DISCOVERY POLICY FOR USAO, NDWV[1]

(Last Updated October 15, 2010)

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[1]This memorandum provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any substantive or procedural rights enforceable at law by any person in any administrative, civil, or criminal matter or case. Nor are any limitations hereby placed on the otherwise lawful mitigative prerogatives of the U.S. Department of Justice. *See*, United States Attorney's Manual (USAM) § 1-1.100; *see also United States v. Caceres*, 440 U.S. 741 (1979).

INTRODUCTION

This is a guide for AUSAs in fulfilling their discovery obligations in the NDWV. While it does not cover every issue an AUSA will be faced with in making discovery decisions, it is meant to provide AUSAs with a framework. Prosecutors are reminded to consult with the designated Criminal Discovery Coordinator and other supervisors in the office, and PRAO if necessary, when they have questions about the scope of their discovery obligations. This policy must be reviewed and considered prior to making determinations regarding any discovery issue examined herein.

As a minimum, the United States has constitutional and statutory mandates for discovery obligations, which are generally set forth in the Federal Rules of Criminal Procedure, Rule 16 and Rule 26.2, 18 U.S.C. § 3500 (*Jencks Act*), *Brady*,[2] *Giglio*,[3] USAM 9-5.001, the Criminal Resource Manual in Section 165 and the Local Rules of Criminal Procedure ("L R Cr P") for the United States District Courts for the Northern District of West Virginia (collectively referred to as "discovery obligations").

However, the Department of Justice (hereinafter "Department") policy on the disclosure of exculpatory and impeaching information and evidence requires broader disclosures than the constitutional or statutory strictures of *Brady* or *Giglio* or Rules 16 and 26.2 . *See* USAM §9-5001. Providing broader discovery serves the interest of judgment, promotes the truth-seeking mission of the Department, and oftentimes fosters a speedy resolution of a case. As a prosecutor knows, while there are occasions when countervailing considerations mitigate against broad or early discovery, the Department encourages AUSAs to provide discovery in excess of the normal mandates, whenever possible. If an AUSA chooses this course, the defense should be advised

[2]*Brady v. Maryland*, 373 U.S. 83 (1963) followed by *U.S. v. Bagley*, 473 U.S. 667, 682 (1985) and *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (prosecutors have a duty to learn of any favorable evidence known to others acting on the Government's behalf in this case), explain the Government's duty to disclose evidence favorable to an accused and material to guilt or punishment.

[3]*Giglio v. United States*, 405 U.S. 150 (1972).

that the AUSA is electing to produce discovery beyond what is required, but is not committing beyond that provided. However, in no disclosure should the discovery be described as "open file." This protects the AUSA from an accusation that a misrepresentation was made by an inadvertent omission of a non-constitutional or statutory item.

This policy is to provide guidance, allowing the AUSAs to make considered decisions as to whether and when to disclose. It is the intention of this policy to adopt a consistent discovery practice for the District, regardless of division or AUSA.

BRADY AND *GIGLIO* MATERIALS

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

> We now hold that the suppression by the prosecution of **evidence favorable to an accused**...violates due process where the evidence is **material either to guilt or to punishment**, irrespective of the 89good faith or bad faith of the prosecution.

Id. at 87.[4]

Nine years later, in *Giglio v. United States*, 405 U.S. 50 (1972), the Supreme Court held that *Brady* material includes material that might be used to impeach key government witnesses, stating:

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

Id. at 154.[5]

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[4]In *Brady*, John Leo Brady was convicted by a jury of first-degree (felony) murder in connection with a robbery/strangulation, and he was later sentenced to death. Before Brady was sentenced, the state prosecutor failed to disclose to Brady a confession of Charles Boblit, Brady's co-defendant, in which Boblit admitted that it was he (Boblit) who did the actual killing, which was Brady's contention. (Boblit, too, was convicted of first-degree (felony) murder and sentenced to death). Because of the state's failure to disclose Boblit's confession, which Brady could have used to support his argument for a sentence of life imprisonment instead of death, the Maryland Court of Appeals vacated Brady's death sentence and remanded the case to the trial court for re-sentencing, which was affirmed by the U.S. Supreme Court.

[5]In the *Giglio* case, John Giglio was prosecuted federally for negotiating forged money orders. Robert Taliento, a bank teller, helped Giglio commit the crime. Taliento was named as an unindicted coconspirator and testified at trial as a government witness. Neither Giglio nor the

The Supreme Court has explained that *Brady* material and *Giglio* material are not two distinct kinds of evidence under the Constitution, but rather, *Giglio* material is merely one form 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 with 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.

