DISCOVERY POLICY

INTRODUCTION

AUSAs in the criminal division must be familiar with and fully comply with their discovery obligations under Federal Rule of Criminal Procedure 16, the Jencks Act, Federal Rule of Evidence 404(b), the *Brady*/*Giglio* line of cases, and the policies of the Department of Justice and this office. In addition, AUSAs should be familiar with obligations imposed by the district court rules. This policy collects the sources of the government's obligations to produce relevant information to a defendant in a criminal case and sets forth discovery policies of the United States Attorney's Office for the Northern District of California. The policies of the United States Attorney's Office set forth in this document supersede any existing formal or informal discovery policy, practices, or protocols that the Office has promulgated or adopted. Nothing in this document is intended to create or confer any rights, privileges, or benefits to prospective or actual witnesses or defendants. It is also not intended to have the force of law. *See United States v. Caceres*, 440 U.S. 741 (1979). This discovery policy does not govern disclosure in cases involving terrorism and national security. Policy concerning these cases will be dependent on guidance currently being developed by the Department.

I. DISCOVERY OBLIGATIONS

A. *Brady*/*Giglio*

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. U.S.*, 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 *Brady* and *Giglio* are constitutional obligations, *Brady*/*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 (1977).

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. *U.S. v. Bagley*, 475 U.S. 667, 676 (1985). Because 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.

B. Federal Rule of Criminal Procedure 16

Under Federal Rule of Criminal Procedure 16, the government must disclose to the defendant, upon request, the following:

1. Any "relevant" oral statement made by the defendant in response to interrogation by a person the defendant knew was a government agent, if the government intends to use the statement at trial;

2. Any "relevant" written or recorded statement by the defendant in the government's control or that the government can obtain by due diligence, including any grand jury testimony by the defendant;

3. Statements by employees of an organizational defendant, if the employee was legally able to bind the defendant regarding the subject of the statement;

4. The defendant's prior record;

5. Documents and objects that are material to preparing the defense, may be used by the government in its case-in-chief, or have been obtained from the defendant;

6. Reports of any physical or mental examination or tests if the item is material to preparing the defense and the government intends to use the item in its case-in-chief;

7. A written summary of any expert testimony that the government intends to introduce at trial.

Rule 16 does not authorize the disclosure of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case.

Note that Rules 12.1, 12.2, and 12.3 may impose disclosure obligations on the government when the defendant raises an alibi defense, an insanity defense, or a public authority defense.

C. Northern District of California Local Rule 16-1.

Local Rule 16-1 imposes additional discovery obligations on AUSAs in this district. This rule should be read in conjunction with Part I.G. of this section, which addresses the U.S. Attorney's Office policy on discovery.

16-1. Procedures for Disclosure and Discovery in Criminal Actions.

> (a) Meeting of Counsel. Within 14 days after a defendant's plea of not guilty, the attorney for the government and the defendant's attorney shall confer with respect to a schedule for disclosure of the information as required by FRCrimP 16 or any

other applicable rule, statute or case authority. The date for holding the conference can be extended to a day within 21 days after entry of plea upon stipulation of the parties. Any further stipulated delay requires the agreement of the assigned Judge pursuant to Civil L.R. 7-12.

(b) Order Setting Date for Disclosure. In the absence of a stipulation by the parties, a schedule for disclosure of information as required by FRCrimP 16 or any other applicable rule, statute or case authority may be set sua sponte by the assigned Judge or Magistrate Judge. If a party has conferred with opposing counsel as required by Crim. L.R. 16-1(a), the party may make an motion pursuant to Crim. L.R. 47-4 to impose a schedule for such disclosure.

(c) Supplemental Disclosure. In addition to the information required by FRCrimP 16, in order to expedite the trial of the case, in accordance with a schedule established by the parties at the conference held pursuant to Crim. L.R. 16-1(a) or by the assigned Judge pursuant to Crim L.R. 16-1(b), the government shall disclose the following:

(1) Electronic Surveillance. A statement of the existence or non-existence of any evidence obtained as a result of electronic surveillance;
(2) Informers. A statement of the government's intent to use as a witness an informant, i.e., a person who has or will receive some benefit from assisting the government;
(3) Evidence of Other Crimes, Wrongs or Acts. A summary of any evidence of other crimes, wrongs or acts which the government intends to offer under FREvid 404(b), and which is supported by documentary evidence or witness statements in sufficient detail that the Court may rule on the admissibility of the proffered evidence; and
(4) Co-conspirator's Statements. A summary of any statement the government intends to offer under FREvid 801(d)(2)(E) in sufficient detail that the Court may rule on the admissibility of the statement.

