UNITED STATES DEPARTMENT OF JUSTICE

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United States Attorney's Office
for the District of Wyoming

EMPLOYEE HANDBOOK
Section Number: Criminal4
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SUBJECT: DISCOVERY POLICY

INTRODUCTION

The District of Wyoming has had a formal written discovery policy since November 15, 1999. That policy was designed to modify the District's "Open File Discovery Policy" that had been in existence for many years. On October 19, 2006, the Department amended USAM § 9-5.001 and that amendment "requires AUSAs to go beyond the minimum obligation required by the Constitution and establishes broader standards for disclosure of exculpatory and impeachment information." Then on January 4, 2010, Deputy Attorney General Ogden issued a memorandum entitled "Guidance for Prosecutors Regarding Criminal Discovery." The memorandum directed USAOs to promulgate discovery polices that addressed certain enumerated issues. As noted in the memorandum, the new disclosure policies are not intended to establish new disclosure obligations. The basic discovery parameters set forth in Fed.R.Crim.P. 16 and 26.2, *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and 18 U.S.C. § 3500 (the Jencks Act) still control a prosecutor's disclosure obligations.[1] This new District policy provides guidance in the areas of gathering discoverable information, general discovery review, *Brady-Giglio* review, witness interviews and note taking, preservation of electronic communications, producing and tracking discovery and the timing of discovery disclosures.[2]

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[1]In addition, the U.S. Attorney's Manual describes DOJ's policy for disclosure of exculpatory and impeachment information. See USAM §§ 9-5.001 ("Policy Regarding Disclosure of Exculpatory and Impeachment Information") and 9-5.100 ("Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Witnesses) ("*Giglio* Policy").

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

DISTRICT OF WYOMING DISCOVERY POLICY

I. Gathering Discoverable Information - The Prosecution Team

The first question to be asked in every case is where to look for discoverable information. Department policy requires prosecutors to seek discoverable information from all members of the prosecution team. In most cases, the prosecution team will include the federal agents and state and local law enforcement officers working on the case. USAM § 9-5.001.

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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.

In determining who should be considered part of the prosecution team, an AUSA must determine whether the relationship is close enough to warrant inclusion for discovery purposes. When in doubt, consult with your supervisors and/or the District's Discovery Coordinator. Examples include:

- Multi-district investigations – the prosecution team could include the AUSAs and agents from the other district(s).

- State/local agencies – a state and local officer is a part of the "prosecution team" if the AUSA or federal agents are directing the officer's actions or if the state or local officer participated in the investigation or gathered evidence which ultimately led to the charges.

- Regulatory agencies – the prosecution team could consist of employees from non-criminal investigative agencies such as the SEC and FDIC.

Considerations in determining whether an agency or entity should be considered part of the "prosecution team":

- Whether the AUSA or investigative agency conducted a joint investigation or shared resources with the other agency or entity;

- Whether the other agency or entity played an active role in the AUSA's case;

- The degree to which information or evidence has been shared or exchanged with the other agency or entity; and

- Whether the AUSA has control over or has directed action by the other agency or entity.

AUSAs should take an expansive view and err on the side of inclusiveness in deciding who should be considered part of the "prosecution team." Additional guidance on this issue is set forth in the DAG's January 4, 2010, memorandum entitled "Guidance for Prosecutors Regarding Criminal Discovery."

II. Conducting the Discovery Review

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:

A. **The Investigative Agency's Files**: With respect to Department of Justice law enforcement agencies, with limited exceptions, the AUSA should be granted access to the substantive case file and any other file or document the AUSA has reason to

believe may contain discoverable information related to the matter being prosecuted.[3] Therefore, the AUSA 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 AUSA should request access to files and/or production of all potentially discoverable materials. 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. AUSAs 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.

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

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

AUSAs should take steps to protect the non-discoverable, sensitive information found within a CI, CW, CHS, or CS file. Further, AUSAs 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. AUSAs must always be mindful of security issues that may arise with respect to disclosures from confidential source files. Prior to disclosure, AUSAs 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

[3]Exceptions to an AUSA'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 files.

possible, consistent with discovery obligations. This strategy may well include the seeking of protective orders from the court in appropriate cases.

