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THE UNITED STATES

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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 [JM 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 [JM 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.

[updated January 2020] [cited in [JM 9-5.100](#)]

9-5.002- 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). Section [9-5.001](#) of the United States Attorney's Manual describes the Department's policy for disclosure of exculpatory and impeachment information. 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 policies for prosecutors regarding criminal discovery set forth below. These policies are 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 policies are subject to legal precedent, court orders, and local rules.

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.

Step I: Gathering and Reviewing Discoverable Information

“Discovery” or “discoverable information,” and the duty to search for it, 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 this policy.

A. Where to look: The Prosecution Team

JM 9-5.001 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.

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. 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. 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, 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.^[1] 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 the non-discoverable, sensitive information found within a CI, CW, CHS, or CS file. Further, prosecutors should consider whether discovery obligations arising from the review of CI, CW, CHS, and CS files may be fully discharged while better protecting government or witness interests such as security or privacy via a summary letter to defense counsel rather than producing the record in its entirety. Prosecutors must always be mindful of security issues that may arise with respect to disclosures from confidential source files. Prior to disclosure, prosecutors should consult with the investigative agency to evaluate any such risks and to develop a strategy for addressing those risks or minimizing them as much as possible, consistent with discovery obligations.
3. Evidence and Information Gathered During the Investigation: Generally, all evidence and information gathered during the investigation should be reviewed, including anything obtained during searches or via

subpoenas, etc. As discussed more fully below in Step 2, in cases involving a large volume of potentially discoverable information, prosecutors may discharge their disclosure obligations by choosing to make the voluminous information available to the defense.

4. Document or Evidence Gathered by Civil Attorneys and/or Regulatory Agency in Parallel Civil Investigations: If a prosecutor has determined that a regulatory agency such as the SEC is a member of the prosecution team for purposes of defining discovery obligations, that agency's files should be reviewed. Of course, if a regulatory agency is not part of the prosecution team but is conducting an administrative investigation or proceeding involving the same subject matter as a criminal investigation, prosecutors may very well want to ensure that those files are reviewed not only to locate discoverable information but to locate inculpatory information that may advance the criminal case. Where there is an ongoing parallel civil proceeding in which Department civil attorneys are participating, such as a *qui tam* case, the civil case files should also be reviewed.
5. Substantive Case-Related Communications: "Substantive" case-related communications may contain discoverable information. Those communications that contain discoverable information should be maintained in the case file or otherwise preserved in a manner that associates them with the case or investigation. "Substantive" case-related communications are most likely to occur (1) among prosecutors and/or agents, (2) between prosecutors and/or agents and witnesses and/or victims, and (3) between victim-witness coordinators and witnesses and/or victims. Such communications may be memorialized in emails, memoranda, or notes. "Substantive" communications include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility. Communications involving case impressions or investigative or prosecutive strategies without more would not ordinarily be considered discoverable, but substantive case-related communications should be reviewed carefully to determine whether all or part of a communication (or the information contained therein) should be disclosed. Prosecutors should also remember that with few exceptions (see, e.g., Fed.R.Crim.P. 16(a)(1)(B)(ii)), the format of the information does not determine whether it is discoverable. For example, material exculpatory information that the prosecutor receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email. When the discoverable information contained in an email or other communication is fully memorialized elsewhere, such as in a report of interview or other document(s), then the disclosure of the report of interview or other document(s) will ordinarily satisfy the disclosure obligation.
6. Potential Giglio Information Relating to Law Enforcement Witnesses: Prosecutors should have candid conversations with the federal agents with whom they work regarding any potential *Giglio* issues, and they should follow the procedure established in JM 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 Declarants: All potential *Giglio* information known by or in the possession of the prosecution team relating to non-law enforcement witnesses should be gathered and reviewed. That information includes, but is not limited to:
 - Prior inconsistent statements (possibly including inconsistent attorney proffers, see *United States v. Triumph Capital Group*, 544 F.3d 149 (2d Cir. 2008))
 - Statements or reports reflecting witness statement variations (see below)
 - Benefits provided to witnesses including:
 - Dropped or reduced charges
 - Immunity

- Expectations of downward departures or motions for reduction of sentence
- Assistance in a state or local criminal proceeding
- Considerations regarding forfeiture of assets
- Stays of deportation or other immigration status considerations
- S-Visas
- Monetary benefits
- Non-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^[2] should be memorialized by the agent.^[3] 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 JM 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 contain information that must be disclosed pursuant to Fed.R.Crim.P. 16(a)(1)(A)-(C) or may themselves be discoverable under Fed.R.Crim.P. 16(a)(1)(B). See, e.g., *United States v. Clark*, 385 F.3d 609, 619-20 (6th Cir. 2004) and *United States v. Vaffee*, 380 F.Supp.2d 11, 2-14 (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 Section 9-5.001 details the Department's policy regarding the disclosure of exculpatory and impeachment information and provides for broader disclosures than required by *Brady* and *Giglio*. Prosecutors are also encouraged to provide discovery broader and more comprehensive than the discovery obligations. If a prosecutor chooses this course, the defense should be advised that the prosecutor is electing to produce discovery beyond what is required under the circumstances of the case but is not committing to any discovery obligation beyond the discovery obligations set forth above.

