IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS Plaintiff, v. EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS and UNITED STATES DEPARTMENT OF JUSTICE Defendants.	CIVIL ACTION NO. 14-cv-00269-CKK **NO HEARING DATE SET** **ORAL ARGUMENT REQUESTED**

DECLARATION OF KERRI L. RUTTENBERG

1. My name is Kerri L. Ruttenberg. I am an attorney licensed in the District of Columbia and represent Plaintiff, the National Association of Criminal Defense Lawyers ("NACDL"), in the above-captioned matter. I make this declaration in support of Plaintiff's Cross-Motion for Summary Judgment and Plaintiff's Opposition to Defendants' Motion for Summary Judgment.

2. Attached as **Exhibit A** is a true and correct copy of a letter dated December 20, 2012, from Kyle O'Dowd, on behalf of NACDL, to the Executive Office for United States Attorneys ("EOUSA") requesting the disclosure of "the Office of Legal Education publication entitled 'Federal Criminal Discovery.'"

3. Attached as **Exhibit B** is a true and correct copy of a letter dated February 28, 2013, from Susan B. Gerson, on behalf of EOUSA, denying NACDL's FOIA request.

4. Attached as **Exhibit C** is a true and correct copy of a letter dated April 26, 2013, from Kyle O'Dowd, on behalf of NACDL, to the Office of Information Policy ("OIP"), appealing EOUSA's denial of NACDL's FOIA request.

5. Attached as **Exhibit D** is a true and correct copy of a letter dated May 17, 2013, from Priscilla Jones, on behalf of OIP, to NACDL acknowledging receipt of NACDL's appeal.

6. Attached as **Exhibit E** is a true and correct copy of a letter dated June 25, 2013, from Sean R. O'Neill, on behalf of OIP, to NACDL denying NACDL's appeal.

7. Attached as **Exhibit F** is a true and correct copy of an excerpt from the Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated April 7, 2009, *In Re Special Proceedings*, No. 09-0198 (EGS) (D.D.C. Mar. 15, 2012). The report was retrieved on July 17, 2014, from the United States District Court for the District of Columbia's website at http://www.dcd.uscourts.gov/dcd/sites/www.dcd.uscourts.gov.dcd/files/Misc09-198.pdf.

7. Attached as **Exhibit G** is a true and correct copy of a press release from Senator Lisa Murkowski dated March 15, 2012, and printed on July 17, 2014, from Senator Murkowski's website at http://www.murkowski.senate.gov/public/index.cfm/pressreleases?ID=5b41d548-ab47-464f-a627-8b1702b75145.

8. Attached as **Exhibit H** is a true and correct copy of the Statement for the Record of the Department of Justice submitted to the Senate Judiciary Committee on March 28, 2012, and printed on July 17, 2014, from the Department of Justice's website at http://www.justice.gov/opa/documents/SFR-for-SJC-hearing-on-Schuelke-report-26MAR12-FINAL.PDF.

9. Attached as **Exhibit I** is a true and correct copy of Deputy Attorney General James M. Cole's testimony before the Senate Judiciary Committee on June 6, 2012. This testimony was printed on July 17, 2014, from the Senate Judiciary Committee's website at http://www.judiciary.senate.gov/imo/media/doc/12-6-6ColeTestimony.pdf.

10. Attached as **Exhibit J** is a true and correct copy of Volume 42, pages 15,347–49 of the Federal Register, dated March 21, 1977.

11. Attached as **Exhibit K** is a true and correct copy of a section of the 1988 United States Attorneys' Manual, printed on July 17, 2014, from the Department of Justice's website at http://www.justice.gov/usao/eousa/foia_reading_room/usamndx/archive/1988/title1general.pdf.

12. Attached as **Exhibit L** are true and correct copies of sections of the current United States Attorneys' Manual. These excerpts were printed on July 17, 2014 and July 22, 2014 from the Department of Justice's website at http://www.justice.gov/usao/eousa/foia_reading_room/usam/. For ease of reference, Plaintiff has added page numbers beginning with NACDL Ex. L 001.

13. Attached as **Exhibit M** is a true and correct copy of the September 2012 edition of the United States Attorneys' Bulletin entitled "Criminal Discovery." The bulletin was printed on July 17, 2014, from the Department of Justice's website at http://www.justice.gov/usao/eousa/foia_reading_room/usab6005.pdf.

Dated: July 23, 2014

Respectfully submitted,

/s/ Kerri L. Ruttenberg

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William G. Laxton, Jr. (D.C. Bar No. 982688)
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Attorneys for Plaintiff National Association of Criminal Defense Lawyers

EXHIBIT A

December 20, 2012

Susan B. Gerson, Acting Assistant Director
FOIA/Privacy Unit
Executive Office for United States Attorneys
Department of Justice
Room 7300, 600 E Street, N.W.
Washington, DC 20530-0001

Re: REQUEST UNDER FREEDOM OF INFORMATION ACT/Expedited Processing Requested

Dear Ms. Gerson:

This letter constitutes a request ("Request") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, and the Department of Justice Implementing Regulations, 28 C.F.R. § 16.1 *et seq*. The Request is submitted by the National Association of Criminal Defense Lawyers ("NACDL").[1] This request seeks the Office of Legal Education publication entitled "Federal Criminal Discovery." On information and belief, this publication was published and/or distributed in March 2011 and may also be referred to as *The Federal Criminal Discovery Blue Book*.

I. Background

Following the exposure of discovery abuse in the prosecution of the late Senator Ted Stevens, the Department of Justice (DOJ) convened a working group to review the policies, practices, and training relating to discovery practices. One of the steps that the DOJ has taken to improve discovery practices is the availability of a Federal Criminal Discovery reference book, "which comprehensively covers the law, policy, and practice of prosecutors' disclosure obligations."[2] NACDL believes that every

[1] The National Association of Criminal Defense Lawyers (NACDL) is a 501(c)(6) non-profit organization that is "primarily engaged in disseminating information" within the meaning of 5 U.S.C. § 552(a)(6)(E)(v)(II) and 28 C.F.R. 16.5(d)(1)(ii).

[2] Cole, James M. Statement to the Senate Judiciary Committee. Hearing, June 6, 2012. Available at: http://www.justice.gov/iso/opa/dag/speeches/2012/dag-speech-120606.html; Accessed: 12/06/12.

American citizen is entitled to know the steps that DOJ has taken to ensure that federal prosecutors abide by the federal discovery rules. As the Federal Criminal Discovery reference book is part of DOJ's efforts to improve prosecutors' legal education pertaining to discovery rules, NACDL requests the book.

II. Requested Records

This Request seeks the Federal Criminal Discovery reference book in its entirety distributed in 2011 by the Office of Legal Education within the Executive Office for United States Attorneys to federal prosecutors nationwide.

III. Application for Expedited Processing

NACDL requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and 28 C.F.R. § 16.5(d). There is a "compelling need" for these records because the information requested is urgently required by an organization "primarily engaged in disseminating information" to "inform the public concerning actual or alleged Federal Government activity," 5 U.S.C. 552(a)(6)(E)(v); 28 C.F.R. § 16.5(d)(1)(ii). *See Am. Civil Liberties Union v. Dep't of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding non-profit, public interest group that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience" to be "primarily engaged in disseminating information") (quoting *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003)). In addition, the request is of widespread and exceptional media interest and the information sought involves possible questions about the government's integrity which affect public confidence. 28 C.F.R. § 16.5(d)(1)(iv).

NACDL is a 501(c)(6) non-profit organization that is "primarily engaged in disseminating information" within the meaning of 5 U.S.C. § 552(a)(6)(E)(v)(II) and 28 C.F.R. 16.5(d)(1)(ii). NACDL publishes a monthly magazine called *The Champion* that features timely and informative articles on the latest developments in criminal justice. The magazine directly circulates to approximately 10,000 recipients, including lawyers, law libraries, law professors, federal and state judges, members of the news media, and members of the public interested in the administration of justice. NACDL also publishes a monthly electronic newsletter and daily news brief, both of which are distributed to NACDL members via e-mail. Additionally, NACDL regularly issues news releases to the press and public that are widely disseminated through e-mail, Facebook, and Twitter, and posted on NACDL's website, www.nacdl.org. Finally, NACDL has a long history of publishing reports about governmental activity and criminal justice issues that are broadly circulated and available to the public at little or no cost, including manuals and government reports obtained through FOIA. *See, e.g., Nat'l Ass'n of Crim. Def. Law. v. Dept. of Justice*, 182 F.3d 981 (D.D.C. 1999).

NACDL urgently requires the information sought by this Request in order to inform the public of federal government activity that concerns the general public interest. See 5 U.S.C. 552(a)(6)(E)(v)(II); 28 C.F.R. § 16.5(d)(1)(ii). In addition, the request is of widespread and exceptional media interest and the information sought involves possible questions about the government's integrity which affect public confidence. 28 C.F.R. § 16.5(d)(1)(iv). The records directly relate to a highly public and controversial

debate over federal prosecutorial discovery practices. Discovery-related misconduct in the high-profile prosecution of the late Senator Ted Stevens led, in 2012, to a court-ordered investigation, a Justice Department Office of Professional Responsibility investigation, and three congressional hearings. In the last year alone, efforts to identify and address misconduct by the Stevens prosecutors have been the subject of dozens of stories in major news outlets ("widespread and exceptional media interest"), including: *Two Prosecutors in Stevens Case Appeal Disciplinary Action*, The Blog of Legal Times, June 27, 2012, *available at* http://bit.ly/UMMStK; Jon May, *Government's Response to Brady Reform Relies on Fear Not Fact*, White Collar Crime Prof Blog, June 15, 2012, *available at* http://bit.ly/RAs1gH; Ginny Sloan, *Congress Must Act to End Prosecutorial Misconduct*, Huffington Post, April 11, 2012, *available at* http://huff.to/SH3YNo; Elizabeth Murphy, *Schuelke: Congress Should Consider Discovery Legislation*, Main Justice, March 28, 2012, *available at* http://bit.ly/VMd0DT; Jordy Yager, *Prosecutors compromised Stevens case*, The Hill, March 28, 2012, *available at* http://bit.ly/UMMBai; *Senate Judiciary Committee To Hold Hearings On Ted Stevens Report*, The Blog of Legal Times, March 21, 2012, *available at* http://bit.ly/TsiDJ8; *Editorial: Justice After Senator Stevens*, The New York Times, March 18, 2012, *available at* http://nyti.ms/XAOMht; Carrie Johnson, *Making Prosecutors Share: Stevens' Case Prompts Bill*, NPR, March 18, 2012, *available at* http://n.pr/ZFlp2W; *Federal prosecutors need to play fair with evidence*, Washington Post, March 18, 2012, *available at* http://wapo.st/ZFlhk0; Charlie Savage and Michael S. Schmidt, *A Call to Fire Prosecutors in Botched Stevens Trial*, The New York Times, March 17, 2012, *available at* http://nyti.ms/UMM7B2; John Bresnahan and Josh Gerstein, *Report blasts prosecutors in Ted Stevens case*, Politico, March 15, 2012, *available at* http://politi.co/ZFkYWp; Charlie Savage and Michael S. Schmidt, *Inner Workings of Senator's Trouble Trial Detailed*, The New York Times, March 15, 2012, *available at* http://nyti.ms/12wfADU; *How to Rein In Rogue Prosecutors*, The Wall Street Journal, March 15, 2012, *available at* http://on.wsj.com/U83Llk; *Ted Stevens Report: The Concealed Evidence and the Prosecutors*, The Blog of Legal Times, March 15, 2012, *available at* http://bit.ly/XANUcx; Carrie Johnson, *Report: Prosecutors Hid Evidence In Ted Stevens Case*, NPR, March 15, 2012, *available at* http://n.pr/Tsi9CA; Amanda Coyne, *Reactions to the report on Ted Stevens corruption trial*, Alaska Dispatch, March 15, 2012, *available at* http://bit.ly/UEyq69; *Ted Stevens Report: Stevens' Defense Attorneys Rip Prosecutors*, The Blog of Legal Times, March 15, 2012, *available at* http://bit.ly/UMLSWH; GW Rastopsoff, *Schuelke Report Released on Stevens Trial, Senator Murkowski Introduces Legislation*, Alaska Native News, March 15, 2012, *available at* http://bit.ly/WjMpEo; Meredith Shiner, *Lisa Murkowski Challenges DOJ on Ted Stevens Case*, Roll Call, March 13, 2012, *available at* http://bit.ly/TWzCBS; Sen. Lisa Murkowski, *Justice, not convictions, more important*, Anchorage Daily News, March 10, 2012, *available at* http://bit.ly/UMN6kB. More news stories related to the Stevens case are available at www.nacdl.org/discoveryreformnews/.

Partly in response to the Stevens case, discovery legislation has been introduced in the Senate, and the Justice Department's internal efforts to ensure discovery compliance have been at issue throughout this legislative debate. There is no doubt that public and media interest in the seriousness and efficacy of any Justice Department efforts to ensure that prosecutors meet their discovery obligations is extremely high ("questions about the government's integrity which affect public

confidence"), and that the public and media have an urgent and compelling need for the information requested herein.

IV. Application for Waiver or Limitations of All Fees

NACDL requests a waiver of all search, review, and duplication fees associated with this Request. The requester is eligible for a waiver of search and review fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 28 C.F.R. § 16.11(c)(3), (d), and for a waiver of all fees, including duplication fees, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.11(k)(1).

* * *

Pursuant to applicable statute and regulations, we will expect a determination regarding expedited processing within 10 calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(d)(4).

If the Request is denied in whole or in part, please justify all withholdings or redactions by reference to specific exemptions under the FOIA and provide all segregable portions of otherwise exempt material. NACDL reserves the right to appeal a decision to withhold any information or to deny a waiver of fees.

NACDL also requests that you provide an estimated date on which you will complete processing of this request. *See* 5 U.S.C. §552(a)(7)(B).

Thank you for your prompt attention to this matter. Please furnish the applicable records to:

Kyle O'Dowd
Associate Executive Director for Policy
National Association of Criminal Defense Lawyers
1660 L St. N.W., 12th Floor
Washington, D.C. 20036

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. *See* 5 U.S.C. 552(a)(6)(E)(vi).

Sincerely yours,

Kyle O'Dowd
Associate Executive Director for Policy

EXHIBIT B

U.S. Department of Justice
Executive Office for United States Attorneys
Freedom of Information & Privacy Staff
600 E Street, N.W., Suite 7300, Bicentennial Building
Washington, DC 20530-0001
(202) 252-6020 FAX: 252-6047 (www.usdoj.gov/usao)

Requester: Kyle O'Dowd Request Number: 13-377

Subject of Request: Federal Criminal Discovery Bluebook

Dear Requester:

FEB 2 8 2013

Your request for records under the Freedom of Information Act/Privacy Act has been processed. This letter constitutes a reply from the Executive Office for United States Attorneys, the official record-keeper for all records located in this office and the various United States Attorneys' Offices.

To provide you the greatest degree of access authorized by the Freedom of Information Act and the Privacy Act, we have considered your request in light of the provisions of both statutes.

The records you seek are located in a Privacy Act system of records that, in accordance with regulations promulgated by the Attorney General, is exempt from the access provisions of the Privacy Act. 28 CFR § 16.81. We have also processed your request under the Freedom of Information Act and are making all records required to be released, or considered appropriate for release as a matter of discretion, available to you. This letter is a [ ] partial [X] full denial.

Enclosed please find:

_____ page(s) are being released in full (RIF);
_____ page(s) are being released in part (RIP);
_____ page(s) are withheld in full (WIF). **The redacted/withheld documents were reviewed to determine if any information could be segregated for release.**

The exemption(s) cited for withholding records or portions of records are marked below. An enclosure to this letter explains the exemptions in more detail.

Section 552			Section 552a
[ ] (b)(1)	[ ] (b)(4)	[ ] (b)(7)(B)	[ ] (j)(2)
[ ] (b)(2)	[X] (b)(5)	[ ] (b)(7)(C)	[ ] (k)(2)
[ ] (b)(3)	[ ] (b)(6)	[ ] (b)(7)(D)	[ ] (k)(5)
_____	[ ] (b)(7)(A)	[X] (b)(7)(E)	[ ] _____
_____		[ ] (b)(7)(F)	

[ ] In addition, this office is withholding grand jury material which is retained in the District.

[ ] A review of the material revealed:

[ ] Our office located records that originated with another government component. **These records were found in the U.S. Attorney's Office files and may or may not be responsive to your request.** These records will be referred to the following component(s) listed for review and direct response to you:_____

[ ] There are public records which may be obtained from the clerk of the court or this office, upon specific request. If you wish to obtain a copy of these records, you must submit a new request. These records will be provided to you subject to copying fees.

[ ] Please note that your original letter was split into separate files ("requests"), for processing purposes, based on the nature of what you sought. Each file was given a separate Request Number (listed below), for which you will receive a separate response:

_____

[ ] See additional information attached.

This is the final action on this above-numbered request. You may appeal this decision on this request by writing to the **Office of Information Policy, United States Department of Justice, 1425 New York Avenue, Suite 11050, Washington, D.C. 20530-0001**. Both the letter and envelope should be marked "FOIA Appeal." Your appeal must be received by OIP within 60 days from the date of this letter. If you are dissatisfied with the results of any such administrative appeal, judicial review may thereafter be available in U.S. District Court, 28 C.F.R. § 16.9.

Sincerely,

Susan B. Gerson
Assistant Director

Enclosure(s)

EXHIBIT C

FREEDOM OF INFORMATION ACT APPEAL

April 26, 2013

Office of Information Policy
United States Department of Justice
1425 New York Avenue NW
Suite 11050

Re: Appeal of Request for Federal Criminal Discovery Bluebook, FOIA Request # 13-377

Dear Sir or Madam:

This is an appeal from the February 28, 2013, decision to withhold records responsive to Freedom of Information Act Request No. 13-377. That request was dated December 20, 2012, and filed by Kyle O'Dowd, Associate Executive Director for Policy, National Association of Criminal Defense Lawyers (NACDL). NACDL requested the Office of Legal Education publication entitled "Federal Criminal Discovery," believed to be published and/or distributed in March 2011 and possibly referred to as *The Federal Criminal Discovery Blue Book*. A copy of NACDL's request is attached as Exhibit A.

By letter dated February 28, 2013, Susan B. Gerson denied NACDL's request in its entirety. A copy of the denial letter is attached as Exhibit B. The denial letter purports that information responsive to NACDL's request is exempt from disclosure under 5 U.S.C. 552(b)(5) and 5 U.S.C. 552(b)(7)(E).

NACDL asserts that the requested document is required to be made public under FOIA and does not fall under either of the claimed exceptions:

(1) 5 U.S.C. 552(b)(5). The requested document is not exempted under (b)(5) as "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The denial letter did not explain how this exemption was relevant to its decision to withhold the requested document, and NACDL asserts that none of the grounds for this exemption apply here. The document does not constitute attorney's work product, attorney-client

communications, or "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."

a. Work Product: The requested document was not prepared for litigation. *PHE, Inc. v. DOJ*, 983 F.2d 248, 251 (D.C. Cir. 1993). The attorney work product privilege protects documents prepared by an attorney revealing the theory of the case or litigation strategy. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 154. Because the purpose of the privilege is to protect the adversarial trial process by shielding the attorneys' preparation from scrutiny, *Jordan v. Dep't of Justice,* 591 F.2d 73, 775 (D.C. Cir. 1978) (*en banc*), this exemption is clearly inapplicable.

b. Attorney Client Privilege: NACDL believes that the requested document was disseminated widely within the agency and/or without restrictions, and that no confidentiality exists and the privilege cannot apply. In addition, the document is not the type of confidential legal counsel protected by the privilege. The requested document does not constitute "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Central, Inc. v. Dep't of the Air Force,* 566 F.2d 242 (D.C. Cir. 1977).

c. Deliberative Process: The requested document is neither predecisional nor deliberative. This privilege protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Nat'l Labor Relations Bd.,* 421 U.S. at 150 (quoting *Stiftung v. V.E.B.*, 40 F.R.D. 318, 324 (D.D.C. 1966). The requested document likely reflects interpretations of current law and not discussions of proposed policies.

(2) 5 U.S.C. 552(b)(7)(E). The requested document is not "records or information compiled for law enforcement purposes," that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." There is no logical way in which the requested document could "create a risk of circumvention of the law." This exemption does not apply to "garden-variety legal analysis," which includes discussion and digests of caselaw. *Mayer Brown LLP v. IRS*, 562 F.3d 1190 (D.C. Cir. 2009). Nor does this exemption apply to materials within the scope of 5 U.S.C. § 552(a)(2), such as administrative staff manuals.

For the forgoing reasons, NACDL requests that this office reconsider the unjustified denial and require that the requested documents be provided.

Sincerely,

Kyle O'Dowd
Associate Executive Director for Policy

EXHIBIT D

U.S. Department of Justice

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

May 17, 2013

Kyle O'Dowd, Esq.
National Association of Criminal Defense Lawyers
12th Floor
1660 L Street, NW
Washington, DC 20036

Re: Request No. 13-377

Dear Mr. O'Dowd:

This is to advise you that your administrative appeal from the action of the Executive Office for United States Attorneys was received by this Office on April 26, 2013.

The Office of Information Policy has the responsibility of adjudicating such appeals. In an attempt to afford each appellant equal and impartial treatment, we have adopted a general practice of assigning appeals in the approximate order of receipt. Your appeal has been assigned number **AP-2013-03081**. Please mention this number in any future correspondence to this Office regarding this matter. Please note that if you provide an e-mail address or another electronic means of communication with your appeal, this Office may respond to your appeal electronically even if you submitted your appeal to this Office via regular U.S. mail.

We will notify you of the decision on your appeal as soon as we can. If you have any questions about the status of your appeal, you may contact me at the number above. If you have submitted your appeal through this Office's online electronic appeal portal, you may also obtain an update on the status of your appeal by logging into your portal account.

Sincerely,

Priscilla Jones
Supervisory Administrative Specialist

EXHIBIT E

U.S. Department of Justice
Office of Information Policy
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

June 25, 2013

Kyle O'Dowd, Esq.
National Association of Criminal
Defense Lawyers
12th Floor
1660 L Street, NW
Washington, DC 20036

Re: Appeal No. AP-2013-03081
Request No. 13-377
AMJ:MWH

VIA: U.S. Mail

Dear Mr. O'Dowd:

You appealed from the action of the Executive Office for United States Attorneys (EOUSA) on your request for access to the "Federal Criminal Discovery Blue Book."

After carefully considering your appeal, I am affirming, on partly modified grounds, EOUSA's action on your request. The Freedom of Information Act provides for disclosure of many agency records. At the same time, Congress included in the FOIA nine exemptions from disclosure that provide protection for important interests such as personal privacy, privileged communications, and certain law enforcement activities. EOUSA properly withheld this information in full because it is protected from disclosure under the FOIA pursuant to 5 U.S.C. § 552(b)(5). This provision concerns certain inter- and intra-agency communications protected by the attorney work-product privilege.

Please be advised that this Office's decision was made only after a full review of this matter. Your appeal was assigned to an attorney with this Office who thoroughly reviewed and analyzed your appeal, your underlying request, and the action of EOUSA in response to your request.

If you are dissatisfied with my action on your appeal, the FOIA permits you to file a lawsuit in federal district court in accordance with 5 U.S.C. § 552(a)(4)(B).

For your information, the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road,

College Park, Maryland 20740-6001; e-mail at ogis@nara.gov; telephone at 301-837-1996; toll free at 1-877-684-6448; or facsimile at 301-837-0348.

Sincerely,

Sean R. O'Neill
Chief
Administrative Appeals Staff

By: Anne D. Work

Anne D. Work
Senior Counsel
Administrative Appeals Staff

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE SPECIAL PROCEEDINGS	)	Misc. No. 09-0198 (EGS)

NOTICE OF FILING OF REPORT TO HON. EMMET G. SULLIVAN

Pursuant to the Court's Order, dated February 8, 2012, the undersigned hereby files the Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated April 7, 2009, and an Addendum containing comments and objections to the Report which were provided to the undersigned by the subjects of the investigation, Joseph W. Bottini, James A. Goeke, Nicholas A. Marsh, Brenda K. Morris, Edward P. Sullivan and William W. Welch III, on March 8, 2012.

Respectfully submitted,

Henry F. Schuelke III (D.C. Bar no. 91579)
Special Counsel

William Shields (D.C. Bar no. 451036)
Janis, Schuelke & Wechsler

Washington, D.C.
Dated: March 15, 2012

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE SPECIAL PROCEEDINGS	)	Misc. No. 09-0198 (EGS)

Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated April 7, 2009

Henry F. Schuelke III
Special Counsel
D.C. Bar no. 91579

William Shields
D.C. Bar no. 451036
Janis, Schuelke & Wechsler

Washington, D.C.
Dated: November 14, 2011

TABLE OF CONTENTS

Executive Summary

The investigation and prosecution of U.S. Senator Ted Stevens were permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated Senator Stevens's defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness. Months after the trial, when a new team of prosecutors discovered, in short order, *some* of the exculpatory information that had been withheld, the Department of Justice ("DOJ") moved to set aside the verdict and to dismiss the indictment with prejudice. New prosecutors were assigned after U.S. District Judge Emmet G. Sullivan held two of the previous prosecutors in contempt for failing to comply with the Court's order to disclose information to Senator Stevens's attorneys and to the Court regarding allegations of prosecutorial misconduct which were made after trial by an FBI agent who had worked on the case.

Judge Sullivan granted the government's motion and dismissed the indictment with prejudice on April 7, 2009, finding that "There was never a judgment of conviction in this case. The jury's verdict is being set aside and has no legal effect." On the same day, Judge Sullivan appointed Henry F. Schuelke III, the undersigned, "to investigate and prosecute such criminal contempt proceedings as may be appropriate" against the six prosecutors who conducted the investigation and trial of Senator Stevens. The investigation lasted two years and required the examination and analysis of well over 128,000 pages of documents, including the trial record, prosecutors' and agents' emails, FBI 302s and handwritten notes, and depositions of prosecutors, agents and others involved in the investigation and trial.

As a direct consequence of the dismissal of the indictment against Senator Stevens, the convictions of Peter Kott and Victor Kohring, Alaskan state legislators, were reversed and new trials ordered because significant exculpatory information in those cases was concealed from the defense, including the same impeachment information about the same government key witness which had been concealed from Senator Stevens. *See United States v. Kohring*, 637 F.3d 895 (9th Cir. 2011); *United States v. Kott*, 423 Fed. Appx. 736 (9th Cir. 2011). The Court of Appeals rejected the government's argument that the prosecutors' "discovery missteps" were harmless and that Mr. Kott and Mr. Kohring had nevertheless received fair trials.

EXHIBIT G

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PRESS RELEASES

Mar 15 2012

Murkowski: "Justice Should Be Blind, Not Blindly Ignored"

Senator Introduces Bipartisan Bill to Enforce Ethical Legal Prosecutions

WASHINGTON, D.C. – Senator Lisa Murkowski today introduced major bipartisan legislation, the Fairness in Disclosure of Evidence Act, designed to create a nationwide standard for disclosure of exculpatory evidence to defendants in federal courtrooms nationwide. Senator Daniel Inouye (D-IL) is the lead Democratic co-sponsor of the bill, introduced the same day as the release of U.S. District Court Judge Emmet Sullivan's report into prosecutorial misconduct in the 2008 trial of Senator Ted Stevens.

"While the injustices that were done to Senator Stevens may have provided the impetus for the focus on this important issue, this bill is not about seeking vindication for Ted," Senator Murkowski told assembled reporters in the Capitol. "It's about learning the vital lessons from the Justice Department's failure of his prosecution and making our criminal justice system work the way our Constitution envisioned that it would."

The bill:

- Requires federal prosecutors to make early disclosure of evidence that demonstrates the innocence of a defendant, and creates a standard for the disclosure of evidence favorable to the defendant – **there are currently almost 100 standards used nationwide**.
- Makes clear that failure to abide by Brady obligations is a serious breach of the government's responsibilities and gives judges a broad range of remedies.

Senator Murkowski

Robert M. Cary, Stevens attorney

Sen. Kay Bailey Hutchinson (R-TX)

"What happened in the trial of Senator Stevens is unfortunately not an isolated incident, but most American do not have the wherewithal that he did to push back against prosecutorial misconduct," said Senator Murkowski. "While I do believe most federal prosecutors are adhering to the law, it's clear the rules in place are not preventing 'hide the ball' prosecutions in cases across the country. There are a few prosecutors out there willing to put a finger on the scales of justice to get more convictions – and this bill seeks to stop that. Justice should be blind, not blindly ignored."

"I would like to thank Senator Murkowski for her leadership with the Fairness in Disclosure of Evidence Act," said **lead Democratic co-sponsor Senator Daniel Inouye of Hawaii.** "This important piece of legislation will help establish uniform standards for prosecutorial disclosure. It is only fair. Also, I sincerely hope that it will help to resolve a matter that has long injured our late and dear friend, my brother, Ted Stevens."

Also co-sponsoring the bill are Senators Daniel Akaka (D-HI), Mark Begich (D-AK) and Kay Bailey Hutchison (R-TX).

Senator Murkowski's legislation has the support of the American Bar Association, the U.S. Chamber of Commerce, the American Civil Liberties Union, the National Association of Criminal Defense Lawyers and the Constitution Project.

"The American Bar Association commends Senator Murkowski for her leadership in introducing The Fairness in Disclosure of Evidence Act of 2012," said **American Bar Association President William T. Robinson III**. "This legislation is an important step towards consistency and fairness in our justice system. There is no reason for the Department of Justice to have 96 different discovery policies rather than one clear policy. A single wrongful conviction is a miscarriage of justice; a history of wrongful convictions because of unclear guidance is an entirely preventable tragedy."

"The duty to provide favorable evidence has often been misunderstood or ignored. Even well-intentioned prosecutors lack the clear statutory guidance necessary to ensure the full and prompt disclosure to the defense of favorable evidence," said **Lisa Monet Wayne, President of the National Association of Criminal Defense Lawyers**. "That lack of disclosure contributes to unjust and wrongful prosecutions and convictions. This legislation fixes that problem. A criminal trial is not a 'win at all costs' game. It is and should be about a fair presentation of all the facts. The 'Fairness in Disclosure of Evidence Act of 2012' provides clear and meaningful standards governing the prosecution's duty to disclose any and all evidence that could help the accused defend her case. Its passage would represent a giant step forward in improving the fairness and accuracy of our criminal justice system."

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EXHIBIT H

Department of Justice

STATEMENT FOR THE RECORD

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARING ON THE SPECIAL COUNSEL'S REPORT
ON THE PROSECUTION OF SENATOR TED STEVENS

MARCH 28, 2012

Statement for the Record from the Department of Justice

Committee on the Judiciary
United States Senate

Hearing on the Special Counsel's Report
on the Prosecution of Senator Ted Stevens
March 28, 2012

1. Introduction

The Department of Justice respectfully submits this statement for the record of today's hearing before the Senate Judiciary Committee on the Special Counsel's Report on the Prosecution of Senator Ted Stevens.

When concerns were first raised about the handling of the prosecution of Senator Stevens, the Department immediately conducted an internal review. The Attorney General recognized the importance of ensuring trust and confidence in the work of Department prosecutors and took the extraordinary step of moving to dismiss the case when errors were discovered. Moreover, to ensure that the mistakes in the *Stevens* case would not be repeated, the Attorney General convened a working group to review discovery practices and charged the group with developing recommendations for improving such practices so that errors are minimized. As a result of the working group's efforts, the Department has taken unprecedented steps, described more fully below, to ensure that prosecutors, agents, and paralegals have the necessary training and resources to fulfill their legal and ethical obligations with respect to discovery in criminal cases. These reforms include a sweeping training curriculum for all federal prosecutors and the requirement – for the first time in the history of the Department of Justice – that every federal prosecutor receive refresher discovery training each year.

In light of these internal reforms, the Department does not believe that legislation is needed to address the problems that came to light in the *Stevens* prosecution. Such a legislative proposal would upset the careful balance of interests at stake in criminal cases, cause significant harm to victims, witnesses, and law enforcement efforts, and generate substantial and unnecessary litigation that would divert scarce judicial and prosecutorial resources. As was recently recognized by the Advisory Committee on Criminal Rules of the Judicial Conference of the United States ("Criminal Rules Committee"), which in 2010-11 considered and rejected changes to Rule 16, true improvements to discovery practices will come from prosecutors and agents having a full appreciation of their responsibilities under their existing obligations, rather than by expanding those obligations.

2. The Schuelke Report and the OPR Investigation

As Mr. Schuelke acknowledged in his report, the Department cooperated fully with Mr. Schuelke's inquiry into the prosecution of former Senator Ted Stevens. The Department's Office of Professional Responsibility ("OPR") separately investigated allegations of professional

misconduct by prosecutors in the *Stevens* case. Although OPR and Mr. Schuelke worked together and shared information throughout the investigative process, OPR is required to make an independent assessment of the allegations of misconduct. The entire Department misconduct review involves various steps, and the process is not finished until all the necessary steps have been completed. No formal action is taken against a Department employee until the disciplinary process is final.

The Department seeks to be as transparent as possible with respect to decisions involving our attorneys. Nonetheless, the Department must also comply with the provisions of the Privacy Act, and disclosures of information from OPR and Office of Inspector General investigations that examine the conduct of individual Department employees have significant Privacy Act implications. The Department's misconduct review process is in its last stages. To the extent it is appropriate and permissible under the law, we will endeavor to make the OPR findings public when that review is final.

The Department acknowledges the wide variety of discovery failures that occurred in the *Stevens* case. These failures are core topics of the Department's training regimen. The discovery training and resources that have been put in place over the past three years are designed, in part, to minimize the likelihood that the types of failures that occurred in *Stevens* will happen again.

