# LEGAL DEFENSE TRUST TRAINING BULLETIN

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## "*BRADY* MATERIAL"--2002

***Los Angeles County District Attorney Issues Guidelines For Disclosing Peace Officer Personnel Records To Criminal Defendants--Is This What To Expect?***

May 28, 2002--the effective date of District Attorney Steve Cooley's new protocol and guidelines for the release of "*Brady* material" from police personnel records--what does it mean for you and your police career? Will this policy be adopted in counties outside of Los Angeles? Is the policy "fair" to you? How will application of the policy affect your livelihood? These, and many more questions are raised by the promulgation of Steve Cooley's policy.

We have written a number of articles and training bulletins on *Brady* issues over the last several years, because the implications of the problem have such a profound effect on police officers' privacy in their personnel records, and ultimately on their careers. If you haven't stayed up with these developments or cared about them, now is the time, because, as we have said all along the way, your career depends upon understanding what all of this means for you, and for your police employers.

### WHAT MAKES "*BRADY* MATERIAL" SUCH A BIG DEAL?

"*Brady* material" in your personnel record consists of information that discloses past conduct, allegations, findings, and other indications that reflect a poor character for truth, honesty and veracity, or a record of dishonesty, discriminatory enforcement, excessive police conduct, or acts of moral turpitude.

Such material, if it exists in your personnel records, may be subject to release to the defense in cases where you are a "material (prosecution) witness". If the material is sufficiently compelling to constitute potential impeachment evidence, it could affect both the prosecution of the case in question, *and* your "value" or fitness as a material witness in future cases. Where the prosecutor determines that the material is so compelling as to destroy your credibility as a prosecution witness, your employer

may feel compelled to remove you from any assignment that involves writing reports and testifying, and may even determine that you are unfit for further police assignment, leading to your employer's efforts to remove you from your employment. This is serious business. You need to pay attention to these developments so that you can look out for yourself. Once the "material" is deposited in your records, you and your career are at risk. Please take this advice seriously--your livelihood depends upon it.

## WHY DO I NEED TO WORRY ABOUT "*BRADY* MATERIAL"IN MY RECORD BEING DISCLOSED? AREN'T MY RECORDS CONFIDENTIAL?

Yes, your personnel records are confidential. But they or information from them, are subject to disclosure in criminal or civil litigation where certain requirements are met and disclosure is ordered by the court.

In 1963, the United States Supreme Court released *Brady v. Maryland*, 373 U.S. 83 (1963) ("*Brady*"). The holding of this case, and others that follow it, is that prosecutors in a criminal case, are obligated to promptly turn over to the defendant, any information of which they are aware, that is "favorable" to the defendant in his or her preparation and defense of the case in which he or she is accused, and which is "material"[1] to the issues of either guilt or punishment. "Favorable" to the accused can mean either that the information tends to "help" the accused (exculpatory) or "hurt" the prosecution (impeachment of prosecution witnesses or evidence).

***If a police officer is a material or substantial witness in a criminal case, he or she may be subject to impeachment by the introduction of information that could cause the trier of fact to question the officer's motives, accuracy, truth, honesty, veracity, integrity or credibility, and therefore, the believability of the officer's testimony. Any witness, not just a peace officer, is subject to impeachment along these lines.***

Subsequent decisions of the Supreme Court and lower federal courts, and our California Supreme and appellate courts, have made clear that these *Brady* obligations extend to all members of the

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[1] "Material" means that the information, had it been disclosed, might reasonably have affected or changed the outcome of the case; that is, suppression of the information undermines confidence in the result of the case. The information must have some plausible, definitive connection to the outcome, more than revealing, for example, minor inconsistencies. The definitions of what is and what is not "material" are taken from the standards applied by appellate courts in reviewing convictions; that is, in hindsight. Had the information been disclosed, is it reasonable that a different outcome would have occurred? If the answer is yes, then the information is "material", and if it was suppressed or not turned over when it should have been, a violation of due process has occurred and a conviction or sentence may be overturned.

"prosecution team", including the police, to at a minimum, facilitate the prosecutor's compliance with the *Brady* obligations, by assisting in the identification of possible *Brady* material in an officer's records, in appropriate cases.