- 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 JM 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 Fed.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 litigation in criminal cases, keeping a record of the disclosures confines the litigation to substantive matters and avoids time-consuming disputes about what was disclosed. These records can also be critical when responding to petitions for post-conviction relief, which are often filed long after the trial of the case. Keeping accurate records of the evidence disclosed is no less important than the other steps discussed above, and poor records can negate all of the work that went into taking the first three steps.

Comment: 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 section 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.

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

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

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

[added December 2017]

9-5.003 - CRIMINAL DISCOVERY INVOLVING FORENSIC EVIDENCE AND EXPERTS

Forensic science covers a variety of fields, including such specialties as DNA testing, chemistry, and ballistics and impression analysis, among others. As a general guiding rule, and allowing for the facts and circumstances of individual cases, prosecutors should provide broad discovery relating to forensic science evidence as outlined here. Disclosure of information relating to forensic science evidence in discovery does not mean that the Department concedes the admissibility of that information, which may be litigated simultaneously with or subsequent to disclosure.

The Duty to Disclose, Generally

The prosecution's duty to disclose is generally governed by Federal Rules of Criminal Procedure 16 and 26.2, 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).

In addition, JM [9-5.001](#) of the United States Attorney's Manual describes the Department's policy for disclosure of exculpatory and impeachment material.

Rule 16 of the Federal Rules of Criminal Procedure establishes three disclosure responsibilities for prosecutors that may be relevant to forensic evidence. First, under Fed.R.Crim.P. 16(a)(1)(F), the government must, upon request of the defense, turn over the results or reports of any scientific test or experiment (i) in the government's possession, custody or control, (ii) that an attorney for the government knows or through due diligence could know, and (iii) that would be material to preparing the defense or that the government intends to use at trial. Second, under Fed. R. Crim. P. 16(a)(1)(G), if requested by the defense, the government must provide a written summary of any expert testimony the government intends to use at trial. At a minimum, this summary must include the witness's opinions, the bases and reasons for those opinions, and the expert's qualifications. Third, under Fed. R. Crim. P. 16(a)(1)(E), if requested by the defense, the government must produce documents and items material to preparing the defense that are in the possession, custody, or control of the government. This may extend to records documenting the tests performed, the maintenance and reliability of tools used to perform those tests, and/or the methodologies employed in those tests.

Both the Jencks Act and *Brady/Giglio* may also come into play in relation to forensic evidence. For example, a written statement (report, email, memo) by a testifying forensic witness may be subject to disclosure under the Jencks Act if it relates to the subject matter of his or her testimony. Information providing the defense with an avenue for challenging test results may be *Brady/Giglio* information that must be disclosed. And, for forensic witnesses employed by the government, *Giglio* information must be gathered from the employing agency and reviewed for possible disclosure. These are the minimum requirements, and the Department's discovery policies call for disclosure beyond these thresholds.

The Duty to Disclose in Cases with Forensic Evidence and Experts

The Department's policy to provide discovery over and above the minimum legal thresholds applies to cases with forensic evidence. Rule 16's disclosure requirements - disclosing the results of scientific tests (16(a)(1)(F)), the witness' written summary (16(a)(1)(G)), and documents and items material to preparing the defense (16(a)(1)(E)) - are often jointly satisfied when presenting expert forensic testimony, since disclosure of the test results, the bases for those results, and the expert's qualifications will often provide all the necessary information material to preparation of the defense. But, depending on the complexity of the forensic evidence, or where multiple forensic tests have been performed, the process can be complicated because it may require the prosecutor to work in tandem with various forensic scientists to identify and prepare additional relevant information for disclosure. Although prosecutors generally should consult with forensic experts to understand the tests or experiments conducted, responsibility for disclosure ultimately rests with the prosecutor assigned to the case. In meeting obligations under Rule 16(a)(1)(E), (F), and (G), the Jencks Act, and *Brady/Giglio*, and to comply with the Department's policies of broad disclosure, the prosecutor should be attuned to the following four steps:

1. First, the prosecutor should obtain the forensic expert's laboratory report, which is a document that describes the scope of work assigned, the evidence tested, the method of examination or analysis used, and the conclusions drawn from the analyses conducted. Depending on the laboratory, the report may be in written or electronic format; the laboratory may routinely route the report to the prosecutor, or the prosecutor may need to affirmatively seek the report from the forensic expert or his or her laboratory. In most cases the best practice is to turn over the forensic expert's report to the defense if requested. This is so regardless of whether the government intends to use it at trial or whether the report is perceived to be material to the preparation of the defense. If the report contains personal information about a victim or witness, or other sensitive information, redaction may be appropriate and necessary. This may require court authorization if the forensic expert will testify, as the report likely will be considered a Jencks Act statement. (See the Additional Considerations section below.)