3. The Department's response to the discovery failures that occurred in *Stevens*

Attorney General Holder, who had taken office shortly after the *Stevens* trial, acted swiftly and decisively after learning of the discovery failures that occurred in that case. A new team of seasoned prosecutors was assigned to review the matter, and they determined that Senator Stevens and his attorneys had not been provided access to information they were entitled to receive. Because the undisclosed information could have affected the outcome of the case, the Attorney General took the extraordinary and appropriate step of dismissing the prosecution of Senator Stevens. He also ordered a comprehensive review of all discovery practices and related procedures across the country to reduce the likelihood of future discovery failures.

The discovery failures in the *Stevens* case were not typical and must be considered in their proper context. Over the past 10 years, the Department has filed over 800,000 cases involving more than one million defendants. In the same time period, only one-third of one percent (.33 percent) of these cases warranted inquiries and investigations of professional misconduct by the Department's Office of Professional Responsibility. Less than three-hundredths of one percent (.03 percent) related to alleged discovery violations, and just a fraction of these resulted in actual findings of misconduct. Department regulations require DOJ attorneys to report any judicial finding of misconduct to OPR, and OPR conducts computer searches to identify court opinions that reach such findings in order to confirm that it examines any judicial findings of misconduct, reported or not. In addition, defense attorneys are not reticent to raise allegations of discovery failures when they do occur.

Our prosecutors and agents work hard to keep our country and communities safe and to ensure that criminals are brought to justice honorably and ethically. Nonetheless, when there is even a single lapse, we must, and we do, take it seriously, because it could call the integrity of our

criminal justice system into question and could have devastating consequences. In April 2009, within days after the *Stevens* case was dismissed, the Criminal Discovery and Case Management Working Group was created to review the Department's policies, practices, and training concerning criminal case management and discovery, and to evaluate ways to improve them. Our comprehensive review of discovery practices identified some areas where the Department could improve, and we have undertaken a series of reforms which have since been institutionalized.

In January 2010, the Office of the Deputy Attorney General issued three memoranda to all criminal prosecutors: "Issuance of Guidance and Summary of Actions Taken in Response to the June 2009 Report of the DOJ Criminal Discovery and Case Management Working Group," "Requirement for Office Discovery Policies in Criminal Matters," and "Guidance for Prosecutors Regarding Criminal Discovery." These memoranda provide overarching guidance on gathering and reviewing potentially discoverable information and making timely disclosure to defendants; they also direct each U.S. Attorney's Office and Department litigating component to develop additional, district- and component-specific discovery policies that account for controlling precedent, existing local practices, and judicial expectations. Subsequently, the Office of the Deputy Attorney General has issued separate guidance relating to discovery in national security cases and discovery of electronic communications.

Later in January 2010, the Deputy Attorney General appointed a long-serving career prosecutor as the Department's first full-time National Criminal Discovery Coordinator to lead and oversee all Department efforts to improve disclosure policies and practices. Since January 2010, the Department has undertaken rigorous enhanced training efforts, provided prosecutors with key discovery tools such as online manuals and checklists, and continues to explore ways to address the evolving nature of e-discovery. These steps have included:

- All federal prosecutors are now required to undertake annual update/refresher discovery training. Roughly 6,000 federal prosecutors across the country – regardless of experience level – receive the required training annually on a wide variety of criminal discovery-related topics.

- During 2010-11, the Department's National Criminal Discovery Coordinator traveled to approximately 40 U.S. Attorney's Offices throughout the country to present four-hour blocks of training on prosecutors' disclosure obligations under *Brady*, *Giglio*, the Jencks Act, Rule 16, and the U.S. Attorneys' Manual ("USAM"), as well as on the discovery implications of electronically stored information ("ESI"). He also conducted numerous training sessions for prosecutors and other law enforcement officials at Main Justice in Washington, D.C. – including a series of training sessions for attorneys at OPR and the Department's Professional Responsibility Advisory Office – and at the National Advocacy Center in Columbia, South Carolina.

- Since 2010, the Department has held several "New Prosecutor Boot Camp" courses, designed for newly hired federal prosecutors, which include training on *Brady*, *Giglio*, and ESI, among other topics.

- These training requirements were institutionalized through their codification in the USAM. Specifically, USAM § 9-5.001 was amended in June 2010 to make training mandatory for all prosecutors within 12 months after hiring, and requiring two hours of update/refresher training on an annual basis for all other prosecutors.

- In 2011, the Department provided four hours of training to more than 26,000 federal law enforcement agents and other officials – primarily from the FBI, DEA, and ATF – on criminal discovery policies and practices. The Department is currently developing annual update/refresher training for these agents.

- In late February 2012, the Department held "train-the-trainer" programs in Washington, D.C., to begin training the next round of federal law enforcement agencies, including Department of Homeland Security agencies such as ICE, various OIGs, and other federal agencies.

- The Department has held several Support Staff Criminal Discovery Training Programs, including one session earlier this month. In addition, the Department has produced criminal discovery training materials for victim/witness coordinators.

- A Federal Criminal Discovery Blue Book – which comprehensively covers the law, policy, and practice of prosecutors' disclosure obligations – was created and distributed to prosecutors nationwide in 2011. It is now electronically available on the desktop of every federal prosecutor and paralegal.

- One of the most challenging issues for prosecutors in meeting their discovery obligations in the digital age is the explosion of ESI. The Department developed – in collaboration with representatives from the Federal Public Defenders and counsel appointed under the Criminal Justice Act – a ground-breaking criminal ESI protocol. The protocol was distributed to prosecutors, defense attorneys, and members of the federal judiciary in February 2012. It is designed to:

    - promote the efficient and cost-effective production of ESI discovery in federal criminal cases;
    - reduce unnecessary conflict and litigation over ESI discovery by encouraging the parties to communicate about ESI discovery issues;
    - create a predictable framework for ESI discovery; and
    - establish methods for resolving ESI discovery disputes without the need for court intervention.

  The protocol has already received praise from the judiciary and defense bar. The Department is in the process of developing training on the protocol for prosecutors, defense attorneys, and the judiciary.

- In order to ensure consistent long-term oversight of the Department's discovery practices, the Department moved the National Criminal Discovery Coordinator position into the Office of the Deputy Attorney General and made it a permanent executive-level position.

The Department's own policies require federal prosecutors to go beyond what is required to be disclosed under the Constitution, statutes, and rules. For example, under the USAM, prosecutors are directed to take a broad view of their obligations and resolve close calls in favor of disclosing exculpatory and impeaching evidence. The USAM requires prosecutors to disclose information beyond that which is "material" to guilt as articulated by the U.S. Supreme Court, and prosecutors must disclose exculpatory or impeachment information "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. In addition, pursuant to the January 2010 memoranda issued by then-Deputy Attorney General David Ogden, prosecutors have been instructed to provide broader and more comprehensive discovery than the law requires, and to be inclusive when identifying the members of the prosecution team for discovery purposes. (The Department's policies do recognize that the requirement that prosecutors disclose more than the law requires may not be feasible or advisable in some national security cases where special complexities arise.)

Despite these and other robust efforts, prosecutors – like other professionals – will never be immune to mistakes. As a matter of policy, we strive to be perfect, even though we know perfection is impossible. We require our prosecutors to strictly obey the law in both letter and spirit, and we work to ensure that isolated mistakes are detected early, corrected, and do not prevent justice from being done.

4. Legislation in this area is unnecessary

With the release of the Schuelke Report, some have argued that legislation is necessary to alter federal criminal discovery practice. The Department does not share that view. As detailed above, since *Stevens*, the Department has addressed vulnerabilities in the Department's discovery practices. In light of these efforts, and the high profile nature of the discovery failures in *Stevens*, Department prosecutors are more aware of their discovery obligations than perhaps ever before. Now, of all times, a legislative change is unnecessary.

Moreover, legislation along the lines that some have suggested, would upset our system of justice by failing to recognize the need to protect interests beyond those of the defendant. It would radically alter the carefully constructed balance that the Supreme Court and lower courts, the Criminal Rules Committee, and Congress have painstakingly created over decades – a balance between ensuring the protection of a defendant's constitutional rights and, at the same time, safeguarding the equally important public interest in a criminal trial process that reaches timely and just results, safeguards victims and witnesses from retaliation or intimidation, does not unnecessarily intrude on victims' and witnesses' personal privacy, protects on-going criminal investigations from undue interference, and recognizes critical national security interests.

Unfortunately, witness safety concerns are more than merely theoretical. Even under the current system's careful balance between a defendant's right to a fair trial and witnesses' privacy and

safety interests, we have had witnesses intimidated, assaulted, and even murdered after their names were disclosed in pretrial discovery. Legislation requiring earlier and broader disclosures would likely lead to an increase in such tragedies. It would also create a perverse incentive for defendants to wait to plead guilty until close to trial in order to ensure that they learn the identities of all the people who would have testified against them.

The Department is also concerned that one such legislative proposal would require disclosure of information that is not substantially related to the defendant's guilt, even in cases where the defendant is pleading guilty. This requirement would result in the unnecessary and harmful disclosure of national security-related information and would compromise intelligence and law enforcement sources and methods. For example, despite the existence of the Classified Information Procedures Act, a new discovery standard could result in the disclosure of investigative steps taken, investigative techniques or trade craft used, and the identities of witnesses interviewed during counterterrorism and counterespionage investigations. Moreover, in cases involving guilty pleas – where a defendant is necessarily prepared to admit facts in open court that establish he or she committed the charged offense(s) – such legislation would require the unnecessary disclosure of the identity of undercover employees or confidential human sources, scarce investigative assets who, once revealed, may no longer be used to covertly detect and disrupt national security threats. Currently, in the national security context, we tell other countries that we will keep the information they share with us confidential unless we absolutely need to disclose it because of its exculpatory nature. Under such a bill, we would have to disclose an increased volume of information and disclose it more frequently, thus discouraging cooperation from our foreign partners.

In cases involving criminal charges against a defendant for child exploitation, impeachment information on the child-victim would need to be disclosed without regard to either admissibility or the substantial policy interests in keeping this information private, even if the evidence against the defendant included his own confession and videotapes of the defendant committing the abuse. In rape cases, information about a sex-crime victim's sexual history, partners, and sexual predisposition would need to be disclosed to the defense – again, regardless of admissibility. The disclosures required by the current legislative proposal cut against the important policy aims of child protection and rape shield laws.

Such legislation would also invite time-consuming and costly litigation over discovery issues not substantially related to a defendant's guilt, resulting in delayed justice for victims and the public and greater uncertainty regarding the finality of criminal verdicts. Inclusion of a provision for awarding attorney's fees would provide a significant incentive to engage in such collateral litigation. These concerns, among others, recently led the Criminal Rules Committee – a body populated by federal judges who are intimately familiar with these discovery issues – to reject a proposed amendment to Rule 16 to expand prosecutors' discovery obligations.

5. Conclusion

The *Stevens* case was deeply flawed. But it does not represent the work of federal prosecutors around the country who work for justice every day. And it does not suggest a systemic problem warranting a significant departure from well-established criminal justice practices that have

contributed to record reductions in the rates of crime in this country while at the same time providing defendants with due process. The *Stevens* case is one in which the current rules governing discovery were violated, not one in which the rules were complied with but shown to be inadequate.

The objective of the criminal justice system is to produce just results. This includes ensuring that the processes we use do not result in the conviction of the innocent, and likewise ensuring that the guilty do not unjustifiably go free. It also includes an interest in ensuring that other participants in the process – *i.e.*, victims, law enforcement officers, and other witnesses – are not unnecessarily subjected to physical harm, harassment, public embarrassment, or other prejudice.

For nearly fifty years, a careful reconciliation of these interests has been achieved through the interweaving of constitutional doctrine (*i.e.*, *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S. 419, 439 (1995)), statutory directives (*i.e.*, the Jencks Act and the Crime Victims' Rights Act), and Federal Rules (*i.e.*, Rule 16; Rule 26.2). Legislation in this area would disturb this careful balance without a demonstrable improvement in either the fairness or reliability of criminal judgments and in the absence of a widespread problem. The rules of discovery do not need to be changed. Rather, prosecutors and other law enforcement officials need to recognize fully their obligations under these rules, must apply them fairly and uniformly, and must be given tools to meet their discovery obligations rigorously. This is what the Department has done since the Attorney General directed the dismissal of the conviction in *Stevens*. And it is what the Department will continue to do in the future, under the policies and procedures that have been implemented and institutionalized during the past three years.

EXHIBIT I

Department of Justice

STATEMENT OF

JAMES M. COLE
DEPUTY ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ENTITLED

"ENSURING THAT FEDERAL PROSECUTORS MEET DISCOVERY OBLIGATIONS"

PRESENTED

JUNE 6, 2012

Statement of James M. Cole
Deputy Attorney General
U.S. Department of Justice

Before the
Committee on the Judiciary
United States Senate

"Ensuring That Federal Prosecutors Meet Discovery Obligations"
June 6, 2012

1. Introduction

Chairman Leahy, Ranking Member Grassley, and distinguished Members of the Committee, I appreciate the opportunity to appear before you to discuss the Department's commitment to criminal discovery efforts that will result in fair trials, the serious public safety risks that would result from proposed legislation in this area, and the process by which the Department recently imposed discipline on two prosecutors responsible for discovery failures in the prosecution of former Senator Ted Stevens. As someone who spent over a dozen years as a prosecutor and then nearly twenty more as a defense attorney, I know firsthand the importance that discovery plays in ensuring criminal defendants fair trials. But, at the same time, I am acutely aware of the other critical interests – such as the safety and privacy of witnesses and victims – that our criminal justice system properly takes into account.

What occurred in the *Stevens* case is unacceptable. But it is not representative of the work of the Department of Justice. And it does not suggest a systemic problem warranting a significant departure from longstanding criminal justice practices that have contributed to record reductions in the rates of crime in this country while at the same time providing defendants with a fair and just process. The *Stevens* case is one in which the well-established rules governing discovery were violated, not one in which the rules themselves were found insufficient to ensure a fair trial. The lesson from *Stevens* was not that the scope of existing discovery obligations needed to change, but rather that the Department needed to focus intently on making sure that its prosecutors understand and comply with their existing obligations. Since *Stevens*, the Department has done just that, by enhancing the supervision, guidance, and training that it provides its prosecutors and by institutionalizing these reforms so that they will be a permanent part of the Department's practice and culture.

Accordingly, the Department does not believe that legislation is needed to alter the way discovery is provided in federal criminal cases. While we fully share Senator Murkowski's goal of ensuring that what occurred in the *Stevens* case is never repeated, we have very serious concerns with her draft legislation. We understand Senator Murkowski's strong views; but in reacting to the *Stevens* case, we must not let ourselves forget the very real dangers to safety and privacy that victims and witnesses often face in the criminal justice system; the national security interests implicated by discovery rules; and the strong public interest in ensuring not only that defendants receive a fair trial but also that the guilty be held accountable for their crimes. As

was recently recognized by the Advisory Committee on Criminal Rules of the Judicial Conference of the United States ("Criminal Rules Committee"), which in 2010-11 considered and rejected changes to Rule 16 not dissimilar to Senator Murkowski's proposals, true improvements to discovery practices will come from prosecutors and agents having a full appreciation of their responsibilities under their existing obligations and the tools and oversight to fulfill those obligations, rather than by expanding those obligations. In other words, new rules are unnecessary. What is necessary, and what the Department has been vigorously engaged in providing since the *Stevens* dismissal is enhanced guidance, training, and supervision to ensure that the existing rules and policies are followed.

2. The Department's enhanced discovery efforts

The Department's own policies require federal prosecutors to go beyond what is required to be disclosed under the Constitution, statutes, and rules. The United States Attorneys' Manual (USAM) was amended in 2006 – several years before the *Stevens* case – to mandate broader disclosure of exculpatory and impeachment evidence than the Constitution requires. The USAM requires prosecutors to disclose information beyond that which is "material" to guilt as articulated by the U.S. Supreme Court, and prosecutors must disclose exculpatory or impeachment information "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. While the Department has had this policy in place since 2006, it was as a result of the *Stevens* case that we have significantly increased our focus on providing prosecutors and agents with the improved guidance, training, and resources necessary to comply with this policy and meet their discovery obligations. After the Attorney General sought the dismissal of the conviction of Senator Stevens, he ordered a comprehensive review of all discovery practices and related procedures to reduce the likelihood of future discovery failures. That review identified areas where the Department could improve, and we have undertaken a series of reforms.

In January 2010, the Office of the Deputy Attorney General issued three memoranda to all criminal prosecutors: "Issuance of Guidance and Summary of Actions Taken in Response to the June 2009 Report of the DOJ Criminal Discovery and Case Management Working Group," "Requirement for Office Discovery Policies in Criminal Matters," and "Guidance for Prosecutors Regarding Criminal Discovery." Through these memoranda, prosecutors have been instructed to provide broader and more comprehensive discovery than before, to provide more than the law requires, and to be inclusive when identifying the members of the prosecution team for discovery purposes. (The Department's policies do recognize that the requirement that prosecutors disclose more than the law requires may not be feasible or advisable in some national security cases where special complexities arise.) These memoranda also provide overarching guidance on gathering and reviewing potentially discoverable information and making timely disclosure to defendants; they also direct each U.S. Attorney's Office and Department litigating component to develop additional, district- and component-specific discovery policies that account for controlling precedent, existing local practices, and judicial expectations. Subsequently, the Office of the Deputy Attorney General has issued separate guidance relating to discovery in national security cases and discovery of electronic communications.

Later in January 2010, the Deputy Attorney General appointed a long-serving career prosecutor as the Department's first full-time National Criminal Discovery Coordinator to lead and oversee all Department efforts to improve disclosure policies and practices. Since January 2010, the Department has undertaken rigorous enhanced training efforts, provided prosecutors with key discovery tools such as online manuals and checklists, and continues to explore ways to address the evolving nature of e-discovery. These steps have included:

- All federal prosecutors are now required to undertake annual update/refresher discovery training. Roughly 6,000 federal prosecutors across the country – regardless of experience level – receive the required training annually on a wide variety of criminal discovery-related topics.

- Starting in 2010, each United States Attorney's Office and Main Justice litigating component has appointed one or more criminal discovery coordinators, who are responsible for working with the National Criminal Discovery Coordinator to provide the necessary training and resources to line prosecutors to help them fulfill their disclosure obligations on a daily basis.

- The Department has held several "New Prosecutor Boot Camp" courses, designed for newly hired federal prosecutors, which include training on *Brady*, *Giglio*, and electronically stored information (ESI), among other topics.

- These training requirements were institutionalized through their codification in the USAM. Specifically, USAM § 9-5.001 was amended in June 2010 to make training mandatory for all prosecutors within 12 months after hiring, and requiring two hours of update/refresher training on an annual basis for all other prosecutors.

- In 2011, the Department provided four hours of training to more than 26,000 federal law enforcement agents and other officials – primarily from the FBI, DEA, and ATF – on criminal discovery policies and practices. The Department is currently developing annual update/refresher training for these agents.

- In late February 2012, the Department held "train-the-trainer" programs in Washington, D.C., to begin training the next round of federal law enforcement agencies, including Department of Homeland Security agencies such as ICE, various OIGs, and other federal agencies.

- The Department has held several Support Staff Criminal Discovery Training Programs, including one session this past March. In addition, the Department has produced criminal discovery training materials for victim/witness coordinators.

- A Federal Criminal Discovery Blue Book – which comprehensively covers the law, policy, and practice of prosecutors' disclosure obligations – was created and distributed to prosecutors nationwide in 2011. It is now electronically available on the desktop of every federal prosecutor and paralegal.

- The Department developed – in collaboration with representatives from the Federal Public Defenders and counsel appointed under the Criminal Justice Act – a ground-breaking protocol issued in February 2012 concerning discovery of ESI. The principal purpose of the protocol, which has already received praise from both the judiciary and the defense bar, is to ensure that prosecutors are complying with their disclosure obligations in the digital era by providing the defense with ESI in a usable format in a timely fashion.

- In order to ensure consistent long-term oversight of the Department's discovery practices, the Department moved the National Criminal Discovery Coordinator position into the Office of the Deputy Attorney General and made it a permanent executive-level position.

3. Legislative reform is unnecessary and will create substantial problems

Since the public release in mid-March 2012 of the *Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated April 7, 2009* ("Schuelke Report"), some have argued that legislation is necessary to alter federal criminal discovery practice. The Department does not share that view.

Legislation along the lines being proposed by Senator Murkowski in S.2197 would upset our system of justice by failing to recognize the need to protect not only the interests of the defendant but those of victims, witnesses, national security and public safety. It would radically alter the carefully constructed balance that the Supreme Court and lower courts, the Criminal Rules Committee, and Congress have painstakingly created over decades – a balance between ensuring the protection of a defendant's constitutional rights and, at the same time, safeguarding the equally important public interest in a criminal trial process that reaches timely and just results, safeguards victims and witnesses from retaliation or intimidation, does not unnecessarily intrude on victims' and witnesses' personal privacy, protects ongoing criminal investigations from undue interference, and recognizes critical national security interests.

Unfortunately, witness safety concerns are more than merely theoretical. Even under the current system's careful balance between a defendant's right to a fair trial and witnesses' privacy and safety interests, we have had witnesses intimidated, assaulted, and even killed after their names were disclosed in pretrial discovery. Law enforcement officials throughout the nation repeatedly confront chilling situations where witnesses are murdered to prevent them from testifying – or in retaliation for providing testimony. Just a few of the many examples include the following:

- In the District of Maryland, prosecutors provided broad discovery, including a 10-page interview report for a potential witness, to the defense attorneys for two defendants in a narcotics case. The defendants pled guilty, so the witness was never called to testify. Nevertheless, in violation of the discovery agreement, one of the defense attorneys turned over a copy of the interview report to the mother of his client. Copies of the interview report were later found in a number of state and federal prison cells. After the interview report was produced, a drug dealer named in the report shot the witness in front of a half-dozen people. The shooter was convicted; his case is presently on appeal.

- In federal court in the District of Columbia, a defendant was recently convicted of heading a violent drug organization. At trial, the government proved that the homicide of a witness – who was killed by a co-defendant before the start of a Superior Court narcotics and firearms trial at which the witness was scheduled to testify – was committed in furtherance of the drug organization's illicit activities. Prosecutors had disclosed the witness's identity in a court filing two weeks before trial. The witness was shot to death as she walked out of a halfway house at 8:30 a.m., next to a busy street during rush hour. Her murderer did not speak to her before shooting her, and nothing was taken from her. Because of her death, the Superior Court case was dismissed.

- In the Eastern District of Pennsylvania, a defendant has been charged with ordering the murders of four children and two women from his federal jail cell. The six murder victims, who were killed in the firebombing of a North Philadelphia row house, included the mother and infant son of a cooperating witness. The defendant is also charged with plotting to kill family members of other witnesses and with maintaining a list of their names and addresses.

- In the Central District of California, witness statements were ordered produced in a gang prosecution shortly after indictment. After the materials were produced, a cooperator was beaten by several gang members at the local detention center, a female cooperator was assaulted by the girlfriend of a gang member, a car was fire-bombed, and the sole eyewitness to a murder was approached at the day care center she uses for child care and asked whether she thought the government could keep her family safe.

Legislation requiring earlier and broader disclosures would likely lead to an increase in such tragedies. It would also create a perverse incentive for defendants to wait to plead guilty until close to trial in order to see whether they can successfully remove identified witnesses from testifying against them.

The proposed legislation would also negatively impact our must vulnerable crime victims. In cases involving criminal charges against a defendant for child exploitation, impeachment information on the child-victim would need to be disclosed without regard to either admissibility or the substantial policy interests in keeping this information private, even if the evidence against the defendant included his own confession and videotapes of the defendant committing the abuse. In rape cases, information about a sex-crime victim's sexual history, partners, and sexual predisposition would need to be disclosed to the defense – again, regardless of admissibility. The disclosures required by the current legislative proposal cut against the important policy aims of child protection and rape shield laws.

The Department is also concerned that Senator Murkowski's legislative proposal would result in the unnecessary and harmful disclosure of national security-related information and would compromise intelligence and law enforcement sources and methods. Although the bill prescribes that classified information be treated in accordance with the Classified Information Procedures Act (CIPA), it nonetheless creates a substantial risk that classified information will be unnecessarily disclosed and that our country's most sensitive investigative sources and methods will be compromised during the prosecution of criminal national security cases. In

cases involving guilty pleas – where a defendant is necessarily prepared to admit facts in open court that establish he or she committed the charged offense(s) – such legislation would require the unnecessary disclosure of the identity of undercover employees or confidential human sources, scarce investigative assets who, once revealed, may no longer be used to covertly detect and disrupt national security threats. Currently, in the national security context, we tell other countries that we will keep the information they share with us confidential unless we absolutely need to disclose it because of its exculpatory nature. Under such a bill, we would have to disclose an increased volume of information and disclose it more frequently, thus discouraging cooperation from our foreign partners.

Such legislation would also invite time-consuming and costly litigation over discovery issues not substantially related to a defendant's guilt, resulting in delayed justice for victims and the public and greater uncertainty regarding the finality of criminal verdicts. Inclusion of a provision for awarding attorney's fees would provide a significant incentive to engage in such collateral litigation. These concerns, among others, recently led the Criminal Rules Committee – a body populated by federal judges who are intimately familiar with these discovery issues – to reject a proposed amendment to Rule 16 to expand prosecutors' discovery obligations.

The primary objective of the criminal justice system is to ensure fair trials and produce just results. Fair trials and just results ensure that the innocent are not wrongly convicted, and that the guilty do not go free. A fair and just criminal justice system should also ensure that other participants in the process – *i.e.*, victims, law enforcement officers, and other witnesses – are not unnecessarily subjected to physical harm, harassment, public embarrassment or other prejudice, or the fear that they might be subjected to such consequences. The bill ignores the very substantial costs the legislation's additional disclosure requirements would impose – costs to the reputational and privacy interests of witnesses, and, if witnesses become less willing to step forward, costs to society from the loss of the just conviction of the guilty. In national security cases, such results could have devastating consequences with respect to the government's ability to protect the American people, an ability that depends upon obtaining the cooperation of confidential human sources. These are real costs and ones that both the Supreme Court and Congress have taken great pains to avoid incurring. Unfortunately, they are costs that the bill fails to recognize.

4. The *Stevens* case

The misconduct that occurred during the *Stevens* prosecution has now been well documented, both in the report of the Special Counsel to District Court Judge Emmet Sullivan and in the report of the Office of Professional Responsibility. The Department's failures in that case were serious and the Attorney General's decision to dismiss the case reflected that seriousness. Nonetheless, it is important to recognize that the misconduct involved in the Stevens case was an aberration. The men and women who make up the prosecutor corps at the Department of Justice are among the best lawyers in the country. They work hard every day to keep Americans safe, to hold criminals accountable for their actions, to ensure that victims and witnesses are treated with the respect and care they deserve, and to do justice for all in every case.

Nevertheless, prosecutors – like other professionals – will never be immune to mistakes. As a matter of policy, we strive to be perfect, even though we know perfection is impossible. We require our prosecutors to strictly obey the law in both letter and spirit, and we work to ensure that isolated mistakes are detected early, corrected, and do not prevent justice from being done. Over the past 10 years, the Department has filed over 800,000 cases involving more than one million defendants. In the same time period, only one-third of one percent (.33 percent) of these cases warranted inquiries and investigations of professional misconduct by the Department's Office of Professional Responsibility ("OPR"). Less than three-hundredths of one percent (.03 percent) related to alleged discovery violations, and just a fraction of these resulted in actual findings of misconduct. Department regulations require DOJ attorneys to report any judicial finding of misconduct to OPR, and OPR conducts computer searches to identify court opinions that reach such findings in order to confirm that it examines any judicial findings of misconduct, reported or not. In addition, defense attorneys are not reticent to raise allegations of discovery failures when they do occur.

On those rare occasions when discovery failures do occur, the Department takes steps to hold individual prosecutors accountable. Late last month, the Department provided to the Senate and House Judiciary Committees a copy of OPR's investigative report and documents relating to the Department's disciplinary process in connection with the federal prosecution of Senator Stevens. OPR issued its 672-page final report on August 15, 2011. That report reflects that OPR thoroughly examined multiple allegations of misconduct that arose during the course of the proceedings in the *Stevens* case. OPR concluded that the government violated its obligations under constitutional *Brady* and *Giglio* principles and Department of Justice policy (USAM § 9-5.001) by failing to disclose exculpatory statements by prosecution witnesses during trial preparation sessions and law enforcement interviews and by failing to disclose a witness's alleged involvement in securing a false sworn statement. OPR found that the government violated D.C. Rule of Professional Conduct 4.1(a) by misrepresenting to the defense certain facts in a September 2008 disclosure letter. In other words, OPR found that the government violated rules that were already in place, thus depriving Senator Stevens of a fair trial.

With respect to the individual prosecutors, OPR concluded that two prosecutors committed professional misconduct by acting in reckless disregard of their disclosure obligations and forwarded the report to the Professional Misconduct Review Unit (PMRU) for consideration of disciplinary action. After evaluating the prosecutors' conduct and the factors mandated by *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), the Chief of PMRU proposed that one prosecutor be suspended without pay for 45 days and that the other be suspended without pay for 15 days, noting that OPR had found that neither prosecutor had acted intentionally. On May 23, 2012, the deciding official in the Office of the Deputy Attorney General – a long-term career employee – determined that the first prosecutor should be suspended for 40 days without pay and that the second prosecutor should be suspended for 15 days without pay. In doing so, the deciding official sustained the OPR findings of misconduct against both prosecutors but rejected an additional OPR finding that the first prosecutor exercised poor judgment by failing to inform his supervisors that the representations in a *Brady* letter were inaccurate and misleading. Both the PMRU Chief and the deciding official agreed that OPR's findings of reckless professional misconduct were supported by the law and the facts and were serious. Although the decisions of the deciding official represent the Department's final actions in this matter, the

prosecutors are entitled by law and regulation to appeal his decisions to the Merit Systems Protection Board.

The proposal for discipline and the disciplinary decision set forth those factors that the disciplinary officials considered in assessing the appropriate punishment. In short, OPR determined that the prosecutors acted recklessly rather than intentionally, and the disciplinary officials also considered that both AUSAs had previously unblemished records with the Department. Additionally, the disciplinary officials were required to consider the consistency of the penalty with those imposed on other employees for the same or similar offenses, and while the discipline did not result in dismissal, we are not aware of any case within the Department where an employee with a record similar to the subject AUSAs was terminated after OPR found that the employee engaged in something less than intentional misconduct

5. Conclusion

The objective of the criminal justice system is to produce just results. This includes ensuring that the processes we use do not result in the conviction of the innocent, and likewise ensuring that the guilty do not unjustifiably go free. It also includes an interest in ensuring that other participants in the process – *i.e.*, victims, law enforcement officers, and other witnesses – are not unnecessarily subjected to physical harm, harassment, public embarrassment, or other prejudice.

For nearly fifty years, a careful reconciliation of these interests has been achieved through the interweaving of constitutional doctrine (*i.e.*, *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S. 419, 439 (1995)), statutory directives (*i.e.*, the Jencks Act and the Crime Victims' Rights Act), and Federal Rules (*i.e.*, Rule 16; Rule 26.2). The legislation proposed by Senator Murkowski would disturb this careful balance without a demonstrable improvement in either the fairness or reliability of criminal judgments and in the absence of a widespread problem. The rules of discovery do not need to be changed – and the *Stevens* case does not prove otherwise. Rather, it demonstrates that prosecutors and other law enforcement officials need to recognize fully their obligations under these rules, must apply them fairly and uniformly, and must be given guidance, tools, and training to meet their discovery obligations rigorously. This is what the Department has done since the Attorney General directed the dismissal of the conviction in *Stevens*. And it is what the Department will continue to do in the future, under the policies and procedures that have been implemented and institutionalized during the past three years.

EXHIBIT J

notices

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF JUSTICE

Office of the Attorney General

[Order No. 696-77]

FREEDOM OF INFORMATION

Published and Unpublished Indexes to Final Opinions and Orders, Statements of Policy and Interpretations, and Administrative Staff Manuals and Instructions

Under subsection (a)(2) of the Freedom of Information Act, 5 U.S.C. 552(a)(2), each agency is required to maintain and make available for public inspection and copying current indexes to the agency's materials relating to certain final opinions and orders, statements of policy and interpretations, and administrative staff manuals and instructions. These indexes are required to be published at quarterly or more frequent intervals and distributed, unless the agency determines by order published in the FEDERAL REGISTER that such publication would be unnecessary and impracticable. The purpose of this order is to bring the Department of Justice into compliance with these requirements of subsection (a)(2) of the Freedom of Information Act.

By virtue of the authority vested in me by 28 U.S.C. 509, and 5 U.S.C. 301 and 552, it is hereby ordered as follows:

1. It is determined that it is unnecessary and impracticable to publish quarterly or more frequently the indexes to the Department of Justice materials indicated below. This determination is made because (a) there is insufficient interest to justify such publication; (b) with respect to some of the indexes listed continual updating and revision is required to reflect the frequent addition of materials; (c) with respect to other indexes changes are too infrequent to warrant quarterly publication; and (d) the practical utility of the indexes does not warrant such publication.

2. Indexes to the materials listed below can be inspected at the Department of Justice Reading Room, Room 1266, 10th and Pennsylvania Avenue NW., Washington, D.C. 20530, except that there are separate public reading rooms maintained by certain Departmental organizations at other locations as noted below. With respect to those materials which are individual documents and not part of a series of similar documents, the list set forth below, together with the headings under which such materials are listed, itself constitutes an index to such materials. In the interests of facilitation of public availability of information, the list set forth below has been prepared with a view to inclusiveness, and accordingly it is possible that a few of the documents or portions thereof referred to below are not of an (a)(2) character or are exempted by subsection (b) of the Act.

