

DISCOVERY POLICY

United States Attorney's Office  
Western District of Virginia

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**PROTECTED INFORMATION**

**ATTORNEY CLIENT PRIVILEGE/WORK PRODUCT DOCTRINE**

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UNITED STATES ATTORNEY'S OFFICE  
WESTERN DISTRICT OF VIRGINIA

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## General Principles for Discovery

This document sets forth the policy on discovery in criminal cases for the United States Attorney's Office for the Western District of Virginia ("the Office"). The Outline that follows is intended to provide a checklist and general guidance. The Office's policy and the Outline do not create or confer any rights, privileges, or benefits on any person. *See United States v. Caceres*, 440 U.S. 741 (1979).

The discovery obligations of federal prosecutors in this District are established by 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), other relevant case law, the Department of Justice's policy on the disclosure of exculpatory and impeachment information, the Local Rules of Criminal Procedure, the discovery orders entered in particular cases, and the rules governing professional conduct. We must comply with all of the authorities set forth above. Thus, the first principle in the discovery policy for this Office is that we must comply with all of the authorities set forth above.

Second, as a general matter and allowing for the exercise of prosecutorial discretion and subject to the needs of individual cases, prosecutors in this District are encouraged to provide discovery beyond what the rules, statutes, and case law mandate ("expansive discovery"). The decision in any particular case on whether, how much, and when to provide materials in excess of that which is required will rest with the lead prosecutor in a case. There may well be good reason for withholding something that does not have to be disclosed, such as the need to protect a witness or safeguard investigations of other people or other crimes committed by the defendant, or to preserve a legitimate trial strategy. Keep in mind, however, that expansive discovery may facilitate plea negotiations or otherwise expedite litigation. In the long term, moreover, expansive discovery may foster or support our Office's reputation for candor and fair dealing.

Finally, if you decide to adopt expansive discovery in a case, **do NOT refer to the expansive discovery practice as "open file discovery."** Our files should never be completely open (to preserve attorney-client privileged information and the work product doctrine) and there may be times when another government agency might have some material or information of which you are not aware. The use of the term "open file" is therefore inexact and potentially misleading.

The Outline that follows provides further guidance. The Outline does not and could not answer every question that may arise in a particular case. There is no substitute for being intimately familiar with the rules, statutes, and case law. Compliance with the governing legal authorities and this Office's policy on discovery will help to achieve a fair and just result in every case, which is our singular goal in pursuing a criminal prosecution.

Timothy J. Heaphy  
United States Attorney  
Western District of Virginia

## I. DISCOVERY MATERIALS - WHAT IS DISCOVERABLE?

### A. Rule 16 Materials

- Defendant's oral statements made to law enforcement in response to interrogation by a person the defendant knew was law enforcement.

***PRACTICE TIP:*** Ask all law enforcement officers who had any contact or dealings with the defendant to disclose to you all statements, **verbal and non-verbal**, made by the defendant at any time. Ask them to plumb the depths of their memories. Ask them again. And again. And finally, ask again.

*Why? You do not want to learn about a relevant statement for the first time on the eve of trial or during the trial itself. An agent may not realize or understand the relevance of a seemingly off-the-cuff comment made by a defendant until trial preparation. Where we learn of such a statement late in the game, we run the risk of suppression of the evidence. Thus, the repeated admonition to ask agents, again and again, for statements of the defendant.*

- Defendant's written or recorded statements, including grand jury testimony.
- Statements by an organizational defendant.
- Defendant's prior record.
- Documents and objects for use in our case-in-chief or which are material to preparing the defense.
- Reports of examinations and tests.
- Expert witnesses - summary of opinion, bases and reasons, qualifications.

***PRACTICE TIP:*** Give serious thought to what actually may be considered "expert testimony." 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 versus distribution. **Don't make the mistake of thinking that expert testimony is only given by Ph.Ds or only consists of testimony that includes an opinion.** Failure to follow proper discovery

*procedures regarding expert testimony might result in suppression of an important part of your case.*

B. Exculpatory and Impeachment Material

1. Brady and Giglio.

We have constitutional obligations, as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), and other case law, to disclose exculpatory and impeachment information when such information is material to guilt or punishment, **regardless of whether a defendant makes a request for such information**. Exculpatory and impeachment information is deemed material to a finding of guilt when there is a reasonable probability that effective use of that information will result in an acquittal. (DOJ policy, however, demands broader disclosure. See below.) Prosecutors must take a broad view of materiality and err on the side of disclosure. For an extensive discussion of cases interpreting *Brady* and *Giglio*, see USA Book, “Brady & Giglio Issues” (<http://10.173.2.12/usao/eousa/ole/usabook/bgig/bgig.pdf>).