But statutes in California which were enacted nearly three decades ago in response to *Pitchess v. Superior Court*, 11 Cal.3d 531 (1974)[2], provide that "peace officer personnel records are *confidential*, and may not be disclosed in a civil or criminal proceeding without compliance with a strict procedure calling for a written motion supported by good cause, and review of any such records by a judge *in camera*, who must order the production of only those records determined to be relevant and material to the proponent's case.[3]

So, although it is quite true that your records are confidential, information about you in those records may be reviewed by a judge , and turned over to a criminal defendant if the case meets the standards imposed by the law, both in statutes and in precedential decisions of our courts. Accordingly, depending on what is in your records, you have reason to be concerned. And, the concern extends not only to what is there, but also to what will be placed there in the future. For example, if there is a current investigation against you that includes a charge of dishonesty, fabrication of documents or evidence, false entries in reports, or the ever-popular "false and misleading statements to investigators", or one of a number of other charges that impugn your integrity or credibility, you are at risk. This situation calls for the utmost vigilance in defending against any such charges. Of course, the real point is to avoid any conduct that could result in such charges being made in the first place. (*See:* Training Bulletin, Vol. 2, Issue 7; *"Truth or Consequences"–The Path To Career Destruction,* July 1999.)

## WHY IS THIS POLICY NECESSARY, AND HOW DOES IT AFFECT ME?

Since the Supreme Court followed up on *Brady v. Maryland, supra,* in *Kyles v. Whitley*, 514 U.S. 419 (1995) and announced that the "*Brady* obligations" extended to all members of the "prosecution team" (including the police) the criminal justice bar (prosecutors and defense lawyers), judges and law enforcement managers have struggled with the question of how to reconcile the competing interests. Defense attorneys, for example, would favor full disclosure of information about "rogue or dishonest cops". They would benefit from a system

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[2] This case spawned the familiar term "Pitchess Motion", which describes an effort by a litigant to discover information in a police officer's personnel record thought to be helpful to the litigant in, among other uses, impeachment of the testifying officer.

[3] *See: Penal Code* §§ 832.7 and 832.8, and *Evidence Code* §§1043 through 1045. These sections collectively provide that such records are confidential, and limit their disclosure to appropriate cases after a judicial determination that the records or information in them, ought to be disclosed, based upon the standards set forth in these sections, particularly in *Evidence Code* §1045.

that would permit storage of such information in databases that could be accessed by the officer's name, for use in any case where the officer is a witness. Prosecutors are interested in a system that would permit them access to information about their police witnesses, so that they can comply with their *Brady* obligations, and anticipate the likelihood for impeachment of their police witnesses, before trial. They may also decline to accept cases for filing where the police witness has a demonstrated record of failures in honesty, integrity, and credibility. Judges have an interest in ensuring that fairness and due process are observed in all criminal proceedings, in that they are the ultimate monitors and guarantors of justice and fairplay in criminal cases. Law enforcement managers have a duty to, on the one hand, cooperate with the criminal justice system by facilitating the disclosure, in appropriate cases, of personnel record information which may adversely affect their officers, deputies and agents. On the other hand, managers have a duty to protect their employees' privacy in these records and to ensure that unauthorized disclosures do not occur. And importantly, as managers responsible to the community, they have a duty to take steps to rid the police ranks of those who, by their conduct, have demonstrated unfitness to perform the duties of a law enforcement officer, including making arrests, writing reports, and testifying. An employee who has, by his or her conduct, damaged or destroyed his or her character for integrity-related issues, may be a candidate for discharge, because his or her value as an officer, deputy or agent has been seriously compromised.

So, District Attorney Steve Cooley, in what will surely be looked at seriously by other county district attorneys, has promulgated these policies and protocols in "Special Directives 02-04 and 02-05" (May 2002).[4]

Truth be told, as is true of practically any compromise of this nature, every competing interest involved is dissatisfied to some degree with the results. As an observer intensely interested in the welfare of law enforcement, I think the policies are, on the whole, a positive development. However the policies predictably leave many questions unanswered, for resolution on a case-by-case basis. But, the efforts by Mr. Cooley to consider the interests of individual officers in the privacy of the records is apparent. For at least that, Steve Cooley ought to be vigorously commended. Knowing him personally, I can tell you that he cares deeply about the men and women of law enforcement, and has demonstrated that commitment over many years as a prosecutor, not just as District Attorney.

The entire "Rampart scandal" experience is of course, deeply involved in the issues confronted in these policies. Among other connections, everyone involved is interested to see whether the policies will facilitate timely identification of police

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[4] The full texts of these directives are available at the L.A. District Attorney's website, at http://da.la.ca.us/sd02-04 (and 02-05).htm.

officers who have, or are willing to, forsake the trust and duties reposed in them, so that fabrication of evidence and false testimony does not occur. This is the part of the movement that is most likely to affect you, as an individual. The tragedy for the thousands upon thousands of honest and dedicated cops is that police testimony is now, more than ever before, subject to attack or scrutiny as suspect, or unreliable without corroboration. Once upon a time, a police officer's testimony given under oath in a trial, had a certain quality as inherently truthful, because, after all, "this is a police officer". Lay jurors, at least, on the whole, used to accept an officer's words as the truth of the matter, absent compelling evidence to the contrary. We wonder whether that acceptance will ever prevail again? Like it or not, the disintegration of the credibility of the police witness in the eyes of many is deeply imbedded in these developments.