The indexes to the (a)(2) materials of the Federal Bureau of Investigation are currently being revised, and will be published at a later date.

(a) *Antitrust Division.* (1) Antitrust Division Manual, chapter 1 (Organization of the Department and the Division), chapter 5 (Policy and Planning), and chapter 6 (Miscellaneous).

(2) Investigations of Cases of Price-Fixing, except for sample documents B, C, P, and G.

(3) Antitrust Guide for International Operations.

(b) *Board of Immigration Appeals.* Public Reading Room, Room 1122, Safeway Building, 521 12th Street NW., Washington, D.C.:

(1) Selected Decisions Designated as Precedents; published periodically in hard cover and as slip opinions by the Government Printing Office.

(2) Precedent and Selected Nonprecedent Decisions; indexed by subject matter in reading room.

(c) *Bureau of Prisons.* Public Reading Room, 117 D Street NW., Washington, D.C.:

(1) Numerical and Alphabetical Listings of Effective Policy Statements: (i) General Management and Administration; (ii) Laws and Legal Matters; (iii) Personnel Management; (iv) Budget Management; (v) Research, Development and Statistics; (vi) Accounting Management; (vii) Procurement and Warehouse Management; (viii) Commissary Management; (ix) Miscellaneous Business and Fiscal Management; (x) Custodial Management; (xi) Food Service Management; (xii) Farm Service Management; (xiii) Safety Standards and Procedures; (xiv) Jail Administration; (xv) Facilities and Equipment; (xvi) Industrial Management; (xvii) Medical Service Management (xviii) Parole Board; (xix) Information Systems.

(2) Numerical and Alphabetical Listings of Effective Operations Memoranda: (i) General Management and Administration; (ii) Personnel Management; (iii) Budget Management; (iv) Inmate Management; (v) Accounting Management; (vi) Procurement and Warehousing Management; (vii) Commissary Management; (viii) Safety Standards and Procedures; (ix) Industrial Management.

(d) *Civil Division.* (1) Civil Division Practice Manual; (2) Civil Division Orders and Directives.

(e) *Civil Rights Division.* (1) Submissions under Section 5 of the Voting Rights Act of 1965.

(f) *Community Relations Service.* Public Reading Room, Room 667B, Todd Building, 550 11th Street NW., Washington, D.C.: (1) Community Relations Service Directives Manual; (2) Memoranda from the Director; policy and position statements.

(g) *Criminal Division.* (The Criminal Division is currently revising all of its policy memoranda for inclusion in the new United States Attorneys' Manual; when published this Manual will supersede all existing publications of the Division, and its index will constitute the (a)(2) index and will be published in the FEDERAL REGISTER):

(1) Miscellaneous Memoranda; including circulars, orders, directives to staff and notices.

(2) Compilations of Legislative Materials.

(3) Adversary Hearings Memorandum.

(4) Authority to Compromise Civil Penalties Assessed Under the Coal Mine Health and Safety Act of 1969, 30 U.S.C. Sections 801 et seq. (Criminal Division Memorandum No. 802 to United States Attorneys).

(5) Copyright Protection of Sound Recordings (Criminal Division Manual, April 1973).

(6) Deletion of Portions of Motion Picture Films or Other Materials or Their Reexportation After Seizure by the Bureau of Customs as Obscene and Inadmissible Under 19 U.S.C. 1305 (Criminal Division Memorandum No. 767 to United States Attorneys).

(7) Extradition Handbook (Criminal Division Manual, December 1974).

(8) Extradition-Provisional Arrest (Criminal Division Memorandum of November 8, 1974, to Section Chiefs).

(9) Handbook for Federal Obscenity Prosecutions (Criminal Division Manual, June 1972).

(10) Handling of Obscene Private Correspondence Cases, 18 U.S.C. 1461 (Criminal Division Letter of August 31, 1964, to United States Attorneys).

(11) Sound Recording Piracy; Violations of 17 U.S.C. 104 (Criminal Division Memorandum No. 793 to United States Attorneys).

(h) *Drug Enforcement Administration.* Public Reading Room, Room 200, 1405 Eye Street NW., Washington, D.C.:

(1) DEA/Registrant Memorandums of Understanding; signed by registrant and DEA official. 21 CFR Part 1300.

(2) DEA Policy and Guidelines not published in the FEDERAL REGISTER.

(3) Tort Claims.

(4) Petitions for Remission or Mitigation of Forfeiture.
(5) Privacy Act—Policy Statements.
(6) Final Orders.
(7) Legal Opinions by Chief Counsel.
(8) Memoranda of Understanding between States and DEA/BNDD/DBAC/FBN.
(9) Compliance Administrative Manual.

(i) *Executive Office for United States Attorneys.* (The Executive Office for United States Attorneys is currently revising all of its policy memoranda for inclusion in the new United States Attorneys' Manual; when published this manual will supersede the existing U.S. Attorneys' Manual and its index will constitute the (a) (2) index and will be published in the FEDERAL REGISTER):
(1) United States Attorneys' Manual.
(2) United States Attorneys' Bulletins.
(3) Proving Federal Crimes, 6th edition, April 1976.

(j) *Immigration and Naturalization Service.* Public Reading Room, 425 I Streeet NW., Washington, D.C., and at all I&NS District Offices:
(1) Administrative Decisions Under Immigration and Naturalization Laws (including both precedent and nonprecedent decisions);
(2) Administrative Manual.
(3) Authority of Officers of the Immigration and Naturalization Service to Make Arrests (M-69).
(4) Border Patrol Handbook.
(5) Guide for the Inspection and processing of Citizens and Aliens by Officers Designated as Immigration Inspectors (M-94).
(6) Immigrant Inspector's Handbook.
(7) Investigator's Handbook.
(8) Naturalization Examiner's Guide.
(9) Officers' Handbook (M-68).
(10) Operations Instruction and Interpretations (the latter pertaining to nationality acquisition and loss).

(k) *Land and Natural Resources Division.* (1) Federal Eminent Domain (a two-volume manual).
(2) Federal Condemnation Manual—1951.
(3) Federal Condemnation Handbook (two volumes).
(4) Condemnation Seminar, volume I—1962.
(5) Condemnation Seminar, Volume II—1963.
(6) Condemnation Seminar, Volume III—1964.
(7) Condemnation Seminar, Volume IV—1966.
(8) Condemnation Seminar, Volume V—1971.
(9) Condemnation Seminar, Volume VI—1973.
(10) Guidelines for Federal Water Pollution Control Litigation—January 18, 1973.
(11) Layman's Guide to Investigating Section 10 Violations—1975.
(12) Directive No. 7-68, Settlement Policy and Guidelines in Condemnation Cases.
(13) Standards for the Preparation of Title Evidence in Land Acquisitions by the United States.
(14) Guidelines for Investigations of Violations of the 1899 Refuse Act.
(15) Title Evidence Requirements for Condemnation Cases—August 1, 1973.
(16) Regulations of the Attorney General Promulgated in Accordance with the Provisions of Public Law 91-393 Approved September 1, 1970, 84 Stat. 835, An Act to Amend Section 355 of the Revised Statutes, as Amended, Concerning Approval by the Attorney General of the Title to Lands Acquired for and on Behalf of the United States.
(17) Manual of Organization, Operation and Procedures.
(18) Analysis of Uniform Relocation Assistance and Real Property Acquisition Act of 1970—March 9, 1971.

(l) *Law Enforcement Assistance Administration.* Public Reading Room, 633 Indiana Avenue NW., Washington, D.C.:
(1) Legal Opinions of the Office of General Counsel of the Law Enforcement Assistance Administration, United States Department of Justice, six indexed volumes, each covering the following time periods:
(i) January 1, 1969 to June 30, 1973;
(ii) July 1, 1973 to December 31, 1973;
(iii) January 1, 1974 to June 30, 1974;
(iv) July 1, 1974 to December 31, 1974;
(v) January 1, 1975 to June 30, 1975;
(vi) July 1, 1975 to December 31, 1975.
(2) Numerical Checklist of Effective LEAA Directives (Instruction 0000.2N, May 31, 1976).
(3) Current Listing of LEAA External Directives (Guideline 0000.6F, March 10, 1976).
(4) Implementation of the Privacy Act of 1974 (Instruction 1030.4, November 25, 1975).
(5) Standards of Conduct (Instruction 1551.2B, April 7, 1975; Change—1, November 12, 1975).
(6) Freedom of Information Act Amendments (Instruction 1600.4A, May 29, 1975).
(7) Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act (Instruction 1600.5, March 7, 1975).
(8) Department of Justice Freedom of Information Act Regulations (28 CFR Part 16(A)) (Instruction 1600.6, March 20, 1975).
(9) Reallocation of LEAA Categorical Grant Funds (Instruction 4050.1, December 11, 1975).
(10) Eligibility for Grants (Instruction 4060.2, September 10, 1974).
(11) State Planning Agency Grants (Manual 4100.1E, January 16, 1976).
(12) Guide for Discretionary Grant Programs (Manual 4500.1D, July 10, 1975; Change—1, April 12, 1976).
(13) Law Enforcement Education Program (Manual 5200.1B, May 6, 1975; Change—1, October 8, 1975).
(14) Competitive Graduate Research Fellowship Program (Guideline 5400.3, December 23, 1974).
(15) Guidelines for the Graduate Research Program: National Criminal Justice Educational Development Consortium Institutions (Guideline 5400.3, January 27, 1975).
(16) Participation Criteria for Internship Program (Guideline 5500.1A, November 7, 1973).
(17) LEAA Visiting Fellowship Program (Guideline 6010.1, November 7, 1974).
(18) Use of LEAA Funds for Psychosurgery and Medical Research (Guideline 6060.1A, June 18, 1974).
(19) Comprehensive Data Systems Program (Manual 6640.1, April 27, 1976).
(20) Financial Management for Planning and Action Grants (Manual 7100.1A, April 30, 1973; Change—1, January 24, 1974; Change—2, December 18, 1974; Change—3, October 29, 1975).
(21) Principles for Determining Travel Cost Applicable to LEAA Grants (Guideline 7100.3A, January 28, 1976).
(22) Distribution, Resolution and Clearance of Audit Reports (Guideline 7140.1A, January 11, 1974).
(23) Reporting of Possible LEAA Fund Misuse, Criminal Activity, Conflict of Interest, or other Serious Irregularities (Guideline 7140.2, December 12, 1973).
(24) Construction Contracts—Equal Employment Opportunity Procedure for Submitting Information on Construction and Renovation Contracts (Guideline 7400.1B, June 4, 1974).
(25) The Effect on Minorities and Women of Minimum Height Requirements for Employment of Law Enforcement Officers (Guideline 7400.2A, June 18, 1974).
(26) Representation of Minorities and Women on Supervisory Boards of Criminal Justice State Planning Agencies and Regional Planning Units (Guideline 7400.4, August 19, 1974).
(27) Addresses of LEAA Regional Offices and State Planning Agencies (Guideline 1300.1F, April 22, 1976).
(28) Organization and Functions (Handbook 1320.1, February 20, 1975; Change—1, June 25, 1975).
(29) LEAA Directives System Handbook (Handbook 1332.1B, March 5, 1975).
(30) Dissemination of Grants Management Information Systems Data (Instruction 1340.1, February 1, 1974).
(31) LEAA Mailing Lists and Categories (Instruction 1441.1B, September 18, 1975).
(32) Procedure for Requesting Personnel Actions Under the Inter-Governmental Personnel Act (Instruction 1520.1, May 22, 1972).
(33) Procedures for Employment of Experts and Consultants in LEAA (Instruction 1520.4, November 30, 1973).
(34) Equal Employment Opportunity (Handbook 1563.1, January 12, 1973; Change—1, March 5, 1974; Change—2, July 15, 1975).
(35) Establishing Contact with Female and Minority Candidates for Employment in LEAA Regional Offices (Instruction 1563.2, July 23, 1975).
(36) Procedures for Processing Complaints of Discrimination Based on Race, Color, Sex, Age and National Origin (Instruction 1563.3A, May 18, 1976).
(37) Procurement References Library (Instruction 1701.5, May 18, 1973).

(38) Planning Grant Review and Processing Procedures (Handbook 4210.-1C, May 17, 1976).

(39) Categorical Grant Processing Procedures (Handbook 4560.1A, October 23, 1975).

(40) Law Enforcement and Criminal Justice Training Programs—Section 402 (b)(6) (Instruction 5700.1, November 9, 1973).

(41) Applicability of the Guideline Manual for the Financial Management for Planning and Action Grants (Instruction 7100.2, July 1, 1974).

(42) Equal Employment Opportunity Programs (Instruction 7400.3, February 13, 1974).

(m) *Offices of the Attorney General and the Deputy Attorney General.* (1) Letters to Congress specifically outlining Freedom of Information policies and procedures.

(2) Annual Report to Congress concerning the implementation of the Freedom of Information Act.

(3) Final determinations by the Attorney General and/or the Deputy Attorney General on Freedom of Information appeals.

(4) Synopses of Department of Justice applications of exemptions in the Freedom of Information Act, pursuant to administrative appeals filed under the provisions of that Act.

(5) Miscellaneous memoranda.

(n) *Office for Improvements in the Administration of Justice.* (1) Guidelines relating to use of statutory provisions to compel testimony or production of information.

(o) *Office of Legal Counsel.* (1) Opinions of the Attorney General; bound volumes and slip opinions.

(p) *Office of Legislative Affairs.* (1) Index of speeches, testimony, remarks of Attorney General, Deputy Attorney General and other officers and employees of the Department. The material is compiled chronologically, beginning with the 92d Congress, and is cumulative.

(2) Index of reports to Congress on pending legislation. The material is compiled numerically according to bill number, beginning with the 92d Congress, and is cumulative.

(3) Index of Congressional correspondence which sets forth official Department policies and positions. The material is listed by the writer's name, beginning about June, 1974, and is cumulative.

(q) *Office of Management and Finance.* (1) Final Decisions in Discrimination Complaints against the Department.

(2) Decisions on Adverse Actions and Discipline of Personnel.

(3) Decisions on Classification Appeals.

(4) Personnel Management Plans.

(5) EEO Affirmative Action Plans.

(6) Order DOJ 0000.4H, Directives Index as of March 31, 1976—Bureaus. (This material covers more than one component.)

(7) Order OBD 0000.1B, Directives Index as of March 31, 1976—Offices, Boards, Divisions, and Division Field Offices. (This material covers more than one component.)

(r) *Office of Public Information.* Room 5114, Justice Building, 10th and Constitution Avenue NW., Washington, D.C.:

(1) Speeches. Cumulative. Contains listing of speeches by Attorneys General, Assistant Attorneys General, Deputy Attorneys General, and Deputy Assistant Attorneys General.

(2) Press Releases, Testimonies, Statements. Cumulative. Contains listing of press releases and statements of policy issued by the Department; testimonies before the Congress by heads of the Department, Divisions, Offices, Boards and Bureaus.

(s) *Office of Watergate Special Prosecution Force.* (1) Memorandum of Understanding Re Handling of Internal Revenue Matters Arising in Connection with Investigation and Prosecution of 18 U.S.C. 610 (Illegal Corporate Contributions) Matters.

(2) Press Releases (two regarding general policy toward violations of 18 U.S.C. 610).

(3) Statement on Violations of 18 U.S.C. 611.

(t) *Tax Division.* (1) Guide for the Preparation of Written Communications in the Tax Division.

(2) Institute on Criminal Tax Trials, 1975.

(3) Manual for Criminal Tax Trials.

(4) Organization, Operation and Procedure Manual.

(5) Tax Division Uniform System of Citation and Instructions on Briefs.

(6) United States Attorneys' Guide; Policies Affecting the Processing of Tax Fraud Cases.

(7) Policy statement regarding interrogation of jurors after trial and the obtaining of name checks on jurors (November 29, 1967).

(8) Policy statement regarding name checks of witnesses in civil and criminal tax cases (November 29, 1967).

(9) Memorandum from the Assistant Attorney General, Tax Division, outlining the policy on tax prosecution press releases (January 12, 1971).

(10) Memorandum from the Assistant Attorney General, Tax Division, regarding prevention of the departure of aliens who have failed to obtain a certificate of compliance from the Internal Revenue Service (May 9, 1972).

(11) Memorandum from the Assistant Attorney General, Tax Division, setting forth procedures for mailing of complaints in tax refund suits (January 5, 1973).

(12) Memorandum from the Assistant Attorney General, Tax Division, establishing guidelines concerning the use of post-trial motions for judgment n.o.v. (January 2, 1974).

(13) Policy statement regarding inspection of tax returns of members of the federal judiciary (February 6, 1974).

(14) Memorandum from the Assistant Attorney General, Tax Division, elaborating upon the policy statement regarding inspection of tax returns of members of the federal judiciary (February 8, 1974).

(15) Memorandum from the Attorney General regarding statutory restrictions on the disclosure of income tax returns (April 24, 1974).

(16) Policy statement regarding opposing attorneys who act as counsel and witness (August 7, 1974).

(17) Policy statement regarding attorney participation on A.B.A. Tax Section Committees (August 7, 1974).

(18) Memorandum from the Assistant Attorney General, Tax Division, concerning procedures in transmitting to the Tax Division complaints filed in tax refund suits (June 23, 1975).

(19) Policy statement regarding refund suits arising during a pending criminal case (February 18, 1975).

(20) Letter from Assistant Attorney General, Tax Division, regarding Reluctant Witness Grand Jury Proceedings (February 12, 1975).

(u) *United States Marshals Service.* (1) Outline of the Office of United States Marshal.

(2) United States Marshals Service.

(3) Women in the U.S. Marshals Service.

(4) The Marshal Today (updated annually).

GRIFFIN B. BELL,
Attorney General.

MARCH 8, 1977.

[FR Doc.77-8337 Filed 3-18-77;8:45 am]

Office of the Attorney General

[Order No. 705-77]

PRIVACY ACT OF 1974

System of Records

Notice is hereby given that pursuant to the provisions of the Privacy Act of 1974 (5 U.S.C. 552a) the Department of Justice proposes to add routine uses to, and expand the retrievability capacity of a portion of an existing system of records maintained by the Immigration and Naturalization Service (INS), JUSTICE/INS-001, The Immigration and Naturalization Service Index System.

A. Pursuant to Section 3(e)(4) of the Privacy Act (5 U.S.C. 552a(e)(4)), notice of the existence of this system JUSTICE/INS-001, The Immigration and Naturalization Service Index System, was published in the FEDERAL REGISTER, 41 FR 39986. The proposed modification will enable employees in field offices of the Immigration and Naturalization Service to access, by means of cathode-ray terminals, automated portions of the subsystem of records known as "Centralized index and records relating to but not limited to, aliens lawfully admitted for permanent residence and United States citizens (Master Index)".

Amendments to the Notice of System of Records are listed as follows:

Categories of records in the system: Par. E is amended by adding the statement, "Records which may be accessed electronically are limited to index and file locator data including name, identi-

EXHIBIT K

United States Attorneys' Manual

Volume I

Title 1, General
Title 2, Appeals
Title 3, Executive Office for
United States Attorneys

1988

Title 1
General

UNITED STATES ATTORNEYS' MANUAL

DETAILED
TABLE OF CONTENTS
FOR CHAPTER 1

1-1.400 DISCLOSURE AND DISTRIBUTION

1-1.410 Disclosure of the Manual

The Manual is United States Government property. It is issued to be used in conjunction with official duties and must be returned to the appropriate administrative officer prior to leaving Department employ.

> All materials contained in the U.S. Attorneys' Manual, unless specifically designated to the contrary, are subject to the provisions of Title 5, U.S.C., Sec. 552(a)(2). Accordingly, this Manual must be made available for public inspection and copying pursuant to 28 C.F.R. § 16.2.

The Manual is available for public inspection at all depository libraries, law school libraries, and the Library of Congress.

1-1.420 Distribution of the Manual

The Manual is published by the Executive Office for U.S. Attorneys and is distributed in bulk to the administrative officer of each U.S. Attorney's Office or Division. *See* USAM 1-1.320. Proper distribution follows.

1-1.421 Department of Justice

A. United States Attorneys' offices:	
U.S. Attorneys	One complete set
Library	One complete set
Branch office library	One complete set
Division Chief	One complete set
Assistant U.S. Attorneys	Those volumes as required for efficient job performance.
B. Legal Divisions:	
Assistant Attorneys General	One complete set
Library	One complete set
C. Offices, Boards and Bureaus:	
Director	One complete set
Library	One complete set

Requests for additional copies of the Manual should be submitted in writing to the Executive Office for U.S. Attorneys, Manual Staff, PAT Building, Rm. 6419, 601 D Street N.W., Washington, D.C. 20530.

A distribution list is also maintained by the Executive Office for U.S. Attorneys. All address changes should be submitted in writing to the above address.

1-1.422 Other Federal Agencies

For information on purchasing the manual, federal agencies should call FTS 673-6348 or write to the above address.

EXHIBIT L

1-1.000 INTRODUCTION

1-1.100 Purpose

The United States Attorneys' Manual is designed as a quick and ready reference for United States Attorneys, Assistant United States Attorneys, and Department attorneys responsible for the prosecution of violations of federal law. It contains general policies and some procedures relevant to the work of the United States Attorneys' offices and to their relations with the legal divisions, investigative agencies, and other components within the Department of Justice. It is available on the Internet at http://www.justice.gov/usao/eousa/foia_reading_room/usam/.

The Manual provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

[updated May 2009]

1-1.200 Authority

The United States Attorneys' Manual was prepared under the general supervision of the Attorney General and under the direction of the Deputy Attorney General, by the United States Attorneys, represented by the Attorney General's Advisory Committee of United States Attorneys, the Litigating Divisions, the Executive Office for United States Attorneys, and the Justice Management Division. *See* A.G. Order 665-76. The Executive Office for United States Attorneys coordinates the periodic revision of the Manual in consultation with the Attorney General, Deputy Attorney General and Associate Attorney General.

This Manual is intended to be comprehensive. When the Manual conflicts with earlier Department statements, except for Attorney General's statements, the Manual will control. Should a situation arise in which a Department policy statement predating the Manual relates to a subject not addressed in the Manual, the prior statement controls, but this situation should be brought to the attention of the Executive Office for United States Attorneys, Manual Staff, Department of Justice, Room 2262, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530.

[updated May 2009]

1-1.300 Disclosure

The Manual is available on the Internet at http://www.justice.gov/usao/eousa/foia_reading_room/usam/.

[updated May 2009]

1-1.400 Organization

The Manual is divided into nine (9) titles:

Title 1—General

Title 2—Appeals

Title 3—Executive Office for United States Attorneys

Title 4—Civil

Title 5—Environment and Natural Resources

Title 6—Tax

Title 7—Antitrust

Title 8—Civil Rights

Title 9—Criminal

[updated May 2009]

1-1.600 Revisions

Substantive changes to the Manual are submitted by the Attorney General, Deputy Attorney General, Associate Attorney General, a litigating division or the Executive Office for United States Attorneys (EOUSA). Substantive changes submitted by an Assistant Attorney General for a litigating division or the Director EOUSA must be reviewed by the Attorney General's Advisory Committee (AGAC) before being incorporated into the Manual. If the AGAC objects to the proposed change, it will meet with the litigating division or EOUSA to resolve. Unresolved issues will be resolved by the Deputy Attorney General or Attorney General. Policy changes issued by the Attorney General, Deputy Attorney General, and Associate Attorney General are effective upon issuance. For guidance in preparing a substantive change, contact the Manual Staff at 202-514-4633.

Clerical changes to the Manual do not require review by the Advisory Committee and can be incorporated directly into the Manual. Clerical changes should be sent to the USAM staff through the Director, EOUSA.

[updated May 2009] [cited in Criminal Resource Manual 1841]

9-5.000
ISSUES RELATED TO TRIALS AND OTHER COURT PROCEEDINGS

9-5.001 Policy Regarding Disclosure of Exculpatory and Impeachment Information

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

B. **Constitutional obligation to ensure a fair trial and disclose material exculpatory and impeachment evidence.** Government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). The law requires the disclosure of exculpatory and impeachment evidence when such evidence is material to guilt or punishment. *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 154. Because they are Constitutional obligations, *Brady* and *Giglio* evidence must be disclosed regardless of whether the defendant makes a request for exculpatory or impeachment evidence. *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995). Neither the Constitution nor this policy, however, creates a general discovery right for trial preparation or plea negotiations. *U.S. v. Ruiz*, 536 U.S. 622, 629 (2002); *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

1. **Materiality and Admissibility.** Exculpatory and impeachment evidence is material to a finding of guilt—and thus the Constitution requires disclosure—when there is a reasonable probability that effective use of the evidence will result in an acquittal. *United States v. Bagley*, 475 U.S. 667, 676 (1985). Recognizing that it is sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence. *Kyles*, 514 U.S. at

439. While ordinarily, evidence that would not be admissible at trial need not be disclosed, this policy encourages prosecutors to err on the side of disclosure if admissibility is a close question.

2. **The prosecution team.** It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all the members of the prosecution team. 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. *Kyles*, 514 U.S. at 437.

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

1. **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.

2. **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.

3. **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.

4. **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.

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

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

2. **Impeachment information.** Impeachment information, which depends on the prosecutor's decision on who

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

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

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

E. **Training.** All new federal prosecutors assigned to criminal matters and cases shall complete, within 12 months of employment, designated training through the Office of Legal Education on *Brady/Giglio*, and general disclosure obligations and policies. All federal prosecutors assigned to criminal matters and cases shall annually complete two hours of training on the government's disclosure obligations and policies. This annual training shall be provided by the Office of Legal Education or, alternatively, any United States Attorney's Office or DOJ component.

F. **Comment.** This policy establishes guidelines for the exercise of judgment and discretion by attorneys for the government in determining what information to disclose to a criminal defendant pursuant to the government's disclosure obligation as set out in *Brady v. Maryland* and *Giglio v. United States* and its obligation to seek justice in every case. This policy also establishes training requirements for federal prosecutors in this area. As the Supreme Court has explained, disclosure is constitutionally required when evidence in the possession of the prosecutor or prosecution team is material to guilt, innocence or punishment. Under this policy, the government's disclosure will exceed its constitutional obligations. Thus, this policy encourages prosecutors to err on the side of disclosure in close questions of materiality and identifies standards that favor greater disclosure in advance of trial through the production of exculpatory information that is inconsistent with any element of any charged crime and impeachment information that casts a substantial doubt upon either the accuracy of any evidence the government intends to rely on to prove an element of any charged crime or that might have a significant bearing on the admissibility of prosecution evidence. This expanded disclosure policy, however, does not create a general right of discovery in criminal cases. Nor does it provide defendants with any additional rights or remedies. Where it is unclear whether evidence or information should be disclosed, prosecutors are encouraged to reveal such information to defendants or to the court for inspection *in camera* and, where applicable, seek a protective order from the Court. By doing so, prosecutors will ensure confidence in fair trials and verdicts. The United States Attorneys' Offices and Department components involved in criminal prosecutions are also encouraged to undertake periodic training for paralegals and to cooperate with and assist law enforcement agencies in providing education and training to agency personnel concerning the government's disclosure obligations and developments in relevant case law.

See also Criminal Resource Manual 165 ("Guidance for Prosecutors Regarding Criminal Discovery").

[updated June 2010] [cited in USAM 9-5.100; Criminal Resource Manual 165]

9-5.100 Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy")

On December 9, 1996, the Attorney General issued a Policy regarding the Disclosure to Prosecutors of Potential

9-6.000
RELEASE AND DETENTION PENDING JUDICIAL PROCEEDINGS —18 U.S.C. §§ 3141 ET SEQ.

9-6.100 Introduction

The release and detention of defendants pending judicial proceedings is governed by the Due Process Clause of the Fifth Amendment, the Excessive Bail Clause of the Eighth Amendment, and the Bail Reform Act of 1984. The Bail Reform Act of 1984 provides procedures to detain a dangerous offender, as well as an offender who is likely to flee pending trial or appeal. *See United States v. Salerno*, 481 U.S. 739 (1987).

For a discussion of the provisions of the Bail Reform Act of 1984 (18 U.S.C §§ 3141 *et seq.*) and related case law see the Criminal Resource Manual at 26.

9-6.200 Pretrial Disclosure of Witness Identity

Insuring the safety and cooperativeness of prospective witnesses, and safeguarding the judicial process from undue influence, are among the highest priorities of federal prosecutors. *See* the Victim and Witness Protection Act of 1982, P.L. 97-291, § 2, 96 Stat. 1248-9. The Attorney General Guidelines for Victim Witness Assistance 2000 provide that prosecutors should keep in mind that the names, addresses, and phone numbers of victims and witnesses are private and should reveal such information to the defense only pursuant to Federal Rule of Procedure 16, any local rules, customs or court orders, or special prosecutorial need.

Therefore, it is the Department's position that pretrial disclosure of a witness' identity or statement should not be made if there is, in the judgment of the prosecutor, any reason to believe that such disclosure would endanger the safety of the witness or any other person, or lead to efforts to obstruct justice. Factors relevant to the possibility of witness intimidation or obstruction of justice include, but are not limited to, the types of charges pending against the defendant, any record or information about the propensity of the defendant or the defendant's confederates to engage in witness intimidation or obstruction of justice, and any threats directed by the defendant or others against the witness. In addition, pretrial disclosure of a witness' identity or statements should not ordinarily be made against the known wishes of any witness.

However, pretrial disclosure of the identity or statements of a government witness may often promote the prompt and just resolution of the case. Such disclosure may enhance the prospects that the defendant will plead guilty or lead to the initiation of plea negotiations; in the event the defendant goes to trial, such disclosure may expedite the conduct of the trial by eliminating the need for a continuance.

Accordingly, with respect to prosecutions in federal court, a prosecutor should give careful consideration, as to each prospective witness, whether absent any indication of potential adverse consequences of the kind mentioned above reason exists to disclose such witness' identity prior to trial. It should be borne in mind that a decision by the prosecutor to disclose pretrial the identity of potential government witnesses may be conditioned upon the defendant's making reciprocal disclosure as to the identity of the potential defense witnesses. Similarly, when appropriate in light of the facts and circumstances of the case, a prosecutor may determine to disclose only the identity, but not the current address or whereabouts of a witness.

Prosecutors should be aware that they have the option of applying for a protective order if discovery of the private information may create a risk of harm to the victim or witness and the prosecutor may seek a temporary restraining order under 18 U.S.C. § 1514 prohibiting harassment of a victim or witness.

In sum, whether or not to disclose the identity of a witness prior to trial is committed to the discretion of the federal prosecutor, and that discretion should be exercised on a case-by-case, and witness-by-witness basis. Considerations of witness safety and willingness to cooperate, and the integrity of the judicial process are paramount.

[updated November 2000]

165 Guidance for Prosecutors Regarding Criminal Discovery

January 4, 2010

MEMORANDUM FOR DEPARTMENT PROSECUTORS

FROM: David W. Ogden
Deputy Attorney General

SUBJECT: Guidance for Prosecutors Regarding Criminal Discovery

The discovery obligations of federal prosecutors are generally established by Federal Rules of Criminal Procedure 16 and 26.2, 18 U.S.C. § 3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). In addition, the United States Attorney's Manual describes the Department's policy for disclosure of exculpatory and impeachment information. *See* USAM 9-5.001. In order to meet discovery obligations in a given case, Federal prosecutors must be familiar with these authorities and with the judicial interpretations and local rules that discuss or address the application of these authorities to particular facts. In addition, it is important for prosecutors to consider thoroughly how to meet their discovery obligations in each case. Toward that end, the Department has adopted the guidance for prosecutors regarding criminal discovery set forth below. The guidance is intended to establish a methodical approach to consideration of discovery obligations that prosecutors should follow in every case to avoid lapses that can result in consequences adverse to the Department's pursuit of justice. The guidance is subject to legal precedent, court orders, and local rules. It provides prospective guidance only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits. *See United States v. Caceres*, 440 US. 741 (1979).

The guidance was developed at my request by a working group of experienced attorneys with expertise regarding criminal discovery issues that included attorneys from the Office of the Deputy Attorney General, the United States Attorneys' Offices, the Criminal Division, and the National Security Division. The working group received comment from the Office of the Attorney General, the Attorney General's Advisory Committee, the Criminal Chiefs Working Group, the Appellate Chiefs Working Group, the Professional Responsibility Advisory Office, and the Office of Professional Responsibility. The working group produced this consensus document intended to assist Department prosecutors to understand their obligations and to manage the discovery process.

By following the steps described below and being familiar with laws and policies regarding discovery obligations, prosecutors are more likely to meet all legal requirements, to make considered decisions about disclosures in a particular case, and to achieve a just result in every case. Prosecutors are reminded to consult with the designated criminal discovery coordinator in their office when they have questions about the scope of their discovery obligations. Rules of Professional Conduct in most jurisdictions also impose ethical obligations on prosecutors regarding discovery in criminal cases. Prosecutors are also reminded to contact the Professional Responsibility Advisory Office when they have questions about those or any other ethical responsibilities.

Department of Justice Guidance for Prosecutors Regarding Criminal Discovery

Step 1: Gathering and Reviewing Discoverable Information[FN1]

A. Where to look—The Prosecution Team

Department policy states:

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

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

In most cases, "the prosecution team" will include the 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 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. Courts will generally evaluate the role of a state or local law enforcement agency on a case-by-case basis. Therefore, prosecutors should make sure they understand the law in their circuit and their office's practice regarding discovery in cases in which a state or local agency participated in the investigation or on a task force that conducted the investigation.

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

Although the considerations set forth above generally apply in the context of national security investigations and prosecutions, special complexities arise in that context. Accordingly, the Department expects to issue additional

guidance for such cases. Prosecutors should begin considering potential discovery obligations early in an investigation that has national security implications and should also carefully evaluate their discovery obligations prior to filing charges. This evaluation should consider circuit and district precedent and include consultation with national security experts in their own offices and in the National Security Division.

