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Witness for the Prosecution: The Jailhouse Informant

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Witness for the Prosecution: The Jailhouse Informant was approved by the Board of Directors of the CDAA Foundation. This model policy was created to provide guidance to prosecutors when using jailhouse informants. Information contained herein is the opinion of the authors and is not intended to dictate how district attorney offices use in-custody informants but offers suggestions on addressing the many issues that may arise when engaging with in-custody informants. The CDAA Foundation reserves a royalty-free, non-exclusive, and irrevocable license to reproduce, publish, and use these materials and authorize others to do so.

Witness for the Prosecution: *The Jailhouse Informant*

Given the inherently clandestine nature of the criminal underworld, law enforcement's success in solving crimes will be hindered without a source of information from within that underworld, an informant.

An informant can be an object, such as a cell phone that contains incriminating text messages about a crime, or it can be a person. Human informants have myriad motivations for supplying information to law enforcement, ranging from good citizenship, to revenge, to the elimination of a rival, to monetary gain, or to earn a benefit for themselves in the disposition of criminal charges.

Our Legislature and courts recognize that informants play a vital role in the ability of law enforcement to maintain a safe society. They also recognize the very real risk of death faced by informants when their cooperation with law enforcement is revealed.

Statutory schemes and case law scrupulously protect the confidentiality of the identity of an informant who is not a material witness in a criminal prosecution to ensure that essential flow of information to law enforcement. (Evid. Code §§ 1040–1042(d); *People v. Hobbs* (1994) 7 Cal.4th 948.)

However, when an informant becomes a witness in a criminal prosecution, those protections fall away and the informant's identity must be revealed. Further, with or without a request from the defense, the prosecution is ethically obligated to provide the defense with discovery of all information within the possession of the prosecution team that might tend to impeach the informant's credibility as a witness. (*Brady v. Maryland* (1963) 373 U.S. 83). This includes any benefit requested, offered, given to, or anticipated by, the informant in exchange for cooperation with law enforcement.

A prosecutor's decision to present the testimony of any witness to a jury requires careful consideration of the value and necessity of that testimony versus any issues related to a witness' credibility. When a witness has a criminal past and is testifying in exchange for benefits from law enforcement, that decision is complex and requires the

scrupulous discharge of the prosecution's ethical discovery obligations related to the credibility of the testifying informant.

A prosecutor's ethical obligations become even more complex when the prosecution calls a very special type of informant as a witness, an informant whose testimony can have a compelling impact on a jury: the "Jailhouse Informant."

A "Jailhouse Informant" is in custody with a charged defendant and is not a co-defendant, accomplice, or percipient witness to the crime charged against the defendant. (Cal. Pen. Code § 1127a(a).) This in-custody informant gleans incriminating information from the defendant about the charges pending against him. Often these admissions are made when a defendant's guard is down and include graphic detail of the defendant's crimes or reveal a particularly damning state of mind during the commission of those crimes.

Juxtaposed against the dramatic impact of the in-custody informant's testimony is the in-custody informant's motive to provide a defendant's incriminating admissions, which includes the potential of fabrication. Usually, in-custody informants testify in exchange for a reduction in the sentence that they will serve for the crimes which brought them into custody.

In-custody informant witnesses testify to a defendant's confession of guilt or admission of criminal behavior, and such evidence, if believed, carries great weight in the determination of guilt. In order to lessen the possibility of any conviction being based on fabricated testimony, the Legislature offered additional guidance to juries in criminal cases involving in-custody informants. (See Assem. Com. on Public Safety, coms. on Assem. Bill No. 278 (1989-1990 Reg. Sess.), third reading, as amended June 12, 1989.)

(People v. Bivert (2011) 52 Cal.4th 96, 121.)

This legislative guidance has taken the form of special jury instructions applicable only to an in-custody informant, as well as statutory obligations, which highlight to the jury the issues of credibility that are unique to a testifying in-custody informant.

