U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

October 18, 2010

MEMORANDUM

TO: All Criminal Division Attorneys

FROM: Lanny A. Breuer
Assistant Attorney General

SUBJECT: Criminal Division Policy Regarding Discovery Practices

INTRODUCTION

This policy is intended to provide guidance on the Criminal Division's discovery practices and rules related to disclosure.[1] It is designed to facilitate Criminal Division (CRM) Attorneys' compliance with disclosure obligations, to identify common discovery-related issues of which all CRM Attorneys should be aware, and to ensure that CRM Attorneys have adequate resources and guidance available to enable them to make appropriate disclosure decisions, either on their own or in consultation with the leadership of their section and the Division. In general, this policy encourages earlier and more liberal disclosure by Division prosecutors than either the Constitution or law requires. This policy is also intended to be sufficiently flexible to give attorneys discretion where permitted by law and to account for the fact that CRM Attorneys operate in jurisdictions throughout the nation that have different discovery rules and practices.

Overview of the Policy

The discovery obligations of CRM Attorneys are established by the Federal Rules of Criminal Procedure, 18 U.S.C. § 3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), relevant case law, the Department of Justice's policy on the disclosure of exculpatory and impeachment information, applicable Local Rules of Criminal Procedure, discovery orders entered in particular cases, and the rules governing professional conduct. All CRM Attorneys must comply with the authorities set forth above. In addition, as set forth more fully in this guidance, it is the policy of the Criminal Division to provide discovery beyond what the rules, statutes, and case law mandate. When faced with a close call as to whether certain information should be disclosed, CRM Attorneys should err on the side of

[1] This policy guidance is intended to satisfy the January 4, 2010 directive from the Deputy Attorney General to develop a discovery policy with which CRM prosecutors must also comply. *See* "Requirement for Office Discovery Policies in Criminal Matters," Memorandum dated January 4, 2010. The guidance, which is solely prospective, is for internal CRM use only and does not create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party, or witness in any administrative, civil, or criminal matter.

disclosure. While there may well be important reasons – such as the need to protect a witness or to safeguard ongoing investigations of other people or other crimes – for withholding information that does not have to be disclosed, as a general rule, CRM Attorneys should provide expansive discovery whenever and wherever possible, recognizing that this approach may facilitate plea negotiations or otherwise expedite litigation. In the long term, moreover, expansive discovery will foster and support a reputation for candor and fair dealing among CRM Attorneys.

This policy is divided into two major parts. Part I of the policy describes a number of matters that CRM Attorneys should discuss with case agents during the course of an investigation to ensure that all discoverable material is appropriately identified and preserved. Part II of the policy describes the discovery process and provides guidance to CRM Attorneys on what should be gathered for review, what should be disclosed, when it should be disclosed, and how it should be disclosed. Incorporated within Part II is the substantive guidance provided by the Deputy Attorney General in his January 4, 2010 memorandum entitled "Guidance for Prosecutors Regarding Criminal Discovery," as well as additional substantive guidance specifically applicable to CRM Attorneys.

Interaction with Policies and Practices of the USAOs

Because the Criminal Division, like other Main Justice components, litigates in every federal jurisdiction in the United States, and frequently in partnership with local United States Attorneys' Offices (USAOs), CRM Attorneys do not operate under just one circuit's law or one set of local rules. As such, CRM Attorneys should in all cases consult with the USAO for the district in which they are litigating to discuss local policies and practice and, where appropriate, to develop a plan for how to handle discovery. The following general principles apply to all investigations and cases in which CRM Attorneys are involved:

- **Applicability of CRM Policy:** In general, CRM Attorneys should follow the discovery practices of the Criminal Division. If a conflict arises in cases being worked jointly with a USAO between local discovery practice and CRM Division practice, then the CRM Attorney should discuss the conflict with the AUSA. If, after discussing it with the AUSA, the CRM Attorney believes that a particular aspect of local discovery practice should be followed, the CRM Attorney should seek approval from his or her Deputy Chief or Section Chief to depart from Criminal Division policy. In deciding whether or not to grant such approval, the Deputy Chief or Section Chief should consider a variety of factors, including but not limited to: whether the CRM Attorney is the lead attorney on the case; whether the departure from Criminal Division policy is nonetheless consistent with the overall goal of providing expansive discovery; whether specific case-related considerations justify the departure from Criminal Division policy; and whether the departure is necessary to maintain a positive working relationship with the USAO. In those instances in which the Deputy Chief or Section Chief believes that departure from the Criminal Division policy is unwarranted, and he or she is unable to resolve the policy conflict with his or her supervisory counterpart in the USAO, the conflict should be raised with the CRM front office for appropriate action.

