Confidential Informants & Cooperating Witnesses:

Building Cases in and out of Court

Dinah M. Manning North Dakota Training '22





A COOPERATOR BY ANY OTHER NAME

"RAT"

"SNITCH"

"NARC"

"COOPERATOR"

"CI"

Cooperating Witness vs. Confidential Informant: What is the big difference?

COOPERATING WITNESS

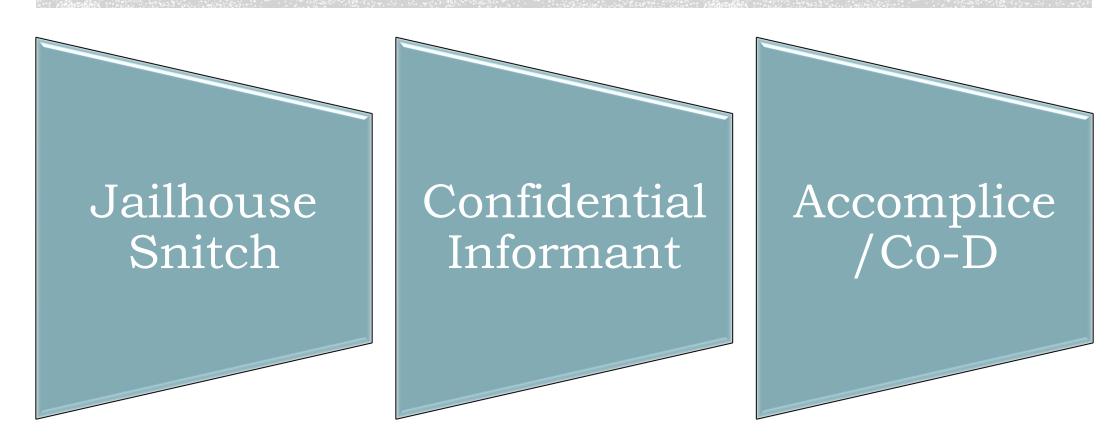
- Someone who is giving information to the prosecution to help them prosecute someone else.
- Typically, getting some type of benefit in the form of a leniency (lesser charges), downward departure at sentencing, etc.
- Usually represented by counsel.

CONFIDENTIAL INFORMANT

- Law enforcement's worker bee
- Could be receiving money and other benefits that have nothing to do with any of their pending charges
- Prosecution fiercely protects their identity
- "Control buys" / Setups



