

## INFORMER CHECK LIST

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### PREPARATION

Remember, there are no secrets. Expect everything to become known to everyone.

Set up a special file for each informer witness.

Keep discovery in mind as you do everything.

Reread Kyles and Osorio.

Get articles and books written by and for defense attorneys on the subject of attacking cooperating criminal witnesses. Anticipate what you'll be in for if you use these kinds of witnesses.

Remind yourself that using an informer will put the government on trial: "The Best Defense is a Good Offense."

### GENERAL BACKGROUND

- 1) Verify the person's true identity.
- 2) Discover all aliases.
- 3) Obtain current rap sheets.
  - a) federal
  - b) state(s)
- 4) Check for outstanding wants and warrants.
- 5) Ascertain whether the person has a lawyer.
  - a) If so, check DR 7-104 and Department policy.
- 6) Ascertain whether the person has ever "worked" for law enforcement before.

- a) Contact handlers to assess performance.
- 7) Ascertain whether the person has ever testified for the prosecution.
  - a) Contact prosecutor to assess performance and juror reaction, etc.
- 8) Secure relevant reports and documents reflecting his character and credibility. Anticipate what a thorough defense attorney will gather, and then get it yourself.
  - a) probation reports
  - b) mental hospital records
  - c) drug abuse treatment records
  - d) prison and parole records
  - e) sentencing memoranda filed by prosecutors in other cases
  - f) Witsec information
  - g) pretrial release performance information (drug testing)
  - h) loan applications
  - i) tax returns
  - j) prior conviction abstracts and files
  - k) discharge your Kyles and Osorio obligation to search for known impeaching evidence in the hands of other agencies

## PRELIMINARY

- 1) Do not stumble over Disciplinary Rule 7-104(A)(1) or any other controlling state ethics rule in your contacts with the witness.
- 2) Before talking to the witness, learn as much as you can about the facts and the witness's involvement.
  - a) Identify and then protect your key information known only to the suspects.
- 3) Never talk to the informer without the presence a witness who can corroborate your bona fides.
- 4) Establish all the terms of each step of the relationship in writing:

proffer immunity, Mezzanato, etc. Don't get cute with the deal.

- 5) Use the person's own lawyer to impress upon him the imperative of telling the whole truth.
- 6) Do not give up too much. Probably giving the person "an opportunity to help yourself" will be all that is necessary.
- 7) Do not "invade the defense camp" during debriefing. Make sure in writing that the witness and the witness's lawyer understand this.
- 8) Meet with your agents to remind them not to become too friendly with the witness and not to say or do anything in the witness' presence that could later cause trouble. Remind them that informers sometimes turn against the government if it suits their needs.
  - a) Do not let the witness become a "junior member" of the investigation or prosecution.
  - b) Give the agents some examples from the El Rukns and the Hallinan failures.
- 9) Do your best to find out about any continuing criminal activity on the part of the witness. See United States v. Steinberg, 99 F.3d 1486 (9th Cir. 1996).
- 10) Remain in control. Do not succumb to the witness's unrealistic demands. At all times ask yourself, "Who is calling the shots?" If it's not you, regroup.
  - a) The witness always (almost) goes first before you deliver on your promises.
- 11) Keep good records of your dealings and contacts. You may need them to defend yourself. A witness log is a good idea.
- 12) Explicitly identify and understand the witness's exact motivation in cooperating. What does the witness want to accomplish by helping you?

- 13) Warn the witness that everything he says after he becomes a witness may be tape recorded and used to attack his testimony, or to undo the deal if it turns out he has lied.

### ASSESSMENT OF USEFULNESS

- 1) List each salient and useful evidentiary aspect of the witness's possible testimony: what can the witness do for your case.
- 2) Attempt to corroborate everything the witness has told you. Corroboration is the key to success.
  - a) Develop new evidence and witnesses from the leads.
- 3) Ask yourself whether each aspect of the witness's testimony you might use is reliable.
  - a) Identify why each salient part of the testimony is reliable: corroborated, etc. Create and use a "corroboration chart."
- 4) Look for admissible prior consistent statements and prior declarations against penal interest as well as other evidence that establishes the witness's credibility. Read United States v. Martinez, 775 F.2d 31 (2d Cir. 1985); United States v. Dukes, 727 F.2d 34, 43 (2d Cir. 1984); United States v. Bright, 630 F.2d 804, 824-25 (5th Cir. 1980).
- 5) Ask the witness about book or movie deals, and anything he may have said or written to "friends", etc., that may cast doubt on his credibility. Review "The Impossible Victory": What does the other side know about the witness that you have missed?
- 6) Cast yourself in the role of the defense attorney for your target and determine how you would defend against this witness if called against your client. Do this very thoroughly. Ask the witness what credibility dirt is out there? Tell him the defense will certainly dig it up and use it, so he better tell you about it now!
- 7) Make a written list of every item you anticipate the defense will bring up to try to discredit the witness's testimony. Ask, "Can my case

survive with this negative baggage, or will it bring it down? How can I handle this troublesome evidence?"

