U.S. Department of Justice
United States Attorney
District of Nevada

CRIMINAL DISCOVERY POLICY

Date: October 15, 2010

I. Policy Summary and Background

On January 4, 2010, Deputy Attorney General Ogden issued a memorandum entitled "Guidance for Prosecutors Regarding Criminal Discovery" ("DAG Ogden Criminal Discovery Guidance"). That same date, he issued a memorandum directing that USAOs promulgate discovery policies governing several enumerated issues relating to criminal discovery. This comprehensive discovery policy implements the directives of the Deputy Attorney General.

This policy provides guidance on gathering, tracking, reviewing and producing information to criminal defendants in accordance with statutory or procedural law and case law, the Constitution, DOJ policy and local rules. These duties are defined in the Federal Rules of Criminal Procedure Rules 12 and 16; the *Jencks Act* and Federal Rule of Criminal Procedure 26.2; *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and their progeny; USAM 9-5.001 (Disclosure of Exculpatory and Impeachment Information) and 9-5.100 (Potential Impeachment Information on Law Enforcement Witnesses); and the local rules of the district and magistrate courts, in particular Local Rule of Criminal Procedure (LRC) 16-1, which sets forth the structure and procedural timing of pretrial discovery in this District. In some respects, this policy requires broader production than the law and local rules. It counsels AUSAs to provide broad and early discovery of information and materials to the extent that broad and early discovery promotes the just resolution of a case and does not jeopardize witness safety, national security, or an ongoing criminal investigation.[1]

The responsibility to produce all discoverable information in a criminal case lies with the AUSA(s)[2] assigned to the case. To fulfill this responsibility, AUSAs should consider several matters:

- **What & When**: What are the policies, rules, statutes and case law that define what must be produced and when must it be produced? (*See Part II. Laws, Rules and Policy Governing the Production of Discoverable Information (What Must Be Produced and When?)*)

1 The policies and principles set forth herein are not intended to have the force of law or to create or confer any rights, privileges, or benefits to defendants. *United States v. Caceres*, 440 U.S. 741 (1979).

2 As used in this policy, "AUSA" includes Special Assistant U.S. Attorneys and DOJ prosecutors working on a case in this district.

- **Who is part of the prosecution team**: AUSAs are obligated to produce information that is within the possession of the prosecution team; thus, defining the scope of the prosecution team is critical. (*See Part III. Who is Part of the Prosecution Team: Gathering and Reviewing Potentially Discoverable Information*)

- **Where to look**: Once the prosecution team has been identified, AUSAs must ensure that all discoverable information is located, reviewed and produced as required, including agency investigative and administrative files, CI/CHS files, emails, PSRs, law enforcement *Giglio*, and other materials. (*See Part IV. Potential Sources of Discoverable Information*)

- **How to produce and track**: AUSAs must decide in what form to produce the discovery (Bates numbered, hard copy, e-copy, available for inspection, redacted, or some other form), and **must keep a detailed record of all discovery produced**. **(***See Part V. Manner of Production and Record-keeping*)

As a general rule, the policies and disclosure principles set forth below do not apply to cases involving national security or classified information. Please consult Section V, infra, for the policies and principles related to disclosures of national security information. In all other cases, any deviation from these policies and principles requires supervisory approval.

II. Laws, Rules and Policy Governing the Production of Discoverable Information (What Must Be Produced and When?)

AUSAs must produce all discoverable information in accordance with federal law, the local rules and DOJ policy. For the purposes of this memorandum, discovery and discoverable information are not limited to Rule 16 information, but include all information and materials the government must disclose to the defendant pursuant to Fed. R. Crim. P. 12 and 16; the Jencks Act and Fed. R. Crim. P. 26.2; Fed. R. Evid. 404(b); *Brady*, *Giglio*; USAM 9-5.001 and 9-5.100; and the local rules.

A. Federal Rules of Criminal Procedure Rule 12 and 16.

In accordance with LCR 16.1, unless a case is declared complex, the AUSA assigned to a case shall confer with defense counsel after arraignment to determine and to designate whether discovery in a case will be governed by a Joint Discovery Agreement or a Government Disclosure Statement. If the AUSA assigned to the case decides to proceed by a Joint Discovery Agreement, the AUSA generally should offer to defense counsel, the Office's standard Joint Discovery Agreement. The Government will agree under the Joint Discovery Agreement to:

(1) disclose all matters required by federal statute, rule, or the United States Constitution, and

(2) subject to any applicable work product protections, law enforcement privileges, or protective orders, voluntarily disclose:

(a) any investigative reports describing facts relating to charges in the indictment, and

(b) any audio or video recordings relating to the charges in the indictment.

The AUSA should require under the agreement that the defense make any reciprocal disclosures required by federal statute, rule, or the United States Constitution.