D. The Jencks Act

Under the Jencks Act, 18 U.S.C. § 3500, the government must produce the prior statement of a government witness after the witness testifies on direct examination. Federal Rule of Criminal Procedure 26.2 implements the Jencks Act and sets forth procedures for applying it. Federal Rule of Criminal Procedure 12(h) states that Rule 26.2 applies at a suppression hearing and therefore the government must produce prior relevant statements by government witnesses who testify at a suppression hearing.

E. Federal Rule of Evidence 404(b)

Rule 404(b) provides that when the government in a criminal case seeks to introduce evidence of other crimes, wrongs, or acts committed by the defendant, it must, on the defendant's

request, "provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it tends to introduce at trial." Although the government should provide notice as early as possible, it is advisable to file a pretrial motion in limine seeking the admission of Rule 404(b) evidence and delineating the evidence that the government seeks to introduce.

F. Department Policy

The U.S. Attorneys' Manual, § 9-5.001, provides as follows:

> 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.
>
> 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 of the defendant for a charged crime.
>
> 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 of the defendant for a charged crime.
>
> 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.
>
> 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 1 and 2 above, several items together can have such an effect. If this is the case, all such items must be disclosed.

G. U.S. Attorney's Office Policy

1. General Discovery Policy

This office has a longstanding practice of allowing AUSAs to provide discovery beyond what is required under Rule 16 and other governing federal law. Providing liberal discovery may facilitate an early resolution of some cases, and defense attorneys may agree in advance to provide early reciprocal discovery in return for receiving greater discovery from the government. In deciding whether to provide discovery beyond the government's legal requirements, an AUSA should always weigh the impact that discovery might have on the safety of witnesses, informants, and victims of the alleged criminal activity and the likelihood that early disclosure will lead the defendant to create false evidence.

In most cases, a case should not be indicted until the AUSA has gathered and is ready to provide all *Brady* material and all discovery that the government is obligated to produce under Federal Rule of Criminal Procedure 16. Discovery of *Brady* and Rule 16 material ordinarily should be provided to the defendant at or before the defendant's arraignment and generally no later than one week before the first district court appearance. As additional discoverable materials come into the possession of the AUSA, they should be produced as soon as possible. Jencks Act and *Giglio* material (that is, information that impeaches a government witness) ordinarily should be produced at a reasonable time prior to trial. Exceptions to these early discovery requirements may be made when producing discovery may affect the safety of a witness, informant, or victim or for other compelling reasons. In addition, AUSAs who are producing information in discovery that may endanger a witness or victim should consider seeking a protective order to prevent dissemination of the information by defense counsel. If for any reason an AUSA does not intend to produce discovery as early as possible, the AUSA should consult with his or her supervisor.

2. Local Rules and Protocols

Although AUSAs have the discretion to provide discovery beyond the legal requirements of Rule 16, it is important that such action by an AUSA not be deemed as an office concession or acknowledgment that such discovery is legally required. In order to avoid any such inference from being drawn, all AUSAs should include a disclaimer of the following nature at the conclusion of discovery letters: *"The provision of the foregoing discovery shall not be construed as a concession or acknowledgment by the government that any or all of the foregoing discovery is required under Rule 16, Jencks or other governing federal statutes or rules."*

As set forth in Part I.C., Criminal Local Rule 16-1 imposes discovery requirements beyond those mandated by Federal Rule of Criminal Procedure 16. Our office opposed enactment of Crim.L.R. 16-1(c) because the rule impermissibly expands otherwise applicable discovery rights of defendants. For that reason, if a defendant relies on Crim.L.R. 16-1(c) in an

oral or written motion to request discovery otherwise not available, an AUSA should object on the ground that the rule impermissibly expands the scope of discovery under Rule 16. *In addition, any defense motions to compel discovery based on Crim.L.R. 16-1(c) should be immediately reported to the appropriate supervisor and the Chief of the Criminal Division so that we can monitor and coordinate our litigation in this area.*

3. Special policy on information in electronic communications

As explained in Part III, *infra*, substantive case-related communications may contain discoverable information. In particular, e-mails or text messages written by AUSAs, agents, and witnesses may contain information such as witness statements, information about witnesses, commentary on a draft report of investigation (such as an FBI 302 or DEA 6), or assertions about substantive issues in the case that could be construed as *Brady/Giglio* information or information that falls within Rule 16 or the Jencks Act.

