

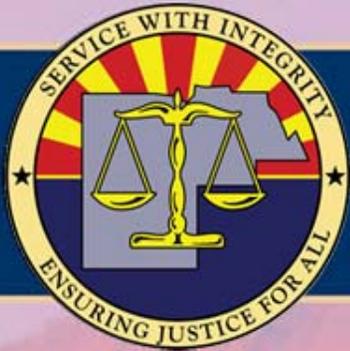
Bill Montgomery Maricopa County Attorney

**Free Talks, Confidential Informants, and
Cooperating Witnesses**



Why a formal policy approach?

- Thoroughly vet use of informants
- Consistent assessments and decisions for use
- Ensure awareness among prosecutors of use
- Disclosure obligations
- Secure integrity/finality of convictions



Practical Considerations

ER 4.2. Communication with Person Represented by Counsel

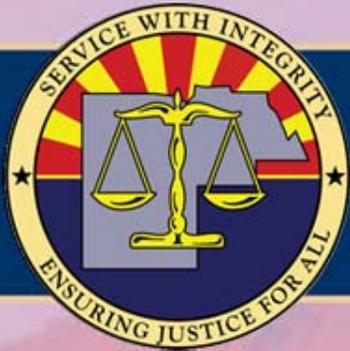
In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

6th Amendment Right to Counsel



Definitions

- “Informant” means any person who receives, or reasonably expects to receive, a benefit in exchange for testimony in a criminal trial, hearing or grand jury, or who receives or reasonably expects to receive a benefit in exchange for information pertaining to a criminal investigation whether the investigation concerns the potential informant or not.
- NOT an Expert or someone who just has travel costs covered.

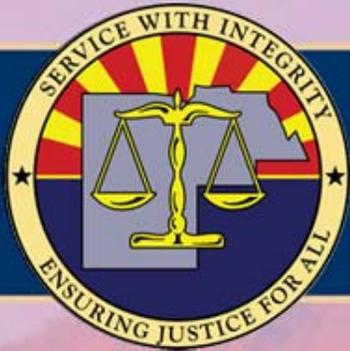


Definitions

“Incarcerated Informant,” an informant in custody who provides information or testifies about matters another inmate told him while both were in custody.

“Accomplice Informant,” an informant who has a pending criminal matter and provides information about one or more accomplices (charged or uncharged) in return for a benefit or consideration in the pending matter.

“Law Enforcement Informant,” an informant who receives a benefit from a law enforcement agency in return for information regarding criminal activity, or in return for criminal investigative work done at the request of the law enforcement agency.



Definitions

“Benefit” should be construed broadly and includes any consideration or advantage an informant requested, or was offered, promised, or received in exchange for information or testimony provided by law enforcement or prosecution. It includes a benefit for the informant or another person at the informant’s request. When an informant asks for a benefit in exchange for proffered information, that request itself should also be considered a benefit for the purpose of disclosure. Common forms of benefits include, but are not limited to:



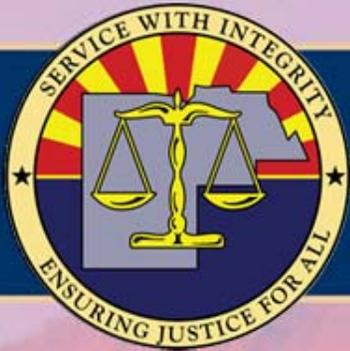
Definitions - Benefits

- a) Formal or informal immunity from prosecution of any crime;
- b) Declination of filing any potential criminal charge;
- c) Avoidance of civil or criminal forfeiture;
- d) Avoidance of arrest;
- e) Beneficial sentencing recommendations, concessions, modifications, or reductions including those related to probation, parole, or conditions of confinement;



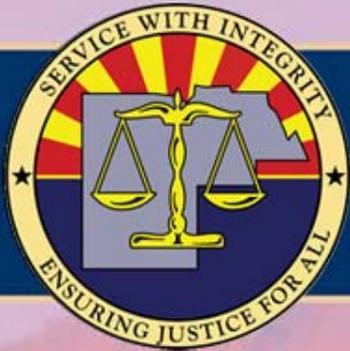
Definitions - Benefits

- f) Benefits related to bail, release conditions, or conditions of pre-trial detention;
- g) The institution, enhancement, or continuation of any government-sponsored benefit including but not limited to pensions, food stamps, health care, housing, transportation, child care, or education;
- h) Drugs;
- i) Property of any value;
- j) Monetary payment;



Definitions - Benefits

- k) A promise or assurance made by investigative or law enforcement officers to act or to refrain from acting in a specific manner;
- l) Any of the foregoing conferred on or promised to a spouse, intimate partner, friend, child, parent, or other family member.



Process Post Charging

Prosecutor becomes aware of interest post-charging

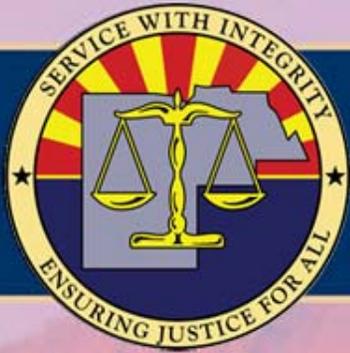
- Speak to Defense Attorney
- Send a pre-proffer letter
- Request use of informant
 - ✓ Materially assist
 - ✓ Corroboration



Process Post-Charging

Supervisory Chain Agrees

- Informant Worksheet completed
- Investigations Division conducts background review



Decision Points

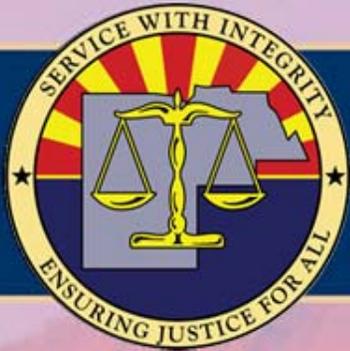
Incarcerated Informant

- Informant Committee reviews

Accomplice/Law Enforcement Informant

- Chief Deputy Approves

Prosecutor makes trial decision to actually use or not



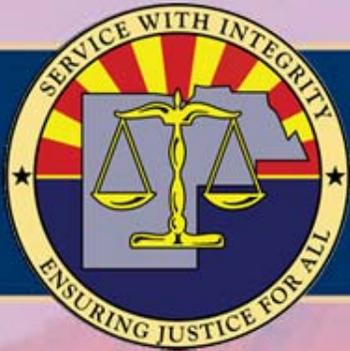
Informant Committee

“Maricopa County Informant Committee” shall be chaired by the Law Enforcement Liaison and include at least one Bureau Chief and two Division Chiefs with criminal prosecution supervision responsibilities. The committee shall convene regularly at the request of the Chair to review referrals. The committee shall review all materials submitted and consider whether the DCA should use the informant or not. The committee will consider the requests as well as all attendant professional responsibilities, including any conflicts of interest.



Process Pre-Charging

- Focus on disclosure from LEA
- Requires immediate supervisor approval to charge
- Prosecutor must confirm LEA “will provide MCAO, upon request, with all legally required information and documents related to the informant for disclosure to the defense, including whether the police informant has been found to be unreliable in the past.”



Additional Considerations

- Physical safety of informants
- Accuracy of testimony
- Post-trial issues
 - ✓ Future conduct of informant
 - ✓ Information calling into question veracity of testimony