

Berkshire District Attorney's Office *Brady* Disclosure Policy

I. General Discovery Obligations of Prosecutors and Overview of *Brady* Policy

When the government intends to prosecute an individual for a violation of the law, it is required to comply with certain “discovery” obligations whereby defendants are provided with all evidence, both inculpatory and exculpatory, that the government has in its possession. The Berkshire District Attorney’s Office (BDAO) has an “open file policy” for all prosecutions. We will turn over any piece of evidence relevant to guilt or innocence as long as it relates to the offense at issue. Pursuant to Rule 14(a)(1)(A) of the Massachusetts Rules of Criminal Procedure, it is in fact mandatory for Massachusetts prosecutors to turn over various types of evidence, including but not limited to written and oral statements, names and addresses of witnesses, expert opinions, police reports, etc. Rule 14(a)(1)(A)(iii) specifically requires prosecutors to provide defendants with “any facts of an exculpatory nature.”

The Massachusetts Rules of Professional Responsibility mirror the discovery requirements set forth in the Rules of Criminal Procedure. Rule 3.8(d) of the Rules of Professional Conduct states that “a prosecutor in a criminal case shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense[.]”

In light of these mandatory discovery requirements, the BDAO hereby implements this written policy regarding its constitutional obligations pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). District Attorney Offices across the country maintain *Brady* policies and procedures in order to adhere to the highest standards of prosecutorial ethics. These policies are standard and expected. Across the Commonwealth, District Attorney Offices are adopting and implementing their own protocols and procedures. A written policy is vital to creating and retaining trust within our community as well as ensuring uniformity in our application of the law.

In *Brady v. Maryland*, the United States Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution.” *Brady*, 373 U.S. 83, 87 (1963). It is the policy of the BDAO to strictly adhere to our *Brady* obligations. The Supreme Court has stated that “the prudent prosecutor will resolve doubtful questions in favor of disclosure.” *United States v. Agurs*, 427 U.S. 97, 108 (1976). In this spirit, our office will lean toward resolving questions related to *Brady* in favor of disclosure. This written protocol is designed to achieve these goals and to foster district-wide uniformity in the way *Brady* issues are resolved.

This written protocol addresses how the BDAO will collect and manage *Brady* material regarding potential government witnesses including but not limited to police officers, employees of the crime lab, and other employees and experts. This area of law is dynamic, and this protocol may be refined as further guidance is received from courts or the legislature.

The following considerations are embedded in this policy:

- Compliance with the law;

- Assurance that law enforcement is provided an opportunity to be heard;
- Respect for labor practices and labor agreements;
- Honor for the legal and ethical obligations of prosecutors;
- Effective communication with law enforcement management, impacted officers/employees, and their representatives.

II. Basics of *Brady*

The United States Supreme Court’s decision in *Brady v. Maryland* requires the prosecution to disclose to the defense any evidence that is “favorable to the accused” and “material” on the issue of guilt or punishment. *Brady*, 373 U.S. at 87. Failure to disclose this evidence violates the defendant’s right to due process. The prosecutor’s obligation to disclose is a proactive one – it is separate and distinct from any discovery request from the defendant.

Evidence that must be disclosed pursuant to *Brady* includes: (1) “exculpatory evidence,” which is evidence favorable to the defendant and likely to change the result on an issue of a defendant’s guilt or his or her eventual punishment if convicted; (2) “favorable evidence,” which includes not only exculpatory evidence but also evidence that may impeach the credibility of a government witness, whether that witness is a law enforcement officer or a civilian; and (3) “impeachment evidence,” which is defined by Rules 607, 608, and 609 of the Massachusetts Rules of Evidence and generally includes any evidence that can be used to impeach the credibility of a witness.

As it pertains to government witnesses, *Brady* evidence tends to fall within one of three categories: evidence of misconduct involving dishonesty; evidence tending to show a bias or some motive to lie; and/or -- for expert witnesses -- a pattern of confirmed performance errors that could compromise the expert’s conclusions.

Disclosure of *Brady* material does not necessarily mean such evidence will be admissible in court. The BDAO will disclose the existence of *Brady* evidence pursuant to this written policy, but may argue against its admissibility pursuant to the Massachusetts Rules of Evidence.

III. Internal Review Process

It is the obligation of the BDAO, in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team. Members of the prosecution team include all BDAO employees, federal, state, and local law enforcement officers, and any other government officials participating in the investigation and prosecution of a criminal case against the defendant. Assistant District Attorneys (ADAs) shall bring any relevant information about a law enforcement officer and/or government witness to the attention of the *Brady* Review Team¹ as promptly as possible.