In finalizing a Joint Discovery Agreement, the AUSA should confer with defense counsel to determine the scope, timing, and method of the disclosures required under LCR 16-l(b)(l)(i) and any additional disclosures upon which the parties agree. The AUSA will endeavor to ensure that the parties comply with LCR 16-1 and file a Joint Discovery Agreement within five (5) days after arraignment, except upon leave of Court. The AUSA shall make the disclosures required by federal statute, rule, or the United States Constitution available within five (5) calendar days of filing the Joint Discovery Statement. The AUSA shall make all other disclosures to which he or she has agreed available within the times set forth in the Joint Discovery Agreement. Notwithstanding any of the deadlines delineated above, the disclosure obligations of the government continue throughout the life of the proceedings.

If after considering the discovery policy of this office and with the concurrence of his or her supervisor, the AUSA decides the best interests of the justice and the prosecution require the withholding of disclosure subject to LCR 16-1 or the Joint Discovery Agreement, the AUSA will provide the defense counsel with notice of the intention to withhold the disclosure, describing the nature of the disclosure being withheld and the basis upon which it is being withheld in sufficient detail to permit defense counsel to file a discovery motion.

In non-complex cases where (1) the AUSA after considering the discovery policy of this Office and the DOJ determines that it is in the interests of the prosecution or in the interest of the safety and privacy of the witnesses that the Government should not enter into a Joint Discovery Agreement; or (2) defense counsel refuses to enter into an offered Joint Discovery Agreement, the AUSA assigned to the prosecution shall file a Government Disclosure Statement. In such cases, within five (5) calendar days of arraignment, the AUSA shall endeavor to confer with defense counsel regarding the timing, scope, and method of the disclosures and reciprocal disclosures required by federal statute, rule, or the United States Constitution, and any additional disclosures which will be made by the government. Within five (5) days of the conference, but in no event more than ten (10) calendar days after the date of arraignment, the AUSA shall file

the Government's Disclosure Statement, which shall include the following information:

(A) the date on which the parties discussed the Disclosure Statement, or an explanation of why a discussion has not occurred;

(B) the scope, timing, and method of the government's disclosures required by federal statute, rule or the United States Constitution; and

(C) the scope, timing, and method of any additional disclosures which will be made by the government.

Before filing any motion for discovery, in compliance with LCR 16-1, the AUSA shall attempt to confer with defense counsel in a good faith effort to resolve the discovery dispute. The AUSA in any motion for discovery shall include a statement certifying that, after personal consultation with defense counsel, the AUSA and defense counsel have been unable to resolve the dispute without court action.

If at any time after arraignment, the Court on its own motion, or upon motion of the parties, designates a case as complex, the AUSA shall endeavor, within five (5) days following such designation, to confer with defense counsel to develop a Proposed Complex Case Schedule, addressing the following:

(i) the scope, timing, and method of the disclosures required by federal statute, rule, or the United States Constitution, and any additional disclosures that will be made by the government;

(ii) whether the disclosures should be conducted in phases, and the timing of such disclosures;

(iii) discovery issues and other matters about which the parties agree or disagree, and the anticipated need, if any, for motion practice to resolve discovery disputes;

(iv) proposed dates for the filing of pretrial motions and for trial; and

(v) stipulations with regard to the exclusion of time for speedy trial purposes under Title 18, United States Code, Section 3161.

The AUSA shall endeavor to ensure that the parties file the Proposed Complex Case Schedule no later than five (5) days after conferring under Section 16-l(a)(2). If any unresolved scheduling or discovery matters remains after conferring with defense counsel, the AUSA, in accord with LCR 16-1, in the filing of the Proposed Complex Case Schedule, shall ask the Court to enter an Order fixing the schedule for discovery, pretrial motions, and trial, and determining exclusions of time under Title 18, United States Code, Section 3161, or to conduct a pretrial conference to address unresolved scheduling and discovery matters.

B. Disclosure of *Brady/Giglio.*

The constitutional guarantee to a fair trial, as interpreted by *Brady* and *Giglio* and their progeny, requires AUSAs to disclose to the defense any evidence that is material to guilt or punishment. *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 154. *Brady* and *Giglio* information must be disclosed to the defense regardless of whether the defense makes a request for such information. On October 19, 2006, the Department issued an amendment to the U.S. Attorney's Manual that requires AUSAs to go beyond the minimum obligations required by the Constitution and establishes broader standards for disclosure of exculpatory and impeachment information. The details of the requirements are set forth in USAM § 9-5.001. In short, the policy requires disclosure of information beyond that which is "material" to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995), and encourages AUSAs to err on the side of disclosure. This policy requires the prosecution team to produce information, not just evidence, and counsels that the assigned AUSA(s) must consider the cumulative impact of items of information. This information and evidence includes the following:

1. Exculpatory Information.

All exculpatory information known to or in the possession of the prosecution team, regardless of whether the information is memorialized, should be disclosed to the defendant reasonably promptly after the filing of the case or the discovery of the information. In accordance with the directives of USAM 9-5.001, AUSAs should go beyond the Constitutional requirements and take a broad view of materiality when determining what 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.