2. DOJ Policy.

The Department of Justice has adopted a policy that requires us to go beyond even the strict requirements of *Brady* and *Giglio* and other relevant case law. Specifically:

- Exculpatory information - information that is inconsistent with any element of the crime or which establishes a recognized affirmative defense, regardless of whether the prosecutor believes the information is admissible evidence or will make a difference between conviction or acquittal.
- Impeachment information - information that either casts a substantial doubt on the accuracy of any evidence the prosecutor intends to rely on to establish an element (including but not limited to witness testimony) or which might have a significant bearing on the admissibility of prosecution evidence. This is regardless of whether the prosecutor believes the information is admissible as evidence or will make a difference between conviction and acquittal.
- Admissibility of the exculpatory or impeachment information - our disclosure requirement applies even when the information subject to disclosure is not itself admissible evidence.

- Cumulative impact - if the cumulative impact of several pieces of information meets the disclosure requirements, disclose all of the information even if the pieces, considered separately, do not meet the requirements.

See United States Attorney's Manual sections 9-5.001  
([http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/5mcrm.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm)).

### 3. 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 Western District of Virginia. 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.

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

### 4. Post-conviction obligations.

The Model Rules also impose a disclosure obligation with respect to evidence favorable to a defendant who has been convicted. Specifically:

- a prosecutor must promptly disclose -- to an appropriate court or authority -- new, credible and material evidence creating a reasonable likelihood that the convicted defendant did not commit the offense of which he was convicted
- if the conviction was obtained in this jurisdiction, promptly disclose that evidence to the defendant, unless the court authorizes delay AND undertake investigation to determine if the defendant did not commit the offense of which he was convicted.

Also, regardless of where the defendant's conviction was obtained, if the defendant is in this district, and we learn of clear and convincing evidence establishing that the defendant did not commit the offense of which he was convicted, we must seek to remedy the conviction.

### C. Witnesses' Statements - Jencks Act and Rule 26.2

#### 1. What is a statement?

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.

***PRACTICE TIP:** This may include relevant portions of a report of, or notes from, an interview of a witness, if the report or notes contain a substantially verbatim recitation of the witness's oral statement. Remember, "substantially verbatim" does not mean "precisely verbatim." See subsection I.D.4 below regarding notes of interviews.*

- grand jury testimony.

#### 2. What is not a statement?

Generally, an agent's report of interview (e.g., FBI "302" or "DEA-6"), is not considered a statement of the witness who was interviewed, unless, as noted above, the report contains a substantially verbatim recital of the witness's statement, or the witness reviews and adopts the report. *United States v. Roseboro*, 87 F.3d 642, 645-46 (4th Cir. 1996). A witness may be deemed to have adopted the report or notes that were taken during an interview if the witness agrees with an agent's oral recitation of his notes or report to see if the notes or report is correct.

***PRACTICE TIP:*** *Generally, we disclose reports of interview to defense counsel, in the exercise of an expansive discovery practice. Remember, even though a report of interview is not generally a statement of the witness interviewed, it is a statement of the agent who prepared the report. The report must be disclosed if that agent will be a witness and the report relates to the subject matter of the agent's testimony.*

*If you decide to disclose an agent's report of interview that under the law is not a witness's statement, discuss your intention with the agent before making the disclosure.*

### 3. Redaction of statements.

Rule 26.2(c) provides that where a statement of a witness contains some material that is relevant to the case, but other material that is either privileged or does not relate to the subject matter of the witness's testimony, the government may call upon the trial court to review in camera the statement in its entirety and excise any privileged or unrelated portions of the statement before it is disclosed to the defense. This implies that the government may not excise such a statement on its own.

***PRACTICE TIP:*** *This rule is one good reason to take separate statements from a single witness for separate investigations or cases.*

### 4. Notes of interview (agents and prosecutors)

In the Fourth Circuit, law enforcement agents are not required to maintain their notes after they have used them to prepare a more formal and complete summary of the interview. *United States v. Hinton*, 719 F.2d 711, 722 (4th Cir. 1983). If, however, an agent's notes contain *Brady* or *Giglio* material that is not included in the agent's formal summary of the interview, the notes remain relevant and the *Brady/Giglio* material must be disclosed. Similarly, **a prosecutor's notes** of a witness interview (as opposed to notes containing mental impressions, personal beliefs, trial strategy and legal conclusions) may have to be disclosed, or the relevant information contained therein, if the notes reflect exculpatory or impeachment information.

