




Achieving Justice: Ethical Considerations in Sexual Assault and Homicide Cases

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This project was supported by Grant No. 2019-MU-BX-K011 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the U.S. Department of Justice's Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the SMART Office. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.



Objectives

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- Determine charging decisions based on the evidence, the law, and ethical obligations.
 - Safeguard victim privacy throughout proceedings.
 - Collaborate with law enforcement and advocacy professionals to ensure that discovery and *Brady* obligations are satisfied.
 - Confirm understanding of media involvement with law enforcement and prosecution.

Prosecutor: A Quasi–Judicial Officer of the Court



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*“The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but **that justice shall be done....**”*

Berger v. U.S., 295 U.S. 78, 88 (1935)

Prosecutor Responsibilities

The prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth. This responsibility includes, but is not limited to, ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the rights of all participants, particularly victims of crime, are respected.

NATIONAL PROSECUTION STANDARDS § 1-1.1
(NAT'L DIST. ATTORNEYS ASS'N, 3rd ed.)

Ethical Guidance

ABA's Model Rules for Professional Conduct

- Rule 3.8 Special Responsibilities of a Prosecutor

ABA's Criminal Justice Standards for the Prosecution Function

- "They are written and intended to be entirely consistent with the ABA's Model Rules of Professional Conduct"

NDAA's National Prosecution Standards

State Rules for Ethical Conduct

Ethical Obligations Throughout and After Litigation



Crime Victims' Rights

18 U.S. Code § 3771

- (1) The right to be **reasonably protected** from the accused.
- (2) The right to **reasonable, accurate, and timely notice** of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right **not to be excluded from any such public court proceeding**, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4) The right to be **reasonably heard** at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