¹ The BDAO *Brady* Review Team shall consist of the District Attorney, First Assistant District Attorney, and Deputy District Attorney.

The prosecutor is ultimately responsible for compliance with discovery obligations. While a prosecutor may involve other BDAO employees such as paralegals and support staff, and engage in computer searches in compiling relevant information, the prosecutor may not delegate the disclosure decision itself. In cases involving voluminous evidence obtained from third parties, the assigned ADA should consult with the *Brady* Review Team to determine whether providing defense counsel access to the voluminous documents will avoid the possibility that a well-intentioned review nonetheless fails to identify material discoverable evidence.

BDAO prosecutors shall not sign a pretrial conference report pursuant to Mass. R. Crim. P. 11(a)(2) unless and until they have conducted a thorough review of all of the materials within the possession, custody, or control of the BDAO, and have identified any *Brady* material related to a law enforcement officer or other government witness. If such information exists, ADAs may only sign such pretrial conference reports after the *Brady* Review Team has determined whether the information at issue requires disclosure. Because *Brady* obligations are ongoing, should an ADA receive relevant information about an officer/government witness after signing a pretrial conference report or a certificate of compliance, the ADA shall promptly bring the information to the attention of a Supervising Attorney. For purposes of this policy, a Supervising Attorney shall mean a member of the *Brady* Review Team.

Any defense motion and/or objection based on an alleged failure to disclose shall be reported to a Supervising Attorney as soon as practically possible. Any judicial finding of a failure to comply with *Brady* obligations shall be reviewed by the District Attorney as well as two (2) attorneys outside of the BDAO as selected by the District Attorney. Any finding of inadvertent mistake, neglect, and/or bad faith shall be relevant in determining appropriate disciplinary action, if any, up to and including termination, for any BDAO employee.

All ADAs will be required to attend an annual training on their *Brady* obligations.

IV. Information Submitted to BDAO By Law Enforcement and Government Agencies

Brady violations usually result in the reversal of convictions, but they can also result in dismissal of charges with prejudice on the ground of outrageous government conduct if the conduct amounts to a due process violation. For these reasons, law enforcement leadership is encouraged to take the initiative to partner with the BDAO and to train personnel on the *Brady* issue. The BDAO seeks to work with law enforcement and government agencies and employees to safeguard the integrity and finality of our collective investigations and convictions.

The BDAO will issue an ongoing request to law enforcement agencies and government agencies such as crime labs to timely provide the BDAO with information concerning officer misconduct, involving officer dishonesty, and failure to pass any necessary proficiency exams.²

² See *Brady* Evidence Disclosure Form. This request is prospective in nature, and the BDAO requests that each agency notify the BDAO of any potential *Brady* information, whether fully investigated or not, in a timely manner. However, with respect to employee conduct prior to the implementation of this policy, the BDAO requests that each agency review its personnel files and provide information consisting of any sustained finding of misconduct within the past 10 years against a currently employed individual. Records and information from juvenile and/or youthful

Law enforcement and government agencies should disclose any and all potential information, and allow the BDAO *Brady* Review Team to determine whether disclosure to defense counsel is required.

Such information regarding any officer or employee includes but is not limited to the following areas:

- a. all convictions and/or continuations without a finding (or similar disposition in jurisdictions outside Massachusetts) entered during the past ten (10) years with the exception of offenses not punishable by incarceration;
- b. all convictions and/or continuations without a finding (or similar disposition in jurisdictions outside Massachusetts) for offenses implicating truthfulness with no time limitation;
- c. currently on probation, parole, or other form of court supervision for any crime in Massachusetts or any other jurisdiction;
- d. currently facing pending criminal charges in Massachusetts or any other jurisdiction;
- e. personnel file includes findings involving any of the following:
 - i. misconduct involving dishonesty, including false verbal or written statements;
 - ii. biased policing;
 - iii. racial profiling;
 - iv. malicious harassment;
 - v. other misconduct that suggests bias against a class of people (race, ethnicity, sexual orientation, gender, disability, economic status, national origin, veteran's status, religious creed, age, or other personal characteristics).
- f. has been the subject of an investigation, irrespective of whether the investigation was conducted by Internal Affairs, and the investigation resulted in a finding that the officer engaged in conduct that implicates any of the categories above, and the information is maintained in any agency file, including but not limited to the officer's personnel file;

offender court proceedings as well as records expunged pursuant to G.L. c. 276, §§ 100F-100T are excluded from the BDAO's ongoing request.

