



Brady-Giglio Guide for Prosecutors

Federal Criminal Procedure Committee

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American College of Trial Lawyers

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Federal Criminal Procedure Committee

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I. Introduction

The Federal Criminal Procedure Committee of the American College of Trial Lawyers offers this guide for state and federal prosecutors to help them comply with their Brady and Giglio obligations (“Brady/Giglio”) to ensure a fair trial and to help them avoid uncomfortable and unnecessary problems and accusations. This guide is the joint product of experienced prosecutors, former prosecutors, and defense attorneys who serve on the committee, with input from state prosecutors who are College members. It is intended to be used by prosecutors to assist them in identifying and adopting best practices to guard against Brady/Giglio violations.

Any prosecutor who has ever faced an accusation of a Brady/Giglio violation knows the uncomfortable emotions that go along with it. Suddenly it is not the defendant who is on trial but the prosecutor. While the law is clear that a Brady/Giglio issue does not necessarily involve a prosecutor’s good faith,¹ any prosecutor who has ever been accused of violating disclosure obligations knows that their good faith is being challenged. Also, depending upon the violation, a prosecutor may be subject to an internal investigation or a state bar investigation.² This guide offers advice on approaching Brady/Giglio issues to minimize failures to make appropriate disclosures and, consequently, to minimize accusations of misconduct. This is good for the prosecutor, fair to the defendant, and crucial for the proper administration of justice.

While some prosecutors have committed intentional Brady/Giglio violations, most violations are unintentional. Instead, they arise from poor management of evidence, a failure to see that a particular bit of evidence might have exculpatory value, or the failure of the investigating agency to provide information to the prosecutor. This guide suggests ways of managing evidence to avoid losing track of it. It also recommends ways of reviewing evidence that make it more likely that prosecutors will appreciate the exculpatory value of evidence and disclose it appropriately.

This guide has three sections. The first discusses intake discovery management (the investigation); the second covers production discovery management (production to the defense); the final section contains a list of items that should trigger specific Giglio concerns for a prosecutor.

¹ “We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (emphasis supplied).

² A prosecutor may be exonerated if his violation was not intentional, but the misery of being the subject of such an investigation is not something to which anyone would willingly submit.

II. Management of the intake of evidence³

A. Documents

This section addresses practices involved in larger paper cases. Smaller cases may have other issues, some of which are discussed below. However, if one is handling a complex investigation with many documents, logging them in when they arrive, reviewing them, and keeping track of their contents, can be a significant challenge. It is easy to forget a document reviewed at the earliest stages of a long-term investigation. However, such a document may prove to be critical to an investigation, or it may be a crucial piece of exculpatory evidence that must be disclosed. Forgetting about this document, or losing track of it, is a recipe for disaster.

Tracking of documents can be done in many different ways, depending upon the complexity of the case. Less document-intensive cases may warrant only a simple spreadsheet that identifies the document, its location, and the crucial facts that it contains. As long as a prosecutor's notes are good and the spreadsheet is readily searchable, a spreadsheet serves as a tool to keep track of things. It is a good practice to have a column in the spreadsheet to mark if a document contains exculpatory evidence. This spreadsheet will make it easy to locate the document when it is time to produce discovery, especially if discovery is produced months or even years after the initial review. This will also save prosecutors who join the prosecution team later on from having to start document review from scratch and will ensure that previously-identified exculpatory evidence is not lost in a personnel transition. There are also software programs, depending upon the particular office's budget, that can be helpful. CaseMap[®] is a relational database that allows an attorney to keep track of documents, link them to a case chronology, and tie them to the persons who are the subjects of the investigation. The database can be customized to mark documents that contain discoverable evidence. When it comes time to produce discovery materials, the database will be useful in ensuring that the prosecutor discloses everything that she should. For more extensive collections of data, there are database software programs that incorporate the contents of the documents, keep them in a searchable platform, and permit the prosecutor to take notes to mark them. These notes or tags could include marking documents for discovery. Two examples are Relativity[®] and Eclipse[®].