For these reasons, AUSAs should take special care to avoid creating electronic communications (including e-mails and text messages) and voice mails that contain information that may be subject to discovery. AUSA should also instruct the agents working on their cases to abide by the same rule. In addition, AUSAs and agents should not engage in substantive case discussions in e-mails, text messages, or other forms of electronic communication with witnesses or potential witnesses of any kind. As a general rule, e-mails and text messages between AUSAs, between AUSAs and agents, between agents, and between witnesses and government personnel should be limited to scheduling or other procedural matters.

To ensure that AUSAs obtain all information that may be subject to discovery, an AUSA should instruct agents working on a case to provide the AUSA with any e-mails that the agent exchanged with a witness or a potential witness or that mentions a witness or potential witness. The AUSA should review those e-mails, as well as any e-mails that the AUSA has written about a case, to determine whether they contain information subject to discovery under *Brady*/*Giglio*, Rule 16, or the Jencks Act. Text messages between agents and witnesses or potential witnesses should also be reviewed to determine if they contain substantive information. If the AUSA discovers such information, the e-mail or text message itself need not be disclosed but the information must be disclosed to the defense in some form. When in doubt about whether an e-mail or text message contains information subject to discovery, the AUSA should consult with his or her supervisor and, if necessary, with the office's Professional Responsibility Officer.

II. THE PROSECUTION TEAM

A. Department policy

1. USAM § 9-5.001 provides as follows:

> 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.

2. Ogden Memo

In a memorandum issued January 4, 2010, Deputy Attorney General Ogden elaborated on this requirement as follows:

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

- Whether the prosecutor 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 prosecutor knows of and has access to discoverable information held by the agency;
- Whether the prosecutor has obtained other information and/or evidence form the agency;
- The degree to which information gathered by the prosecutor 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, prosecutors should consider (1) whether state or local agents are working on behalf of the prosecutor or are under the prosecutor's control; (2) the extent to which state and federal governments are part of a team, are participating in a joint investigation, or are sharing resources; and (3) whether the prosecutor has ready access to the evidence. Courts will generally evaluate the role of a state or local law enforcement agency on a case-by-case basis. Therefore, prosecutors should make sure they understand the law in their circuit and their office's practice regarding discovery in cases in which a state or local agency participated in the investigation or on a task force that conducted the investigation.

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

III. REVIEW

A. Files to review

The Ogden Memo directs prosecutors to review "all potentially discoverable material within the custody or control of the prosecution team." According to the Ogden Memo, that review should include the following:

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

2. Confidential Informant (CI)/Witness (CW)/Human Source (CHS)/Source (CS) Files: The credibility of cooperating witnesses or informants will always be at issue if they testify during a trial. Therefore, prosecutors are entitled to access to the agency file for each testifying CI, CW, CHS, or CS. Those files should be reviewed for discoverable information and copies made of relevant portions for discovery purposes. The entire informant/source file, not just the portion relating to the current case, including all proffer, immunity, and other agreements, validation assessments, payment information, and other potential witness impeachment information should be included within this review.

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

Prosecutors should take steps to protect non-discoverable, sensitive information found within a CI, CW, CHS, or CS file. Further, prosecutors should consider whether discovery obligations arising from the review of CI, CW, CHS, and CS files may be fully discharged while better protecting government or witness interests such as security or privacy via a summary letter to defense counsel rather than producing the record in its entirety.

Prosecutors must always be mindful of security issues that may arise with respect to disclosures from confidential source files. Prior to disclosure, prosecutors should consult with the investigative agency to evaluate any such risks and to

develop a strategy for addressing those risks or minimizing them as much as possible, consistent with discovery obligations.

3. Evidence and Information Gathered During the Investigation: Generally, all evidence and information gathered during the investigation should be reviewed, including anything obtained during searches or via subpoenas, etc. As discussed more fully below in Step 2, in cases involving a large volume of potentially discoverable information, prosecutors may discharge their disclosure obligations by choosing to make the voluminous information available to the defense.

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

5. Substantive Case-Related Communications: "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.

Prosecutors 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.