B. What to Review

To ensure that all discovery is disclosed on a timely basis, generally all potentially discoverable material within the custody or control of the prosecution team should be reviewed.[FN2] The review process should cover the following areas:

1. The Investigative Agency's Files: With respect to Department of Justice law enforcement agencies, with limited exceptions,[FN3] 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.[FN4] 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 obligalions 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 victimúwitness 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 discoverablc 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[FN5] should be memorialized by the agent.[FN6] 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. 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).

Step 2: Conducting the Review

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.

Step 3: Making the Disclosures

The Department's disclosure obligations are generally set forth in Fed.R.Crim.P. 16 and 26.2, 18 U.S.C. § 3500 (the Jencks Act), *Brady*, and *Giglio* (collectively referred to herein as "discovery obligations"). 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 sct forth above.

A. Considerations Regarding the Scope and Timing of the Disclosures: Providing broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases. It also provides a margin of error in case the 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.

B. Timing: Exculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant reasonably promptly after discovery. Impeachment information, which depends on the 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.

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

Step 4: Making a Record

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.

Conclusion

Compliance with discovery obligations is important for a number of reasons. First and foremost, however, such compliance will facilitate a fair and just result in every case, which is the Department's singular goal in pursuing a criminal prosecution. This guidance does not and could not answer every discovery question because those obligations are often fact specific. However, prosecutors have at their disposal an array of resources intended to assist them in evaluating their discovery obligations including supervisors, discovery coordinators in each office, the Professional Responsibility Advisory Office, and online resources available on the Department's intranet website, not to mention the experienced career prosecutors throughout the Department. And, additional resources are being developed through efforts that will be overseen by a full-time discovery expert who will be detailed to Washington from the field. By evaluating discovery obligations pursuant to the methodical and thoughtful approach set forth in this guidance and taking advantage of available resources, prosecutors are more likely to meet their discovery obligations in every case and in so doing achieve a just and final result in every criminal prosecution. Thank you very much for your efforts to achieve those most important objectives.

FN 1. For the purposes of this memorandum, "discovery" or "discoverable information" includes information required to be disclosed by Fed.R.Crim.P. 16 and 26.2, the Jencks Act, *Brady*, and *Giglio*, and additional information disclosable pursuant to USAM 9-5.001.

FN 2. How to conduct the review is discussed below.

FN 3. Exceptions to a prosecutor's access to Department law enforcement agencies' files are documented in agency policy, and may include, for example. access to a non-testifying source's files.

FN 4. Nothing in this guidance alters the Department's Policy Regarding the Disclosure to Prosecutors of PotentiaJ Impeachment Information Concerning Law Enforcement Agency Witnesses contained in USAM 9-5.100.

FN 5. "Interview" as used herein refers to a formal question and answer session with a potential witness conducted for the purpose of obtaining information pertinent to a matter or case. It does not include conversations with a potential witness for the purpose of scheduling or attending to other ministerial matters. Potential witnesses may provide substantive information outside of a formal interview, however. Substantive, case-related communications are addressed above.

FN 6. In those instanccs in which an interview was audio or video recorded, further memorialization will generally not be necessary.

[added January 2010] [cited in USAM 9-5.001; 9-5.100]

1737 Civil Action to Enjoin the Obstruction of Justice -- 18 U.S.C. § 1514

The Victim and Witness Protection Act of 1982 created a Federal civil cause of action authorizing a United States District Court to restrain the "harassment" of crime victims and witnesses or to prevent and restrain existing or imminent violations of 18 U.S.C. §§ 1512 (excluding those consisting of misleading conduct) and 1513. This amendment, which is codified at 18 U.S.C. § 1514, defines "harassment" as "a course of conduct directed at a specific person that causes substantial emotional distress. . .and serves no legitimate purpose." 18 U.S.C. § 1514(c). *See United States v. Cofield*, 11 F.3d 413, 418, n.6 (4th Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994); *Shepherd v. American Broadcasting Companies, Inc.*, 151 F.R.D. 194, 204 (D.C. Cir. 1993), *rev'd on other grounds*, 62 F.3d 1469 (D.C. Cir. 1995); *United States v. Tison*, 780 F.2d 1569 (11th Cir. 1986) (it was harassing conduct for a party to intimidate another into not providing accurate information to Federal law enforcement officials and to file a civil lawsuit in order to obtain information not discoverable in a pending criminal proceeding). A government attorney is responsible for bringing such an action. *Shepherd*, 151 F.R.D. at 204.

Section 1514 sets out the manner in which an attorney for the government may request an ex parte request for a temporary restraining order (TRO) to prevent the harassment of a witness in both criminal and civil matters involving the Federal government. *Shepard*, 151 F.R.D. 194 at 204. A court may provide two forms of equitable relief: a TRO or a protective order. A TRO may be sought and may be issued without notice to the adverse party if it is shown that notice should not be given and that the government has "a reasonable probability" of prevailing on the merits. The standard of proof for a TRO is described as "reasonable grounds." *United States v. Stewart*, 872 F.2d 957, 962 (10th Cir. 1989). The life of a TRO cannot exceed 10 days, unless good cause to prolong the order is shown before its expiration, in which case a district judge may extend the order for up to 10 days or for a longer period agreed to by the adverse party. In contrast, a protective order must be preceded by an adversary hearing, and the standard of proof for the government is "preponderance of the evidence." The life of a protective order cannot exceed three years, but a second protective order may be sought during the last 90 days of the first.

On its face, section 1514 appears to limit the scope of equitable relief permitted since it makes express provision only for TROs and protective orders "prohibiting harassment of a victim or witness in a federal criminal case." Since "'harassment' means a course of conduct directed at a specific person that. . .causes substantial emotional distress in such person," it could be argued that section 1514 does not comprehend third-party harassment such as the intimidation of a witness' friend for the purpose of dissuading the witness from testifying at a trial. Although the statute is ambiguous on this point, it is clear that the statute does not cover the harassment of jurors and officers of the court.For the legislative history of 18 U.S.C. § 1514, *see* S. Rep. No. 532, 97th Cong., 2d Sess. 27-29, *reprinted in* 1982 U.S.C.C.A.N. 2515, 2533-35; and 128 Cong.Rec. H8204-05 (daily ed. Sept. 30, 1982).

[cited in USAM 9-69.100]

2054 Synopsis of Classified Information Procedures Act (CIPA)

I. DEFINITIONS, PRETRIAL CONFERENCE, PROTECTIVE ORDERS AND DISCOVERY

After a criminal indictment becomes public, the prosecutor remains responsible for taking reasonable precautions against the unauthorized disclosure of classified information during the case. This responsibility applies both when the government intends to use classified information in its case-in-chief as well as when the defendant seeks to use classified information in his/her defense. The tool with which the proper protection of classified information may be ensured in indicted cases is the Classified Information Procedures Act (CIPA). *See* Title 18, U.S.C. App III.

CIPA is a procedural statute; it neither adds to nor detracts from the substantive rights of the defendant or the discoery obligations of the government. Rather, the procedure for making these determinations is different in that it balances the right of a criminal defendant with the right of the sovereign to know in advance of a potential threat from a criminal prosecution to its national security. *See, e.g.*, *United States v. Anderson*, 872 F.2d 1508, 1514 (11th Cir.), *cert. denied*, 493 U.S. 1004 (1989); *United States v. Collins*, 720 F.2d 1195, 1197 (11th Cir. 1983); *United States v. Lopez-Lima*, 738 F. Supp. 1404, 1407 (S.D.Fla. 1990). Each of CIPA's provisions is designed to achieve those dual goals: preventing unnecessary or inadvertent disclosures of classified information and advising the government of the national security "cost" of going forward.

A. *Definitions of Terms*

Section 1 of CIPA defines "classified information" and "national security," both of which are terms used throughout the statute. Subsection (a), in pertinent part, defines "classified information" as:

> [A]ny information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security.

Subsection (b) defines "national security" to mean the "national defense and foreign relations of the United States."

B. *Pretrial Conference*

Section 2 provides that "[a]t any time after the filing of the indictment or information, any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution." Following such a motion, the district court "shall promptly hold a pretrial conference to establish the timing of requests for discovery, the provision of notice required by Section 5 of this Act, and the initiation of the procedure established by Section 6 (to determine the use, relevance, or admissibility of classified information) of this Act."

C. *Protective Orders*

completed the government's review of any classified material and have identified any such material that is arguably subject to the government's discovery obligation. Where supported by law, the prosecutor, during the proceeding, should first strive to have the court exclude as much classified information as possible from the government's discovery obligation. Second, to the extent that the court rules that certain classified material is discoverable, the prosecutor should seek the court's approval to utilize the alternative measures described in section 4, i.e., unclassified summaries and/or stipulations. The court's denial of such a request is subject to interlocutory appeal. *See* Section III.A, *infra*.

II. SECTIONS 5 AND 6: NOTICE AND PRETRIAL EVIDENTIARY RULINGS

NOTICE OF INTENT TO USE CLASSIFIED INFORMATION

Following the discovery process under section 4, there are three critical pretrial steps in the handling of classified information under sections 5 and 6 of CIPA. First, the defendant must specify in detail, in a written notice, the precise classified information he reasonably expects to disclose. Second, the Court, upon a motion of the Government, shall hold a hearing pursuant to section 6(a) to determine the use, relevance and admissibility of the proposed evidence. Third, following the 6(a) hearing and formal findings of admissibility by the Court, the Government may move to substitute redacted versions of classified documents from the originals or to prepare an admission of certain relevant facts or summaries for classified information that the Court has ruled admissible.

A. The Section 5(a) Notice Requirement

PRETRIAL EVIDENTIARY HEARING, SUBSTITUTIONS AND STIPULATIONS

The linchpin of CIPA is section 5(a), which requires a defendant who reasonably intends to disclose (or cause the disclosure of) classified information to provide timely pretrial written notice of his intention to the Court and the Government. Section 5(a) expressly requires that such notice "include a brief description of the classified information," and the leading case under section 5(a) holds that such notice

> must be *particularized*, setting forth *specifically* the classified information which the defendant reasonably believes to be necessary to his defense.

United States v. Collins, 720 F.2d 1195, 1199 (11th Cir. 1983) (emphasis added) *See also United States v. Smith*, 780 F.2d 1102, 1105 (4th Cir. 1985) (*en banc*). This requirement applies both to documentary exhibits and to oral testimony, whether it is anticipated to be brought out on direct or on cross-examination. *See, e.g.*, *United States v. Collins*, *supra*, (testimony); *United States v. Wilson*, 750 F.2d 7 (2d Cir. 1984) (same).

If a defendant fails to provide a sufficiently detailed notice far enough in advance of trial to permit the implementation of CIPA procedures, section 5(b) provides for preclusion. *See United States v. Badia*, 827 F.2d 1458, 1465 (11th Cir. 1987). Similarly, if the defendant attempts to disclose at trial classified information which is not described in his/her section 5(a) notice, preclusion is the appropriate remedy prescribed by section 5(b) of the statute. *SeeUnited States v. Smith*, *supra*, 780 F.2d at 1105 ("A defendant is forbidden from disclosing any such information absent the giving of notice").

B. The Section 6(a) Hearing

The purpose of the hearing pursuant to section 6(a) of CIPA is for the court "to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial...." 18 U.S.C. App. III § 6(a). The statute expressly provides that, after a pretrial section 6(a) hearing on the admissibility of evidence, the court shall enter its rulings *prior* to the commencement of trial. If the Attorney General or his/her designee certifies to the court in a petition that a public proceeding may result in the disclosure of classified information, then the hearing will be held *in camera*. CIPA does not change the "generally applicable evidentiary rules of admissibility," *United States v. Wilson*, *supra* 750 F.2d at 9, but rather alters the *timing* of rulings as to admissibility to require them to be made before the trial. *Accord*, *United States v. Smith*, *supra*, 780 F.2d at 1106.

At the section 6(a) hearing, the court is to hear the defense proffer and the arguments of counsel, and then rule whether the classified information identified by the defense is relevant under the standards of Fed.R.Evid. 401. *United States v. Smith*, *supra*, 780 F.2d at 1106. The court's inquiry does not end there, for under Fed.R.Evid. 402, not all relevant evidence is admissible at trial. The Court therefore must also determine whether the evidence is cumulative, prejudicial, confusing, or misleading," *United States v. Wilson*, *supra*, 750 F.2d at 9, so that it should be excluded under Fed.R.Evid. 403.

At the conclusion of the section 6 (a) hearing, the court must state in writing the reasons for its determination as to each item of classified information. 18 U.S.C. App..III section 6(a).

C. *Substitution Pursuant to Section 6(c)*

If the court rules any classified information to be admissible, section 6(c) of CIPA permits the Government to propose unclassified "substitutes" for that information. Specifically, the Government may move to substitute either (1) a statement admitting relevant facts that the classified information would tend to prove or (2) a summary of the classified information instead of the classified information itself. 18 U.S.C. App. III section 6(c)(1). *See United States v. Smith*, *supra*, 780 F.2d at 1105. In many cases, the government will propose a redacted version of a classified document as a substitution for the original, having deleted only non-relevant classified information. A motion for substitution shall be granted if the "statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specified classified information." 18 U.S.C. App. III section 6(c).

If the district court will not accept a substitution proposed by the government, an interlocutory appeal may lie to the circuit court under CIPA section 7. If the issue is resolved against the government, and classified information is thereby subject to a disclosure order of the court, the AUSA must immediately notify the ISS. Thereafter, the Attorney General may file an affidavit effectively prohibiting the use of the contested classified information. If that is done, the court may impose sanctions against the government, which may include striking all or part of a witness' testimony,

resolving an issue of fact against the United States, or dismissing part or all of the indictment. *See* CIPA section 6(e). The purpose of the relevance hearings under 6(a) and the substitution practice under 6(c), however, is to avoid the *necessity* for these sanctions.

III. OTHER RELEVANT CIPA PROCEDURES

A. *Interlocutory Appeal*

APPEAL FROM INTERLOCUTORY ORDER

Section 7(a) of the Act provides for an interlocutory appeal by the government from any decision or order of the trial judge authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information. Section 7 appeals must be approved by the Solicitor General. The term "disclosure" within the meaning of section 7 includes both information which the court orders the government to divulge to the defendant or to others as well as information already possessed by the defendant which he or she intends to disclose to unapproved people. Section 7(b) provides that the court of appeals shall give expedited treatment to any interlocutory appeal filed under subsection (a). As a matter of *fairness*, the policy of the Department shall be that the defense be given notice of the government's appeal under section 7.

B. Introduction of Classified Information

Section 8(a) provides that "writings, recordings, and photographs containing classified information may be admitted into evidence without change in their classification status." This provision simply recognizes that classification is an executive, not a judicial, function. Thus, section 8(a) implicitly allows the classifying agency, upon completion of the trial, to decide whether the information has been so compromised during trial that it could no longer be regarded as classified.

In order to prevent "unnecessary disclosure" of classified information, section 8(b) permits the court to order admission into evidence of only a part of a writing, recording, or photograph. Alternatively, the court may order into evidence the whole writing, recordings, or photograph with excision of all or part of the classified information contained therein. However, the provision does not provide grounds for excluding or excising part of a writing or recorded statement which ought in fairness to be considered contemporaneously with it. Thus, the court may admit into evidence part of a writing, recording, or photograph only when fairness does not require the whole document to be considered.

Section 8(c) provides a procedure to address the problem presented during a pretrial or trial proceeding when the defendant's counsel asks a question or embarks on a line of inquiry that would require the witness to disclose classified information not previously found by the court to be admissible. If the defendant knew that a question or line of inquiry would result in disclosure of classified information, he/she presumably would have given the government notice under section 5 and the provisions of section 6(a) would have been used. Section 8(c) serves, in effect, as a supplement to the hearing provisions of section 6(a) to cope

with situations which cannot be handled effectively under that section, e.g., where the defendant does not realize that the answer to a given question will reveal classified information. Upon the government's objection to such a question, the court is required to take suitable action to avoid the improper disclosure of classified information.

C. Security Procedures

Section 9 required the Chief Justice of the United States to prescribe security procedures for the protection of classified information in the custody of Federal courts. On February 12, 1981, Chief Justice Burger promulgated these procedures. For further information regarding those procedures, please contact the Justice Management Division Office of Security, (202) 514-2094.

D. Public Testimony By Intelligence Officers

Although the IC is committed to assisting law enforcement where it is legally proper to do so, it must also remain vigilant in protecting classified national security information from unauthorized disclosure. Just as with law enforcement agencies, the successful functioning of the IC turns in significant part upon the ability of its intelligence officers covertly to obtain information from human sources. In carrying out that task, the intelligence officers must, when necessary, be able to operate anonymously, that is, without their connection to an intelligence agency of the United States being known to the persons with whom they come in contact. For that reason, an intelligence agency is authorized under Executive Order 12958 to classify the true name of an intelligence officer.

During the pre-trial progression of an indicted case, as the court enters its CIPA rulings under sections 4 and 6, it may become apparent to the prosecutor that testimony may be required from an intelligence officer or other agency representative engaged in covert activity, either because the Court has ruled under CIPA that certain evidence is relevant and admissible in the defense case, or because such testimony is necessary in the government's rebuttal. Just as the substance of that testimony, to the extent it is classified and is being offered by the defense, must be the subject of CIPA determinations by the court, the prosecutor must also ensure that the same considerations are afforded to the true names of covert intelligence community personnel, if those true names are classified information. That is, the prosecutor must seek the court's approval, under either CIPA section 4 or section 6, of an alternative method to the witness' testimony in true name that will provide the defendant with the same ability that he would have otherwise had to impeach, or bolster, the credibility of that witness.

In any criminal case in which it becomes likely that an intelligence agency employee will testify, the Assistant United States Attorney (AUSA) assigned to the case shall immediately notify the Internal Security Section (ISS). That office, in consultation with the general

counsel at the appropriate intelligence agency, will assist the AUSA during pretrial motion practice and litigation on the issue of whether the witness should testify in true name and other issues related to the testimony of intelligence agency personnel.

[cited in USAM 9-90.240]

EXHIBIT M

Criminal Discovery

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Director

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Introduction to the Criminal Discovery Issue of the USA Bulletin

The Hon. James M. Cole
Deputy Attorney General of the United States
United States Department of Justice

It is with great pleasure that I introduce this edition of the United States Attorneys' Bulletin devoted to such a significant subject as criminal discovery. As you all know, over the past three years, the Department of Justice has taken major strides to ensure that federal prosecutors throughout the nation have the supervision, guidance, and training necessary to meet our disclosure obligations in criminal cases. And we have been transparent to the judiciary, the Criminal Rules Committee, the defense bar, and Congress in carrying out this objective.

During my tenure as Deputy Attorney General, I have been directly involved in various facets of this effort, ranging from issuing several important memoranda concerning criminal discovery to testifying before the Senate Judiciary Committee in June 2012 at a hearing entitled, "Ensuring that Federal Prosecutors Meet Discovery Obligations."

In complying with our disclosure responsibilities in criminal cases, prosecutors must ensure that a defendant's constitutional rights are protected. Yet, we must discharge this important responsibility while simultaneously ensuring that the criminal trial process reaches timely and just results, protects victims and witnesses from retaliation or intimidation, safeguards ongoing criminal investigations, and protects critical national security interests.

The articles in this Bulletin will help prosecutors achieve these goals by providing topical guidance on a wide array of issues. They are interesting to read, highly instructive, and offer practical advice. The articles also complement one another in many ways. The Bulletin contains articles concerning: the new Criminal ESI Protocol—a topic I discussed at the Georgetown Law Center in April 2012; the importance of "materiality" for prosecutors' day-to-day responsibilities; potential *Giglio* information for law enforcement witnesses; *Brady* and *Giglio* implications of Federal Rule of Evidence 806 relating to hearsay declarants; scope of the prosecution team, particularly where there are parallel proceedings; the potential conflict between *Brady* and the attorney-client privilege; and discovery implications of the Crime Victims' Rights Act. Collectively, these articles will be an important resource for prosecutors now and for many years to come.

This edition of the United States Attorneys' Bulletin is the latest resource the Department has made available to federal prosecutors on the subject of criminal discovery. In March of this year, the Attorney General issued a memorandum entitled "Criminal Discovery Resources and Training," summarizing the Department's most significant criminal discovery efforts over the past three years.

One of my top priorities as Deputy Attorney General is to ensure that all prosecutors are prepared to meet the challenges presented by criminal discovery. Each United States Attorney's office and Main Justice criminal component has one or more Criminal Discovery Coordinators who are responsible for providing guidance to prosecutors on discovery-related topics. In addition, in November 2011, the Department moved the National Criminal Discovery Coordinator position into my office and made it a permanent position. I encourage you to discuss discovery-related issues with supervisors and

the Criminal Discovery Coordinators in your office, and—if it would be helpful—to reach out to Andrew Goldsmith, the current National Criminal Discovery Coordinator, as well, at Andrew.Goldsmith@usdoj.gov.

Thank you for all you do to make sure our pursuit of justice is done fairly and effectively.

The Hon. James M. Cole
Deputy Attorney General
United States Department of Justice

The New Criminal ESI Discovery Protocol: What Prosecutors Need to Know

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I. Introduction

Criminal cases are built increasingly upon electronically stored information (ESI). Today, the key evidence is just as likely to be the defendant's emails to co-conspirators, a bank's electronic records of money laundering transactions, or digital video surveillance of a bank robbery, as it is the defendant's fingerprints or his confession. Managing electronic information means jumping into a new world of technology that changes rapidly. Every day brings new hardware and operating systems for smart phones and computers; new developments for Facebook, Twitter, and other commercial services; and new strategies for managing and searching for information described by terms such as "predictive coding" and "computer-assisted searching." In order to help prosecutors meet these challenges when it comes to disclosing ESI in criminal cases, the Department of Justice has developed a ground-breaking protocol containing a comprehensive set of best practices.

II. Illustrative Cases: *Briggs* and *Stirling*

Two recent cases illustrate the new discovery challenges posed by ESI for prosecutors. The first of these cases, *United States v. Briggs*, 2011 WL 4017886 (W.D.N.Y. Sept. 8, 2011) and 831 F. Supp. 2d 623 (W.D.N.Y. 2011) (partial reconsideration), involves a multi-defendant drug conspiracy currently pending in Buffalo, New York. In *Briggs*, the prosecutors produced wiretap data from the DEA's Voicebox software and other discovery using IPRO, a suite of software products commonly used by United States Attorneys' offices in most cases. The defendants disputed the use of IPRO, arguing that IPRO's TIFF images ("tagged image file format") could not be sorted or searched. The defendants claimed they were entitled to production in different file formats that would give them more extensive electronic searching, sorting, and tagging features. In particular, the defendants argued they were entitled to the Voicebox data in a fully functional Excel spreadsheet. The government responded that concerns about redaction of informant information from the original "native files," server space, and cost limited what it could provide.

Although the Magistrate Judge rejected wholesale adoption of the Federal Rules of Civil Procedure as the standard for production of criminal ESI, he borrowed one of its principles:

> For purposes of the motion *in this case*, the standard of Federal Rule of Civil Procedure 34(b)(2)(E)(ii) *should apply here*, that is the Government produces this ESI "in a reasonably

> usable form or forms." While Rule 34(b)(2)(E) notes options for production as documents "are kept in the usual course of business," Fed.R.Civ.P. 34(b)(2)(E)(i), here that would lead either to producing these materials in their native formats (with the redaction issues discussed above) or via IPRO with its limited search capabilities (since IPRO is the Government's usual course of business to present such quantities of information for trial). That rule also states that "a party need not produce the same electronically stored information in more than one form," *id.*, R. 34(b)(2)(E)(iii). But here the Government is ordered to replace the production by IPRO and produce it in another way.

2011 WL 4017886 at *8 (emphasis in original).

The Magistrate Judge determined that "as between the Government and defense, the Government is in the better position to organize this mass of information and re-present it in a manner that is searchable by the defense," and that the government must choose "a reasonably usable form," but that the defendants could not dictate which electronic form the government must use. According to the court, native files or searchable PDF files were acceptable. *Id.* Subsequent to the government's original response to the discovery motion, it was determined that the Voicebox data could be provided in searchable PDF format without causing a server space issue. After the data was provided as searchable PDF files, the defendants objected to this format as not allowing for the same searching and sorting as Excel files. The government objected to providing the data in Excel as the integrity of the data could not be insured. The Magistrate Judge issued an order supporting the government's decision to provide the Voicebox data in searchable PDF format. In July 2012, the District Court upheld this order.

Another new case illustrates additional challenges in dealing with ESI. In *United States v. Stirling*, Case No. 1:11-cr-20792-CMA (S.D. Fla. June 5, 2012), the government seized the defendant's computer pursuant to a search warrant and provided the defendant with a forensic copy of the hard drive. Before trial, an FBI analyst performed a forensic examination of the hard drive, determined that the defendant had "chatted" with his co-defendants via Skype, extracted that information from the hard drive, and converted it into text format, which totaled 214 pages. According to the court, this information was "not readily available by opening the folders appearing on the hard drive." The government did not provide the Skype evidence to the defendant before trial in text format and did not use it in its case-in-chief. It did, however, notify the defendant that there was evidence on the hard drive that it would use to impeach him if he testified. The defendant testified, and in rebuttal the government used the text-format Skype chat log to impeach his testimony. In the court's view, "[p]roduction of something in a manner which is unintelligible is really not production," noting that the log "had a devastating impact" and "irreparably damaged [defendant's] credibility and his duress defense." *Id.* at 2. Following the jury's guilty verdict, the court granted a new trial under Rule 33 "in the interest of justice."

The court cited *Briggs* for the principle that, "while the Federal Rules of Civil Procedure need not be adopted as the standard for production of criminal ESI, the standard of Federal Rule of Civil Procedure 34(b)(2)(E)(ii) should apply and the Government be required to produce ESI in a reasonably usable form." (citing to *Briggs*, 2011 WL 4017886, at *8). According to the *Stirling* court:

> If, in order to view ESI, an indigent defendant such as Stirling needs to hire a computer forensics expert and obtain a program to retrieve information not apparent by reading what appears in a disk or hard drive, then such a defendant should so be informed by the Government, which knows of the existence of the non-apparent information. In such instance, and without the information or advice to search metadata or apply additional programs to the disk or hard drive, production has not been made in a reasonably usable form.

Id. at 4-5. The court concluded that simply providing the forensic image—when the government knew of the Skype chat log—did not satisfy Rule 16(a)(1)(B)(i)'s requirement that the government disclose any relevant written or recorded statement by the defendant if the statement is within the government's possession, custody, or control, and the attorney for the government knows it exists.

The significance of *Stirling* remains to be seen. Defense attorneys and law professors quickly hailed the decision. *See, e.g.*, *New Trial Ordered for ESI Discovery Violation - Electronic Evidence Must be Usable*, WHITE COLLAR CRIME PROF. BLOG, June 6, 2012 ("In light of the prevalence of ESI discovery in white collar cases it is ironic that an important principle regarding electronic discovery is developed for us in an indigent's drug smuggling case. But, we'll take it!"), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/2012/06/new-trial-ordered-for-discovery-violation-document-dumps-do-not-work.html. On the one hand, the court's ruling seems to require the government to identify incriminating evidence for the defendant so he can structure his testimony in a way that conforms to the evidence. On the other hand, *Stirling* is probably limited to its unique facts and circumstances: in other words, in cases involving indigent defendants and particularly complex ESI, some courts may interpret Rule 16(a)(1)(B)(i) broadly.

III. The New ESI Discovery Protocol

To help prosecutors and defense attorneys cope with the new challenges of electronic information, the Department of Justice developed a set of best practices for ESI discovery management in collaboration with the Office of Defender Services (ODS), Federal Defender Organizations (FDO), private attorneys who accept Criminal Justice Act (CJA) appointments, representatives of the Administrative Office of United States Courts, and liaisons from the United States Judiciary. On February 13, 2012, the new Criminal ESI Discovery Protocol (Protocol) was simultaneously issued by Deputy Attorney General James Cole on behalf of the Department, and representatives of ODS, FDO, CJA, as well as the federal judiciary. DEP'T OF JUSTICE AND ADMIN. OFFICE OF THE U.S. COURTS JOINT WORKING GRP. ON ELEC. TECH. IN THE CRIMINAL JUSTICE SYS., *Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases* (2012), *available at* http://www.fd.org/docs/litigation-support/final-esi-protocol.pdf.

The Protocol quickly received attention in media reports (*see, e.g.*, Eric Topor, *Joint Federal Criminal E-Discovery Protocol Places Cooperation Above Motion Filings*, BLOOMBERG BNA: DIGITAL DISCOVERY & E-EVIDENCE, Mar. 1, 2012); garnered praise from the judiciary and defense bar; and became the main topic of a wide variety of conferences and programs. For example, in April 2012, representatives from the Department, ODS, PDO, and CJA, who were directly responsible for developing the Protocol, participated in a program at Georgetown University Law Center entitled "The New Criminal ESI Protocol: What Judges and Practitioners Need to Know," at which Deputy Attorney General James Cole delivered the opening remarks. Consistent with the Department's long-term commitment in this area, every prosecutor will receive training on the Protocol this year. The Department will also be assisting the Federal Judicial Center in training members of the federal bench.

The Protocol has several goals: efficient management of post-indictment discovery between the government and criminal defendants, reducing costs for the government and defendants, fostering communication between prosecutors and defense counsel about ESI discovery issues, avoiding unnecessary pretrial litigation over ESI discovery, promoting uniform best practices for recurring issues, and protecting the security of sensitive information produced as discovery.

The Protocol consists of four parts:

- 10 core principles that guide the best practices, which contain hyperlinks to other parts of the Protocol
- "Recommendations" for ESI discovery that provide the general framework for managing ESI, including planning, production, transmission, dispute resolution, and security
- "Strategies and commentary" that provide technical and more particularized guidance for implementing the recommendations, as well as definitions of common ESI terms
- A one-page checklist for addressing ESI production issues.

IV. The 10 guiding principles

The 10 guiding principles borrow from common sense, the developing e-discovery case law, accepted practices, and the desire to encourage discussion rather than litigation:

- **Principle 1**: Lawyers have a responsibility to have an adequate understanding of electronic discovery.
- **Principle 2**: In the process of planning, producing, and resolving disputes about ESI discovery, the parties should include individuals with sufficient technical knowledge and experience regarding ESI.
- **Principle 3**: At the outset of a case, the parties should meet and confer about the nature, volume, and mechanics of producing ESI discovery. Where the ESI discovery is particularly complex or produced on a rolling basis, a continuing dialogue may be helpful.
- **Principle 4**: The parties should discuss what formats of production are possible and appropriate, and what formats can be generated. Any format selected for producing discovery should maintain the ESI's integrity, allow for reasonable usability, reasonably limit costs, and, if possible, conform to industry standards for the format.
- **Principle 5**: When producing ESI discovery, a party should not be required to take on substantial additional processing or format conversion costs and burdens beyond what the party has already done or would do for its own case preparation or discovery production.
- **Principle 6**: Following the meet and confer, the parties should notify the court of ESI discovery production issues or problems that they reasonably anticipate will significantly affect the handling of the case.
- **Principle 7**: The parties should discuss ESI discovery transmission methods and media that promote efficiency, security, and reduced costs. The producing party should provide a general description and maintain a record of what was transmitted.
- **Principle 8**: In multi-defendant cases, the defendants should authorize one or more counsel to act as the discovery coordinator(s) or seek appointment of a Coordinating Discovery Attorney.
- **Principle 9**: The parties should make good faith efforts to discuss and resolve disputes over ESI discovery, involving those with the requisite technical knowledge when

necessary, and they should consult with a supervisor, or obtain supervisory authorization, before seeking judicial resolution of an ESI discovery dispute or alleging misconduct, abuse, or neglect concerning the production of ESI.

- **Principle 10**: All parties should limit dissemination of ESI discovery to members of their litigation team who need and are approved for access, and they should also take reasonable and appropriate measures to secure ESI discovery against unauthorized access or disclosure.

Principle 1 is the linchpin. In the past, many prosecutors and defense lawyers took a hands-off approach to e-discovery, believing it was something for their IT staffs to address and solve. Today, management of electronic information is often front and center in litigation, and courts rightfully expect the lawyers to understand and solve— with help— their e-discovery issues. Principle 2 is also critically important because the technology of e-discovery is changing so quickly that specialized knowledge is important to address e-discovery issues.

V. Scope of the Protocol and its limitations

There is no "one-size-fits-all" approach to ESI discovery, and the Protocol recognizes that by stating it only applies to cases where the volume and/or nature of the ESI produced as discovery significantly increases the complexity of the case. Discovery in smaller, less complex cases can be managed adequately without the Protocol and/or by using paper copies.

The Protocol does not alter any party's substantive legal discovery obligations, which arise under *Brady v. Maryland*, *Giglio v. United States*, the Jencks Act, and Federal Rule of Criminal Procedure 16. Nor does it apply to ESI that is contraband (for example, child pornography) or in cases involving classified information.

In pretrial litigation around the country, some defense attorneys have attempted to seize upon particular phrases to argue that the government has not complied with the Protocol. This approach misapprehends the nature and structure of the Protocol. Instead, the Protocol prominently states that it sets forth "a collaborative approach to ESI discovery involving mutual and interdependent responsibilities." Protocol, at 3. Also, its recommendations "may not serve as a basis for allegations of misconduct or claims for relief and they do not create any rights or privileges for any party." *Id.* at 5. In essence, the Protocol describes a set of best practices that form the steps of a process, and not a set of rules for the parties to flourish like swords.