United States v. Bagley, 473 U.S. 667, 676 (1985).

Still, it is often useful to keep *Brady* and *Giglio* analytically distinct. First, *Brady* and *Giglio* are, at a more specific level, conceptually different kinds of evidence, and they are commonly referred to separately, as different kinds of evidence: "*Giglio* material" being the label for *impeachment evidence*, and "*Brady* material" being the label for every other kind of evidence that could be helpful to the defendant's efforts to create a reasonable doubt (*exculpatory evidence*) or receive a lower sentence (*mitigating circumstances*). Second, the AUSA's duties under *Giglio*, at least with respect to *law enforcement* witnesses, which are discussed below, are somewhat different and more complicated than his or her duties under *Brady*.

In making *Brady* disclosures, an AUSA must provide any evidence favorable to an accused which is material to the question of guilt or punishment. Since prior to trial, we are unable to determine any particular defendant's strategy, it is difficult to assess the materiality of evidence before trial. The Department's policy is for prosecutors to take a broad view of materiality and err on the side of disclosure. *See* USAM §9.501.

It also must be remembered that materiality has nothing to do with admissibility. A defendant is entitled to *Brady* evidence regardless of its possible admission at trial. Additionally, an AUSA's *Brady* obligation (and *Giglio* as well) is not limited to the AUSA's personal knowledge. *Kyles v. Whitely*, 514 U.S. 419 (1995). The knowledge of any member of the prosecution team[6] is imputed to the AUSA(s) handling the case. It is, therefore, the

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trial AUSA knew until after the trial that a different AUSA, the one who had handled the grand jury proceedings, had given Taliento full immunity in exchange for his testimony. The U.S. Supreme Court decided that the government's failure to disclose the immunity agreement violated due process and overturned Giglio's conviction.

[6]A discussion of who consists of the prosecution team is addressed later.

responsibility of the AUSA to make inquiries of the prosecution team about *Brady* and *Giglio* issues.

As for an AUSA's *Giglio* duties, we must disclose material to the defendant that includes "**evidence affecting [the] credibility" of key government witnesses.** *Giglio v. United States*, 405 U.S. 150, 154 (1972). This duty exists with respect to key government witnesses at suppression hearings, trials, and sentencing hearings.

As with *Brady* material, an AUSA is constitutionally required to disclose all *Giglio* material that he/she or any member of the prosecution team is aware of. The AUSA, consequently, "has a duty to learn of any [*Giglio* material] known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

Accordingly, the AUSA **must** ask the case agent if he/she or any member of the prosecution team knows of any *Giglio* material on any government witness. Under *Kyles*, the AUSA is **required** to make these inquiries.

Finally, two things should be kept in mind about potential *Giglio* material that comes to the AUSA's attention: First, the decision to disclose or not disclose impeachment evidence on a law enforcement or *civilian* government witness ultimately rests with the AUSA, decisions on law enforcement should be made only after discussing with the Giglio Contact. Second, simply because the information is disclosed does not mean it will be admissible at trial.

An AUSA may determine that the early disclosure of *Brady, Giglio* (or *Jencks*) material may raise issues of national security, witness safety or obstruction of justice, and wish not to disclose same as addressed in this policy. If an AUSA makes such a determination, they must obtain supervisory approval from the Criminal Chief, First Assistant and/or the United States Attorney, before withholding the disclosure. If supervisory approval is given, the AUSA must provide defendant's counsel of the time and manner in which disclosure will be made. USAM §9-5.100(D)(4).

Whenever it is unclear whether such evidence or information should be disclosed, AUSAs are recommended to seek an *in camera* hearing and Protective Order from the Court.

1. Timing of Disclosures

    a. General Discovery - Local Rules

        i. According to the "Standard Discovery Form" under "Forms" on the NDWV district court web site, "Standard requested discovery material" means discovery covered by Fed.R.Crim.P., Rule 16, as well as any matter as to which the government will seek judicial notice and whether any evidence was derived through wiretaps.

ii. Unless the parties agree otherwise or the court orders otherwise (such as when a case is designated as a complex case), the prosecution must provide standard requested discovery material to defendant's counsel within 10 days of a defense request for discovery. [L R Cr P, Rule 16.01(d)-].

iii. Additional standard requested discovery material must be provided as soon as the prosecution receives it under most circumstances. For exceptions, *see* L R Cr P, Rules 16.01(g) and 16.04.

iv. If the defense requests discovery beyond "Standard requested discovery material," the prosecutor should first consult with a supervisor and the Criminal Discovery Coordinator. If such additional discovery is being declined, then the AUSA must comply with the procedures in L R Cr P., Rule 16.02.

b. Exculpatory and impeachment material

i. *Brady* material

(1) Prior to indictment, "...[When a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person." [USAM 9-11.233].