B. Other kinds of evidence

Today, many cases involve video evidence from police video cameras mounted on the dashboards of police cars or worn on the officer's uniform. Video evidence can also come from public and private security cameras. Prosecutors need to be sure that they have collected all the relevant videos that the police have. If the case involves a dashcam and a

³ We recognize that most prosecutor's offices are small. The recommendations throughout this paper are general, suggesting considerations and practices, but each office will have to consider how to create and adapt practices to meet its own circumstances.

body cam, or body cams of two different officers, prosecutors need to be sure that they have all of them and can keep track of them. There may be other forms of evidence that prosecutors need to keep track of, and these are only examples.

III. Managing Discovery

A. Discovery Standards

Each jurisdiction has its own rules regarding what the prosecution must produce in discovery. In addition, there will always be variations among offices in the same state and with federal prosecutors across districts. Some jurisdictions require open file discovery; others have more restrictive rules. However, discovery practice within the rules is often left to the discretion of the prosecutor. Having a more generous discovery practice can have significant benefits for the prosecution and can avoid some of the disasters that follow the failure to disclose exculpatory evidence. While the prosecutor does not need to have a completely open file, there are many benefits to working with a presumption of discoverability. More generous discovery reduces the chance that the prosecutor will fail to disclose evidence that turns out to be exculpatory. Generous discovery practices at the outset also avoid complaints about late disclosure of evidence. This does not mean that a prosecutor must ignore concerns about security for witnesses or other similar issues. Nor does it mean that a prosecutor needs to turn over work product. When concerns arise about witness security, a prosecutor may decide to delay disclosing certain evidence, seek *in camera* review, or move the court for a protective order. However, working with a presumption of discoverability helps focus a prosecutor's thinking on the real concerns about generous discovery practices – risks of witness or evidence tampering. If there is no good reason not to disclose evidence, making disclosure the norm will have significant benefits for most prosecutors and their cases.⁴

Although the U.S. Department of Justice does not have “open file” discovery, it does encourage broad discovery beyond the requirements of the rules. “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.” (Justice Manual [JM] § 9-5.002)⁵

The Department of Justice also advises prosecutors to turn over exculpatory information, not just evidence. (“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

⁴ Another benefit of more generous disclosure is that a prosecutor may be better able to convince the defense that a guilty plea is the best option for the defendant. When a defendant understands the case against him, he is more likely to decide to plead guilty.

⁵ <https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings>

evidence.” JM § 9-5.001.)⁶ For federal prosecutors, an example of “information” would be agent reports of witness interviews. Such reports are rarely verbatim transcripts of the witness’s statement. Thus, unless the prosecutor shows the report to the witness and she in some way adopts it, the report is not a statement of that witness under the Jencks Act. (18 U.S.C. § 3500). *Palermo v. United States*, 360 U.S. 343 (1959).⁷ The local rules in some districts require production of such reports.

However, that report might be inconsistent with the testimony that the witness gives in court. Turning the report over in advance allows the prosecutor to avoid scrambling mid-trial to review the reports to see if there is some inconsistency. By turning over the report in advance, the prosecutor has disclosed potential impeachment material without having to review it in great detail to determine its impeaching value. “Information” has been disclosed, which the defense can now use to determine its course in the trial. If the report is Giglio material, the prosecutor has met her obligations.⁸

It is fairly easy to manage cases with only a few police reports and other documents. However, it is never safe to assume that a law enforcement agency has provided everything relevant to the case. Law enforcement officers make judgments about matters that they deem irrelevant and often exclude them from reports. While these judgments are often accurate, there are times when officers fail to recognize exculpatory, and even inculpatory, evidence. A prosecutor should consider reviewing documents deemed “non-pertinent” by the agency to ensure that she does not overlook relevant materials when providing discovery.

In cases in which several law enforcement agencies played a role, the prosecutor’s obligation to look for relevant and exculpatory evidence extends to any agency whose role was large enough to make it part of the prosecution team.⁹ This is a natural extension of

⁶ <https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings>

⁷ Remember that using an agent’s report to refresh a witness’s recollection before trial may result in mandated production of the report. First, the witness may “otherwise adopt[] or approve[]” (18 U.S.C. § 3500(e)(1)) the agent’s report by telling you that it is an accurate report of what she said. Second, Rule of Evidence 612 gives the court discretion to order the production of any writing used to refresh a witness’s recollection before she testifies and to permit the defense to cross examine the witness about it. (We refer to the Federal Rules of Evidence, because as of this writing all states have evidence codes or guides modeled on the Federal Rules of Evidence, except for California, Kansas, Missouri, and New York. There may be variations between the Federal Rules and the rules of the state in which you practice.).