6. Potential Giglio Information Relating to Law Enforcement Witnesses: Prosecutors 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 the law enforcement employee as a witness. Prosecutors should be familiar with circuit and district court precedent and local practice regarding obtaining Giglio information from state and local law enforcement officers.

7. Potential Giglio Information Relating to Non-Law Enforcement Witnesses and Fed.R.Evid. 806 Dec!arants: 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 Cif. 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-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: Although not required by law, generally speaking, witness interviews should be memorialized by the agent. Agent and prosecutor notes and original recordings should be preserved, and prosecutors should confirm with agents that substantive interviews should be memorialized. When a prosecutor participates in an interview with an investigative agent, the prosecutor and agent should discuss note-taking responsibilities and memorialization before the interview begins (unless the prosecutor and the agent have established an understanding through prior course of dealing). Whenever possible, prosecutors 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, prosecutors should try to have another office employee present. **[Note: in the NDCA, prosecutors should only conduct an interview of a witness without an agent or other government employee present in extraordinary circumstances.]** 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, prosecutors 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, prosecutors should consider whether memorialization and disclosure is necessary 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. Prosecutors should pay particular attention to agent notes generated during an interview of the defendant or an individual whose statement may be attributed to a corporate defendant. Such notes may conlain information that must be disclosed pursuant to Fed.R.Crim.P. 16(a)(1)(A)-(C) or may themselves be discoverable under Fed.R.Crim.P. 16(a)(1)(B). *See, e.g., United States v. Clark*, 385 F.3d 609, 619-20 (6th Cir. 2004) and *United States v. Vaffee*, 380 F. Supp. 2d II, 12-14 (D. Mass. 2005).

B. Personnel who conduct the review

The Odgen Memo states as follows:

> Having gathered the information described above, prosecutors must ensure that the material is reviewed to identify discoverable information. It would be preferable if prosecutors could review the information themselves in every case, but such review is not always feasible or necessary. The prosecutor is ultimately responsible for compliance with discovery obligations. Accordingly, the prosecutor 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 prosecutor, the prosecutor's decision about how to conduct this review is controlling. This process may involve agents, paralegals, agency counsel, and computerized searches. Although prosecutors may delegate the process and set forth criteria for identifying potentially discoverable information, prosecutors should not delegate the disclosure determination itself. In cases involving voluminous evidence obtained from third parties, prosecutors 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.

IV. GIGLIO AND IMPEACHMENT INFORMATION

A. Department Policy

The U.S. Attorney's Manual, § 9-5.100, sets forth the Department's *Giglio* policy. That policy defines *Giglio* information as follows:

> The exact parameters of potential impeachment information are not easily determined. Potential impeachment information, however, has been generally defined as impeaching information which is material to the defense. It also includes information that either casts a substantial doubt upon the accuracy of any evidence—including 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 may include but is not strictly limited to: (a) specific instances of conduct of a witness for the purpose of attacking the witness' credibility or character for truthfulness; (b) evidence in the form of opinion or reputation as to a witness' character for truthfulness; (c) prior inconsistent statements; and (d) information that may be used to suggest that a witness is biased.

The Department's policy also sets forth procedures for disclosing potential impeachment information relating to Department of Justice employees. Although each investigative agency employee is obligated to inform prosecutors with whom they work of potential impeachment information as early as possible prior to providing a sworn statement or testimony in any criminal investigation or case, a prosecutor may also decide to request potential impeachment information from the investigative agency. The procedure for requesting information is set forth in the next section on USAO *Giglio* policy.

An agency that receives a request for *Giglio* material on an agent is required to disclose the following: (a) any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during an administrative inquiry; (b) any past or pending criminal charge brought against the employee; and (c) any credible allegation of misconduct that reflects upon the truthfulness or possible bias of the employee that is the subject of a pending investigation. 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 to the prosecuting office under the following circumstances: (a) when the government is required by a court decision in the district where the investigation or case is being pursued; (b) when (i) the allegation was made by a federal prosecutor, magistrate judge, or judge; or (ii) the allegation received publicity; (c) when the U.S. Attorney's Office and the agency agree that such disclosure

is appropriate, based upon exceptional circumstances involving the nature of the case or the role of the agency 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.