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

D. **Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agencies in Parallel Civil Investigations**: If an AUSA 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, AUSAs may very well want to ensure that those files are reviewed not only to locate discoverable information, but also 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.

E. **Substantive Case-Related Communications**: "Substantive" case-related communications may contain discoverable information. Those communications that contain discoverable information should be maintained in the case file or otherwise preserved in a manner that associates them with the case or investigation. "Substantive" case-related communications are most likely to occur (1) among prosecutors and/or agents, (2) between prosecutors and/or agents and witnesses and/or victims, and (3) between victim-witness coordinators and witnesses and/or victims. Such communications may be memorialized in emails, memoranda, or notes. "Substantive" communications include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility. Communications involving case impressions or investigative or prosecutive strategies without more would not ordinarily be considered discoverable, but substantive case-related communications should be reviewed carefully to determine whether all or part of a communication (or the information contained therein) should be disclosed.

F. **Potential *Giglio* Information Relating to Law Enforcement Witnesses**: AUSAs should have candid conversations with the federal agents with whom they work regarding any potential *Giglio* issues, and they should follow the procedure established in USAM §9-5.100 whenever necessary before calling a law enforcement

employee as a witness. AUSAs should be familiar with circuit and district court precedent and local practice regarding obtaining *Giglio* information from state and local law enforcement officers.

The following questions, among others, should be asked of all testifying law enforcement witnesses. Note that the following questions are quite broad; an affirmative answer to any of these questions does not necessarily mean that a *Giglio* disclosure is necessary. The issue of when and whether a *Giglio* disclosure is required is governed by USAM §9-5.100:

- Are you or have you ever been the subject of any allegation or finding of misconduct?

- Are you or have you ever been the subject of any administrative allegation of bias or untruthfulness, including any finding of lack of candor in response to an administrative inquiry?

- Are you or have you ever been the subject of any administrative allegation of bias or untruthfulness that was resolved with a lesser finding, e.g., conduct unbecoming of an officer?

- Has any court ever found your testimony to be untruthful (including in civil proceedings)?

- Are you or have you ever been the subject of any allegations of excessive force?

- Have any criminal charges ever been filed against you (regardless of outcome)?

- Have you ever been named in a lawsuit, i.e., sued anyone or been sued (including domestic matters)?

- Did anything happen during this case that could be argued as evidence of your bias against the defendant(s)?

- Do you currently have or have you ever had any significant personal relationship with any of the victims, witnesses (including other police officers, social workers, or medical professionals), lawyers, judge(s), or defendant(s) in this case? A significant personal relationship is a relationship, beyond being mere acquaintances or work colleagues, that could potentially influence your testimony or create a possible bias toward or against any victim, witness, lawyer, judge, or defendant.

G. Potential *Giglio* Information Relating to Non-Law Enforcement Witnesses and Fed. R. Evid. 806 Declarants: All potential *Giglio* information known by or in the

possession of the prosecution team relating to non-law enforcement witnesses should be gathered and reviewed. That information includes, but is not limited to:

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

2. Statements or reports reflecting witness statement variations (see below)

3. Benefits provided to witnesses including:

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

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

    - Animosity toward defendant
    - Animosity toward a group of which the defendant is a member or with which the defendant is affiliated
    - Relationship with victim
    - Known but uncharged criminal conduct (that may provide an incentive to curry favor with a prosecutor)

5. Prior acts under Fed. R. Evid. 608
6. Prior convictions under Fed. R. Evid. 609
7. Known substance abuse or mental health issues or other issues that could affect the witness's ability to perceive and recall events

III. *Brady* and *Giglio*[4]

In accordance with the U.S. Department of Justice's *Brady/Giglio* policies set forth in USAM §§ 9-5.001 and 9-5.100 (revised October, 2006), the United States Attorney's Office for the District of Wyoming has adopted the following:

