

## II. IDENTIFYING THE PROBLEM AND GETTING THE DISCOVERY YOUR CLIENT IS ENTITLED TO.

### A. The “Ethical” Discovery Duties Are Not the Same as the “Legal” Duties.<sup>2</sup>

Most prosecutors at best pay lip service to their *ethical* discovery obligations and most Black Robes are oblivious to even the existence of such. [REDACTED]

[REDACTED]

[REDACTED]

### SPECIAL RESPONSIBILITIES OF PROSECUTORS AND OTHER GOVERNMENT LAWYERS

- (a) A prosecutor or other government lawyer shall not institute, cause to be instituted or maintain a criminal charge when the prosecutor or other government lawyer knows or it is obvious that the charge is not supported by probable cause.
- (b) A prosecutor or other government lawyer in criminal litigation *shall make timely disclosure* to counsel for the defendant . . . of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal. [Emphasis added]
  - **NOTE:** Unlike the *Constitutional* rule of *Brady* and its progeny, the ethical rule here does *not* contain any “materiality” prong thus it is broader in scope and should always be asserted separately in your discovery demands.

### 1. The American Bar Association, Standards for Criminal Justice (4th ed, 2015), *The Prosecution Function*.<sup>3</sup>

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<sup>2</sup> For an extensive discussion of this issue, see Green & Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 Notre Dame L. Rev. 51 (2016), available at: [http://ndlawreview.org/wp\\_content/uploads/2016/12/NDL102.pdf](http://ndlawreview.org/wp_content/uploads/2016/12/NDL102.pdf) [last accessed: 29 April 2019].

<sup>3</sup> Available at: [http://www.americanbar.org/groups/criminal\\_justice/standards/ProsecutionFunctionFourthEdition.html](http://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html) [last accessed: 12 March 2017].

Standard 3-5.4 is entitled, “Identification and Disclosure of Information and Evidence.” It reads

in relevant part:

- (a) After charges are filed if not before, the prosecutor should diligently seek to identify all information in the possession of the prosecution or its agents that tends to negate the guilt of the accused, mitigate the offense charged, impeach the government’s witnesses or evidence, or reduce the likely punishment of the accused if convicted.
- (b) The prosecutor should diligently advise other governmental agencies involved in the case of their continuing duty to identify, preserve, and disclose to the prosecutor information described in (a) above.
- (c) Before trial of a criminal case, a prosecutor should make timely disclosure to the defense of information described in (a) above that is known to the prosecutor, regardless of whether the prosecutor believes it is likely to change the result of the proceeding, unless relieved of this responsibility by a court’s protective order. (Regarding discovery prior to a guilty plea, see Standard 3-5.6(f) below.) A prosecutor should not intentionally attempt to obscure information disclosed pursuant to this standard by including it without identification within a larger volume of materials.
- (d) The obligations to identify and disclose such information continue throughout the prosecution of a criminal case.
- (e) A prosecutor should timely respond to legally proper discovery requests, and make a diligent effort to comply with legally proper disclosure obligations, unless otherwise authorized by a court. ***When the defense makes requests for specific information, the prosecutor should provide specific responses rather than merely a general acknowledgment of discovery obligations.*** Requests and responses should be tailored to the case and “boilerplate” requests and responses should be disfavored. [Emphasis added].
- (f) The prosecutor should make prompt efforts to identify and disclose to the defense any physical evidence that has been gathered in the investigation, and provide the defense a reasonable opportunity to examine it.
- (g) A prosecutor should not avoid pursuit of information or evidence

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because the prosecutor believes it will damage the prosecution's case or aid the accused.

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There is no good reason not to include specific discovery demands under the above standard the Supreme Court of the United States routinely cites them.

**2. ABA Formal Opinion, 09-454 (July 8, 2009), *Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense*.<sup>4</sup>**

If you have not read this opinion and put a copy of it in your "Trial Notebook," do so before you continue reading here. This Ethics Opinion interprets Rule 3.8(d), *Model Rules of Professional Conduct*, and contains additional citations of authority. The Opinion covers the following areas:

- a. *Waiver*: A defendant *cannot* waive his/her rights under RPC 8.3(d);
  - This includes waivers under "Open File" discovery plans.
- b. *Sentencing*: The duty continues through the sentencing process;
  - Do *not* overlook or ignore this. Sometimes it is our only chance at real advocacy for our clients.
- c. Supervisors and Managers must ensure compliance with this Rule;
  - ***Preserve this issue!*** If an ADA denies the existence of *Brady* material and you have a good faith belief that it exists, send a letter to the Supervisor or Bureau Chief, etc., asking for a "supervisory review" citing this Opinion.