(2) According to the Local Rules, *Brady* material will be disclosed at the same time as the Rule 16 disclosures. Additional *Brady* material will be disclosed upon receipt by the government. [L R Cr P, Rule 16.05]. However, the USAM requires AUSAs disclose exculpatory information "reasonably promptly after it is discovered."

ii. *Giglio* material

(1) Such evidence will "...be made in sufficient time to permit the defendant to make effective use of that information at trial," and, in any event, no later than 14 days before trial. The USAM requires the disclosure occur "at a reasonable time before trial."

iii. AUSAs should remember that W.Va. Rule 3.8(d) of the Rules of Professional Conduct provide for prosecutors that they, "[M]ake 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 the prosecutor is relieved of this responsibility by a protective order of the tribunal."

c. *Roviaro* and 404(b) evidence shall be disclosed no later than 14 days before trial. [L R Cr P, Rule 16.06]

d. Disclosure of discovery is a continuing duty up through the end of the trial. [L R Cr P, Rule 16.11]

PROSECUTION TEAM

In order for an AUSA to satisfy their discovery obligations, they must know where to look, who to ask and what to look at. The AUSA is obliged to seek all exculpatory, impeachment and discovery material from the "prosecution team."

In most cases, 'the prosecution team' will include the agents and law enforcement officers within the relevant district working on the case. In multi-district investigations, investigations that include both AUSAs and prosecutors from a Department litigating component or other United States Attorney's Office (USAO), and parallel criminal and civil proceedings, this definition will necessarily be adjusted to fit the circumstances. In addition, in complex cases that involve parallel proceedings with regulatory agencies (SEC, FDIC, EPA, etc.), or other non-criminal investigative or intelligence agencies, the prosecutor should consider whether the relationship with the other agency is close enough to make it part of the prosecution team for discovery purposes.

Some factors to be considered in determining whether to review potentially discoverable information from another federal agency or district include:

1. Whether the prosecutor and the agency conducted a joint investigation or shared resources related to investigating the case;

2. Whether the agency played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in targeting discussions, or otherwise acting as part of the prosecution team;

3. Whether the prosecutor knows of any has access to discoverable information held

by the agency;

4. Whether the prosecutor has obtained other information and/or evidence from the agency;

5. The degree to which information gathered by the prosecutor has been shared with the agency;

6. Whether a member of any agency has been made a Special Assistant United States Attorney;

7. The degree to which decisions have been made jointly regarding civil, criminal or administrative charges; and,

8. The degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party.

Many cases arise out of investigations conducted by multi-agency task forces or otherwise involving state law enforcement agencies. In such cases, prosecutors should consider (1) whether state or local agents are working on behalf of the prosecutor or are under the prosecutor's control; (2) the extent to which state and federal governments are part of a team, are participating in a joint investigation, or are sharing resources; and, (3) whether the prosecutor has ready access to the evidence. Courts will generally evaluate the role of a state or local law enforcement agency on a case-by-case basis. Therefore, prosecutors should make sure they understand the law in their circuit and their office's practice regarding discovery in cases in which a state or local agency participated in the investigation or on a task force that conducted the investigation.

Prosecutors are encouraged to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes. Carefully considered efforts to locate discoverable information are more likely to avoid future litigation over *Brady* and *Giglio* issues and avoid surprises at trial.

Although the considerations set forth above generally apply in the context of national security investigations and prosecutions, special complexities arise in that context...Prosecutors should begin considering potential discovery obligations early in an investigation that has national security implications and should also carefully evaluate their discovery obligations prior to filing charges. This evaluation should consider circuit and district precedent and include consultation with national security experts in their own offices and in the National Security

Division." Before making **any** disclosures in a case involving national security, an AUSA must contact the Criminal Chief.[7]

Material Which Should be Reviewed

"To ensure that all discovery is disclosed on a timely basis, generally all potentially discoverable material within the custody or control of the prosecution team should be reviewed. The review process should cover the following areas:

