

Massachusetts Office of the Attorney General *Brady/Giglio* Procedure

I. Introduction

The following *Brady/Giglio* Procedure is part of the framework the Attorney General's Office (AGO) applies to ensure that its Assistant Attorneys General (AAsG) who prosecute criminal matters receive the information necessary to ensure that all defendants who are prosecuted by the AGO receive due process. This Procedure outlines the process by which the AGO will seek potentially exculpatory "impeachment" information about and from its law enforcement partners.¹ It is the responsibility of all AAsG who prosecute criminal matters to familiarize themselves with this Procedure, as well as the AGO's *Brady/Giglio* Policy.

This Procedure is intended solely to guide office practices. It does not create any enforceable rights, duties, or remedies for defendants, witnesses, or third parties. Compliance or noncompliance with this Procedure shall not be cited as evidence of prosecutorial misconduct or negligence. Although this Procedure itself does not have the force of law and creates no substantive legal rights, it is informed by vital legal principles and is intended to assist AGO prosecutors in carrying out their duty to learn of and disclose potential exculpatory information regarding all law enforcement partners who participate in cases the AGO prosecutes.

II. Responsibilities of AAsG

Upon being assigned a new criminal case, all AAsG who prosecute criminal matters have the following responsibilities:

1. **Identify Prosecution Team:** Upon being assigned to a criminal case, AAsG will start by determining who in their case are members of the "prosecution team" for whom inquiry and potential disclosure are required. The "prosecution team" for any criminal case prosecuted by the AGO includes, but is not limited to, anyone who is a potential witness in the case. Additional guidance on the scope of the "prosecution team" can be found in the AGO's *Brady/Giglio* Policy and Mass. R. Crim. P. 14(a)(1). If an AAG is uncertain whether someone is a member of the prosecution team after reviewing that Policy and Rule 14, they should consult a member of the Brady Review Team.
2. **Notify Brady Review Team:** Upon making this determination, AAsG shall notify the Brady Review Team (BRT) of the names and departments/employers of the members of the "prosecution team" in their case. This notification should be made as soon as practicable after being assigned a new criminal matter to ensure compliance with the timelines for disclosure required by Mass. R. Crim. P. 14(c). AAsG shall provide this notification by email to AGOBradyReviewTeam@mass.gov.

¹ "Law enforcement partners" includes, but is not limited to, local, state, and federal law enforcement officers and agencies, and the State Police Crime Laboratory.

Massachusetts Office of the Attorney General *Brady/Giglio* Procedure

3. ***BRT Queries POST and MSP Databases:*** Upon receipt of this notification from an AAG listing the names and departments/employers of the members of the prosecution team, the BRT shall query the POST Commission's database of "Officer Disciplinary Records" for all law enforcement officers who are members of the prosecution team in the case.² For any Massachusetts State Police who are members of the prosecution team, the BRT shall also query the MSP Portal for any entries about the officer(s).³
4. ***Notification to Defense:*** If the POST or MSP databases contain any information about the member of the prosecution team in question, the BRT will provide the AAG with a discovery notice including all information in the database entries. The AAG shall provide notice and the contents of the database entries to defense counsel as soon as practicable.⁴
5. ***Candid Conversation:*** In addition to identifying the members of the prosecution team, notifying the BRT, and disclosing the contents of POST and MSP database entries, AAsG shall also have a candid conversation with each member of the prosecution team regarding any potential impeachment information, including the categories of potential impeachment information described in Section IV of this Procedure. If the prosecution team member in question is also an AGO employee, the candid conversation should include a supervisor who can review and confirm their answers.

A form to guide these candid conversations is included as an appendix to the Policy.

If this conversation identifies any potential impeachment information, AAsG shall provide all such information to the BRT by email to AGOBradyReviewTeam@mass.gov. If there is insufficient time to provide such information to the full Brady Review Team for it to review the material and make a disclosure decision, the AAG may make the disclosure decision themselves if the AAG deems the evidence exculpatory as defined in Section IV of this Procedure and the AGO's *Brady/Giglio* Policy.⁵ If a member of the prosecution team declines to participate in the candid conversation, the AAG shall document the refusal and immediately notify both their supervisor and the BRT, who will determine whether additional action or disclosure is required.

² The POST Commission's database of officer disciplinary records can be found at: <https://mapostcommission.gov/discipline-status-records/disciplinary-records/>.

³ The "MSP Portal" contains what the Massachusetts State Police describes as its "internal affairs concise officer history." For each allegation of misconduct listed in the portal, at least the following information is provided: (1) the case number, (2) the "classification" and "finding" for the allegation, and (3) the disposition.

⁴ See Mass. R. Crim. P. 14(b)(2)(C)(i)(h) (requiring disclosure of "[a]ny information about such witness contained in any database or list of information about law enforcement misconduct maintained by or available to the prosecuting office").

⁵ The AAG may contact individual members of the BRT and/or their supervisors to inform their disclosure decision. If an AAG makes an emergency disclosure without Brady Review Team approval, the AAG must promptly notify the BRT after the disclosure and provide documentation of the disclosed materials.

