111TH ANNUAL IACP CONFERENCE LAW ENFORCEMENT EDUCATION AND TECHNOLOGY EXPOSITION

November 13-17, 2004
Los Angeles, CA

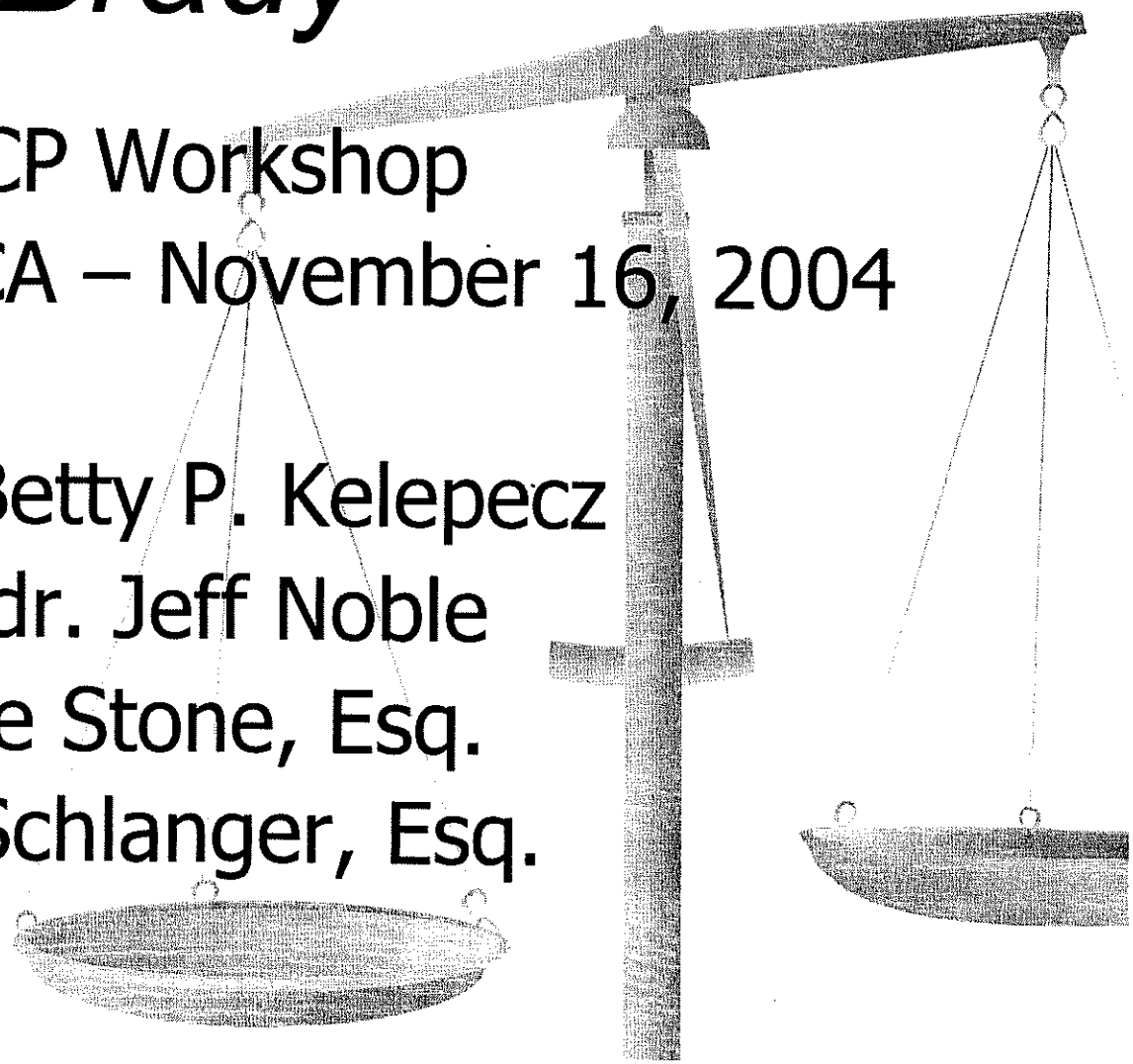
Truth of Consequences: Dealing With The Deceitful Police Officer