- **Supervisory Consultation:** CRM Attorneys are responsible for keeping their supervisors informed of any discovery conflicts or issues that arise. A CRM Attorney should consult his or her supervisor any time the CRM Attorney has a question or doubt about discovery practice or guidelines.

    - If there is any question regarding applicable ethics rules, the CRM Attorney should consult with the Criminal Division's Ethics Advisors and/or the Department's Professional Responsibility Advisory Office.

    - If any agent or agency is resistant to complying with a CRM discovery practice applicable to the investigation, the CRM Attorney's supervisor should be notified immediately.

SPECIFIC PRACTICES

PART I: Investigative Practices

I. Start of Investigation

A. Prosecution Team Coordination. In all cases, as early as possible and long before indictment, CRM Attorneys should work with investigators and any participating AUSAs to plan for how discovery obligations will be addressed and satisfied.

B. Instructions to Agent at Start of Investigation. CRM Attorneys are responsible for ensuring (in coordination with the relevant AUSAs, if any), that all agents working on criminal matters are aware of the discovery policies and practices governing the criminal investigation. Specifically, CRM Attorneys (again, in coordination with the relevant AUSAs) should provide the following guidance to investigators, either orally or in writing. A sample guidance letter can be found at Appendix A.

1. Witness Interviews

Although not required by law, generally speaking, witness interviews[2] should be memorialized by the agent.[3] Agent and prosecutor notes and original recordings should be preserved, and CRM Attorneys should confirm with agents that substantive interviews will be memorialized. When a CRM Attorney participates

[2] "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. Substantive, case-related communications are addressed below. Trial preparation meetings with witnesses are also separately addressed below.

[3] In those instances in which an interview is audio or video recorded, further memorialization will generally not be necessary, other than, of course, memorialization of the fact that such an interview occurred.

in an interview with an investigative agent, the CRM Attorney and agent should discuss note-taking responsibilities and memorialization before the interview begins (unless the CRM Attorney and the agent have established an understanding through prior course of dealing). Whenever possible, CRM Attorneys 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, CRM Attorneys should make every attempt to have another office employee present.

2. Rough Interview Notes

a. Agents should be asked to retain all rough notes of interviews (whether taken by hand or on computer), even if notes are described, consolidated, or otherwise formalized in a final investigative report, including a final MOI, FBI-302, DEA-6, or ROI (collectively, "MOI").

b. Notes should not be taken on pre-existing question outlines or other documents that may be inappropriate to provide to the defense.

3. Correspondence Practices

a. Agents should be instructed that all correspondence relating to the investigation must be retained with the case file.

b. Correspondence includes:
   i. Formal written correspondence;
   ii. Informal written correspondence; and
   iii. Emails, including any emails to or from witnesses.

4. Specific Email Practices

a. Because email communications may not be as complete as investigative reports and may have the unintended effect of circumventing an agency's procedures for writing and reviewing reports, agents should be encouraged to memorialize all substantive written communications between agents and prosecutors in the form of an MOI or similar formal investigative report, and not in the form of email. Substantive written 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.

b. Agents should be instructed that this policy is not intended to discourage emails between agents and CRM Attorneys regarding investigative strategies or legal issues, nor is it intended to discourage the efficient practices of sending

formal investigative reports as email attachments to prosecutors or of using email for scheduling (e.g., a witness interview, grand jury time, etc.).

c. If, notwithstanding the CRM Attorney's requests to the agent, substantive information pertaining to a case or witness is communicated in an email, the CRM attorney should save and print out the email and maintain the printed email in the case file for review and possible production. Alternatively, the agent who authored or received the email should be advised to write an MOI that reflects the substantive information contained therein.

II. Pre-Indictment

A. Instructions to Case Agent Regarding Materials to be Gathered

1. CRM Attorneys (in coordination with the relevant AUSAs, if any) should ask the case agent to gather all discovery materials outlined in Part II below. The request should be made sufficiently in advance of indictment so that the gathering and review process can be completed before the indictment is returned. If the nature of the case makes that timing impossible, the request should be made as early as practicable.

2. CRM Attorneys are responsible for monitoring agent compliance to ensure that discovery can be made available in accordance with Part II, below.

B. Instructions to Victim/Witness Coordinator Regarding Statements by Victims or Witnesses

1. In cases involving victims, CRM Attorneys (in connection with the relevant AUSA, if any) should give the relevant victim/witness coordinator a list of victims prior to indictment. CRM Attorneys should also instruct the victim/witness coordinator to provide the CRM Attorney with any statements the victims may make about the offense.

