

INTERNAL REVENUE SERVICE
UIL 9999.98-00

Number: **199902018**
Release Date: 1/15/1999

CC:EL:CT-604200-98
BCTownsend

DATE: November 20, 1998

MEMORANDUM FOR DISTRICT COUNSEL, DELAWARE-MARYLAND (CT)

FROM: Barry J. Finkelstein
Assistant Chief Counsel (Criminal Tax)

SUBJECT: Discussion of Giglio/Henthorn Issues in CRLs

This responds to your request for advice regarding the extent to which Giglio/Henthorn¹ issues should be identified and discussed in criminal reference letters ("CRLs"). As discussed below, we fully encourage anticipation of Giglio/Henthorn issues affecting the merits of prosecution and discussion of such in CRLs. Based on the information provided in your request for advice, we find your CRL disclosure of potential impeachment information concerning a special agent in a specific case generally was consistent with the letter and spirit of Treasury Order 105-13, as well as the local United States Attorney's Giglio Policy implementation plan. (Copies attached.)²

As a general matter, there is no immediate need to inquire into the personal background of an investigating special agent absent a pending criminal discovery request. Thus, inquiry into, and discussion of, potential Giglio/Henthorn issues should not be a concern in CRLs as a matter of course. To the extent your office has become aware of specific, serious Giglio/Henthorn problems of certain special agents, it will be

¹ Referring to the decisions in Giglio v. United States, 405 U.S. 105 (1972) and United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991).

² The Attorney General and the Secretary of the Treasury each have issued a "Giglio Policy" ostensibly "to ensure that prosecutors receive sufficient information intended to meet their Giglio obligations, while protecting legitimate privacy rights of government employees." See Attorney General's "Giglio Policy" and Treasury Order 105-13, "Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Department of the Treasury Witnesses," respectively. Each United States Attorney's Office has issued an implementation plan designed to comply with the Giglio policy.

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necessary to evaluate the potential impact of such information within the distinct contours of each case. Where the testimony of the investigating special agent is anticipated on a key aspect of the case (e.g., a taxpayer admission) and the derogatory information is admissible, the CRL should address the potential impeachment information.

BACKGROUND

As advised in your request, your office recently found it necessary to comment in a CRL on a Giglio/Henthorn issue present in a particular case and now question whether you should continue to do so as a matter of course given certain circumstances present in your district. You believe such comment is properly encompassed within Counsel's obligation to assess the merits of criminal cases under the prosecution standards established in CCDM (31)310 and 320 and to refer only those cases which in your professional opinion meet those standards. In particular, you question whether an adequate assessment of the likelihood of conviction can be made without noting and assessing the impact of information known to you which affects the credibility of the investigating special agent who may be called as a witness, i.e., potential impeachment information which ultimately may be required to be disclosed to the defendant pursuant to obligations under Giglio v. United States, 405 U.S. 105 (1972).

DISCUSSION

Giglio/Henthorn Reviews: Matter of Trial Procedure

In all criminal cases the government is under a constitutional obligation to disclose upon a defendant's request evidence material either to guilt or punishment (i.e., exculpatory evidence), Brady v. Maryland, 373 U.S. 83 (1963), including evidence which may be used to impeach a government witness. Giglio v. United States, 405 U.S. 105, 154 (1972). With respect to potential impeachment information, the government is obligated upon a defendant's request to examine the personnel files of government employees it intends to call as witnesses in a criminal trial in order to determine if any portions of the files ought to be made available to the defense for impeachment purposes once the defense has made a demand for their production. United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991).

Fundamentally, it is the defendant's prerogative to seek criminal discovery, including initiating Giglio/Henthorn requests, i.e., discovery of potential impeachment information contained in IRS employees' personnel files. Giglio/Henthorn reviews normally are triggered in response to an appropriate discovery motion and a subsequent request from the prosecutor to the Chief, Criminal Investigation ("CI"). The exact timing for disclosure of requested evidence materially favorable to the defendant is not settled. See United States v. Pollack, 534 F.2d 964, 973-974 (D.C. Cir.), cert. denied, 429 U.S.

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924 (1976)(disclosure must take place before trial); Grant v. Alldredge, 498 F.2d 376, 382 (2d Cir. 1974) (same); but see United States v. Allain, 671 F.2d 248, 255 (7th Cir. 1982) (disclosure not required until trial); United States v. Campagnuolo, 592 F.2d 582, 859 (5th Cir. 1979).