VI. Highlights of the Protocol

A. Involving people with technical knowledge

With e-discovery, there are many ways for the train to become derailed. E-discovery savvy technicians can help anticipate and solve technical and strategic e-discovery issues, so the Protocol recommends that "each party should involve individuals with sufficient technical knowledge and experience to understand, communicate about, and plan for the orderly exchange of ESI discovery." *Id.* Two central issues in the *Briggs* case were technical—the matter of searchable text in the government's initial production and how the Voicebox data would be produced. These are examples of issues where early participation by e-discovery technicians could assist prosecutors. Solving technical issues early can help avoid the repetitive discovery productions ordered in *Briggs.*

B. The producing party decides how to produce discovery

One of the Protocol's key provisions is that the receiving party does not get to dictate how the producing party's discovery will be produced: "the producing party is not obligated to undertake additional processing desired by the receiving party that is not part of the producing party's own case preparation or discovery production." *Id.* at 4. The Protocol seeks to strike a balance, and the corollary recommendation is:

> Nonetheless, with the understanding that in certain instances the results of processing ESI may constitute work product not subject to discovery, these recommendations operate on the general principle that where a producing party elects to engage in processing of ESI, the results of that processing should, unless they constitute work product, be produced in discovery along with the underlying ESI so as to save the receiving party the expense of replicating the work.

Id. at 6-7.

One goal of the Protocol is to save the parties' money by reducing unnecessary duplication of processing. Thus, for example, if the government receives business records in PDF and uses the PDF files for its own case preparation, then it is not obliged to undertake additional processing of the files to create TIFF images and OCR text simply because the defendant wants that. If the government processed the PDF files to create TIFF and OCR text for its case preparation, however, then it should produce the TIFF/text files upon the defendant's request to save the defendant the unnecessary expense of replicating the government's processing.

C. Meet-and-confer

The Protocol recommends a "meet-and-confer" session in complex ESI cases, a procedural step borrowed from civil practice. The goal of a meet-and-confer should be to identify and solve ESI discovery issues shortly after arraignment in order to move efficiently to a trial or plea. The Protocol suggests possible topics to address at the meet-and-confer session: the types and contents of ESI discovery produced; electronic forms of production; proprietary or legacy data in non-industry standard formats; privileged or work product information; confidential or personal information; incarcerated defendants; ESI discovery volume; naming conventions and logistics; software or hardware limitations; ESI from hard drives, cell phones, or other storage devices; a schedule for producing and reviewing ESI; protective orders and claw-back agreements; memorializing the parties' agreements; notice to the court of anticipated delays in producing discovery; and security of ESI discovery.

A particularly difficult discovery challenge results when the government seizes ESI storage devices from multiple defendants. This seizure could include computer hard drives, smart phones, or other devices. If these storage devices contain information outside the terms of a search warrant (which is common and often leads to a filter team review) or privileged information, the challenge of unwinding each device's owner's privacy or privilege issues becomes even more complicated. *See* Vincent J. Falvo, Jr., *When Discovery Under* Brady *May Conflict With the Attorney-Client Privilege*, in this issue. Although the government may desire to access whatever it is authorized to look at, each device's owner wants to assert privacy interests or privileges against both the government and the co-defendants. In one case, the government's failure to complete a filter team review of multiple storage devices within 15 months of the arraignment led the court to find an unreasonable search and suppress any evidence from the devices. *United States v. Metter*, 2012 WL 1744251 (E.D.N.Y. May 17, 2012). A good time to start grappling with such convoluted ESI discovery challenges is the meet-and-confer.

D. Table of contents

That the Preface to this year's *Georgetown Law Journal Annual Review of Criminal Procedure*, 41 GEO. L.J. ANN. REV. CRIM. PROC. (2012), which was written by Attorney General Holder, addresses creation of a table of contents in cases involving ESI speaks to the significance of this topic. In the Preface, entitled *In the Digital Age, Ensuring That the Department Does Justice*, the Attorney General discusses how federal prosecutors strive to exceed what the constitution requires when it comes to disclosure in criminal cases, how the ESI Protocol will enable prosecutors to address criminal discovery in the digital age, and why a table of contents is critical in cases involving large quantities of ESI.

As explicitly stated in the Protocol, a table of contents has several key benefits in complex cases involving large quantities of ESI:

> If the producing party has not created a table of contents prior to commencing ESI discovery production, it should consider creating one describing the general categories of information available as ESI discovery. In complex discovery cases, a table of contents to the available discovery materials can help expedite the opposing party's review of discovery, promote early settlement, and avoid discovery disputes, unnecessary expense, and undue delay.

Protocol, Strategies and Commentary at 2.

The Protocol then specifically references *United States v. Skilling*, 554 F.3d 529, 577 (5th Cir. 2009), *vacated in part on other grounds*, 130 S. Ct. 2896 (2011), where the Fifth Circuit analyzed the government's *Brady* obligations in the context of an ESI database that was several hundred million pages. In *Skilling*, although the government's discovery production was massive, it was electronic and searchable. Further, the government produced a set of "hot documents" and indices. The court rejected Skilling's claim that the government should have located and turned over exculpatory evidence within the voluminous discovery, finding that "the government was in no better position to locate any potentially exculpatory evidence than was Skilling." *Id.* at 577. Other courts have reached similar conclusions where the government provided searchable ESI discovery materials. *See, e.g., United States v. Warshak*, 631 F.3d 266, 297 (6th Cir. 2010); *United States v. Ohle*, 2011 WL 651849, at *4 (S.D.N.Y. Feb. 7, 2011). The *Skilling* court went on to state "it should go without saying that the government may not hide *Brady* material of which it is actually aware in a huge open file in the hope that the defendant will never find it." 554 F.3d at 577.

The purpose of creating a table of contents is *not* to require a detailed, item-by-item index; rather, it is designed to be a general guide to the organization of the materials produced. The Protocol recognizes that no single table of contents is appropriate for every case, and the producing party may devise a table of contents that is suited to the materials it provides in discovery, its resources, and other considerations.

E. Forms of production

The Protocol recommends that ESI received from third parties (for example, banks, mortgage companies, and telecommunications providers) be produced in the form it was received or in a "reasonably usable form," language that is similar to Federal Rule of Civil Procedure 34(b)(2)(E)(ii). For example, emails received as native files can be produced as native files or in another format, such as searchable PDFs or as TIFF images and OCR text with a "load file." As defined in the Protocol, a load file is a "file used to import images or data into databases. . . . Load files must be obtained and provided

in software-specific formats to ensure they can be used by the receiving party." Protocol, at 21. The meet-and-confer should address what alternatives work best for both parties. ESI received from a party's own business records should be produced in the format(s) in which it was maintained or in a reasonably usable form or forms. Discovery productions should be in industry standard formats.

Information received on paper can be produced as paper, made available for inspection, or, if it has already been converted to digital format, produced as electronic files that can be viewed and searched. However, the Protocol recommends that information received as ESI should not be printed to paper and produced unless agreed to by the parties.

Both investigative reports and witness interviews are treated separately. They can be produced on paper if they were received that way, or they can be converted to digital format. Absent particular issues such as redactions or substantial costs or burdens of additional processing, electronic versions of investigative reports and witness interviews should be produced in a searchable text format (such as ASCII text, OCR text, or plain text (.txt)) in order to avoid the expense of reprocessing the files.

F. Receiving party's new obligation

Both parties have responsibilities under the Protocol. With e-discovery there are bound to be issues, whether from technical glitches, compatibility problems, or ignorance. To identify snags before they seriously delay the process, the Protocol recommends that the receiving party (usually the defense) "should be pro-active about testing the accessibility of ESI discovery *when it is received*." *Id.* at 13 (emphasis in original). Hopefully, over time, judges will come to expect early identification of e-discovery problems and take a dim view of any attorney who shortly before trial requests a continuance or seeks other relief to address an e-discovery snafu.

G. Transmitting ESI discovery

ESI discovery should be transmitted on electronic media of sufficient size to hold the entire production, for example, a CD, DVD, or thumb drive. Media should be clearly labeled with the case name and number, the producing party, a unique identifier for the media, and a production date. The Protocol recommends three categories for email transmission of discovery based upon the sensitivity of the information: (1) not appropriate for email transmission (for example, grand jury transcripts, materials affecting witness safety, or classified information); (2) encrypted email transmission (personal identifying information or information subject to protective orders; and (3) unencrypted email transmission (other information). *Id.* at 19.

H. Informal resolution of ESI discovery matters

The Protocol encourages the parties to resolve ESI discovery disputes, whenever possible, with good faith discussions and without litigation:

> Before filing any motion addressing an ESI discovery issue, the moving party should confer with opposing counsel in a good-faith effort to resolve the dispute. If resolution of the dispute requires technical knowledge, the parties should involve individuals with sufficient knowledge to understand the technical issues, clearly communicate the problem(s) leading to the dispute, and either implement a proposed resolution or explain why a proposed resolution will not solve the dispute.

Id. at 7.

To implement this approach, the Protocol recommends that prosecutors and federal defender offices:

> should institute procedures that require line prosecutors and defenders to: (1) consult with a supervisory attorney before filing a motion seeking judicial resolution of an ESI discovery dispute, and (2) obtain authorization from a supervisory attorney before suggesting in a pleading that opposing counsel has engaged in any misconduct, abuse, or neglect concerning production of ESI.

Id. at 8.

Furthermore: "Any motion addressing an ESI discovery dispute . . . should include a statement" of the movant, stating that after consultation with the opposing party, the parties have been unable to resolve their dispute. *Id.*

I. Security — protecting sensitive ESI discovery from unauthorized access or disclosure

Recent events around the world have demonstrated the vulnerability of ESI to motivated hackers, with headlines recounting stories of commercial or governmental accounts that were hacked. ESI discovery produced in some criminal cases could be attractive to rival drug gangs, terrorist groups, commercial competitors, the news media, or hackers. At the same time, prosecutors and defense attorneys may seek to take advantage of the Internet to disseminate and share ESI discovery efficiently. Recently, the Office of Defender Services entered into a contract with Summation with the expectation of creating shared databases containing criminal discovery on the Internet to facilitate sharing and review with clients and co-defendants. CJA counsel and private defense attorneys are moving in the same direction. As a result, prosecutors have new concerns about what to produce, when to produce it, and whether the ESI discovery they produce is vulnerable to outsiders.

The Protocol recognizes that "[t]he parties' willingness to produce early, accessible, and usable ESI discovery will be enhanced by safeguards that protect sensitive information from unauthorized access or disclosure." *Id.* at 8. The Protocol recommends that the parties address security concerns and practices at the meet-and-confer, and if the producing party—usually the prosecutor— concludes that the security measures for the particular case are inadequate, then the producing party should seek a protective order from the court addressing handling of ESI discovery.

J. Coordinating discovery attorney

The Administrative Office for United States Courts has hired three full-time attorneys to help resolve e-discovery issues in complex criminal cases. The Protocol encourages federal defenders and CJA counsel to avail themselves of this new resource, or, alternatively, in a multi-defendant case, to designate one or more defense counsel as the discovery coordinator to accept the government's discovery on behalf of all defendants and manage its dissemination to the remaining defendants.

K. ESI discovery production checklist

The Protocol includes a one-page checklist covering the key recommendations. It is suitable for use during a meet-and-confer session between the parties, at arraignment, or a discovery planning conference with the court. The checklist should prove to be a handy, easy reference guide for prosecutors and defense counsel— and the court, in certain circumstances— to ensure that each important topic is covered during the various stages of criminal discovery. *Id.* at 22.

VII. Conclusion

The process of gathering evidence for criminal cases, producing discovery to defendants, presenting evidence in court, and managing the record on appeal, is rapidly moving from paper format to electronic systems. This technological advance holds great promise for improved efficiency and reduced costs for prosecutors, defendants, and courts. As we move from paper to digital systems, however, we may be in for a bumpy ride. The turbulence can be smoothed slightly by accepting that we have to master the technology, the terminology, and the strategies for effectively managing case information during the investigation, discovery phase, and trial. The new ESI Discovery Protocol is a collection of best practices to help anticipate, understand, and resolve the inevitable issues involved in complex ESI cases. Will it prevent all problems in dealing with disclosure of ESI, such as those encountered in the *Briggs* and *Stirling* cases described earlier? Probably not. But the Protocol will certainly reduce the number of problems, minimize their potential impact, and provide a predictable framework for resolving disputes when they do arise.❖

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Getting a Clue: How Materiality Continues to Play a Critical Role in Guiding Prosecutors' Discovery Obligations

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Agatha Christie's fictional detective, Hercule Poirot, was a master of perception. The significance of the charred remains of a hotel receipt, overlooked by Inspector Japp and his subordinates, was never lost on the Belgian sleuth. Such minor details usually held the key to solving the mystery and identifying the true killer. Moreover, the killer was always someone the police never suspected. Such fictional accounts, unfortunately, form the basis for many a criminal defense attorney's concern that materiality ought not to rest in the hands of the prosecution team. Yet the criminal discovery rules and case law still support the basic precept that the prosecution has an obligation to produce material, potentially exculpatory evidence to the defense, and yes, the prosecution team makes that call. The Supreme Court has stated that the "defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the [Government's] files." *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987) (citations omitted). The government is typically the "sole judge of what evidence in its possession is subject to disclosure." *United States v. Presser*, 844 F.2d 1275, 1282 (6th Cir. 1988).

While department policy and the USAM direct that prosecutors take a broad view of our discovery obligations, *Brady* material is and should remain uniquely limited to evidence that is either exculpatory or impeaching of a key witness. *See* Memorandum from Deputy Attorney General David Ogden, "Guidance for Prosecutors Regarding Criminal Discovery" (Jan. 4, 2010), *available at* http://dojnet.doj.gov/usao/eousa/ole/usabook/memo/ogden_memo.pdf (Ogden Memo). Litigation efforts to expand the definition of *Brady* to include anything favorable to the defense— regardless of materiality— should be resisted. As Deputy Attorney General James M. Cole recently explained to the Senate Judiciary Committee, expanding criminal discovery to eliminate or dilute the materiality

requirement threatens to undermine other key aspects of the criminal process, including the need to protect the privacy and security of victims and witnesses, and national security. Witnesses have, unfortunately, been threatened or killed based upon information produced in discovery. Statement of Deputy Attorney General James M. Cole before the Senate Judiciary Committee (June 6, 2012), *available at* http://www.justice.gov/iso/opa/dag/speeches/2012/dag-speech-120606.html.

Prosecutors, who are intimately familiar with the facts and particular security risks associated with their cases, are in the best position to manage both the culling and timing of discovery. And courts are well-equipped to assess when and whether prosecutors misstep. But while it is well-established *who* must first determine whether a report, statement, or tangible item is material, judges who must ultimately decide *whether* we have made the correct call are often confronted with a myriad of interpretations for what constitutes "material" material. The materiality requirement appears in *Brady v. Maryland*, 373 U.S. 83 (1963), and although the wording of the test for materiality is sometimes phrased in different ways by different courts, the test generally refers to information that would "put the whole case in . . . a different light . . . ." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995); *see also United States v. Ferguson*, 2012 WL 511489, at *16 (E.D. Mich. Feb. 16, 2012) (explaining that *Brady* material refers to information relevant to guilt or innocence, and it does not encompass anything and everything that might aid a defendant's trial preparation). Since *Kyles v. Whitley*, the Court has consistently described the test for a constitutional violation as whether the information at issue is of such significance that its nondisclosure "undermines confidence in the outcome of the trial." *Whitley*, 514 U.S. at 434 (quoting *United States v. Bagley*, 473 U.S. 667 (1985)). "[The] touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* Any effort to require a lesser showing by a defendant who argues that undisclosed information rendered his trial unfair should be vigorously opposed as a clear and unwarranted departure from the Court's teaching. "[S]trictly speaking, there is never a real 'Brady violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

Materiality is among the most litigated issues when it comes to determining whether the government has satisfied its obligations under *Brady*. *Compare Smith v. Almada*, 640 F. 3d 931, 940 (9th Cir. 2011) (holding that an officer's failure to disclose a witness's false account was immaterial because that witness's testimony was not "crucial" at trial), *with United States v. Kohring*, 637 F.3d 895, 902 (9th Cir. 2011) (holding that additional impeachment material regarding a key government witness was material). The Supreme Court recently addressed the materiality element of *Brady* in *Smith v. Cain*, 132 S.Ct. 627 (2012), and during oral argument several of the justices made clear their view that *Brady* and disclosure have two different aspects depending upon whether one views the obligation prospectively or retrospectively. Deputy Attorney General Cole also addressed this issue in his recent testimony before Congress. When asked whether the *Brady* standard was too vague and subjective, DAG Cole explained that while the *Brady* prejudice standard was used for appellate review,

> going into trial, looking at it prospectively, that's not the standard we use in the Justice Department . . . . [O]ur standard is any evidence that is inconsistent with any element of any crime charged against the defendant, turn it over; any information that casts doubt upon the accuracy of any evidence, including but not limited to witnesses' testimony, turn it over; and that we tell people, err on the side of disclosure.

Statement of Deputy Attorney General James M. Cole before the Senate Judiciary Committee (June 6, 2012), *available at* http://www.justice.gov/iso/opa/dag/speeches/2012/dag-speech-120606.html.

Brady was a death penalty case in which there was no dispute that Brady and a compatriot robbed and killed a merchant. What the prosecution failed to reveal at the death penalty phase of Brady's trial was that the co-defendant had confessed that he, and not Brady, was the actual shooter. The evidence was immaterial to guilt or innocence under the felony-murder rule but was highly relevant to the question of punishment. Thus, the *Brady* case itself involved undisclosed evidence that was unquestionably relevant and material to punishment. Prosecutors and courts have struggled with the line-drawing ever since. What forms the contours of materiality for purposes of *Brady* is still being debated 40 years later, even in the Supreme Court.

In the recent Supreme Court case of *Smith v. Cain*, 132 S.Ct. 627 (2012), the crime involved an armed raid on a stash house that resulted in the death of five of the home's occupants. Of the three survivors, only one was able to positively identify Smith as one of the shooters. The prosecutors had police reports that included statements from the surviving victim, taken while he was still at the scene, that stated he could not identify any of the shooters and that he would not recognize any of them if he saw them again. Later that same night at the police station, the victim told an officer that one of the shooters (the one who pointed a gun in his face) had a sloping haircut and a gold "grill" (gold teeth). The victim's trial testimony about the gun that he saw also became more specific at trial—he told the officers at the scene only that he had seen a gun, but at trial he testified that it was a 9mm, which happened to correspond to the testimony of the state's ballistics expert.

During oral argument for *Smith v. Cain*, the Court was incredulous when the state's attorney attempted to argue that the victim's initial statement to the police was not "material." Justice Ginsberg asked, "But how could it not be material? Here is the only eyewitness . . . , and we have inconsistent statements. Are you really urging that the prior statements were immaterial?" Transcript of Oral Argument at 29, *Smith v. Cain*, 132 S.Ct. 627 (2012) (No. 10-8145), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-8145.pdf. Justice Kennedy also expressed surprise at the state's position: "And you say that's immaterial. I find that just incredible." *Id.* at 33. Justice Scalia added to the pile-on: "[M]ay I suggest that . . . you stop fighting as to whether it should be turned over? Of course, it should have been turned over. I think the case you're making is that it wouldn't have made a difference." *Id.* at 51-52. Justice Breyer commented that the report was facially exculpatory, and Justice Kagan pointedly asked the lawyer if her office had ever considered conceding the point. Justice Sotomayor commented that *Brady* has two distinct components: "Should they [the reports] have been turned over? And if they had, is there a reasonable probability of a different outcome?" *Id.* at 46. Justice Kennedy emphasized this point when he stated: "I think you mis-spoke when you . . . were asked what is the test for when Brady material must be turned over. And you said whether or not there's a reasonable probability . . . that the result would have been different. That's the test for when there has been a *Brady* violation. You don't determine your *Brady* obligation by the test for the *Brady* violation. You‹re transposing two very different things." *Id.* at 49.

The Court reiterated the *Kyles* test of whether favorable information undisclosed and unknown to the defendant merits relief: would the undisclosed information have placed the case in such a different light as to undermine confidence in the outcome of trial? Ultimately, Louisiana was unable to convince the Court that the failure to disclose the material was not prejudicial, and the state lost this case 8-1. Like *Brady*, the exculpatory value of the undisclosed evidence was readily apparent— so much so that one might even say that a defense attorney who possessed such a report would be considered deficient for failing to use it when cross-examining the victim. But this still leaves an open question: if the test for *Brady* production differs from the test for *Brady* violation as Justices Sotomayor and Kennedy affirmatively stated, what is that preliminary test?

Cases like *Brady* and *Smith* provide some guidance to prosecutors tasked with reviewing the products of an investigation with a view towards disclosure, but that guidance is limited by its retrospective (if not omniscient) viewpoint. The Court in those cases had the benefit of an entire trial record by which they could comfortably make an educated guess about the probable effect of non-disclosure. It does not take a lot of creativity to imagine what a reasonably competent defense attorney would have done with the police reports in the *Smith* case: he would have cross-examined the victim extensively about both his prior claim that he could not identify the shooter and his failure to provide specifics about the gun, and the defense attorney would have emphatically argued to the jury that this one eyewitness to the events in question could not be trusted, given his shifting accounts. Regarding it as speculation as to which version a jury might believe, the majority declined to engage in the dissent's analysis that continued beyond the unremarkable conclusion that the undisclosed witness statement had impeachment value to the defendant. The dissent went on to assess in some detail the likely impact of the impeachment considering other evidence, including other statements the witness made close in time. What factors are properly considered in determining the materiality of undisclosed information present another question for another article, but the fact of post-trial litigation itself emphasizes the point that prosecutors are almost always better served dealing with information before or at trial, rather than afterwards.

At the pre-trial stage, assessing materiality is a greater challenge, and, as a consequence, some trial courts have conflated the approach that appears in the DOJ policy and ABA standards with the constitutional standard governing materiality under *Brady*. In *United States v. Mohamud*, 3:10-cr-475-KI (D. Or. Nov. 26, 2010), the district court recently adopted a pretrial disclosure standard under the auspices of *Brady* that encompassed all evidence "favorable to the defense." *See also United States v. Phair*, No. CR 12-16RAJ (W. D. Wash. June 19, 2012) (requiring disclosure of all evidence favorable to the defense or likely to lead to favorable, admissible evidence); *United States v. Zinnel*, 2011 WL 5593109 (E.D. Cal. Nov. 16, 2011) (rejecting materiality as a factor governing disclosure obligation and concluding that prosecutor is obliged to turn over anything exculpatory or impeaching); *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005) (holding that prosecutor should not view his discovery obligation "through the end of the telescope" that an appellate court would use, but instead must disclose what is "favorable"); *Boyd v. United States*, 908 A.2d 39, 60 (D.C. Cir. 2006) (interpreting *Strickler v. Greene*, 527 U.S. 263, for the proposition that a prosecutor has a duty to disclose even when information turns out not to be material). While the *Strickler* Court refers to a "broad duty" of disclosure, it cites nothing in support of that proposition, and the Second Circuit vacated a district court order requiring disclosure of all impeaching and exculpatory information without regard to materiality. *United States v. Coppa*, 267 F.3d 132, 142-44 (2d Cir. 2001). The Department of Justice, as a matter of policy, requires a broad view of materiality (USAM 9-5.001), but our policy position should be viewed as just that— guidance designed to facilitate effective discharge of the constitutional obligation— and should not be confused or conflated with the obligation itself. This approach by some trial court judges may be a result of a judge's philosophy about discovery or an attempt to formulate a bright line rule intended to eliminate discovery disputes; yet such conflation does not reflect the constitutional rule or typify the prevailing practice. *See, e.g., United States v. Ruiz*, 536 U. S. 622, 629 (2002) (rejecting a defense claim to entitlement to impeachment material before entering a guilty plea, noting that "the Constitution does not require the prosecutor to share all useful information with the defendant"). In addition to the guidance set forth in the Ogden Memo, this article offers some tips that prosecutors should keep in mind when responding to overly broad and unduly burdensome discovery requests that range far beyond the scope of *Brady*, Rule 16, and the critical requirement of materiality:

1. The Defendant is responsible for establishing the materiality of his request by making a prima facie showing. *See United States v. Stevens*, 985 F.2d 1175, 1180 (2d Cir. 1993); *United States v.*

Mandel, 914 F.2d 1215, 1219 (9th Cir. 1990) (Rule 16); *United States v. Cadet*, 727 F.2d 1453, 1468 (9th Cir. 1984); *United States v. Messina*, 2011 WL 3471511, at *2 (E.D.N.Y. Aug. 8, 2011); and *United States v. Pottorf*, 769 F. Supp. 1176, 1178-79 (D. Kan. 1991); *see also United States v. Gatewood*, 2012 WL 2286999, at *2 (D. Ariz. June 18, 2012) (rejecting a defense request for social security numbers, addresses, and phone numbers of witnesses based upon absence of proof any of this information was material to the defense, noting that defendant has "no general right to unredacted discovery"). As a consequence, prosecutors should resist requests that are vague or seemingly disconnected from the issues in the case and demand that the requester explain his theory of how and why the documents he seeks are material. While the *Brady* disclosure requirement is self-executing for those bits of evidence that are readily recognized as exculpatory (for example, someone else confessed), by analogy to Rule 16 cases, some courts require a prima facie showing for everything else. *See United States v. Agurs*, 427 U.S. 97, 110 (1976); *see, e.g., United States v. Fiel*, 2010 WL 3291826, at *2 (E.D. Va. Aug. 19, 2010) (rejecting defense requests that appeared in the form of interrogatories, noting that many of the requests were facially irrelevant). Thus if a prosecutor is pursuing an arson charge against a rancher and that defendant demands copies of every National Environmental Policy Act impact statement ever issued in the state for any prescribed burn permit, the prosecutor may and should demand an explanation for how and whether such documents bear any relevance to any claim or defense in the case. *See, e.g., United States v. Reese*, 2010 WL 2606280, at *20-21 (N.D. Ohio June 25, 2010) (denying a *Brady* demand for ATF guidelines because defendant's request was based on speculation and lacked a specific purpose); *United States v. Beard*, 2005 WL 3262545, at *3 (E.D.Mich. Nov. 30, 2005) (holding that internal Project Safe Neighborhoods program guidelines were not material to preparing the defense under Rule 16 or to guilt or punishment under *Brady*). Courts have made clear that the *Brady* rule is not a lever to crack open the government's files, and the judiciary has rejected defense discovery requests deemed to be "fishing expeditions," "utter speculation," or "shots in the dark." *United States v. Marshall*, 532 F.2d 1279, 1285 (9th Cir. 1976); *United States v. Rodriguez-Rivera*, 473 F.3d 21, 26 (1st Cir. 2007); *United States v. Sloan*, 381 F. App'x. 606, 608-09 (7th Cir. 2010); *see also Gray v. Netherland*, 518 U.S. 152, 168 (1996) (" '[T]here is no general constitutional right to discovery in a criminal case, and *Brady*,' which addressed only exculpatory evidence, 'did not create one.' ") (quoting *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)).

2. Defendants must be reasonably specific. Document requests must be "framed in sufficiently specific terms to show the government what it must produce." *Marshall*, 532 F.2d at 1285 (quoting *United States v. Ross*, 511 F.2d 757, 763 (5th Cir. 1975)). When a defendant makes only a general demand for "all potentially exculpatory material," the prosecutor properly decides what must be disclosed, and absent a more specific request, the prosecutor's decision is final. *United States v. DeCologero*, 530 F.3d 36, 75 (1st Cir. 2008). The Supreme Court has recognized that the specificity of the defense request is relevant to an assessment of whether the prosecutor has an obligation to disclose the information. *See United States v. Bagley*, 473 U.S. 667, 680-83 (1985); *Agurs*, 427 U.S. at 103-08. If the defense fails to request information or if the request is general, the prosecutor is expected to produce evidence when the exculpatory nature of such evidence is "obvious." "[W]hen the prosecution receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Bagley*, 473 U.S. at 682 (quoting *Agurs*, 427 U.S. at 106). Specific requests give prosecutors notice of the value of certain items of evidence, and courts have observed that a defense attorney may reasonably assume that a prosecutor's failure to respond to a specific request means that no such evidence exists. *See id.*

3. Be wary of the "star witness" designation. Nothing makes a witness more critical to a prosecution than undisclosed potential impeachment evidence. Prosecutors should (and generally do) handle obviously key or critical witnesses with particular care when it comes to gathering, reviewing, and producing evidence that may be relevant to impeach such witnesses. But not every witness on the

government's list is properly subject to such rigor, and courts have recognized this practical reality. *See, e.g., United States v. Blanco*, 392 F.3d 382, 387 (9th Cir. 2004) (observing that *Brady* encompasses impeachment information that undermines a "significant" witness). Once a judge or the facts of the case pin a star on a witness's lapel, however, our obligations are heightened. Consequently, it is important to resist the label when it really is not appropriate because the witness relates to a collateral point. Key factors in the determination of whether a witness has a starring or supporting role include whether the witness's testimony related to an element of the offense and whether that witness was the only witness who testified about an essential element of the offense. *Compare Smith v. Cain*, 132 S.Ct. at 630 ("[Witness's] testimony was the *only* evidence linking Smith to the crime. And [witness's] undisclosed statements directly contradict his testimony . . . ." (emphasis in original)), *with United States v. Bland*, 517 F.3d 930, 934 (7th Cir. 2008) ("[Witness's] testimony played such a small role in the trial that it was immaterial whether the jury might have discredited it based on evidence from the misconduct investigation.").

4. Be wary of the "thousand cuts." In contrast with most law enforcement, bank tellers, records custodians, and parish priests, just about every cooperating witness has baggage. Examining the bad stuff about a witness in isolation may lead to misjudgments about the total package. When an appellate court reviews the record on the back-end, it will view impeachment material about our star witnesses collectively. *See, e.g., United States v. Kohring*, 637 F.3d 895, 902 (9th Cir. 2011).

5. Consider submitting material to the district court for *ex parte* review. If your case agent was arrested in college 17 years ago for using his roommate's identification to get into a bar, or if a witness has an eight-year-old misdemeanor DUI, you should consider this option to avoid unnecessary embarrassment to your witnesses. Remote evidence that a defense attorney might be anxious to use, but which would be inadmissible for impeachment purposes, may be reviewed preliminarily by a trial court judge should there be any question about the need for disclosure. *See, e.g., United States v. Allen*, 416 F. App'x 875, 879 (11th Cir. 2011) ("The prosecutor may mark potential *Brady* material as a court exhibit and submit it to the court for an *in camera* inspection if its qualification as *Brady* material is debatable."); *United States v. Blackman*, 407 F. App'x. 591, 596 (3d Cir. 2011) (affirming trial court's *ex parte* decision that certain information concerning local police officer witnesses, which the government had submitted "in an abundance of caution," need not be disclosed to defendants).

In addition to these practice tips, it will be important going forward to assure trial courts that we are fulfilling our legal and ethical obligations to provide relevant, material discovery to the defense. By complying with department policy, we should handily meet any prospective definition of materiality regardless of how the trial court defines that term. Meeting the more expansive standard should neither dilute the constitutional principle nor chill our ability to protect victims and witnesses. Materiality should mean that the item of evidence actually matters—that is, it relates to a real and important issue at trial, and its absence could well change the jury's view of the case. Cumulative evidence, impeachment evidence regarding collateral witnesses, and evidence that "might," but does not lead to evidence relevant to the development of a defense should never be considered *Brady* material simply because a defendant thinks it "might" be helpful to his case. But while the "cumulative" impeachment rule is alive and well, be attentive to information that provides a defendant with a new or different line of impeachment. *See, e.g., Gonzales v. Wong*, 667 F.3d 965, 684 (9th Cir. 2011) (noting that "impeachment evidence does not become immaterial merely because there is some other impeachment of the witness at trial. Where the withheld evidence opens up new avenues for impeachment, it can be argued that it is still material"); *United States v. Wilson*, 481 F.3d 475, 481 (7th Cir. 2007) ("evidence that provides a new basis for impeachment is not cumulative"). The bottom line is that our production should be consonant with basic fairness and consistent with the *Kyles* test for materiality. As Justice Kennedy observed during the oral

argument in *Smith*, there is a difference between an obligation for production of exculpatory or impeachment information and the determination of whether the failure to produce such evidence constitutes a *Brady* violation.

The latter formulation comes into play when an appellate court decides whether a defendant is entitled to any relief. By the same token, the different views do not and should not alter the basic premise that what falls within the definition of *Brady* evidence must be both material and exculpatory. Thus, before the charred remains of the hotel receipt that Poirot salvaged from the ashes of a fireplace may be deemed *Brady* material, the defense must reveal its reasoning and prove, in a substantive way, that the withheld evidence actually changes the landscape of the case. If prosecutors use their little gray cells and take the broad view of materiality urged by department policy, there should be no surprise endings.❖

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Assessing Potential Impeachment Information Relating to Law Enforcement Witnesses: Life After the Candid Conversation

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I. Introduction

I have noticed a trend. In the days following our district's criminal discovery training of law enforcement agents on our obligation to produce potential impeachment information, the phone rings either on my desk or on the desk of another prosecutor in the office. A nervous agent is calling. He has heard the *Giglio* presentation. He now fears he has a *Giglio* issue and wants to talk in person. At the appointed date and time, the agent appears in my doorway. His eyes, his hands, and the sheen of sweat on his face betray his uncertainty and nervousness. Unlike most other encounters, the agent spends little time on casual chit-chat. He finally gets up the nerve to describe the event that he thinks might have marred his record, and waits for my diagnosis of how bad the problem is. Of course, being a lawyer, I am compelled to ask more questions, and being familiar with *Giglio* case law and the difficulty of predicting with much certainty how a particular judge would view the information, I know that there are many variables and few black and white answers. This fact makes both of us wring our hands a bit and wipe the sweat from our brows.

