DISCLOSURE OF POTENTIAL IMPEACHMENT EVIDENCE FOR RECURRING INVESTIGATIVE OR PROFESSIONAL WITNESSES
I. BACKGROUND

In representing the State of Washington, Prosecuting Attorneys function as ministers of justice. To administer justice Prosecuting Attorneys accept responsibility for the integrity of the criminal justice system and responsibilities that run directly to a charged defendant.

In Brady v. Maryland, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Strickler v. Green, 527 U.S. 263 (199); Kyles v. Whitley, 514 U.S. 419 (1995); Brady, 373 U.S. 83, 87 (1963). It is the policy of the Yakima County Prosecutor's Office to strictly adhere to our Brady obligation.

This written protocol is designed to achieve this goal, and to foster county-wide uniformity in the way Brady issues are resolved. All Yakima County Deputy Prosecuting Attorneys are required to know and follow this protocol and all relevant law concerning Brady obligations. This written protocol memorializes the practices of the Yakima County Prosecutor's Office that have been utilized for some time.

It has always been the policy of this office to resolve questions related to Brady in favor of disclosure, and this protocol does not change that policy, or our interpretation of CrR 4.7. This protocol addresses only how this office will handle Brady material regarding witnesses who, due to their profession, are likely to testify in future cases. This will most often occur with police officers or other government witnesses, such as employees of the crime lab or other experts who routinely testify for the State.

This area of law is dynamic, so this protocol may be refined as further guidance is received from courts or the Legislature.

II. Basics Of Brady

The United States Supreme Court's decision in Brady v. Maryland requires the prosecution to disclose to the defense any evidence that is "favorable to the accused" and "material" on the issue of guilt or punishment. Brady, 373 U.S. at 87. Failure to disclose violates the defendant's right to due process. Id. 86-87. The prosecutor's duty to disclose applies even if the defense has not requested that piece of information.

"Exculpatory evidence" is evidence favorable to the defendant and likely to change the result on an issue of a defendant's guilt or his or her eventual punishment if convicted. "Favorable evidence" includes not only exculpatory evidence but also evidence that may impeach the credibility of a government witness, whether that witness is a law enforcement officer or a civilian. Strickler v. Greene, 527 U.S. at 281-82. "Impeachment evidence" is defined by Evidence Rules 607, 608, and 609. It generally includes any evidence that can be used to impeach the credibility of a witness.

Brady evidence regarding recurring government witnesses usually falls into one of several general categories: misconduct involving dishonesty; evidence tending to show a bias or some motive to lie; and -- for expert witnesses -- a pattern of confirmed performance errors that could compromise the expert's conclusions.
The prosecution does not have an obligation to disclose preliminary, challenged or speculative information. United States v. Agurs, 427 U.S. 97, 109 n.16 (1976). Nevertheless, the United States Supreme Court has stated that "the prudent prosecutor will resolve doubtful questions in favor of disclosure." Id. at 108. See United States v. Acosta, 357 F.Supp.2d 1228, 1233 (2005) (recognizing that because it is extremely difficult, if not impossible, to discern before trial what evidence will be deemed "material" after trial, the government should resolve doubts in favor of full disclosure). Thus, we should err on the side of providing timely discovery.

Information that is disclosed is not necessarily admissible; these issues must be kept separate. See State v. Gregory, 158 Wn.2d 759, 797 (2006). Thus, there will be many times when we disclose Brady material, but argue strenuously against its admissibility. The mere fact that a recurring government witness has been added to the Brady list is not necessarily a comment by the Committee on that individual's future viability as a witness, on his or her reputation, or on the person's ability to serve in his or her current capacity.

Independent of the constitutional due process requirement, there are court and practice rules that apply. Prosecutors are required by Criminal Rule 4.7(a)(3) to "disclose any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged." This obligation is "limited to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff." Criminal Rule 4.7(a)(4). Once information is provided to the Prosecutor's Office by law enforcement agencies, that material becomes subject to disclosure under Criminal Rule 4.7(a)(3).

A closely concurrent duty to disclose such information is also placed upon prosecutors by Rule of Professional Conduct 3.8(d).

The requirements of Due Process and those of Criminal Rule 4.7 and Rule of Professional Conduct 3.8 apply to evidence that could be used to impeach witnesses. The scope of the requirements addressing potential impeachment evidence is different. Due Process will focus upon evidence that raises issues of credibility or competency, and imposes an affirmative duty on prosecuting attorneys to learn of impeachment evidence for recurring witnesses for the prosecution/investigation team i.e. investigators and forensic scientists. The court and practice rules requirements are limited to information possessed by the prosecuting attorney, but categorically include any prior convictions of a recurring witness for the prosecution/investigation team.