Although the government may not be under an immediate obligation to disclose Giglio/Henthorn information until criminal discovery is sought, it has an ongoing responsibility to meet its Giglio obligations. See generally Kyles v. Whitley, 514 U.S. 419 (1995); United States v. Bagley, 473 U.S. 667, 682 (1985). Accordingly, it is incumbent upon the government to assess the existence of potential impeachment information affecting the credibility of a special agent who may testify.³ While this obligation ultimately rests with the individual prosecutor assigned to a case, he or she is not personally required to review a testifying government employee's personnel files. Instead, a law enforcement officer personally familiar with the relevant facts may conduct the review of the testifying government employee's files. United States v. Jennings, 960 F.2d 1488, 1491 (9th Cir. 1992); United States v. Herring, 83 F.3d 1120 (9th Cir. 1996). Moreover, in the majority of investigations and cases in which government employees may be affiants or witnesses, it is expected that the prosecuting attorney will be able to obtain all potential impeachment information directly from government witnesses during the normal course of investigations and/or preparation for hearings or trials. Treas. Order 105-13. In fact the Giglio Policy expressly places the obligation upon each agency employee 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. Id.

Nevertheless, in some cases a prosecutor may also decide to request potential impeachment information from the employing government agency. Where the

³ As stated in Treasury Order 105-13, "the exact parameters of potential impeachment information are not easily determined. Potential impeachment information has been generally defined as impeaching information which is material to the defense. 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."

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government witness is a special agent, such reviews routinely are conducted by CI personnel at the time criminal discovery is commenced.⁴ Assistance of Counsel may or may not be sought with regard to any such review. It was an intentional decision to leave Counsel's role ambiguous. Giglio/Henthorn are trial rights. Primary responsibility for trial procedures rests with the prosecutor. The role and extent of Counsel's support will depend upon local procedure. It was decided to allow each locale to develop its own procedure rather than mandate a universal one.

Addressing Giglio/Henthorn Issues in Referral Context

While we have little difficulty in recognizing Counsel's criminal referral responsibility properly encompasses assessing the impact of potential impeachment information when necessary, we believe it is more likely to be the rare instance warranting CRL disclosure and discussion of Giglio/Henthorn issues. Referral of a case for criminal prosecution is predicated on determinations that (a) the evidence is sufficient to establish guilt beyond a reasonable doubt; and (b) a reasonable probability of conviction exists. CCDM (31)310. Counsel is obliged to evaluate all criminal cases by these prosecution standards and refer only those which meet these standards. In so doing, all the facts and circumstances surrounding a criminal tax case must be considered when deciding whether to recommend prosecution. CCDM (31)321.

As should be clear from the above discussion, it is not Counsel's role to conduct a Giglio/Henthorn review to properly discharge its referral obligation. This is not to say that Counsel should not address substantive Giglio/Henthorn issues in the context of a CRL. In the event potential impeachment information comes to light in the course of reviewing a proposed prosecution, such information should be given due consideration. "Is the information admissible?" "Is the agent expected to testify?" "If so, is his or her testimony crucial to the case?" "What, if any, independent evidence corroborates or supports such testimony?" In some cases the information may only consist of unsubstantiated allegations. Disclosure of this information in a CRL generally is appropriate only in the limited circumstances outlined in Treasury Order 105-13 and the "Giglio Policy" implemented by the local United States Attorney's Office. In other cases, the information may consist of evidence of specific instances of misconduct which fall squarely within the definition of potential impeachment information set forth in Treasury Order 105-13. If such information is known, it should be evaluated in the context of the underlying case and addressed in a CRL. Since District Counsel is most familiar with the case and the potential impeachment information which may or may not affect the merits of prosecution, CRL disclosure and evaluation of potential impeachment information ordinarily will be a matter of local discretion. Of course, such discretion rests with the ultimate referring authority in any given case.

⁴ See IRM Handbook 9.6.3.7.1.1, Henthorn Requests.

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Conclusion

Compliance with Giglio/Henthorn obligations is a matter of local concern. Federal Giglio policies have been issued by the Attorney General and the Secretary of the Treasury to guide such compliance. Although Chief Counsel has no specific obligation to identify and discuss Giglio/Henthorn issues in the context of a CRL, such discussion is appropriate in cases where the potential impeachment information affects the merits of prosecution. While CRL disclosure and evaluation of potential impeachment information generally is a matter of local discretion, such discretion rests with the ultimate referring authority in any given case.

If you have any questions or comments, please feel free to contact Brian Townsend on (202) 622-4470.

Attachments (2)