Also, the government may **not** limit its obligation to disclose exculpatory or impeachment evidence of which it is aware either by simply declining to make a written record of the information in the first place or by omitting the information in a final draft of the memorandum of interview and destroying the notes that contain that information. The substantive demands of *Brady* and *Giglio* are not thwarted by the manner in which the government treats or packages exculpatory information.

***PRACTICE TIP:*** *It is highly recommended that you emphasize with all members of the prosecution team that exculpatory and impeachment information must be disclosed, regardless of whether we make a formal record of it.*

*It is recommended that you explain to the agents working on the case that they may not destroy their informal notes unless and until everything exculpatory or impeaching in them has been fairly included in a formal memorandum of the interview. Such a warning, regularly given, should help to dispel any notion that the duty to disclose exculpatory or impeachment material may be controlled or limited by the manner in which that information is recorded or treated. Moreover, demanding that agents review their notes against their final, formal memoranda to insure that all impeaching or exculpatory information has been disclosed is perhaps one way to forestall that task eventually falling to AUSAs.*

#### 5. Applicability of the Jencks Act and Rule 26.2.

The Jencks Act applies to trials. Rule 26.2 applies to:

- preliminary hearings
- detention hearings
- suppression hearings
- sentencing hearings
- hearings to consider revocation of probation or supervised release
- 2255 hearings

See Section IV below regarding the timing of disclosure.

#### 6. Electronic Communications Among Prosecution Team Members

Electronic communications (email, text messaging, instant messaging, etc.) among prosecution team members may be considered Jencks material if they relate to the subject matter as to which the agent-witness will testify. AUSAs must preserve and produce all electronic communications from agents that relate to the subject matter as to which the agent may be expected to testify. In addition, recognizing that electronic 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 should ask agents to refrain from using electronic messages for "substantive" communications about the 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 electronic communications 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 electronic communications for substantive discussions with witnesses and, if agents do use electronic communications for that purpose, direct them to forward those messages so that the AUSA can preserve and produce them to the defense.

#### D. Materials NOT Subject to Disclosure Requirements

Rule 16 generally does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or by an agent in connection with the investigation or prosecution of a case. See Fed. R. Crim. P. 16(a)(2).

***PRACTICE TIP:*** *An agent's report, however, may contain information favorable to the defendant. It may also contain information that might be deemed a "statement" for purposes of the Jencks Act or Rule 26.2. That is, to the extent it relates to the subject matter of the agent's testimony, or contains a substantially verbatim recital of another witness's oral statements, the relevant portions of the report may be subject to disclosure.*

*Again, under an expansive discovery practice, you may wish to consider disclosing the agent's report, regardless of whether the law and the rules would require disclosure. Discuss this with the agent before making the disclosure.*

## II. GATHERING DISCOVERY MATERIALS

### A. Where to Look - the Prosecution Team

We must locate and disclose all discoverable materials noted above in Section I, including information that is exculpatory and/or impeaching of a prosecution witness, that is within the possession of the "prosecution team." This team includes the agents and law enforcement officers who helped to develop the case or worked with or under the supervision of the prosecutor during the investigation. The "prosecution team," however,

may at times include other agencies. For a more complete discussion of who might be included in the “prosecution team” for discovery purposes, see pages 2-3 of the Deputy Attorney General’s [January 4, 2010 “Guidance For Prosecutors” memo](#).

## B. What to Review/Request

All evidence and other potentially discoverable material gathered during the investigation, whether in our custody or the custody or control of the other members of the prosecution team, should be reviewed. Special care should be given to gathering exculpatory/impeachment information and witnesses’ statements, as discussed above in Section I. Specifically, you should review, or cause to be reviewed by someone intimately familiar with the law and DOJ policy on the disclosure of exculpatory and impeachment information, the following:

- *All* of the agency’s investigative files.
- *All* of the CI/CW/CHS/CS files, by whatever name the agency labels these. Agencies who make use of confidential informants and cooperating individuals have their own established procedures for retaining information about those witnesses. The agencies may keep multiple files containing different types of records or information. Thus, inquiries to agencies about informants should include a review of every kind of file that might contain information about the individual.
- Evidence/information obtained via subpoena, search warrants, or other legal process. With respect to electronically-stored evidence, including e-mails, sufficient time must be allotted for a search of hard drives, disks and other storage hardware. These searches may take a long time, so they should be undertaken well before indictment.
- Evidence/information gathered by civil or regulatory agencies in parallel investigations.
- Substantive communications/correspondence including e-mails, text messages, and letters, between and among prosecutors, agents, witnesses, victims, victim-witness coordinators, etc.
- Potential *Giglio* information about non-law enforcement witnesses (including declarants whose hearsay statements the government might seek to introduce at trial). Ask the case agent to run a criminal history report on all non-law enforcement witnesses.