B. U.S. Attorney's Office Policy

The policy of this office is to fully satisfy its constitutional obligations to disclose impeachment material concerning agency witnesses in all criminal cases. Accordingly, all AUSAs must be familiar with their responsibilities under the *Giglio*, *Brady*, and *Henthorn* line of cases. We are responsible for disclosing to the defense information that potentially (1) impeaches the honesty, credibility, or veracity of a government witness or (2) tends to exculpate the defendant or mitigate potential punishment. We have special responsibilities under *Henthorn* for witnesses who are federal government employees or who are cross-designated from state or local law enforcement agencies if we also have possession of their personnel files.

Listed below is a summary of the procedures that must be followed for these witnesses to determine if there is any disclosable information that is potentially impeaching.

1. Request to Agencies

Requesting Official: The Department's *Giglio* policy requires that a single representative in this Office be designated as the Requesting Official who formally makes the request to agencies for potential impeaching material.

Request: Although the Office has a single requesting official, each AUSA is responsible for preparing a letter to be sent to the agency where a testifying witness is employed. The letter should be signed by the individual AUSA, but to comply with Department policy the request must be made in the name of the office's Requesting Official. The Requesting Official should receive a copy of each letter that an AUSA sends to an agency. The Requesting Official must be kept informed of any discussions with agency counsel concerning *Giglio* material. The form letter for making a request can be found at [hyperlink]. Any material alterations in this form must be approved by the Requesting Official. The list of agency officials to whom the requests should be sent is located at [hyperlink].

Timing: Requests for agency inquiries should be sent to the agencies at least 30 days before trial and preferably 45 days before trial. Requests may be sent further in advance, and such advance inquiries are encouraged.

Reply: Upon receiving a reply from an agency in response to the office's request, the Requesting Official will promptly forward that reply to the trial AUSA.

Review and Decision on Disclosure: The trial AUSA will review the information received from the agency and determine whether that information should be disclosed to the

court or to the defense. If the trial AUSA believes that any potential information received from an agency should be disclosed as *Giglio* material, and the agency does not oppose disclosure, the information should ordinarily be disclosed. When the AUSA is unsure whether to disclose information, *or in any case in which the agency opposes disclosure*, the AUSA should consult with his or her supervisor. AUSAs and their supervisors may consult with the Requesting Official or the office's Professional Responsibility Officer. If the matter cannot be resolved by the AUSA, the supervisor, the Requesting Official, or the PRO, the matter should be referred to the Criminal Chief.

Review and Decision on Non-Disclosure: The trial AUSA will review the information received from the agency and determine whether that information should be disclosed to the court or to the defense. If the trial AUSA believes that any potential information received from an agency should not be disclosed as *Giglio* material, the AUSA must confirm that decision with his or her supervisor. If the trial AUSA and his or her supervisor agree that the information need not be disclosed, then disclosure need not be made. When *any* doubt exists about whether to disclose information, *or in any case in which the agency opposes disclosure*, the AUSA should consult with the Requesting Official or the office's Professional Responsibility Officer. If the matter cannot be resolved by the AUSA, the supervisor, the Requesting Official, or the PRO, the matter should be referred to the Criminal Chief.

In Camera Review: When the office determines, after consultation with the agency, that guidance from the court is necessary to ascertain whether or to what extent disclosure is required, a submission may be made to the district court *ex parte* and *in camera* to seek a decision as to whether disclosure is required and, if so, the form or extent of the required disclosure. An AUSA should not make an *ex parte, in camera* submission without permission from his or her supervisor. Such filings should be made sparingly.

If an AUSA makes an *ex parte, in camera* submission, the submission should include only the impeachment information and those legal arguments that cannot be made without disclosing the impeachment information itself. Notice must be provided to the defense when an *ex parte, in camera* submission is made. The notice must inform the defense that a sealed pleading has been made, describe the general nature of the submission, and contain any legal arguments that can be made without disclosing the impeachment material.

Predisclosure Consultation with Agency: No disclosure of impeachment information obtained from an agency pursuant to this policy may be made without obtaining the agency's views on disclosure. The agency's views should be sought early enough to allow the agency time to review the decision to disclose the information and fully express its views. If the agency, after consultation with the AUSA and his or her supervisor, objects to a decision to disclose, the matter should be referred to the Requesting Official. If the Requesting Official cannot resolve the dispute, the issue should be referred to the Criminal Chief. The Criminal Chief will not resolve the dispute without consulting with the agency.