A. Policy Regarding Disclosure of Exculpatory and Impeachment Information ("*Brady Policy*")

1. Purpose. Consistent with applicable federal statutes, rules, and case law, the policy set forth here is intended to promote regularity in disclosure practices, through the reasoned and guided exercise of prosecutorial judgment and discretion by attorneys for the government, with respect to the government's obligation both to disclose exculpatory and impeachment information to criminal defendants and to seek a just result in every case. The policy is intended to ensure timely disclosure of exculpatory and impeachment information so as to ensure that trials are fair. The policy, however, recognizes that other interests, such as witness security and national security, are also critically important, see USAM 9-21.000, and that if disclosure prior to trial might jeopardize these interests, disclosure may be delayed or restricted (e.g., pursuant to the Classified Information Procedures Act). This policy is not a substitute for researching the legal issues that may arise in an individual case. Additionally, this policy does not alter or supersede the policy that requires prosecutors to disclose "substantial evidence that directly negates the guilt of a subject of the investigation" to the grand jury before seeking an indictment. See USAM 9-11.233.

2. Constitutional obligation to ensure a fair trial and disclose material exculpatory and impeachment evidence. Government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). The law requires the disclosure of exculpatory and impeachment evidence when such evidence is material to guilt or punishment. *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 154. Because they are Constitutional obligations, *Brady* and *Giglio* evidence must be disclosed regardless of whether the defendant makes a request for exculpatory or impeachment evidence. *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995). Neither the Constitution nor this policy, however, creates a general discovery right for trial preparation or plea negotiations. *U.S. v. Ruiz*, 536 U.S. 622, 629 (2002); *Weatherford v. Bursey*, 429 U.S. 545, 559

[4] This section is reproduced in its entirety under Chapter X, Legal Policies, Section 5-1 of the District's Employee Handbook.

(1977).

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

b. **The prosecution team.** It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all the members of the prosecution team (as defined above).

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

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

b. **Additional impeachment information that must be disclosed.** A

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

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

d. Cumulative impact of items of information. While items of information viewed in isolation may not reasonably be seen as meeting the standards outlined in paragraphs a. and b. above, several items together can have such an effect. If this is the case, all such items must be disclosed.

4. Comment. This policy establishes guidelines for the exercise of judgment and discretion by attorneys for the government in determining what information to disclose to a criminal defendant pursuant to the government's disclosure obligation as set out in *Brady v. Maryland* and *Giglio v. United States* and its obligation to seek justice in every case. Where it is unclear whether evidence or information should be disclosed, prosecutors are encouraged to reveal such information to defendants or to the court for inspection in camera and, where applicable, seek a protective order from the court. By doing so, prosecutors will ensure confidence in fair trials and verdicts. Prosecutors are also encouraged to undertake periodic training concerning the government's disclosure obligation and the emerging case law surrounding that obligation.

B. *Giglio* Policy

Pursuant to USAM 9-5.100, the following plan for the United States Attorney's Office for the District of Wyoming is intended to set forth the policies and procedures of this office regarding the Department of Justice's "*Giglio* Policy" as required by the December 13, 1996 memorandum from then Director Carol DiBattiste.

This policy anticipates that the majority of such information concerning law enforcement witnesses shall come from the witnesses themselves, as has traditionally been the case. The policy is also intended to do everything reasonably possible to protect the reputations and privacy interests of the law enforcement officials who may be affected by this policy.

1. Definition of Impeaching Material

It is probably not possible to identify every conceivable type of impeachment information; however, for purposes of this document, such information may include, but is not strictly limited to, the following:

a. Specific instances of conduct of the witness for the purpose of attacking the witness' credibility or character for truthfulness;

b. Evidence in the form of opinion or reputation as to the witness' character for truthfulness;

c. Prior inconsistent statements; and

d. Information that may be used to suggest that a witness is biased.

2. Expectation of Disclosure by Agent/Witness

It is anticipated that in the great majority of instances any *Giglio* information subject to disclosure to the defense will be revealed to prosecutors by the agents/witnesses themselves. It is already the obligation of the agents/witnesses to make this information known to this office at the earliest opportunity, and it has been the experience of this office that this disclosure is made by such agents/witnesses. The policy set forth herein is to establish procedures and protocols for those unusual cases in which a prosecutor feels that further inquiry, for whatever reason, may be warranted.