COOPERATOR ARCHETYPES







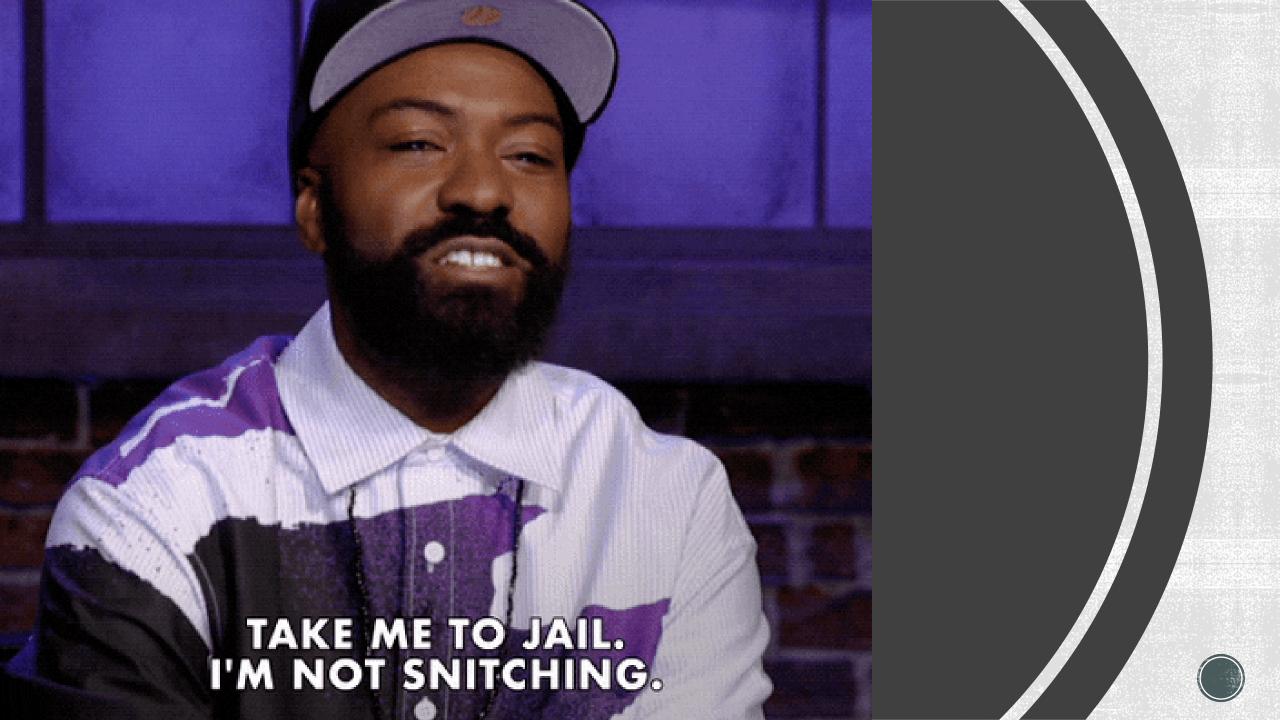
JAILHOUSE SNITCH

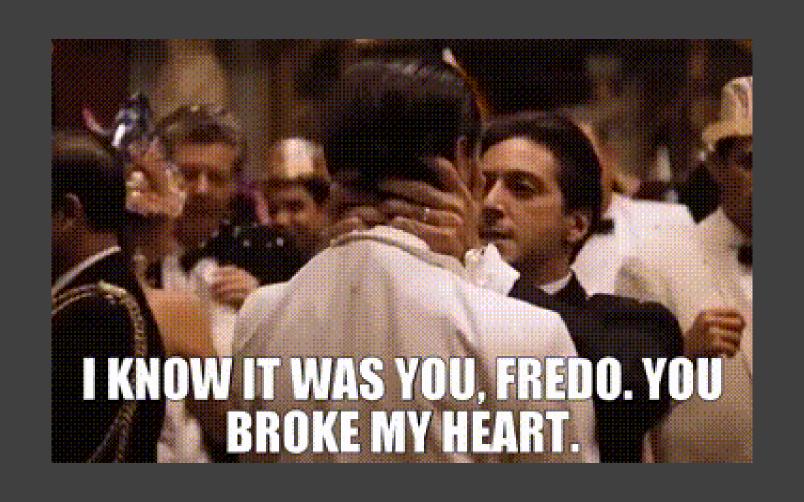




CONFIDENTIAL INFORMANT









ACCOMPLICE / Co-D (Co-Actor)



Investigation

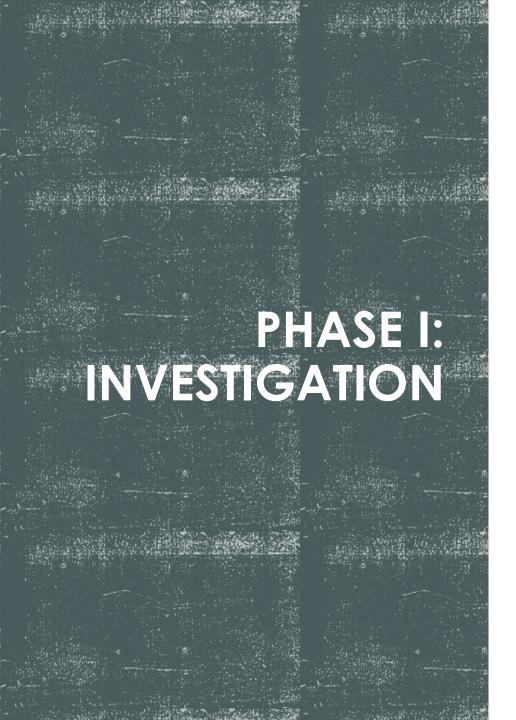
Discovery / Litigation

Trial Preparation – Cross-Examination

OVERVIEW



INVESTIGATION



- Who is the cooperator?
- Known to client?
 - If so, get all the information you can from your client:
 - Name
 - DOB
 - Known affiliations / associations
 - Family
 - Friends
 - Social Media
 - Phone Number
- Unknown to client?
 - Start digging

TLO/Accurint/databases

DMV records

Cooperator's Own Cases

- Plea forms
- Conviction records
- Sentencing materials

GATHER INFO EARLY: Records





- CASES THEY'VE TESTIFIED IN:

- Attend proceedings
- Request transcripts of proceedings
 - Depositions
 - Grand Jury
 - Preliminary hearing
 - Evidentiary hearing
 - Trial
- Cooperation agreements

Gather Info Early: Who can help?

