FUTURE POLICIES REGARDING THE USE OF CONFIDENTIAL NARCOTIC INFORMANTS

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Current Status of Informant Management in California

Within California, there are no standardized policies regarding the use of confidential narcotic informants. Each law enforcement agency in California follows its own set of guidelines, which primarily serve as risk management tools. Some policies are very detailed, but others are very minimal. Information about the confidential narcotic informants court testimony, declined prosecutions, and allegations of dishonesty, are not routinely documented and placed in any data base.

There is no requirement that agencies follow the five basic principles of informant management outlined by the federal Drug Enforcement Administration (DEA) which are definition, establishment, fingerprinting and criminal history, payment, and management review.

There are links to provide deconfliction of narcotics investigations, but no such data base exists to pass on the critical information to assess an informants credibility such as:

- Their past court testimony.
- Declined prosecutions.
- Previous allegations of dishonesty.
- A mechanism for investigating allegations of dishonesty brought against an informant.
- How to manage informant data under the constitutional requirement of the 1963 United States Supreme Court decision in *Brady v Maryland*.[1]

This information, if it can be obtained, is passed on via word of mouth by the investigator who was assigned to handle the informant.

In the enforcement of narcotics cases, the use of informants has grown dramatically as a means of obtaining information for probable cause for search warrants and prosecution. In a study by the National Law Journal, 92 percent of narcotic search warrants filed in federal courts relied upon information from confidential narcotic informants.[2]

Law enforcement officers in California have a tool to assist them in checking confidential narcotic informants. It is known as the Los Angeles Clearinghouse. In early 1991, the Los Angeles County Police Chiefs Association (LACPCA) came together in a mutual agreement to initiate a project to bring advanced technology and automated systems to bear on the problem of critical substance abuse and drug control. The chiefs formed the Los Angeles County Regional Criminal Information Clearinghouse (LACRCIC), as a program to link together all available public databases to expedite identification of narcotic suspects, promote the exchange of information crucial to multi jurisdictional investigations, to provide drug trafficking trend analysis and intelligence analysis, and to improve officer safety. The project is currently referred to as the Los Angeles Clearinghouse.[3]

The most common use of the Los Angeles Clearinghouse is to maintain a narcotic intelligence data base with names, aliases, organizations, businesses, aircraft, and vessels. The participating agencies submit information in which they retain the original proprietorship. The Los Angeles Clearinghouse functions only as a conduit of information to track critical events and provide for deconfliction of events and investigations. The names of the narcotic informants are documented by the Los Angeles Clearinghouse, but no information about their criminal history, payment

records, or performance as an informant is retained. When a law enforcement officer makes an inquiry with the Los Angeles Clearinghouse, to check if a person has worked as a narcotic informant, the officer is given the agency who has placed the name in the data base and given instructions to contact that agency for information. The Los Angeles Clearinghouse does not have a standard criterion for determining the validity and reliability of a narcotic informant. They do not certify a person as a narcotic's informant or track their activities.

In essence, what the Los Angeles Clearinghouse can tell you is if another law enforcement agency is using that person as a confidential informant and put you in touch with the handling agency for more information. The Los Angeles Clearinghouse acts as a conduit of information and they do not maintain the proprietorship over the data. The proprietorship remains with the agency that posted the subject at the Los Angeles Clearinghouse as a confidential narcotic informant.

The Los Angeles Clearinghouse is used by all law enforcement agencies throughout Los Angeles County, and by Law enforcement agencies in 24 other California counties. They are also used by most federal agencies operating in Los Angeles County involved in narcotic investigations. The Los Angeles County Sheriff's Department requires that all informants approved for its use must be posted with the Los Angeles Clearinghouse.

The Los Angeles Clearinghouse is able to connect information with a data base known as the Western States Information Network (WSIN). WSIN is one of six Regional Intelligence Sharing Systems designed by Congressional appropriation to the United States Department of Justice in 1981. It was designed to form a partnership

between the federal government and local law enforcement. WSIN's primary mission is to maintain a central repository of criminal intelligence on narcotic traffickers and disseminate information to authorized agencies upon request.

WSIN's geographic coverage includes the five western United States of Alaska, California, Hawaii, Oregon, and Washington. Participation in information gathering on narcotic informants via WSIN is strictly voluntary for law enforcement agencies in those states.[4]

The Los Angeles Clearinghouse and WSIN do not track an informant's criminal history, payment history, work performance, or allegations lodged against them such as perjury, or other acts of misconduct. Each agency entering a subject into WSIN's data bases is allowed to set its own definition of what a confidential narcotic informant is. These data bases refer to them as subjects, who are acting as informants. There is not a standardized policy required for the handling of these subjects classified as informants. That information can only be obtained by making a contact with the investigator who places the subject into the database, who maintains the proprietorship over the data. Once again, the data is relayed via word of mouth.