Of course, not all encounters ("candid conversations") between federal prosecutors and agents about *Giglio* are this intense. However, because all *Giglio*-related encounters require multiple layers of analysis, the final decision about how we should handle potential impeachment information can be difficult. This article focuses on the analysis of potential impeachment information once it has been disclosed to the prosecutor, and not on USAM 9-5.100, known as "the *Giglio* policy," which addresses agents' obligation to disclose potential impeachment information to prosecutors and the mechanism by which prosecutors are able to make a formal request for potential impeachment information from Department of Justice and Treasury law enforcement agencies.

Truth be told, gathering, assessing, analyzing, and producing potential impeachment information relating to law enforcement witnesses is probably among the least favorite responsibilities that prosecutors and law enforcement agents must fulfill. This low popularity rating is due to a number of factors, including the negative impact that the *Giglio* conversation and the resulting disclosures can have on the professional working relationship between the prosecutor and agent-witness and the reputation and career of the agent-witness. The unpredictability of how the defense will try to use the information and how judges will permit the information to be used in court drag the popularity rating even lower.

II. The impact of DOJ's discovery policy: USAM 9-5.001

The standard that prosecutors use to analyze potential impeachment information has shifted over the last six years. Historically, prosecutors looked to the case law that interpreted the Constitution to guide their decisions on what potential impeachment information should be disclosed to the defense. The prosecutor's decision whether to disclose potential impeachment information was tethered to the case law definition of materiality and the admissibility of the information under evidence law. When the Department of Justice issued USAM 9-5.001 in 2006, the new policy required prosecutors to disclose more impeachment information (and exculpatory information, but that is not the focus of this article) than the Constitution and case law required. This mandate was reinforced in the memoranda issued by Deputy Attorney General Ogden in January 2010. As the prosecutors across the country have applied this new broad disclosure requirement in practice over the last nearly six years, the angst and tension already felt by many prosecutors and agents has increased.

The reason for this angst is not because prosecutors and agents have a desire to conceal scandalous information that the defense would be entitled to use on cross-examination. The angst exists because USAM 9-5.001, which requires broad disclosure of discoverable information, frequently results in prosecutors providing information to the defense that may not be admissible to impeach, but that could damage the reputations and careers of agents. Compounding this situation is the knowledge that a prosecutor could find herself on the receiving end of an Office of Professional Responsibility investigation if she is accused of violating DOJ policy or the law.

The point of this article is this: DOJ's broad disclosure mandate is a valid and laudable recognition that it is difficult to assess the materiality of potential exculpatory and impeachment information before trial. However, it should not be interpreted as a mandate to ignore the Federal Rules of Evidence (FRE), the case law that defines proper impeachment, or approved methods of protecting information from disclosure or limiting access. Under the current DOJ mandate, in some cases prosecutors will find themselves in the position of making disclosures to the defense and then arguing that the information is not admissible and not the proper subject of cross-examination. We owe law enforcement witnesses careful assessment and well-reasoned advocacy every step of the way.

III. The assessment of potential impeachment information

In every case, justice requires that we carefully assess potential impeachment information relating to our law enforcement agent-witnesses. The number of variables that must be considered can make the analysis quite complex and even messy. Case law reflects that the route that courts take to reach a decision regarding what is proper impeachment of law enforcement agent-witnesses is not always clear. Frequently, court decisions regarding what may be used to impeach a law enforcement agent-witness do not include a careful analysis of admissibility under the Federal Rules of Evidence. Reading between the lines, one could conclude that the courts allow far more latitude in the impeachment of law enforcement agent-witnesses because they hold law enforcement agent-witnesses to a higher standard. This higher standard is something we should expect.

With those towering cumulonimbus thunder clouds on the horizon, a prosecutor could be tempted to disclose all potential impeachment information relating to law enforcement witnesses to the defense and be done with it: no request for *ex parte* review, no motion *in limine* to exclude the information as inadmissible, and no request for a protective order to limit the circulation of sensitive information. The defense bar would probably applaud such an approach. Thankfully, not many prosecutors have adopted this approach, nor should they.

A. Consider case-specific factors

Prosecutors should consider many things when evaluating potential impeachment information to determine whether it should be disclosed to the defense. After assessing the potential impeachment information itself (that is, the nature of the agent‹s misconduct or alleged misconduct, the reliability of the information that the misconduct actually occurred, and the past history of disclosures relating to the misconduct or alleged misconduct), the prosecutor should then review the potential impeachment information in the light of various case-specific factors. These case-specific factors include the charges pending against the defendant, the underlying facts, known or anticipated defenses, the law enforcement witness's role in the case, and the assigned judge's history for ruling on similar matters. Each of these factors and the nature of the misconduct or alleged misconduct itself is critical to assessing relevancy, admissibility, and disclosure issues. Misconduct or alleged misconduct could be admissible in one case and not another, depending on the witness's role, the anticipated defenses, the assigned judge's expectations and previous rulings, and other case-specific factors. Similarly, DOJ's broad disclosure policy may require a prosecutor to disclose misconduct information in one case, but not in another because the witness‹s role or the defense changed.

B. Consider evidence law

With these case-specific factors in mind, we should then evaluate the potential impeachment information for relevance and admissibility. Is the information admissible or could it lead to admissible evidence? Unfortunately, time and space only permit the briefest overview of this critical area. It is important to note that because of the broad disclosure requirements of USAM 9-5.001 and the Ogden Memo, our analysis cannot end here. As will be discussed when we address the third stage of the analysis, DOJ policy recognizes the importance of admissibility and materiality in assessing information, but it requires more of prosecutors.

Simply put, not all agent misconduct is relevant for impeachment purposes. Most courts limit impeachment to matters relating to truthfulness and bias, many of which are addressed in the FRE:

- The witness is incompetent to testify because he or she does not understand the nature of the oath or the duty it imposes to tell the truth; the witness is not a first-hand witness to the events; or the witness has memory issues. *See* FED. R. EVID 601, 602, and case law.
- The witness suffers from bias, prejudice, sympathy, interest, or corruption. *See United States v. Abel*, 469 U.S. 45, 52 (1984); *Davis v. Alaska*, 415 U.S. 308, 316 (1974).
- The witness has made prior inconsistent statements. *See* FED. R. EVID. 613.
- The witness has a prior conviction, especially crimes that have, as an element, proof of a dishonest act or statement. *See* FED. R. EVID. 609.
- The witness has engaged in acts suggesting untruthfulness. *See* FED. R. EVID. 404(a)(3) and 608(b).
- The witness has a reputation for untruthfulness, or someone has the opinion that the witness's character for truthfulness is bad. *See* FED. R. EVID. 608(a).

If the potential impeachment information fits into one of the accepted categories of impeachment, we should evaluate it for "relevance" as defined by FRE 401 and tempered by FRE 403: Does the potential impeachment evidence tend to prove something at issue in this case? That is, is it relevant to the credibility of a witness? Even if the court determines that the information is relevant,

under FRE 403, the court can exclude it "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403.

Arguably, when determining the relevance of particular misconduct for impeachment, the more removed in time and relationship to the pending case it is, the less probative force it would have, and the less relevant it would be. "[Rule 608(b)] does not require or imply that every negative bit of evidence existing concerning a witness may be dragged into a case no matter how remote or minor the alleged misconduct." *United States v. Lafayette*, 983 F.2d 1102, 1106 (D.C. Cir. 1993). Does the act of dishonesty or untruthfulness relate to the pending case, or did it occur or allegedly occur in the context of another case, or day-to-day work of the law enforcement witness? How long ago did the misconduct occur — last month or ten years ago? *See United States v. Baldwin*, 2010 WL 4511102 (D.Colo. Nov. 2, 2010) (magistrate judge looked to Rules 404, 608, and 609 in determining whether any information in officer's 10-year-old divorce case was *Brady* or *Giglio* material, and found that nothing within the file was a basis for material, admissible impeachment).

Not all false statements are relevant for impeachment purposes; otherwise, we may need to consider asking our agents about all the lies they told their mothers or their teachers in junior high school. As with any misconduct, the more removed in time and relationship the misconduct is, the more we should consider asking the court to exclude it from the case as being more prejudicial than probative under FRE 403. In assessing relevancy, courts have considered what the false statement was and the motivation behind the false statement. *See United States v. Alston*, 626 F.3d 397, 404 (8th Cir. 2010) (The court compared the motivation behind an alleged false statement to an officer's supervisor in the past and the motivation behind an alleged fabrication of a complex confession by the defendant in the pending case, and stated, "The difference in motive is clear, and that difference lowers the probative value of the evidence. . . . In addition to having only limited probative value, the proffered cross-examination would have created a danger of unfair prejudice.").

Two cases, among many, that discuss what factors a court should consider when determining whether a prior judicial finding of untruthfulness is admissible to impeach are *United States v. Cedeño*, 644 F.3d 79, 83 (2d Cir. 2011) (listing five factors in addition to those considered by the district court, including: whether the lie was under oath, whether the lie was about a significant matter, how much time had elapsed since the lie, the motivation for the lie, and whether the witness had offered an explanation for the lie), and *United States v. Dawson*, 425 F.3d 389, 396 (7th Cir. 2005), *on reh'g*, 434 F.3d 956, 959 (7th Cir. 2006) (asking whether a judge in another proceeding finding the witness not credible violated FRE 608(b)'s prohibition of "extrinsic evidence," but pointing out that trial court retained authority to control cross-examination and could exercise discretion to preclude such questioning "when the witness had testified frequently and been disbelieved in only one case or where it was unclear whether and why the witness's testimony had been rejected."). In sum, prosecutors would do well to examine false statements and prior negative judicial credibility findings under FRE 403 for unfair prejudicial impact, and not just concede relevancy because the false statement or judicial finding appears on first blush to be permissible 608(b) impeachment.

More could be written about defense arguments and court sympathy to the idea that past misconduct by a law enforcement witness unrelated to truthfulness is "favorable to defense," but time and space do not permit. *See United States v. Rubio-Lara*, 2011 WL 3502480 (N.D. Cal. Aug. 10, 2011).

C. Consider the mandate of USAM 9-5.001

Finally, whether potential impeachment information is admissible or could lead to admissible evidence is important, but even when the answer is "no" to both questions, it is possible that we may have to disclose information to the defense because of DOJ's broader disclosure requirement found in USAM 9-5.001. DOJ policy requires us to disclose information beyond that which courts have found material, that is, information that casts a substantial doubt on the accuracy of any evidence or that has a significant bearing on the admissibility of any evidence. Consider, for example, an agent-witness who was disciplined for coercion, excessive force, or abuse of authority in a previous investigation. The agent took a confession from the instant defendant who is now challenging the voluntariness of the confession. The misconduct information does not fit within any impeachment category listed above and will likely not be admissible under FRE 404(b), except in very limited circumstances. Nevertheless, it is the type of information that a prudent prosecutor, following the mandate of USAM 9-5.001, would be well-advised to submit to the court for *ex parte* review or provide to the defense and move the court to prohibit cross-examination.

IV. Ex parte reviews, motions in limine, and protective orders

If prosecutors are required to make broad disclosures of potential impeachment information, does this mean that our analysis of evidence law in stage two is a waste of time? No. Disclosure is one thing, admissibility is another. We can use our analysis under evidence law to formulate and make our best argument to the court that either we should not be required to disclose the information to the defense at all, or that the court should not permit the defense to use the information to impeach the agent-witness. There will be times when a prosecutor should present sensitive information—particularly information relating to pending investigations of allegations of misconduct—to the court for review and, if the court orders the disclosure of the information, should seek a protective order limiting the use and circulation of the information. The more complex the analysis, and the more we wrestle with the admissibility of particular potential impeachment information or whether we should disclose a particular piece of potential impeachment information to the defense, the more likely it is that the prudent course of action is to provide the information to the court for an *ex parte* review, at the very least, or to provide it to both the court and defense counsel, and then argue against its admissibility.

Although our obligation to disclose impeachment information trumps an agent-witness's privacy rights in cases involving substantiated and relevant credibility or bias findings, the reputation and privacy of an agent is a countervailing factor that should be considered when an investigation of alleged misconduct of a law enforcement witness is not yet complete. It is entirely possible that the investigation will be resolved in favor of the agent. If, however, information about the pending investigation is disclosed to the defense before the conclusion of the investigation, that agent's reputation will have suffered. If you live in a district or circuit that permits cross-examination for bias if a law enforcement witness is under investigation, you should consider submitting the information to the court and asking the court to limit the information that you are required to disclose to the defense. In *United States v. Wilson*, 605 F.3d 985, 1006 (D.C. Cir. 2010), the district court limited cross-examination of a police officer who was the subject of a pending investigation, recognizing that "the prejudice to this officer given the uncertainty of the [allegations] is quite high, [and] the prejudice to her career is quite high." *See also* FED. R. EVID. 403; FED. R. CRIM. P. 16(d). Although the redactions in *Wilson* make the case a bit difficult to fully understand, one principle that can be gleaned from it is that the court recognized the serious damage that could be done by providing too much information about a pending matter. *See also United States v. Novaton*, 271 F.3d 968, 1004-07 (11th Cir. 2001) (excluding cross-examination of officer's

involvement in prior complaint because it was unproven and pending, and thus would be substantially more prejudicial than probative).

V. Conclusion

DOJ's mandate to provide broad and early discovery is a recognition that the identification of potential impeachment (and exculpatory) information, and the decision about what to disclose, can be quite complex. There is great peril if we attempt to navigate these waters without consulting with our supervisors and other prosecutors who are experts in *Brady/Giglio* and evidence law when we encounter difficult situations. There is even greater peril in attempting to serve as both the prosecutor and the judge. In the end, we do justice by engaging in careful, informed analysis and making appropriate, measured disclosures of potential impeachment information relating to our law enforcement witnesses.❖

ABOUT THE AUTHOR

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Federal Rule of Evidence 806 and its Discovery Obligations

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The scene: the United States Attorney's Office. Present: a two-person trial team preparing for trial in a narcotics distribution case. The conversation goes like this:

John Senior: That cooperating co-defendant we have in this case surely has a lot of Giglio baggage. Every person who knows him thinks he is a liar sufficient to rival Jim Carrey in that movie. He has two perjury convictions along with his drug convictions, not to mention all the fibs he told about his scholastic and job history. But those statements that he made when he and our defendant, who is going to trial, were out selling the dope are great. We have to get those in. Lucky for us, all of those statements were made while his buddy was present. We can call the buddy because co-conspirator declarations can be related by someone other than the declarant. If we don't call the cooperator, we don't have to disclose all of the impeaching material on the cooperator, just the stuff on the buddy, who is relatively clean.

Jill Junior: Not so fast, John. I just returned from a great evidence class at the National Advocacy Center, and the instructors talked about Rule 806. If I heard them correctly, I think we have to turn over all of the impeaching material on the cooperator if we plan on introducing his statements under 801(d)(2)(E). I think according to Rule 806 he is subject to impeachment just as if he took the stand.

John: Really? I have never read past Rule 804. Let's see what Rule 806 has to say.

> **Rule 806. Attacking and Supporting Credibility of Declarant.** When a hearsay statement – or a statement described in Rule 801(d)(2)(C), (D), or (E) – has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

FED. R. EVID. 806.

John: I guess we better rethink our strategy. I think the cooperator would be an ideal witness for you to cut your teeth on in your first trial.

In the discovery context, the important point for prosecutors to remember is that Rule 806 expands the government's *Brady/Giglio* obligation because impeaching information of the hearsay declarant must be disclosed. *United States v. Jackson*, 345 F.3d 59, 71 (2d Cir. 2003). The source of the obligation is the due process clause and the prosecutor's obligation to disclose *Brady/Giglio* information. *United States v. Shyne*, 617 F.3d 103, 107-08 (2d Cir. 2010). But, the declarant is not a witness for

purposes of the Jencks Act, so Rule 806 does not mandate disclosure of the declarant's Jencks statements. *Id.*; *United States v. Williams-Davis*, 90 F.3d 490, 513 (D.C. Cir. 1996).

As indicated in the trial team's conversation above, Rule 806 will be most frequently applied in situations where the United States introduces a co-conspirator declaration of a non-testifying declarant through another witness. However, that will certainly not be the only situation that will trigger application of the Rule. Admissions by a defendant's representative, for example, a tax defendant's accountant to the Internal Revenue Service, or a businessman's salesman, may bring the Rule into play. The introduction of hearsay statements by a non-testifying declarant in the form of excited utterances, present sense impressions, or statements for the purpose of medical diagnosis or treatment, will also call for application of the Rule. Thus, in order for a prosecutor to comply with the discovery obligation engendered by the Rule, he or she must undertake careful analysis of out-of-court statements the government may offer at trial.

Because the Rule provides that the non-testifying declarant may be impeached just as if he testified at trial, all available methods of impeachment that would exist if the declarant had testified are available to the adverse party. A slightly modified list of Irving Younger's methods of impeachment is helpful in categorizing impeaching information that may need to be disclosed to the defendant:

- Defects in first hand knowledge, generally perception (Rule 602)
- The inability to testify truthfully (Rule 603)
- Defects in memory
- The inability to communicate
- The declarant is biased, prejudiced, has an interest in the case, or is corrupt
- The declarant has been convicted of certain crimes (Rule 609)
- The declarant has made statements that are inconsistent with the hearsay declaration
- The declarant has committed acts that adversely affect his character for truthfulness
- The witness has a bad character for truthfulness (Rule 608(a))

Additionally, any evidence that contradicts the declarant's statements must also be turned over. *See also United States v. King*, 73 F.3d 1564, 1571 (11th Cir. 1996). It is likely that such contradictory evidence should be disclosed under *Brady* anyway as it frequently will counter an important aspect of the government's case.

Department of Justice guidance for prosecutors, as set forth in the Memorandum from Deputy Attorney General Ogden, gives a more specific list of potentially impeaching material. Memorandum from Deputy Attorney General David Ogden, "Guidance for Prosecutors Regarding Criminal Discovery" (Jan. 4, 2010), *available at* http://dojnet.doj.gov/usao/eousa/ole/usabook/memo/ogden_memo.pdf (Ogden Memo). Given that the Department's discovery policy as set forth in section 9-5.001 of the United States Attorneys' Manual, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm, requires broader disclosure than that required by *Brady* and *Giglio*, prosecutors should take an expansive view in deciding what material should be disclosed under Rule 806.

The potential impact of mishandling Rule 806 is illustrated in *United States v. Moody*, 903 F.2d 321, 327-30 (5th Cir. 1990), where the defendant was not allowed to introduce adverse character evidence pertaining to two fugitives whose statements were introduced as declarations of co-conspirators. The court held it was reversible error to prohibit the proffered impeachment, saying the trial judge "harbored the misconception, reinforced by the government, that hearsay declarants cannot be impeached if they fail to testify at trial." *Id*. at 328. In fact, the circuit court was "dismay[ed]" that the United States failed to acknowledge the applicability of Rule 806 to the case. *Id*. at 329.

It is important to remember that even if the declarant is available for the other side to call, it is the introduction of a statement described in Rule 806 that triggers the ability to impeach, and therefore the government's disclosure obligation. In *United States v. Wali*, 860 F.2d 588, 591 (3d Cir. 1988), the government argued, unsuccessfully, that because the defendant did not seek to depose the hearsay declarant, he should not be permitted to utilize Rule 806 to impeach the declarant.

For the opposing party to utilize Rule 806 to admit impeaching evidence, the credibility of the declarant must be in issue: that is, the declarant's statement must be offered for the truth of the matter asserted. For example, in *United States v. Becerra*, 992 F.2d 960, 965 (9th Cir. 1993), the statement of an informant to a law enforcement officer was not offered for the truth, but rather to provide the basis for the officer's and the defendant's conversation about cocaine; therefore, Rule 806 was not available to impeach the informant. Similarly, in *United States v. Zagari*, 111 F.3d 307, 317-18 (2d Cir. 1997), a declarant's statements were introduced for the effect on the defendants' scienter, not for their truth, so Rule 806 did not apply. *See also, United States v. Paulino*, 445 F.3d 211, 217 (2d Cir. 2006); *United States v. Stefonek*, 179 F.3d 1030, 1036-37 (7th Cir. 1999). Accordingly, if the statement is not offered for the truth, there is no obligation to disclose impeaching material about the declarant because his credibility is not an issue in the trial. Of course, the credibility of the witness relating the statement is at issue, and any impeaching material about that witness must be disclosed. (As a practice tip, when the prosecution introduces a statement of an absent declarant for a non-hearsay purpose, it is good practice to request a limiting instruction to that effect. That will prevent the defense from utilizing Rule 806. This was not done in *United States v. Burton*, 937 F.2d 324, 327-28 (7th Cir. 1991). *See also Zagari*, 111 F.3d 307).

Strategic decisions on whether to call the impeachable witness will impact the government's discovery obligations. As seen in the conversation reported above, the trial team's conundrum is whether to call the cooperator and suffer through extensive impeaching cross examination, or not call him and suffer through impeachment but not cross examination. Because the cooperator has a cooperation agreement, if he testifies he will be subject to bias cross examination on the agreement. Therefore, the agreement and his benefits thereunder must be disclosed. On the other hand, if the cooperator is not called and his coconspirator declarations are admitted through another witness, the cooperator's arrangement with the government should not need to be disclosed because his later acquired bias could not have influenced the truth of the statement he made in furtherance of the conspiracy.

Rule 806 does not make admissible the evidence that is excluded by another rule; the rules that govern impeachment still apply. *United States v. Finley*, 934 F.2d 837, 839 (7th Cir. 1991). In order to use prior convictions to impeach, the requirements of Rule 609 must be met. For example, generally more than 10 years must not have elapsed from the date of the conviction or the release from imprisonment for it to be used to impeach the declarant. *See* FED. R. EVID. 609(b). Or, if the impeaching party wants to utilize a witness to say the declarant has a bad character for truthfulness, the witness must testify in the form of an opinion or about the declarant's reputation; testimony about specific instances of conduct would not be permissible. *See* FED. R. EVID. 405(a). However, given that Department policy mandates that "information that casts a substantial doubt upon the accuracy of any evidence" be disclosed, a prosecutor should give serious consideration to disclosing material that may not be in "admissible form," and then argue that it is inadmissible at the appropriate time. *See* Dep't of Justice, UNITED STATES ATTORNEYS' MANUAL 9-5.001(C)(2) (2008), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm.

The statement offered under Rule 806 must be for impeachment and not for the truth of the statement. Where the probative value of the purported impeaching statement actually is dependent upon its truth, Rule 806 is inapposite. In *United States v. Dent*, 984 F.2d 1453, 1460 (7th Cir. 1993), *abrogated*

on other grounds, *United States v. Gilbert*, 391 F.3d 882 (7th Cir. 2004), the district court prevented the use of Rule 806 when it found that the defendant really wanted to use a statement to his lawyer that was contrary to his state court guilty plea as substantive evidence of innocence and not to "impeach" his plea. In *United States v. Maliszewski*, 161 F.3d 992, 1011 (6th Cir. 1998), one defendant wanted to introduce another defendant's statement to prove who picked up a package of drugs. Since the statement was offered against the United States, it could not be admitted as a declaration of a co-conspirator, and because it was really being offered as substantive rather than impeaching evidence, Rule 806 was of no help to the defendant. Once again, however, even if Rule 806 does not provide for use of the information at trial, information such as described in these two cases would be favorable to the defense under *Brady*.

As mentioned, Rule 806 allows for impeachment in any recognized manner. Some are relatively straightforward, such as evidence of a lack of knowledge or impeachment by conviction. Two bear special mention because they pose wrinkles in the discovery arena.

Rule 806 poses an interesting impeachment conundrum relative to Rule 608(b), which allows for impeachment through cross examination about acts that adversely affect the declarant's character for truthfulness. How does a defendant impeach a non-testifying hearsay declarant under Rule 608(b) where instances of dishonesty may be inquired into on cross-examination but no extrinsic evidence is allowed? In *United States v. Saada*, 212 F.3d 210, 221 (3d Cir. 2000) and *United States v. White*, 116 F.3d 903, 920 (D.C. Cir. 1997), the courts indicated that a witness could be asked if he knew of the prior misconduct of the declarant, but no extrinsic evidence could be introduced. The court in *United States v. Friedman*, 854 F.2d 535, 570 n.8 (2d Cir. 1988), stated that "resort to extrinsic evidence may be the only means of presenting such evidence to the jury." The point relevant to this article is that acts that may be inquired of under Rule 608(b) must be disclosed even though the impeaching party will not be able to introduce them in the normal way, through cross examination.

The second issue bearing further discussion is the impeachment through prior inconsistent statements under Rule 613. Deciding if the declarant has been inconsistent in his declarations is a fact intensive question. Statements are inconsistent "when two statements, one made at trial and one made previously, are irreconcilably at odds." *United States v. Winchenbach*, 197 F.3d 548, 558 (1st Cir. 1999). A broader definition of inconsistency is found in *United States v. Barile*, 286 F.3d 749, 755 (4th Cir. 2002) (quoting *United States v. Gravely*, 840 F.2d 1156, 1163 (4th Cir.1988)): "A prior statement is inconsistent if it, 'taken as a whole, whether by what it says or what it omits to say affords some indication that the fact was different from the testimony of the witness whom it sought to contradict.' " Omissions in a prior statement are inconsistent "if it would have been 'natural' for the witness to include details in the earlier statement." *United States v. Meserve*, 271 F.3d 314, 320-21 (1st Cir. 2001).

The "statements need not be diametrically opposed to be inconsistent." *United States v. Denetclaw*, 96 F.3d 454, 458 (10th Cir. 1996) (quoting *United States v. Agajanian*, 852 F.2d 56, 58 (2d Cir.1988)). As the Supreme Court said in *Jencks v. United States*, 353 U.S. 657, 667 (1957):

> Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

The courts have discretion to determine if a prior statement is in fact inconsistent. (The cases cited in this paragraph both arose in the Rule 806 context). In *United States v. Avants*, 367 F.3d 433, 447-48 (5th Cir. 2004), the statement of a deceased witness, whose preliminary hearing testimony was read at

trial, when questioned by the FBI, said that he knew nothing of the murder and would discuss the matter only in the presence of his attorney. This was determined not to be plainly inconsistent. The trial court took the statement to mean that he, the witness, did not wish to talk to the agents. In *United States v. Houlihan*, 92 F.3d 1271, 1284 (1st Cir. 1996) (quoting *United States v. Houlihan*, 887 F.Supp. 352, 368 (D. Mass. 1995)), the trial court ruling, affirmed by the First Circuit, was that portions of a deceased victim/witness' interviews were "too convoluted, collateral, or cumulative to be admitted."

On the other hand, some courts have held that the government may not limit impeachment under Rule 806 by limiting the direct examination so the testimony is not literally contradicted by a prior statement. In *United States v. Wali*, 860 F.2d 588, 591 (3d Cir. 1988), a conviction was reversed because the government introduced a co-conspirator's statements establishing the existence of a conspiracy to import drugs. Even though the statements did not say that the defendant was the same person as one named in the conspiracy, the impeaching statements that the defendant was not involved in drug dealing were inconsistent with the 801(d)(2)(E) statements and should have been admitted. In *United States v. Grant*, 256 F.3d 1146, 1154 (11th Cir. 2001) the court stated, "The test is whether the out-of-court statement would have been admissible for impeachment purposes had the co-conspirator statements been delivered from the witness stand by the co-conspirator himself, not as hearsay about what he said during the conspiracy but as contemporaneous in-court statements." There the facts are similar to those in *Wali*. The government introduced a co-conspirator's statements that, among other things, he had a partner in Jamaica. The defense lawyer obtained an affidavit from the conspirator that he had no partner and that he had lied about other statements about the defendant. The court held these statements were inconsistent with the evidence the government introduced, even thought the government had not elicited testimony on direct examination that the defendant was the partner. It seems that the courts may allow impeaching evidence that is contrary to the government's theory of participation by the defendant even if the testimony and the alleged inconsistent statement are not precisely at odds. Perhaps in a Rule 806 context, because the declarant is not on the stand and the opponent cannot conduct a full cross-examination, courts will give greater latitude to the definition of inconsistency. Thus, under the Department's expansive view of our discovery obligation, evidence at odds with the *spirit* of the hearsay statement, even if not its *letter*, should be disclosed. Whether it is admissible under Rule 806 can be argued after disclosure.

As you can see, interesting questions arise when a rule that governs the admissibility of evidence creates a disclosure obligation that is narrower than the Department's discovery policy. Thorough knowledge of the substance and relevance of the out-of-court statements to be offered is the starting point, followed by analysis of the potential impeaching information pertaining to the declarant and the information that contradicts the statement. Then a prosecutor can determine whether Rule 806, with its inherent disclosure obligation, and the Department's disclosure policies, require providing discovery to the defense.❖

ABOUT THE AUTHOR

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Avoiding a State of Paralysis: Limits on the Scope of the Prosecution Team for Purposes of Criminal Discovery

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I. Introduction

In all criminal cases, the scope of a federal prosecutor's discovery obligations depends in part on the scope of the "prosecution team," that is, those individuals and agencies who are so closely aligned with the prosecution that documents and data in their possession are "in the possession, custody, or control" of the government for purposes of discovery. In many cases, determining the scope of the prosecution team is easy. For example, the prosecution team includes the law enforcement officer who investigated the government's case. *See Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006). On the other hand, the prosecution team generally does not include private organizations. *See United States v. Lekhtman*, 2009 WL 5095379, at *7 (E.D.N.Y. Dec. 15, 2009).

Determining the scope of the prosecution team can be more challenging in cases involving parallel criminal and civil regulatory proceedings or those involving federal investigative agencies with separate civil arms. In recent years, defense counsel have made efforts to expand the definition of the prosecution team and require prosecutors to disclose information from an ever-increasing array of federal agencies. *See, e.g.*, Audrey Strauss, *"Brady" Obligation Extends Beyond Prosecutor's Office*, N.Y. L.J., (Nov. 5, 2009); Daniel L. Zelenko, *Responding to the Ogden Memo: New Challenges and Opportunities for Defense Attorneys*, 2011 WL 190334, at *1-7 (ASTAPORE Jan. 2011); Per Ramfjord, *DOJ's New Discovery Policies: Will They Make a Difference?*, 2011 WL 190333, at *1-12 (ASTAPORE Jan. 2011). This article focuses on the limits courts have placed on which agencies qualify as members of the prosecution team whose files must be reviewed for potential discovery materials.

It is well established that "[t]he government has no affirmative duty to take action to discover information which it does not possess," *United States v. Jones*, 34 F.3d 569, 599 (8th Cir. 1994) (quoting *United States v. Tierney*, 947 F.2d 854, 864 (8th Cir. 1991)), and a significant body of case law limits the reach of the government's "possession, custody, or control" of information. The January 4, 2010 Memorandum from Deputy Attorney General David W. Ogden, "Guidance for Prosecutors Regarding Criminal Discovery," *available at* http://dojnet.doj.gov/usao/eousa/ole/usabook/memo/ogden_memo.pdf (Ogden Memo), sets forth factors for use in determining whether a particular federal agency qualifies as part of the prosecution team and closely tracks this case law. Careful consideration of the factors set forth in the Ogden Memo during the investigative stage of a criminal case should enable prosecutors to avoid having to scour the files of a host of agencies as part of their disclosure obligations.

II. Rules and guidance for identifying members of the "prosecution team"

A federal prosecutor's disclosure obligations arise from a number of sources, including the Federal Rules of Criminal Procedure, the Jencks Act (18 U.S.C. § 3500), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). Federal Rule of Criminal Procedure 16(a)(1)(E) requires prosecutors to disclose specific items including documents and data "within the government's possession, custody, or control" where:

> (i) the item is material to preparing the defense;
>
> (ii) the government intends to use the item in its case-in-chief at trial; or
>
> (iii) the item was obtained from or belongs to the defendant.

FED. R. CRIM. P. 16(a)(1)(E).

Pursuant to *Brady*, the prosecutor has a Constitutional duty to produce "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment . . . ." 373 U.S. at 87. "Impeachment evidence, . . . as well as exculpatory evidence, falls within the *Brady* rule." *United States v. Bagley*, 473 U.S. 667, 676 (1985) (citing *Giglio*, 405 U.S. at 154). Department of Justice policies require even broader disclosures than the Constitution. United States Attorneys' Manual (USAM) 9-5.001 and 9-5.100. In order to fulfill a prosecutor's disclosure obligations, "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

This determination can be particularly difficult in cases involving parallel criminal and civil proceedings or multiple federal agencies. The Ogden Memo sets forth factors to consider in determining whether a federal agency qualifies as part of the prosecution team whose materials should be reviewed for potential disclosure:

- 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.

Although every case must be evaluated on its facts, the guidance set forth in the Ogden Memo is consistent with the reasonable limits most courts place on the scope of the prosecution team whose files the prosecutor must review for possible disclosure under *Brady*, *Giglio*, Rule 16, or the Jencks Act.

III. The government's obligation to review and disclose evidence from federal agency files is limited to members of the "prosecution team"

Federal courts have long recognized that "the imposition of an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor's office on the case in question would inappropriately require [courts] to adopt a monolithic view of government that would condemn the prosecution of criminal cases to a state of paralysis." *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) (quoting *United States v. Gambino*, 835 F.Supp. 74, 95 (E.D.N.Y.1993)); *see also, e.g.*, *United States v. Pelullo*, 399 F.3d 197, 217 (3d Cir. 2005); *United States v. Beers*, 189 F.3d 1297, 1304 (10th Cir. 1999). For this reason, prosecutors are not obligated to search for exculpatory evidence in other government offices or agencies that, while tangentially associated with a matter, are not working together with the government in the investigation and prosecution of the criminal case. *See, e.g.*, *Pelullo*, 399 F.3d at 216-19 (district court erred in concluding that government's *Brady* obligation extended to documents in the possession of a civil division of the United States Department of Labor (DOL), even though criminal case utilized criminal agents from DOL; under the facts and circumstances of the case, civil arm of agency was not part of "prosecution team"); *United States v. Morris*, 80 F.3d 1151, 1169-70 (7th Cir. 1996) (district court properly concluded that *Brady* did not require the government to seek out potentially exculpatory information in hands of IRS and other federal agencies because they were not "part of the team that investigated this case or participated in its prosecution").