<u>Snitch's Social Media / Profiles</u>

- Scour social media
- You can find helpful photos, locations, associations, etc.
- Make sure it's publicly available information

People Who Know Them Best

- Significant others (exes!)
- Associates
- Complainants
- Co-Defendants
- Probation Officers / Pre-Trial Officers
- LEO who arrested them
- Employers
- Landlords
- Cellies





- Policies & procedures / manuals
 - FOIA
 - Networks
 - NACDL
- What types of policies?
 - Guidelines for handling informants
 - Guidelines regarding documentation of informants
 - Polices regarding benefits that can be conferred
- N.D. Cent. Code § 29-29.5-04
- Andrew's Law Materials

- After July 1, 2018, a law enforcement agency may not use a confidential informant unless the law enforcement agency is trained in the use of confidential informants in a training course approved by the attorney general.
 - a. Training must occur at least once every three years, and must establish that the law enforcement agency has trained all personnel who are involved in the use or recruitment of confidential informants in the law enforcement agency's policies and procedures in a manner consistent with the peace officer standards and training requirements.
 - b. The law enforcement agency shall document the date and scope of all training along with all law enforcement personnel trained.
- 2. The peace officers standards and training board shall adopt rules for the use of confidential informants which at a minimum:
 - a. Assign the consideration of the preservation of the safety of a confidential informant.
 - b. Execute reasonable protective measures for a confidential informant.
 - c. Establish guidelines for the training and briefing of confidential informants.
 - d. Restrict off-duty association or social relationships by law enforcement agency personnel with confidential informants.
- e. Establish procedures to deactivate confidential informants which maintain the safety and anonymity of confidential informants.
- f. Establish a process to evaluate and report the criminal history and propensity for violence of any target offenders.
- g. Establish written security procedures protecting the identity of a confidential informant.
- Establish written procedures relating to the use of a paid confidential informant.

Juicy Materials

- Training course materials for personnel using / recruiting informants
- Guidelines for training and briefing of confidential informants
- Procedures to maintain safety and anonymity of Cis
- Written procedures for paid confidential informant





Subpoena: Rule 17

- Determine what you want to subpoena
 - Will the producing entity turn it over to the government?
 - Do you care or not?
- Remember: Even if you can't use the materials in trial and prove up with extrinsic evidence, you can still utilize the information to build your theory of the witness and inform your cross-examination plan.



Subpoena: Be Strategic

Case filings — criminal, civil

CI Handler records

Work records

Medical records

School records

Insurance records

Credit reports

Prosecution file in prior cases

Police records

Probation records

Prison records

Phone records (cell site, location, texts)

ICE records, A-Files

Jail calls

Text messages



DISCOVERY & LITIGATION

DISCOVERY



The prosecution will try to withhold and sit on this information, so the best bet is trying to nestle yourself comfortably in the rules and case law that force them to do their job.

- (1) Brady and progeny
- (2) Rule 16
- (3) Local rules



- SCOTUS is clear that the full force of a prosecution's disclosure obligations under Brady applies to both exculpatory and impeachment evidence. *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999).
- SCOTUS has generally "disavowed any difference between exculpatory and impeachment evidence for Brady purposes." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995).

Brady: Duty to Disclose Information Not Just Documents

Brady encompasses *all* favorable information

- Not just the production of documents (Rule 16)
- The prosecution is required to disclose certain <u>favorable</u> <u>information</u>, even if that information has not previously been recorded and has only been communicated orally to a member of the prosecution team.

Any written promises: plea deals, cooperation agmt, non-pros ltr

Any inducements the prosecution has made to witness (or counsel)

Any promises of leniency even if just implied or inferred

Benefits received:

- Dismissal of charges
- Immunity
- U-Visa, S-Visa

Communications between Cl and handlers, agents, etc.