The Los Angeles County Sheriff's Department (California)

A review of the Los Angeles County Sheriff's Department, reveals that it has rigid policies in place regarding the use of confidential narcotic informants. The Los Angeles County Sheriff's Department adheres to the five basic principles of informant management identified by the Federal Drug Enforcement Administration (DEA).

The sheriff's Narcotics Bureau tracks all narcotics informants utilized by the

sheriff's department in a computer data base. Based on 2001 figures, the Los Angeles County Sheriff's Department has more than 7000 registered narcotic informants. Of those informants, approximately 250 are in active use. These are confidential narcotic informants who are registered under their current department policies.

Narcotic Informants registered with the sheriff's department can only be activated for a period of six months and are issued a number for tracking. They must have a copy of their arrest reports, criminal histories, and driving records on file. They are asked to sign an informant advisement which is an agreement which outlines their limitations and expectations. If an investigator wants to use a confidential narcotic informant, they must have it approved by a lieutenant. All payments to an informant must be approved by a supervisor, with threshold limits set identifying approval levels for amounts of payment. The payment records to an informant are kept for audit and management review annually.[5]

The Los Angeles County Sheriff's Department does not track informants used by other agencies. Each bureau within the sheriff's department maintains it's own informant records. The only exception is with narcotic informants. Sheriff's department policies mandate that all narcotic informants be tracked by the sheriff's Narcotic's Bureau, regardless of where the investigation initiated.

If a sheriff's department investigator believes an informant is unreliable, they may remove them from their status and classify them as unreliable. Information about the informants court testimony, declined prosecutions, and allegations of dishonesty, are not routinely documented and placed in the data base. Currently there is no requirement that these issues be investigated.

A Call For Reform

In the enforcement of narcotic cases, defense attorneys have grave concerns about the use of paid and defendant confidential narcotic informants. The lack of standardized oversight and certification is leaving the perception, by many in the criminal justice system, that the use of confidential narcotic informants can lead to abuse and misconduct.

They also believe that law enforcement officials and prosecutors fail to adhere to their constitutional responsibilities to comply with the requirements of the 1963 United States Supreme Court decision in the case of *Brady v Maryland*, regarding the information about an informants past. That *Brady* case decision mandates that prosecutors disclose to defendants any evidence which could be deemed as possibly exculpatory. It states that the government has a constitutional duty to ensure that a defendant receives a fair trial. The case decision states the government must disclose to a defendant, information in its possession which would be favorable to the accused and material to his defense. The government obligation includes disclosing information that would be useful to impeach the credibility of a government witness. Thus the government is legally obligated to disclose information that reflects upon the credibility of an informant that is called as a witness.[6]

Could narcotic informants be certified based upon their acceptance to a basic criterion that would standardize their use? Would this standardization and certification increase public confidence in the use of informants and minimize the perception of misconduct regarding their use? Would this certification serve to reduce the risk of misconduct by law enforcement officers and prosecutors?

Three different voices calling for reform in the way law enforcement agencies manage confidential narcotic informants are discussed in this article. The first is from a survey conducted by the Hastings Constitutional Law Quarterly which surveyed informant practices in several state and federal agencies and found the internal policies lacking and no sole source of oversight regarding the handling of informants.

The second is a management review conducted by the federal Drug Enforcement Administration of an incident involving a confidential informant who was paid more than a million dollars for his services over a fifteen-year period and was accused of perjury. The mission of the review was to examine the events that transpired and make recommendations in order to prevent the recurrence of false testimony by any other informants in the future.

And finally the third, are the recommendations from a conference of more than 150 judges, prosecutors, defense attorneys, and academics gathered at Yeshiva University, Benjamin N. Cardozo, School of Law in New York City, in December 2000. The conference outlined a series of recommended reforms for law enforcement, prosecutors, and judges, regarding the use of confidential narcotic informants.

The future study on this issue is critical as forces other than law enforcement agencies are attempting to shape this issue by bringing the future to the present. Ignoring it will only give those forces the ability to create an optimistic outcome for them, and a pessimistic outcome for law enforcement agencies.