November 16, 2004
1:00 PM to 2:30 PM
Los Angeles Convention Center
Room: 403A

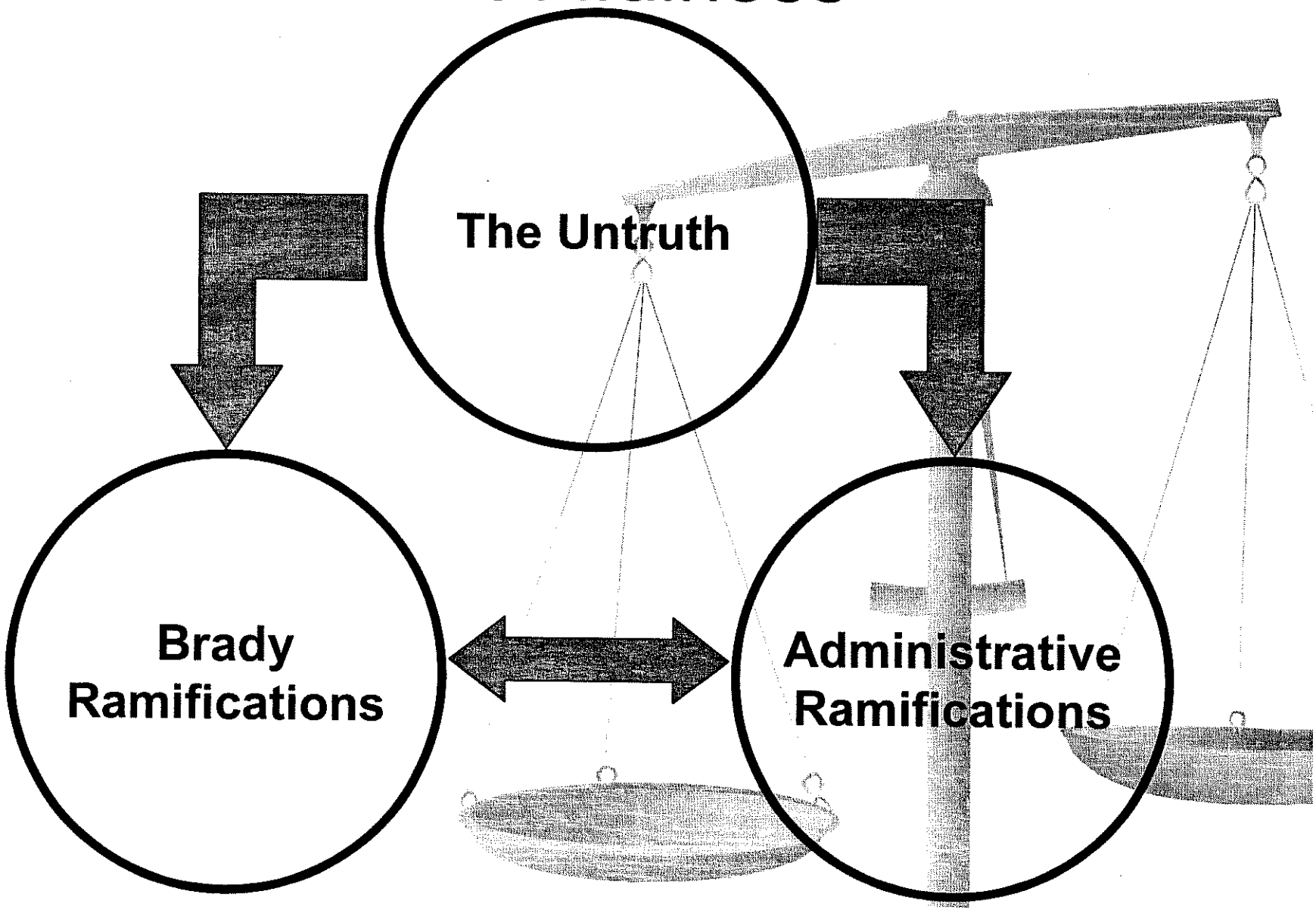
Officer Truthfulness and *Brady*

IACP Workshop
Los Angeles, CA – November 16, 2004

Chief Betty P. Kelepecz
Cmdr. Jeff Noble
Mike Stone, Esq.
Jeff Schlanger, Esq.

