



# Brady/Giglio Policy of the Rice County Attorney Office

---

Adopted, January 27, 2015

Updated, 2/2016, 4/2018, 3/2020, 9/2020, 1/2022

John L. Fossum, Rice County Attorney

It is the policy of this office to disclose to the defense information material to the case, particularly that which may tend to exculpate the defendant or which may be used to impeach the credibility of state witnesses.

The Minnesota Rules of Criminal Procedure start the inquiry as to whether information should be disclosed, but the rules are not the only source of law to be considered. The following is to be considered only a brief outline, not an exhaustive review of the law on disclosure.

1. Scope of Discovery
  - A. **Brady v. Maryland**, 373 U.S. 83, 87 (1963) all "material" information must be provided to the defense by the prosecution.
  - B. "Material" evidence includes exculpatory evidence as well as impeachment evidence concerning government witnesses. **Strickler v. Greene**, 527 U.S. 263, 281-82 (1999).
  - C. If any law enforcement agent possesses the information or evidence, the prosecutor has an obligation to learn the information and turn it over to the defense. **Kyles v. Whitley**, 514 U.S. 419 (1995).
  - D. The defense does not have to request the information -the prosecutor has the obligation to turn it over. **United States v. Agurs**, 427 U.S. 97, (1976).
  - E. "Under **Brady**, the suppression by the State, whether intentional or not, of material evidence favorable to the defendant violates the constitutional guarantee of due process." **Walen v. State**, 777 N.W.2d 213, 216 (Minn. 2010).
2. Impeachment Evidence: The Brady disclosure obligation includes impeaching information. **State v. Hunt**, 615 N.W.2d 294, 299 (Minn. 2000) (citing **United States v. Bagley**, 473 U.S. 667, 676, (1985)).

- A. Where a witness's reliability "may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within the **Brady** rule". **Pederson v. State**, 692 N.W.2d 452, 460 (Minn. 2005) (quoting **Giglio v. United States**, 405 U.S. 150, 154 (1972)).
- B. Incentives offered to witnesses, including plea bargains, offers of favorable treatment and payments to witnesses must be disclosed. **State v. Lynch**, 590 N.W.2d 75, 79 (Minn. 1999); Plea bargains to cooperate **must be disclosed** even if made by another office. **State v. Smith**, 541 N.W.2d. 584, 588 (Minn. 1996)
- C. Prosecutors are required to disclose prior written or recorded statements of witnesses and summaries of oral statements. Minn. R. Crim. Proc. 9.01, **State v. Miller**, 754 N.W.2d 686, 705 (Minn. 2008); **State v. Palubicki**, 700 N.W.2d 476, 490 (Minn. 2005).
- D. The complete criminal record of witnesses must be disclosed, failure to do so is a violation of Minn. R. Crim Proc. 9.01; **State v. Miller**, 754 N.W.2d at 705-706.
- E. Failure to disclose that a witness has been found incompetent to stand trial is a violation of the **Brady** obligations. **State v. Hunt**, 615 N.W.2d 294 (Minn. 2000).
- F. Failure to disclose that a victim had another name and criminal history under that name is a **Brady** violation. **Gorman v. State**, 619 N.W.2d 802 (Minn.App. 2000)
- G. Failure to disclose police reports involving the victim, is a violation of the prosecutor's duty to disclose. **State v. Radke**, 821 N.W.2d 316, 326 (Minn. 2012).
- H. Failure to disclose evidence which the prosecutor believes is relevant only as rebuttal evidence may result in the reversal of a conviction for prosecutorial misconduct. See: **State v. Whitcup**, No. A14-1666, 2015 WL 499398, (Minn. Ct. App 2015). Note the prosecutor in this case was the subject of a disciplinary proceeding though the referee determined she did not act in bad faith and dismissed the petition. **In Re: Olson** A16-0280 (Minn. 2016).
- I. Failure to disclose impeaching information, or misstating factual information in discovery may result in attorney discipline. **In Re: Mollin**, 906 N.W.2d 260 (Minn. 2018). Reinstated; 910 N.W. 459 (Minn. 2018).

Repeated failures to disclose and an attempt to settle cases without disclosing **Brady/Giglio** impeachment evidence may result in disbarment. **In Re: Pertler** (Minn. Sept. 10, 2020) A20-0934.

- J. Failing to disclose PBT and HGN results prior to trial resulted in a public reprimand and 1 year of probation. **In Re: Rubin**, (Minn. Jan. 18, 2022) A21-1570
3. Disclosure is not the same as admissibility.
- A. There is no obligation to communicate preliminary, challenged, or speculative information. **United States v. Agurs**, at 109 & fn 16 (citing **Giles v. Maryland**, 386 U.S. 66, 98 (1967)).
  - B. Whether evidence is admissible under state law is not dispositive of the question of required disclosure. If the evidence in question could have led to the discovery of admissible impeachment evidence, disclosure is required. See **United States v. Morales**, 746 F.3d 310, 315, (2014); **Wood v. Bartholomew**, 516 U.S. 1 (1995). As a result, evidence that would not be admissible under Minnesota law must still be assessed for the possibility that disclosure could lead to impeachment information on a case by case basis.
4. Disclosure: Law enforcement agencies are required to produce any impeachment information known about any witness, including law enforcement witnesses, to the prosecution.
- a. Individual prosecutors will determine whether or not a witness with known impeachment problems pursuant to **Brady/Giglio** is necessary to the presentation of the case, and make disclosures as required.
  - b. Law Enforcement officers with known impeachment issues will not be relied upon by this office to sign a verified complaint, affidavit or search warrant application without disclosing all known impeachment issues to the court. **See: Franks v. Delaware**, 438 U.S. 154, 171-72 (1978).
  - c. Impeachment information relating to officers includes:
    - i. False written statement, report or other document
    - ii. Misconduct that reflects on truthfulness
    - iii. Misconduct that indicates a racial, religious, or other personal bias
    - iv. Misconduct that indicates promises, offers, or inducements, including the offer of immunity
    - v. Misconduct involving handling of evidence or property
    - vi. Misconduct that involves the use of force

- vii. Criminal conviction (misdemeanor or above)
- viii. Misconduct that involves harassment
- ix. Misconduct that involves the inappropriate or unauthorized use of government data
- x. Misconduct that reflects on credibility

5. The Rice County Attorney Office shall at all times comply with the Minnesota Rules of Professional Conduct:

**RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR**

The prosecutor in a criminal case shall:

....

(d) 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, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

...

**Comment**

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

....

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

6. This office will also rely on the admonition of Justice Stevens in ***United States v. Agurs***: “Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure.” 427 U.S. at 108 (1976).