A. The Prosecutor's Duty to Disclose in General

1. Exculpatory Material or Information
   a. As part of the constitutional right to a fair trial, prosecutors have the duty to disclose all materially exculpatory evidence to a defendant. This duty comes from the United States Supreme Court's ruling in *Brady v. Maryland*, 373 US 83 (1963).

   b. In general, material evidence is evidence that has a reasonable probability of acquitting the defendant.

   c. Exculpatory evidence is evidence that is inconsistent with the charged crime or helps establish an affirmative defense.

2. Impeachment Information Considered Exculpatory
   a. Because the reliability of the State's witnesses is of critical importance to determine whether the State has proved its case against the defendant, exculpatory evidence has been held to include evidence that impeaches the credibility of any State witness. *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Bagley*, 473 U.S. 667, 676 (1985); *People v. Beaman*, 229 Ill. 2d 56, 73 (2008).

   b. This is because "impeachment of a witness can make the difference between acquittal and conviction…where credibility is the central issue in the case and the evidence presented at trial consists of opposing stories presented by the defendant and government agents." *United States v. Kiszewski*, 877 F.2d 210, 216 (2nd Cir. 1985).

3. Possession or Control
   a. Cook County Assistant State's Attorneys (ASAs) must disclose exculpatory or mitigating material even if they do not possess or control the material. The duty includes information in the possession of or known to any member of the prosecution team, or which ASAs could have discovered by acting diligently. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *People v. Beaman*, 229 Ill. 2d 56, 73 (2008).

   b. As noted in Illinois Supreme Court Rule 412(f), ASAs "should ensure that a flow of information is maintained between the various investigative personnel and its office."

   c. In general, the prosecution team includes the entire Cook County State's Attorney's Office (CCSAO), law enforcement officers and agencies involved in the case, as well as any expert witnesses in the case, such as medical examiners and crime lab personnel.

d. Because ASAs are accountable for the possession or knowledge of exculpatory or mitigating information by the prosecution team, ASAs must engage in a search inquiry with their investigative partners and expert witnesses about what they know or is in their files.

e. This "flow of information" mentioned in Rule 412(f) is not only crucial to ASAs but to law enforcement agencies as well. Federal courts have ruled that law enforcement agencies have an obligation to disclose exculpatory evidence to prosecutors. *Newsome v. McCabe*, 256 F.3d 747, 752 (7th Cir. 2001); *Jean v. Collins*, 221 F.3d 656 (4th Cir. 2000).

f. ASAs must make a good-faith effort to "specifically identify" for the defense the exculpatory nature of items tendered. *Illinois Supreme Court Rule 412*.

g. ASAs are only required to identify material that is "clearly exculpatory or mitigating." *Committee Comment to Illinois Supreme Court Rule 412.*

h. Moreover, the defense may not communicate in any way to the trier of fact that ASAs labeled the material as exculpatory or mitigating.

i. While ASAs have no duty to disclose information that is "preliminary, challenged, or speculative", the United States Supreme Court has cautioned that ASAs are to "resolve doubtful questions in favor of disclosure." *United States v. Agurs*, 427 U.S. 97, 108-109 fn. 16, (1976).

4. Illinois Obligations Extend Brady-Giglio Holdings
   a. ASAs' duties and obligations extend beyond what is required in the *Brady* and *Giglio* decisions.

   b. Illinois Rule of Professional Conduct 3.8 mandates that ASAs disclose to the defendant 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."

   c. Furthermore, Illinois Supreme Court Rule 412 states that "the State shall disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce his punishment therefor."

5. Duty To Disclose
   Read together, your duty to disclose therefore involves disclosing to the defendant:
   a. All exculpatory, which includes impeachment, or mitigating (whether or not it will change the result of a trial),
   b. Material or information (whether or not it is admissible as evidence or currently written down),
   c. In your possession or control (whether or not it exists in your file),
   d. Regardless of whether the defense makes a request.

B. <u>The Prosecutor's Duty to Disclose: Impeachment Information</u>

ASAs must disclose to the defendant any other matter that involves the bias, motive, interest, or credibility of the witness. As noted above, ASAs are accountable for impeachment information that they do not possess or control and that is in the possession or knowledge of law enforcement, that could be discovered through the exercise of due diligence. ASAs must ask their investigative partners if they know of, or if their files contain, any impeachment information.

1. Impeachment Information – State's Witness Generally
   a. ASAs must identify and turn over to the defense all potential impeachment information that is within their possession and control for all State witnesses.

   b. This includes:
      i. The witness's criminal history (including pending cases);

      ii. Receipt or expectation of receipt of benefits from the State;

      iii. Prior inconsistent statements by the witness;

      iv. Prior inaccurate or unsuccessful attempts at identification by an occurrence witness; and

      v. Other matters that involve the bias, motive, or credibility of the witness.