Massachusetts Office of the Attorney General *Brady/Giglio* Procedure

6. ***Disclosure & Timing:*** If the BRT determines that any of the information discovered from a witness through a candid conversation must be disclosed under the criteria enumerated in Section IV of this Procedure, AAsG shall provide notice to defense counsel as soon as practicable.⁶ The BRT will assist AAsG with the drafting of discovery notices if needed.
7. ***Continuing Duty of Disclosure:*** AAsG who either know or become aware of information that may bear on the credibility of a member of the prosecution team, regardless of timing, shall report that information to the Brady Review Team. If the Brady Review Team determines that the information should be disclosed, AAsG shall provide notice to defense counsel as soon as practicable.
8. ***Training:*** All AAsG who prosecute criminal matters will be required to attend a regular training on their *Brady* obligations and the requirements of this Procedure.

III. Responsibilities of the Brady Review Team

An internal AGO “Brady Review Team” will be established to implement this Procedure. The AGO Brady Review Team will be responsible for reviewing information and/or materials received in response to requests from AAsG or its own inquiries to determine whether it should be classified as information to disclose under the criteria enumerated in Section IV of this Procedure.

If the information and/or material reviewed by the Brady Review Team does qualify as material warranting disclosure, the Brady Review Team shall notify the law enforcement officer and their police department of the decision to include said officer on the AGO’s “Required Disclosure List.” The “Required Disclosure List” does not include officers contained only in the POST or MSP databases. Instead, the list includes the names of all law enforcement employees for whom the Brady Review Team has decided, using the criteria enumerated in Section IV of this Procedure, that disclosure to defense counsel is required under *Brady/Giglio* if the employee is part of the prosecution team in a particular case. The “Required Disclosure List” is not a list of officers who are disqualified from testifying on behalf of the Commonwealth or being part of the prosecution team in AGO cases. Instead, it is a list of officers about whom a disclosure decision has already been made by the Brady Review Team. The AGO will make disclosures about any officer included on this list in cases where the officer is a member of the prosecution team.

After receiving notice of an officer’s potential inclusion on the AGO’s “Required Disclosure List,” the law enforcement officer and/or police department may request reconsideration of this decision; notice of a request for reconsideration must be received within 14 days of the AGO’s notification to the department and officer. The Brady Review Team shall review any additional materials or information that the law enforcement officer and/or police department

⁶ AAsG should provide notice of potential *Brady/Giglio* materials to the defense before the first pretrial conference in a case as required by Mass. R. Crim. P. 14(c), recognizing that a prosecutor’s responsibility to provide this mandatory discovery pursuant to Rule 14 remains ongoing throughout the duration of a case. Mass. R. Crim. P. 14(d). In all cases, disclosure must be made sufficiently in advance of trial or other critical proceeding to permit the defendant a reasonable opportunity to make effective use of the information.

Massachusetts Office of the Attorney General *Brady/Giglio* Procedure

provides when reconsidering its decision to include said officer on the AGO's "Required Disclosure List."

The Brady Review Team shall conduct a yearly review of the AGO's "Required Disclosure List" to determine whether any law enforcement officers should be removed from the list because disclosure to defense counsel is no longer required. In considering whether removal is warranted, the Brady Review Team shall be guided by the categories enumerated in Section IV of this Procedure.

The Brady Review Team shall create a discovery notice template for all law enforcement witnesses on the AGO's "Required Disclosure List." The Brady Review Team shall also review the information to be disclosed and make necessary redactions to protect the identity of any third parties, personally identifiable information, and/or medical or mental health records. Finally, the Brady Review Team shall determine whether a protective order should be sought before any disclosures.

IV. Categories of Potential Impeachment Information

Generally speaking, the categories of potential impeachment information about members of the prosecution team should include, but not be limited to, officers' prior inconsistent statements, evidence of bias, and any information that could be used to attack an officer's credibility, ability to perceive, or character for truthfulness—including both specific instances of conduct and more general opinion or reputation evidence. The AGO's Brady Review Team and AAsG will conduct a complete and thorough evaluation to determine which information does or does not require discovery notices and disclosures in pending criminal cases.

Under this Procedure, potential impeachment information will be construed broadly. It will be considered to include (but not be limited to) the following categories of information and will apply to any and all members of the "prosecution team."

1. All information regarding past criminal convictions, continuations without a finding, or other dispositions involving an admission (in any jurisdiction, regardless of sealing or expungement), subject to one or more of the following qualifications:
 - a. Any conviction or admission to a felony offense (no time limitation);
 - b. Any conviction or admission to an offense involving false statements, misleading conduct, or otherwise implicating honesty or character for truthfulness (no time limitation); OR
 - c. Any conviction or admission of any kind within the past ten (10) years.
2. All information regarding currently pending criminal charges where the witness is listed as a defendant (in any jurisdiction).
3. All information regarding known but uncharged criminal conduct by the witness that may provide an incentive to curry favor with the prosecutor.