***PRACTICE TIP:*** Anytime the government has reason to question a witness’s credibility, the government has a duty to inquire. *United States v. Osorio*,

929 F.2d 753 (1st Cir. 1991).

*Also, remember that when a declarant's hearsay statements are admitted into evidence, the credibility of the declarant may be attacked, and if attacked may be supported, as if the declarant testified as a witness. Fed. R. Evid. 806.*

### C. Confidential Informants/Witness Testifying Under Plea or Immunity Agreement

You 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, you should investigate and disclose any information obtained in the following areas when you are going to have a confidential informant or cooperating witness 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:
    - i. Monetary payments--how are they calculated?
    - ii. Expenses, costs and housing--is anyone paying?
    - iii. Immigration status for the witness and/or family members
    - iv. Arrests--intervention by law enforcement
    - v. Taxes--has the witness paid taxes on informant payments?
  - any notes, diaries, journals, e-mails, letters, social networking sites or other writings by the witness
  - prison files, tape recordings of telephone calls, and e-mails, if the informant is in custody
  - criminal history
- PRACTICE TIP:** *You should request that the law enforcement agency on the case check not only the national databases, but also the database of the states and municipalities where the witness is known to have lived. Why? Some states and municipalities may not have entered relevant information into national databases. Consequently, the national databases may not contain relevant charges, including misdemeanor charges that are related to credibility, like bad check charges, or currently pending arrest warrants.*

*You should also review the criminal history with the potential witness to ensure completeness.*

*Also see the “The Use of a Criminal as a Witness,” by Senior United States Circuit Judge Stephen S. Trott, for an extensive discussion of the issues associated with using confidential informants and other cooperators (<http://10.173.2.12/usao/eosua/ole/usabook/homi/07homi.htm>).*

#### D. Agent Awareness of *Brady/Giglio* and DOJ Policy

It is the prosecutor’s responsibility to ensure that the agents working on a case understand the government’s obligations with respect to exculpatory and/or impeachment information. Prosecutors should undertake efforts to educate new agents or agents who are unfamiliar with the government’s obligations under *Brady/Giglio* and DOJ Policy.

#### E. *Giglio* Information About Prosecution Team Members

We also have an obligation to seek out potential impeachment information about law enforcement agents and other members of the prosecution team who are expected to testify. Prosecutors should follow the established **GIGLIO PLAN FOR THE WESTERN DISTRICT OF VIRGINIA** (September 28, 2007) and standard forms currently in effect. These materials may be found on the Office’s shared or “S” drive.

#### F. Trial Preparation Interviews

When preparing a witness for a hearing or trial, be very aware of our continuing obligation to disclose information that might be exculpatory or have impeachment value. Thus, if a witness provides information that conflicts in material ways with information the witness has previously provided, or conflicts with material information provided by other witnesses, we should disclose that conflict to the defendant.

***PRACTICE TIP:*** *What is the standard? Measure any conflicting information provided by a witness against the standards set forth in the DOJ Policy, United States Attorney’s Manual section 9-5.001, discussed above in Section I.C.2.*

### III. PREPARING DISCOVERY MATERIALS FOR AND MAKING THE DISCLOSURE

#### A. Bates Labeling/Electronic Storage of Materials

##### 1. Bates labeling.

As documents are gathered during the course of an investigation, you should make a complete and organized record of what has been gathered by the prosecution

team. You should give serious consideration to Bates labeling all documents. This process can be done very quickly with office software. **Do not Bates label original documents.** Scan the originals and Bates label the electronic version. The originals should be kept in the order and condition in which they were obtained. . (There may be times that a production or seizure of records is too voluminous for scanning. In this instance, you should make the documents available for review by defense counsel.)