Credibility

In addition to the standard jury instructions related to the credibility of witnesses, upon request of the defense, the court must instruct the jury that:

[t]he testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating such testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case.

(Cal. Pen. Code § 1127a(b); see, CALCRIM 336.)

The risks taken by an in-custody informant who cooperates with law enforcement are very real. Prisoners unite in brutal and lethal retaliation against an informant in their midst. In many situations, an in-custody informant will not assume that risk unless he is faced with a lengthy state prison sentence for violent or serious crimes that produces a compelling motive to fabricate evidence. The in-custody informant's victims and other members of the public may not recognize the need to strike a deal with a violent criminal. This mindset may be shared by the jurors who will determine the credibility of the in-custody informant.

“Victims of crime are entitled to have the criminal justice system view criminal acts as serious threats to the safety and welfare of the people of California. The enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system fully protecting those rights and ensuring that crime victims are treated with respect and dignity, is a matter of high public importance. California's victims of crime are largely dependent upon the proper functioning of government, upon the criminal justice system and upon the expeditious enforcement of the rights of victims of crime described herein, in order to protect the public safety and to secure justice.... [¶] The rights of victims pervade the criminal justice system. ...”
(Cal. Const., art. I, § 28(a)(2)-(3).)

(*Santos v. Brown* (2015) 238 Cal.App.4th 398, 411-412.)

In the evaluation of whether to use an in-custody informant, prosecutors should consider the cost to society of reducing the informant's punishment for crimes he or she committed, the significant negative impact the applicable jury instructions and the informant's criminal history will have on the informant's credibility, and the argument that the expectation of receiving a benefit in exchange for testimony could create a motive for the informant to fabricate evidence. The information supplied by the in-custody informant must be compelling enough to overcome the obstacles created by these credibility issues.

Corroboration

Pursuant to Penal Code section 1111.5, the court has a *sua sponte* duty to instruct the jury that an in-custody informant's testimony requires corroboration.

A jury or judge may not convict a defendant, find a special circumstance true, or use a fact in aggravation based on the uncorroborated testimony of an in-custody informant. The testimony of an in-custody informant shall be corroborated by other evidence that connects the defendant with the commission of the offense, the special circumstance, or the evidence offered in aggravation to which the in-custody informant testifies. Corroboration is not sufficient if it merely shows the commission of the offense or the special circumstance or the circumstance in aggravation. Corroboration of an in-custody informant shall not be provided by the testimony of another in-custody informant unless the party calling the in-custody informant as a witness establishes by a preponderance of the evidence that the in-custody informant has not communicated with another in-custody informant on the subject of the testimony.

(Cal. Pen. Code § 1111.5(a); *People v. Davis* (2013) 217 Cal.App.4th 1484; 1488-1489.)

While the corroboration required by Penal Code section 1111 for accomplice testimony must "tend to connect" the defendant to the commission of the crime and may be "slight, [and] entirely circumstantial ...", the corroboration of an in-custody informant required by Penal Code section 1111.5 must directly connect the defendant to the commission of the crime. (*Id.* at 1489-1490.)

An in-custody informant comes into contact with a defendant who has already been charged with a crime. In other words, a prosecutor has concluded, without the in-custody informant's information, that the investigation was sufficient to prove the charges, enhancements, or sentencing allegations to a jury beyond a reasonable doubt.

In order to present the testimony of an in-custody informant, the prosecution must produce independent evidence that directly connects the defendant to the commission of the crime. Thus, if proof beyond a reasonable doubt and independent evidence exists that directly connects the defendant to the commission of the crime independent of the in-custody informant's testimony, this draws the necessity and value of the testimony of the in-custody informant into serious question.

Assessing the value and necessity of the testimony

After careful assessment, the rare circumstance may arise that the value and necessity of the testimony of an in-custody informant outweighs the significant negative impact of the jury instructions related to credibility and corroboration, as well as the cost to society when prosecutors make deals with criminals. If the decision is made to call an in-custody informant as a witness, the in-custody informant creates a unique ethical minefield for the prosecution with the discharge of discovery obligations and with statutory compliance.