Reports of investigation (ROI)

Criminal history / RAP sheets

Discoverable Information



Ask early, often, and specifically

Initial Discovery Letter

Cooperator Discovery Letter

Example of Specific Asks:

- Any information relating to potential witness bias, including benefits received by the witness.
 - ✓ Banks v. Dretke, 540 U.S. 668, 702-03 (2004) (Brady violation when government failed to disclose witness status as paid informant)
 - ✓ Giglio v. United States, 405 U.S. 150 (1972) (Brady violation where government failed to disclose non-prosecution agreement with cooperating witness)
- Any information related to a witness's dishonesty and/or criminality.
 - ✓ A copy of any criminal record of any witness, including witness's prison records and probation records, as well as a written description of any criminal cases pending against any witness.



All deals, benefits, promises of benefits, threats, or statements that benefits would not be provided without cooperation, that were made to any government witness in connection with this case.

All information that any government witness has been or is a police informant and/or cooperating witness.

If any witness is, or has been, an informant or cooperating witness, then we are requesting disclosure of:

- amounts paid to the informant in connection with this case
- non-monetary assistance provided to the informant or cooperating witness, including assistance in avoiding or minimizing harm from charges pending against the informant or cooperating witness
- all benefits, promises of benefits, or statements that benefits would not be provided without cooperation that were made to the CI/CW in connection with this case, whether fulfilled or not
- the nature of assistance provided in the past, including the number of occasions and form of help.

Sample Language for Bias/Benefits Requests



Perjury by any government witness at any time, whether or not adjudicated and whether or not in connection with this case. *See Mooney v. Holohan.* 294 U.S. 103 (1935).

Any information regarding any prior "bad acts" of a government witness that may bear upon the veracity of the witness.

- All information that CI/CW has made prior false accusations, including but not limited to prior complaints to the police or enforcement agencies that did not result in a conviction.
- Any prior inconsistent, non-corroborative, or other witness statements that the witness's trial testimony will not reflect.
- The names and addresses of all persons who would contradict or impeach any government testimony or other evidence.
- Any information that tends to show a government witness's bias or corruption.

Sample Language for Veracity Requests



LITIGATION

Protective orders

Disclosure of identity

Reliability hearing

Expert Testimony re: workings and expectations of informant culture, particularly for jailhouse informants

Propose jury instructions (i.e., jailhouse snitch in particular)

Discovery motions

- Co-D's / Accomplice's Plea Deal
- Exculpatory information (rewards, promises, inducements made to CI/CW)



TRIAL PREPARATION

YOU'VE COLLECTED ALL THIS INFORMATION, NOW WHAT?





What kind of cooperator are we working with?



Why have they chosen to cooperate? What do they gain?



What is your cross-examination strategy at trial?

Building Your Theory

You need the jury to understand the full breadth and depth of what the government has engineered and what the CI/CW is doing to client

Accomplice Scenario: Create a timeline, assess their criminal liability/exposure; saving own skin

Jailhouse Snitch: No prior relationship to client, no reason for client to confess or discuss his case with the snitch; opportunist