3. Identification of "Requesting Official"

The First Assistant United States Attorney (FAUSA) is the appropriate contact point in this office for prosecutors who believe that a request to a law enforcement agency regarding impeachment material is necessary (i.e., the "Requesting Official").[5]

Any Assistant United States Attorney (AUSA) who has determined that such a request is merited shall submit a written memorandum outlining the agency (or agencies) to whom such a request is to be made, the agent (or agents) about whom the request is to be made, and a factual basis for why the request is appropriate and necessary.

[5]The United States Attorney may authorize one or more other persons in the office to act as the “Requesting Official” on those occasions when the FAUSA is unavailable.

The Requesting Official shall be the only authority to make such requests on behalf of this office to any agency. In extraordinary circumstances such as where information comes to light during or immediately before trial and where the Requesting Official is not available, the AUSA should immediately notify the Criminal Chief or other member of the management team.

4. Unsubstantiated or Incredible Allegations or Allegations Which Have Resulted in Exoneration

Paragraph 6 of the Department's "*Giglio* Policy" provides as follows:

"Allegations that cannot be substantiated, are not credible, or have resulted in the exoneration of an employee generally are not considered to be potential impeachment information. Upon request, such information which reflects upon the truthfulness or bias of the employee, to the extent maintained by the agency, will be provided by the prosecuting office under the following circumstances: (a) when the Requesting Official advises the Agency Official that it is required by a Court decision in the district where the investigation or case is being pursued; (b) when, on or after the effective date of this policy: (I) the allegation was made by a federal prosecutor, magistrate judge, or judge; or (ii) the allegation received publicity; (c) when the Requesting Official and Agency Official agree that such disclosure is appropriate, based upon exceptional circumstances involving the nature of the case or the role of the witness; or (d) when disclosure is otherwise deemed appropriate by the agency. The agency is responsible for advising the prosecuting office, to the extent determined, whether any aforementioned allegation is unsubstantiated, not credible, or resulted in the employee's exoneration."

Should a dispute arise between the office and any agency as to whether information has to be disclosed to defense counsel, the Requesting Official shall serve as the representative of this office in resolving such dispute. In the event that such a resolution becomes impossible, then the ultimate decision shall be made by the United States Attorney for the District of Wyoming in consultation with the appropriate agency representative.

When this office receives information of unsubstantiated and/or incredible allegations or allegations which have resulted in exoneration, which information ultimately is not disclosed to defense counsel, then, at the conclusion of the case, such information should be purged from the file maintained in this office and returned to the agency from which it was received. This office shall maintain all motions, responses, legal memoranda, court orders, and internal office memoranda or correspondence

in the same fashion as other documents maintained for the file.

5. Maintenance of Records

The documents pertaining to potential impeachment information shall be maintained in the case file in which the agent/witness is expected to testify or serve as a witness.

In any case in which potential impeachment information was not provided to the defense, this office shall not maintain any system of records that can be accessed by the identity of the agent/witness, exclusive of keeping motions and court orders and supporting documents in the relevant criminal case file in the usual fashion.

When such information has been disclosed to the defense counsel such information along with any judicial rulings and related pleadings, correspondence and memoranda shall be stored in a file maintained by the FAUSA (Requesting Official) in such manner as to be accessed by the identity of the agent/witness.

Where such records are maintained in the Office of the United States Attorney for the District of Wyoming, any AUSA relying upon the accuracy of such records should notify the Requesting Official and request an update of those records so as to obtain any additional information which may be available.

Any records maintained by this office of impeaching information, which records can be accessed by the identity of the agent/witness, shall be maintained in the same manner as tax information records by the Requesting Official and may be accessed by AUSAs only upon approval of the Requesting Official.

Case files in which impeaching information obtained from an agency is contained shall be stored by AUSAs in the same manner as files containing tax information and records.