- g. with respect to scientific, laboratory, and/or other potential expert witnesses, failure to pass job-related proficiency tests, exams, or assessments or any failures to obtain certifications or proficiency testing from third party vendors related to skills that may be the subject of testimony as it pertains to the specific case, their expertise, or their training;
- h. for any potential expert witnesses, confirmed performance errors that would compromise final conclusions;
- i. has engaged in any other conduct that could be considered impeachable evidence against the officer/expert witness/employee that is not mentioned expressly in the categories above.

The agency should promptly supplement its initial submission to the BDAO with any and all new information, including internal investigations, findings and/or conclusions made within the agency.

The BDAO will notify the relevant agency and officer/employee by letter regarding whether the information provided requires disclosure. The BDAO allows for the affected individual and/or their representative to present further information for additional review.

V. Disclosure Parameters

The BDAO will inform defense counsel via letter of the existence of information that falls within the following parameters:

- 1) all convictions and continuations without a finding entered during the past ten (10) years with the exception of offenses not punishable by incarceration;
- 2) all convictions and continuations without a finding for offenses implicating truthfulness with no time limitation;
- 3) all sustained findings in personnel records of untruthfulness or other misconduct implicating credibility with no time limitation;
- 4) all open criminal cases, including any case in which the witness is currently on probation, parole, or other form of court supervision; and
- 5) any other information the Commonwealth learns and believes implicates the credibility and/or truthfulness of a government witness.

Although the BDAO will put defense counsel on notice of *Brady* material by letter, discovery of documents containing such information will be handled on a case by case basis. If the BDAO is in possession, custody, or control of such documents, they will be turned over to defense counsel. If the BDAO is not in possession, custody, or control of such documents, this office will promptly notify defense counsel. Defense counsel will then be responsible for filing a

motion and/or issuing a subpoena pursuant to Rule 17 of the Massachusetts Rules of Criminal Procedure or other applicable law.

If in the judgment of the BDAO it would be detrimental to the interests of justice and/or any ongoing law enforcement investigation to disclose certain information, such disclosure may be declined, and defense counsel advised in writing, with a copy filed with the clerk, of the specific matters on which disclosure is declined and the reasons for declining. If the defendant files a motion to compel discovery, the BDAO will argue, by affidavit and supporting memorandum, why such disclosure should not be made. The BDAO may file its submissions in support of declination under seal for the court's *in camera* consideration. Unless otherwise ordered by the court, a redacted version of each such submission shall be served on the defendant.

VI. Confidentiality and Public Records Law

All *Brady* information exchanged between a government agency and the BDAO shall be considered and protected as confidential within our office, and shall be maintained in a secure electronic file. Hard copies of *Brady* materials will be kept in a single, secure, and locked location. Employees of the BDAO will be trained to maintain strict confidentiality regarding all information concerning *Brady* material and potential government witnesses. The BDAO will take strong action against any employee making improper use of confidential information or contributing to a breach of confidentiality, which will include disciplinary action, up to and including termination.

However, all public employees must be aware that all records involving their employment are subject to potential disclosure pursuant to the Massachusetts public records law. The BDAO will engage in all necessary legal analysis to determine the scope of disclosure on a case by case basis, and will rely upon the exceptions to the public records law where appropriate.

ADAs may also request protective orders to ensure confidentiality on the part of the attorneys, and may submit materials to the court *in camera* to determine if disclosure is required. If the BDAO is aware of an investigation that remains incomplete, an ADA may file a motion under seal not to disclose the information unless and until a finding of misconduct is made. However, even with these precautions and requests, law enforcement and government employees should remain aware of the wide reach of the public records law.

VII. “Do Not Call” List

The BDAO may determine that an officer or employee’s credibility is so tainted as to disqualify that person from testifying on behalf of the Commonwealth. Such a determination may be made where the person was the sole percipient witness to a crime and/or the sole affiant for a criminal complaint. A limited exception may be permitted on the basis of necessity and/or where the evidence of a defendant’s guilt overwhelming and the officer’s testimony is needed for a limited purpose. The BDAO *Brady* Review Team will assess these situations on an individual basis by focusing on whether the credibility matter at issue constitutes a material fact in the context of an ongoing proceeding.

VIII. Officer/Employee Right of Appeal: Petition For Removal From BDAO *Brady* Files

We recognize the significance of a *Brady* disclosure on an officer's career and personal and professional development. We will provide fair and comprehensive consideration for all individuals involved. To that end, the affected officer/employee may petition to be removed from the BDAO's file containing the names of witnesses whose involvement in criminal cases require *Brady* letters to be sent to defense counsel. The burden of production for removal is on the officer/employee, and the BDAO will consider any and all information submitted in this regard. Determination regarding whether removal is warranted rests solely within the discretion of the BDAO.