USAM 9-5.001.C.1. This includes, but is not limited to, exculpatory information contained in interview memoranda of testifying and non-testifying witnesses and in internal emails, memos, and other reports. The exculpatory information need not be provided in its original form; for example, it is sufficient to send a letter to defense counsel advising of the exculpatory information in lieu of providing a copy of the original source document or recording, which could be an email, letter, or other document or source.

2. Impeachment Information.

Giglio v. United States, 405 U.S. 150 (1972), and its progeny, require the Government to turn over to the defendant anything known to the Government which would adversely impact the outcome of a trial in a material way. USAM 9-5.001 goes

beyond *Giglio's* requirements and requires AUSAs to disclose anything that is material to the witness's credibility, or "that casts a substantial doubt upon the accuracy of any evidence, . . . 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." USAM 9-5.001. The information should be disclosed "regardless of whether the information . . . would itself constitute admissible evidence." USAM 9-5.001.

Examples of what must be turned over include inconsistent statements, promises of leniency or immunity made to a witness, plea/cooperation agreements entered into with a witness, any benefit provided to the witness by the Government,[3] payments to a witness, any information that may be indicative of the witness's bias including, but not limited to, the witness's incarceration, probation, or supervised release status, the prior criminal record ("rap" sheet) of a witness, and other prior material acts of misconduct of a witness.

For a fuller discussion of inconsistent statements *see Part II. D. "Witness Interviews, Brady and Giglio in Interviews of Testifying and Non-testifying Witnesses, and Interviews of Non-testifying Individuals"* below.

3. Timing of Disclosure.

a. Pre-Charge Disclosures.

(1) Grand Jury:

Exculpatory Information. Although the Supreme Court has held that there is no constitutional requirement that the government disclose exculpatory evidence to the grand jury*, see United States v. Williams*, 504 U.S. 36, 52-54 (1992), USAM 9-11.233 requires AUSAs to disclose to the grand jury "substantial evidence that directly negates the guilt of a subject of the investigation."

Impeachment Information: Although there is no legal duty to seek out impeachment information from the prosecution team or present impeachment information to a grand jury, if an AUSA is aware of significant impeachment information relating to a testifying witness, the AUSA should consider disclosing it to the grand jury, taking into account the witness's role in the case and nature of the impeachment information, among other things.

3 Such benefits include a promise to be lenient on or not bring charges against a cooperating witness's family member or other person of significance to the cooperator.

(2) Affidavits:

Exculpatory Information. If an AUSA is aware of substantial exculpatory information at the time he or she is preparing an affidavit in support of a search warrant, complaint, seizure warrant, or TIII, the AUSA should disclose the information in the affidavit unless the AUSA obtains supervisory approval not to do so.

Impeachment Information. If at the time an AUSA is preparing an affidavit in support of a search warrant, complaint, seizure warrant or TIII, the AUSA is aware of impeachment information relating to the affiant or other person relied upon in the affidavit such as a confidential informant, and that impeachment information is sufficient to undermine the court's confidence in the probable cause contained in the affidavit, the AUSA should disclose the information in the affidavit unless the AUSA obtains supervisory approval not to do so. A known prior judicial finding of a lack of credibility of an affiant or person relied upon in the affidavit should be disclosed in the affidavit.

b. Post- Charge Disclosures:

(1) Exculpatory Information: After a defendant is charged, exculpatory information should be disclosed reasonably promptly upon its discovery. USAM 9-5.001.D.1. If an AUSA discovers exculpatory information after conviction, sentencing and appeal, the AUSA should discuss the proper way to handle the matter with a supervisor.

(2) Impeachment information:

(a) Pre-Trial Hearings Impeachment information relating to government witnesses who will testify at a preliminary/detention hearing, motion to suppress, or other pre-trial hearing should be disclosed sufficiently in advance of the hearing to allow the hearing to proceed efficiently.

(**b) Guilty Pleas** The Supreme Court has held that there is no constitutional requirement that the government disclose impeachment information prior to a guilty plea. *United States v. Ruiz*, 536 U.S. 622 (2002).

(c) Trial Impeachment information should be disclosed "at a reasonable time before trial to allow the trial to proceed efficiently." USAM 9-5.001 D 2.

(**d) Sentencing** USAM 9-5.001.D.3. requires:

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

Thus, AUSAs should disclose such information no later than the date the court issues its preliminary presentence (PSR) investigation. If additional favorable information becomes apparent after the initial PSR is issued, it should be disclosed promptly.