A New Vision of Informants

In an article printed in the Hastings Constitutional Law Quarterly titled “A New

Vision of Informants," a series of reforms are called for regarding the use of confidential narcotics' informants. The article warns that if law enforcement agencies do not self-initiate these reforms, the courts and legislatures will step in and do it for them.

The following are the suggested reforms that the article gathered from more than six dozen prosecutors, defense attorneys, judges, and drug enforcement officers.

One - Require authorities to provide any existing negative information about a confidential informant who is being used to obtain a search warrant. Currently, law enforcement officers are only required to tell a judge or magistrate that an informant has proven to be reliable in the past. They are not required to offer knowledge that an informant has lied in the past or that some of his tips have proven false. "Any information that would be exculpatory or place doubt on the credibility of the informant should be presented to the magistrate at the time the search warrant is being requested," stated Judge Stephen S. Trott of United States 9th Circuit Court, who was chief of the criminal division of the Justice Department during the term of President Ronald Reagan.[7] "The way the system is now, I'm not sure the magistrate is getting a clear and accurate picture of the situation."[8]

Two - Judges, magistrates and other officials with power to sign search warrants should be more inquisitive about an informant's credibility. This is a recommendation that experts quoted in the article state should be done by the judiciary, and not imposed through legislation. "Unfortunately, there is not an aggressive questioning of agents about the reliability of their informants, " says E. Michael McCann, Chairman of the American Bar Association's Criminal Justice Section, and a prosecutor in Milwaukee, Wisconsin.[9] Judge Trott goes even further in his suggested reforms. He believes more

magistrates and jurists need to demand that an informant be produced during ex parte requests for search warrants. “Have the confidential informant stand before the judge and raise his right hand and swear this is the truth” he says, “That may clear up many problems.”[10]

Three - Computerize. A national computer data base should be set up in which law enforcement agencies and prosecutors could warn their counterparts elsewhere of informants who have proven to be unreliable, have committed perjury, or have had a complaint made against them by officers of the court.

Four - The use of informants and the payments made to them should be routinely scrutinized, and violations should be followed by swift punishment. Many times agencies make policies, and few safeguards are in place to verify that they are adhered to. Rarely are any law enforcement officers disciplined for not adhering to policies related to handling of informants.

Five - Investigators should put informants through a lie detector process before using them. This would help weed out the liars and intimidate those informants who are contemplating deception.

Six - Law enforcement agencies should have a policy to make deals “only with little fish to get big fish,” Judge Trott states.[11] “Too many times we make deals with the wrong people and discover that the informant is actually worse than the people on trial.”

Seven - Require corroboration for every tip an informant provides. Many times investigators get lazy and do not do an adequate job of surveillance or other means of verifying the informers word. Information from informants should be the beginning of the investigation, not the end.

Drug Enforcement Administration (DEA) Management Review

In a case titled *Bennett v. DEA* , the issue was raised about an informant who was testifying in a federal drug murder trial. It was learned in pre-trial motions, that the star witness, a paid informant, had perjured himself in previous criminal proceedings about the extent of his criminal past. The case also focused on how much he had been paid during his fifteen-year tenure as an informant. The DEA stated the informant had been paid more than one million dollars; however, the defense was ready to prove it was more like four million dollars. The defense alleged the DEA knew about the informant's perjury and continued to utilize him as an informant without disclosing the fact to the defense.[12]

As a result of great media scrutiny, pressure from the defense community, public outcry, and the filing of the lawsuit, the DEA initiated a management review of the incident. Its mission was to examine the events that transpired and make recommendations in order to prevent the recurrence of false testimony by any other informants in the future.

The review found that the informant had worked for the DEA for more than 16 years and was involved in more than 280 investigations, in 31 cities, and was utilized by 211 DEA agents. The management review determined the informant had also performed services for six other federal agencies and an unknown number of various state and local agencies.

Not all the findings of the management review have been made public. Three pages of recommendations have been withheld by the DEA for unknown reasons. H. Dean Steward is the attorney representing the plaintiff in the lawsuit, which is still

pending in federal court. Mr. Steward, who obtained the management review from the DEA in a Freedom of Information Act (FOIA) request, stated he believes some of the recommendations were not released because they were identified in the review as recommendations, yet the DEA decided not to adopt them.[13]

The management review identified five major topic areas of DEA informant policy. They are:

- Definition. The DEA calls its informants Confidential Sources (CS) and defines them as a person(s) who under the direction of a specific agent, and with or without expectation of compensation, furnishes information on drug trafficking or performs a lawful service for DEA in its investigation or drug trafficking.
- Establishment. The DEA requires that each informant be established properly by completing a personal history report, and advising informants of a cautionary guideline that tells them they shall not violate criminal law in furtherance of gathering information or providing services to the DEA, and that any evidence of such a violation will be reported to the appropriate law enforcement agency. It also advises informants they have no official status implied or otherwise as agents of the DEA.
- Fingerprinting and Criminal History. All informants shall be fingerprinted and their criminal histories checked carefully with the Federal Bureau of Investigation.
- Payment. Payment to an informant must be commensurate with the value of services. An approval process for payments is established with yearly and lifetime caps also imposed.
- Managements review of Informants. Management shall review the use of

informants by examining the following criteria. First, should an informant continue to remain active. Second, is the informant being utilized appropriately. Third, were the debriefings of the informant complete and fully reported. Fourth, where the appropriate initial and ongoing approval requirements were being met.

The DEA has a data base it tracks informants in called the Confidential Source System (CSS). The data base contains only the specific biographical information about the informant such as addresses, telephones numbers, etc. It also notes how much the informant has been paid and the investigator handling the informant. The DEA noted that much of the other information about an informant was available in reports and files, yet was not automated for access by agents. The bulk of their informants' information was kept manually in reports.

The DEA Management Review concluded the following:

– The informant had been paid approximately $1.9 million by the DEA alone, over a sixteen-year period.

– The informant had testified falsely sixteen times in trials and sworn depositions while under oath. It was found the informant gave false testimony about his arrest record, level of education, and payment of income taxes. The informant's testimony was not monitored while under deposition nor was the transcript reviewed afterward. In one trial where the informant stated under oath he had testified falsely in prior trials, the case agent appropriately documented the incident and notified their supervisors.

– The information about prior false testimony and work history of the informant was placed in the informant's file, but no vehicle for automating that information

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existed. There was no policy in place to effectively track information regarding his testimony. Agents had to rely on verbal recommendations of other agents who had used the informant to evaluate if he could be considered reliable and effective.

- The DEA found it was their responsibility to advise prosecutors about any information they have that would impact the credibility of an informant. It was found that prosecutors would not run criminal history checks on the informant, so they had no idea he was lying when he gave responses abut his criminal history while under oath. The DEA policy was only to provide information to prosecutors about an informant on a need to know basis. With that understanding, the prosecutors are at the mercy of whatever the investigative agency provides them.
- The DEA said they did not have policies in place to address allegations of misconduct regarding their informants. When allegations of misconduct were raised by defense counsel about the informant's conduct, the DEA administratively closed the matter. This was because the allegations were not regarding an employee of the DEA.
- The DEA recommended they have an informant data base that tracks informants more effectively. They recommended the system should automate and track data regarding courtroom and deposition testimony and an ongoing review of the informants criminal history. They recommended the system track and review any information involving an informant regarding arrests, false testimony, declined prosecutions, allegations of dishonesty, etc. They recommended a
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mechanism be set up to investigate those allegations also and report on the findings in the data base.

– The DEA recommended that program managers of the informants' data base be trained thoroughly in issues which could be pointers toward information which mandates that prosecutors disclose to defendants any evidence which could be deemed as possibly exculpatory. The DEA stated that in order for the government to fulfill its constitutional duty to ensure that a defendant receives a fair trial, the government must disclose to the defendant, information in its possession which would be favorable to the accused and material to his defense. The government obligation includes disclosing information that would be useful to impeach the credibility of a government witness. Thus the government is legally obligated to disclose information that reflects upon the credibility of an informant that is called as a witness. [14]

The Cardoza Panel

In December 2000, more than 150 judges, prosecutors, defense attorneys, and academics gathered at Yeshiva University, Benjamin N. Cardozo, School of Law in New York City. The event organizers and sponsors, the Jacob Burns Ethics Center and the Cardozo Law Review, had brought the group together to discuss what they described as this troubling conundrum surrounding the use of confidential narcotic informants.

The question discussed at the conference was this: Is Justice obtainable in a criminal justice system where the prosecution of narcotics cases increasingly relies on deals struck with cooperating witnesses or criminal informants who barter testimony in

exchange for lenient treatment or money from prosecutors?

During the conference, members of the defense community argued the dangers of relying heavily on informants to prosecute narcotic cases. They stated prosecutors have tremendous power over defendants by agreeing not to press charges against those defendants who agree to testify against other defendants. They argued that this is a unique discretion that even judges do not have. They noted that a judge's discretion is severely limited to sentencing which is mandated by statute. The prosecutor faces no such restriction in whether to bring charges against a defendant.