***PRACTICE TIP:** It is recommended that you Bates label the documents in a way that will allow you to determine the source of the documents. (It is also recommended that you keep a record or log containing a description of the documents, the Bates numbers, the source of the documents, and how they were obtained). For example, in an investigation of John Doe, rather than simply Bates labeling all documents in numerical order with no reference to the source, you may wish to Bates label that bank's records as DOE.Bank ABC.0001 - 1000, or in a similar fashion. Documents obtained via search warrant might be labeled DOE.SW.0001-1000. You might use the initials "VP" to indicate voluntary production.*

*It is not necessary to include the target's name in the label, and you may ultimately choose to label documents in any manner that fits the needs of your particular case. Whatever system you use, however, please ensure that you have a record system that will allow you, as well as any person who might have to deal with the documents at a later time (including the Office's FOIA contact), to determine the source of the documents and how they were obtained. It is important that we be able to determine if records were obtained via the grand jury, in order to ensure that we comply with the secrecy requirements of Rule 6 of the Federal Rules of Criminal Procedure.*

## 2. Formatting.

You may format the documents using either the .tif or the .pdf file format. You may also choose to use OCR (optical character recognition) for the documents. OCR will allow the documents to be searched for particular words or terms.

***PRACTICE TIP:** The recent trend, particularly in large, document-intensive cases, is to provide documents with OCR. The defense will in all likelihood ask the court for documents to be disclosed in a searchable format.*

## B. Grand Jury Materials

### 1. Handling grand jury materials.

The Department of Justice has guidelines for obtaining and handling evidence

pursuant to grand jury subpoena. See United States Attorney's Manual Section [9-11.254](#); *Federal Grand Jury Practice Manual*, Chapter 6 (October 2008). Specific points to remember:

- Identify a records custodian. Typically this is the agent on the case. This person must be familiar with and have the ability to comply with the security requirements for storing grand jury materials.
- Subpoena log. Maintain a log of subpoenas issued for documents and other objects. The log should record the date the subpoena was issued, the grand jury to which the documents or objects were subpoenaed, the date they were received, and the date they were returned to the grand jury.
- Bates label documents. See discussion of Bates labeling in Section III.A above. Remember, do not Bates label the original documents.
- Make a return to the grand jury of the documents returned.

***PRACTICE TIP: This is important!*** *The use of the grand jury to obtain documents or other objects presupposes that the records were obtained for use **by the grand jury**. A timely return makes the grand jury aware of the existence of the records.*

*Also, the Right to Financial Privacy Act **mandates** that records obtained from a financial institution be physically returned to the grand jury. See generally 12 U.S.C. §§ 3401-3422. Accordingly, always physically present documents and objects obtained from a financial institution to the grand jury. (You may substitute a description of the documents for actual presentation, when the volume of the documents makes actual presentation impractical.)*

### C. Materials Seized by Search Warrant

If you have used a search warrant in the investigation, material related to the warrant, including affidavits, orders and the warrant itself, must be disclosed so that the defense can pursue a motion to challenge the constitutionality of the search and suppress evidence obtained in the search. Moreover, if the affiant is to be a witness at the trial, the affidavit is in all likelihood a Jenck's Act statement.

Before disclosing a search warrant affidavit, be sure that it is not sealed. If the affidavit has been sealed pursuant to our motion, you must apply for an order to unseal the affidavit before disclosing it to the defense. In those instances where the substance of the affidavit should not be made public -- as in where the affidavit may refer to an ongoing, covert criminal investigation -- you may ask for an order allowing the limited release of the

material to defense counsel, but prohibiting defense counsel from copying the material or making it public.

#### D. The Discovery Response

We should make a written response to the defense each time we disclose discovery materials.

##### 1. Keeping a record.

We should keep in our files an exact copy of everything we have disclosed and in the form that it was disclosed.

##### 2. “Hot documents.”

In a complicated, document-intensive case, you may want to list "hot documents," that is, documents that are certain to be introduced as exhibits in the government's case-in-chief. In addition to expediting litigation, this may help to avoid having the court order the government to furnish a bill of particulars.

##### 3. 404(b) evidence.

Don't forget to note our intent to use 404(b) evidence in the response. Err on the side of providing notice.