2. CRM Attorneys should instruct the victim-witness coordinator and the case agent to record all benefits or services provided to the victim-witness, including non-monetary benefits or assistance.

PART II: Discovery and Disclosure

I. Step 1: Gathering and Reviewing Discoverable Information

A. Where to Look–The Prosecution Team

Department policy states:

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

USAM § 9-5.001. This search duty also extends to information CRM Attorneys are required to disclose under Federal Rules of Criminal Procedure 16 and 26.2 and the Jencks Act.

In most cases, "the prosecution team" will include the prosecutors, agents, and law enforcement officers working directly on the case. In multi-district investigations, investigations that include both CRM Attorneys and AUSAs, 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 CRM Attorney should consider whether the relationship with the other agency is close enough to make it part of the prosecution team for discovery purposes. Some factors to be considered in determining whether to review potentially discoverable information from another federal agency include:

- Whether the CRM Attorney and the agency conducted a joint investigation or shared resources related to investigating the case;
- Whether the agency played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in targeting discussions, or otherwise acting as part of the prosecution team;
- Whether the CRM Attorney knows of and has access to discoverable information held by the agency;
- Whether the CRM Attorney has obtained other information and/or evidence from the agency;
- The degree to which information gathered by the CRM Attorney has been shared with the agency;
- Whether a member of an agency has been made a Special Assistant United States Attorney;

- The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges; and
- The degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party.

Many cases arise out of investigations conducted by multi-agency task forces or otherwise involving state law enforcement agencies. In such cases, CRM Attorneys should consider (1) whether state or local agents are working on behalf of the prosecutors or are under the prosecutors' 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 prosecutors have 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, CRM Attorneys should make sure they understand the law in the relevant circuit and the local USAO'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.

CRM Attorneys 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.

B. What to 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.[4] 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,[5] the CRM Attorney should be granted access to the substantive case file and any other file or document the CRM Attorney has reason to believe may contain discoverable information related to the matter being prosecuted.[6] Therefore, the CRM Attorney 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 CRM Attorney 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

[4] How to conduct the review is discussed below.

[5] Exceptions to a CRM Attorney'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.

[6] Nothing in this guidance alters the Department's Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses contained in USAM §9-5.100.

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

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

   CRM Attorneys should take steps to protect the non-discoverable, sensitive information found within a CI, CW, CHS, or CS file. Further, CRM Attorneys 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.

   CRM Attorneys must always be mindful of security issues that may arise with respect to disclosures from confidential source files. Prior to disclosure, CRM Attorneys 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. This strategy may well include the seeking of protective orders from the court in appropriate cases.