Protective Order: If the office decides to disclose potentially impeaching information about an agency witness, the trial AUSA will, when appropriate, seek a protective order to limit the use and further dissemination of the information by defense counsel.

Copies of Disclosure: When the AUSA discloses information to the court or the defense, the AUSA will provide a copy of the information disclosed, along with any pertinent judicial rulings or pleadings, to the relevant agency officials and the Requesting Official.

Confidentiality: The Requesting Official and the AUSA will preserve the security and confidentiality of potential impeachment information through proper storage and restricted access.

Notice of Conclusion of Case: When a request has been made to an agency for information, the AUSA must advise that agency when the need for such information has ended. This notification must be provided because the agency is under a continuing duty to provide any new impeaching information as long as the need for that information exists. The AUSA may rely on the case agent or other agent assigned to the case to convey to the relevant agency that the case has been concluded. Notification to the agency shall be provided no later than the time of sentencing, acquittal, dismissal, or other final action.

Unsubstantiated Allegations: Information received from an agency concerned allegations that have not been substantiated, were not credible, or that resulted in exoneration ordinarily need not be disclosed to the defense. When in doubt, however, an AUSA should consult with his or her supervisor. Special care should be taken to preserve the confidentiality of such information. Any such information, if not disclosed to the defense, shall be returned to the agency, along with all copies made, at the conclusion of the case.

System of Records: The office may not retain in any system of records that can be accessed by the identity of an employee potential impeachment information that was provided by an agency, except that the Requesting Official may maintain a system of records of information disclosed to defense counsel. In particular, the Requesting Official may maintain the information disclosed, along with any pertinent judicial rulings, related pleadings, correspondence, and memoranda in a system of records that can be accessed by the identity of the employee.

Updating Records: The Requesting Official will check this office's system of records when requesting information about a specific witness. Before any AUSA uses or relies on information included in a system of records maintained by the office, the Requesting Official shall contact the relevant agency to determine the status of the potential impeachment information and shall add any additional information provided to the system of records. After receiving any update, the Requesting Official will advise the trial AUSA of the prior disclosures. The AUSA shall keep such information confidential in the same manner as initial disclosures from the agency.

2. Oral Inquiry to Witnesses

Inquiry Required: AUSAs must conduct an oral inquiry of any federal, state, and/or local government employee witness before that witness submits any sworn statement or testifies at any proceeding. The obligation to conduct the inquiry extends to agents who will testify under oath in any proceeding or who will be the affiant on a complaint, search warrant, or Title III affidavit.

Use of Form: The Office has adopted a form to guide the inquiry to law enforcement agents, and the questions on the form should be asked of every witness who will provide a sworn affidavit or testimony. The form can be found on the Wordperfect drop-down menu and should be included when a new case jacket is issued to an AUSA. The form should be completed for each agent who will provide a sworn statement or testimony. The agent's yes and no answers should be recorded on the form. If the agent answers "no" to every question, the form should be maintained in the case file until the conclusion of the case, including any appeal.

If the agent answers "yes" to any question, the AUSA should conduct an additional inquiry to elicit any potential impeachment information. That information may be recorded on the form or on a separate sheet of paper. If the information is recorded on a separate sheet, it should be physically attached to the form.

Determination to Disclose Information: If the AUSA believes or harbors any doubt over whether information provided by the agent in response to the inquiry must be disclosed in a complaint, search warrant affidavit, or Title III application or provided to the defense, the AUSA should consult with his or her supervisor. If the supervisor agrees that the information should be disclosed, the AUSA or his or her supervisor should obtain the agency's position on whether the information should be disclosed. If the agency objects to disclosure, then the matter should be resolved pursuant to the procedure described in paragraph 1, above.

Protective Order: If the office decides to disclose potentially impeaching information about an agency witness, the trial AUSA will, when appropriate, seek a protective order to limit the use and further dissemination of the information by defense counsel.

Retention and Destruction of Form: If information provided by an agent in response to an oral inquiry is disclosed to the defense, all documents regarding the disclosure, including the form, should be maintained in the case file, and a copy of all relevant documents should be sent to the Requesting Official. The Requesting Official will preserve that information in a system of records identified by the agent's name.

If information provided by the agent is not disclosed, then the form and any notes or other documents created to record the agents disclosure should be maintained in the case file, and a copy should be sent to the Requesting Official. At the conclusion of the case, the form may be maintained in the case file, but it should not be retained in any record that can be accessed by the name of the agent.