Confidential Informant: Witness for hire

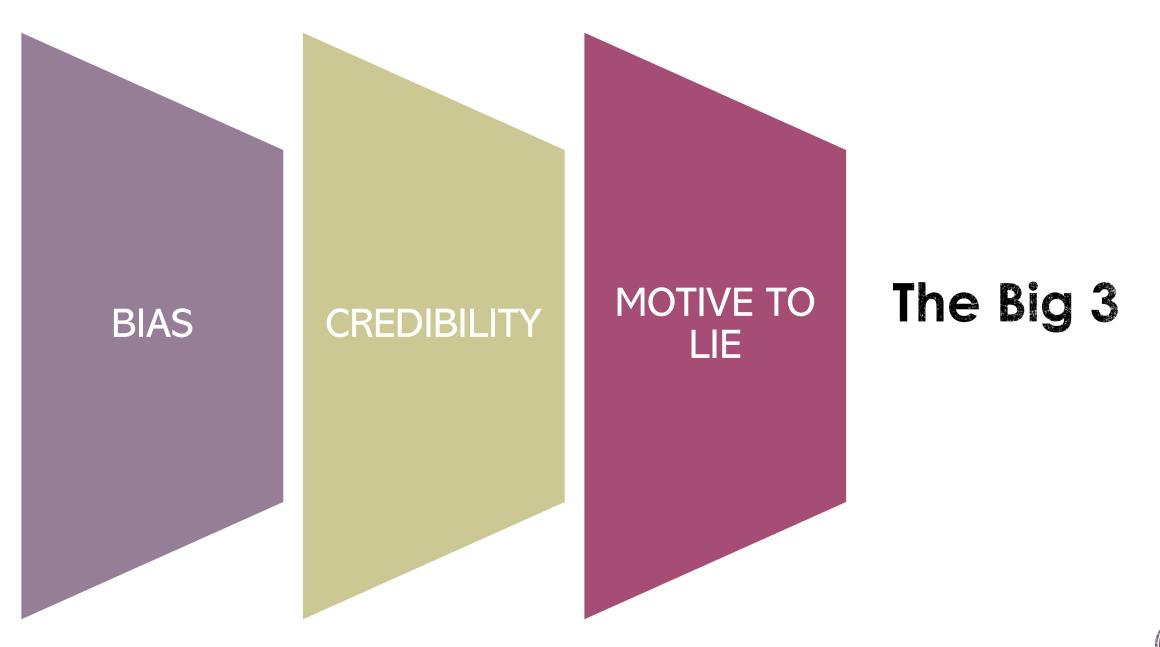
Paint the Picture

Cross-Examination



"Perhaps you'd like to reconsider that last answer."













Bias cross-examination is guaranteed by the Sixth Amendment as a basic component of the right to confront adverse witnesses.

- The Confrontation Clause entitles a defendant to cross-examine about a witness' potential bias.
 - Davis v. Alaska, 415 U.S. 308, 316 (1974)
 - United States v. Abel, 469 U.S. 45, 50 (1984)



• Events are probative of bias whenever "a jury might reasonably have found [they] furnished the witness a motive for" shading the truth, or, when they raise "the possibility" of bias.

Van Arsdall, 475 U.S. at 679; Davis, 415 U.S. at 317 ("counsel sought to show the existence of possible bias," which may or may not have been accepted by jury).



- •While trial judges have wide latitude to regulate the extent and scope of witness examinations, they have no discretion to prohibit relevant bias cross-examination of a government witness.
 - Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986).



Helpful Rules for Cross-Examination

Rule 404(b) — Prior Act Evidence

Rule 607 — Anyone can attack witness's credibility

Rule 608 (a) — Reputation, Character, Opinion

Rule 608 (b) — Prior Acts of Dishonesty

Rule 609 — Impeachment with Prior Conviction



Rule 404(b): Other Crimes, Wrongs, or Acts

(2) **Permitted Uses**. This evidence may be admissible for another purpose, such as proving **motive**, opportunity, **intent**, **preparation**, **plan**, knowledge, identity, absence of mistake, or lack of accident...



Rule 607: Who May Impeach a Witness

Any party, including the party that called the witness, may attack the witness's credibility.



Rule 608 (a) — Reputation, Character, Opinion

(a) Reputation or Opinion Evidence.

A witness's credibility may be attacked or supported by <u>testimony</u> about the witness's <u>reputation</u> for having a character for truthfulness or untruthfulness, or by testimony in the form of an <u>opinion</u> about that character.

But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.



Rule 608 (b) — Specific Instances of Dishonesty

(b) Specific Instances of Conduct.

Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness.

But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

- (1) the witness; or
- (2) another witness whose character the witness being crossexamined has testified about.



O CROSS CHAPTERS

Sample Cross Chapters to Get At Bias/Motive of CI/CW

- Formal or informal agreements
- Pending charges, probation revocations, or possible future charges
- Promises made by the LEO
- Promises made by the Prosecutor
- Potential penalties in pending case (man-min, maximum, criminal history)
- Sentencing agreements (specific sentence, leniency)
- Avoiding jail time
- Dismissals
- 5k Motions (federal only)
- Payment received (amount, factors in amount)
- Privileges
- Immigration / legal status: U-Visa, S-Visa

YOU GOTTHIS! THEY'RE NOT READY FOR YOU!