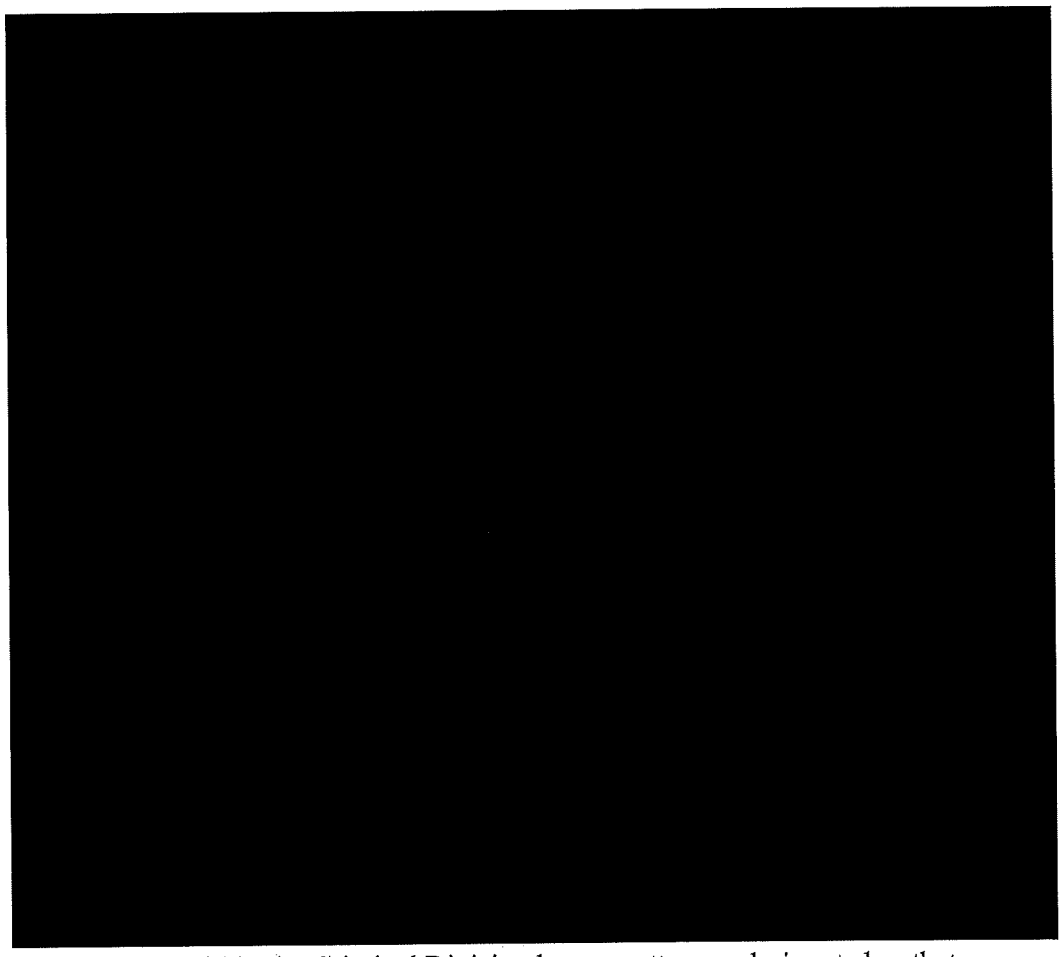
3. Evidence and Information Gathered During the Investigation: Generally, all evidence and information gathered during the investigation should be reviewed, including anything obtained during searches or via subpoenas, etc. As discussed more fully below in Step 2, in cases involving a large volume of potentially discoverable information, CRM Attorneys 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 Agencies in Parallel Civil Investigations: If a CRM Attorney 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, CRM Attorneys 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.

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

6. Potential *Giglio* Information Relating to Law Enforcement Witnesses: CRM Attorneys 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. CRM Attorneys 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:



All Sections within the Criminal Division have an attorney designated as that Section's *Giglio* coordinator. At least two weeks before a trial begins in which a federal, state, or local law enforcement witness is expected to testify, and as soon as practicable before a suppression or sentencing hearing begins in which such a witness is expected to testify, the CRM Attorney should give the *Giglio* coordinator the name and employing agency of every law enforcement witness who is expected to testify. In addition, the CRM Attorney should let the *Giglio* coordinator know whether the CRM Attorney desires a formal request to the employing agency of the law enforcement witness for all potential *Giglio* material on the witness in the agency's files.

7. Potential *Giglio* Information Relating to Non-Law Enforcement Witnesses and Fed. R. Evid. 806 Declarants: All potential *Giglio* information known by or in the possession of the prosecution team relating to non-law enforcement witnesses should be gathered and reviewed. That information includes, but is not limited to:

- Prior inconsistent statements (possibly including inconsistent attorney proffers, *see United States v. Triumph Capital Group*, 544 F.3d 149 (2d Cir. 2008)
- Statements or reports reflecting witness statement variations (see below)
- Benefits provided to witnesses including:
  - Dropped or reduced charges
  - Immunity
  - Expectations of downward departures or motions for reduction of sentence
  - Assistance in a state or local criminal proceeding
  - Considerations regarding forfeiture of assets
  - Stays of deportation or other immigration status considerations
  - S-Visas
  - Monetary benefits
  - Non-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
- Other known conditions that could affect the witness's bias such as:
  - Animosity toward defendant
  - Animosity toward a group of which the defendant is a member or with which the defendant is affiliated
  - Relationship with victim
  - Known but uncharged criminal conduct (that may provide an incentive to curry favor with a prosecutor)
- Prior acts under Fed. R. Evid. 608
- Prior convictions under Fed. R. Evid. 609
- Known substance abuse or mental health issues or other issues that could affect the witness's ability to perceive and recall events.

8. Information Obtained in Witness Interviews: Interview memoranda of witnesses expected to testify, and of individuals who provided relevant information but are not expected to testify, *should* be reviewed.