2. Second, the prosecutor should disclose to the defense, if requested, a written summary for any forensic expert the government intends to call as an expert at trial. This statement should summarize the analyses performed by the forensic expert and describe any conclusions reached. Although the written summary will vary in length depending on the number and complexity of the tests conducted, it should be sufficient to explain the basis and reasons for the expert's expected testimony. Oftentimes, an expert will provide this information in an "executive summary" or "synopsis" section at the beginning of a report or a "conclusion" section at the end. Prosecutors should be mindful to ensure that any separate summary provided pursuant to Rule 16(a) should be consistent with these sections of the report. Further, any changes to an expert's opinion that are made subsequent to the initial disclosure to the defense ordinarily should be made in writing and disclosed to the defense.
3. Third, if requested by the defense, the prosecutor should provide the defense with a copy of, or access to, the laboratory or forensic expert's "case file," either in electronic or hard-copy form. This information, which may be kept in an actual file or may be compiled by the forensic expert, normally will describe the facts or data considered by the forensic expert, include the underlying documentation of the examination or analysis performed, and contain the material necessary for another examiner to understand the expert's report. The exact material contained in a case file varies depending on the type of forensic analysis performed. It may include such items as a chain-of-custody log; photographs of physical evidence; analysts' worksheets or bench notes; a scope of work; an examination plan; and data, charts and graphs that illustrate the results of the tests conducted.

In some circumstances, the defense may seek laboratory policies and protocols. To the extent that a laboratory provides this information online, the prosecutor may simply share the web address with the defense. Otherwise, determinations regarding disclosure of this information should be made on a case-by-case basis in consultation with the forensic analysts involved, taking into account the particularity of the defense's request and how relevant the request appears to be to the anticipated defenses.

4. Fourth, the prosecutor should provide to the defense information on the expert's qualifications. Typically, this material will include such items as the expert's curriculum vitae, highlighting relevant education, training and publications, and a brief summary that describes the analyst's synopsis of experience in testifying as an expert at trial or by deposition. The prosecutor should gather potential Giglio information from the government agency that employs the forensic expert. If using an independent retained forensic expert, the prosecutor should disclose the level of compensation as potential Giglio information; the format of this disclosure is left to the discretion of the individual prosecuting office. Disclosure should be made according to local rules but at least as soon as is reasonably practical and, of course, reasonably in advance of trial. It is important that the prosecutor leave sufficient time to obtain documents and prepare information ahead of disclosure. When requesting supporting documents from a laboratory's file regarding a forensic examination, the prosecutor should consult the guidelines set by the laboratory for the manner in which discovery requests should be made, and for the time required for them to process and deliver the materials to the prosecutor. Further, if multiple forensic teams have worked on a case, the prosecutor should build in sufficient time to consult with, and obtain relevant materials from, each relevant office or forensic expert.

Additional Considerations

Certain situations call for special attention. These may include cases with classified information or when forensic reports reveal the identities of cooperating witnesses or undercover officers, or disclose pending covert investigations.

In such cases, when redaction or a protective order may be necessary, prosecutors should ordinarily consult with supervisors.

Laboratory case files may include written communications, including electronic communication such as emails, between forensic experts or between forensic experts and prosecutors. Prosecutors should review this information themselves to determine which communications, if any, are protected and which information should be disclosed under *Brady/Giglio*, Jencks, or Rule 16. If the circumstances warrant (for example, where review of a case file indicates that tests in another case or communications outside the case file may be relevant), prosecutors should request to review additional materials outside the case file.

Finally, when faced with questions about disclosure, prosecutors should consult with a supervisor, as the precise documents to disclose tend to evolve, based especially upon the practice of particular laboratories, the type and manner of documentation at the laboratory, and current rulings from the courts.