■ [REDACTED]

■ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>4</sup> Available at:

[http://www.americanbar.org/content/dam/aba/events/professional\\_responsibility/2015/May/Conference/Materials/ab\\_a\\_formal\\_opinion\\_09\\_454.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/professional_responsibility/2015/May/Conference/Materials/ab_a_formal_opinion_09_454.authcheckdam.pdf) [Last Accessed: 29 April 2019].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**C. Constitutional Discovery.**

**1. Brady Material is “Favorable” Material, Not “Exculpatory” Material.**

This is a concept that *most* State prosecutors simply do not understand, and thus, frequently violate. *Brady* material is *favorable* information, *not* “exculpatory” information, relevant to guilt or innocence, the degree of guilt, or for sentencing purposes. If you receive a *Brady* response which says something to this effect, “The People are aware of their *Brady* obligations and will disclose any *exculpatory* evidence that we become aware of,” right off the bat, the prosecutor has proven that s/he does not even know, much less understand the *Brady* rule, so just how are they going to comply with it?<sup>10</sup> Bring this to the Black Robe’s attention immediately and request that the Court Order them to comply with *Brady* as written, not as the People interpret it. Notably, in the majority opinion in *Brady*, the Court *never* uses the word “exculpatory,” only “favorable” information.<sup>11</sup> So, tailor your *Discovery Request* to follow the holding in *Brady*.

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<sup>9</sup> *People v. Smith*, 169 Misc.2d 258, 261 (Sup.Ct. Onondaga Co. 1996).

<sup>10</sup> *See*, ABA *Standard 3 5.4(e)*, *supra*, as to why this is an improper response.

<sup>11</sup> New York case law is replete with this erroneous analysis – no doubt because the majority of appellate jurists who have criminal trial experience, were former prosecutors, who never knew or understood *Brady* themselves.

## 2. *Kyles* Material is *Not* Co-Extensive With *Brady* Material.

If you have not read *Kyles*, do so before you do your next discovery demand. Contrary to many New York decisions, the Court in *Kyles* held that the prosecution, under *Brady* principles, violated it in numerous ways.<sup>12</sup>

- Withholding information that “the investigation was limited by the police's uncritical readiness to accept the story and suggestions of an informant whose accounts were inconsistent to the point . . . .”<sup>13</sup>
- “[T]hat the lead police detective who testified was either less than wholly candid or less than fully informed . . . .”<sup>14</sup>
- “[T]hat the informant's behavior raised suspicions that he had planted both the murder weapon and the victim's purse . . . .”<sup>15</sup>
- “[T]hat one of the four eyewitnesses crucial to the State's case had given a description that did not match the defendant and better described the informant. . . .”<sup>16</sup>
- “[T]hat another eyewitness had been coached . . . .”<sup>17</sup>
- “[T]hat there was no consistency to eyewitness descriptions of the killer's height, build, age, facial hair, or hair length.”<sup>18</sup>
- Evidence as to “the reliability of the investigation in failing even to consider Beanie's [informant] possible guilt . . . .”<sup>19</sup>

*Kyles* offers numerous *federal* Due Process considerations for *Brady* material – most of which seem to be as alien to Black Robes as Einstein’s theories in physics. And, unless New York decides

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<sup>12</sup> A sample “*Kyles* Demand” is at Appendix “C” hereto.

<sup>13</sup> 514 U.S. at 453.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 454.

<sup>19</sup> *Id.* at 446.

to adopt a more liberal standard than federal law mandates, ensure that your pleadings are clear that you are relying on *both* the federal standards and New York law.

**3. *Giglio* Material – the Negligence Standard.**

Simply put, this mandates disclosure of all deals, promises or other types of inducements, oral or written, formal or informal by a District Attorneys office to any prosecution witness. Remember the clear language of the opinion:

Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.<sup>20</sup>

Again, you must make a specific demand for *Giglio* material, so tailor your discovery demands accordingly.

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>20</sup> 405 U.S. at 154 55.