V. DISCLOSURES

The Ogden Memo states as follows:

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"). Prosecutors must familiarize themselves with each of these provisions and controlling case law that interprets these provisions. In addition, prosecutors 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*. Prosecutors are also encouraged to provide discovery broader and more comprehensive than the discovery obligations. If a prosecutor chooses this course, the defense should be advised that the prosecutor is electing to produce discovery beyond what is required under the circumstances of the case but is not committing to any discovery obligation beyond the discovery obligations set forth above.

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 prosecutor's good faith determination of the scope of appropriate discovery is in error. Prosecutors are encouraged to provide broad and early discovery consistent with any countervailing considerations. But when considering providing discovery beyond that required by the discovery obligations or providing discovery sooner than required, prosecutors 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. In most jurisdictions, reports of interview (ROIs) of testifying witnesses are not considered Jencks material unless the report reflects the statement of the witness substantially verbatim or the witness has adopted it. The Working Group determined that practices differ among the USAOs and the components regarding disclosure of ROIs of testifying witnesses. Prosecutors should be familiar with and comply with the practice of their offices.

Prosecutors should never describe the discovery being provided as "open file." Even if the prosecutor intends to provide expansive discovery, it is always possible that something will be inadvertently omitted from production and the prosecutor will then have unintentionally misrepresented the scope of materials provided. Furthermore, because the concept of the "file" is imprecise, such a representation exposes the prosecutor 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 the discovery obligations, prosecutors may seek a protective order from the court addressing the scope, timing, and form of disclosures.

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 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. 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. Prosecutors should be attentive to controlling law in their circuit and district governing disclosure obligations at various stages of litigation, such as pre-trial hearings, guilty pleas, and sentencing.

Prosecutors 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. Prosecutors 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, prosecutors should consider making Rule 16 materials available as soon as is reasonably practical but must make disclosure no later than a reasonable time before trial. In deciding when and in what format to provide discovery, prosecutors should always consider security concerns and the other factors set forth in subparagraph (A) above. Prosecutors 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 Fcd.R.Crim.P. 16(b)(1).

Discovery obligations are continuing, and prosecutors 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.

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, prosecutors should take great care to ensure that the full scope of pertinent information is provided to the defendant.

B. Record

1. The Ogden Memo states as follows:

One of the most important steps in the discovery process is keeping good records regarding disclosures. Prosecutors should make a record of when and how information is disclosed or otherwise made available. While discovery matters are often the subject of ligation 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.

2. U.S. Attorney's Office Policy:

AUSAs must maintain a specific and accurate record of the items they provide in discovery. Ordinarily, that means a complete Bate numbered set of the discovery provided, or, if the number of documents is too large, an accurate and complete description of the documents that were made available to the defense.

V. CASES INVOLVING NATIONAL SECURITY

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

As a general rule, in those cases where the prosecutor, after conferring with other members of the prosecution team, has a specific reason to believe that one or more elements of the Intelligence Community (IC) possess discoverable material, he or she should consult NSD regarding whether to request a prudential search of the pertinent IC element(s). All prudential search requests and other discovery requests of the IC must be coordinated through NSD. Although discovery issues relating to classified information are most likely to arise in national security cases, they may also arise in a variety of other criminal cases, including narcotics cases, human trafficking cases, money laundering cases, and organized crime cases. In particular, it is important to determine whether the prosecutor, or another member of the prosecution team, has

specific reason to believe that one or more elements of the IC possess discoverable material in the following kinds of criminal cases:

- Those targeting corrupt or fraudulent practices by middle or upper officials of a foreign government;

- Those involving alleged violations of the Arms Export Control Act or the International Emergency Economic Powers Act;

- Those involving trading with the enemy, international terrorism, or significant international narcotics trafficking, especially if they involve foreign government or military personnel;

- Other significant cases involving international suspects and targets; and

- Cases in which one or more targets are, or have previously been, associated with an intelligence agency.

For these cases, or for any other case in which the prosecutors, case agents, or supervisors making actual decisions on an investigation or case have a specific reason to believe that an element of the IC possesses discoverable material, the prosecutor should consult with NSD regarding whether to make through NSD a request that the pertinent IC element conduct a prudential search. If neither the prosecutor, nor any other member of the prosecution team, has a reason to believe that an element of the IC possesses discoverable material, then a prudential search generally is not necessary.