[added December 2017]

9-5.004 - GUIDANCE ON THE USE, PRESERVATION, AND DISCLOSURE OF ELECTRONIC COMMUNICATIONS IN FEDERAL CRIMINAL CASES

All prosecution team members should be aware of the government's obligations regarding the preservation and disclosure of electronic communications, or "e-communications," which include emails, text messages, SMS (short message service), instant messages, voice mail, pin-to-pin communications, and similar means of electronic communication. Although e-communications offer benefits in the form of speed and efficiency, all team members should understand that case-related e-communications may potentially be disclosed to the defense. Thus, all team members should understand the risks of e-communications; the need to comply with agency rules regarding documentation and record-keeping during an investigation; the importance of careful and professional communication; and the obligation to preserve and produce such communications when appropriate. All members of the prosecution team, including federal, state, and local law enforcement officers, are responsible for making available to the prosecutor all potentially discoverable e-communications. It is the prosecutor's responsibility to oversee the gathering, review, and production of discovery. The prosecutor should discuss these matters with all members of the prosecution team at the outset and during the investigation.

The following guidance applies at all phases of a criminal case including investigation, trial preparation, trial, and post-trial:

- Prosecution team members should exercise the same care in generating case-related e-communications that they exercise when drafting more formal reports, and only write and send e-communications that are appropriate for displaying to the court, the jury, and the public.
- Prosecution team members should exercise caution when using e-communications with non-law enforcement witnesses. Individuals not on the prosecution team, including victims, lay witnesses, and outside experts, should be informed that e-communications are a written record that may be disclosed to the defense and that appropriate care should be exercised.
- Substantive e-communications among prosecution team members, including communications containing factual information relating to witnesses, evidence, or investigative activity, should be avoided except when, to meet operational needs, they are the most effective means of communication. Substantive case information should be recorded in formal reports.
- E-communications, like formal reports, should state facts accurately and completely; be professional in tone; and avoid witticism, careless commentary, opinion, or over-familiarity in tone.
- Prosecution team members should not use personally owned electronic communication devices, personal email accounts, social networking sites, or similar accounts to transmit case-related information to witnesses or other team members.

- Prosecution team members should preserve for later review and possible disclosure all substantive e-communications created or received by team members during the course of an investigation and prosecution, and all e-communications sent to or received from lay witnesses, regardless of content.
- E-communications should be preserved in their native electronic format; when that is not feasible, another method of preservation should be identified and used.
- If the e-communication contains sensitive information, the prosecutor should consider whether to file a motion for a protective order, seek supervisory approval to delay disclosure, make appropriate redactions, summarize the substance of an e-communication in a letter rather than disclosing the e-communication itself, or take other safeguarding measures. Sensitive information includes information that would affect the privacy or safety of any person, reveal investigative techniques or national security information, or compromise the integrity of another investigation. If discoverable information is not provided in its original form and is instead provided in a letter to defense counsel, prosecutors should take great care to ensure that the full scope of pertinent information is provided to the defendant.
- Prosecutors handling an investigation or case involving national security related issues or intelligence community equities should consult with the National Security/Anti-Terrorism Advisory Council (ATAC) Coordinator in their office and/or the National Security Division for specific guidance on searching for, gathering, reviewing, and disclosing communications in these areas, as well as special procedures (such as the Classified Information Procedures Act, or "CIPA") that may apply.

For background and additional guidance on these matters, see the March 30, 2011, Deputy Attorney General Cole memorandum, *Guidance on the Use, Preservation, and Disclosure of Electronic Communications in Federal Criminal Cases*.*

*Note that the discussion of personal use of social media in Deputy Attorney General Cole's 2011 memorandum has been superseded by JM 1-9.000 (Personal Use of Social Media).

[added December 2019]

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 Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy"). It applies to all Department of Justice Investigative agencies that are named in the Preface below. On October 19, 2006, the Attorney General amended this policy to conform to the Department's new policy regarding disclosure of exculpatory and impeachment information, see JM 9-5.001. On July 11, 2014, the policy was revised in several respects, including with regard to the candid conversation between a prosecutor and an agency employee; the definition of impeachment information; record-keeping; information that must be provided to agencies; the transfer of Giglio-related information between prosecuting offices; and the notification of a prosecuting office of *Giglio* issues when an agency employee is transferred to a new district.

In early 1997, the Secretary of the Treasury issued the 1996 version of the *Giglio* Policy for all Treasury investigative agencies, and that policy remains in effect for Treasury investigative agencies.