6. Consultation with and Notification of Agencies

Prior to disclosure to the defense or the Court of any information pursuant to this policy, this office, through the Requesting Official or through the AUSA initiating such request if specifically authorized by the Requesting Official, shall notify the agency of the intention of this office to reveal such information. Upon notification, the agency shall be given the opportunity to express its views as to the propriety of revealing such information. Any

disputes regarding the propriety of revealing such information shall be resolved through the agency contact and the Requesting Official and/or through the United States Attorney.

Whenever potential impeaching information received from an agency is disclosed to the Court or to the defense, such information, together with any judicial rulings and related pleadings, shall be provided to the agency that provided such information.

7. Appropriateness of Ex Parte, in Camera Review of Information

In some cases it may be appropriate to consult with the Court regarding the need to disclose certain information. In such cases, an ex parte application, under seal, requesting in camera inspection, shall be made to the Court. Such requests shall include language allowing this office to notify the agency providing the information of the request and of the ruling thereon.

In the event disclosure is ordered, this office shall seek protective orders to limit the scope of the use and dissemination of such information by defense counsel so as to protect the reputation and privacy rights of the agent(s)/witness(es) affected by such disclosure.

8. Duty to Notify of Closing File

When a file in this office has been closed on a matter in which impeaching information has been made available by any agency, this office shall promptly notify the agency of the closure of the file so that the agency will be on notice that its continuing duty to disclose as to newly occurring matters has ended.

9. Removal of Records Upon Transfer, Reassignment or Retirement of Employee

The Requesting Official shall remove from this office's system of records any record of impeaching information that can be accessed by the identity of the agent/witness upon being notified that the agent/witness has retired, been transferred to an office in another judicial district, or been reassigned to a position in which the agent/witness will neither be an affiant nor a witness. The removal of such records shall not be affected, however, until all litigation pending in this office in which the agent/witness could be an affiant or witness has been completed.

IV. Witness Interviews and Note -Taking

Witness interviews[6] should be memorialized by the agent,[7] and not the AUSA. Notes and original recordings should be preserved, and AUSAs should confirm with agents that substantive interviews are memorialized. When an AUSA participates in an interview with an investigative agent, the AUSA and agent should discuss note-taking responsibilities and memorialization before the interview begins (unless the AUSA and the agent have established an understanding through prior course of dealing).[8] Whenever possible, AUSAs should not conduct an interview without an agent present to avoid the risk of making themselves a witness to a statement and being disqualified from handling the case if the statement becomes an issue. If exigent circumstances make it impossible to secure the presence of an agent during an interview, AUSAs should try to have another office employee present.

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

B. **Trial Preparation Meetings with Witnesses**: Trial preparation meetings with witnesses generally need not be memorialized. However, AUSAs should be particularly attuned to new or inconsistent information disclosed by the witness during a pre-trial witness preparation session. New information that is exculpatory or is impeaching should be disclosed.

C. **Agent Notes**: Agent notes should be reviewed if there is a reason to believe that the notes are materially different from the memorandum, if a written memorandum was not prepared, if the precise words used by the witness are significant, or if the witness disputes the agent's account of the interview. AUSAs 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

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[6] "Interview" as used herein refers to a formal question and answer session with a potential witness conducted for the purpose of obtaining information pertinent to a matter or case. It does not include conversations with a potential witness for the purpose of scheduling or attending to other ministerial matters. Potential witnesses may provide substantive information outside of a formal interview, however.

[7] In those instances in which an interview was audio or video recorded, further memorialization will generally not be necessary.

[8] It should be noted that some agencies, such as the FBI, will not prepare reports of interviews (i.e., 302s) if any other agents or the AUSA take notes during the interview.

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. Vallee*, 380 F.Supp.2d 11, 12-14 (D. Mass. 2005).

V. Preservation of Electronic Communications/ESI (electronically stored information)

A. Email

The use of email has become widespread. AUSAs, law enforcement agents, and other employees use email to communicate about a variety of case related matters. While a valuable tool, email may have significant adverse consequences if not used appropriately. The use of email to communicate substantive case-related information in criminal and parallel criminal/civil cases may trigger AUSAs responsibilities under the Jencks Act, Federal Rules of Criminal Procedure Rules 16 and 26.2, *Brady*/*Giglio*, USAM 9-5.001, and the Federal Records Act.