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

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

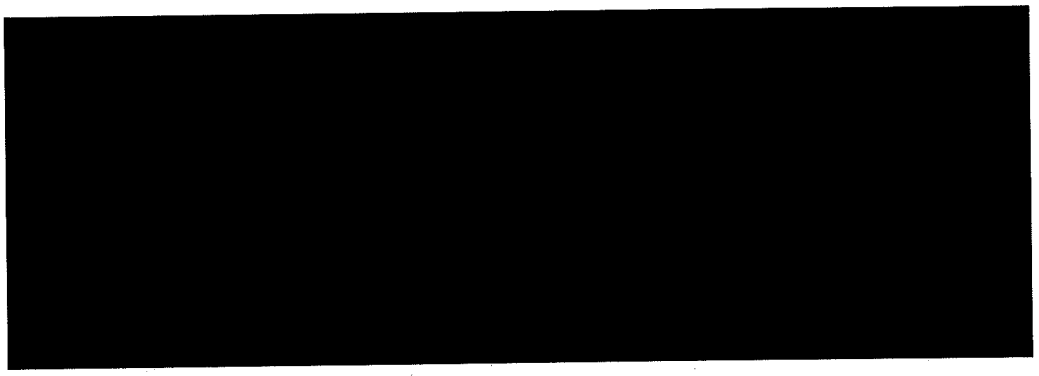
c. Agent Notes: Agent notes should be reviewed if there is a reason to believe that the notes are materially different from the memorandum, if a written memorandum was not prepared, if the precise words used by the witness are significant, or if the witness disputes the agent's account of the interview. CRM Attorneys 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. Vallee*, 380 F.Supp.2d 11, 12-14 (D. Mass. 2005).

In addition, agent notes of witness interviews should be reviewed for potential *Brady* and *Giglio* information, particularly when the notes are from an interview of a witness who is expected to testify pursuant to an agreement with the government, such as a cooperating co-conspirator.

9. Information Possessed by the Intelligence Community: 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." CRM Attorneys 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 CRM Attorney, after conferring with other members of the prosecution team, has a specific reason to believe that one or more elements of the Intelligence Community (IC) possess discoverable material, he or she should consult the National Security Division (NSD) regarding whether to request a prudential search of the pertinent IC element(s). All prudential search requests and other discovery requests of the IC must be coordinated through NSD.

Although discovery issues relating to classified information are most likely to arise in national security cases, they may also arise in a variety of other criminal cases, including narcotics cases, human trafficking cases, money laundering cases, and organized crime cases. In particular, it is important to determine whether the CRM Attorney, 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:



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 CRM Attorney should consult with NSD regarding whether to make through NSD a request that the pertinent IC element conduct a prudential search. If neither the CRM Attorney, 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.

II. Step 2: Conducting the Review

Having gathered the information described above, CRM Attorneys must ensure that the material is reviewed to identify discoverable information. It would be preferable if CRM Attorneys could review the information themselves in every case, but such review is not always feasible or necessary. The CRM Attorney is ultimately responsible for compliance with discovery obligations. Accordingly, the CRM Attorney should develop

a process for review of pertinent information to ensure that discoverable information is identified. Because the responsibility for compliance with discovery obligations rests with the CRM Attorney, the CRM Attorney's decision about how to conduct this review is controlling. This process may involve agents, paralegals, agency counsel, and computerized searches. Although CRM Attorneys may delegate the process and set forth criteria for identifying *potentially* discoverable information, CRM Attorneys should not delegate the disclosure determination itself. In cases involving voluminous evidence obtained from third parties, CRM Attorneys should consider providing defense access to the voluminous documents to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence. Such broad disclosure may not be feasible in national security cases involving classified information.

III. Step 3: Making the Disclosures

The Department's disclosure obligations are generally set forth in Fed. R. Crim. P. 16 and 26.2, 18 U.S.C. § 3500 (the Jencks Act), *Brady*, and *Giglio* (collectively referred to herein as "discovery obligations"). CRM Attorneys must familiarize themselves with each of these provisions and controlling case law that interprets these provisions. In addition, CRM Attorneys should be aware that USAM § 9-5.001 details the Department's policy regarding the disclosure of exculpatory and impeachment information and provides for broader disclosures than required by *Brady* and *Giglio*. CRM Attorneys are also encouraged, as set forth below, to provide discovery broader and more comprehensive than the discovery obligations. If a CRM Attorney chooses this course, the defense should be advised that: (1) the fact that certain non-discoverable materials are provided does not obligate the government to provide all non-discoverable materials; and (2) the fact that certain non-discoverable materials are provided should not be taken as a representation as to the existence or non-existence of other non-discoverable materials.

CRM Attorneys should also remember that with few exceptions (*see, e.g.*, Fed. R. Crim. P. 16(a)(1)(B)(ii)), the format of the information does not determine whether it is discoverable. For example, material exculpatory information that the prosecutor receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email. When the discoverable information contained in an email or other communication is fully memorialized elsewhere, such as in a report of interview or other document(s), then the disclosure of the report of interview or other document(s) will ordinarily satisfy the disclosure obligation.