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

Preface: The following policy is established for: the Federal Bureau of Investigation, Drug Enforcement Administration, Bureau of Alcohol, Tobacco, Firearms and Explosives, the United States Marshals Service, the Department of Justice Office of the Inspector General, and the Department of Justice Office of Professional Responsibility ("the investigative agencies"). It addresses their disclosure of potential impeachment information to the United States Attorneys' Offices and Department of Justice litigating sections with authority to prosecute criminal cases ("Department of Justice prosecuting offices"). The purposes of this policy are to ensure that prosecutors receive sufficient information to meet

their obligations under *Giglio v. United States*, 405 U.S. 150 (1972), and to ensure that trials are fair, while protecting the legitimate privacy rights of Government employees. NOTE: This policy is not intended to create or confer any rights, privileges, or benefits to prospective or actual witnesses or defendants. It is also not intended to have the force of law. *United States v. Caceres*, 440 U.S. 741 (1979).

The exact parameters of potential impeachment information are not easily determined. Potential impeachment information, however, has been generally defined as impeaching information which is material to the defense. *It also includes information that either casts a substantial doubt upon the accuracy of any evidence—including witness testimony—the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence.*[FN1] This information may include but is not strictly limited to: (a) specific instances of conduct of a witness for the purpose of attacking the witness' credibility or character for truthfulness; (b) evidence in the form of opinion or reputation as to a witness' character for truthfulness; (c) prior inconsistent statements; and (d) information that may be used to suggest that a witness is biased.

FN1. The italicized language was added in 2006 when JM 9-5.001 was issued. It broadens the definition of "potential impeachment information."

This policy is not intended to replace the obligation of individual agency employees to inform prosecuting attorneys with whom they work of potential impeachment information prior to providing a sworn statement or testimony in any investigation or case. In the majority of investigations and cases in which agency employees may be affiants or witnesses, it is expected that the prosecuting attorney will be able to obtain all potential impeachment information directly from agency witnesses during the normal course of investigations and/or preparation for hearings or trials.

This policy is intended to provide guidance to prosecuting offices and investigative agencies regarding what potential impeachment information must be produced to the prosecuting office. It does not address the issue of what information the prosecution must produce to the defense, or to the court for *ex parte*, *in camera* review. That determination can only be made after considering the potential impeachment information in light of the role of the agency witness, the facts of the case, and known or anticipated defenses, and after considering JM 9-5.001, relevant Department guidance, the Federal Rules of Evidence, case law, local court rulings and judicial predisposition, and other relevant guidance, policy, regulations and laws.

Procedures for Disclosing Potential Impeachment Information Relating to Department of Justice Employees

- 1. Obligation to Disclose Potential Impeachment Information.** It is expected that a prosecutor generally will be able to obtain all potential impeachment information directly from potential agency witnesses and/or affiants. Prosecutors should have a candid conversation with each potential investigative agency witness and/or affiant with whom they work regarding any on-duty or off-duty potential impeachment information, including information that may be known to the public but that should not in fact be the basis for impeachment in a federal criminal court proceeding, so that prosecuting attorneys can take appropriate action, be it producing the material or taking steps to preclude its improper introduction into evidence. Likewise, each investigative agency employee is obligated to inform prosecutors with whom they work of potential impeachment information as early as possible prior to providing a sworn statement or testimony in any criminal investigation or case. Each investigative agency should ensure that its employees fulfill this obligation. Potential impeachment information that may relate directly to agency employee witnesses is defined more fully in paragraphs 5 and 6.

Because there are times when an agency employee will be unaware that he or she is the subject of a pending investigation, prosecutors will receive the most comprehensive potential impeachment information by having both the candid conversation with the agency employee and by submitting a request for potential impeachment information to the investigative agency. Therefore, in all cases, a prosecutor should carefully consider and is encouraged to request potential impeachment information from the investigative agency. This policy sets forth procedures for those cases in which a prosecutor decides to make such a request.

- 2. Agency Officials.** Each of the investigative agencies shall designate an appropriate official(s) to serve as the point(s) of contact concerning Department of Justice employees' potential impeachment information ("the Agency Official"). Each Agency Official shall consult periodically with the relevant Requesting Officials about

Supreme Court case law, circuit case law, and district court rulings and practice governing the definition and disclosure of impeachment information.

3. **Requesting Officials.** Each of the Department of Justice prosecuting offices shall designate one or more senior official(s) to serve as the point(s) of contact concerning potential impeachment information ("the Requesting Official"). Each Requesting Official shall inform the relevant Agency Officials about Supreme Court case law, circuit case law, and district court rulings and practice governing the definition and disclosure of impeachment information.
4. **Request to Agency Officials.** Upon initiation of a case or matter within the prosecuting office, or anytime thereafter, a prosecutor may request potential impeachment information relating to an agency employee associated with that case or matter. The prosecutor shall notify the appropriate Requesting Official, who may request potential impeachment information relating to the employee from the employing Agency Official(s) and the designated Agency Official(s) in the Department of Justice Office of the Inspector General ("DOJ-OIG") and the Department of Justice Office of Professional Responsibility ("DOJ-OPR").
5. **Disclosure of Potential Impeachment Information by Agency Employee and Agency**

(a) **Agency Review and Disclosure.** Upon receiving the request described in Paragraph 4, the Agency Official(s) from the employing agency, the DOJ-OIG, and the DOJ-OPR shall each conduct a review, in accordance with its respective agency plan, for potential impeachment information regarding the identified employee.