## WHAT ARE THE KEY FEATURES OF THE POLICIES?

The case prosecutor plays the pivotal role in application and adherence to the policies, because the directives charge the prosecutor with the responsibility of initiating a request to police agencies to review personnel records to look for possible *Brady* material on individual officers (Special Directive 02-04, page 1, hereafter "SD"). At the time the case is filed, the prosecutor is to make a "preliminary determination" whether potential impeachment or exculpatory material may exist. The prosecutor is to look at the police report and all other documentation available at the time of filing, to find: (1) statements by the defendant or defense witness which *contradict* the officer's statements; or (2) statements by the defendant or defense witness that the officer used excessive force; or (3) statements by the defendant or defense witness that the officer made racial, religious or other statements exhibiting bias. If such statements exist, and the officer is a *material* witness, then the prosecutor must make a request to the police agency to review its records for any possibly *Brady* material, using a specially-designed form which is to be completed by the agency and returned to the prosecutor. If the agency locates possible *Brady* material in the officer's records, it enters the name, identification number and employment status on the form and returns it to the prosecutor. The prosecutor will then file a motion for discovery of the *Brady* material, using the procedures in *Evidence Code* §§1043-1047, and the trial judge will review that material *in camera*, to decide what should be disclosed to the prosecution and defense in the case. (SD 02-04, page 2.) After filing of the case, if a prosecutor learns information in (1), (2) or (3) above, then he is to initiate the request.

If, aside from the reports and documents available to the prosecutor, the defense attorney alleges that there are statements available to the defense that contradict the officer's statements, the prosecutor is to direct the defense attorney to *either*: (1) file a *Pitchess* motion; or (2) provide the prosecutor with a declaration under oath by the person with knowledge of the officer's untruthfulness, whereupon the prosecutor will initiate the request to the

agency.

In any case, the agency should not be required to produce the entirety of an officer's personnel record, but only that material which is reasonably responsive to the request. (*See: People v. Mooc*, (2001) 26 Cal.4th 1216, 1230.)

## WHAT IS POSSIBLE "*BRADY* MATERIAL" IN MY RECORDS?

Beyond "exculpatory" material, "impeachment evidence" (for our purposes, "*Brady* material") in an officer's file includes evidence of:

1. False reports;
2. Pending criminal charges;
3. Parole or probation status;
4. Evidence which contradicts the officer's statements or reports;
5. Evidence undermining the officer's expertise;
6. A finding of misconduct by an agency board, commission or other adjudicative body that reflects on the officer's truthfulness, bias or moral turpitude;
7. Evidence that the officer has a poor reputation for untruthfulness;
8. Evidence that the officer is biased against the defendant individually or as a member of a class or group;
9. Evidence of promises, offers or inducements to the officer connected with his statements or testimony. (*See:* SD 02-05, page 3.)

The directives specify what is *not Brady material*, as well: allegations that cannot be substantiated, are not credible, are unfounded, or are preliminary, challenged or speculative are not *Brady* material; nor is the existence of *pending* criminal or administrative investigations.

## IF POSSIBLE "*BRADY* MATERIAL" IS LOCATED ON ME,WILL IT END UP IN ANY DATABASE?

Yes, possibly. The District Attorney is implementing a "*Brady* Alert System", to include both known and current *Brady* information. SD 02-05 states:

> The System will ***not*** create secondary personnel files on police officers or governmentally employed experts. The only information from an employee's personnel file to be included in the system is that which is received pursuant to *Pitchess* motion, where a court has released information without a protective order prohibiting dissemination of the material, or pursuant to an investigation resulting in a criminal charge filed against the employee (S.D. 02-05, pages 4, 5.)

Filing deputies are to access the System before filing a case, and 30 days before

trial, to learn of any impeachment information on an officer, and may disclose such information to the defense.

Obviously, protective orders must be sought in any case where a judge determines to release personnel record information, to prevent this kind of dissemination and stockpiling of data on officers. (*See: Evidence Code* §1045 (d) and (e).)

## CONCLUSION

There is much more to these policies than we can discuss in the limited space available in an article or training bulletin. However, we will monitor further developments and report more details in subsequent publications.

**We reemphasize at this point, however, that law enforcement agencies should apply a "clear and convincing" standard of proof in regard to any charge or allegation which affects an officer's credibility, or which constitutes "impeachment evidence" as it is defined in these policies. While a mere "preponderance of evidence" may be sufficient to sustain generally, allegations of police misconduct, the higher standard of "clear and convincing evidence" should be applied to any charges that could lead to impeachment evidence or the existence of *Brady* material in an officer's file. The potential damage to and destruction of employees' careers created by sustained integrity violations demands that nothing less than clear and convincing evidence support them.**

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