Crime Victims' Rights

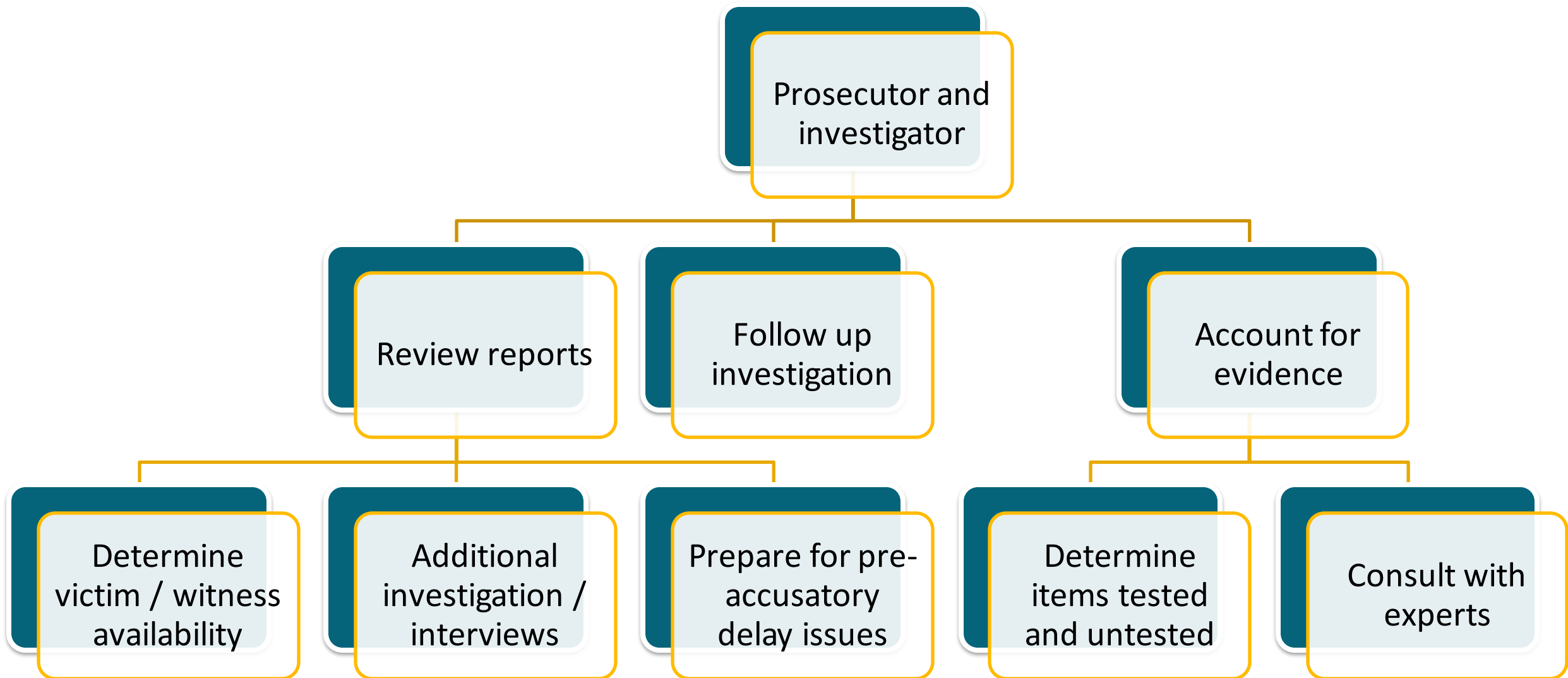
18 U.S. Code § 3771

- (5) The reasonable right to **confer with the attorney for the Government** in the case.
- (6) The right to **full and timely restitution** as provided in law.
- (7) The right to proceedings **free from unreasonable delay**.
- (8) The right to be treated with **fairness** and with respect for the victim's **dignity and privacy**.
- (9) The right to be **informed in a timely manner of any plea bargain** or deferred prosecution agreement.
- (10) The right to be informed of the rights under this section...

Beginning the Work

Ethical Considerations

Assessing the Viability of Charges in Cold Cases: Ethical Considerations and Due Diligence



Determining Admissibility of Evidence for Charging

Crawford, et al.: declarant availability or exception, e.g., forfeiture by wrongdoing



Search and seizure issues: abandoned DNA / surreptitiously obtained



Miranda: interrogation



Williams v. Illinois: unavailable witness



Relevant and material to elements of crime

Current Cases of Homicide and Sexual Assault

Review reports, identify evidence and chain, submit for testing

Crime scene documentation, video, photographs, measurements analysis

Consult with ballistics, blood spatter, fingerprint experts, DNA analysts

Homicide witness interviews, possible res gestae statements by victim, statements/admissions of suspect

Consider impact of trauma and need for expert

Consult with forensic pathologist / SANE

Determining potential defenses

Denial, alibi, self defense (homicide), consent (sexual assault)

Multidisciplinary Case Review



Diligence, Promptness and Punctuality

ABA Crim. Just. Standards for Prosecution Function § 3-1.9

(a) The prosecutor should act with diligence and promptness to investigate, litigate, and dispose of criminal charges, consistent with the interests of justice and with due regard for fairness, accuracy, and rights of the defendant, victims, and witnesses. The prosecutor's office should be organized and supported with adequate staff and facilities to enable it to process and resolve criminal charges with fairness and efficiency

Charging and Indictment Decisions

Ethical Considerations

Functions and Duties of the Prosecutor

ABA Model Code of Professional Responsibility: 3-1.2

(b) The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.

Some Factors to Consider

Combination of Ethical Guidance

**Consistent with the
interests of justice**

The strength of the case

The extent or absence of
harm, whether the crime
includes violence

The views and motives
of the victim

The defendant's relative
level of culpability in the
criminal activity;
defendant's criminal
history

Some Factors to Consider

Combination of Ethical Guidance, Cont'd

The status of the victim, including the victim's age or special vulnerability

The possible influence of any cultural, ethnic, socioeconomic or other improper biases

The impact of the crime on the community

Any other aggravating or mitigating circumstances

Factors Not to Consider

NDAAs Prosecution Standards 4-1.4

- a. **The prosecutor's individual or the prosecutor's office rate of conviction;**
- b. Personal advantages or disadvantages that a prosecution might bring to the prosecutor or others in the prosecutor's office;
- c. Political advantages or disadvantages that a prosecution might bring to the prosecutor;
- d. Characteristics of the accused that have been recognized as the basis for invidious discrimination, insofar as those factors are not pertinent to the elements or motive of the crime...

The Case

An investigator brings the following case for the prosecutor's review:

- A 22-year-old female victim, a university student, was at a local bar frequented by students and instructors.
- At one point, she headed to her instructor's apartment for more drinks with other students. Later in the evening, she felt sick, and the instructor gave her medicine for nausea.
- The instructor offered to take her home, and she accepted.

The Case (cont'd)

- The next morning, the victim awoke to severe vaginal pain and marks on her throat.
- The window screen in her bedroom was outside of her apartment building on the ground.
- The victim reported the assault three days later and was examined by a SANE at the university hospital.
- The suspect was contacted and denied assaulting the victim. He said he had put the victim to bed and left.
- The suspect and the victim had engaged in some consensual sexual activity in prior months.