**PRACTICE TIP:** *You may wish to add a caveat like this:*

*It is the position of the United States that the evidence noted above should not be considered as evidence of other crimes, wrongs, acts under Fed. R. Evid. 404(b), because the evidence arose out of the same transaction or series of transactions as the charged offenses, is inextricably intertwined with the evidence regarding the charged offenses, or is necessary to complete the story of the crime on trial. See United States v. Chin, 83 F.3d 83, 87-88 (4th Cir. 1996) (holding that acts intrinsic to charged crimes do not fall under Rule 404(b)). Notice is provided nevertheless, in the event that the foregoing evidence is deemed to fall under Rule 404(b).*

**CAUTION!** *Child pornography may not be released to a defendant, notwithstanding its relevance and the fact that it may constitute evidence. Depictions of child pornography are **contraband**, and should receive special handling. See Section V.A below relating to child pornography.*

#### E. Limiting Disclosures

In a case where there are legitimate concerns about the safety of an informant or witness, it may be appropriate to apply to the court for a protective order limiting distribution and copying of material disclosed or about to be disclosed. There have been occasions when a witness's statement or grand jury testimony has been copied and distributed in a jail or to other potential defendants. Obviously, this may jeopardize the safety of the witness. In situations where this kind of concern is justified, courts have ordered defense counsel not to make copies of certain discovery material and not to let that material out of their personal custody. In these instances, the lawyers may review the material in question with their clients, but may not provide the client with the documents or transcripts themselves.

#### F. Communication With Agent About Discovery

While perhaps an obvious point, remember to discuss discovery with the case agent before indictment. Issues such as protecting witnesses, turning over the agent's report, redacting certain items of information (such as agency file numbers and the like), and ensuring that all potentially exculpatory or impeachment information has been brought to the attention of the prosecutor in a case, are vitally important.

In any case with a confidential informant or cooperating witness, such as drug cases, you **must** discuss with the agent the timing of any disclosure that would reveal the identity of the confidential informant or cooperating witness, before the disclosure is made. This will allow the agent to take steps to safeguard the witness.

### IV. TIMING - WHEN DO YOU DISCLOSE THE MATERIALS?

#### A. Disclosing Exculpatory/Impeachment Information Before Indictment

In applying for a search warrant, we have a duty to disclose exculpatory or impeachment information if that information would defeat a finding of probable cause. This duty to disclose arises not from *Giglio*, but under *Franks v. Delaware*, 438 U.S. 154 (1978). This duty to disclose impeachment information would apply to any confidential informant on whose statements a search warrant affidavit was based. It would also apply, however, to the affiant as well. Again, the standard for measuring whether to disclose exculpatory or impeachment information, particularly about a law enforcement officer, is whether the exculpatory or impeachment information would defeat probable cause.

Case law does not require that the government disclose exculpatory or impeachment

information to a grand jury. Department of Justice policy, however, mandates the presentation of evidence that substantially negates the target's guilt in any grand jury proceeding. See [USAM 9-11.233](#).

***Practice Tip:*** *If you have impeachment information against an affiant law enforcement officer that is substantial enough to negate a finding of probable cause, you should seriously reconsider using that officer as the affiant or whether you should be applying for a search warrant at all. Similarly, if you are aware of evidence that substantially negates a target's guilt, you had better be giving your case a second thought. Why should we present a case for indictment if there is substantial evidence negating guilt?*

#### B. General Post-Indictment Timing Requirements

Our obligations on when we have to disclose discovery materials are very important. Obviously we must comply with the applicable law and discovery orders regarding the timing of disclosures. In addition, being cognizant of the timing requirements should spur us to *gather* the discovery materials as early as possible in the course of an investigation and any resulting prosecution. Where possible, the following deadlines for making disclosure should be observed unless different disclosure deadlines have been ordered by the court:

- Brady Material should be disclosed as soon as possible after indictment.
- Rule 16 and additional materials covered by standard discovery requests should be provided as soon as practicable and not later than 14 days before trial.
- Additional discovery materials obtained within 14 days of trial should be provided as soon as reasonably possible.
- Witnesses' Statements/Jencks materials should be disclosed no later than 7 days before trial and no later than 1 day before any hearing covered by Rule 26.2.
- Impeachment/Giglio materials should be disclosed no later than 7 days before trial
- Sentencing considerations - exculpatory or impeachment information that casts doubt on proof of a material matter relevant to sentencing, even if unrelated to proof of guilt, should be turned over no later than the date of the filing of the court's initial presentence investigation report.

***PRACTICE TIP:*** *Whenever possible, gather and prepare all of the materials that must be disclosed prior to indictment.*

### C. Delayed Disclosure

Situations may arise where delayed disclosure of discovery materials may be justified. These situations may include instances where the integrity of an ongoing investigation may be compromised by a disclosure, the safety of a witness may be compromised, or national security interests may be implicated. In such situations, it may be prudent to delay disclosure of material for a reasonable time. You should consult with your supervisor if you wish to delay any disclosure of discovery materials that may otherwise be required by law, rule, or the court order.