> **(e) Post-conviction evidentiary hearings** (probation, supervised release revocations, habeas actions) Impeachment information should be disclosed at a reasonable time before the hearing to allow the hearing to proceed efficiently.

C. Impeachment Information Relating to Law Enforcement Witnesses.

In some cases AUSAs may encounter *Giglio* issues with respect to law enforcement witnesses who will be the affiant or a witness at a hearing or trial. For example, an agent may have been found to have committed misconduct, or may be the subject of a pending internal or criminal investigation. USAM 9-5.100 contains the Department's policy on obtaining and disclosing *Giglio* information relating to law enforcement witnesses. The *Giglio* officer to assist with *Giglio* requests in the office relating to law enforcement witnesses is (currently) AUSA Eric Johnson.

All potential impeachment information obtained from a law enforcement witness or the witness's agency should be carefully protected and only disclosed to those with a need to know.

1. Obtaining *Giglio* Information for Law Enforcement Witnesses.

In any case where defense counsel by motion or other means has requested a review of testifying law enforcement witnesses personnel files for impeachment information [or in prosecutions involving testimony by undercover agents, officers of the Las Vegas Metropolitan Police Department, and/or BIA/Indian Country officers], the AUSA assigned to the case shall ask the Giglio officer for the Office to send a Henthorn letter to any federal or state agency whose employee is likely to testify at trial. In all other cases, the AUSA has the discretion to determine whether or not to have a Henthorn letter sent to the federal or state agency employing a testifying witness. If the AUSA decides not to have a Henthorn letter sent to the employing agency, the AUSA should ask each potential federal or state affiant/witness:

A. If the witness is aware of any specific instances of misconduct, both within and outside the scope of his or her employment, that may bear on the witness' credibility (including the finding of a lack of candor during any administrative inquiry);

B. If the witness has any pending allegations of misconduct with his or her employing agency;

C. If the witness has ever had criminal charges filed against him or her, regardless of the outcome of the charges;

D. If the witness is aware of any evidence suggesting his or her bias against the target, subject or defendant;

E. If the witness is aware of any findings of misconduct, allegations or pending investigations of misconduct similar to circumstances or potential defenses in the case (such as, coercion, entrapment, mishandling of evidence or use of force);

F. If the witness is aware of any prior findings by a court concerning the witness that may impact on the witness' credibility; or

G. If the witness is aware of any negative allegations or opinions about the witness' reputation or character that have been in media stories or otherwise publicly aired.

The AUSA should make the above-described inquiry of a testifying federal or state affiant/witness sufficiently in advance of a hearing or trial to permit enough time for a formal *Giglio* request to be made to the agency, if necessary, and for the agency to respond to the request prior to hearing or trial.

2. Requesting and Reviewing Personnel and Disciplinary Files.

When requested by an AUSA, the *Giglio* officer will request all *Giglio* information from the affiant/witness' agency through a Henthorn letter. The federal or state agency official responsible for reviewing the affiant/witness' file will conduct a review of the agent's or employee's personnel and disciplinary files and disclose any impeaching information from the file to the requesting *Giglio* officer. Because gathering and reviewing *Giglio* records takes time, AUSAs should make a request to the *Giglio* officer for a Henthorn letter sufficiently in advance of the witness' anticipated testimony to allow the process to be completed before trial or the witness testifies.

3. Disclosure of Potential Impeachment Information to the Court or Defense Counsel.

Once the agency discloses any *Giglio* information to the *Giglio* officer, the *Giglio* officer in consultation with the prosecuting AUSA will review the material to determine whether it should be disclosed to the court for an *ex parte*, *in camera* review or to defense counsel. The *Giglio* officer will disclose to the AUSA any potential *Brady* or *Giglio* materials. Before the AUSA discloses any material either to the court for an *ex parte*, *in camera* review, or to defense counsel, the AUSA should discuss the matter fully with the *Giglio* officer. If it is determined that disclosure should occur, the *Giglio* officer or prosecuting AUSA should notify the agent or agency[4] before disclosure occurs, and give them an opportunity to be fully heard on the matter.

If an AUSA asks the court to conduct an *ex parte, in camera review* of potential *Giglio* information, the AUSA should ensure that the AUSA's *ex parte, in camera* presentation to the court, and the potential *Giglio* information reviewed by the court are made part of the court record, under seal if appropriate, to allow for appellate review, if necessary. The AUSA should provide the *Giglio* officer and the law enforcement agency with any pleadings or documents that are filed with the court regarding a law enforcement witness' potential impeachment information, as well as with any court rulings on potential impeachment information, so that the *Giglio* officer can handle the information in a consistent fashion in future cases.

4. Protective Orders.

AUSAs should seek protective orders of sensitive potential impeachment information in appropriate cases to prohibit disclosures by defense counsel or the defendant to third parties not involved in the case.