The Case (cont'd)

- In a follow-up interview, the victim told law enforcement that she remembered her instructor on top of her in her bed the night before she woke up with vaginal pain and injuries to her throat.
- The officer indicated that the victim seemed “reluctant” to share this information.
- The officer advises you that there is no further investigation to be done and asks if you will charge the case. What is your response?



“

A prosecutor may file and maintain charges even if juries in the jurisdiction have tended to acquit persons accused of the particular kind of criminal act in question.

ABA Prosecution Standard 3-4.4(c)



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A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.

*CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION
FUNCTION § 3-4.3(a) (Am. Bar Ass'n, 4th ed.)*

You want additional investigation before charging. Can you investigate the suspect online? Friend him on Facebook?

Considerations

- Would conducting an online search be considered an “investigation” and affect your immunity?
- Is following a public account considered “investigation” and/or “communication” with a represented party?
- Is following a public account different than “friending” someone? If so, how?
- Some social media companies have terms of service that disallow undercover accounts, with specific exceptions for law enforcement
- Who is going to testify to online search and findings?

Absolute Immunity

Imbler v. Pachtman, 424 US 429 (1976)

For functions that are “intimately associated with the judicial phase of the criminal process.”

“Intimately associated”

Initiating the
prosecution

Presenting the
case

Drafting legal
documents

Determining
probable cause
to proceed

Deciding to file
charges

Presenting
information and
motions to court

Does Not Include

- Acting as your own investigator
- Giving advice to police during investigation
- Attesting to the truth of facts in support of an arrest warrant
- Signing a search warrant affidavit

Kalina v. Fletcher, 522 U.S. 118 (1997); *Imbler v. Pachtman*, 424 U.S. 429 (1976); *Burns v. Reed*, 500 U.S. 478 (1991)

Qualified Immunity

Buckley v. Fitzsimmons, 509 U.S. 259 (1993)

- Offering legal advice to police about an unarrested suspect
- Police investigative work
- Administrative activities

“When the functions of prosecutors and detectives are the same ... the immunity that protects them is also the same.”

Qualified Immunity Standard

Harlow v. Fitzgerald, 457 U.S. 800 (1982)

“...[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”

The Case

- The investigator is contacted by law enforcement in another jurisdiction and informed that your suspect is implicated in a forensic genetic genealogy search in a cold case of sexual assault homicide.
- Your suspect is not in custody pending charges. Your investigator needs a reference DNA sample from the suspect for your case and has been asked to assist the other jurisdiction with a confirmatory DNA sample for their case. They ask you about options to obtain the DNA. What is your advice?

Obtaining DNA from Suspects



CONSENT

SEARCH
WARRANT

SURREPTITIOUS
COLLECTION

Discarded DNA: Foundation for Argument

California v. Greenwood 108 S.Ct. 1625 (1988)

- Fourth Amendment does not prohibit the warrantless search and seizure of garbage left for collection outside the curtilage of a home
- Warrantless search and seizure of garbage bags left at the curb outside Greenwood's house would violate the Fourth Amendment **only if** respondents manifested a **subjective expectation of privacy** in their garbage that society accepts as **objectively reasonable**
- Individual states may construe their own constitutions as imposing more stringent constraints on police conduct than the federal Constitution

Legal Considerations: Doctrine of Abandonment

- The abandonment doctrine states that a person has no reasonable expectation of privacy in property that is abandoned in public.
 - *California v. Greenwood*, 486 U.S. 35 (1988)
- Warrantless examination or collection of such property does not constitute a search under the Fourth Amendment.
- Investigator should carefully document any associated surveillance, including offender conduct and context when DNA is discarded.

Discarded DNA Inquiries

Whether the abandonment was intentional: no intention to retain privacy

- *See Com. v. Perkins*, 883 N.E.2d 230, 239-40 (Mass. Sup. Jud. Ct. 2008); *see also State v. Williford*, 767 S.E.2d 139, 141 (N.C. Ct. App. 2015); *Com v. Cabral*, 866 N.E.2d 429, 434 (Mass. App. Ct. 2007)

Whether abandonment was voluntary (or induced by police misconduct)

- *See Hudson v. State*, 205 S.W.3d 600, 604 (Tex. Ct. App. 2006)

Whether abandonment occurred in public

- *See State v. Reed*, 641 S.E.2d 320 (N.C. Ct. App. 2007)

The Case

Your investigator has now been contacted by the crime laboratory with a request for consumption of the DNA sample from the victim for testing.

