Navigating Brady-Giglio
from a law enforcement perspective.

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Salt Lake County District Attorney’s Office
Overview of Brady-Giglio
What is Brady material?

- Evidence favorable to the accused where the evidence is material to either guilt or punishment; this includes information which could impeach an officer as a witness if the witness’ credibility is material to a verdict of sentence.

  - Brady v. Maryland, 373 U.S 83 (1963)
Brady examples:

- Officer is disciplined for writing false reports
- Officer sent for a department medical exam based upon questionable judgment
- Officer is found with un-receipted evidence
- Evidence tending to support an affirmative defense
What is Giglio material?

• Any information that could be used to impeach the credibility of a witness; “When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls with the prosecution.”
Giglio examples:

- Statement suggesting bias
- Discipline related to dishonesty, truthfulness or lack of candor
- Confidential informant offers
- Special privileges while incarcerated
- Incompetence
What is the Brady-Giglio rule?

- Prosecutors have a constitutional obligation to produce exculpatory and impeachment information relating to material witnesses and
- Law enforcement are agents of Prosecutors.
- The law enforcement case manager leads the evidence gathering team for the prosecutor.
What is needed to prove a Brady-Giglio violation?

- The evidence at issue must have been favorable to the accused because it is either **exculpatory** or **impeaching** of a government witness;
- The evidence at issue must have been suppressed by the prosecution, whether willfully or inadvertently; and
- The suppression of evidence must have **resulted in prejudice** to the accused.
What evidence is material?

• It is the type of evidence that might have **affected the outcome of the trial**. The prosecutor need not disclose evidence that is neutral, irrelevant, speculative, or inculpatory under Brady.

• The prosecution’s constitutional disclosure requirements arise even when the accused has not specifically requested exculpatory or impeaching evidence. The Court held that favorable evidence is material if there is a “reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”
What isn’t Brady material?

- Under Wood v. Bartholomew, the Court held that the prosecution’s failure to disclose inadmissible information does not amount to a Brady violation where there is only “mere speculation” about whether its disclosure would have led to admissible evidence. 516 U.S. 1, 6 (1995).
Who has an obligation under Brady?

- In Kyles v. Whitley, the Court held that the government has an affirmative duty to search for, learn of and disclose Brady material in the possession of the prosecution team, which includes prosecutors, police and persons and agencies working on behalf of the government. 514 U.S. 419, 437-38 (1995).
When does Brady material need to be disclosed?

• The Constitution does not require disclosure concerning “impeachment information relating to any informants or other witnesses” before entering into a binding plea agreement with a defendant. United State v. Ruiz, 536 U.S. 622, 625 (2002).

• In its decision, the Court only settled the narrow issue of the disclosure required under Brady in the plea agreement context with respect to impeachment material. It did not decide the issue of whether the prosecution must disclose material exculpatory evidence before entering into a guilty plea with a defendant and federal circuits are split with respect to this issue.
Summary of Brady-Giglio

- A Brady violation occurs when the government fails to disclose materially favorable evidence irrespective of good faith or bad faith on the part of the government;
- Brady evidence includes both impeachment and exculpatory information;
- The prosecution’s disclosure duties extend to evidence that is known only to other government agents involved in the investigations;
- Evidence is only material if there is a reasonable probability that the outcome of the proceeding would have been different if the evidence had been disclosed; and
- Reversal of a conviction requires a showing that the materially favorable evidence evaluated in light of the totality of evidence is of such a nature as to undermine confidence in the verdict.
History of Brady

- Brady v. Maryland, 373 U.S. 83 (1963)
- Pitchess v. Superior Court, 522 P.2d 305 (Cal. 1974)
- ABA resolution (2010)
- Salt Lake County DA’s Brady-Giglio formalized policy (2017)
ABA Resolution

• The ABA “urges federal, state, local and territorial courts to adopt a procedure whereby a criminal trial court shall conduct, at a reasonable time prior to a criminal trial, involving felony or serious misdemeanor charges, a conference with the parties to ensure that they are fully aware of their respective disclosure obligations under applicable discovery rules, statutes, ethical standards and the federal and state constitutions and to offer the court’s assistance in resolving disputes over disclosure obligations.”

• See http://www.abanet.org/leadership/2010/midyear/pdfs/Daily_JournalFINAL.pdf
New Policy
adopted by Salt Lake County DA
to ensure Brady obligations are met.

• Quarterly request for all Brady-Giglio information
• Maintenance of restricted Brady-Giglio files
• Separate Certification by Testifying Officer
  • See attached sample materials
So why do I care about the obligations of a prosecutor?
If you represent any type of law enforcement entity, Lab or Officer you are considered to be an agent of the prosecutor.

• What information should I provide?
  • Disciplinary files
  • Investigative files
  • Administrative findings
  • Medical Information
  • Citizen Complaints
  • Any other information that may tend to exculpate or impeach a witness

• When do I need to provide information?
  • Production is Dependent on the Prosecutorial Agency’s policy
    • When you become aware of it; Upon request by the prosecutor; or periodic intervals
Do I need to take any precautions regarding the release of this information?

