

SALINE COUNTY ATTORNEY BRADY/GIGLIO POLICY

The purpose of this policy is to ensure that prosecutors in the Office of the Saline County Attorney receive sufficient information to meet their obligations under *Brady v Maryland* 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972), while protecting the legitimate privacy rights of government employees. The exact parameters of potential impeachment information are not easily determined. Potential impeachment information, however, has been generally defined as impeaching information which is favorable and material to the defense. This information may include but is not strictly limited to: (a) specific instances of conduct of a witness for the purpose of attacking the witness' credibility or character for truthfulness; (b) evidence in the form of opinion or reputation as to a witness' character for truthfulness; (c) prior inconsistent statements; and (d) information that may be used to suggest that a witness is biased.

Kansas Statutes Annotated 22-3212 and 22-3213 set forth the statutory obligation of the Office of the Saline County Attorney to collect and provide complete discovery to the defense in all criminal matters. See *State v. Lewis*, 327 P.3d 1042 (2014). The failure to disclose material evidence can, by itself, provide grounds for a new trial irrespective of the good or bad faith of the prosecution. *Brady*, 373 U.S. at 87. Evidence favorable to the defense has been specifically held to encompass impeachment evidence as well as exculpatory evidence. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *United States v. Bagley*, 473 U.S. 667, 676 (1985); and *State v. Kelly*, 216 Kan. 31, 37 (1975).

The Kansas Supreme Court has included this discovery responsibility in the Rules of Professional Conduct that govern the behaviors of Kansas prosecutors. Rule 3.8(d) states that prosecutors are ethically required to 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. See *In re Jordan*, 278 Kan. 254, 261 (2004).

If any law enforcement officer is in possession of discoverable information, the prosecution has a positive obligation to provide the information even if the defense does not make such a request. *United State v. Agurs*, 426 U.S. 97, 108 (1976); *State v. Nguyen*, 251 Kan. 69, 82 (1992). Given this affirmative obligation, the continuing open file policy of this office does not absolve us of our affirmative obligation to seek out and specifically provide exculpatory information. *State v. Adam*, 257 Kan. 693, 707 (1995).

Prosecutors have an affirmative duty to seek out exculpatory and impeachment evidence in the possession of law enforcement agents. It is no defense to the *Brady* responsibility that the prosecution did not know about the material information that was in the possession of a law enforcement agent. See *State v. Francis*, 282 Kan. 120 (2006). The obligation to disclose is collectively held by law enforcement and the prosecution:

“There is no ambiguity in our law. The obligation under *Brady* and *Giglio* is the obligation of the government, not merely of the prosecutor [citation omitted] Exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where the investigating agency does.”

U.S. v. Blanco, 392 F.2d 382, 394 (2004).

This policy is not intended to replace the obligation of individual agency employees to inform prosecuting attorneys with whom they work of potential impeachment information prior to providing a sworn statement or testimony in any investigation or case. In the majority of investigations and cases in which agency employees may be affiants or witnesses, it is expected that the prosecuting attorney will be able to obtain all potential impeachment information

directly from agency witnesses during the normal course of investigations and/or preparation for hearings or trials.

I. Definition of *Brady/Giglio* Material/Information

Brady/Giglio material is exculpatory evidence favorable to the accused. Information which is material to guilt or punishment and may impact the credibility of a government witness includes evidence that can be used to impeach a government witness. For officers, this includes not only convictions for crimes of dishonesty, but any information in their personnel file that relates to any internal investigation report, or finding of dishonest or untruthful conduct.

II. Saline County Attorney's Agreement with Salina Police Department and Saline County Sheriff's Office.

The County Attorney's Office has an agreement with the Salina Police Department and the Saline County Sheriff's Office that they will contact the Saline County Attorney immediately upon the commencement of an investigation that could result in a *Giglio* impairment of the officer. Upon receipt of that information, the Saline County Attorney will determine whether or not the investigation should be disclosed to the assistant county attorneys. The Saline County Attorney will review the daily witness lists and if the officer being investigated is scheduled to be a witness, the County Attorney and Assistant County Attorney will consult with each other and determine whether a continuance should be sought and if the existence of the pending investigation should be disclosed at that time.