⁸ Some states require the production of all law enforcement reports of testifying witness interviews. In those jurisdictions, this will not be an issue.

⁹ A complete discussion of when an agency is part of the prosecution team is beyond the scope of this paper. For some guidance compare *United States v. Risha*, 445 F.3d 298 (3d Cir. 2006) (where state and federal agents have pooled their investigative efforts and formed a team, federal prosecutors charged with constructive knowledge of impeaching information regarding a witness in possession of the state; court looks to whether the party with knowledge is acting on government’s behalf or is under its control,

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Kyles v. Whitley, 514 U.S. 419 (1995), which makes it clear that prosecutors have “a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.”¹⁰ The U.S. Department of Justice provides the following guidance for its prosecutors.” (JM § 9-5.002):¹¹

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.

B. Production standards

Digital evidence can present challenges in production. It is important that prosecutors produce documents in a format that the defense can view. If metadata is important, the prosecutor needs to be aware of that and find ways to ensure its production, too. To the extent possible, digital evidence should be searchable to make defense review easier.

whether there was a joint investigation, and whether the entity charge with constructive possession has ready access to the information), with *United States v. Reyeros*, 537 F.3d 270 (3d Cir. 2008) (where witness was serving a sentence in Colombia, actions of Colombian government in permitting American law enforcement agents to interview him in Colombia and acting on U.S. extradition request for him did not make the Colombian government part of the prosecution team and there was no constructive possession of information known to the government of Colombia).

¹⁰ *Kyles v. Whitley*, 514 U.S. at 437.

¹¹ <https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings>

C. Using An Evidence-Based Definition of Materiality To Make Brady Decisions

The *Brady* decision requires prosecutors to disclose evidence that “is material either to guilt or to punishment.”¹² In 1963, materiality was a doctrine of evidence – tied to the question of relevance. The distinction between materiality and relevance was a subtle one. The drafters of the Federal Rules of Evidence eliminated the term and embodied the concept of materiality in Rule 401(b) as a “fact of consequence.” A fact of consequence is any fact that is important for deciding the case. It does not have to be an element of the crime. As the Advisory Committee Note explains, “The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action.” In 1963, under any standard of materiality, the fact that someone else had done the killing was certainly material to whether Brady deserved to be put to death.

In *United States v. Bagley*, 473 U.S. 667 (1985), the Court shifted the meaning of materiality to mean evidence that could have affected the outcome. As the Second Circuit has recognized, the Supreme Court has shifted the prosecutor’s duty from an easy, evidence-based test of materiality to a difficult result-affecting test. *United States v. Coppa*, 267 F.3d 132 (2d Cir. 2001). The Supreme Court in *Kyles v. Whitley* gave some general guidance when it wrote, “This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence.” 540 U.S. 419, 439 (1995). However, that hardly provides much guidance at all. *Bagley* and *Kyles* create a nearly impossible standard to apply pretrial. In most cases, it is difficult to say in advance what might affect the outcome of a trial. That revelation often only appears mid-trial. Disclosure then may be too late, and, in any event, it will shift the entire focus to the prosecutor’s failure to disclose earlier instead of the defendant’s conduct.

The safer course is for prosecutors to use evidence-based materiality as the standard. That means examining evidence pretrial and deciding if it has any impact on any issue in the case. In making this decision, a prosecutor should not try to determine the impact of the evidence on the trial’s outcome; the only question is: could the defense use it?¹³ In most

¹² *Brady v. Maryland*, 373 U.S. at 87.

¹³ Some courts have mandated this approach:

The prosecutor cannot be permitted to look at the case pretrial through the end of the telescope an appellate court would use post-trial. Thus, the government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed-with the benefit of hindsight-as affecting the outcome of the trial. The question before trial is not whether the government thinks that disclosure of the information or evidence it is considering withholding might change the outcome of the trial going forward, but whether the evidence is favorable and therefore must be disclosed. Because the definition of “materiality” discussed in *Strickler* and other appellate cases is a standard articulated in the post-conviction context for appellate review, it is not the appropriate one for prosecutors to apply during the pretrial discovery phase. The only question before (and even during) trial is whether