A. Considerations Regarding the Scope and Timing of the Disclosures: Providing broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases. It also provides a margin of error in case the CRM Attorney's good faith determination of the scope of appropriate discovery is in error. CRM Attorneys are encouraged to provide broad and early discovery. But when considering providing discovery beyond that required by the discovery obligations or providing discovery sooner than required, CRM Attorneys should always consider any appropriate countervailing concerns in the

particular case, including, but not limited to: protecting victims and witnesses from harassment or intimidation; protecting the privacy interests of witnesses; protecting privileged information; protecting the integrity of ongoing investigations; protecting the trial from efforts at obstruction; protecting national security interests; investigative agency concerns; enhancing the likelihood of receiving reciprocal discovery by defendants; any applicable legal or evidentiary privileges; and other strategic considerations that enhance the likelihood of achieving a just result in a particular case.

CRM Attorneys should never describe the discovery being provided as "open file." Even if the CRM Attorney intends to provide expansive discovery, it is always possible that something will be inadvertently omitted from production and the CRM Attorney will then have unintentionally misrepresented the scope of materials provided. Furthermore, because the concept of the "file" is imprecise, such a representation exposes the CRM Attorney to broader disclosure requirements than intended or to sanction for failure to disclose documents, e.g., agent notes or internal memos, that the court may deem to have been part of the "file."

When the disclosure obligations are not clear or when the considerations above conflict with our discovery obligations, CRM Attorneys may seek a protective order from the court addressing the scope, timing, and form of disclosures.

B. Timing: Exculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant reasonably promptly after discovery. Impeachment information, which depends on the CRM Attorney's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. *See* USAM § 9-5.001. Section 9-5.001 also notes, however, that witness security, national security, or other issues may require that disclosures of impeachment information be made at a time and in a manner consistent with the policy embodied in the Jencks Act. CRM Attorneys should be attentive to controlling law in the circuit and district in which they are practicing governing disclosure obligations at various stages of litigation, such as pre-trial hearings, guilty pleas, and sentencing.

CRM Attorneys should consult the local discovery rules for the district in which a case has been indicted. Many districts have broad, automatic discovery rules that require Rule 16 materials to be produced without a request by the defendant and within a specified time frame, unless a court order has been entered delaying discovery, as is common in complex cases. CRM Attorneys must comply with these local rules, applicable case law, and any final court order regarding discovery. In the absence of guidance from such local rules or court orders, CRM Attorneys should make Rule 16 materials available as soon as is reasonably practical and, in any event, no later than a reasonable time before trial. In deciding when and in what format to provide discovery, CRM Attorneys should always consider security concerns and the other factors set forth in subparagraph (A) above. CRM Attorneys should also ensure

that they disclose Fed. R. Crim. P. 16(a)(1)(E) materials in a manner that triggers the reciprocal discovery obligations in Fed. R. Crim. P. 16(b)(1).

CRM Attorneys normally should provide Jencks material to the defense at least five (5) days before trial, absent a USAO policy or discovery order to the contrary. In situations where a trial date is not actually set until a calendar call fewer than five (5) days before trial, CRM Attorneys should make the Jencks disclosure as soon as the trial date is established. With supervisory approval, CRM Attorneys may delay a Jencks disclosure if necessary to protect victims or witnesses from harassment or intimidation, to protect the integrity of ongoing investigations, to protect the trial from efforts at obstruction, or to protect national security interests. CRM Attorneys should also be prepared to make Jencks disclosures at detention hearings, sentencing hearings, and any other hearing listed in Rule 26.2(g). CRM Attorneys should also consider whether, in appropriate cases, earlier Jencks disclosure would be prudent.

Discovery obligations are continuing, and CRM Attorneys should always be alert to developments occurring up to and through trial of the case that may impact their discovery obligations and require disclosure of information that was previously not disclosed.

C. Form of Disclosure: There may be instances when it is not advisable to turn over discoverable information in its original form, such as when the disclosure would create security concerns or when such information is contained in attorney notes, internal agency documents, confidential source documents, Suspicious Activity Reports, etc. If discoverable information is not provided in its original form and is instead provided in a letter to defense counsel, including particular language where pertinent, CRM Attorneys should take great care to ensure that the full scope of pertinent information is provided to the defendant. CRM Attorneys must also be cognizant that if the information is not located in a document, *Brady* and *Giglio* material must nevertheless be reduced to writing and disclosed.