Also, national security cases involving classified information may be subject to special litigation under the Classified Information Procedures Act (CIPA, 18 U.S.C. Appendix III). See Section V. D.

## V. SPECIAL CONSIDERATIONS

### A. Child Pornography

#### 1. Protective orders.

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, so long as the government provides a reasonable opportunity to inspect, view, and examine the material in government offices. The statute also provides that this material is to remain in government care, custody, and control. Thus, in cases where child pornography has been found on a computer belonging to or otherwise used by the defendant, the government and the defense typically agree on a protective order that will allow for the defense to have a “mirror image” of the computer evidence. This mirror image, however, is kept in the custody of law enforcement and can only be accessed by the defense at government offices, with limited exception.

#### 2. Handling child pornography.

It is a common practice to introduce (under seal) a sample of the defendant’s collection of child pornography at a guilty plea hearing. In these instances, you should choose images that will satisfy not just the elements of the crime charged, but also any enhancements under the U.S. Sentencing Guidelines.

***PRACTICE TIP:*** Handle child pornography with care, given that the images are contraband. Thus, it is at least unwise, and possibly illegal, for us to keep child pornography in our files, even though the images may be necessary for us to review as we make charging decisions about the case, prepare for trial and negotiate. If

*you need to work with copies of images, you should have copies made (this applies to a digital or hard copy equally) in which the faces of the children and the portions of the images that are pornographic are obliterated or pixelated so that the faces and graphic pornography are not identifiable. The remaining images are no longer child pornography under the statutory definition. Enough of the images should remain so as to allow us to make informed charging decisions, prepare for trial and negotiate the case.*

*Nonetheless, even when the images have been changed in this manner, they should be treated with discretion and not unnecessarily published or distributed.*

## B. Cases Involving a Wiretap

### 1. Disclosure orders.

Section 2517 of Title 18 governs the disclosure of the contents of wire, oral or electronic communications that were intercepted pursuant to court order. You should review this section thoroughly upon obtaining the court authorization for the interception and before making any disclosures. Disclosure orders must be on file prior to submitting any information obtained from the interception to a grand jury and before indictment.

### 2. Sealing the recordings.

When the order authorizing the interception expires, you **must** make the recordings available to the district judge who authorized the interception and then **SEAL** the recordings. If you do not properly seal the recordings, they will be suppressed. Any evidence **derived** from the recordings will also be suppressed.

***PRACTICE TIP:*** *If an interception is used in a search warrant affidavit, you must refer to the information as being from a “source of information,” rather than revealing the interception itself.*

### 3. Using interception evidence in a hearing.

If you intend to rely on intercepted communications at a detention or preliminary hearing, you must, at least ten (10) days before the hearing, serve the defense with a copy of the interception application and the court’s authorization order. If you do not comply with the ten day rule, the intercepted communications will not be received into evidence.

***PRACTICE TIP:*** *Obviously, interceptions (commonly referred to as “Title III wiretaps”) present unique legal requirements. You should thoroughly familiarize yourself with all of the statutory requirements set forth in 18 U.S.C. § 2510 et seq.*

## C. Death Penalty Cases

### 1. Continuance pending AG decision.

Capital cases present unique challenges. Upon indictment, it is advisable to file a motion to continue the trial and pre-trial motions hearing, and submit a proposed schedule, in order to allow for a period of time in which the defendant may present to the Department of Justice his reasons and argument that the government should not seek the death penalty and to allow sufficient time for the Attorney General to make a final decision on whether to seek the death penalty.

***PRACTICE TIP:*** *The motion for a scheduling order and speedy trial waiver is designed to avoid a situation where the government files a notice of intent to seek the death penalty just prior to, or in the weeks leading up to, the trial. A relatively late filing of the notice may result in the court granting the defendant's motion to strike the death penalty notice. Moreover, even if the court were to deny a motion to strike the death penalty notice, in the Fourth Circuit the defendant could immediately appeal, under the collateral order doctrine. See United States v. Ferebe, 332 F.3d 722, 726 (4th Cir. 2003).*

### 2. Witness list.

Pursuant to 18 U.S.C. § 3432, the government must supply a witness list to the defendant, at least three days before commencement of the trial. (Pursuant to this statute, the defendant must also be supplied with a copy of the indictment and a list of the veniremen three days before trial.) The list should include 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 furnishing the list may jeopardize the life or safety of any person.