What is your advice?

Consumptive Testing

ABA Standards for the Crim. Just. Function § 3.4

(a) When possible, a portion of the DNA evidence tested and, when possible, a portion of any extract from the DNA evidence should be preserved for further testing.

(b) A laboratory should not undertake testing that entirely consumes DNA evidence or the extract from it without the prior approval of the prosecutor if a law enforcement officer is requesting the testing, or of defense counsel if the testing is requested by defense counsel or defense counsel's agent.

(c) Before approving a test that entirely consumes DNA evidence or the extract from it, the prosecutor should provide any defendant against whom an accusatorial instrument has been filed, or any suspect who has requested prior notice, an opportunity to object and move for an appropriate court order.

Providing Information / Discovery

Ethical Considerations

The Case

- The victim in your case has retained an attorney who has asked you for discovery so they can prepare the victim for trial.
- Discovery includes:
 - The victim's statements, the suspect's statements, and statements from other students who were present at the suspect's apartment.
 - A video showing the suspect walking the victim into her apartment with the victim walking well and talking to the suspect.
 - A narrative detailing a conversation with the investigator from another jurisdiction on the cold case sexual assault homicide that implicates the defendant
- Should you provide the victim's attorney with a copy of the reports? What if the victim is seeking civil litigation based upon these claims?

Prosecutors and investigators should be prepared to...

Work with victims/witnesses/families

- Ensure engagement with system- and community-based advocates

Ensure discovery obligations are met

- For both defense counsel and victim attorneys

Respond to Public Records Requests

Preserving the Integrity of the Case: Working with Victims and Witnesses

- Victims and witnesses may request information from the prosecutor.
- Victims and witnesses are members of the public and may make Public Record Requests.
- Public Records Request and dissemination of information may be disclosable.
- Communicate with victim and victim's attorney regarding disclosure of information.

The Case

- You are contacted by local, regional, and national media about your case and other investigations.
- What information can you provide?
- Your investigator wants to provide additional information to determine if there are other victims who may report. Can they do this?

Managing Release of Information

Press releases / media interviews/ PRA requests

- Prosecutor
- Law enforcement
- Media coverage
- Requests for comment

Special Responsibilities of a Prosecutor

ABA Model Rules of Prof. Conduct R. 3.8(f)

Except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Collaboration and Ethical Responsibilities



Releasing Information

01

Media may request copies of public records: filing documents, police reports, witness statements

02

Review law to determine exemptions and redactions

03

Determine which, if any, records may be sealed and applicable case law for criterion for sealing

Victim Privacy

For many victims, “privacy is like oxygen; it is a pervasive, consistent need at every step of recovery. Within the context of the legal system, if a victim is without privacy, all other remedies are moot.”

Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*,
38 SUFFOLK U. L. REV. 467, 473 (2005).

The Case

You learn that a defense attorney is representing the suspect. You are advised that the attorney has served a subpoena duces tecum on a counselor's office requiring production of counseling records concerning the victim. You were not aware of the counseling records.

What can you do? Do you have standing?

The defense attorney files a motion to compel contents of the victim's cell phone. What now?

Victim Privacy Considerations

Public Records Requests

- Police reports
- Affidavits for search/arrest warrants
- Charging documents

Advocates

- Confidentiality and privilege (system-based v. community-based)

Defense counsel

- Discovery

Victim's Records



Responses to Motions to Compel

The item is not within your care, custody, or control

Rule 16, Federal Rules of Criminal Procedure



Victim has a right to privacy

See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965)



Defendant cannot go on a "fishing expedition"; they must articulate a specific reason why they believe the evidence is necessary or exculpatory

Subpoena Duces Tecum

- Notice may or may not be provided to the prosecutor
- Third party provider may notify prosecutor
- Considerations for response: communication with issuing attorney; communication with attorney, if any, representing provider; potential objection and/or request for *in camera review*
- There must be a showing of reasonable expectation of material information, not based upon conjecture
- May be directed to a provider

Discovery of Forensic Examination

Comply with discovery and due process obligations

- Discovery is material if the information sought is relevant to the case and will lead to the discovery of admissible evidence. *See U.S. v Holihan*, 236 F.Supp.2d 255 (2002); *U.S.v. Stevens*, 985 F.2d 1175 (2d Cir.1993)

Make appropriate redactions

Ask for an *in camera* inspection of forensic report

The Case

You are contacted by a victim-witness advocate in your office. They called the victim to provide information about pre-trial scheduling. The victim said they were worried that “their memory may have been off” when they recalled that the suspect was on top of them.