Emails fall into three general categories: potentially privileged communications; substantive communications; and purely logistical communications.

Emails may be used to communicate with others regarding case strategy, to seek approval or legal advice from supervisors or others, to give legal advice, or to request that an agent, paralegal, or other USAO personnel conduct certain research, analysis, or investigative action in anticipation of litigation. Such emails are "potentially privileged" and as such may be protected from discovery.

An email that contains "substantive" case-related information raises additional legal issues. AUSAs and other personnel must be careful in the exchange of such email. We should avoid using email to communicate substantive case-related information in criminal and parallel criminal/civil cases whenever possible. Because email communications from agents may not be as complete as investigative reports, and may have the unintended effect of circumventing the investigative agency's established procedures for writing and reviewing reports, AUSAs should advise investigative agents that, unless circumstances dictate otherwise, substantive written communications from agents about cases should be in the form of a formal investigative report, rather than an email.

Email may be used to communicate purely logistical information and to send formal investigative reports as attachments, or to communicate efficiently regarding non-substantive issues such as scheduling meetings, interviews, and court appearances.

When substantive communications are sent via email, these guidelines should be followed:

1. If email is used to communicate substantive case-related information with

agents, victim/witnesses, or anyone else, the email must be maintained in the case file or electronically in an Outlook folder. Alternatively, the AUSA can require the agent to memorialize the substantive communication in a written interview report.

2. As part of the discovery collection and review process, AUSAs should routinely ask agents and others to provide them with access to all emails that contain substantive case-related information. This includes, but is not limited to, communications between agents, and between agents, AUSAs, any USAO personnel, or anyone else, just as any formal reports would be collected and reviewed.

3. While substantive emails need to be reviewed during the discovery phase, any discoverable information may be disclosed in a redacted or alternative form (e.g., a letter or memo) in appropriate circumstances, particularly when agency policy or practice disfavors disclosure of emails. Redaction may also be appropriate if an email contains a mix of substantive, potentially privileged communications, and purely logistical information.

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

B. Electronically Stored Information

AUSAs should consider the disclosure of electronically stored information ("ESI") on a case-by-case basis, in consultation with the agents.

1. If documents are in electronic form, the AUSA should consider providing electronic copies on DVD.

2. For electronic evidence seized by warrant, AUSAs should consider having an agent pull word processing documents, spreadsheets, databases, emails and other substantive files off of drives and provide that data on disk.

3. For an entire computer imaged pursuant to warrant, AUSAs should consider making a forensic image available to the defense by allowing the defense to supply a blank hard drive onto which the agent would copy the forensic image.

4. AUSAs must disclose ESI in accordance with the same discovery provisions governing disclosure of non-ESI, including Rules 16 and 26.2, *Brady* and *Giglio*. Similarly, AUSAs who know, or have reason to believe, that otherwise discoverable ESI includes child pornography, should provide counsel for the defendant a reasonable opportunity to inspect the contraband pursuant to 18 U.S.C. § 3509(m). If the otherwise discoverable ESI contains other forms of contraband, the AUSAs should consider either providing the defendant with an opportunity to inspect the materials, or providing a copy of the materials to the defendant subject to a protective order.

   - In those cases where the complete contents of ESI have not been reviewed by the government, either because of limitation in the scope of a warrant or because of the volume of stored material, the AUSA should consider whether there is a statutory or other prudential reason for not disclosing the unexamined ESI. If the AUSA determines that non-disclosure is warranted, the attorney should notify defense counsel of the non-disclosure and the basis for the non-disclosure.

