

**SUGGESTED STEPS / MINIMUM STANDARDS TO ENHANCE THE COMPLETE & TIMELY DISCLOSURE OF DISCOVERABLE MATERIALS IN CRIMINAL CASES.<sup>i</sup>**

**I. The Defense<sup>ii</sup>**

- **STEP #1.** Defense counsel's obligation to investigate the case (including, but not limited to, interviewing witnesses, consulting with experts, obtaining physical evidence, etc.) may result in defense counsel becoming aware of the existence of both exculpatory and inculpatory evidence or other information harmful to the accused. During this process defense counsel may also become aware of other information and make a determination that such information will not be introduced by the defense at trial during its case in chief. Such information is protected by the Rules of Professional Conduct (RPC) and need not be disclosed before or during trial.
- **STEP #2.** Defense counsel's guiding principle regarding disclosure should be the timely and complete disclosure of discoverable material that is to be introduced by the defense during its case in chief at trial. Disclosure should take place as soon as possible after that determination is made.
- **STEP #3.** Assuming that the defense is required to provide reciprocal discovery or other information to the prosecution via court rule, defense counsel should timely respond to legally proper discovery requests, and make a diligent effort to comply with legally proper disclosure obligations, unless otherwise authorized by a court.
- **STEP #4.** When colorable questions arise regarding whether or not disclosure is required, defense counsel should consider seeking court intervention via an ex parte application or submitting the material to the court under seal.
- **STEP #5.** When the prosecution makes requests for specific information, defense counsel should provide specific responses rather than merely a general acknowledgement of discovery obligations.
- **STEP #6.** Requests and responses should be tailored to the case, and "boilerplate" requests and responses should be disfavored.

## II. The Prosecution <sup>iii</sup>

- STEP #1. The guiding principle for prosecutors regarding the disclosure of discoverable material throughout the pendency of a criminal case is as follows:
  - A prosecutor should recognize that her/his disclosure obligation is not based upon actual knowledge.
  - Instead, knowledge of discoverable material in the actual possession of other law enforcement entities and their agents may be imputed to her/him and therefore oblige her/him to seek out and disclose discoverable material.
- STEP #2. After charges are filed, if not before, the prosecutor should diligently seek to identify all information in the possession of the prosecution or its agents that tends to negate the guilt of the accused, mitigate the offense charged, impeach the government's witnesses or evidence, or reduce the likely punishment of the accused if convicted.
- STEP #3. The prosecutor should diligently advise other governmental agencies involved in the case of their continuing duty to identify, preserve, and disclose to the prosecutor information described in STEP #2.
- STEP #4. Before trial of a criminal case, a prosecutor should make timely disclosure to the defense of information described in STEP #2, regardless of whether the prosecutor believes it is likely to change the result of the proceeding, unless relieved of this responsibility by a court's protective order.
- STEP #5. A prosecutor should not intentionally attempt to obscure information disclosed pursuant to this standard by including it within a larger volume of materials without identification.
- STEP #6. A prosecutor should timely respond to legally proper discovery requests, and make a diligent effort to comply with legally proper disclosure obligations, unless otherwise authorized by a court. When the defense makes requests for specific information, the prosecutor should provide specific responses rather than merely a general acknowledgement of discovery obligations. Requests and responses should be tailored to the case and "boilerplate" requests and responses should be disfavored.

- STEP #7. Before entering into a disposition agreement, the prosecutor should disclose to the defense a factual basis sufficient to support the charges in the proposed agreement, and information currently known to the prosecutor that tends to negate guilt, mitigates the offense, or is likely to reduce punishment.
  
- STEP #8. Additional case-specific steps:
  - ***At critical stages during the investigation and prosecution of the case in court, communication with the responsible law enforcement agency regarding the status of the case. For the purposes of this document “critical stages” shall include, but not be limited to the arraignment of the defendant in court; felony case screening; substantive motions and hearings in court; pre-trial conference; Frye and sentencing hearings; and at least two (2) weeks in advance of the scheduled trial date.***
  
  - A prosecutor should gather and review all potentially discoverable material in the possession of the prosecution team including. ***The material and information to be reviewed includes but is not limited to:***
    - electronic and paper police department files relating to the investigation of the case and its witnesses
  
    - all relevant information that may be used for the purpose of impeachment including that of confidential informants or cooperating witnesses
  
    - all physical and documentary evidence and information gathered during the investigation
  
    - any scientific analysis or other evidence subject to RIRE 702-705 that may be in the possession of law enforcement, a public or private laboratory, or their agents
  
    - any substantive case-related communication between members of the prosecution team
  
    - candid conversations with law enforcement agents regarding any potential Giglio issues

- information obtained during witness interviews including inconsistent information disclosed by the witness during a pre-trial witness preparation session
  - notes of law enforcement personnel made during the investigation that are at variance with their reports or testimony
- At the conclusion of the review a prosecutor should memorialize the material reviewed, the information to be disclosed, and the reasons for any non-disclosure