1. The Investigative Agency's Files: With respect to Department of Justice law enforcement agencies, with limited exceptions,[8] the prosecutor should be granted access to the substantive case file and any other file or document the prosecutor has reason to believe may contain discoverable information related to the matter being prosecuted. Therefore, the prosecutor can personally review the file or documents or may choose to request production of potentially discoverable materials from the case agents. With respect to outside agencies, the prosecutor should request access to files and/or production of all potentially discoverable material. The investigative agency's entire investigative file, including documents such as FBI Electronic Communications (ECs), inserts, emails, etc. should be reviewed for discoverable information. If such information is contained in a document that the agency deems to be an internal document such as an email, an insert, an administrative document, or an EC, it may not be necessary to produce the internal document, but it will be necessary to produce all of the discoverable information contained in it. Prosecutors should also discuss with the investigative agency whether files from other investigations or non-investigative files such as confidential source files might contain discoverable information. Those additional files or relevant portions thereof should also be reviewed as necessary.

2. Confidential Informant (CI)/Witness (CW)/Human Source (CHS)/Source (CS) Files: The credibility of cooperating witnesses or informants will always be at issue if they testify during a trial. Therefore, prosecutors are entitled to access to the agency file for each testifying CI, CW, CHS or CS. Those files should be

[7]The Department has issued guidelines through Acting Deputy Attorney General Gary G. Grindler, dated September 29, 2010, regarding procedures regarding disclosure of Intelligence Community or Military in Criminal Investigation, which should be reviewed in every relevant investigation. *See also*, page 14 of this policy regarding this office's policy as to disclosure in National Security and Terrorism cases.

[8]Exceptions to a prosecutor's access to Department law enforcement agencies' files are documented in agency policy, and may include, for example, access to a non-testifying source's file.

reviewed for discoverable information and copies made of relevant portions for discovery purposes. The entire informant/source file, not just the portion relating to the current case, including all proffer, immunity, and other agreements, validation assessments, payment information, and other potential witness impeachment information should be included within this review. If a prosecutor believes that the circumstances of the case warrant review of a non-testifying source's file, the prosecutor should follow the agency's procedures for requesting the review of such a file. Prosecutors should take steps to protect non-discoverable, sensitive information found within a CI, CW, CHS or CS file. Further, prosecutors should consider whether discovery obligations arising from the review of CI, CW, CHS and CS files may be fully discharged while better protecting government or witness interests such as security or privacy via a summary letter to defense counsel rather than producing the record in its entirety. Prosecutors must always be mindful of security issues that may arise with respect to disclosures from confidential source files. Prior to disclosure, prosecutors should consult with the investigative agency to evaluate any such risks and to develop a strategy for addressing those risks or minimizing them as much as possible, consistent with discovery obligations.

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

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

5. Substantive case-related communications, include emails between agent-AUSA, agent-witnesses and agent-cooperator. As such, AUSAs should refrain from communicating with other AUSAs, agents or witnesses through any electronic means, including, but not limited to, email and text messages, where those communications involve trial or investigative strategy. Any AUSA who does communicate through these mediums should be mindful that those

communications may be discoverable and disclosable to the defense and the courts. Electronic records that are case related must be printed and stored in the AUSA file. All "sent emails" should be printed out of the "Sent Items" folder in Outlook, to have a time and date stamp record of the email. "Substantive" communications include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility.

6. "Agent Notes: Agent notes should be reviewed if there is a reason to believe that the notes are materially different from the memorandum, if a written memorandum was not prepared, if the precise words used by the witness are significant, or if the witness disputes the agent's account of the interview. Prosecutors should pay particular attention to agent notes generated during an interview of the defendant or an individual whose statement may be attributed to a corporate defendant. Such notes may contain information that must be disclosed pursuant to Fed.R.Crim.P. 16(a)(1)(A)-(C) or may themselves be discoverable under Fed.R.Crim.P. 16 (a)(1)(B). *See, e.g., United States v. Clark*, 385 F.3d 609, 619-20 (6th Cir. 2004) and *United States v. Vaffee*, 380 F.Supp.2d II, 12-14(D. Mass. 2005)." [Criminal Resource Manual, Section 165, B.8.c.]