### 3. Mental health issues for penalty phase.

Pursuant to Fed. R. Crim. P. 12.2(c)(2), the results and reports of any examination of the defendant by an expert retained by the government, regarding a mental condition affecting punishment, are to be sealed and not disclosed to attorneys for the government or the defendant unless and until the defendant is found guilty of a capital offense. It is common, however, for the court to issue an order that establishes a protocol for conducting mental health examinations.

## D. Cases Involving Classified Information

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

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

- Those targeting corrupt or fraudulent practices by middle or upper officials of a foreign government;
- Those involving alleged violations of the Arms Export Control Act or the International Emergency Economic Powers Act;
- Those involving trading with the enemy, international terrorism, or significant international narcotics trafficking, especially if they involve foreign government or 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.

#### E. Other General Considerations

##### 1. Records of regularly conducted activity.

Notice of our intent to introduce records of regularly conducted activity pursuant to Fed. R. Evid. 902(11) (for domestic records) or 18 U.S.C. § 3505 (for foreign records) should be accomplished as part of a formal discovery response.

##### 2. Prior convictions older than ten years.

Notice of intent to introduce evidence of a prior conviction to impeach a witness, and that more than ten years has passed since the date of the conviction or the release of the witness from confinement (whichever is later), pursuant to Fed. R. Evid. 609(b) should be accomplished as part of a formal discovery response.

##### 3. Co-defendant statements and *Bruton*.

If you intend to introduce at trial statements by a defendant that have been redacted to eliminate references to co-defendants, pursuant to *Bruton v. United States*, 391 U.S. 123 (1968), submit the statements, with the proposed redactions highlighted, to the defense and the court, well before the pre-trial motions hearing. This will put the defense on notice of our intent, avoid surprise, and provide the court sufficient time to rule on any defense objections.

***PRACTICE TIP:*** *Bruton* protects the right to confrontation under the Sixth Amendment. It does not apply to statements made by a co-conspirator that were made in furtherance of the conspiracy, or to non-testimonial statements.

##### 4. Notice of alibi.

A request for notice of alibi pursuant to Fed. R. Crim. P. 12.1. Our request will require the defendant to provide certain information, which will trigger our obligation to respond with the names, addresses, and telephone numbers of witnesses who will testify that the defendant was at the scene of the crime and also the names of rebuttal witnesses to the defendant's alibi defense.

***PRACTICE TIP:*** *Requesting notice of alibi is highly recommended in any case where a defendant might claim that he was not present when the crime occurred. Be aware that after a defendant files a notice of alibi, the government will have to respond in ten days with the names of witnesses and other information listed in Fed. R. Crim. P. 12.1(b)(1). You may want to file your request for notice of alibi closer to trial, because of the timing and disclosure requirements, in order to protect the safety of your witnesses.*

5. Insanity and mental health.

Notice from the defendant of intent to assert an insanity defense, or intent to introduce expert evidence relating to mental disease, defect or other condition, pursuant to Fed. R. Crim. P. 12.2 should be given by the time set for filing pre-trial motions, or a later time set by the court.

6. Public authority defense.

If a defendant intends to rely on the defense of actual or believed exercise of public authority on behalf of a law enforcement or intelligence agency, the defendant must provide timely notice pursuant to Fed. R. Crim. P. 12.3. The notice must be filed under seal if an intelligence agency is the purported source of public authority.

7. Organizations as victims.

If an organization is the victim of a charged federal crime, the government must file a statement identifying the victim-organization. If the victim-organization is a corporation, the statement must identify any parent corporation and any publicly held corporation that owns 10% or more of the victim-corporation's stock, or state that there is no such corporation. See Fed. R. Crim. P. 12.4.

8. Trial subpoenas.

Rule 17(c) of the Federal Rules of Criminal Procedure allows for the parties to subpoena documents or objects for use at trial. The parties may apply to the court for early production. Remember, production is to be made to the court (this usually translates to the Clerk's Office) prior to trial and the documents or objects are thereafter made available to all parties. That is, a Rule 17(c) subpoena is not a means to get exclusive access to potential evidence. When the material subpoenaed is disclosed, it is disclosed to all parties.

***Practice Tip:*** *Be alert to any attempt by the defense - it may be intentional or inadvertent - to have the subpoenaed items delivered to their offices rather than the court.*