2. Impeachment Information – State's Witness Law Enforcement, Testifying ASAs and Experts
   a. To aid in determining the existence of any potentially impeaching information regarding any law enforcement witness (police officers, lab analysts, forensic

examiners, and experts), ASAs shall ask a series of questions as soon as ASAs have identified the likely witnesses.

b. The goal of the questions is to identify potentially impeaching information so the ASA can preliminarily determine what needs to be disclosed.

c. ASAs should not attempt to elicit the witness' opinions or gather facts, except to the extent required to determine the discoverable nature of the information.

d. ASAs should have this conversation with each witness individually, outside the presence of other witnesses. The timing of this discussion with law enforcement witnesses will necessarily depend upon the type of case but ASAs should attempt to interview witnesses at the first possible opportunity to allow time to do necessary follow-up.

e. ASAs are to begin the conversation with the witness with an explanation of the *Giglio* obligations and explain that these same questions are asked of every law enforcement and governmental witness who is expected to testify.

f. ASAs are to then, ask the following questions:

i. To the best of your knowledge and recollection, are you aware of any complaints, investigations, or disciplinary actions against you relating to the performance of your official duties or your off-duty conduct?
- If so, were any of those complaints sustained?
- Are there any complaints still pending?
- Do any of the sustained or pending matters involve dishonesty or untruthfulness?

ii. To the best of your knowledge, have you ever had an allegation or finding by a judge or prosecutor in a criminal, civil (including divorce, child support, or bankruptcy), or administrative proceeding that reflects negatively upon your truthfulness or your bias, including a finding of a lack of candor?
- If so, please describe the allegation or finding and identify the court.

iii. Have you ever been arrested, charged with, or convicted of a criminal offense?
- If so, please provide the approximate date, nature of the charge and disposition, and indicate the jurisdiction or agency.

g. For expert witnesses, ASAs are to *also* ask the following questions:
   i. Have you ever received a finding by a judge that you are not qualified to testify about [the field of current testimony]?

   ii. Have you ever testified to findings/opinions inconsistent with or contrary to your findings/opinions in this case?

   iii. Are you aware of any literature, authoritative expert, or colleague who disagrees with your methodology or the opinions you've reached in this case?

   iv. Have you ever had a finding by your employer regarding your performance that compromises your conclusions or ability with respect to [the subject of the anticipated testimony]?

h. If the witness answers "no" to all these questions, the ASA is to document that no discoverable information was disclosed in the file.

i. If the witness answers "yes" to any of the above questions, the ASA is to ask the witness only the questions needed to determine where to obtain the relevant documents (CR files, criminal history, public filings, transcripts, etc.) so a determination can be made whether this information needs to be disclosed.

j. Again, ASAs are to keep in mind that simply because impeaching information exists does not mean:
   i. The information must be disclosed to the defense; or

   ii. The information will be allowed to be elicited at trial.

k. As noted above, whether and how to disclose information is to be discussed with an ASAs supervisory chain once the relevant facts have been obtained.

l. Potentially impeaching information about a law enforcement witness is to be shared only with the ASA's trial partners, supervisory chain and/or the Chief Ethics Officer (CEO) and the Brady/Giglio Officer. Nothing is to be disclosed to the defense or the Court until a disclosure determination has been made pursuant to this protocol.

m. Together, the CEO, Brady/Giglio Officer, trial ASAs, and the ASA's supervisory chain will determine:

i. What needs to be disclosed;

ii. How the information should be disclosed (e.g., ex parte, or with or without a protective order); and

iii. What is needed to advise the witness about the disclosure.

C. <u>Existence of Potential Impeachment Information vs. Disclosure vs. Admissibility in Court</u>

1. The fact that potential impeachment information exists does not automatically mean that the information must be disclosed to the defense or that the information will be admitted at trial.

2. ASAs have no duty to disclose potential impeachment information that is "preliminary, challenged, or speculative", but ASAs are to "resolve doubtful questions in favor of disclosure." *United States v. Agurs*, 427 U.S. 97, 108-109 fn. 16, (1976).

3. Disclosure does not mean the individual cannot or will not be called as a witness. It only means that ASAs must and will disclose the information to the defense.

4. ASAs will continue to determine which witnesses will be called at trial on a case-by-case basis, based on all of the facts and circumstances of the case, and what is needed to be proved beyond a reasonable doubt. Other than the accused in a criminal case, there is no "right to be called as a witness".

5. The fact that disclosure of information to the defense is required does not automatically mean that the information is admissible and can be used at trial. ASAs will take all necessary steps to bar or limit the use of the information at trial as set out in Illinois Rule of Evidence 608 as well as *People v. Driskell*, 213 Ill.App.3d 196 (4th Dist. 1991) and *People v. Fonza*, 217 Ill.App.3d 883, 892 (1st Dist. 1991).