Defense attorneys also complained about adequate discovery about an informant's past performance. They said that prosecutors do not turn over enough information to facilitate effective cross examination of informants. One speaker at the conference noted that prosecutors may be reluctant to turn over more than the bare minimum of information about an informant's past. This is because they believe the information about an informant's past would be used by the defendant, who has as much incentive to lie as the informant, to concoct a story to refute the informant's testimony.

Saul Kassin, a professor of psychology from Williams College argued that "as a general rule, we are terrible human lie detectors." He sated that many prosecutors and police investigators rely on "common sense" or their "gut" to tell them when an informant is lying. He stated that studies indicate most people's performance in discerning the truth is not significantly better than would be achieved by flipping a coin. He said experts such as police officers and judges do not fair much better. Professor Kassin concluded by adding that most law enforcement officials have no significant way

of assessing an informants credibility.[15]

Prosecutors defended the use of informants stating that many significant cases could not be made without the help of cooperating witnesses. The prosecutors said that vigorous cross-examination, careful corroboration, and other checks built into the system are sufficient to prevent wrongful convictions based on false testimony.

As part of the conference, participants offered a variety of suggestions to help prosecutors and police officers do a better job. Among the suggestions were:

- Better supervision and training of police officers in the handling of informants
- Fuller documentation of informant records and plea negotiations. This would include videotaping of informant interviews.
- Beefed up internal standards and policies for law enforcement agencies and prosecutors.
- The allowing of additional discovery and court hearings regarding an informant's background to ferret out tainted testimony.
- Tougher punishment for informants who lie.
- Restriction or ban on the use of jailhouse snitches.[16]

The findings of The Cardoza Panel, The DEA Management Review, and the study conducted by the Hastings Constitutional Law Quarterly, revealed that when it comes to the use of confidential narcotic informants, there is a lack of trust by the officers of the court. They believe there is no consistent standardization of how confidential narcotic informants are selected, utilized, paid, tracked, and monitored by law enforcement officers.

Bringing the Future to the Present

The lack of standardized oversight and certification is leaving the perception by many in the criminal justice system that the use of confidential narcotic informants can lead to abuse and misconduct. In order to address this emerging issue, law enforcement leaders need to develop a standardized certification process for the use of confidential narcotic informants that would be universally endorsed by all law enforcement agencies.

This certification process would require that all agencies adhere to the basic principles of informant management outlined in this report. Those basic principles are definition, establishment, fingerprinting and criminal history, payment, and management review. This standardized certification process would all include:

- Development of an informant data base which could be utilized by all agencies operating within a given jurisdiction. This would not be a narcotic incident deconfliction data base, it would be strictly an informant data base.
- That data base should automate and track data regarding courtroom and deposition testimony of the informant and conduct an ongoing review of the informant's criminal history. The system should track and review any information involving an informant regarding arrests, false testimony, declined prosecutions, allegations of dishonesty, etc.
- The certification process plan should establish a mechanism that enables law enforcement agencies to investigate allegations of misconduct against an informant, and report on the findings in the data base.
- The certification process should address the training of program managers of the

informant data base about how to identify pointers toward *Brady v. Maryland* type information, which mandates that prosecutors disclose to defendants any evidence which could be deemed as possibly exculpatory. In order for the government to fulfill its constitutional duty to ensure that a defendant receives a fair trial, the government must disclose to the defendant, information in its possession which would be favorable to the accused and material to his defense. The government obligation includes disclosing information that would be useful to impeach the credibility of a government witness. Thus, the government is legally obligated to disclose information that reflects upon the credibility of an informant that is called as a witness. Part of the certification process would be to incorporate a legal adviser component to assist in managing the data base.

- The certification process should address how critical information about an informant can be gleaned from reports and placed into the data base for analysis and retrieval. Currently most of the critical information about an informant's past history and work performance is relayed via word of mouth.
- The certification process needs to address proprietorship issues regarding informant information. With many agencies contributing to the same data base, protocols need to be worked out regarding this issue.

Questions for the Future

A futures scan of the social, technological, environmental, economic, and political factors related to the use of confidential narcotic informants reveals the critical

need to have a standardized certification process for the use of confidential narcotic informants. It is clear this emerging issue will have significant impact in the future prosecution of narcotic cases where confidential informants are utilized.

The only certainty about this question is that change is inevitable. The warning here is for law enforcement leaders not to let others create a future for them that imposes a pessimistic outcome on their own agency. Law enforcement leaders should create their own future by developing a standardized certification process regarding the use of confidential informants.

Endnotes

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