not set forth in the statute) would also constitute Brady material. Often this material consists of evidence of mistreatment in the defendant’s past or a defendant’s mental health problems. Before deciding what evidence constitutes Brady material in a capital sentencing, AUSAs should consult with the district’s Capital Case Coordinator.

#### **G. Classified Materials**

Prosecutions that implicate national security information, which is often classified, carry unique challenges. Although the same discovery requirements (e.g., Rule 16, Brady, and Giglio) apply, the manner in which the government meets its responsibilities differ from the standard criminal case. Discovery in national security cases or cases involving classified information must account for the special considerations that apply to those cases. Prosecutors handling such cases may need to deviate from the general discovery policies set forth herein in certain circumstances, based on an individualized assessment of the specific factors in the case and in a manner that is consistent with the law.

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," which is incorporated herein by reference and is posted on the district's Intranet site. AUSAs 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 an AUSA, 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, the AUSA should consult with 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 AUSA, 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 AUSAs, 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 AUSA should consult with the NSD regarding whether to make through NSD a request that the pertinent IC element conduct a prudential search. If neither the AUSA, 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.

#### **H. Electronic Discovery**

Nearly every criminal case involves some form of electronic evidence such as bank and telephone records, wire transfer receipts, e-mails, and text messages. Both material received electronically and items obtained in hard copy format may be provided to the defense electronically on discs. As noted above, in large-document cases, that is often the most efficient method of production and, because electronic documents may be downloaded easily and quickly onto Sanction or a similar program, the most efficient method of presentation at trial. You may format the documents using either the tagged image file (.tif) or the portable document file (.pdf) format. You may also choose to use optical character recognition (“OCR”) for the documents. OCR will allow the documents to be searched for particular words or terms. This will not only streamline a search for documents relevant to a particular issue or witness but will also facilitate a search for Brady and Giglio information.

Date: October 18, 2010