The in-custody informant and the Fifth and Sixth Amendments

A defendant who is in custody charged with a crime has a Sixth Amendment right to counsel. That right is violated when an in-custody informant formally, or informally as inferred from the behavior of law enforcement and the informant, acted as an agent of law enforcement to deliberately coax incriminating statements from a charged defendant. (*Massiah v. United States* (1964) 377 U.S. 201; *United States v. Henry* (1980) 447 U.S. 264, 271; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1240; *In re Neely* (1993) 6 Cal.4th 901, 915; *In re Wilson* (1992) 3 Cal.4th 945, 950; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1247-1248.)

If the informant acts on his own initiative to elicit statements from the defendant, that conduct does not violate the Sixth Amendment even if law enforcement had a general policy of encouraging inmates to listen and report. (*People v. Fairbank* (1997) 16 Cal.4th

1223, 1247.) In other words, where “[t]he police simply made use of [the informant's] own motivation to inform on defendant” (*People v. Martin* (2002) 98 Cal.App.4th 408, 418), courts have declined to find a knowing subversion of the defendant's right to counsel.

Circumstances which may tend to prove the existence of an informal agreement that the in-custody informant was acting as an agent of law enforcement include a prior relationship between law enforcement and the informant, specific direction to the informant to target a defendant or a specific type of information, and whether law enforcement moved the informant within the custodial facility to have access to a defendant.

Consequently, the history of an in-custody informant's housing and movements within the custodial facility and any prior instances when he provided information to law enforcement will be relevant to the determination of whether the in-custody informant's conduct violated the defendant's right to counsel and right against self-incrimination.

In addition, the history of the in-custody informant, especially his prior history of cooperation with law enforcement, is also relevant to his credibility in general, so this requires a prosecutor who is using an in-custody informant to meticulously and thoroughly investigate the background of such informant, and prior history and instances of providing cooperation or testimony, to make sure that the prosecution is providing the defense with all relevant discovery.

The Prosecution Team

Once an in-custody informant becomes a prosecution witness, the discovery obligations of the “prosecution team” may expand to include the staff of the custodial institution.

Knowledge of potentially exculpatory or impeaching evidence related to the in-custody informant will be imputed to the prosecutor whether or not it was known by the prosecutor. “*Brady* suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutor.” (*Youngblood v. West Virginia* (2006) 547 U.S. 867, 869–870.)

Therefore, in order to comply with *Brady*, the prosecutor has an ethical duty to learn of any evidence that is favorable to the defense, including inducements made to a prosecution witness to testify known to others acting on the government's behalf which includes custodial institutions. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 175; *People v. Masters* (2016) 64 Cal.4th 1019, 1067.)

In *Wearry v. Cain* (2016) 577 U.S. ___, 136 S.Ct. 1002, 194 L.Ed.2d 78, the United States Supreme Court reversed a 14-year-old Louisiana death penalty conviction for *Brady* violations related to a testifying in-custody informant. Following Wearry's conviction and sentencing, police reports surfaced that were not discovered to the defense that documented a statement made by the informant to another inmate, "I'm going to make sure he (Wearry) gets the needle 'cause he jacked over me," and an allegation that the in-custody informant asked another inmate to lie in his testimony against Wearry.

Further, as the prosecution must correct any false or misleading testimony by a witness related to any inducements, a prosecutor has an ethical duty to discover what those inducements were and to disclose them. (*People v. Phillips* (1985) 41 Cal.3d 29, 46.)

Notably, in *Wearry v. Cain*, the Supreme Court found that the failure to disclose that, contrary to the prosecution's assertions at trial, an in-custody informant had twice sought a deal to reduce his existing sentence in exchange for testifying against Wearry and had been told by the police that they would "talk to the D.A. if he told the truth" to be part of the *Brady* violations that resulted in the reversal of the conviction.