You learn from your investigator that this is what they also told the investigator, which the investigator summarized as “reluctant.”

What do you do with this information?

Brady Obligations

Due Process

Brady v. Maryland, 373 U.S. 83 (1963)

Duty to disclose *Brady* material is a due process right, not a discovery rule dependent on a request by the defense

- *United States v. Agurs*, 427 U.S. 97 (1976)

The standard of materiality is the same regardless of whether there has been no request for discovery

- *United States v. Bagley*, 473 U.S. 667 (1985)

Prosecution Team

“A prosecution team may have many members with different responsibilities. At its core, members of the team perform investigative duties and make strategic decisions about the prosecution of the case...Interacting with the prosecution team, without more, does not make someone a team member...Among many others, these circumstances include whether the individual actively investigates the case, acts under the direction of the prosecutor, or aids the prosecution in crafting trial strategy.”

IAR Sys. Software, Inc. v. Superior Court, 12 Cal. App. 5th 503, 517, 218 Cal. Rptr. 3d 852, 862 (Ct. App. 2017), as modified on denial of reh'g (June 30, 2017), review denied (Oct. 11, 2017) (citations removed)

Special Responsibilities of a Prosecutor

Rule 3.8(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;

Rules for Discovery

Governed by court rules of the jurisdiction

Considerations of physical or electronic transmission

Documenting discovery provided

Ensuring security of discovery

Practice Tips

Redact references to victim's personal identification information in case reports, preserving original documents.

Request that Court order defendant not to disseminate discovery: in custody and out of custody considerations.

Giglio v. United States

405 U.S. 150 (1972)

Requires disclosure of:

- Any “deals” made by the government to a witness
- Any impeachment evidence for any witness

Has been construed to require the disclosure of anything of value provided to a witness by the “prosecution team”

Practice Tips

Cross training for prosecutors, law enforcement, advocates

Information regarding:
Brady/ Giglio disclosure

Process for documenting
and advising prosecutor

Disclosure to the defense

Jury Selection

Ethical Considerations

Juror Challenges

Race

- *Batson v. Kentucky*, 476 U.S. 79 (1986)
- *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019)

Native American

- *Kesser v. Cambra*, 465 F.3d 351 (9th Cir. 2006)

Sex

- *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127 (1994)

LGBTQ

- *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (2014)

Batson Challenge:
Defending

Take good faith peremptory challenges

Prepare to justify if necessary

Take time questioning the panelist

State behavioral observations clearly on record if they form part of concern

Maintain notes to record all areas of concern

Batson v. Kentucky, 476 U.S. 79, 89 (U.S. 1986) ; *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127 (1994)

Batson Analysis

Moving party must establish a *prima facie* case of impermissible discrimination;



Burden shifts to the opposing party to articulate a neutral, nondiscriminatory reason for the peremptory; and



The court determines whether the moving party has carried their burden of proving purposeful discrimination.

Raising a *Batson* Challenge

- Carefully evaluate the composition of the panel within the range of peremptory challenges
- If concern develops during defense inquiry, ask questions to rehabilitate if possible
- Look for a pattern of strikes or object on basis of a single strike
- Fairly analyze necessity as opposed to unfair striking of members of cognizable class
- Motion can be brought at any time before seating of the jury

Georgia v. McCollum, 505 U.S. 42 (1992)

Raising a *Batson* Challenge (cont'd)

1

Establish prima facie case of purposeful discrimination

2

Identify stricken juror as member of protected cognizable group

3

Argue that membership in group and relevant circumstances creates inference that strike was based on membership

CHALLENGES FOR CAUSE

Taken in open court

On the record with defendant present

Frame objection based upon core of concern for fairness and impartiality, respecting panelists' candor

Be aware of context of objection and reactions of other panelists

Preserving the Record

ABA Standards for the Crim. Just. Function 3-1.5

At every stage of representation, the prosecutor should take steps necessary to make a clear and complete record for potential review. Such steps may include: filing motions including motions for reconsideration, and exhibits; making objections and placing explanations on the record; requesting evidentiary hearings; requesting or objecting to jury instructions; and making offers of proof and proffers of excluded evidence.

Going Forward

- 
- Determine charging decisions based on the evidence, the law, and ethical obligations.
 - Safeguard victim privacy throughout proceedings.
 - Collaborate with law enforcement and advocacy professionals to ensure that discovery and *Brady* obligations are satisfied.
 - Confirm understanding of media involvement with law enforcement and prosecution.