5. Securely Maintaining Sensitive Agency Material.

All potential impeachment information received from an agency pursuant to a *Giglio* request should be securely maintained and should not be shared with any person who does not have a need to know. The AUSA should keep a copy of all potential *Giglio* information received from a *Giglio* officer in the case file. *Giglio* material disclosed to the court or to defense should be clearly marked in the criminal case file, so it is clear what was disclosed to the court. Because *Giglio* information is sensitive, *Giglio* information in a criminal case file should be kept in a

4 In some cases, an agent may be unaware that there is a pending investigation of their alleged misconduct. In such cases, the *Giglio* officer and the AUSA should be careful to discuss the matter only with the agency, and not with the agent.

sealed envelope when it is not in use. Consult the Office's *Giglio* officer for more details on proper storage and security of *Giglio* information.

D. Witness Interviews.

1. Interviews of Testifying Witnesses.

Absent unusual circumstances, such as potential serious threats to witness safety, national security, or an ongoing criminal investigation, AUSAs should produce reports of testifying witness interviews and witness statements to the defense prior to the hearing or trial. Interview reports of testifying witnesses should be produced sufficiently in advance of the witness's testimony to permit defense counsel to make effective use of the information. AUSAs have discretion to determine how far in advance of the testimony the reports will be disclosed based upon the particular circumstances of their case and any reciprocal discovery agreements they may reach with defense counsel. In cases governed by the Office's standard Joint Discovery Agreement, the AUSA will disclose no later than 45 days after arraignment all reports and memoranda of interviews of witnesses the AUSA intends to call at trial. In other cases, the AUSA should take care to ensure that he or she releases such reports and memoranda within the time frames provided in the Government Disclosure Statement, Complex Case Schedule or other court scheduling order.

Production of witness interview reports is required regardless of whether the reports qualify as statements as defined by the Jencks Act, contains *Brady* or *Giglio* information, or is discoverable under any other law, rule, or policy. Our policy requires earlier and broader production than is required by the Jencks Act, or the local rules.[5]

Deviation from the policy of production of reports of witness interviews requires supervisory approval.

a. Jencks Act/Rule 26.2.

Although this policy requires broad and early production of reports of witness interviews, AUSAs should nonetheless be familiar with the law's requirements and be prepared to object to the improper use or treatment of such reports as "witness statements" to the extent that they do not qualify as statements under the Jencks Act.

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5 Federal Rule of Criminal Procedure 26.2 and the Jencks Act do not require disclosure of witness statements until after the witness has testified on direct examination in a hearing or trial.

(1) Be careful not to characterize a witness interview as a Jencks Act statement in discovery letters or court pleadings if the interview does not fit the Jencks Act definition of a witness statement.

(2) Because witness interview reports are not Jencks material unless the witness has adopted the memorandum as his statement, AUSAs should continue to object to use of the report in cross examination.

The Jencks Act defines witness statements as "(1) a written statement made by [a] witness and signed or otherwise adopted or approved by him; (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by [the] witness and recorded contemporaneously with the making of such oral statement; or (3) a statement, however taken or recorded, or a transcription thereof, if any, made by [a] witness to a grand jury." 18 U.S.C. 3500(e).

b. *Brady* and *Giglio* in Interviews of Testifying Witnesses.

This policy requires production of testifying witness interview reports regardless of whether they contain *Brady* or *Giglio* information. Part of the rationale for early production is that *Brady* and *Giglio* is not always readily identifiable, especially when the defense is not readily apparent. Furthermore, sometimes it is only the cumulative effect that renders the information relevant in the context of *Brady* or *Giglio*.

Because AUSAs are sometimes required by the court to respond to defense requests that are specific to *Brady* and *Giglio,* AUSAs should review witness interviews for potential *Brady* or *Giglio.* A witness interview may contain favorable information if it contains information that the witness will receive a benefit from cooperating, or that the witness has given materially conflicting information or information that materially conflicts with another witness statement, or failed to tell the whole truth from the beginning, or failed to advise the interviewing agent of certain facts during an interview.

AUSAs should be particularly sensitive to the potential for inconsistent statements if the same potential witness has been interviewed repeatedly. Some cooperating witnesses may provide false information or not tell all they know the first time they are interviewed. If a witness initially denies or minimizes his knowledge of or involvement in criminal activity, and thereafter provides information that is materially broader or different, the fact that the witness provided materially different information should be memorialized, even if the variance occurs within the same interview, and should be provided to the defense as *Giglio* information.

Memorializing Favorable Information and the Duty to Disclose. The duty to disclose to the defendant the substance of what a witness has said during interviews, debriefings, or informal discussions cannot be avoided by failing to memorialize these events. If any such events occur that are not memorialized in an interview report, the AUSA should determine what the witness said during the session and disclose the content of the witness' statements to the defense. AUSAs should emphasize to agents the importance of memorializing all impeaching information.

c. *Brady* and *Giglio* in Agent Notes.