1. Hard Copy Documents. If the government possesses original paper documents, the CRM Attorney may, at the outset, choose whether to provide the defense with electronic copies, paper copies, or access to original documents. The CRM Attorney normally should provide the defense with access to original paper documents upon request.

    a. While reviewing original documents, the defense normally should have access to a copier to make a reasonable amount of copies for free.

    b. If documents are not scanned, the defense may pay for a copy service to make copies. The local USAO or investigative agency normally should be consulted to obtain the names of approved copy services.

    c. The investigative agency *must not* keep track of what documents the defense is copying.

d. The investigative agency *must* keep track of the defense's *access* to all documents. It is recommended that the agent present the defense with a list of the bates numbers to which the defense is being given access and ask for a signature of the reviewing defense attorney.

2. Electronically Stored Information. CRM Attorneys should consider the disclosure of electronically stored information ("ESI") on a case-by-case basis, in consultation with the agents and the relevant USAO.

   a. If documents are in electronic form, the CRM Attorney should consider providing electronic copies on DVD.

   b. For electronic evidence seized by warrant, CRM Attorneys should consider having a tech agent pull word processing documents, spreadsheets, databases, emails and other substantive files off of drives and provide that data on disc.

   c. For an entire computer imaged pursuant to warrant, CRM Attorneys should consider making a forensic image available to the defense by allowing the defense to supply a blank hard drive onto which the tech agent would copy the forensic image. (As described below in paragraph (d)(i), there is an open question as to what portions of imaged computers to disclose to the defense if the warrant authorizes the government to review only limited files.)

   d. CRM Attorneys 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, CRM Attorneys 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 CRM Attorneys 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.

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

   e. Be prepared to work with the defense to ensure it can review ESI. You may need to provide access to a terminal and/or technical assistance, especially if the defense lacks financial resources.

3. Large Volumes of Documents. When providing the defense with access to a large number of bankers boxes of documents, consider providing a general index of documents (e.g., "search records," "bank records," "phone records" will often suffice). Also, when dealing with massive amounts of data and a defense lacking resources, consider whether to provide the defense with "hot docs" or search terms. Consult with your supervisor before disclosing such work product.

D. What to Disclose: CRM Attorneys bear ultimate responsibility for disclosure decisions. Disclosure of records and physical objects collected as part of the investigation should be as broad as possible, in order to avoid situations where withheld records or objects are later determined to be relevant to the government's case in chief or to the preparation of the defense. That said, as noted above, the government's discovery policy is not "open file" discovery, and this term should never be used to describe it. CRM Attorneys should consult with any participating AUSAs before making disclosures.

1. Materials that must be disclosed:
   a. *Brady*, Jencks, and *Giglio* materials.
   b. All materials required by Fed. R. Crim. P. 16 and 26.2, including statements of the defendant under Rule 16(a)(1)(A) and (B).
   c. Exculpatory and impeachment materials required by USAM § 9-5.001.
   d. Additional materials or information required by any discovery order entered by the court.

2. Additional materials for which disclosure should be strongly considered, even where they do not fall into the categories described in paragraph 1 above, include:
   a. Materials obtained pursuant to grand jury subpoena.
   b. Documents provided voluntarily by potential witnesses, including cooperating defendants/targets.
   c. Search warrant materials.
   d. Other relevant materials collected in the course of the investigation.

3. What may be withheld (unless they contain *Brady* or *Giglio* material):
   a. CRM Attorney notes (but see subsection 4 below).
   b. Agent rough notes, where they are formalized in a final MOI (but see subsection 4 below).
   c. Other materials subject to attorney/client, work product (not including witness MOIs), or deliberative process privileges (but see subsection 4 below).
   d. Reports and grand jury transcripts of non-testifying witnesses, unless they are transcripts of employees of an organizational defendant, disclosure of which is governed by Fed. R. Crim. P. 16(a)(1)(C).
   e. Other materials collected in the course of the investigation that are not arguably relevant to the case charged.