7. Potential *Giglio* information relating to both non-law enforcement and law enforcement witnesses.

8. Witness interview notes of AUSAs and/or agents taken in preparation for a court hearing.

Conducting the Review

1. Having gathered the information described above, prosecutors must ensure that the material is reviewed to identify discoverable information. AUSAs should review the information themselves in every case, but in those limited circumstances when such review is not feasible or necessary because of the voluminous nature of the documents, the AUSA may develop a process for review of pertinent information to ensure that discoverable information is identified. Because the responsibility for compliance with discovery obligations rests with the prosecutor, the prosecutor's decision about how to conduct this review is controlling. This process may involve agents, paralegal, agency counsel and computerized searches. Although AUSAs may delegate the process and set forth criteria for identifying potentially discoverable information, the AUSA shall not delegate the disclosure determination itself. Remember, however, that it is the AUSA who is personally responsible for compliance with the discovery obligation.

In cases involving voluminous evidence obtained from third parties, AUSAs should consider providing defense access to the voluminous documents to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence. *See* Criminal Resource Manual, Section 165, Section B.8.

Disclosure of Reports of Interview for Testifying or Non-Testifying Witnesses

An issue often facing AUSAs are issues regarding the disclosure of reports of interview for testifying and non-testifying witnesses. Following are some general points of consideration. However, as with most items, as the policy urges, if there is any question, always err on the side of caution and disclose.

a. For testifying witnesses

i. Reports of interview (ROI's) such as FBI 302's and DEA 6's are not considered *Jencks* material unless the ROI contains a verbatim statement of the witness or the witness has adopted it. Therefore, the general policy is that ROI's are *not required* to be turned over to the defense in discovery. *United States v. Hall*, 93 F.3d 126, 131 (4th Cir. 1996)

ii. Exceptions apply where an ROI contains impeachment or exculpatory information. In that situation, consideration may be given whether to provide the ROI itself or instead compose a letter to the defense containing the impeachment/exculpatory information.

iii. Some witnesses' statements will vary during the course of an interview or investigation. For example, they may initially deny involvement in criminal activity, and the information they provide may broaden or change considerably over the course of time, especially if there are a series of debriefings that occur over several days or weeks. Material variances in a witness' statements should be memorialized, **even if they are within the same interview**, and should be provided to the defense as *Giglio* information. *See*, Criminal Resource Manual, Section 165 B.8.a. When these witnesses are interviewed for trial preparation, AUSAs should be particularly attuned to new or inconsistent information disclosed by the witness. If such information is exculpatory or impeachment, it should be disclosed immediately.

iv. An agent's ROI is *Jencks* if the agent is going to testify about the subject matter contained in the ROI. Therefore, you must disclose the ROI as the *Jencks* material of the testifying agent.

b. For non-testifying witnesses:

i. ROIs of a witness are not by case law or otherwise required to be disclosed, unless they contain material which is exculpatory or may lead to impeachment evidence.

ii. While it is not required to disclose the ROI, the Department recommends that AUSAs "may wish to consider providing" to avoid any claim of violation of our obligation, considering any subsequent review is made in hindsight and the prosecutors good faith prospective analysis at the time of non-disclosure is irrelevant.

Giglio Material on Law Enforcement Witnesses

1. Generally

A law enforcement agent who is called as a witness knows (or certain should know) whether there is anything that exists that could be used to impeach him. That simple fact taken together with the irrebuttable presumption, established in *Kyles v. Whitley*, that the AUSA knows everything that any member of the prosecution team knows (whether or not he/she has such actual knowledge) means that the AUSA will be held legally responsible for disclosing all *Giglio* material on law enforcement witnesses, even if he/she and the case agent have no idea that such material exists. Hence, the AUSA absolutely must find out, one way or another, if there is any *Giglio* material on any employee of a law enforcement agency - whether federal, **state** or **local** who will or might be a witness at any suppression hearing, trial, or sentencing hearing. The two forms of impeachment that will come into play most often with law enforcement witnesses are bias and specific instances of misconduct involving dishonesty.

2. The Attorney General's *Giglio* Policy

In recognition of the tension that may arise between AUSAs and agents because of *Giglio*, the Attorney General issued a directive, dated December 9, 1996, entitled "*Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses* ('[AG's] *Giglio Policy')*." This policy was amended on October 19, 2006, to conform to the Department's new policy regarding disclosure of exculpatory and impeachment evidence. By its own terms, the AG's *Giglio* Policy governs only the DOJ law enforcement agencies (FBI, USMS, DEA, INS). But the Secretary of the Treasury has adopted the AG's *Giglio* Policy for the Treasury agencies as well. *See* USAM § 9-5.001.

There are three methods which an AUSA should use to learn whether there is any potential *Giglio* material on a law enforcement witness.