Although it is not necessary to produce an agent's handwritten notes under Rule 16 or the Jencks Act, it is necessary to preserve them in the event that the accuracy of the related formal report becomes an issue.

It is not necessary for AUSAs to review agent notes related to each potential witness' interview. However, AUSAs should consider reviewing agent's notes of particularly critical interviews, including any interview of a defendant, and the notes relating to any report of interview of which the defense has questioned the accuracy of the agent's formal report. If the notes contain favorable information that is not memorialized in a formal report or any information that is materially inconsistent with the formal report, the notes or the information included in the notes should be produced.

d. The Duty to Disclose Material Inconsistencies Learned During Pre-trial Witness Interviews.

AUSAs should disclose information learned during pre-trial witness preparation that is materially inconsistent with information provided by the same or a different government witness. All new information learned during a pre-trial preparation session is not necessarily impeachment information. New information that qualifies as impeachment information may be disclosed through a report of the interview prepared by the agent, or through a letter from the AUSA to the defense. Regardless, the AUSA and the agent should reach a clear understanding on who will memorialize the information, and the AUSA should ensure that the inconsistency is disclosed to the defense in a timely manner. The best practice would be to have the agent memorialize the inconsistency.

The duty to disclose to the defendant the substance of what a witness has said during a pre-trial preparation session cannot be avoided by failing to memorialize it.

2. Interviews of Non-Testifying Individuals.

Although reports of interviews of non-testifying individuals should be reviewed, AUSAs are not required to produce interview reports of non-testifying individuals unless the reports contain exculpatory information or information inconsistent with or otherwise impeaching of a testifying witness or the government's theory of the case.

3. Supervisory Approval Required to Deviate from Policy.

If an AUSA believes it is appropriate to deviate from this policy, the AUSA should seek supervisory approval.

E. Discoverability of Prosecutor's Notes.

A prosecutor's notes of witness interviews are usually protected from discovery by work product privilege rules and Federal Rule of Criminal Procedure 16(a)(2). AUSAs should be mindful, however, that notes that contain substantially verbatim quotes of what a witness said during an interview (potential Jencks Act), or favorable information (*Brady/Giglio*), may contain information that is discoverable. If the discoverable information in the AUSA's notes is contained in other materials provided to the defense (such as Form 302s and other reports, agent's notes or letter to defense), it will often suffice to provide the other materials to the defense. It is possible, however, that if the exact nature of the information contained in the notes becomes an issue in the case, the court may review the notes *in camera*.[6] AUSAs should avoid having substantive interaction with witnesses without an agent or other person present who can serve as a witness to the exchange. If an issue arises in a case regarding the contents or discoverability of a prosecutor's notes, the AUSA should consult with a supervisor.

F. Similar Act Evidence: Federal Rules of Evidence 404(b).

Because early production of Rule 404(b) evidence may facilitate the early resolution of a case, AUSAs should consider whether providing early Rule 404(b) evidence to the defense will help resolve the case. Generally, unless the AUSA has been granted leave of court, the AUSA should produce and give notice of any evidence the Government will seek to admit under Rule 404(b), no later than 30 days before trial.

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6 *See United States v. Jones*, 620 F. Supp.2d 113 (D. Mass. 2009); *United States v. Jones*, 2010 WL 565478 (D. Mass. Feb. 19, 2010); *United States v. Livingstone*, 576 F.3d 881 (8th Cir. 2009); *United States v. Reid*, 300 Fed.Appx. 50 (2d Cir. 2008); *United States v. Campos*, 20 F.3d 1171 (5th Cir. 1994) (unpublished).

G. Charts and Summaries.

Charts and summaries that will be used in Opening Statement or at trial should be produced no later than 10 days in advance of trial as required by the Joint Discovery Agreement.

III. Who is Part of the Prosecution Team: Gathering and Reviewing Potentially Discoverable Information

A. Prosecution Team.

When gathering discoverable information, AUSAs should collect from the members of the prosecution team all information that is required to be produced by Fed. R. Crim. P. Rules 12 and 16; the *Jencks Act* and Fed. R. Crim. P. 26.2; Fed. R. Evid. 404(b); and *Brady* and *Giglio*. In USAM 9-5.001, a prosecution team is defined as including federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant. The AUSA needs to know which agencies have played a role in the investigation and make all reasonable inquiries to ascertain what pertinent case information exists. When identifying members of the prosecution team, AUSAs should err on the side of inclusiveness, in accordance with DOJ guidance.