Benefits, Consideration, and Inducements

A "benefit" is referred to in Penal Code section 1127a(d) as "consideration" and is defined as "any plea bargain, bail consideration, reduction or modification of sentence, or any other leniency, benefit, immunity, financial assistance, reward, or amelioration of current or future conditions of incarceration in return for, or in connection with, the informant's testimony in the criminal proceeding in which the prosecutor intends to call him or her as a witness."

Thus, for purposes of producing potential *Brady* evidence, the prosecutor is held to be in constructive possession of any knowledge possessed by the custodial facility related to

circumstances which might tend to prove a formal or an informal agency agreement between the in-custody informant and law enforcement and any benefits that were requested by, offered to, or received by, the in-custody informant. Further, the prosecutor has an ethical duty to investigate whether that information exists within the custodial facility. (*People v. Uribe* (2008) 162 Cal.App.4th 1457, 1475.)

Penal Code section 4001.1 specifically restricts the monetary benefit or consideration that may be offered, given to, or promised to an in-custody informant in exchange for testimony to \$50.00. However, it does not restrict payments related to “any plea bargain, bail consideration, reduction or modification of sentence, or any other leniency, benefit, immunity, financial assistance, reward, or amelioration of current or future conditions of incarceration in return for, or in connection with, the informant's testimony in the criminal proceeding in which the prosecutor intends to call him or her as a witness.” On the other hand, discovery of any unrestricted financial benefit, such as the reduction of fines attendant to a plea bargain with an in-custody informant or the costs of relocating the witness’ family, has to be discovered to the defense.

In addition to inducements or benefits offered, or requested, for the in-custody informant’s testimony, information known to the custodial institution about the informant’s prior history as an in-custody informant may be discoverable to reveal the extent of benefits that the in-custody informant has received in exchange for information.

A prosecutor’s own office is within the prosecution team and the knowledge of prior testimony secured by offers of benefits possessed by one prosecutor within the office may be imputed to all. (*People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696,709; *People v. Lucas* (2014) 60 Cal.4th 153, 274; *People v. Clark* (2011) 52 Cal.4th 856, 981; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1132.) At the most fundamental level, benefits given by one prosecutor to a witness should be accessible to another prosecutor within the same office to allow a prosecutor to intelligently make the decision whether to call a witness. Consequently, the facts of benefits conferred and other issues related to credibility of in-custody informants need to be collected and maintained in a district attorney’s office repository that is accessible to a prosecutor under the appropriate circumstances, such as an In-Custody Informant Bank.

While a district attorney's office has absolute immunity from civil liability for failure to create an Informant Bank (*Van de Kamp v. Goldstein* (2009) 555 U.S. 335), that immunity does not extend to *Brady* violations. A prosecutor cannot ethically discharge the prosecution's *Brady* obligations with regard to prior benefits given to an in-custody informant if that information is not collected and maintained and even a negligent failure to create and maintain a mechanism to track that information will not excuse the failure to produce this evidence.

The Legislature's definition of benefit is intentionally broad; however, what if a benefit which does not fall within that definition has been requested, or received, by the informant? That benefit not contemplated by the Legislature could have life-altering significance to the in-custody informant and could be a compelling motive to fabricate evidence. In this circumstance, compliance with the statutory scheme related to the discovery of benefits meets the Constitutional and ethical obligations imposed on the prosecution to produce all potentially exculpatory evidence. Consequently, when an informant asks for something in exchange for his information, that request should be disclosed as it relates to a potential motive to fabricate evidence.

Written statement of benefits

Penal Code section 1127a requires that

(w)hen the prosecution calls an in-custody informant as a witness in any criminal trial, contemporaneous with the calling of that witness, the prosecution shall file with the court a written statement setting out any and all consideration promised to, or received by, the in-custody informant.