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federal circuits, the prosecutor's disclosure duty is not limited to admissible evidence. For *Brady* purposes, inadmissible evidence may be material if it could have led to the discovery of admissible evidence.¹⁴

This means that prosecutors need to analyze their evidence in light of the Rules of Evidence and consider the various ways that evidence can be used. For example, affirmatively exculpatory evidence is relevant under Rule 401.¹⁵ However, the law of impeachment must also be considered.¹⁶ Rules 608 and 609 provide methods of impeaching witnesses by using a witness's reputation and prior acts of dishonesty and certain types of convictions. Sometimes Rule 404(b) (evidence of other wrongful acts) may be relevant. For example, in a prosecution for assaulting a police officer or resisting arrest, allegations of prior misconduct by the officer, particularly involving the misuse of force, may be evidence that the defense could present. In addition to the rules themselves, most states continue to permit many common law forms of impeachment, such as prior inconsistent statements¹⁷ and bias, as well as evidence that relates to questions of competence – the ability to observe, recall, and relate. Bias can relate to the particular defendant or to a class to which she belongs. It can also mean bias in favor of the prosecution, as was true in *Giglio*. Witnesses who have hearing and vision problems or drug and alcohol problems may present “competence” questions about their ability to observe, recall, and relate.¹⁸

Using evidence-based materiality is a more effective means of avoiding *Brady* problems because the focus is not on a harmless error standard. The harmless error standard may be useful to defend a conviction on appeal but is likely to lead to poor choices before

the evidence at issue may be “favorable to the accused”; if so, it must be disclosed without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial.

United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005).

¹⁴ *Johnson v. Folino*, 705 F.3d 117, 130 (3d Cir. 2013); *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003) (en banc); *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002); *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000); *United States v. Phillip*, 948 F.2d 241, 249 (6th Cir. 1991). *But see Hoke v. Netherland*, 92 F.3d 1350, 1356 n. 3 (4th Cir. 1996); *Jardine v. Dittmann*, 658 F.3d 772, 777 (7th Cir. 2011). In *United States v. Morales*, 746 F.3d 310, 315 (7th Cir. 2014), the court questioned the validity of the *Jardine* rule, but did not reconsider the issue.

¹⁵ This would include evidence that might show that someone else committed the crime. *Kyles v. Whitley*, *supra*; *Leka v. Portuondo*, 257 F.3d 89 (2d Cir. 2001) (*Brady* violation found where eyewitness described how murder occurred, but the description of the crime by another witness, who made no identification, cast doubt on the factual description of the eyewitness. The evidence from the non-identifying witness suggested that the defendant was not the perpetrator.) *Leka* presents a perfect example of how a prosecutor could view evidence as merely impeaching – a failure to make an identification that only seems relevant if the witness testifies – while it can also be viewed as affirmatively exculpatory.

¹⁶ *Giglio v. United States*, 405 U.S. 150 (1972).

¹⁷ *Kyles*, *supra*, requires disclosure of such evidence.

¹⁸ These issues can involve sensitive questions regarding the personal privacy of a witness. A witness who successfully completed drug rehabilitation is one such example. These may be cases for *in camera* disclosure to the court first. *United States v. Agurs*, 427 U.S. 97 (1975); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). However, prosecutors should be alert to these questions and not ignore them.

trial. Instead, using a forward-looking approach, prosecutors should ask themselves, “could the defense use this evidence?” Remember that disclosing evidence or information does not mean conceding its admissibility. One can disclose facts to the defense and argue against their admissibility before the judge. Not only does this avoid failure to disclose problems, but a judge’s decision to admit evidence is generally reviewed on appeal under an abuse of discretion standard. That is an easier standard to meet than the *Bagley* standard, which inevitably puts a prosecutor’s character on the line.¹⁹

D. Discovery Tracking

If the defense claims that they are seeing evidence for the first time in the middle of trial, how can the prosecutor respond? Having a system that inventories the items produced in discovery can be crucial. This is directly related to the prosecutor’s ability to keep track of evidence as it is collected. If the prosecutor uses a collection system that itemizes everything received, it should not be hard to record everything that has been produced. If this information can be kept in a single file (spreadsheet or a table in a word processing document), then also it is easy to keep track of items that have not been produced. This can be useful in the pretrial phases of a case. As the prosecutor learns more about the defense theories, it will be easy to review what has not been produced and revisit production decisions.