6. As a further note, Illinois Rule 608 does not allow specific examples of conduct to be used as impeachment regarding truthfulness.

7. The mere fact that a potential government witness is subject to a disclosure is not an assessment of or opinion by the CCSAO regarding that person's future viability as a witness, on his or her reputation, or the person's ability to serve in his or her current capacity.

8. The CCSAO does not comment on or involve itself in any manner with the employer/employee relationship between the law enforcement agency or governmental employer and the employee.

9. The CCSAO does not and will not make determinations or give opinions or advice as to whether the agency continues to employ or seeks discipline or the separation of the employee. Those determinations are the sole responsibility of the individual's employer.

D. <u>Timing Of Disclosure</u>

1. Due process requires that disclosure of exculpatory and impeachment evidence be made in sufficient time to permit the defendant to make effective use of that information at trial, regardless of whether the defense has made a request. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1997).

2. Illinois Supreme Court Rule 412 requires disclosure "as soon as practicable following the filing of a motion by defense counsel." Therefore, if the defense makes a motion for discovery, ASAs must disclose exculpatory evidence as soon as practicable. If no motion is made, ASAs must still disclose exculpatory evidence reasonably promptly after receiving it.

3. Impeachment information, which depends on the prosecutor's decision as to who is or may be called as a witness, should be disclosed within a reasonable time after discovery and before trial (recognizing that often impeachment information will not be discovered until a witness prep that occurs very shortly before – and many times during – trial).

4. Moreover, under Illinois Supreme Court Rule 415(b), ASAs have a continuing duty to disclose exculpatory and impeaching information that they may learn about after their initial disclosures.

E. <u>Disclosure List and Appeals Process</u>

1. The CCSAO shall maintain two lists involving law enforcement witnesses and expert witnesses who are subject to disclosure due to potentially impeaching material ("Disclosure List") or who shall not be called as witnesses in any proceeding ("Do Not Call List").

2. Determination of who shall be placed on the Do Not Call List shall be made at the discretion of the CCSAO. While the vast majority of individuals on the list are those who have been stripped of authority, inclusion on the list is not limited specifically to such incidents.

3. The Brady/Giglio Officer shall maintain both lists and regularly review and update each one.

4. In addition, the Do Not Call List shall be published on the CCSAO website in furtherance of the CCSAO's commitment to transparency.

5. In accordance with provisions related above, the Brady/Giglio Officer shall also notify the witnesses, through their employer, when the witness has been placed on either list and the reason for the inclusion.

6. Within 90 days of notification, the witness or their representative can submit a letter to the CEO, Brady/Giglio Officer and Brady Committee, comprised of members of the Executive Staff and bureau chiefs, including reasons challenging the determination along with supporting documents requesting a review of the CCSAO's decision.

7. To the extent that a finding has been made by a judge or administrative body, the CCSAO must be presented with an order overturning such a determination.

8. Witnesses should be aware that if a trial date is pending, the CEO and/or Brady Committee may decide that it is necessary to disclose the material in its possession before a response has been submitted. However, when time permits, the formal procedure should be used.

9. Upon receipt of the information, the CEO and/or Brady Committee will make a determination as to whether the witness shall be removed from the list. That finding shall be communicated to the witness. The finding shall also be communicated to the witness' employer only if the decision results in removal from the list.

F. <u>Procedures</u>

1. Determining Disclosure; Manner and Disclosure of Notice
   a. In most cases, individual ASAs learn of potential impeachment information through:
      i. Inquiry of the law enforcement officer or government expert; or

      ii. As the result of the CCSAO being notified by a law enforcement agency or the government expert's employer of potential impeachment information.

   b. The following process is used to determine whether disclosure is mandated under the law:

i. When an ASA learns of potential impeachment information the ASA notifies their supervisor and bureau chief.
   - In cases where the judge appears to have made an adverse credibility finding against an officer, the ASA assigned to the case in which the finding was made shall file with the court a motion seeking clarity from the judge as to whether the judge intended to make an adverse credibility finding against the officer.

ii. Once the bureau chief knows all the facts and circumstances regarding the potential impeachment information, the bureau chief, ASAs, and the ASAs' supervisor will consult with the CEO and the Brady/Giglio Officer about the matter. In notifying the CEO and the Brady/Giglio Officer of the adverse credibility finding, the bureau chief, ASA and the ASA's supervisor shall forward to the CEO and the Brady/Giglio Officer copies of any and all documents relevant to the finding, including, but not limited to all court transcripts relevant to the adverse credibility finding and copies of any relevant court orders.

iii. The CEO and Brady/Giglio Officer determine by a preponderance standard, more likely than not, whether disclosure is required and how any such disclosure shall occur.

iv. If disclosure is required, the CEO and Brady/Giglio Officer will determine how that shall occur, on a case-by-case basis, including but not limited to the following manner of disclosure: notice of disclosure tendered to the defense, notice of disclosure tendered to the defense and filed in court, in camera inspection, ex parte under seal, subject to a protective order.
   - In situations where it is not clear whether something rises to the level of disclosure or whether a certain finding is an adverse credibility finding, the CEO and Brady/Giglio Officer may consult the Brady Committee in order to assist the CEO in making the decision. The CEO makes the final decision regarding disclosure. In making this determination, neither the CEO nor committee reviews or inspects the employment file of the witness.