(b) **Agency Employee.** Before serving as an affiant or witness in any case or matter, the agency employee shall advise the prosecuting attorney(s) of the existence of any potential impeachment information. Potential impeachment information can include both on-duty and off-duty conduct. Prosecutors should be mindful that some potential impeachment information, including potential impeachment information stemming from off-duty conduct, may not be in agency files and may only be known to the agency employee.

(c) **Potential Impeachment Information.** Agency witnesses and Agency Officials should make broad disclosures of potential impeachment information to the prosecutor so that the prosecutor can assess the information in light of the role of the agency witness, the facts of the case, and known or anticipated defenses, among other variables. Potential impeachment information is defined in the Federal Rules of Evidence, case law, unpublished court rulings, and Department of Justice policy and guidance. Unless advised by a *Giglio* Requesting Official or prosecutor that case law or court rulings in the district require broader disclosures, potential impeachment information relating to agency employees may include, but is not limited to, the categories listed below:

- i) any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during a criminal, civil, or administrative inquiry or proceeding;
- ii) any past or pending criminal charge brought against the employee;

iii) any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation;

iv) prior findings by a judge that an agency employee has testified untruthfully, made a knowing false statement in writing, engaged in an unlawful search or seizure, illegally obtained a confession, or engaged in other misconduct;

v) any misconduct finding or pending misconduct allegation that either casts a substantial doubt upon the accuracy of any evidence—including witness testimony—that the prosecutor intends to rely on to prove an element of any crime charged, or that might have a significant bearing on the admissibility of prosecution evidence. Accordingly, agencies and employees should disclose findings or allegations that relate to substantive violations concerning:

- (1) failure to follow legal or agency requirements for the collection and handling of evidence, obtaining statements, recording communications, and obtaining consents to search or to record communications;

(2) failure to comply with agency procedures for supervising the activities of a cooperating person (C.I., C.S., CHS, etc.);

(3) failure to follow mandatory protocols with regard to the forensic analysis of evidence;

vi) information that may be used to suggest that the agency employee is biased for or against a defendant (*See United States v. Abel*, 469 U.S. 45, 52 (1984). The Supreme Court has stated, "[b]ias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest."); and

vii) information that reflects that the agency employee's ability to perceive and recall truth is impaired.

6. Treatment of Allegations Which Are Unsubstantiated, Not Credible, or Have Resulted in

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

Note. With regard to allegations disclosed to a prosecuting office under this paragraph, the *Giglio* Requesting Official shall ensure that special care is taken to protect the confidentiality of such information and the privacy interests and reputations of agency employee-witnesses, in accordance with paragraphs 7(b) and 12 below.

7. Prosecuting Office Records

(a) Information in System of Records. For the purpose of ensuring that potential impeachment information is handled consistently within a prosecuting office, whenever potential impeachment information has been disclosed to the court or defense, or when a decision has been made that an agency employee should not testify or serve as an affiant because of potential impeachment information, Department of Justice prosecuting offices may retain the following types of information in a *Giglio* system of records that can be accessed by the identity of the disclosing agency's employee:

- i) the potential impeachment information;
- ii) any written analysis or substantive communications, including legal advice, relating to that disclosure or decision; and
- iii) any related pleadings or court orders.

In all other circumstances, prosecuting offices may keep any written legal analysis and substantive communications integral to the analysis, including legal advice relating to the decision, and a summary of the potential impeachment information in the *Giglio* system of records. The complete description of the potential impeachment information received from the Agency Official may be maintained in the criminal case file, but it may not be maintained in the *Giglio* system of records.

(b) Secure Records with Limited Access. *Giglio* Requesting Official(s) shall ensure that the information in their office's *Giglio* system of records is securely maintained and is accessible only upon a request to a *Giglio* Requesting Official or other senior management entrusted with this responsibility. The information shall only be disclosed to requesting prosecutors within that office on a case-related, need-to-know basis. It should be

noted that much of the information in the *Giglio* system of records is sensitive information which if released or reviewed without a case-related need could negatively impact the privacy and reputation of the agency-employee to whom it relates, and could violate the Privacy Act.