Files are government records - GRAMA – specific state or federal laws
Files may contain private and protected information
Employees may have a privacy right to non-disclosure
Disclosure may lead to an allegation that a property right was damaged
Wide-dissemination of the documents could lead to liability
How can I avoid problems when complying with Brady-Giglio disclosure obligations?
GRAMA

• Most requests will require you to release private or controlled information related to an employee within your organization.
• Use the sharing provision of GRAMA
• Require that once a record is shared, it is not disseminated further without order of the court.
• Require the Requesting Prosecutor to notify the employee before disclosure if the employee is in active litigation on the issue disclosed.
(1) A governmental entity may provide a record that is private, controlled, or protected to another governmental entity, a government-managed corporation, a political subdivision, the federal government, or another state if the requesting entity:

a) . . .

b) enforces, litigates, or investigates civil, criminal, or administrative law, and the record is necessary to a proceeding or investigation;

(5) A governmental entity may disclose a record to another state, the United States, or a foreign government for the reasons listed in Subsections (1) and (2) without complying with the procedures of Subsection (2) or (4) if disclosure is authorized by executive agreement, treaty, federal statute, compact, federal regulation, or state statute.

(9) Records that may evidence or relate to a violation of law may be disclosed to a government prosecutor, peace officer, or auditor.
What is required to share a record?

Police Chief
Police Department Address

SUBJECT: GRAMA request regarding Officer __________

Mr. Chief __________

Pursuant to Utah Code §63G-2-206(1)(b), the Salt Lake County District Attorney’s office is requesting all records held by _________ Police Department (public, private, controlled, or protected) involving Officer __________ as outlined below, from his hire date to present. As of today __________, is either a witness or a victim in one hundred one separate criminal cases which have been sent to our office for screening of criminal charges. Many of those cases have been filed and are at various procedural stages.

Criminal prosecutors have an affirmative duty to disclose evidence favorable to a defendant. See Brady v. Maryland, 373 US 83 (1963). That duty extends beyond exculpatory evidence in a specific case and includes impeachment evidence against witnesses offered during the prosecution’s case in chief. See United States v. Bagley, 473 U.S. 667, 676 (1985). Prosecutors are ultimately responsible for collecting, evaluating, and providing this Brady evidence to defendants, even if law enforcement agencies have not informed prosecutors the materials exist. See Kyles v. Whitley, 514 US 419, 438 (1995). The records requested below are requested because they are necessary to the resolution of prosecution proceedings and investigations the District Attorney is handling. As you are aware, if impeachment evidence is not provided to the defense as explained above criminal cases can be dismissed and convictions reversed on appeal.

Based on the requirements of section 63G-2-206, please consider this letter as a written assurance, as provided in subsection 63G-2-206(2)(a). The District Attorney’s Office represents that the records requested regarding _______________ are necessary to the District Attorney’s duties and functions, that the records will be used for criminal investigation and enforcement purposes which are similar to the purposes for which the records were originally obtained, and that the use of the records by the District Attorney will not prejudice(s). The District Attorney hereby requests a copy of all records in possession of the _______________ Police Department to that effect. The request extends to records of expressed opinion or reputation regarding _______________ character, as well as records of specific instances of conduct indicative of such. If Police Chief __________ or a designee has compiled one or more investigative reports or memos regarding Officer __________, those may consist of, include, or refer to the records requested herein, and should be supplied to the District Attorney pursuant to this request.

Along with each record, please inform the District Attorney’s office of the record’s classification as public, private, controlled, or protected. Pursuant to Utah Code §63G-2-206, our office acknowledges it will be subject to the same restrictions on disclosure absent a more specific court rule or order, state statute, federal statute, or federal regulation. Our office will both inform the department of any records request we receive regarding Officer _______________, records and will vigorously defend each record’s meritorious classification.

Please feel free to contact _______________ of our office with any questions, comments, or concerns.

Sincerely,

Deputy District Attorney

It has come to the attention of the District Attorney that _______________ has conducted himself in a manner that has led the _______________ Police Department to suspect he may have a character for untruthfulness, may have a motive to misrepresent, may be biased, or may hold prejudice(s). The District Attorney hereby requests a copy of all records in possession of the _______________ Police Department to that effect. The request extends to records of expressed opinion or reputation regarding _______________ character, as well as records of specific instances of conduct indicative of such. If Police Chief __________ or a designee has compiled one or more investigative reports or memos regarding Officer __________, those may consist of, include, or refer to the records requested herein, and should be supplied to the District Attorney pursuant to this request.

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Deputy District Attorney
Other considerations

• Placing restrictions on re-disclosure such as, a court order.
• Requiring a protective order
• Developing a mechanism for employee intervention into the criminal proceeding.
• Consider requiring notice back to the disclosing entity.
• Consider requiring notice to the employee if a court order is requested.
• Consider developing internal policies for impacted employees.
What are the consequences of a failure to disclose?

- Potential 1983 civil liability

• Department of Justice Memorandum to Criminal AUSAs and SAUSAs Re: Policy for Discovery in Criminal Cases: https://www.justice.gov/sites/default/files/usa0/pages/attachments/2015/04/01/ian_discovery_policy.pdf