Although "Brady and its progeny have recognized a duty on the part of the prosecutor to disclose material evidence that is favorable to the defendant over which the prosecution team has control," courts also recognize that "Brady clearly does not impose an affirmative duty upon the government to take action to discover information it does not possess." *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007) (holding no *Brady* violation where government's cooperating witness failed to disclose potentially exculpatory evidence until three weeks into trial) (internal quotation marks and citation omitted). Thus, *Brady*'s progeny "cannot be read as imposing a duty upon the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue." *Pelullo*, 399 F.3d at 216.

In determining whether documents and data are within the government's possession, custody, or control, courts "have typically required the prosecution to disclose under Rule 16 documents material to the defense that: (1) it has actually reviewed, or (2) are in the possession, custody, or control of a government agency so closely aligned with the prosecution so as to be considered part of the prosecution team." *United States v. Finnerty*, 411 F. Supp. 2d 428, 432-33 (S.D.N.Y. 2006) (collecting cases). In determining whether an agency is so closely aligned as to be part of the prosecution team, courts examine whether the investigation and prosecution of the alleged offenses was a jointly-undertaken endeavor between the prosecution and the entity at issue. *See, e.g.*, *id.*; *United States v. Brodnik*, 710 F. Supp. 2d 526, 544-45 (S.D. W. Va. 2010). Although the government's disclosure obligations arise from both Rule 16 and *Brady*, courts disagree with respect to whether the scope of the prosecution team differs for purposes of these two rules. *Compare United States v. Chalmers*, 410 F. Supp. 2d 278, 289 (S.D.N.Y. 2006) ("[T]he Court is not persuaded that the 'government' for purposes of Rule 16 should be any broader than the 'prosecution team' standard that has been adopted in the *Brady* line of cases."), *with United States v. Norris*, 753 F. Supp. 2d 492, 530 n.21 (E.D. Pa. 2010), *aff'd* 419 F. App'x. 190 (2011),

cert. denied, 132 S.Ct. 250 (2011) (doubting that the "constructive possession" aspect of "possession of the government" that applies as to *Brady* applies to Rule 16).

For example, in a criminal tax case, "[o]nly the criminal investigation side of the IRS involved in th[e] investigation is the government . . . ; the vast administrative arm of the IRS, i.e., ordinary tax collection, is not." *United States v. Zinnel*, 2011 WL 5593109, at *3 (E.D. Cal. Nov. 16, 2011) (*request for reconsideration granted on other grounds*, 2011 WL 6825684 (E.D. Cal. Dec. 28, 2011)). This is because "when the prosecution desires to obtain tax files for a criminal investigation, it does not simply 'access' the files, but must petition the court demonstrating precise criteria before any access is permitted." *Id.* (citing 26 U.S.C. § 6103 (i)). Therefore, unless the tax information has already been disclosed to the prosecutor or the Criminal Investigation Division of the IRS, materials in the possession of the civil side of the IRS are not subject to disclosure. *See id.*; *see also United States v. Bibby*, 752 F.2d 1116, 1124-25 (6th Cir. 1985) (prosecutor in tax case was not obligated under *Brady* or *Giglio* to obtain the IRS's civil audit file on one of its witnesses); *United States v. Landron-Class*, 714 F. Supp. 2d 278, 282-83 (D.P.R. 2010) (rejecting defendant's request that government be compelled to obtain additional tax returns not in its possession because the tax returns "would not fall under the government's duty to produce" and would be cumulative of other evidence to be introduced at trial); *United States v. Dawes*, 1990 WL 171074, at *3 (D. Kan. Oct. 15, 1990) (collecting IRS cases regarding obligation to disclose witness tax returns in prosecution's possession). *But see United States v. Prokop*, 2012 WL 2375001, at *2 (D. Nev. June 22, 2012) (ordering production of 4,487 tax files held to be in government's possession, custody, and control in tax fraud case where prosecution represented that Criminal and Civil Investigation Divisions of IRS participated in the investigation).

Indeed, courts generally hold that agencies that must be "subjected to formal processes to obtain information" are not within the control of the government for purposes of the government's disclosure obligations. *See United States v. Salyer*, 271 F.R.D. 148, 156 (E.D. Cal. 2010) (declining defendant's request to treat United States Trustee, Office of Inspector General, and all other agencies of the United States as part of prosecution team, and noting that "[t]he prosecution does not become the FOIA (Freedom of Information Act) agent for the defense"). "The need for formal process in the acquisition of documents is the antithesis of 'access' as defined by the [case law]." *Id.*; *see also Zinnel*, 2011 WL 5593109, at *3 ("The requirement to obtain an order before access of tax records is authorized stands as the antithesis of constructive possession.") (citing *United States v. Lochmondy*, 890 F.2d 817, 823 (6th Cir. 1989)).

Similarly, the contention that the participation of one arm of a federal agency in a criminal prosecution automatically makes the entire agency part of the prosecution team was considered and rejected by the Third Circuit in *Pelullo*, 399 F.3d at 210. In *Pelullo*, one arm of the DOL, the Labor Racketeering Office, had agents participating in a criminal investigation of a defendant's actions with respect to an employee benefit plan. *Id.* at 209. Simultaneously, a separate civil arm of the DOL, the Pension and Welfare Benefits Administration (PWBA), was monitoring a civil case to which the defendant was a party and that involved the same employee benefit plan. *Id.* The PWBA had collected documents exchanged by the litigants in the civil matter, *id.*, and the defendant argued that the government's *Brady* obligation extended to the content of the documents possessed by the PWBA. *Id.* at 216.

The Third Circuit reversed the district court and held that the PWBA was not part of the prosecution team and thus the PWBA documents were not subject to disclosure under *Brady*. *Id.* at 216-19. The court reviewed authority from a variety of jurisdictions establishing the general principle that "the prosecution is only obligated to disclose information known to others acting on the government's

behalf in a particular case." *Id.* at 218. Applying that principle to the PWBA documents, the Third Circuit held that the PWBA was not part of the prosecution team for discovery purposes:

> There is no indication that the prosecution and PWBA engaged in a joint investigation or otherwise shared labor and resources. Nor is there any indication that the prosecution had any sort of control over the PWBA officials who were collecting documents. And Pelullo's arguments to the contrary notwithstanding, that other agents in the DOL participated in this investigation does not mean that the entire DOL is properly considered part of the prosecution team, even though it was known to investigators drawn from the same agency as the prosecution team. Likewise here, the PWBA civil investigators who possessed the documents at issue played no role in this criminal case.

Id. at 218 (internal citation and parenthetical omitted); *see also United States v. Merlino*, 349 F.3d 144, 155 (3d Cir. 2003) (holding that audio tapes of witness statements known to be in possession of Bureau of Prisons were not under the control of the prosecution because Bureau of Prisons was not involved in investigation or prosecution of defendants).

Finally, there is some indication in the case law that courts do not view favorably defense efforts to expand the prosecution team where such efforts "generate[] the aroma of a tactical maneuver." *United States v. Labovitz*, 1997 WL 289732, at *3 (D. Mass. May 30, 1997); *cf. United States v. Darwich*, 2011 WL 2518914, at *1 (E.D. Mich. June 24, 2011) (denying defense pretrial motions for "a staggering degree of discovery"); *United States v. Wardell*, 2009 WL 1011316, at *1 (D. Colo. Apr. 15, 2009) (denying defense discovery motion where "[n]othing other than defendant's own completely unsubstantiated supposition supports a conclusion that the prosecutors in this case had possession of or access to" the requested materials).

In *Labovitz*, a bank fraud defendant sought disclosure of documents in the possession of the FDIC, which had taken over the victim bank. 1997 WL 289732, at *1. The district court found that the prosecutors "lack[ed] the power to compel the FDIC to produce documents to anyone," *id.* at *3, and noted that "at least as regards FDIC documents, the defendant [had] received generous discovery and ha[d] not been prejudiced in any way." *Id.* at *6. The court denied the defendant's motion, stating, "What, it seems, defendant does want to do is conduct a broad fishing expedition (to use this overworked metaphor) into the files of the FDIC in search of any document that might be considered 'material' in the broadest sense, despite any assertion of privilege." *Id.* at *4; *see also United States v. Cerna*, 633 F. Supp. 2d 1053, 1061 (N.D. Cal. 2009) (rejecting the assertion that *Brady* requires the government "to unearth from an agency, even an agency involved in the investigation, every random scrap of paper of possible defense use"). However, "Rule 16 does not permit this kind of rummaging even in the files of the Government itself." *Labovitz*, 1997 WL 289732, at *4.

IV. Under limited circumstances, courts require review of agency files for discoverable information

In general, courts appear more likely to order disclosure of documents and data in agency files if the agency has previously shared information related to the case with the prosecutor. For example, the district court in the *W.R. Grace* case ordered the government to search the files of myriad federal environmental agencies for evidence favorable to the defense. *United States v. W.R. Grace*, 401 F. Supp. 2d 1069, 1077-78 (D. Mont. 2005). In the court's view, the Ninth Circuit had rejected the "prosecution team" concept, and instead held that "[t]he prosecution is in possession of information held by any government agency provided the prosecution has knowledge of and access to the information . . . regardless of whether the agency holding the information participated in the

investigation." *Id.* at 1078 (citing *United States v. Santiago*, 46 F.3d 885, 894 (9th Cir. 1995) (holding government had "possession and control" of Bureau of Prisons files where defendant was charged with committing murder in a BOP facility and BOP "actually contributed to the investigation")).

The court reasoned that the government had previously obtained information from each of the agencies at issue, stating, "It is insufficient for *Brady* purposes for the prosecution to produce only that information from other agencies that has found its way into the physical possession of the prosecutor. The prosecution may not simply ask for information it wants while leaving behind other, potentially exculpatory information within agency files." *Id.* at 1079. Because the agencies previously provided requested information to the prosecution, exculpatory information in the agencies' files was "within the prosecution's 'possession and control' for *Brady* purposes," and the government was required to review the agency's files for evidence favorable to the defendants. *Id.* at 1079-80 (stating that "the government has levied a broad and complex Indictment and has consulted with a number of federal agencies in gathering evidence against the accused," so the Constitution "requires that the prosecution's search for evidence favorable to the accused be as far-reaching as the search for evidence against him").

In the Seventh Circuit, "if a government agency is charged with the administration of a statute and has consulted with the prosecution in the case, the agency will be considered part of the prosecution and its knowledge of *Brady* material will be imputed to the prosecution." *United States v. Bhutani*, 175 F.3d 572, 577 (7th Cir. 1999) (citing, *inter alia*, *United States v. Wood*, 57 F.3d 733, 737 (9th Cir. 1995) ("The government cannot with its right hand say it has nothing while its left hand holds what is of value.")). Therefore, in a case in which the defendants were charged with offenses related to adulterated pharmaceuticals, information held by the FDA could be "imputed to the prosecution." *Id.* (finding no *Brady* violation because the FDA data at issue "was not published until well after the trial had ended" and was therefore "not within the possession of the government").

Finally, under some circumstances, courts order the production of specific, known documents from agency files and do not require prosecutors to search the agency's entire file for potentially discoverable information. For example, in *United States v. Gupta*, 2012 WL 990830, at *1 (S.D.N.Y. Mar. 26, 2012), the United States Attorney's Office (USAO) criminally prosecuted a defendant for insider trading and the SEC brought a parallel civil enforcement action. *Id.* The USAO and the SEC conducted joint interviews of 44 witnesses, and the SEC separately conducted only two witness interviews. *Id.* On these facts, the court held that the prosecutor was required to "review the SEC's memoranda and interview notes and disclose to defendant any '*Brady*' material therein." *Id.*

Similarly, in *United States v. Rigas*, 779 F. Supp. 2d 408, 414 (M.D. Pa. 2011), the court held that a prosecutor in the Middle District of Pennsylvania was required to turn over notes regarding the SEC's interview with a particular witness. The court found that the SEC's investigation was "jointly undertaken" with the USAO in the Southern District of New York and that the interview notes were readily accessible to the government. *Id.* at 414-15. Notably, the district court in the criminal case in the Southern District of New York had previously denied the defendant's request for disclosure of notes of the SEC's interviews, holding that the notes were not within the government's "possession, custody, or control" because "there was no joint investigation with the SEC." *United States v. Rigas*, 2008 WL 144824, at *2 (S.D.N.Y. Jan. 15, 2008), *aff'd*, 583 F.3d 108, 125-26 (2d Cir. 2009).

Importantly, in both *Gupta* and the Middle District of Pennsylvania's decision in *Rigas*, the prosecutor's duty to review and disclose SEC material was limited to the specific documents the defendant requested and did not extend to the SEC's entire file. The *Gupta* court noted that the prosecutor's obligation was limited to reviewing the SEC's interview notes because they were within the scope of the "joint investigation," but pointed out that "[t]his does not mean that all of the documents the

SEC prepared and accumulated in its investigation of [the defendant] are part of the joint investigation." 2012 WL 990830 at *3; *see also Rigas*, 779 F. Supp. 2d at 414 (noting defendants "are seeking limited information from the SEC and are not asking that agency to open its entire file to them").

V. Limitations on disclosure requirements within the "prosecution team"

A determination that a particular federal agency or arm of a federal agency is part of the government's prosecution team does not end the inquiry with respect to whether information in the agency's files must be disclosed to the defendant in a criminal case. There are at least two important exceptions to such a disclosure requirement—the information must be material and it must not be privileged.

A. Materiality

Rule 16(a)(1)(E) requires disclosure of certain documents and data that are "material to preparing the defense." FED. R. CRIM. P. 16(a)(1)(E). For a thorough discussion of materiality, *see* Kelly A. Zusman and Daniel Gillogly, *Getting a Clue: How Materiality Continues to Play a Critical Role in Guiding Prosecutors' Discovery Obligations*, in this issue. "A defendant must make a threshold showing of materiality, which requires a presentation of 'facts which would tend to show that the Government is in possession of information helpful to the defense.' " *Santiago*, 46 F.3d at 894 (quoting *United States v. Mandel*, 914 F.2d 1215, 1219 (9th Cir. 1990)). Specifically, a document is material under Rule 16 if its pretrial disclosure will enable a defendant "significantly to alter the quantum of proof in his favor." *United States v. Caro*, 597 F.3d 608, 621 and n.15 (4th Cir. 2010) (quoting *United States v. Ross*, 511 F.2d 757, 763 (5th Cir. 1975)); *see also United States v. Pesaturo*, 519 F. Supp. 2d 177, 190 (D. Mass. 2007) (reviewing Rule 16 materiality standards across jurisdictions).

In cases in which defendants seek open-ended discovery from a federal regulatory agency or the civil arm of the investigative agency involved in the case (if prosecutors have neither obtained nor disclosed information from the agency's files), it is unlikely that defense counsel will be able to make more than a conclusory allegation that material information may be present in the agency's files. In these situations, discovery should be denied, because "[n]either a general description of the information sought nor conclusory allegations of materiality suffice." *Santiago*, 46 F.3d at 894 (quoting *Mandel*, 914 F.2d at 1219) (holding defendant's assertion he needed to know whether any inmate witnesses were members of rival gangs insufficient to establish materiality of Bureau of Prisons files); *see also United States v. Krauth*, 769 F.2d 473, 476 (8th Cir. 1985) (quoting *United States v. Conder*, 423 F.2d 904, 910 (6th Cir. 1970)) (defendant's materiality burden "not satisfied by a mere conclusory allegation that the requested information is material to the preparation of the defense"); *Finnerty*, 411 F. Supp. 2d at 431 ("Conclusory allegations are insufficient, however, to establish materiality, and the burden is on the defendants to make a prima facie showing that the documents sought are material to preparation of the defense.") (citing *United States v. McGuinness*, 764 F.Supp. 888, 894 (S.D.N.Y. 1991)) (internal citations omitted).

B. Work product, attorney-client, and deliberative process privileges

To the extent a defendant seeks disclosure of documents between and among prosecutors and agencies, particularly where those documents contain opinions and mental impressions of the case, such documents may be protected from disclosure by one or more applicable privileges. *See United States v. Kohring*, 637 F.3d 895, 907 (quoting *Morris v. Ylst*, 447 F.3d 735, 742 (9th Cir. 2006)) ("[I]n general, a

prosecutor's opinions and mental impressions of the case are not discoverable under *Brady*/[*Giglio*] *unless* they contain underlying exculpatory facts.") (emphasis in original).

Rule 16(a)(2) protects from disclosure "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." FED. R. CRIM. P. 16(a)(2). For example, in *United States v. Robinson*, 439 F.3d 777, 779-80 (8th Cir. 2006), the court held that the defendant in a tax evasion case was not entitled to discovery of "internal documents used by the government to calculate gross receipts." Rule 16(a)(2) protected the documents from disclosure, even if the denial of such materials "made trial preparation extremely difficult." *Id.*

In addition, it is well-established that "the work-product doctrine applies to criminal litigation as well as civil," and it "protect[s] material prepared by agents for the attorney as well as those prepared by the attorney himself." *United States v. Nobles*, 422 U.S. 225, 236, 238-39 (1975). Although materials such as an attorney's notes regarding witness interviews clearly qualify as protected work product, such protection can potentially be overcome by a defendant's substantial need for *Brady* material. *Gupta*, 2012 WL 990830, at *4. *But see United States v. Wirth*, 2012 WL 1580991, at *1-2 (D. Minn. May 4, 2012) (holding agent rough notes and draft summaries of interviews were protected from disclosure by the work-product doctrine). To the extent memoranda qualifying as work product contain "the prosecutor's opinions and mental impressions about the case, the memoranda themselves [do] not have to be disclosed; only the 'underlying exculpatory facts' in the memoranda [have] to be disclosed." *Johnson v. United States*, 2012 WL 1836282, at *149 (N.D. Iowa Mar. 22, 2012).

Finally, "[t]he attorney-client privilege covers conversations between prosecutors (as attorneys) and client agencies within the government," and "[t]he deliberative-process privilege covers memoranda and discussions within the Executive Branch leading up to the formulation of an official position." *United States v. Zingsheim*, 384 F.3d 867, 871-72 (7th Cir. 2004).

VI. Conclusion

Issues involving which agencies are members of the "prosecution team" and whose files should be reviewed for potential discovery materials can be thorny. Defense counsel are increasingly attempting to chip away at divisions between agencies and treat the entire federal government as a single entity for purposes of prosecutors' discovery obligations. In reality, prosecutors' obligations are much more limited. Each case requires fact-specific analysis, but in general, a prosecutor who consults the guidance set forth in the Ogden Memo during the investigative stage will minimize the amount of resources necessary to comply with his or her discovery obligations during the course of the criminal prosecution.❖

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When Disclosure Under *Brady* May Conflict With the Attorney-Client Privilege

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I. Introduction

The Government has indicted defendants Adam and Bravo, two former employees of the Corporation, for securities fraud. In the course of discovery, government investigators uncover a legal opinion in the Corporation's files. The legal opinion tends to exonerate defendant Adam, but further implicates defendant Bravo and an uncharged subject, Charlie, in the investigation. Defendant Adam requests disclosure of any internal memoranda pursuant to *Brady v. Maryland,* while defendant Bravo raises the issue of attorney-client privilege. The Corporation, fearing further criminal and civil liability, refuses to waive its privilege in the opinion.

The *Brady* doctrine directs the prosecutor to release the legal opinion in discovery to both defendants Adam and Bravo, though the prosecutor would violate the Corporation's and/or defendant Bravo's attorney-client privilege in doing so. But if the prosecutor preserves the secrecy of the legal opinion, the prosecutor may commit a reversible *Brady* violation with respect to defendant Adam. Even if she merely reviews the opinion, any further investigation and prosecution of subject Charlie may be tainted irrevocably.

A prosecutor's constitutional imperative to *disclose* exculpatory material under *Brady* may thus directly conflict with the duty to *withhold* the same material from another defendant pursuant to attorney-client privilege. This potential conflict has arisen in a small number of prosecutions, but federal courts have avoided holding that one doctrine trumps the other. Large quantities of electronically stored information (ESI), however, may transform this fringe concern into a substantial obstacle in criminal discovery more difficult for courts and prosecutors to avoid.

II. Existing jurisprudence

In *Brady v. Maryland*, the Supreme Court held that government prosecutors are required by the Due Process Clause to provide material evidence favorable to an accused defendant upon request. 373 U.S. 83, 87 (1963). *See Giglio v. United States*, 405 U.S. 150, 154 (1972) (extending *Brady* obligation to evidence impeaching witnesses).

At the same time, the Supreme Court continues to reaffirm the attorney-client privilege as "one of the oldest recognized privileges for confidential communications. . . . intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.' " *Swidler & Berlin v. United States,* 524 U.S. 399, 403 (1998) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). The Court accordingly

held that the privilege survived the death of the client and thus permitted the attorney of a deceased client to withhold his notes from a subpoena in a criminal investigation. *Id*. at 410-11.

The *Swidler* Court expressly declined, however, to address the broader issue of how the attorney-client privilege intersects with a defendant's constitutional rights:

> Petitioners, while opposing wholesale abrogation of the privilege in criminal cases, concede that exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege. We do not, however, need to reach this issue, since such exceptional circumstances clearly are not presented here.

Id. at 408, n.3.

The Supreme Court's decision in *Swidler* stands in contrast to cases where it definitively resolved struggles between the demands of criminal discovery and recognized evidentiary privileges. *See United States v. Nixon*, 418 U.S. 683, 707, 713 (1974) (holding that executive privilege must yield to specific need for evidence in criminal prosecution); *Davis v. Alaska*, 415 U.S. 308, 319 (1974) (state privilege in protecting secrecy of juvenile offender records must yield to defendant's Sixth Amendment right to confront witnesses).

Notably, a three-justice dissent in *Swidler* found the conflict was squarely before the Court, and indicated that a defendant's right to due process outweighed a client's privilege:

> [E]ven petitioners acknowledge that an exception may be appropriate where the constitutional rights of a criminal defendant are at stake.
>
> . . . .
>
> Where the exoneration of an innocent criminal defendant or a compelling law enforcement interest is at stake, the harm of precluding critical evidence that is unavailable by any other means outweighs the potential disincentive to forthright communication.

524 U.S. at 413, 416 (O'Connor, J.) (dissenting).

Since *Swidler*, other federal courts have likewise declined to address whether the vindication of a defendant's rights under *Brady* supersedes the attorney-client privilege. Both the Eighth and Ninth Circuits, in fact, relied specifically upon the *Swidler* Court's demurrer to affirm denials of habeas corpus petitions from state defendants. *Newton v. Kemna*, 354 F.3d 776, 781-82 (8th Cir. 2004) ("[W]e are unable to discern any transcendental governing principles that foreshadow what the Supreme Court would do in the case before us."); *Murdoch v. Castro*, 609 F.3d 983, 993 (9th Cir. 2010) (en banc) (noting that the *Swidler* Court "would not consider the question whether the attorney-client privilege might yield in the face of constitutional rights").

Little jurisprudence exists, moreover, indicating what principles should guide trial courts faced with a direct contest between these doctrines. Prosecutors parsing the discovery demands of multiple defendants may assume that *Brady* rights, arising from the Due Process Clause in the Fifth Amendment, will naturally trump the attorney-client privilege. Response of Government at 6, *United States v. Carollo*, No. 10-00654 (S.D.N.Y. Nov. 14, 2011), ECF No. 77 ("The Government seriously doubts that the Privilege-Claimant is suggesting that the Government can withhold *Brady* information simply because that information is in an otherwise privileged document.").

Even when prosecutors regard both interests as equally compelling, they may naturally elevate immediate *Brady* demands over attorney-client secrecy due to risk aversion. Deliberate suppression of exculpatory material threatens the constitutional regularity of a case in which the prosecutor bears sole

professional responsibility. A breach of attorney-client secrecy, in contrast, may only affect civil liabilities or prosecutions of other individuals as yet, or never to be, indicted.

The primacy of *Brady* over attorney-client secrecy, however, is not predestined. Notwithstanding the dissent in *Swidler*, it is not certain that the Supreme Court would weaken attorney-client secrecy, an unshakeable pillar of the adversarial system, in favor of a defendant's access to arguably exculpatory evidence. The Court has previously ruled in favor of the confidentiality of a third party against a defendant's assertion of constitutional rights. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 52-53 (1987) (rejecting defendant's contention that he was entitled under Confrontation Clause to unfettered access to youth services file guaranteed confidential by state statute). *See also United States v. Shrader*, 716 F. Supp. 2d 464, 473 (S.D. W. Va. 2010) ("Any court would make short work of an argument that the attorney-client privilege can be overcome by a criminal defendant's cross-examination needs. The argument that the psychotherapist-patient privilege is only applicable when not inconvenient for a criminal defendant is similarly deficient.").

Under any view, a prosecutor transgresses the attorney-client privilege at considerable risk to his case and professional standing. Federal courts have long recognized that a prosecutor's egregious breach of the attorney-client privilege may take on constitutional dimensions under the Due Process and Self-Incrimination Clauses of the Fifth Amendment, as well as the right to counsel under the Sixth Amendment. *See United States v. Kennedy*, 225 F.3d 1187, 1194–95 (10th Cir. 2000); *United States v. Voigt*, 89 F.3d 1050, 1067 (3d Cir. 1996); *United States v. White*, 879 F.2d 1509, 1513 (7th Cir. 1989), and cited cases.

At a minimum, a prosecutor's improvident breach of the attorney-client privilege in discovery— even when ordered by the trial court— may justify interlocutory appeal and cause substantial delay. *United States v. Williams Cos., Inc.*, 562 F.3d 387, 397 (D.C. Cir. 2009) (discovery order subject to interlocutory appeal by intervenor claiming attorney-client privilege); *In re Lott*, 424 F.3d 446, 449-51 (6th Cir. 2005) (granting mandamus and reversing discovery order improperly directing petitioner to release communications with attorney); *United States v. Cuthbertson*, 651 F.2d 189, 193-95 (3d Cir. 1981) (holding discovery order subject to immediate appeal where it required release of interviews taken in *60 Minute* broadcast pursuant to *Brady*).

Regardless of the circumstances, the Supreme Court has cautioned that courts should refrain from "balancing" a defendant's *Brady* rights against another party's attorney-client privilege. In *Jaffee v. Redmond*, the Supreme Court explicitly rejected balancing of the demands of *Brady* and *Giglio* with recognized confidentiality privileges. 518 U.S. 1, 17-18 (1996) ("Making the promise of [patient] confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."). *See Swidler & Berlin*, 524 U.S. at 409 (rejecting balancing of privileges as introducing "substantial uncertainty into the privilege's application").

III. Avoidance and accommodation by trial courts

In the absence of clear guidance, federal trial courts faced with competing demands between *Brady* disclosure and attorney-client secrecy have simply avoided placing one doctrine above the other. For example, in *United States v. Williams Companies, Inc.*, an energy company intervened in a fraud prosecution of two of its former traders, opposing a discovery order compelling the government to disclose an internal report by the company's attorneys. The company argued that a deferred prosecution agreement that released the report to the government, coupled with the attorney-client privilege, superseded defendants' rights under *Brady*. 562 F.3d 387, 390-92 (D.C. Cir. 2009).

On interlocutory appeal, the District of Columbia Circuit declined to address the company's claim that attorney-client privilege foreclosed any disclosure of the report to the defendants. Instead, the court remanded the matter for additional findings regarding the guarantees of confidentiality and whether the report, in fact, contained material favorable to the defendants. *Id*. at 397. *See also United States v Bergonzi*, 216 F.R.D. 487, 492-93 (N.D. Cal. 2003) (determining attorney-client privilege did not apply to internal report provided pursuant to a disclosure agreement with SEC in prosecution of former employees), *aff'd*, 403 F.3d 1048, 1049-50 (9th Cir. 2005).

Both the trial and appellate courts similarly sidestepped the issue in *United States v. Defonte*, 2006 WL 559443 (S.D.N.Y. Mar. 6, 2006). Defonte, a federal prison guard accused of abusing prisoners, subpoenaed the journal entries of his alleged victim, which the victim claimed were protected by attorney-client privilege. The trial court determined that the privilege did not apply to the journal because, in part, the alleged victim kept it in her cell. *Id*. at *1. On expedited review, the Second Circuit found that the trial court defined a prisoner's expectation of privacy too narrowly, but "did not decide that there were compelling or overwhelming Sixth Amendment concerns involved in its decision . . . ." *United States v. DeFonte*, 441 F.3d 92, 95-96 (2d Cir. 2006) (remanding for further findings).

In *United States v. Carollo*, 2011 WL 6935292 (S.D.N.Y. Dec. 20, 2011), a panel of three district court judges— each presiding over a separate prosecution of price-fixing in bond auctions— considered a latent conflict between *Brady* and attorney-client privilege. The government moved to disclose recordings of two confidential informants pursuant to *Brady*. Both the defendants and the financial houses that employed them opposed the motion, arguing that the informants improperly steered conversations toward attorney-client communications and thus tainted the prosecution. The government countered that its *Brady* obligations unequivocally superseded any privileges in the recordings. *Id.* at *2.

Following a hearing, the panel found that the defendants failed to carry their burden to demonstrate that the various prosecutions were prejudicially tainted by breaches of attorney-client privilege. The panel declined, however, to address the underlying issue of whether the intervening employers could suppress the privileged portion of the recordings, contrary to the Government's *Brady* obligations. *Id.* at *3.

Finally, the pre-trial ruling in *United States v. Sattar*, 2003 WL 22137012 (S.D.N.Y. Sept. 15, 2003), illustrates the same reluctance to address this issue squarely, even where the privileged communication constitutes important evidence of the offenses charged. In *Sattar*, the government charged defendant Sattar with conspiring to provide material support to a terrorist organization based upon his relationship with Sheikh Omar Ahmad Ali Abdel Rahman. Rahman was convicted for the World Trade Center bombing in 1993. Defendants Yousry and Stewart, Rahman's translator and attorney respectively, were also indicted based on their prison conversations with Rahman that served as cover for his continued participation in terrorist activity. *Id.* at *1-3.

Defendant Sattar sought disclosure of the recordings and notes of the prison conversations pursuant to *Brady*, but Rahman refused to waive his attorney-client privilege. The government prosecution team, which had not reviewed the recordings and notes, sought *in camera* review. Defendant Stewart moved for, among other remedies, appointment of a special master to assess the government's claims that it should have access to privileged materials for purposes of disclosure to Sattar. *Id.* at *15-18.

In making its ruling, the district court noted that the government was "correct that the evidentiary privileges asserted by Stewart are not constitutional in nature," and that "[t]he attorney-client privilege . . . is itself based in policy, rather than in the Constitution . . ." *Id.* at *17. Like the above courts, however, the district court in *Sattar* stopped short of ordering the release of the allegedly

privileged items in vindication of Sattar's constitutional rights. *Id.* at *21-22 (directing government taint team to identify portions of recordings and notes purportedly containing privileged material for possible further review).

The disputes over disclosure of the recordings and notes in *Sattar* continued for an additional year under a protective order obligating Rahman to timely assert his privilege upon notice of a party's intention to use particular recordings. *United States v. Sattar*, 395 F. Supp. 2d 79 (S.D.N.Y. 2005), *aff'd*, *United States v. Stewart*, 590 F.3d 93 (2d Cir. 2009) (affirming convictions of Sattar, Yousry, and Stewart).

IV. Complications of large quantities of electronically stored information (ESI)

With large scale computerized recordkeeping, disputes over *Brady* obligations and preservation of attorney-secrecy may become prevalent and more difficult for trial courts to avoid. First, the sheer volume of computerized material that organizations produce—and that prosecutors must review for purposes of discovery—has grown enormously. The use of email for important communications, in particular, may spread privileged materials over a wide area of a business's computers, its employees' personal computers, and third-party service providers. An employee will sooner forward an email with legal advice attached to numerous recipients than retrieve, copy, and distribute a formal hard copy of legal advice.

Most important, outright seizure of a target's computer hard-drives or servers has become a preferred method of retrieving computerized evidence for criminal prosecution. Government agents may accordingly take custody of billions of documents and metadata in computerized form. *See* Response of Government in *United States v. Kim Dotcom*, No. 12-CR-003 (E.D.Va. June 8, 2012), ECF No. 99 (seizure of more than 1,100 servers, comprising 28 petabytes of information— equivalent to more than 500 million file cabinets).

As a result, the frequency with which government investigators know (or suspect) that they are in possession of materials subject to both disclosure under *Brady* and suppression under attorney-client privilege will increase. Neither the prosecutors nor potential targets, moreover, may be aware of all materials covered by the attorney-client privileges or how to locate them in the ocean of computerized information. In that new milieu, traditional discovery measures, such as privilege logs or *in camera* review, will simply be overwhelmed.

Nonetheless, once the government takes possession of undifferentiated computerized evidence, its obligations under *Brady* and the attorney-client privilege may attach, whether or not it has the opportunity or ability to review that information. *See* FED. R. CRIM. P. 16(a)(1)(E) (mandating disclosure of items "within the government's possession, custody, or control"). *Cf. Johnson v. Norris*, 537 F.3d 840, 847 (8th Cir. 2008) (no *Brady* violation with respect to witness's confidential psychiatric records where government never had possession).

Every investigation where the government takes possession of large caches of computerized data may render it susceptible to accusations of improper exposure to privileged information. For example, in *United States v. Warshak*, 631 F.3d 266, 292 (6th Cir. 2010), government investigators seized the contents of over 90 computers and servers of a herbal supplement company whose owner was being investigated for mail fraud. The company's computers contained over 60,000 emails either from or to the company's attorneys. The government isolated the emails in question and returned them to the defendant.