In complex cases involving task forces, multi-district investigations, parallel proceedings, or other non-criminal investigative or regulatory agencies, AUSAs should examine the relationship of all entities to determine 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 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 from 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. *See "DAG Ogden's Criminal Discovery Guidance."*

B. Responsibility of AUSA for the Review of Potentially Discoverable Information.

Review of all potentially discoverable information generally should be conducted by the AUSA, or, when deemed appropriate by the AUSA, by a case agent, paralegal or other person who has met with the AUSA and who understands the discovery gathering plan. Whether review of potentially discoverable information is conducted personally by the AUSA or by the case agent or other person, the AUSA is responsible for overseeing the gathering and production of discovery to ensure that all discoverable information is identified and produced, or made available to the defense for inspection and copying. Ultimate responsibility for the production of all discoverable information lies with the AUSA(s) assigned to the case.

IV. Potential Sources of Discoverable Information

The AUSA should seek out discoverable information from the prosecution team. The gathering process should include a review of the following potential sources of discoverable information:

A. Investigative Agency's Files.

All substantive case-related information in the possession of an agent who is part of the investigative team should be reviewed to determine whether it should be disclosed as part of discovery. This review generally should be conducted by the AUSA, or, when deemed appropriate by the AUSA, by a case agent, paralegal or other person who has met with the AUSA and has been instructed as to the discovery plan and what likely items of discovery will be found in the agency's files. In instances where the case agent or

other person is used to review the agency files, the AUSA should make clear that the agent or person should err on the side of inclusion and make specific inquiry of the AUSA concerning any item the agent or person is unsure should be included in discovery.

The search for information should not be limited to formal investigative reports such as FBI 302's, DEA-6's, IRS MOI's, or similar documents. The investigative agency may also have substantive case-related information in other formats or locations that an agent may not consider to be part of the "investigative" file, such as electronic communications (EC's), searchable electronic databases, inserts, emails, or other forms of electronic communications. It may not be necessary to disclose the information in its original format, but AUSAs, agents or other persons conducting the discovery review should review the information in its original format, whenever possible.

B. Confidential Informant (CI)/Witness (CW)/Human Source (CHS) Files.

These files will likely contain *Giglio* information which should be disclosed to the defense or to the court for a ruling on whether it should be disclosed to the defense. AUSAs should make arrangements with the investigative agency possessing the file(s) to review the file(s) personally, or, when deemed appropriate by the AUSA, through another agent or paralegal who has been debriefed as to materials to look for during the review.

C. Evidence and Information Gathered During the Investigation.

AUSAs or appropriately instructed case agents, paralegals or other persons should review all evidence and information gathered during the course of the investigation, including, but not limited to, information and evidence gathered via search warrant, grand jury, administrative, inspector general or other subpoena; Title III wiretaps; consensual monitoring; surveillance; and witness interviews. If the volume of evidence makes it impractical for the AUSA or others to review all the evidence, this obligation may be satisfied by making the evidence available to the defense for inspection and copying.

D. Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agencies in Parallel Civil Investigations.

If civil attorneys and/or regulatory agencies involved in parallel civil investigations are deemed to be part of the prosecution team, AUSAs or appropriately instructed case agents, paralegals or other persons should also gather and review any and all information and evidence from them that could be discoverable using the criteria set forth in DAG Ogden's Criminal Discovery Guidance.

E. Substantive Case-Related Communications (emails, tweets, text messages, voicemail, memoranda, notes).

To avoid creating evidence, and to ensure that our federal agency law enforcement partners comply with their own internal reporting rules, AUSAs should avoid

using email or voicemails to communicate substantive case-related information with agents or witnesses. AUSAs should discourage agents and witnesses from communicating substantive case-related information with them via email or through voicemail messages that may be difficult or impossible to capture and transcribe.

"Substantive" case-related email or voicemail 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, text messages, voicemails, 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.

AUSAs should also remember that with few exceptions *(see, e.g.,* Fed. R. Crim. P. 16(a)(I)(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.

F. Personnel and Disciplinary Files that May Contain Potential *Brady or Giglio* Information Relating to Law Enforcement Witnesses.

AUSAs should determine whether each potential law enforcement witness has on or off duty instances of misconduct, including pending investigations, which may qualify as potential impeachment or exculpatory information. *See discussion in Part II. C., above.*

G. Handwritten Notes of Agents.

AUSAs should consider review the agent's notes of critical interviews, which would include any interview of a defendant, and the notes relating to any report of interview the accuracy of which the defense has questioned. *See also Part II D 1 c, above.*

H. Presentence Reports.

If an AUSA has a witness who is or was a defendant in federal court, in most cases there will be a Presentence Report (PSR) relating to that witness. The PSR may contain Jencks, *Brady*, or *Giglio* that may need to be disclosed at the appropriate time. AUSAs should obtain the court's consent to disclose any relevant information contained in a PSR. AUSAs should notify and consult with a supervisor, and then follow this procedure:

1. Review the PSRs of witnesses for potential Jencks, *Brady* or *Giglio* material. If the witness was a defendant in another district, the AUSA should contact the other district to obtain the PSR.