A cover letter with the discovery that enumerates the materials produced (even if only by category) can be useful. It serves as a written record at the time of production of what the prosecutor turned over. Defense claims months later that they never got something are less persuasive if the prosecutor’s cover letter itemized the production and there was no defense complaint about missing items at the time.

If the prosecutor’s office budget permits, digital production has many advantages. Producing all discovery on a single CD or DVD (or a few of them, or in massive cases, on a hard drive) allows the prosecutor to disclose evidence in an organized and searchable format.²⁰ One benefit of digital discovery is that the prosecutor can make a second copy of the items produced at the same time. This provides a concise record of production.

E. An Object Lesson

Two recent opinions in a criminal case illustrate the wisdom of this guidance. In *United States v. Nejad*, 2020 WL 5549931 (S.D.N.Y. September 16, 2020), and 2021 WL

¹⁹ As discussed above, having a presumption in favor of production obviates the need even to make these relevance assessments.

²⁰ This means that PDF files should be in OCR (optical character recognition) format. Organized means that the files have some logical organizational structure. This can include all files from a common source in a folder with subfolders, or files of a particular format grouped together. The organization structure will depend upon the case. The beauty of electronic discovery is that the defense can organize it in a different way if they so choose, but they will have received the discovery in a usable format.

681427 (S.D.N.Y. February 22, 2021), prosecutors did not turn over a particular document to the defense until the trial was underway. The investigation had started in the Manhattan District Attorney's Office and was taken over by the U.S. Attorney's Office. One Assistant D.A. was appointed as a Special AUSA to serve on the prosecution team. The DA's office had obtained the document in question, designated as GX 411, early in the investigation, and the ADA reviewed it in March 2015. Four years later, in the run up to trial, the ADA was reviewing files when he came across GX 411 again. He thought it was *inculpatory*, notified the AUSAs with whom he was working, and sent them a copy. The prosecutors decided not to offer it. Five days into the trial, based upon defense cross examination of a witness, the prosecutors decided that they should offer the document. It was then that they realized that they had not produced it and did so. The defense immediately saw GX 411's exculpatory value and objected. The prosecutors apparently did not recognize its exculpatory nature until that moment.²¹

While there is no guarantee that the suggestions above would have prevented this disaster,²² had the prosecutors logged the document at intake, created an index of discovery production, kept track of what they had not produced, and used a presumption of disclosure, the odds are high that they would have produced it. Furthermore, prosecutors are advocates. All advocates develop tunnel vision – they tend to see the facts through the perspective of their particular side. An evidence-based analysis of materiality for GX 411 (does this document have any bearing on the issues in this case?) rather than a result-based analysis (will the failure to disclose this undermine confidence in any conviction?) may have ensured prompt disclosure.

IV. Giglio Checklist

Because every case is different, the items listed here are things that a prosecutor needs to consider. There may be cases in which the prosecutor must disclose such material; there may be other cases in which disclosure is a closer call. The purpose of this section is to alert prosecutors to issues they should consider in making disclosure decisions.

As discussed above, it is vital to consider the many ways to attack the credibility of a witness by reviewing the appropriate rules of evidence. A witness can be impeached in two

²¹ The district court found that the prosecutors did not intentionally withhold the exhibit and that they did not appreciate its exculpatory value. Nevertheless, the opinions convey the judge's level of outrage at the systemic failure of the prosecution. In addition, the judge put the names of the prosecutors in her opinion. If any of these prosecutors is appearing before a judge for the first time, these opinions may well be the initial impression that the judge will have of them. Moreover, if any of them apply for jobs outside the office, any potential employer doing a basic investigation will learn of their conduct in the case.

Not for discussion here, but efforts by the prosecutors to "bury" GX 411 with other documents when they did disclose it are also an object lesson on how the cover up can be as bad as (or worse than) the Brady/Giglio violation.

²² After the conviction, the government agreed to a new trial and dismissed the indictment with prejudice.

general ways. The first is specific to the case, such as prior inconsistent statements, contradictions, or evidence that the witness could not have observed the matters to which she testifies. The second is not specific to the case but deals with traits of the witness, such as bias, defects of competency (challenges to the ability of the witness to observe, recall, and relate), or a disposition for dishonesty. The first category is easier to spot because it is directly related to the proof of the facts in the case. An eyewitness's failure to make an identification earlier or evidence that the witness was not at the scene are examples that are not hard to identify. Evidence in the second category – traits of the witness not related to the case – range in difficulty from easy to very hard. For the hard ones, the point of this paper is to alert prosecutors to the issues.