Despite return of the emails, the district court granted the company's motion for a *Kastigar*-type hearing to determine whether the Government's temporary access to them tainted the investigation. The district court determined that it did not, and on post-conviction appeal, the Sixth Circuit upheld the district court's conclusions. *Id.* at 292-95. The Sixth Circuit also rejected the defendant's argument that the government had "abdicated" its *Brady* obligations by simply returning undifferentiated computer files that were previously and continually in its possession. *Id.* at 295 (expressing doubt whether fruit-of-poisonous tree analogy applies to breaches of attorney-client privilege). *See United States v. Squillacote*, 221 F.3d 542, 558 (4th Cir. 2000) (finding *Kastigar*-type proceedings not applicable to breaches of evidentiary or testimonial privilege).

But the strategy of isolating and returning arguably privileged materials, successful in *Warshak*, may not work in every case. Assignment of a separate taint team to handle seized computer equipment may be prohibitively cumbersome or expensive, and prosecuting attorneys may still not be able to demonstrate that they have not viewed privileged materials. Simply returning arguably privileged materials to one defendant, of course, would not address the situation where a second defendant is entitled to disclosure of those materials under *Brady*.

Early submission to the trial court of materials potentially covered by both doctrines may not constitute a viable alternative. Most judges would agree to review a small number of documents if it would insure vindication of an important constitutional imperative. However, even the most committed jurist would likely decline to perform an initial review on entire computer servers to eliminate theoretical disputes between *Brady* and attorney-client secrecy. *Cf. McNelton v. McDaniel*, 2006 WL 1215169, *1-2 (D. Nev. May 5, 2006) (negotiation between habeas corpus petitioner, citing *Brady*, and Las Vegas Police Department, citing attorney-client privilege, narrows scope of dispute to six sentences for *in camera* review).

In *United States v. Zolin*, 491 U.S. 554 (1989), the Supreme Court held that a trial court may elect to employ *in camera* review to determine applicability of the attorney-client privilege, where the moving party has demonstrated a good faith factual basis for invoking the crime-fraud exception. The *Zolin* Court cautioned, however, that under no circumstances, does any party hold a right to *in camera* review, and expressly identified the volume of evidence to be reviewed as a significant factor for trial courts when considering whether to conduct such a review. *Id*. at 568-72, 574 (holding decision whether to conduct *in camera* review subject to clearly erroneous standard).

Even with a willing judge, the wholesale review of computerized evidence for purposes of discovery may be viewed as participation in the prosecution of offenses and a breach of the court's impartiality.

> There is also reason to be concerned about the possible due process implications of routine use of in camera proceedings. . . . [W]e cannot ignore the burdens *in camera* review places upon the district courts, which may well be required to evaluate large evidentiary records without open adversarial guidance by the parties.

Id. at 571-72.

Regardless of the approach taken, prosecutors may not have an unlimited amount of time to tackle computer servers filled with potential evidence. In *United States v. Metter*, 2012 WL 1744251 (E.D.N.Y. May 17, 2012), the defendant successfully moved to suppress the entire seizure of over 60 computer servers. The government had represented to the district court that a taint team would review the contents of the servers to determine whether the seized evidence was within the scope of the search warrant. *Id.* at *5.

While the district court recognized that review of voluminous computerized data presented unique challenges, it nonetheless determined that a delay of 15 months to initiate that review rendered the search unreasonable under the Fourth Amendment. *Id.* at *9 ("The government's retention of *all* imaged electronic documents, including personal emails, without *any* review whatsoever to determine not only their relevance to this case, but also to determine whether any recognized legal privileges attached to them, is unreasonable and disturbing.") (emphasis in original).

V. Conclusion

The potential for direct conflicts between the *Brady* doctrine and the attorney-client privilege is easily recognized and likely to increase with large quantities of ESI. As of yet, however, the Supreme Court and lower federal courts have shown little inclination to resolve a conflict between those two doctrines. Under those circumstances, prosecutors should first isolate any possible privileged material in order to inoculate against any accusation of taint. Thereafter, prosecutors would do best to follow the lead of the trial courts and avoid or accommodate possible conflicts in any possible way.❖

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Discovery and the Crime Victims' Rights Act

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The Department of Justice's recent policy statements encouraging liberal discovery disclosures reflect the United States' vigilant commitment to ensuring a criminal defendant's right to a fair trial. As vital to the pursuit of justice as these disclosures to defendants may be, there is an equally compelling imperative that cannot be lost in the process—the obligation to protect the interests of crime victims and witnesses. As Deputy Attorney General Cole recently remarked:

> Fair trials and just results ensure that the innocent are not wrongly convicted, and that the guilty do not go free. A fair and just criminal justice system should also ensure that other participants in the process—i.e., victims, law enforcement officers, and other witnesses—are not unnecessarily subjected to physical harm, harassment, public embarrassment or other prejudice, or the fear that they might be subjected to such consequences.

Deputy Attorney General James M. Cole, Remarks Before the Senate Judiciary Committee, June 6, 2012, *available at* http://www.justice.gov/iso/opa/dag/speeches/2012/dag-speech-120606.html.

There are many important interests that should be counterbalanced against discovery disclosures, including national security interests, maintaining the confidentiality and continued viability of law enforcement practices, and the protection of ongoing criminal investigations. This article will focus on the interplay between the discovery demands of the criminal justice system and the critical need to protect the privacy, dignity, and of course, safety of victims and witnesses. Those interests have been codified in the Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771 (2012).

I. What is the Crime Victims' Rights Act (CVRA)?

The CVRA is a statutory scheme designed to protect victims' rights and ensure them the opportunity to be involved in the criminal justice process. *United States v. Moussaoui*, 483 F.3d 220, 234 (4th Cir. 2007); *Kenna v. United States Dist. Court*, 435 F.3d 1011, 1016 (9th Cir. 2006) ("The [CVRA] was enacted to make crime victims full participants in the criminal justice system."); *Does v. United States*, 817 F. Supp.2d 1337 (S.D. Fla. 2011).

The statute enumerates the following eight rights:

(1) The right to be reasonably protected from the accused

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused

> (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding
>
> (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding
>
> (5) The reasonable right to confer with the attorney for the Government in the case
>
> (6) The right to full and timely restitution as provided in law
>
> (7) The right to proceedings free from unreasonable delay
>
> (8) The right to be treated with fairness and with respect for the victim's dignity and privacy

18 U.S.C. § 3771(a) (2012).

The statute tasks both courts and prosecutors with the responsibility of protecting these rights. *See* § 3771(b)(1) ("[T]he court shall ensure that the crime victim is afforded the rights described in subsection (a)."); § 3771(c)(1) ("Officers and employees of the Department of Justice . . . shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)."); *Does v. United States*, 817 F. Supp. 2d at 1340-41. Importantly, the statute not only mandates that the district court "shall ensure" that crime victims are afforded these rights, but requires a court to state its reasons on the record for any decision denying relief under the CVRA. 18 U.S.C. §3771(b)(1) (2012) ("The reasons for any decision denying relief under [the CVRA] shall be clearly stated on the record.").

II. Legislative history of the CVRA

One Senate sponsor of the CVRA called it "the latest enactment in a forty-year civil rights movement" for victims' rights. John Kyl et. al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 583 (2005). Senator Kyl also described a history of policy frustration over how to endow the criminal justice system with essential balance by strengthening rights and protections for innocent crime victims caught up in the process, when a series of federal statutes, such as the Victim and Witness Protection Act of 1982 (VWPA) and the Victims' Rights and Restitution Act of 1990, proved ineffective at fully securing victims' rights. *Id.* at 583-93. The CVRA was enacted "to transform the federal criminal justice system's treatment of crime victims," *id.* at 593, through the dual means of articulating and providing for enumerated substantive rights of victims, *see* 18 U.S.C. § 3771(a)(1) - (8), and prescribing that the crime victim may autonomously assert and litigate these rights, in limited fashion, in both the district court and court of appeals. *See id*. § 3771(d).

Several of the enumerated rights may be implicated by criminal procedures and rules calling for discovery by the government to the defendant. *See id.* § 3771(a)(1) (the "right to be reasonably protected from the accused"); *id*. § 3771(a)(8) (the "right to be treated with fairness and with respect of the victim's dignity and privacy"). For instance, production of a victim's address, financial data, medical, psychological, or sexual history to the defense all could involve interests identified in these provisions. Senator Kyl emphasized that the statute's enumerations "are not intended to just be aspirational. . . . 'It is not the intent of this bill that its significance be whittled down or marginalized by the courts or the executive branch. This legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process.' " *See* Kyl, at 613, 614 (quoting 150 Cong. Rec. S10911).

The Federal Rules of Criminal Procedure were amended to help implement provisions of the CVRA, and several of these amendments reinforce the means (and the need) to protect victim information from discovery. *See* FED. R. CRIM. P. 12.1(b) (exempting victim address and telephone information from alibi discovery); FED. R. CRIM. P. 17(c)(3) (requiring court order, following notice and opportunity to victim to litigate, before trial subpoena may issue for personal or confidential information about a victim). *See also* 18 U.S.C. § 3509(d) (2012) (special privacy protection for information and documents concerning child victims and child witnesses); *id*. § 3664(d)(4) (special privacy protection for restitution matters); *id*. § 3432 (requiring production of the list of government witnesses to defendant *in a capital case*) (emphasis added).

III. The CVRA and discovery: dual duties

Federal prosecutors face a dual challenge: to fulfill both the Department of Justice's policies and judicial expectations for generous and broad criminal discovery and also the statutory and other responsibilities to safeguard victim rights and interests that may be impacted by criminal discovery. The need to achieve this sometimes difficult balance is recognized in Department of Justice policies and promulgations. *See, e.g.*, Memorandum from Deputy Attorney General David Ogden, "Guidance for Prosecutors Regarding Criminal Discovery" (Jan. 4, 2010), *available at* http://dojnet.doj.gov/usao/eousa/ole/usabook/memo/ogden_memo.pdf (Ogden Memo):

> 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 . . . . and other strategic considerations that enhance the likelihood of achieving a just result in a particular case.

In addition to this guidance, there is a prescribed disciplinary procedure with regard to victim complaints that Department of Justice employees, including prosecutors, have failed to comply with the CVRA. *See* 28 C.F.R. § 45.10 (2012). And while the CVRA does not itself create a cause of action against government employees for claimed violations, *see* 18 U.S.C. § 3771(d)(6) (2012), the Federal Tort Claims Act may reach action (or inaction) by an Assistant United States Attorney (AUSA) concerning victim rights that are not a discretionary function. *See Ochran v. United States*, 117 F.3d 495, 499 (11th Cir. 1997).

To avoid such problems and to fulfill the dual duty to provide correct, and often generous, criminal discovery, while also protecting victim rights, timely communication with victims (or, if they are represented, their counsel) is key. Victims should have the opportunity to understand what kind of material may need to be provided by the government in discovery and prosecutors should appreciate what privacy, dignity, or safety issues may be implicated by prospective discovery. In addition, communications with victims may result in material required to be produced under the Jencks Act or Federal Rule of Criminal Procedure 26.2, including electronic communications such as email, and this additional requirement should also be understood by victims, law enforcement agents, and victim-witness coordinators and staff.

IV. Who is a "victim" under the CVRA?

Courts and the Department generally take a broad view of those to be classified as CVRA "victims." Under the CVRA, a crime victim is defined as "a person directly and proximately harmed as a result of the commission of a Federal offense . . . ." 18 U.S.C. § 3771(e) (2012). To qualify as a "crime victim" for purposes of the CVRA, an individual does not need to be identified in an indictment or be someone "whose identity constitutes an element of the offense." *In re Stewart*, 552 F.3d 1285, 1289 (11th Cir. 2008). An individual "may qualify as a victim, even though [he] may not have been the target of the crime, as long as [he] suffers harm as a result of the crime's commission." *Id*. at 1289. In *Stewart*, for example, the court found that home purchasers were CVRA "crime victims" of a defendant who was charged with mortgage fraud-related wire fraud and money laundering in which a bank was the only named victim. *Id. But see In re Antrobus*, 519 F.3d 1123, 1125 (10th Cir. 2008) (affirming district court's finding that the parents of deceased woman were not "directly and proximately harmed" by a defendant convicted of transferring a gun to a juvenile who later used the firearm in a rampage and murdered their daughter); *United States v. Atl. States Cast Iron Pipe Co.*, 612 F.Supp.2d 453, 503 (D.N.J. 2009) (finding definitions of "victim" under CVRA, MVRA, and VWPA are "aligned" and holding that six employees who were harmed before the offense of conviction were not CVRA victims); *United States v. Sharp*, 463 F. Supp.2d 556, 564 (E.D. Va. 2006) (tangential harm resulting from a drug offense does not suffice to confer victim status); *United States v. Guevara-Toloso*, 2005 WL 1210982, at *3 (E.D.N.Y. May 23, 2005) (victims of federal offender's prior state crimes are not crime victims under CVRA). A victim may be a person or an entity, and may be the representative of a child, or someone who is incapacitated or deceased. 1 U.S.C. § 1 (2012); 18 U.S.C. § 3771(e) (2012).

While the formal determination of who qualifies as a CVRA victim of a particular crime will depend on the facts of each case, the 2011 Attorney General Guidelines encourage Department personnel to provide assistance not only to direct victims of crimes but also to relevant-conduct victims, where appropriate. Many victim determinations may arise in regard to restitution issues that will be resolved only at the sentencing phase, whereas protection of victim interests as to discovery issues requires earlier action, further counseling a broad view of who is a victim at that earlier stage.

V. Balancing discovery and victim rights

Certain steps can be taken both in individual cases and, with the participation of the courts, on a district-wide level, that can assist in balancing the privacy, dignity, and safety rights of victims with appropriate disclosures to defendants. Protections should be considered both in the dissemination of sensitive victim information to the press and the public, and to the defendant personally. Surprisingly, although the issues raised by the CVRA have been addressed by courts for decades, there are only a handful of cases to date that have directly balanced discovery rights in relation to the rights of victims under the CVRA.

A. What type of discoverable victim/witness information may be protected?

A myriad of information may be subject to both disclosure in discovery and protection under the CVRA. The types of information include those which courts have traditionally looked to protect. As noted by the Second Circuit prior to enactment of the CVRA, "[f]inancial records of a wholly owned business, family affairs, illnesses, embarrassing conduct with no public ramifications, and similar matters will weigh more heavily against access than conduct affecting a substantial portion of the public." *See United States v. Amodeo*, 71 F.3d 1044, 1051 (2d Cir. 1995). *See also id.* at 1050 ("The privacy interests of third parties . . . should weigh heavily in a court's balancing equation."). *See also United States v.*

Mitchell, 2010 WL 890078, at *7 (D. Utah Mar. 8, 2010) (relying in part on the CVRA, court holds that "[i]n a case involving allegations of the sexual abuse of a minor, the court agrees with the government that there is a risk that broadcast and potentially re-broadcasts of the videos [of an interview of the victim] could essentially amount to revictimization"). As noted, *supra*, other statutes may provide additional protections as well.

In some instances, the disclosure of even the name of a victim may be subject to protection. As one court considering the CVRA noted,

> The government chooses to be a litigant in each case it prosecutes, and the defendant is permissibly forced into that role upon a showing of probable cause. *But individuals covered by the CVRA have done nothing that warrants unwanted intrusion into their lives, and they may have good reason either to be concerned about the public listing of their names and contact information or simply to prefer not to be reminded of their victimization each time the court schedules a proceeding.*

United States v. Turner, 367 F. Supp.2d 319, 328-29 (E.D.N.Y. 2005) (emphasis added). Obvious cases where protection of victim names should be considered include those in which publicizing the names of sexual abuse victims may cause undue embarrassment and psychological hardship. *United States v. Robinson*, 2009 WL 137319, at *3 (D. Mass. Jan. 20, 2009) (relying on CVRA in denying newspaper's Motion to Compel identity of victim of sex-for-fee scheme); *United States v. Clark*, 335 F. App'x 181, 183 (3d Cir. 2009) (relying on CVRA in redacting names of child pornography victims in sentencing victim impact statements). Cases involving safety issues of confidential informants may also warrant identity protection. *United States v. Barbeito*, 2010 WL 1439510, at *1 (S.D. W. Va. Apr. 8, 2010); *United States v. Gangi*, 1998 WL 226196, at *1 (S.D.N.Y. May 4, 1998). *But see United States v. Stone*, 2012 WL 137746 (E.D. Mich. Jan. 18, 2012). Neither the Constitution nor Federal Rule of Criminal Procedure 16 requires production of a government witness list to a defendant in a non-capital case. *See United States v. Napue*, 834 F.2d 1311, 1318 (7th Cir. 1987); *United States v. Fischel*, 686 F.2d 1082, 1090 (5th Cir. 1982) (discovery in criminal cases is narrowly limited and makes no provision for disclosure of witness names or addresses).

CVRA considerations may also come into play in deciding whether to protect the names or other identifying information (such as account numbers and financial profiles) of victims in financial fraud cases. In addition to the CVRA, the rules of restitution procedure also require heightened court awareness of victim privacy. *See* 18 U.S.C. § 3664(d)(4) (2012) ("The privacy of [restitution] records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera."). Publicizing even the names of financial fraud victims may cause them severe embarrassment and mental distress, impacting not only their privacy but their dignity as well. Disclosure to their peers and the public that they have fallen prey to a scheme, as well as a public acknowledgment of their financial losses, may only serve to increase their victimization. In *United States v. Madoff*, 626 F. Supp. 2d 420 (S.D.N.Y. 2009), for example, certain victims made clear that they did not want their names made public. Examples of the distress posed by disclosure voiced by the victims included:

> (1) "This has already cost me and my family dearly and the pain is immeasurable. Having the press contact us will only serve to reopen wounds that will take years to heal."; (2) "I do NOT consent for the safety of my family. More public information is a security issue."; and (3) "I do NOT consent and do NOT want my correspondence or personal information released. That would be a huge invasion of privacy. I have already been through a lot due to the Madoff fraud and the release of this would certainly cause additional duress."

Id. at 426. *See also* Michael Levi, *Suite Revenge?: The Shaping of Folk Devils and Moral Panic about White-Collar Crimes*, 49 BRITISH J. OF CRIM. 48, 60 (2009).

Protection of victims of financial crimes may also be warranted in light of concerns about their economic security. *See, e.g., United States v. Jackson*, 95 F.3d 500, 508 (7th Cir. 1996) (noting, in holding that a vulnerable victim enhancement applied to telemarketers who targeted individuals who had previously been defrauded, that "[w]hether these people are described as gullible, overly trusting, or just naive . . . , their readiness to fall for the telemarketing rip-off, not once but *twice* . . . demonstrated that their personalities made them vulnerable in a way and to a degree not typical of the general population") (emphasis in original); *see also United States v. Ciccone*, 219 F.3d 1078 (9th Cir. 2000); *United States v. Brawner*, 173 F.3d 966 (6th Cir. 1999); *United States v. Randall*, 162 F.3d 557 (9th Cir. 1998); Creola Johnson, *Stealing the American Dream: Can Foreclosure-Rescue Companies Circumvent New Laws Designed to Protect Homeowners From Equity Theft?*, 2007 WIS. L. REV. 649, 662-63 (2007) (observing that "[v]ulnerability to fraud strongly correlates to the quality of the consumer's recent life experiences. . . . [and that a recent study] reported that victims of investment and lottery fraud experienced a greater number of negative life events than nonvictims"). Great care should be taken prior to publication of any identifiers of fraud victims as doing so may lead future fraudsters to individuals who are most vulnerable to their schemes, thus compromising the victims' financial security.

B. Protective orders

Protective orders can be a useful tool in limiting or placing conditions on the dissemination and use of victim and witness information both to the public and, particularly where safety is an issue, to the defendant. Federal Rule of Criminal Procedure 16(d)(1) permits a court to deny, restrict, or defer pre-trial discovery when a party can demonstrate the need for these types of actions: "At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief." FED. R. CRIM. P. 16(d)(1). Although most Circuits have not defined "good cause," at least in the Third Circuit, "good cause" under this criminal discovery Rule mirrors "good cause" under the Rules of Civil Procedure:

> "Good cause is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning do not support a good cause showing. . . ." The good cause determination must also balance the public's interest in the information against the injuries that disclosure would cause.

United States v. Wecht, 484 F.3d 194, 211 (3d Cir. 2007) (quoting *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994)); *but see United States v. Patkar*, 2008 WL 233062, at *4 (D. Haw. Jan. 28, 2008) ("This Court is not convinced that the Ninth Circuit would apply these civil standards to protective orders in criminal actions.").

To date, there are no published decisions that have specifically opined on whether "good cause" for a Rule 16 protective order may be found in upholding the mandatory dictates of the CVRA. At least two courts have issued unpublished opinions, however, in which the CVRA was considered in determining whether "good cause" existed for protective orders. *United States v. Kaufman*, 2005 WL 2648070 (D. Kan. Oct. 17, 2005); *United States v. Patkar*, 2008 WL 233062 (D. Haw. Jan. 28, 2008). In both cases, the court found "good cause" for a protective order. Given the statute's requirement that courts put on the record their reasons for denying CVRA relief, *see* 18 U.S.C. § 3771(b)(1) (2012), the CVRA may provide a potent argument in favor of protection.

Protective orders may include provisions to hold counsel, as well as the defendant, in contempt for unauthorized disclosures. A trial court "can and should, where appropriate, place a defendant and his counsel under enforceable orders against unwarranted disclosure of the material which they may be entitled to inspect." *Alderman v. United States*, 394 U.S. 165, 185 (1969). It is appropriate for a protective order to admonish the parties that the purpose of discovery is trial preparation and that sensitive information provided within the scope of the protective order is to be used only for that purpose. *See United States v. Salemme*, 978 F. Supp. 386, 390 (D. Mass. 1997) (requiring government to make certain disclosures and ordering that those disclosures be used "solely for the purpose of litigating matters in this case"); *United States v. Gangi*, 1998 WL 226196, at *4 (S.D.N.Y. May 4, 1998) (ordering that information disclosed under protective order "[s]hall be used only by defendants and their counsel solely for purposes of this action").

Protective Orders (Press): Particularly in high profile cases, motions from the press to obtain discovery are common. Protective orders have been an effective tool to allow liberal disclosure to defendants while maintaining the privacy and dignity of victims from unwelcome intrusions by the media.

Traditionally, courts have found that "discovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation." *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986); *see also Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 396 (1979) (Burger, C.J., concurring) ("[I]t has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants."); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) ("[R]estraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information."); *United States v. Smith*, 776 F.2d 1104, 1111 (3d Cir. 1985) (because Rule 16 materials must be furnished by the Government to the defendant, no presumption in favor of public access applies to those materials); *In re Gannett News Serv., Inc*., 772 F.2d 113, 116 (5th Cir. 1985) ("temporary denial of access [to evidence not yet ruled admissible] . . . constitutes no form of prior restraint"); *United States v. Carriles*, 654 F. Supp. 2d 557 (W.D. Tex. 2009) (restrictions on defendant's dissemination of discovery materials to press does not violate the First Amendment). As long as the underlying discovery material is not filed with the court, courts rarely find that either the First Amendment or the common law right of access to judicial proceedings are implicated. *See, e.g., Carriles*, 654 F. Supp. 2d at 572-73.

Tensions arise in some cases when discovery documents are filed with the court. *Wecht*, 484 F.3d at 211 (where discovery documents were filed under seal and *in camera* with the court for ruling, district court did not abuse discretion in finding documents were not subject to protective order); *Patkar*, 2008 WL 233062, at *4 (distinguishing *Wecht* because documents were not filed with the court). There may also be difficulties in limiting the dissemination of information through pretrial filings. *Carriles*, 654 F. Supp. 2d at 570. Department policy limiting a prosecutor's ability to request the closure of judicial proceedings to the press and the public may also be a consideration. 28 C.F.R. § 50.9 (2012); USAM 9-5.150 (There is a "strong presumption" against closing proceedings, and "[g]overnment attorneys may not move for or consent to the closure of any criminal proceeding without the express prior authorization of the Deputy Attorney General."). Prosecutors should be strategic in counterbalancing the potential need to make a record that discovery has been provided, versus specifying or describing discovery material to a degree that intrudes on victim interests.

Protective Orders (Defendant): It may be appropriate to seek protective orders limiting a defendant's personal access to victim materials and information, particularly when there is a potential danger to victims and witnesses. *See, e.g. United States v. Pray*, 764 F. Supp. 2d 184, 190 (D.D.C. 2011) ("In sum, one plain principle runs through the cases: a criminal defendant's discovery rights—even a

defendant facing the possibility of a death sentence—are constrained when there are realistic fears for the safety of witnesses."). Common restrictions in violent crime cases, as well as cases involving cooperators and confidential informants, allow the defendant personal access to materials only in the presence of defense counsel and her staff. *See, e.g., United States v. Rafaela-Ramirez*, 2009 WL 1537648, at *1 (D. Colo. May 29, 2009) (ordering that Jencks Act material not be left in the exclusive custody of the defendant, citing concerns for witness safety and the fact that the burden on the defense is "not extensive"). Indeed, in some jurisdictions, such provisions are standard in *all* cases. *See, e.g., In re Bragg*, 2012 WL 566958, at *3 (W.D. Va. Feb. 21, 2012) (finding criminal defense attorney in contempt of court for failing to abide by *standard* discovery order that prohibited the removal of any discoverable material from the office of defense counsel unless kept in the personal possession of defense counsel at all times, and that prohibited a defendant's possession of discoverable material unless in the presence of defense counsel). Other restrictions include having counsel maintain a log of all disseminations. In cases where victim safety may be significantly compromised by disclosure, defense counsel alone may be given access to discovery materials. *See, e.g., United States v. Shryock*, 342 F.3d 948, 983 (9th Cir. 2003).

There may also be occasion to limit a defendant's access to personal items of a victim simply based upon concerns regarding the victim's privacy and dignity. The invasion by an accused into a victim's intimate, private effects must be carefully balanced with a defendant's constitutional and statutory discovery rights. *United States v. Rand*, 2011 WL 4949695, at *4 (S.D. Fla. Oct. 18, 2011) (denying defendant's motion to review victim's phone for non-contraband images of herself and her family). Restrictions allowing defense review while retaining governmental custody of sensitive items may provide the necessary balance in certain instances. Prosecutors should make sure that agents or other government personnel who administer discovery production or access are fully aware and compliant with any specially ordered discovery procedures.

C. Court orders/local rules

A number of jurisdictions have enacted local rules limiting dissemination of information for purposes other than litigation. Many jurisdictions have local rules limiting extra-judicial statements of the parties in matters. Other jurisdictions, including the Western District of Virginia, have enforceable contempt orders included in their Standing Discovery Order that prevent defense counsel from disseminating information not only to the press, but to their clients when not in counsel's presence. *See, e.g., In re Bragg*, 2012 WL 566958, at *3 (referencing *standard* discovery order prohibiting the removal of discoverable material from the office of defense counsel unless in the personal possession of defense counsel). Seeking enforcement of these rules and orders may assist in meeting the goals of the CVRA.

D. Redactions and non-disclosure

The redaction and non-disclosure of non-discoverable matters is a time-honored tool for the protection of sensitive information. Redactions are of particular importance in an electronic age, where a single unauthorized disclosure may result in private information being published and forever available on the Internet: "If an electronic copy of [personal] evidence is taken outside government control, there is no ability to ensure what may happen to those images, whether they may be altered in some manner or duplicated or used in any manner to harass the victim." *Rand*, 2011 WL 4949695, at *4. Indeed, in their own rules and procedures, federal courts have recognized the need to exercise great care with personal information that may be subject to electronic dissemination. *See, e.g.*, FED. R. CRIM. P. 49.1; *Case Management Electronic Case Filing: Administrative Procedures*, Southern District of Florida, at 19, *available at* http://www.flsd.uscourts.gov/wp-content/uploads/2011/04/FINAL-2011-Administrative-

Procedures.pdf ("[F]ilers should *exercise caution* when filing documents that contain . . . [i]ndividual financial information [or] [i]nformation regarding the victim of any criminal activity.") (emphasis in original); U.S. COURTS, Judicial Conference Policy On Privacy and Public Access to Electronic Case Files (Mar. 2008), *available at* http://www.privacy.uscourts.gov/privacypolicy_Mar2008Revised.htm.

Prosecutors should take care that all non-disclosed material is, in fact, non-discoverable. Particular care should be taken with redactions, which the defense may seek to have the court review. In fact, with respect to Jencks statements, all redactions from a Jencks-producible statement must be reviewed by the court. *See* FED. R. CRIM. P. 26.2(c) ("If the party who called the witness claims that the [Jencks] statement contains information that is privileged or does not relate to the subject matter of the witness's testimony, the court must inspect the statement in camera."). Redaction should be done in a transparent way, that is, in such a manner so that the party receiving redacted material is fairly on notice that a document has been redacted. Similarly, if certain items are not to be disclosed in their entirety, defense counsel may be given a listing of the types of undisclosed information so that an appropriate record is made. Significant questions about the discoverability of materials that the government does not intend to disclose may be brought to the attention of the court for *in camera* review. *See* USAM 9-5.001(F) ("Where it is unclear whether evidence or information should be disclosed, prosecutors are encouraged to reveal such information to defendants or to the court for inspection *in camera* and, where applicable, seek a protective order from the Court.").

E. Delayed disclosure

Another procedure routinely used to assist in the protection of victims is the delay of disclosure of otherwise discoverable information. While the Department's policy and good practice generally encourage early turnover of discovery, delayed disclosure may be appropriate and effective in those cases where significant victim privacy, dignity, and safety concerns are at play. *See* Ogden Memo, *supra*:

> 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.

Ogden Memo (emphasis added). The CVRA's directives to consider these issues may bolster a prosecutor's decision to hold off on turning sensitive material over to defense counsel.

Of course, prosecutors must be mindful of both constitutional and statutory directives about the timing of disclosure, including those contained in local Standing Discovery Orders. Most statutes, however, allow for leeway in the timing of disclosure. Neither Rule 16 nor *Brady* contain specific timing requirements, although both have been interpreted to require reasonable time for the defense to be able to make use of the material. *See*, *e.g. Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *United States v. Farley*, 2 F.3d 645, 654 (6th Cir. 1993). The statute and rule governing Jencks material provide that its production may not be required until after the direct examination of the witness; however, most prosecutors voluntarily produce the material earlier. Similarly, *Giglio* information is witness-specific and must only be turned over after determinations have been made as to whether the particular individual at issue will be called as a witness:

> Impeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. In some cases, however, a prosecutor may have to balance the goals of early disclosure against other significant interests—such as witness security and national security—and may conclude that it is not appropriate to provide early disclosure. In such

> cases, required disclosures may be made at a time and in a manner consistent with the policy embodied in the Jencks Act, 18 U.S.C. § 3500.

USAM 9-5.001(D)(2).

In those cases where delayed disclosure may be questioned, seeking court approval, with reference to the CVRA, may be prudent. USAM 9-5.001(F). In those districts that have Standing Discovery Orders that accelerate or prescribe a timetable for production of *Brady* and *Giglio* material, delayed disclosure requires court permission.

F. Motions *in limine*

There may be instances where sensitive victim information is available to the defense either through discovery or their own investigation. Where the information is not otherwise admissible, prosecutors may consider bringing motions *in limine* to exclude reference to the information. Although there are no published cases in which the admissibility of victim information was limited pursuant to the CVRA, it may nonetheless provide a basis for such rulings. *But see United States v. Pinke*, 2009 WL 4432669, at *2 (E.D. Ky. Dec. 2, 2009) ("To the extent [the CVRA] might allow a victim to avoid testifying in a criminal trial—no court opinion to my knowledge has considered the possibility—that right must yield to the defendant's right to compel the testimony of witnesses in his favor."). There may be other steps that can be taken in order to preserve the privacy and dignity of victims, including limiting the public exposure of sensitive evidence. *See, e.g., United States v. Kaufman*, 2005 WL 2648070, at *2 (D. Kan. Oct. 17, 2005) (holding that videos of sexual misconduct of defendants toward their mentally ill patients being shown only to jury and not visible to people seated in the gallery does not violate First Amendment rights of local media).

G. Defense subpoenas

In further support of victim rights, in 2008 Congress amended Federal Rule of Criminal Procedure 17(c)(3) to implement the Crime Victims' Rights Act and to "provides a protective mechanism when the defense subpoenas a third party to provide personal or confidential information about a victim." FED. R. CRIM. P. 17, Advisory Committee Notes, 2008 Amendments. Such subpoenas now require prior judicial approval, notice, and an opportunity for the victim to move to modify or quash the subpoena:

> After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

FED. R. CRIM. P. 17(c)(3).

Rule 17 subpoenas are not intended to be brought *ex parte* or to supplement discovery. *United States v. Bradley*, 2011 WL 1102837, at *1 (S.D. Ill. Mar. 23, 2011). Courts have consistently held that Rule 17 subpoenas are not intended to be used as a "general 'fishing expedition.' " *United States v. Cuthbertson*, 630 F.2d 139, 144 (3d Cir. 1980). Vigorous enforcement of the requirements of Rule 17 is consistent with the mandates of the CVRA.

VI. Conclusion

It is frequently noted that

> [t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Berger v. United States, 295 U.S. 78, 88 (1935). This saying is almost always invoked in case law to emphasize the duty of prosecutors to ensure that a defendant receives due process. But in light of the CVRA and the progressing movement to secure and enforce the rights of victims in the criminal justice process, it takes on added meaning: Prosecutors have the duty also to ensure that innocent victims not suffer, through the criminal discovery process, in ways that the law may prevent. In a climate of judicial vigilance and congressional oversight of the rights of defendants to receive all the discovery to which they are entitled, fulfilling this dual duty can be a challenge for prosecutors. However, the CVRA, its legislative history, and the Federal Rules of Criminal Procedure provide the tools for the proper balance to be struck, and for prosecutors to help implement justice both for defendants and for victims in the criminal discovery process.❖

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