- a) the deal, rewards, expense payments, promises, etc.
  - b) priors
  - c) past acts reflecting on credibility
  - d) lies/denials/omissions
  - e) inconsistent statements
  - f) statements that are inconsistent with the facts as you know them
  - g) requests for rewards, etc.
  - h) the appearance and general character of the witness and the witness's testimony
  - i) Witsec subsistence payments
- 8) List the arguments (reasons) you will make to jury as to why they should buy each aspect of the witness's testimony on which you intend to rely notwithstanding the obvious negative indicators.
- 9) Assess (with the assistance of another experienced prosecutor) whether the person's testimony as a whole -- including anticipated cross -- will help or hurt you.
- a) What is the downside of calling this person?
  - b) Might your case actually be stronger without this witness?
- 10) Can you use what you have learned from the witness to shore up your case so that you will not have to call the witness to the stand. But, see Kyles for what can happen even if you don't call him.
- 11) Is the deal you intend to make defensible? Does it make sense? Is it a "good trade?" Will the jury and your community accept it? How will you justify it to them?
- 12) Will the defense be able to claim your witness is the actual perpetrator?
- a) Is he?
  - b) How will you head off or defeat such a claim?
  - c) Require the agents to investigate this possibility and be prepared with evidence to disprove it, maybe in your case in

chief. Can you use Kyles as a sword to make your case in chief stronger by proving the veracity of your witness?

- 13) Can you adequately control this witness? Have you just become his "juice man?"
- 14) Drop back from the trees and look at the forest, not just technically as a prosecutor, but also as just an informed citizen. Ask if the witness's evidence you intend to rely on is truthful. Are you on a fool's errand, or is calling this witness appropriate and necessary?

### WRITTEN AGREEMENT WITH THE WITNESS

- 1) Develop a signed statement to "lock in" the witness in case he changes his testimony.
- 2) Consider a motion in limine to reduce the baggage, but don't create a viable appellate issue. Live with it if you have to.
- 3) Make sure your final deal is complete and thoroughly understood. The deal does not authorize the witness to get into new trouble and have you bail the witness out.

- Will it be admissible as written?

### DISCOVERY

- 1) Reread Brady, Giglio, Bagley, and Kyles.
- 2) Obtain all pretrial statements of the witness.
  - a) your rough notes
  - b) investigator's rough notes
  - c) tape recorded phone calls made by a prisoner witness from prison
- 3) Identify all Brady and Kyles material.
  - a) exculpatory
  - b) impeachment
  - c) promises/consideration/details

- d) expectations of the witness
  - e) rap sheets
  - f) anything that reflects on credibility
  - g) secret promises made by your agents to the witness
- 4) Turn it all over. Keep good records of your good faith. Get a signed acknowledgment.
- a) If in doubt, at least give the information ex parte to a judge for confirmation of your decision. If the judge says it's discoverable, you have just saved yourself on appeal.
- 5) Advise the agents of your continuing duty to turn over anything that crops up. Let the agents read Kyles.

## TRIAL TACTICS

- 1) Design a plan effectively to present this witness and the witness's negative baggage to the court and to the jury. Every problem piece of the testimony requires a strategy such as inoculation. A successful trial lawyer is like a successful chess player. If you think just about your next move, you'll get nowhere. You have to anticipate the counters to your moves and determine what you'll do in turn to respond successfully to the counters, and so on. Work this up with another prosecutor.
- a) jury instructions: review and prepare
    - How will you handle the tough ones?
      - If your witness is in the Witness Security Program, read United States v. Partin, 601 F.2d 1000 (9th Cir. 1979) for the definitive jury instruction on this subject.
  - b) jury selection/voir dire
    - Will the jurors automatically discard the testimony of an informer?
  - c) opening statement

- Introduce them to the whole package.
- d) order of witnesses
  - Prop the witness up with good corroborating witnesses both before and after the witness testifies.
- e) direct examination
  - Figure out what you expect on cross and then plan to blunt it on direct.
- f) final argument
  - The issue is not whether the witness is a terrible or a good person, but whether the evidence from the witness contributes to resolving these charges.
  - Tell the jury to set aside the witness's testimony until they look at everything then add it to the mix.