A. Prior convictions/prior acts of dishonesty

Evidence of prior convictions is the easiest Giglio issue. If the rules of evidence permit impeachment using a particular type of conviction, prosecutors must disclose them. On the other hand, prior acts of dishonesty will always involve questions of judgment. No one expects a prosecutor to ask a witness if he ever lied to his mother and, if so, to catalogue those lies. However, acts of stealing, cheating, and lying may be a proper basis for cross examination in a particular jurisdiction. Even if they are not (compare Federal Rule of Evidence 608(b) with Pennsylvania Rule of Evidence 608(b), which does not permit cross examination about prior acts of dishonesty), knowledge of these facts may allow the defense to search for character witnesses about the witness's reputation for honesty, which would be admissible under Rule 404(a)(3).

B. Bias

Bias questions also range from easy to extremely hard. A witness who has a plea agreement has a potential bias to favor the prosecution.²³ Bias can also be inferred from any favors granted by the prosecution to the witness, such as help with a case in another jurisdiction or with a parole board, immunity and non-prosecution agreements, expectations of sentence reductions, consideration concerning asset forfeiture, relocation assistance, and similar benefits offered to a third party who is close to the witness and which act as an inducement to the witness to cooperate.

Cooperating witnesses who have served as informants can present problems. Such witnesses may have worked for more than one law enforcement agency. The "rewards" that they have received can reflect on their biases as witnesses. Every prosecutor should be in the practice of making requests to the law enforcement agency to determine whether the witness worked with other agencies and if so, to learn what benefits those agencies have given the witness.

²³ *Giglio v. United States*, *supra*

Personal bias against the defendant and racial bias of a witness, when the bias is against the defendant's race, are easy cases. For example, if a witness who freely uses pejorative terms when speaking about someone of a different race or culture testifies against someone from that race or culture, the bias is clear. However, using those pejorative terms can be complicated if the defendant is not a member of the class against which the witness has exhibited such prejudice.

C. Giglio issues involving law enforcement officers

Many of these issues become more important and more complex when the witness is a law enforcement officer. They are challenging for many reasons. First, prosecutors tend to have a bias in favor of law enforcement. Prosecutors regularly work with law enforcement agencies and need to maintain a good working relationship with them. Second, Giglio issues for law enforcement officers can effectively end their careers by barring them from testifying. For blatant lying in court, such punishment is well-deserved. However, lying in administrative matters or personal issues may present some challenges.²⁴ What about things that happened a long time ago? Rule 609(b) bars the use of convictions that are more than ten years old. Should there be a similar presumption for Giglio disclosure? Prosecutors who have confronted these issues have found them difficult to navigate. This section is not written to tell prosecutors what to do, but to help prosecutors identify and analyze the problems, each of which is fact-bound. Few have easy answers. Our purpose here is to open more prosecutors' eyes to the problems.

Dishonesty in the line of duty can often present problems. A judge may find that a law enforcement officer is not credible. Such findings can range from a clear statement that the judge disbelieves the officer to the judge finding the testimony of another witness more worthy of belief based upon factors such as the opportunity to observe. These situations require an analysis of the facts of the prior testimony and that court's determination.²⁵ Difficult issues can also arise with misrepresentations made by a law enforcement officer to superiors. These can range from relatively trivial matters (reporting facts honestly, but miscoding the entry in the system) to serious (lying about the facts of a criminal investigation).²⁶

²⁴ Issues of dishonesty by a law enforcement officer outside of the line of duty are similar to those of any other witness and probably should be judged by the same standards. Acts of stealing and cheating, as well as lying to one's mother as a child are easy. Dishonesty in other areas, such as with one's spouse, may not be.

²⁵ The Supreme Court has not disapproved the use of dishonest statements to a suspect during interrogation. *Frazier v. Cupp*, 394 U.S. 731, 739 (1969). Misrepresentations during an investigation are quite different from false testimony in court. The former are probably not Giglio material; the latter clearly are.