First, the AUSA **must** initially seek *Giglio* material on a law enforcement witness by asking the witness directly. Moreover, the AUSA's obligation to ask the law enforcement witness directly about evidence that might be used to impeach him may not be delegated to the case agent.

Second, the AUSA should inquire of the *Giglio* Contact whether the office is aware of any *Giglio* material on the witness.

Third, the *Giglio* Contact may decide to request potential impeachment information from the investigative agency." The AUSA initiates this procedure by requesting the *Giglio* Contact to aks the law enforcement witness' agency to look for and identify any potential *Giglio* material on the witness.

Where the AUSA is concerned that there may be a potential *Giglio* issue, **the AUSA must contact the *Giglio* contact and/or Criminal Chief** prior to the commencement of **any** suppression hearing, trial or sentencing hearing in which a law enforcement witness (i.e. a member of the "prosecution team") is, or law enforcement witnesses are, expected to testify and give him the name(s) of the law enforcement witness(es). **The AUSA must make this contact as soon as reasonably practicable.**

The AUSA's contact with the *Giglio* contact should occur sooner rather than later. Early contact will allow sufficient time to search the office's repository for any *Giglio* material on the AUSA's law enforcement witness(es). It will also allow sufficient time to request the witness' agency to look for and produce potential *Giglio* material on the witness. Early contact will also give the AUSA time to regroup and reorganize the government's investigation or presentation of evidence if it turns out that a law enforcement witness carries so much *Giglio* baggage that he cannot be used as a witness.

Indeed, if any law enforcement employee with a *Giglio* issue will be or could be a significant witness in the government's case-in-chief, the AUSA should make contact with the Criminal Chief as early in the investigation as possible (i.e., well before indictment). This will help ensure that any agent who has a serious *Giglio* problem will not become an essential government witness. Once it becomes apparent that an agent has a serious *Giglio* problem, the AUSA should simply forbid him from, among other things, interviewing a target by himself, being the sole witness of any other potentially significant event, being an affiant, or acting in an undercover capacity.

Throughout this process, of course, AUSAs should appreciate the fact that the disclosure of *Giglio* material on a law enforcement witness may adversely affect his privacy interests and reputation.[9] **As such, consideration should be given to the appropriateness of presenting the information to the Court ex parte and requesting Protective Orders.**

3. Defense Motions to Compel the Production of Law Enforcement Personnel Files

On occasion, in an effort to obtain all existing *Giglio* material on law enforcement witnesses, the defendant will choose not to rely solely on the government's good faith; he will also try to invoke the power of the district court to force the government to turn over the personnel files of the law enforcement witnesses. Fortunately, Circuit Courts of Appeal (although not the Fourth), which have directly ruled on the issue, require the defendant to make some affirmative showing that the personnel file requested may actually contain *Giglio* material. "Mere speculation that a government file may contain *Brady* [i.e., *Giglio*] material is not sufficient...A due process standard which is satisfied by mere speculation would convert *Brady* into a discovery device and impose an undue burden upon the district court." *United States v. Driscoll*, 970 F.2d 1472, 1482 (6th Cir. 1992). *See, also United States v. Navarro*, 737 F.2d 625, 631 (7th Cir.), *cert. denied* 469 U.S. 1020 (1984); *United States v. Pitt*, 717 F.2d 1334, 1338-39 (11th Cir. 1983), *cert. denied* 465 U.S. 1068 (1984).

Cases Involving National Security Matters

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

[9]The AG's *Giglio Policy* explains that its "purpose...is to insure that prosecutors receive sufficient information to meet their obligations under *Giglio v. United States*, 405 U.S. 150 (1972), while protecting the legitimate privacy issues of Government employees."

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.

Maintaining a Record of Disclosures

Prosecutors should make a record of when and how information is disclosed or otherwise made available. Unless impractical, all discovery should be "bate stamped," and copies of the numbered discovery should be maintained for the file. Whether or not the discovery is "bate stamped," a record shall be maintained in the file sufficient to document exactly when and what was provided to the defense as discovery.

ADDITIONAL REFERENCE MATERIAL

1. A hyperlink to USAM 9.5.001 discovery obligations can be found beginning here:

   http://www.justice.gov/usao/eousa/foia_reading_room/usam/

2. In addition to the DAG's directive, the DAG issued DOJ "Guidance for Prosecutors Regarding Criminal Discovery," which can be found in the Criminal Resource Manual, Section 165, at this hyperlink:

http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.htm

3. Local district court rules for the NDWV specific to criminal discovery can be found beginning at this hyper link:

http://www.wvnd.uscourts.gov/