However, this requirement of filing the written recitation of benefits contemporaneously with the in-custody informant's testimony does not relieve the prosecution of their *Brady* and discovery obligation pursuant to Penal Code section 1054.7, which is noted specifically in the statute:

The statement filed with the court shall not expand or limit the defendant's right to discover information that is otherwise provided by law. The statement shall be

provided to the defendant or the defendant's attorney prior to trial and the information contained in the statement shall be subject to rules of evidence.

(Cal. Pen. Code § 1127a(c).)

The in-custody informant and Marsy's Law compliance

Enacted through emergency legislation, Penal Code section 1191.25 requires the prosecution to make good-faith attempts to notify the victim of the crimes for which the in-custody informant shall receive consideration in exchange for testimony.

That notice must be given "within a reasonable time before the in-custody informant is called to testify. The notice shall include information concerning the prosecution's intention to offer the in-custody informant a modification or reduction in sentence or dismissal of the case or early parole in exchange for the in-custody informant's testimony in another case. The notification or attempt to notify the victim shall be made prior to the commencement of the trial in which the in-custody informant is to testify where the intention to call him or her is known at that time, but in no case shall the notice be made later than the time the in-custody informant is called to the stand.

This Penal Code section is a codification of the Victims' Bill of Rights Act of 2008, adopted by voter initiative Proposition 9, amending the California Constitution, article I, section 28, known as "Marsy's Law." Marsy's Law creates for the victims of crime a constitutional right to be heard at sentencing or any proceeding that might result in the early release from custody. (*Santos v. Brown* (2015) 238 Cal.App.4th 398, 404.)

Thus, if a prosecutor fails to notify the victim of the prosecution's intention to reduce the in-custody informant's sentence, that failure not only violates the victim's constitutional rights, but also violates the prosecutor's oath of office to uphold the Constitution of the State of California.

Recusal and disbarment

Failing to recognize and address the ethical issues related to discovery regarding an in-custody informant may result in the recusal of a prosecutor, or of the entire district attorney's office, and in disciplinary action by the State Bar of California.

Deliberate and intentional withholding of relevant or material evidence or information, if done in bad faith, may result in the recusal of a prosecutor or the entire District Attorney's Office and a complaint to the State Bar. (Cal. Pen. Code § 1424.5.)

Consequently, when in doubt about the relevance or materiality of evidence related to the credibility of an in-custody informant, a prosecutor should allow the court to make the decision regarding discovery by utilizing the legal protections of privileges and motions *in limine* to limit the admissibility of the evidence. When it comes to *Brady* obligations, the "prudent prosecutor will resolve doubtful questions in favor of disclosure." (*United States v. Agurs* (1976) 427 U.S. 97, 108.)

Penal Code section 1054.7 allows the court upon application by the prosecution to deny, delay, or restrict the production of discovery prior to trial upon a showing of good cause during an *in camera* proceeding of threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement.

If there are issues related to the confidentiality of an on-going investigation or to the in-custody informant's status as an informant in an unrelated case, the prosecution may invoke the privileges of Evidence Code sections 1040–1042(d) and request a ruling from the court *in camera* as to the discoverability of the evidence in question.

Given the prosecution's ethical obligations to ensure the safety of an informant and the life-long threat to a testifying informant, the prosecution should request protective orders for all discovery that was produced related to an in-custody informant restricting its use and disclosure to the current prosecution.

DISTRICT ATTORNEY OFFICE POLICY

To safeguard and ensure the ethical discharge of prosecutorial duties and the integrity of convictions, every district attorney's office should develop an office policy which controls and regulates all facets of calling an in-custody informant as a witness for the prosecution.

With the great diversity in district attorney office size and organization throughout our state, the policy and the means of implementation will vary. However,

[t]he major guiding principle in drafting such policy should be to advance the notion that the first, best, and most effective shield against injustice for an individual accused, or society in general, must be found not in the persons of defense counsel, trial judge, or appellate jurist, but in the integrity of the prosecutor.

