

# Special Directive

**TO: ALL ASSISTANT DISTRICT ATTORNEYS**

**FROM: SUSAN HAWK, DISTRICT ATTORNEY**

**SUBJECT: GENERAL POLICY REGARDING DISCLOSURE OF EXCULPATORY,  
IMPEACHMENT OR MITIGATING INFORMATION**

**DATE:**

---

Subject to any future changes in the law, this Special Directive sets forth the office policy regarding disclosure of exculpatory, impeachment or mitigating information pursuant to article 39.14(h) of the Texas Code of Criminal Procedure (the Michael Morton Act), *Brady v. Maryland*, 373 U.S. 83 (1963) and Rule 3.09 of the Texas Disciplinary Rules of Professional Conduct (TDRPC). To the extent that this Special Directive conflicts with previous policies, this Special Directive controls.

Article 39.14(h) specifically states:

[n]otwithstanding any other provision of this article, the state shall disclose to the defendant any exculpatory, impeachment or mitigating document, item or information in the possession, custody or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.

TDRPC 3.09 in turn requires a prosecutor in a criminal case 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, 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.

## DIRECTIVES

It is imperative that assistant district attorneys understand and comply with their constitutional, statutory, and ethical duties to disclose exculpatory, impeachment and mitigating information to the defense. These duties exist regardless of the particular form of the information -- i.e., written or oral, recorded or not recorded.

In the event an assistant district attorney is unsure whether disclosure is warranted or determines disclosure is not required, the assistant district attorney shall consult with their chief regarding the matter. In cases where the assistant district attorney decides to withhold

information, he/she must document and be prepared to articulate the basis for their decision. If additional guidance is needed regarding whether information falls within an assistant district attorney's constitutional, statutory or ethical disclosure obligations, the Public Integrity Unit and/or the Conviction Integrity Unit should be consulted.

Absent good cause, any disclosure of exculpatory, impeachment and mitigating evidence shall be recorded in an approved office disclosure form and shall occur as soon as practicable. Because a prosecutor's statutory and ethical duty to disclose such information is a continuing obligation, if new information becomes known to, or comes into the possession of, the assistant district attorney that was not turned over to the other party as required above, the existence of the information shall be promptly disclosed to the defendant or the court.

Intentional failures to disclose exculpatory, impeachment or mitigating information will not be tolerated.

## GUIDANCE

Generally speaking, information is exculpatory if it could aid the defendant's case in some way – it does not matter how, or even how much. Impeachment information on the other hand is a form of exculpatory information that can be used to attack the credibility of a state's witness. Although it may sometimes be more difficult to identify, courts have treated impeachment information as significant because the truthfulness and reliability of a given witness may ultimately be determinative of guilt or innocence. Finally, information is mitigating if it tends to reduce the moral blameworthiness of the defendant.

Despite the simplicity of the aforementioned definitions, application of the definitions to any given case requires a fact specific analysis and an understanding that disclosure compliance is contextual. Even so, given the fact that the Michael Morton Act and TDRPC 3.09 impose a broader duty on prosecutors to disclose exculpatory, impeachment and mitigating information than *Brady* and its progeny, all prosecutors shall disclose such information without engaging in a materiality review. Materiality and "material evidence" are generally defined in the context of an appeal from a conviction. Neither one of which has a place in a prosecutor's assessment as to whether certain information is exculpatory, impeachment or mitigating to the defendant, thereby requiring disclosure.

Disclosure decisions should always be made through the lens of the "careful prosecutor" who errs on the side of disclosure. *Kyles v. Whitely*, 514 U.S. 419 (1995)