2. Identify what, if any, information in the PSR is arguably *Brady/Giglio*/Jencks.

3. If the AUSA identifies information that he or she believes should be disclosed and that information has not been disclosed elsewhere and is not readily available from another source, the AUSA should prepare a disclosure motion and order requesting either an *in camera* review or disclosure.

4. Attach as Exhibit(s) to the motion the PSR(s) with the material we seek to disclose highlighted. The goal is for the judge to have the entire PSR and to assist him or her to discern what we believe should be disclosed.

5. Prepare a separate motion and order to seal the disclosure motion and exhibits.

6. File the disclosure motion and proposed order with the trial judge (not the sentencing judge) along with the motion and order to seal.

7. When the disclosure order is signed, serve defense counsel with the material from the PSR covered by the order and serve a copy of the order on defense counsel. The Order should be drafted in a way that it need not be sealed.

With regard to Jencks material, the case law is clear that a testifying witness's entire PSR is not Jencks material. That is, failing to object to the PSR is not equivalent to the witness' adoption of the entire PSR as a statement under the Jencks Act. However, the testifying witness's PSR may contain Jencks material, which is most likely to appear in the defendant's version of the offense. AUSAs should examine the defendant's version of the offense to determine: (a) if it falls within the Jencks Act definition of statement, that is, whether it is written by the defendant, a quote, or a substantially verbatim recital of an oral statement; and (b) if it relates to the subject matter of the witness's testimony. Of course, even if it is not Jencks, it may still be subject to disclosure under *Brady* or *Giglio*.

I. Work Product.

In discharging the duty to produce relevant case-related material, an AUSA must exercise caution to avoid unintentional or unnecessary waiver of privileged or confidential materials. If attorney work product contains information otherwise subject to disclosure under Rule 16, Jencks, or *Brady*/*Giglio*, the AUSA must ensure that the materials have been appropriately redacted prior to disclosure to the defense. Where redaction is inadequate to protect confidential information, the AUSA will discuss with his or her supervisor the possibility of obtaining a protective order or taking other measures to protect confidentiality consistent with disclosure obligations.

J. Victim-Witness Personnel.

AUSAs should work with victim-witness coordinators to ensure that they and other USAO employees do not discuss substantive case related information with witnesses. If witnesses speak to victim-witness personnel about the case, the victim-witness staff member should report the contact to the AUSA. If the information is relevant, material, exculpatory or impeaching, and is not otherwise covered by discovery already provided, the communication with the victim-witness personnel should be memorialized and produced to defense counsel. Optimally, the victim-witness employee will cut off the communication, and alert the case agent, who may conduct a follow-up interview that then may be documented in the ordinary course.

V. Manner of Production and Record-Keeping

A. Manner of Production.

1. Documents.

AUSAs should maintain a record of discovery provided to the defense. Generally, all documentary evidence should be Bates numbered. Whenever possible, discoverable documents should be scanned and produced electronically in a format that allows the documents to be searched by a word or name. Disks containing electronic data should be well-labeled so that they can readily be identified. If the discoverable documents in a case are too voluminous to be scanned, the documents should be made available to the defense for inspection and copying, and a record should be made of when the documents were made available and when the defense reviewed the documents.

2. Non-documentary evidence should be made available to the defense for inspection and photographing.

3. Video and Audio Recorded Conversations should be duplicated and produced to the defense.

B. Recording-Keeping.

AUSAs should keep a written record in the criminal case file of all discovery produced to the defense and all evidence made available for inspection and copying. When discovery is provided or made available by an AUSA, the AUSA should use a discovery production letter or form to memorialize in detail the discovery that was provided or the items or material that was made available for inspection or copying. All production letters or forms should be maintained in the criminal case file.

C. Privacy Protection: Redacting Documents.

AUSAs should consider redacting all personal identifiers in whole or in part from discovery, including, but not limited to, names of minors, dates of birth, social security numbers, taxpayer identification numbers, home street addresses, telephone numbers, Medicare or Medicaid ID numbers, financial account numbers, or any other identifier which may improperly disclose private or sensitive information. Federal Rule of Criminal Procedure 49.1, which contains direction for redacting documents filed with the court, should also be used as a starting point for the redaction of documents that will be produced in discovery. If because of the volume of discovery the redaction process is so time-consuming that the production of discovery will be delayed, AUSAs may wish to consider seeking a protective order at the discovery stage. If the case goes to trial, the sensitive information should be redacted from exhibits prior to their introduction in accordance with the court's standing order.

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 Armes 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 prudent search. If neither the prosecutor, nor any other member of the prosecution team, has reason to believe that an element of the IC possesses discoverable material, then a prudential search generally is not necessary.