Massachusetts Office of the Attorney General *Brady/Giglio* Procedure

4. All information regarding civil lawsuits where the witness is listed as a defendant and a finding of civil liability was made against the witness related to the performance of the witness's official policing duties.
5. All information regarding matters or pending matters for which the witness is under any form of criminal court supervision in any jurisdiction (e.g., probation, parole, pretrial probation, etc.).
6. All information regarding any prior findings by a judge, magistrate, or arbitrator—or any other credible, neutral source—that an officer has testified untruthfully under oath, knowingly made any false or misleading oral or written statements, knowingly abused official authority, or engaged in other misconduct reflecting on truthfulness or integrity (no time limitation).
7. All information regarding sustained or confirmed departmental findings of misconduct from any law enforcement agency or jurisdiction where the member of the prosecution team is currently employed or has ever been employed, regardless of whether any investigation was conducted by an internal affairs or other unit, subject to one or more of the following qualifications:
 - a. Any matters involving dishonesty, including false or misleading verbal or written statements, in the discharge of official policing duties (no time limitation);
 - b. Any matters involving the use of excessive or unreasonable force, or other abuse of official authority, in the discharge of official policing duties (no time limitation);
 - c. Any matters that suggest impairment of the ability to perceive and recall matters accurately;
 - d. Any matters involving profiling, targeting, harassment, or other conduct or statements that suggest bias against any individual or group of individuals, especially (but not only) on account of race, religion, ethnicity, national origin, language, gender, sexual orientation, economic status, age, disability, veteran's status, or other personal or group characteristics (no time limitation); OR
 - e. Any matters that have received publicity or become a matter of public knowledge and concern.
8. All information regarding currently pending departmental investigations from any law enforcement agency or jurisdiction where the member of the prosecution team is currently employed or has ever been employed, regardless of whether any investigation was conducted by an internal affairs or other unit, subject to one or more of the following qualifications:
 - a. Any matters involving dishonesty, including false or misleading verbal or written statements, in the discharge of official policing duties;
 - b. Any matters involving the use of excessive or unreasonable force, or other abuse of official authority, in the discharge of official policing duties;
 - c. Any matters that suggest impairment of the ability to perceive and recall matters accurately;
 - d. Any matters involving profiling, targeting, harassment, or other conduct or statements that suggest bias against any individual or group of individuals,

Massachusetts Office of the Attorney General *Brady/Giglio* Procedure

- especially (but not only) on account of race, religion, ethnicity, national origin, language, gender, sexual orientation, economic status, age, disability, veteran's status, or other personal or group characteristics; OR
- e. Any matters that have received publicity or become a matter of public knowledge and concern.
9. All information regarding the status of a sworn law enforcement officer who is a member of the prosecution team, as determined by the Massachusetts Peace Officer Standards and Training (POST) Commission, including:
 - a. The record of all certifications issued by the POST Commission (no time limitation);
 - b. Any records pertaining to the decertification or suspension of certification by the POST Commission (no time limitation); OR
 - c. Any records pertaining to the investigation of complaints and allegations of misconduct by the POST Commission's Division of Police Standards (no time limitation).
 10. From any member of the prosecution team, whether a sworn law enforcement officer or civilian employee, all information regarding any failures to pass job-related training or proficiency assessments, subject to one or more of the following qualifications:
 - a. For potential expert witnesses, any failures to pass any tests, examinations, evaluations, or failures to obtain certifications from outside providers, relating to expertise, training, knowledge, skills, or proficiencies that may be the subject of testimony (no time limitation);
 - b. Any failures involving training or assessments for testifying truthfully, writing truthful reports, or other matters involving truthfulness in official, oral and written statements (no time limitation);
 - c. Any failures involving training or assessments regarding bias, excessive force, or other unlawful use of official authority (no time limitation); OR
 - d. Any other failures to complete particular assessments within the past ten (10) years, which:
 - i. occurred more than once (i.e. were repeated failures); or
 - ii. were never corrected, or properly completed, without appropriate explanation.
 11. All information regarding a deliberate untruthful statement during a court case or other official proceeding, or in a police report or other sworn statement.
 12. All information regarding a falsification on any record or any item to be proffered as evidence in any court proceeding or before any judicial officer.
 13. All information regarding any other officer conduct or statements, not expressly mentioned in the categories above, which nonetheless could be used to impeach the credibility of an officer who is a potential witness in any criminal case prosecuted by the AGO, including, but not limited to:

Massachusetts Office of the Attorney General *Brady/Giglio* Procedure

- a. A mental illness that existed at the time of the event to which the witness will testify and which impacts the witness's ability to perceive or recall the event;
- b. A history of substance use disorder or untreated substance use disorder at the time of the event to which the witness will testify, or the use of alcohol or drugs at that time;
- c. Any information that may be used to suggest that the witness is biased for or against a particular defendant;
- d. An egregious dereliction of duty, such as using a position as a law enforcement officer to gain a private advantage; OR
- e. Any additional information that casts doubt upon the accuracy or reliability of any evidence—including witness testimony—that a prosecutor may rely upon to prove an element of any charged crime, or that might bear on the admissibility or weight of any evidence introduced by the prosecution or the defense in any criminal case.