(c) Duty to Update. Before any prosecutor or *Giglio* Requesting Official uses or relies upon information included in the prosecuting office's *Giglio* system of records, the Requesting Official shall contact the relevant Agency Official(s) to determine the status of the potential impeachment information, the Agency Official(s) shall provide an update, and the Requesting Official shall update the prosecuting office's *Giglio* system of records to ensure that the information in the system of records is accurate.

8. Information That Must Be Provided to Agencies. When Agency Officials have provided potential impeachment information to a Requesting Official, the Requesting Official shall inform the employing Agency Official how the prosecuting office used the information. A circumstance may arise in which a prosecutor or Requesting Official learns of potential impeachment information relating to an agency employee from a source other than the agency—including but not limited to the agency employee. In such circumstance, the Requesting Official shall notify the Agency Official of such information and provide the Agency with a timely opportunity to meaningfully express its views regarding the information, as required by Paragraph 12. Regardless of the source of the information, the Requesting Official will:

- (a) advise the employing Agency Official whether the employee provided an affidavit or testimony in a criminal proceeding or whether a decision was made not to use the employee as a witness or affiant because of potential impeachment issues;
- (b) advise the employing Agency Official whether the information was disclosed to a Court or to the defense and, if so, whether the Court ruled that the information was admissible for use as impeachment information; and
- (c) provide the employing Agency Official a copy of any related pleadings, and any judicial rulings, findings or comments relating to the use of the potential impeachment information.

The agency shall maintain judicial rulings and related pleadings on information that was disclosed to the Court or the defense in a manner that allows expeditious access upon the request of any Requesting Official.

9. Continuing Duty to Disclose. Each agency plan shall include provisions which will assure that, once a request for potential impeachment information has been made, the prosecuting office will be made aware of any additional potential impeachment information that arises after such request and during the pendency of the specific criminal case or investigation in which the employee is a potential witness or affiant. A prosecuting office which has made a request for potential impeachment information shall promptly notify the relevant agency when the specific criminal case or investigation for which the request was made ends in a judgment or declination, at which time the agency's duty to disclose shall cease.

10. Providing Records and Information to Another Federal Prosecuting Office and Disposition of Records

(a) Distribution of Information to Another Federal Prosecuting Office with Notice to Agency Official(s). If an agency employee has been transferred to another judicial district, or will testify or serve as an affiant in another judicial district, the prosecuting office in the originating district may provide any relevant information from its *Giglio* system of records relating to that agency employee to a *Giglio* Requesting Official in the new district. Moreover, nothing shall prohibit the Requesting Official in the new district from consulting with the Requesting Official in the former district about the manner in which the former district handled certain potential impeachment information.

The *Giglio* Requesting Official(s) providing the information shall notify the Agency Official(s) when distributing materials from its *Giglio* system of records to another prosecuting office, unless the information relates to pending investigations or other incomplete matters, the status of which may have changed or been resolved favorably to the agency employee. With regard to pending investigations or other incomplete matters, to avoid the unnecessary disclosure of potentially derogatory information regarding an agency employee, the *Giglio* Requesting Official transferring the information shall notify the relevant Agency Official(s) before providing any information to another prosecuting office, except as noted in paragraph 13. The Agency Official(s) shall provide a prompt update. Whether notice is provided before or contemporaneously with the transfer,

the *Giglio* Requesting Official shall also advise the Agency Official(s) what materials will be or have been distributed.

(b) Duty to Update. The Requesting Official in the new prosecuting office shall seek an update from Agency Official(s) as part of the *Giglio* analysis, and shall allow the agency the timely opportunity to fully express their views as required by Paragraph 12 and to provide an update. The Requesting Official in the new district is not bound by the former district's decisions regarding disclosure of information to the Court or defense, or use of the agency employee as a witness or affiant, and should review the former district's information along with other relevant information, when making an independent decision regarding disclosure to the Court or defense, use of the agency employee as a witness or affiant, and other related issues.

(c) Removal of Records Upon Transfer, Reassignment, or Retirement of Employee. Upon being notified that an agency employee has retired, been transferred to an office in another judicial district, or been reassigned to a position in which the employee will neither be an affiant nor witness, and subsequent to the resolution of any litigation pending in the prosecuting office in which the agency employee was involved, the Requesting Official shall remove from the prosecuting office's system of records any record that can be accessed by the identity of the employee. More specifically, the records must be removed at the conclusion of the direct and collateral appeals, if any, or within one year of the agency employee's retirement, transfer, or reassignment, whichever is later.