(Hollywood v. Superior Court (2008) 43 Cal. 4th 721, 734.)

Thus, office policy should include mandatory training for all prosecutors, custodial staff, and law enforcement personnel which could potentially become part of the prosecution team regarding the constitutional, ethical, and statutory obligations that arise when an in-custody informant becomes a prosecution witness. Not only will this training protect the rights of a criminal defendant, it will protect prosecutors from inadvertently violating discovery obligations which could result in recusal or adverse action by the State Bar.

As part of the district attorney office policy regulating the use of an in-custody informant as a witness, there should be multiple levels of objective review of the necessity and value of the testimony in light of the law applicable to the credibility of an in-custody informant. The decision to use an in-custody informant should be documented and approved by senior management.

As appellate review can last for a decade or more as evidenced in *Wearry*, a chronological log should be maintained in the case file to document significant events in

the use of the in-custody informant as a witness to ensure the re-creation of an accurate appellate record. For example, the date information related by, or to, the informant was received, the dates of requests to custodial staff for information received regarding the credibility of the in-custody informant, and the date that information was discovered to the defense, as well as the dates of significant events, such as *in camera* hearings, which may not be recorded in the minutes of the criminal proceedings.

Detailed documentation should be encouraged for appellate review. Documents containing privileged information, for example, the documentation of the decision to use the informant as a witness will contain the work product of attorneys' impressions of the strengths and weaknesses of the prosecution evidence or documents with privileged information regarding the informant, should be sealed within the case file with brief exterior notations of the contents. If sealed materials are kept in a secure location other than the case file, a description of those sealed materials and their location should be documented in the case file.

District attorney case files that contain information related to the testimony of an in-custody informant should be stored within the district attorney's office and not be sent off-site for storage to protect confidential information and to ensure that those files are not inadvertently destroyed.

District attorney's offices should maintain a repository of information related to testifying in-custody informants, an "In-custody Informant Bank," which includes the case name and docket number, the dates the informant testified, all benefits requested or received, and any instances of untruthfulness or other circumstances related to the in-custody informant's credibility. Given the confidential nature of the information and the need to protect the informant, the In-Custody Informant Bank should be accessible only to designated D.A. personnel. Requests for information from the In-Custody Informant Bank should be made in writing or electronically to document all such requests. Responses to requests should be made in writing or electronically so that there is documentation of all information produced and when. A means of notification should be developed to inform the in-custody informant when information is released and to whom to allow the in-custody informant to take steps to protect himself.

Discovery related to the in-custody informant should be paginated and released only with a signed discovery receipt from the defense and only with appropriate protective orders from the court.

Given the complexity of the prosecution's *Brady* obligations, it can be useful to develop a checklist detailing the steps that should be taken by a prosecutor with regard to the use of an in-custody informant as a witness.

The following scenario illustrates those steps. All of the following events, and their results, are documented in the chronological log in the case file upon the completion of each step.

A prosecutor is contacted by custodial staff and told that an in-custody informant is interested in providing information about a defendant. Following discussion with a supervisor, the assigned prosecutor contacts jail staff to eliminate the possibility that the informant has received the information from a source other than the defendant:

- The informant's cell is searched to eliminate the possibility that the informant has the police reports or newspaper accounts of the defendant's crimes.
- Visitor logs are researched to eliminate the possibility that a witness or other source of knowledge related to the defendant's crimes has visited the informant.
- The informant's housing in the custodial facility is researched to determine if the informant has been housed with a co-defendant or witness.
- The informant's court appearances are researched to determine if he has been in court holding or in transports to court with co-defendants or witnesses.
- Does the informant have access to the internet or other forms of media, such as newspapers, in the custodial facility (Is he a trustee? Is he representing himself?) which would allow him to research the defendant's crimes?