### III. Law Enforcement <sup>iv</sup>

- STEP #1. The prosecutor assigned to the case should be granted access to the complete substantive case file and any other file or document ***when there is reason to believe that they may contain discoverable information*** related to the matter being prosecuted, whether in electronic or paper form, so that she/he can personally review the file or documents or may choose to request production of potentially discoverable materials from the case agents.
- STEP #2. The investigative agency's entire investigative file, including documents, inserts, emails, etc., should be available for review in order to determine the existence of discoverable information.
- STEP #3. The law enforcement agency should have a policy in place regarding the disclosure of Giglio material to the prosecutor that is consistent with state law and court rules and procedures. For the purpose of this document "Giglio material" includes, but is not limited to, allegations made and investigations made into officer misconduct and the results thereof.
- STEP #3. The investigating law enforcement agency should take the necessary steps to ensure the free flow of information between it and the prosecutor assigned to the case. These may include but are not limited to:
  - Designation of a case agent as a member of the prosecution team
  - Making readily available all relevant case files and information relating to the prosecution of the case
  - Exploring the possibility and when available making use of the sharing of information via the internet or other secure electronic means
  - Use of an automated case management system with the ability both upload and download relevant case information to members of the entire prosecution team
  - ***At critical stages during the investigation and prosecution of the case in court, communication with the prosecuting agency regarding the status of the case. For the purposes of this document "critical stages" shall include, but not be limited to, the arrest and arraignment of the defendant in court; felony case screening; substantive motions and hearings in court; pre-trial conference; Frye and sentencing hearings; and at least two (2) weeks in advance of the scheduled trial date.***

## ENDNOTES

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<sup>i</sup> For the purpose of this document “discoverable material” is deemed to be that information in which disclosure is required pursuant to court rules or The Exculpatory Evidence Doctrine.

<sup>ii</sup> Authorities relied upon in this section include:

- RPC 1.6
- Strickland v. Washington, 466 U.S. 668 (1984)(6<sup>th</sup> Am. right to the effective assistance of counsel)
- Dufresne v. Moran, 729 F. 2d 18 (1<sup>st</sup> Cir. 1984)(comprehensive list of defense counsel’s obligations and responsibilities pursuant to the 6th Am. during case preparation)
- NLADA Performance Guidelines 4.1-4.2
- State v. Burke, 522 A.2d 725 (1987)(trial justice committed error in excluding a defense witness as a discovery sanction when non-disclosure was due to the fact that counsel was surprised by the testimony of the complaining witness on cross-examination and hence could not have foreseen the need to contradict that testimony; no requirement that material only used to cross examine a state’s witness be disclosed)
- AMERICAN BAR ASSOCIATION Fourth Edition of the CRIMINAL JUSTICE STANDARDS for the DEFENSE FUNCTION (4/16/15). Standard 4-4.5. Compliance With Discovery Procedures

<sup>iii</sup> Authorities relied upon in this section include:

- Kyles v. Whitley, 514 US 419 (1995)(prosecutions duty to seek out discoverable material)
- United States Department of Justice Criminal Justice Manual, (USDOJ) 9-5.000 - Issues Related To Discovery, Trials, And Other Proceedings; 9-5.001 Policy Regarding Disclosure of Exculpatory and Impeachment Information; 9-5.002 Criminal Discovery; 9-5.003 Criminal Discovery Involving Forensic Evidence and Experts; 9-5.100 Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy")
- For the purpose of this section “prosecution team” is defined as, “federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant.” USDOJ 9-5.001 Policy Regarding Disclosure of Exculpatory and Impeachment Information B. 2.
- AMERICAN BAR ASSOCIATION Fourth Edition of the CRIMINAL JUSTICE STANDARDS for the PROSECUTION FUNCTION (2/13/15). Standard 3-5.4. Identification and Disclosure of Information and Evidence; Standard 3-5.6 Conduct of Negotiated Disposition Discussions

<sup>iv</sup> Authorities relied upon in this section include:

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- Senate Resolution # R 328 (creating the Senate discovery task force)
  - USDOJ 9-5.002 Criminal Discovery B. 1. The Investigative Agency's Files, states that,

“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.”
  - *State v. Beaumier*, 480 A.2d 1367, 1372 (R.I. 1984)(“Although at the time of trial both investigations were a distant memory and no official charge of misconduct was ever leveled against (the police witness) those objective factors are not determinative of the admissibility of the evidence. The right of confrontation is concerned with the proposition that a jury be allowed to evaluate any motive that a witness may have for testifying. That right is especially precious where, as here, the motive may belong to the state's prime witness. It is clear, therefore, that the evidence concerning the investigation should have been admitted...in the final analysis, it is the jury that should consider the evidence and reach its own conclusion); *State v. Beaumier*, 482 A.2d 1199, 1201 (R.I. 1984) (on the state's motion to reconsider the court stated that, “Consequently, the evidence of the ongoing investigation (into officer misconduct) was certainly relevant to the issue of the question of motive and should have been admitted for the jury's consideration”)
  - Relevant portions of changes to NY Criminal Procedure Law ARTICLE 245 DISCOVERY, PART LLL, SECTION 245.55. Flow of information.