VI. Managing the Discovery Process - How to Produce and Track Discovery Provided

It is imperative that the USAO maintain a record of the disclosures made to defense counsel. The exact fashion in which an AUSA maintains a record will change depending of the facts of the case. For example, the AUSA may maintain a bates stamped copy of all material disclosed, a disk of all material disclosed, or a written record of the documents and evidence reviewed by counsel on particular dates. An AUSA must maintain a record of disclosures sufficient to counter a claim by defense counsel that a particular document or piece of evidence was not disclosed.

Generally, our office has an expansive discovery policy.[9] However, we should always be aware that providing discovery is not routine, and we should always limit available discovery, within the bounds permitted by law, to prevent danger to witnesses, informants, and/or law enforcement and prevent "tipping off" those who may be under investigation in the future. In many cases, an

[9] While we have, as an Office, generally adopted an expansive discovery policy (note exceptions herein), it is not advisable to refer to the expansive discovery practice as "open file discovery." Our files should not ever 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 the AUSA is not aware. The use of the term "open file" is therefore inexact and potentially misleading.

expansive discovery policy will not present problems but, in the cases in which we deem it necessary, the United States Attorney's Office will supply only such discovery as it is strictly required to supply pursuant to Rule 16, Fed. R. Crim. P., the *Jencks* Act, and our obligations under *Brady*, and its progeny. And, we will contest any efforts to obtain discovery beyond these three parameters on any case where we believe a proper purpose is served by limiting discovery.

The following actions will be taken by our office:

1. The AUSA handling the case may, with the concurrence of a member of the management team, designate the case for "Legally Required Discovery Only." In order to determine when this designation is needed, consultation with case agents in every case is required. We need to consider agents' input, listen to their concerns about protecting witnesses and confidential informants, and weigh any concerns they have regarding damage to an investigation that could occur if expansive discovery is provided.

2. Each AUSA shall carefully review all discovery before it is provided to defense counsel. This review must occur to ensure that we are complying with all legal and policy requirements.

3. The AUSA assigned to the case will inform the District Court Judge at the time of arraignment as to the manner in which discovery will be handled in the particular case. If another AUSA is covering the arraignment, it is the assigned AUSA's responsibility to make any discovery restrictions known to the covering AUSA.

4. The documents released through the discovery process will be marked in a manner to identify which defense attorney received the document.

   The AUSA handling the case may want to request of the court that any discovery order or order allowing access to grand jury transcripts contain the following language:

   > "It is further ordered, adjudged, and decreed that defense counsel in this matter is prohibited from copying any discovery material provided by the United States and is prohibited from providing to the defendant, any discovery material provided to defense counsel by the United States, without first obtaining the permission of the court after notice and an opportunity to be heard have been afforded to the United States of America."

   This policy is specifically authorized by Rule 16(d)(1), Fed. R. Crim. P., which confers on federal trial courts the discretion to enter appropriate protective orders in order to protect either ongoing investigations or to protect witnesses from danger.

5. Whether the case is an open case file or closed case file, the dates of birth and social security numbers shall always be redacted. Addresses of individuals shall be

redacted if, in the opinion of the AUSA, releasing the address would put any person in danger or otherwise compromise the case. If additional personal identifying information is contained in a report that could cause harm to any person, redaction is appropriate even in an "expansive file" case. Please also be aware that in all cases any medical information should be protected as appropriate.

6. Any disclosure of criminal history information shall be provided in summary form, in lieu of a verbatim copy of, for example, an NCIC printout.

VII. Timing of Discovery Disclosures

A. Rule 16 and Rule 12 Discovery

Every judge in the District orders at arraignment the production of Rule 16 discovery by a certain date. You should comply with the order by either sending the Rule 16 material to defense counsel or making the Rule 16 material available for review.

It is the policy of the District to turn over Rule 12 material (e.g., search warrants, reports of search and seizure and arrests, and witness identification) to the defense with the Rule 16 material. It is in our interest to provide such notice by turning over evidence that may be the subject of a motion to suppress as soon as possible. Furthermore, if you have a case in which there is evidence that is not covered by a discovery rule but that may be the subject of a motion to suppress (for example identification procedures), you should turn the material over with the Rule 16 material.