The prosecutor researches whether the in-custody informant has acted as an agent of law enforcement:

- Was the informant moved within the custodial facility to have access to the defendant?
- Has the informant previously provided custodial staff with information?
- If so, what were the benefits that the informant received?
- Did the informant receive training from custodial staff regarding functioning as a "listening post"?

- Is custodial staff aware of any false information provided by the informant?

The prosecutor requests that the District Attorney's Office In-Custody Informant Bank be researched to determine if the informant has ever testified as a witness for the prosecution.

- If so, what were the benefits the informant received?
- Were there any issues related to the credibility of the informant's testimony?

The prosecutor researches the informant's criminal history.

- Contact the detective who investigated the crimes that brought the informant into custody.
- Is the informant a gang member?
- Is there a gang rivalry between the informant and the defendant?
- Was there bad blood between the informant and the defendant on the streets?

The prosecutor contacts the detective on the defendant's case.

The prosecutor notifies the informant's attorney of the informant's request to speak with the prosecution.

The interview of the informant is scheduled with the investigating detective in a location with recording equipment. Optional participants are the prosecutor and the custodial staff that the informant approached. Consideration should also be given to whether the informant's attorney needs to be present. If the informant's attorney is invited to participate in the interview and declines, that declination should be documented.

- No offers are made to the informant until the decision is made that the information is credible and his use is authorized by a supervisor.
- Does the informant's information directly connect the defendant to the crime?
- Is the informant corroborated by truly independent evidence or by an accomplice with no connection to the informant?
- Does the informant need to testify or can his information lead to other evidence or witnesses?
- Does the informant provide proof of facts truly not proven by any other means?
- Assess Sixth Amendment issues: has the informant been functioning as a *de facto* agent of law enforcement?

The prosecutor presents all of the above information to a supervisor and senior management.

If the decision is made not to use the informant, the prosecution is in possession of the statement of a defendant communicated through the informant which is discoverable pursuant to Penal Code section 1054.1.

- If there is no information in the informant's statement that is exculpatory or impeaching of another witness and the statement itself would reveal the identity of the informant if it was discovered to the defense, the prosecutor schedules an *in camera* hearing in the defendant's case.
- During the *in camera* hearing, the privileges of Evidence Code section 1040–1042(d) are invoked with regard to the statement from the informant, and the prosecutor requests that the court find that the informant is not a material witness and sustain the prosecution's claim of privilege with regard to the informant's statement.
- If there is not a valid claim of privilege, due to the fact that the informant and the defendant are housed in the same custodial facility, the prosecutor requests pursuant to Penal Code section 1054.7 that the court find good cause to withhold, or delay, discovery of the defendant's statement to the informant.
- If the decision is made to use the informant as a witness, an offer of consideration or benefit is made to the informant with his attorney present. The offer is recorded or documented.

The prosecutor informs custodial staff of the decision to use the informant as a witness and the informant is offered secure housing prior to the release of discovery. The prosecutor requests documentation of that offer and the informant's acceptance, or declination, of secure housing.

The prosecutor prepares a paginated discovery package which includes:

- all impeachment information related to the in-custody informant,
- all benefits or consideration asked for, offered to, or received by the in-custody informant, and
- all recordings of interactions with the informant on numbered discs.

The prosecutor requests a protective order regarding the discovery from the court.

The prosecutor complies with Marsy's Law notification to the in-custody informant's crime victims of any offers made in the disposition of the informant's case.

The prosecutor provides the defense with discovery, the discovery protective order, and a detailed discovery receipt, and receives a signed copy of the discovery receipt.

The prosecutor files a written statement of all benefits received by the in-custody informant pursuant to Penal Code section 1127a.

The prosecutor requests that the court instruct the jury regarding the credibility of an in-custody informant and the requirement of corroboration of an in-custody informant.

The prosecutor periodically updates the District Attorney's Office In-Custody Informant Bank pursuant to policy and finalizes the in-custody informant's file once the in-custody informant's criminal case is resolved or consideration has been received.