At the conclusion of the investigation, the Salina Police Department and the Saline County Sheriff's Office will immediately notify the Saline County Attorney that the investigation has determined the officer has become *Giglio* impaired. The

Assistant County Attorneys will be notified immediately. A list of all pending cases in which the officer is involved will be prepared and a letter sent to each defense attorney advising that potentially exculpatory evidence exists.

Upon the request of counsel, the court may order the personnel file or investigatory file be produced for an in camera review. The court will notify counsel that information exists which should be turned over to counsel. A protective order will be signed prior to the disclosure of the information. The protective order will set forth the terms under which the information can be disseminated to others. The protective order will require counsel to destroy the written information at the conclusion of the case and certify to the court this has been done.

A prosecutor can make a formal *Brady/Giglio* request from each law enforcement and government agency conducting business and regularly participating as witnesses in Saline County. A request should be made to state agencies who may be involved in a case within our jurisdiction. When an inquiry is made, it will request: (a) any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during an administrative inquiry; (b) any past or pending criminal charge brought against the employee; and (c) any credible allegation of misconduct that reflects upon the truthfulness or possible bias of the employee that is the subject of a pending investigation.

Should the Salina Police Department or Saline County Attorney's Office notify the Saline County Attorney that the investigation has determined the allegations were unfounded, the County Attorney will notify the assistant county attorneys of that determination. Allegations that cannot be substantiated, are not credible, have been

unfounded, or have resulted in the exoneration of an employee generally are not considered to be potential impeachment information.

III. Saline County Attorney Determines the Impact on Cases

When a determination has been made that a government employee has been become *Giglio* impaired and has a material role in a criminal prosecution, the Saline County Attorney may, on a case by case basis:

- elect not to file a case;
- dismiss a case already filed;
- proceed with the prosecution without using the officer as a witness;
- proceed with the case, including the possibility the officer may be called as a witness after disclosure to the defense;
- refuse to accept future affidavits from a *Giglio* impaired officer.

IV. Saline County Attorney Reliance on Law Enforcement Agencies

The prosecution cannot disclose potential *Brady/Giglio* material it does not know exists. The Saline County Attorney's Office has responsibility for potential *Brady/Giglio* information known to the "prosecution team". Under case law, the "prosecution team" includes any law enforcement or government agency providing direct assistance in the investigation or prosecution of the case. The obligation to evaluate and when appropriate, disclose potential *Brady/Giglio* material extends to information held by the prosecution team, even if the individual prosecutor or the Saline County Attorney's Office did not know of the material. These legal principles require the Saline County Attorney to depend on the cooperation of law enforcement agencies in providing the Saline County Attorney with notice of information the Saline County Attorney might not already have. Failure to disclose such material has the potential to result in the reversal of a conviction. To that end, the County

Attorney will rely on law enforcement and government agencies to notify the Saline County Attorney in the following circumstances:

- a. When the law enforcement agency sustains a violation of agency policy that amounts to *Brady/Giglio* material regardless of the nature of the disciplinary action that results.
- b. When the agency becomes aware that an officer either: (a) is under criminal investigation; (b) is being prosecuted in a criminal case, or has been convicted in a criminal case; and/or (c) is on criminal probation.

The Saline County Attorney will send a letter to the Salina Police Department and the Saline County Sheriff asking the internal affairs officer and/or the Chief/Sheriff to verify compliance and that all exculpatory and material evidence as well as impeachment information or status relative to the employees of their office has been disclosed to the Saline County Attorney's Office.

V. Discipline of Impaired Officer

The Saline County Attorney's Office takes no position on the discipline of any law enforcement personnel by virtue of that employee becoming *Giglio* impaired. Discipline is a matter for decision by the law enforcement or government agency.

VI. Annual Review

This policy shall be reviewed annually.

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