²⁶ These, and other difficult questions, may be the ideal situation for making an *ex parte* disclosure to the court for a ruling as permitted by *United States v. Agurs*, *supra*, and *Pennsylvania v. Ritchie*, *supra*. See footnote 18 above.

In some places, officers who are involved in misconduct are allowed to resign in lieu of discipline. Problems arise when they obtain police work in another jurisdiction, which either has not checked their backgrounds or ignores the prior misconduct. Depending upon the prior misconduct, Giglio issues can lurk in these situations, and learning about them is not easy.

Where police unions are strong, prosecutors also need to consider how to handle cases of police officers whose disciplinary charges have been sustained through the police department only to be overturned in arbitration. If the arbitration system has a history of reversing discipline regardless of the underlying facts, prosecutors might want to take this into account.²⁷

Prosecutors' offices should consider establishing procedures for requesting information about allegations of an officer's misconduct that are contained in the employing law enforcement agency's personnel files. The procedures should include the designation of a person to make requests from the law enforcement agencies, standards for review, and general rules regarding circumstances for disclosure.²⁸ It is helpful to have a single person in each law enforcement agency designated to receive such requests and to be in charge of production. Not only does this allow for a clear chain of responsibility, but it also permits the designated people to develop expertise. In rural counties, prosecutors may know every officer and everything there is to know about them, making the inquiry fairly easy. In most places, this will not be true.

There are several resources one can review for guidance in this area: JM § 9-5.100(5)(c),²⁹ the Model Policy for Brady Disclosure Requirements of the International Association of Chiefs of Police,³⁰ Illinois Association of Chiefs of Police Brady Material Disclosure Policy,³¹ the Baltimore Police Department Exculpatory Evidence Disclosure Requirements,³² the Pennsylvania District Attorney's Association Suggested Giglio Protocols for Law Enforcement,³³ the New Jersey Attorney General's Memo on Disclosure of Exculpatory and Impeachment Evidence in Criminal Cases.³⁴ None of these is perfect. Indeed, some of them may contradict others. Nonetheless, they are helpful to get an idea of various problems and potential resolutions.

²⁷ The U.S. Department of Justice position is that "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," but it does contain exceptions. See [JM § 9-5.100](#).

²⁸ The U.S. Department of Justice policy and procedure for this can be found in [JM § 9-5.100](#).

²⁹ <https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings-9-5.100>

³⁰ <https://www.theiacp.org/sites/default/files/all/b/BradyPolicy.pdf>

³¹ [https://www.ilchiefs.org/assets/docs/draft_brady-policy-ILACP\(00366068-5xC010D\).pdf](https://www.ilchiefs.org/assets/docs/draft_brady-policy-ILACP(00366068-5xC010D).pdf)

³² <https://www.powerdms.com/public/BALTIMOREMD/documents/568218>

³³ <https://www.pdaa.org/wp-content/uploads/2019/12/Giglio-Protocols-PDAA.pdf>

³⁴ https://www.nj.gov/oag/dcj/pdfs/policies/LPS_Brady-Giglio-Policy_June-2019.pdf

D. Other considerations

As discussed above concerning Rule 404(b) (other crimes evidence), when an important issue in the case is the use of force, evidence of the previous misuse of force by an officer is potential Giglio material. This issue could arise in a case involving charges of an assault on an officer or in a hearing in which the defendant claims that the officer coerced a confession by violence or threats of violence.³⁵

Issues related to witness competence can present sensitive questions when dealing with any witness and particularly with police officers. Police work is stressful, and anyone who has worked with police knows that alcoholism can be a problem. If these problems can have an impact on an officer's ability to observe or recall, prosecutors face difficult issues balancing the defendant's right to a fair trial with a witness's right to privacy.

V. Conclusion

Brady/Giglio issues can be difficult even for prosecutors alert to them. For unaware prosecutors, they are an unmarked minefield. A prosecutor's failure to comply with his or her disclosure obligations undermines the prosecution's cases and is harmful to the administration of justice. The American College of Trial Lawyers hopes that this guide will help prosecutors throughout the United States meet these challenges with integrity.

³⁵ New Jersey has recently established a public database of officers accused of abuse of force. <https://www.njoag.gov/force/>. Such a database will eliminate a prosecutor's need to conduct an investigation to find such information. It will also make such information readily available to all defense counsel.