11. **Notification.** When an agency employee is transferred to a new district, the Agency shall ensure that a Requesting Official in the new district is advised of any potential impeachment material known to the Agency when the employee begins meaningful work on a case or matter within the prosecuting district or is reasonably anticipated to begin meaningful work on such a case or matter.
12. **Prosecuting Office Plans to Implement Policy.** Each prosecuting office shall develop a plan to implement this policy. The plan shall include provisions that require: (a) communication by the prosecuting office with the Agency Official about the disclosure of potential impeachment information to the Court or defense counsel, including indicating what materials are being distributed, and allowing for the Agency to promptly update the information and express its views on whether certain information should be disclosed to the Court or defense counsel; (b) preserving the security and confidentiality of potential impeachment information through proper storage and restricted access within a prosecuting office; (c) when appropriate, seeking an *ex parte, in camera* review and decision by the Court regarding whether potential impeachment information must be disclosed to defense counsel; (d) when appropriate, seeking protective orders to limit the use and further dissemination of potential impeachment information by defense counsel; (e) allowing the relevant agencies the timely opportunity to fully express their views; and (f) information contained within the *Giglio* system of records may not be disclosed to persons outside of the Department of Justice except in a criminal case to which the United States is a party, and where otherwise authorized by law, regulation, or court order.
13. **Exception to Requirements Regarding Providing Notice to Agencies and Soliciting Agency Views.** In rare circumstances, a *Giglio* issue may arise immediately before or during a court proceeding, and a prosecuting office may determine that it does not have time to solicit the agency's views or provide notice before it must take action on the matter. In such a case, the prosecuting office shall provide notice or solicit agency views as promptly as the circumstances reasonably permit. Many situations of this type can be avoided by ensuring that prosecutors and agency employee witnesses have candid conversations and that prosecutors submit formal *Giglio* requests sufficiently in advance of any proceedings.
14. **Investigative Agency Plans to Implement Policy.** Each investigative agency shall develop a plan to effectuate this policy.

[updated January 2020]

9-5.110 - TESTIMONY OF FBI LABORATORY EXAMINERS

In situations where FBI laboratory examinations have resulted in findings having no apparent probative value, yet defense counsel intends to subpoena the examiner to testify, the United States Attorney (USA) should inform defense counsel of the FBI's policy requiring payment of the examiner's travel expenses by defense counsel. The USA should

also attempt to secure a stipulation concerning this testimony. This will avoid needless expenditures of time and money attendant to the appearance of the examiner in court.

[updated December 2006]

9-5.150 - AUTHORIZATION TO CLOSE JUDICIAL PROCEEDINGS TO MEMBERS OF THE PRESS AND PUBLIC

Procedures and standards regarding the closure of judicial proceedings to members of the press and public are set forth in 28 C.F.R. § 50.9. Government attorneys may not move for or consent to the closure of any criminal proceeding without the express prior authorization of the Deputy Attorney General.

There is a strong presumption against closing proceedings, and the Department foresees very few cases in which closure would be warranted. Only when a closed proceeding is plainly essential to the interests of justice should a Government attorney seek authorization from the Deputy Attorney General to move for or consent to closure of a judicial proceeding. Government attorneys should be mindful of the right of the public to attend judicial proceedings and the of the Department's obligation to the fair administration of justice.

Any request for authorization to move for or consent to closure, in addition to setting forth the relevant and procedural background, should include a detailed explanation of the need for closure, addressing each of the factors set forth in 28 C.F.R. § 50.9(c)(1)-(6). In particular, the request should address in detail how an open proceeding will create a substantial likelihood of danger to specified individuals; how ongoing investigations will be jeopardized; or how a person's right to a fair trial will be impaired. The request must also consider reasonable alternatives to closure, such as delaying the proceeding, if possible, until the reasons justifying closure cease to exist. An applicable form is available to Department attorneys.

Whenever authorization to close a judicial proceeding is being sought pursuant to 28 C.F.R. § 50.9 in a case or matter under the supervision of the Criminal Division, the request should be directed to the Policy and Statutory Enforcement Unit, Office of Enforcement Operations. In cases or matters under the supervision of other divisions of the Department of Justice, the appropriate division should be contacted.

Because of the vital public interest in open judicial proceedings, every 60 days after termination of any proceeding closed pursuant to 28 C.F.R. § 50.9, Government attorneys must review the records of the proceedings to determine whether the reasons for closure still apply. As soon as the justification for closure ceases to exist, the Government must file an appropriate motion to have the records unsealed. See 28 C.F.R. § 50.9(f). While the Criminal Division monitors compliance with this requirement, it is the affirmative obligation of the U.S. Attorney's Offices to ensure that sealed records are reviewed in accordance with the regulation's requirements. U.S. Attorney's Offices should acknowledge this obligation in any request for authorization to move for or consent to closure.

[updated January 2020]

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[9-6.000 - Release And Detention Pending Judicial Proceedings ▶](#)