A law enforcement officer's or forensic expert's privacy interest does not prevent disclosure of disciplinary records, as such records are considered to be of legitimate concern to the public. See, e.g. Dawson v. Daly, 120 Wn.2d 782, 795-96, 845 P.2d 995 (1993); Cowles Pub'g Co. v. State Patrol, 44 Wn. App. 882, 724 P.2d 379 (1986), rev'd on other grounds, 109 Wn.2d 712, 748 P.2d 597 (1988).
Thus, Prosecuting Attorney's disclosure requirements cumulatively include both an affirmative duty to seek out certain impeachment information, and a duty to disclose information that may not impact the witness' credibility.

III. GUIDELINES

1. As required by law, this office requests law enforcement agencies to inform it of information that could be considered exculpatory to criminal defendants. For purposes of disclosure, this office must determine whether the information is potentially exculpatory and how and when to make that information available at pending and future trials. This is a constitutional obligation that rests singularly with the prosecutor and cannot be delegated to any other agency.

2. As required by Criminal Rule 4.7 and Rules of Professional Conduct 3.8, this office will disclose to defense attorneys information that tends to negate the defendant's guilt. These requirements extend to any prior convictions as well as any information that a reasonable person, knowing all relevant circumstances, could view as impairing the credibility of an officer that will or could be called to testify in a particular criminal proceeding.

3. The Potential Impeachment Disclosure (PID) standard depends on what a reasonable person could believe. It does not necessarily reflect the belief of this office or a law enforcement agency. Consequently, disclosure may be required in cases where this office and/or the law enforcement agency believe that no misconduct occurred, if a reasonable person could draw a different conclusion. The fact that an officer is on the Possible Impeachment list does not equate to a finding by the Prosecutor's Office that the officer committed misconduct or that the officer is not credible as a witness. The finding is that of the individual's current or former employing agency.

4. The PID standard requires consideration of all relevant circumstances. Because this office is not an investigatory agency, it lacks the ability to ascertain those circumstances. Consequently, this office relies on law enforcement agencies to conduct investigations into allegations of officer misconduct, and to advise this office of the results of those investigations.

IV. PROCESS

The Prosecuting Attorney is the main contact point for all information relating to PID determinations.

1. Any law enforcement agency that receives information concerning alleged misconduct relating to truthfulness, bias, or other behavior that could be exculpatory to criminal defendants, and involves an officer engaged in criminal cases is required to report such conduct to the Yakima County Prosecutor’s Office in the event of a sustained finding of misconduct. Law enforcement agencies also must report any criminal convictions an officer
may have. Any law enforcement agency that employs individuals who routinely perform expert witness services are additionally asked to report confirmed performance errors committed by those individuals, where those errors could compromise an expert witness’s opinions.

2. It is the responsibility of the employing agency to notify the officer that he or she is being considered for inclusion on the PID List at the time that the employing agency makes the disclosure to the Yakima County Prosecuting Attorney’s Office.

3. If the allegations are sustained and they involve misconduct related to dishonesty or falsehood, the investigating agency shall notify the Prosecuting Attorney as soon as there is a sustained finding of misconduct. An allegation is sustained when it is factually supported, even if discipline is not imposed.

4. If it is uncertain whether or not the information meets the PID standard, the information may be submitted to the court for an in camera inspection in a case in which the officer or expert witness is a listed witness.

5. This criteria is intended for the guidance of the Prosecuting Attorney’s Office and law enforcement agencies. It may be modified or abrogated by the Prosecuting Attorney at any time. Exceptions may also be authorized by the Prosecutor or his designee. These guidelines do not confer legal rights on any individual or entity.

V. Deputy Prosecuting Attorney Responsibilities

If a DPA or any staff member becomes aware of PID material regarding a recurring government witness, the deputy or staff member shall inform the elected prosecuting attorney and members of the Brady Committee.

VI. The Office PID List

When a subpoena is issued, a DPA should receive notice that a recurring government witness is associated with PID material. The DPA will also be required to view the PID list to determine if any witness has PID material.

Witnesses on the PID list will be classified as having either potential impeachment evidence (PID material), or criminal convictions that do not encompass a crime of dishonesty or false statement.

VII. When A Deputy Prosecuting Attorney Discovers That A Potential Trial Witness Is On The PID List, or subject to PID disclosure.

The DPA shall promptly make the PID disclosure to defense counsel. If the DPA reasonably believes that the potential PID material may not be
discoverable, due to the specific facts of the case and the witness's anticipated testimony, the DPA shall notify the Elected Prosecuting Attorney or any member of the Brady Committee.

In all other instances, the DPA shall disclose the fact that the witness is on the PID List to defense counsel. If there is some question about whether the individual should be on the PID List, the DPA should discuss with the Elected Prosecutor and/or the members of the Brady Committee whether the material should be submitted to the court for an in camera review.

VIII. When Potential PID Material Is Discovered During Trial

The DPA should talk to the Elected Prosecuting Attorney or members of the Brady Committee to determine an appropriate action. If the Elected Prosecutor is unavailable, then the DPA should consult with a member of the Brady Committee.

Dated this 16th day of December, 2015.

Joseph A. Brusic