

ADOPTED – JUNE 19, 2013

MODEL POLICY

DISCLOSURE OF POTENTIAL IMPEACHMENT EVIDENCE FOR RECURRING  
INVESTIGATIVE OR PROFESSIONAL WITNESSES

WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS  
2013

This written policy is designed to achieve compliance with these requirements, and to foster county-wide uniformity in the way potential impeachment of recurring government witness issues are resolved. ***All County deputy prosecuting attorneys are required to know and follow this protocol and all relevant law concerning potential impeachment of recurring government witness disclosure obligations.***

## **I. BACKGROUND**

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

One specific responsibility is an affirmative duty to disclose potentially exculpatory information to a charged defendant. There are several sources for disclosure requirements of potentially exculpatory information.

A constitutional Due Process requirement for disclosure is set out in Brady v. Maryland, 373 U.S. 83 (1983). This requirement has been explained and modified by several subsequent cases. This Due Process requirement applies to all information in the hands of governmental agencies. Prosecutors have “a duty to learn of any [exculpatory] information known to the others acting on the government’s behalf in the case, including the police.” Kyles v. Whitely, 514 U.S. 419 (1995). Impeachment evidence is especially likely to be ‘material’ under disclosure requirements. Silva v. Brown 416 F.3d 980 (9<sup>th</sup> Cir.2005). Failure to comply with these requirements can lead to reversal of a criminal conviction.

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 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 witnesses credibility.

## **II. 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. *It is a constitutional obligation that rests singularly with the prosecutor and cannot be delegated to any other agency.*

2. As required by CrR 4.7 and RPC 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. If this office concludes that an officer is subject to PID that does not reflect a conclusion that the officer committed misconduct or that the officer is not credible as a witness.

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.

### **III. PROCESS**

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

2. 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 requested to investigate or arrange for the investigation of those allegations. Any law enforcement agency that employs individuals who routinely perform expert witness services are additionally asked to investigate confirmed performance errors committed by those individuals, where those errors could compromise an expert witness's opinions.

3. At the initiation and upon completion of the investigation, the agency is requested to notify the Prosecuting Attorneys Office of the relevant allegation and determination. This should be done whether or not the agency determined that the allegations were well founded.

4. If this office obtains information about alleged misconduct by a law enforcement officer or agency expert witness that has not been fully investigated, it will ask the officer's agency to conduct an investigation. This may occur where, for example, an officer or expert witness employee has resigned from his/her agency in lieu of termination.

5. When a Prosecuting Attorney is advised that an investigation is pending concerning a recurring government witness, the witness may be added to a "pending review" list to be monitored regularly for sustained findings of misconduct related to dishonesty or falsehood. On pending cases involving the recurring government witness, the Prosecuting Attorney shall notify defense counsel of the existence of the open investigation and direct further inquiry to the investigating agency. *Law enforcement shall immediately advise the Prosecuting Attorney if at any point in the investigation, an allegation of misconduct relating to dishonesty or falsehood is confirmed or acknowledged.*

6. The Prosecuting Attorney's Office will notify the agency and the officer/employee whether or not the information satisfies the PID Standard.

7. If the allegations are sustained and they involve misconduct related to dishonesty or falsehood, the investigating agency shall notify the Prosecuting Attorney. An allegation is sustained when it is factually supported, even if discipline is not imposed. The witness may then be added to the "Potential Impeachment Disclosure List" or other process for future disclosure. If the allegations are determined to be unfounded, the witness will be removed from the "pending review" status. If appropriate, this office will seek protective orders covering such information.

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

9. The Prosecuting Attorney's Office will maintain a record of the information that he or she reviewed in making the determination, which could include a copy of the law enforcement agency's final IA determination, if any.

10. These guidelines are 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.

#### **IV. Deputy Prosecuting Attorney Responsibilities**

1. 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 or their designee.
2. If the elected prosecuting attorney or their designee believes that the information could constitute PID material, he or she will direct the DPA to prepare a memorandum summarizing the material. The memo should focus only on facts and avoid conclusions or speculation.

#### **V. If your office maintains a PID List**

A secure electronic database may be maintained with copies of all PID material. Hard copies of the PID material will be kept in a single secure location. Access to the PID materials will be monitored.

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 permitted 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.

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

When a DPA becomes aware that a subpoenaed witness is on the PID list, or subject to PID disclosure, the DPA should request more detail about the nature of the PID material. If the DPA determine that the potential PID material is not discoverable, due to the specific facts of the case and the witness's anticipated testimony, the DPA shall notify the elected prosecuting attorney or their designee.

In all other instances, the DPA should discuss with the elected prosecuting attorney or their designee whether the material should be disclosed directly to the defense attorney, or if it should be submitted to the court for an *in camera* review. The DPA should also discuss with the elected prosecuting attorney or their designee the need for a protective order. The DPA shall notify the elected prosecuting attorney or their designee if a judge in their case makes a ruling regarding the admissibility of the PID material.

**VII. When Potential PID Material Is Discovered During Trial**

The DPA should talk to the elected prosecuting attorney or their designee to determine an appropriate action.