   - After consultation with the committee, if it is still unclear whether the potentially impeaching material is required to be disclosed, the trial ASAs shall reveal the material to the court, *in camera*, for the court's determination whether it is subject to disclosure. If the court's *in camera* review involves particularly sensitive information, the presenting ASAs shall seek a protective order regarding the information.

v. Regarding potential impeachment information arising out of ongoing administrative or criminal investigations, the CEO, after consultation with the Brady Committee, determines whether the law mandates the disclosure of this type of potential impeachment information and the manner of disclosure. If the committee cannot agree on whether disclosure is warranted, the final decision regarding disclosure shall rest with the CEO.

vi. If the CEO determines that disclosure of the potential impeachment information is required, the CEO and/or Brady/Giglio Officer willy notify internal stakeholders, the General Counsel of the Chicago Police Department (or their designee), the Chief of Police (if suburban police) or the head of the witness' governmental agency, and COPA in instances where a judge has made an adverse credibility finding, that disclosure is required and how the disclosure will occur.

vii. The CEO and/or Brady/Giglio Officer will keep, maintain, and update as needed, a current list/database of officers that are subject to disclosure and the reason for the disclosure.

viii. This disclosure list will be kept on the One Drive or the L: Drive in a manner that is secure and accessible for all ASAs. Only the CEO and the Brady/Giglio Officer will have the ability to create or amend the list. ASAs are encouraged to proactively confirm witness lists against the Disclosure List and Do Not Call List over the course of a trial, as the list is not static, and changes may be made to a witness's status.

ix. The disclosure requirement is not necessarily permanent. Circumstances may change such that disclosure is no longer required. The decision that disclosure is no longer required will follow the same process that was used to determine that disclosure was originally required. The CEO and/or Brady/Giglio Officer will also notify everyone originally notified of the disclosure requirement that, as of the effective date of the decision, disclosure is no longer required.

x. **The mere passage of time between an adverse credibility finding being made and the time of the witnesses' testimony has no impact on the ASA's duty of disclosure**, if the finding is:

- Reversed or vacated on the merits (either the conduct did not occur or was not proven to the requisite standard) by a court, other tribunal, or the body making the initial determination: it may result in disclosure being no longer required. The CEO will review the reversal and will determine whether ASAs continue to have a duty to disclose the finding.

- Reversed or vacated on procedural grounds: ASAs will disclose the initial finding and the fact that it was reversed or vacated on procedural grounds.

- Vacated in return for witness dismissing any legal claims against employer: ASAs will continue to disclose the finding and will disclose the circumstances of the removal.

- Sanction or penalty for violation reduced: ASAs will continue to disclose the finding.

xi. The CCSAO does not comment on or involve itself in any manner with the employer/employee relationship between the law enforcement or other governmental agency and the employee. The CCSAO does not and will not make determinations, give opinions or advice whether the agency continues to employ or seeks discipline or the separation of the employee. Those determinations are the sole responsibility of the individual's employer.

2. Non-Sponsorship of Witness
   a. In its discretion, the CCSAO may decide that it will no longer sponsor certain witnesses.

   b. As a point of clarification, disclosure of impeachment information, even in situations where the CCSAO has decided not to call the witness, does not constitute non-sponsorship.

   c. Non-sponsored witnesses are included on the Do Not Call List and are individuals that the CCSAO will not call in their law enforcement or government capacity as a witness in any trial or hearing, or use as an affiant on any search warrants or other legal process.

   d. The CCSAO will make that determination in the following manner:
      i. The State's Attorney of Cook County, after consultation with the CEO and Executive Staff, if the State's Attorney deems such consultation appropriate, makes the final decision as to whether the CCSAO will not sponsor a person as a witness.

ii. Situations that may lead to non-sponsorship include, but are not limited to:

- A pending criminal case or conviction in a criminal case or receiving a disposition of supervision in a criminal case, especially in cases involving dishonesty, moral turpitude, or arising out of the course the witness' employment,

- A finding of dishonesty or making a false report, conviction for a criminal offense,

- Any other circumstance deemed appropriate by the State's Attorney of Cook County.

iii. Notification, list maintenance, and addition/removal from the list will be maintained as stated in the previous section.