AUSAs should always consider security concerns of victims/witnesses when making discovery timing decisions. In addition AUSAs should also consider the need to protect ongoing investigations, prevent obstruction of justice, investigative agency concerns and other strategic considerations that improve our chances of reaching a just result in our cases.

B. Expert Disclosures

Rule 16 requires disclosure upon the request of the defendant a written summary of a testifying expert's expected testimony, including the expert's opinions, bases and reasons for the opinions, and the expert's qualifications. In most cases, expert disclosures are not made by the Rule 16 deadline as established at the arraignment because either the government has not determined whether an expert will testify or the expert has not yet been identified. Therefore, judges typically set a date for expert disclosures that is tied to the trial date. These disclosure dates are not uniform and vary by judge, and in certain cases no disclosure date is set. Thus, AUSAs should make expert discloses in compliance with any pre-trial order, but in the absence of such an order, no later than one week prior to trial.

C. Confidential informants

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

In those instances where we are required to disclose the identity of the informant, judges typically require the government to make the informant available to the defense. A judge generally sets a date by which the informant must be identified and made available for an interview.

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

Federal Rules of Evidence 404(b) requires reasonable pretrial notice of other crimes or bad act evidence to be offered by the United States. Given that it would likely be held to be ineffective assistance of counsel not to make such a request, notice should be provided even if no request is made. Similar notice obligations exist for introduction of evidence in sexual abuse cases. FRE 413 authorized introduction of evidence of similar crimes in sexual assault cases and FRE 414 allows introduction of similar evidence in child molestation cases.

Both FRE 413 and 414 mandate that the government must give notice of its intention to offer such evidence and disclose the evidence to the defendant at least 15 days prior to trial, and AUSAs must comply with this requirement. FRE 404(b) mandates reasonable notice without a specific deadline. However, in many cases judges set a specific deadline for disclosure of 404(b)-type evidence. AUSAs should disclose FRE 404(b) evidence in compliance with any pre-trial order but in the absence of such an order, no later than one week prior to trial.

E. Jencks Act Material

Although not required by the Jencks Act, the policy in the District is to disclose Jencks Act material three days before trial. In many cases, however, AUSAs should consider giving broader and earlier discovery than required by the policy because it fosters a speedy resolution of many cases.[10] Early disclosure also negates any issues concerning whether the Jencks Act material contains *Brady* or *Giglio* information. An AUSA must obtain supervisory approval to disclose Jencks Act material less than three days before trial. Withholding of such material should be based on security concerns of victims and witnesses,

[10] Depending on the nature of the case (i.e., an ongoing drug investigation), "disclosure" of agent interview reports can be made by allowing the defense to review the reports in the USAO.

protecting ongoing investigations, preventing obstruction of justice, investigative agency concerns, or other strategic considerations that improve our chances of reaching a just result.

Tenth Circuit law is clear that agent interview reports are not Jencks Act material for the individual interviewed unless the individual adopted the report or the report is a substantially verbatim recitation of what the individual said during the interview. While we should never concede that such interview reports are Jencks, the policy in the District is to disclose such interview reports as if they were Jencks Act material. Therefore, if an AUSA seeks to disclose interview reports that are not technically Jencks Act material less than three days before trial, the AUSA must obtain supervisory approval.

An AUSA is not required to disclose agent interview reports for non-testifying individuals. However, AUSAs should err on the side of disclosing such reports absent concerns related to witness safety, obstruction of justice, ongoing investigations, or legitimate privacy concerns.

Subject to our obligations under *Brady* and its progeny, agent interview reports may be redacted as reasonably necessary to mitigate concerns related to witness safety, obstruction of justice, and to protect ongoing investigations.

Rule 26.2 applies the Jencks Act to suppression hearings and to the extent specified in the Rules to other proceedings such as preliminary hearings, sentencing and detention hearings. The rule requires production of the statement of a witness, other than the defendant, after the witness has testified upon motion of the party who did not call the witness. AUSAs must be prepared to provide such statements to defense counsel at these various hearings.

F. *Brady* and *Giglio*

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

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

2. **Impeachment information.** Impeachment information, which depends on

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

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

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

[End]