4. Special considerations governing MOIs and rough notes:

   a. CRM Attorneys should disclose all MOIs reflecting interviews of testifying trial witnesses, even though in many jurisdictions their disclosure is not required as Jencks material. For this reason, when disclosing MOIs, the MOIs should not be described to opposing counsel as "Jencks" material. MOIs should be redacted to remove any non-discoverable information that concerns other cases or investigations, as well as any sensitive personal information such as social security numbers, home addresses, telephone numbers, and birthdates. With supervisory approval, CRM Attorneys may withhold otherwise non-discoverable portions of MOIs of testifying witnesses (i.e., portions of MOIs that do not contain *Brady*, *Giglio*, Jencks, or Rule 16 material) if necessary to protect victims and witnesses from harassment or intimidation, protect the integrity of ongoing investigations, protect the trial from efforts at obstruction, or protect national security interests. CRM Attorneys should consider filing a motion in limine to prevent the improper use of the MOIs by defense counsel at trial. A sample motion in limine can be found at Appendix B.

   b. If an MOI of a non-testifying witness contains *Brady* or *Giglio* material, including inconsistencies between non-testifying witnesses or between a non-testifying witness and a testifying witness, that *Brady* or *Giglio* material must be disclosed. If an MOI of a non-testifying witness contains no known *Brady* or *Giglio* material, CRM Attorneys should consider whether disclosure might still be made to avoid inadvertent non-disclosure of material that may be pertinent to some defense or inconsistent with evidence as it develops at trial.

   c. CRM Attorneys must inform the defense if the agent's rough notes are materially inconsistent with the final MOI. This may be done by letter, or by providing the defense with a copy of the rough notes.

   d. CRM Attorneys must review their own notes, if any, of witness interviews to ensure all necessary disclosures are made.

   e. If the agent's notes or final MOI materially contradict the CRM Attorney's notes or memory, the CRM Attorney must disclose the contradictions.

5. Expert witness discovery

   a. CRM Attorneys should research circuit case law to determine whether outside expert witnesses are considered part of the prosecution team. *See, e.g., United States v. Stewart*, 433 F.3d 273, 297-99 (2nd Cir. 2006) (expert not part of prosecution team despite broad role, including testimony). Note that government employee experts will almost always be considered part of the prosecution team.

b. If experts are deemed part of the prosecution team, the CRM Attorney normally should ask the expert to provide the government with all case-related materials and any other information in his or her possession that could be exculpatory or impeachment material.

c. CRM Attorneys may need to disclose draft expert reports:

   i. Pursuant to the *Jencks* Act, if, under applicable circuit precedent, a draft report qualifies as a statement that has been "adopted or approved" by the expert witness.

   ii. Pursuant to *Brady* or *Giglio* if there are material differences between the draft and the final report.

   iii. But note that effective December 2010, the Federal Rules of Civil Procedure are being amended to make clear that draft expert reports are subject to work product protection. This civil rule change may impact the question of whether the disclosure of draft expert reports in criminal cases is necessary.

d. Correspondence from the expert to the government normally should be disclosed as *Jencks* material, unless it contains any *Brady* or *Giglio* material (which would necessitate earlier disclosure).

e. CRM Attorneys normally should compile and disclose to the defense evidence upon which the expert relied.

6. Sentencing

   a. 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. *See* USAM 9-5.001(D)(3).

7. Disclosures when guilty plea expected

   a. Even when a guilty plea is expected, CRM Attorneys, consistent with relevant circuit case law, should disclose to the defense any substantial exculpatory evidence of which they are personally aware that directly negates the guilt of the defendant.

   b. Although the Supreme Court held in *United States v. Ruiz*, 536 U.S. 622 (2002), that the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant, CRM Attorneys should consult circuit case law to determine whether other discovery must be made available to the defense

prior to the entry of a guilty plea in the case of a pre-indictment plea agreement where the defendant does not waive the right to receive such discovery.

8. Specialized discovery issues

   a. A number of specialized discovery issues are implicated in cases involving wiretaps, child pornography, or the death penalty. In such cases, the CRM Attorney will have a number of additional considerations to take into account during the discovery process. Specialized guidance concerning discovery obligations and procedures involving wiretaps, child pornography, and the death penalty can be found in USABook or online at http://10.173.2.12/usao/eousa/ole/tables/subject/all.htm.

IV. Step 4: Making a Record

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

In all cases, the goal is to be able in court to identify when discovery of each item was provided. CRM Attorneys should:

A. Describe discovery by cover letter to the defense. The cover letter normally should list the bates numbers of the materials disclosed.

B. Where discovery is provided on disc, a copy of the disc normally should be maintained and designated as read-only so there is a static copy of what was disclosed.

CONCLUSION

While each case is different and will necessarily involve specific and unique considerations, the general approach of the CRM Attorney should be to provide expansive discovery whenever and wherever possible subject, of course, to important countervailing considerations such as witness safety and national security. Any questions or uncertainties regarding the application of this discovery policy in a particular case or circumstance should be raised with a Deputy Chief or Section Chief.