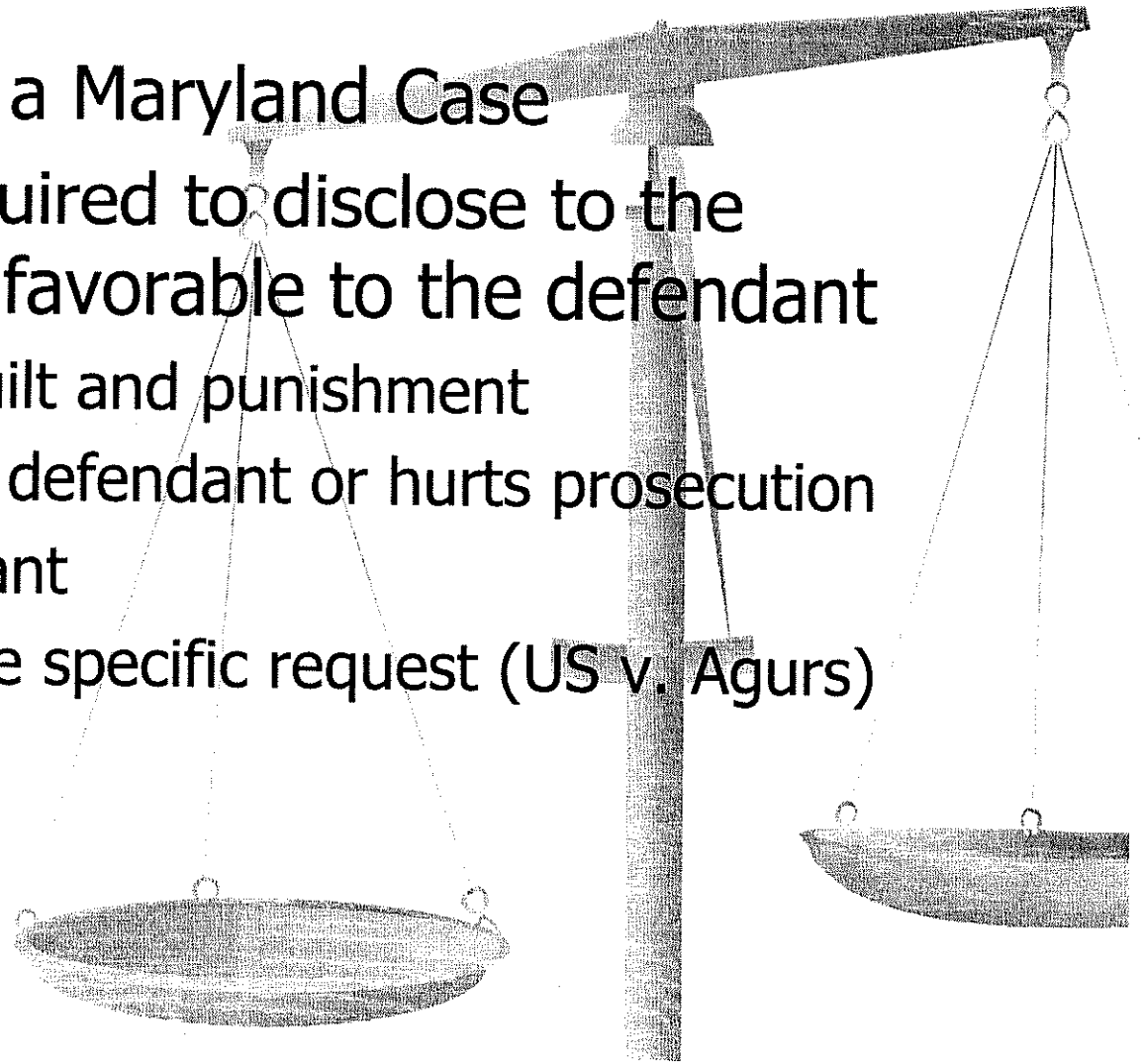


The Ramifications of Untruthfulness



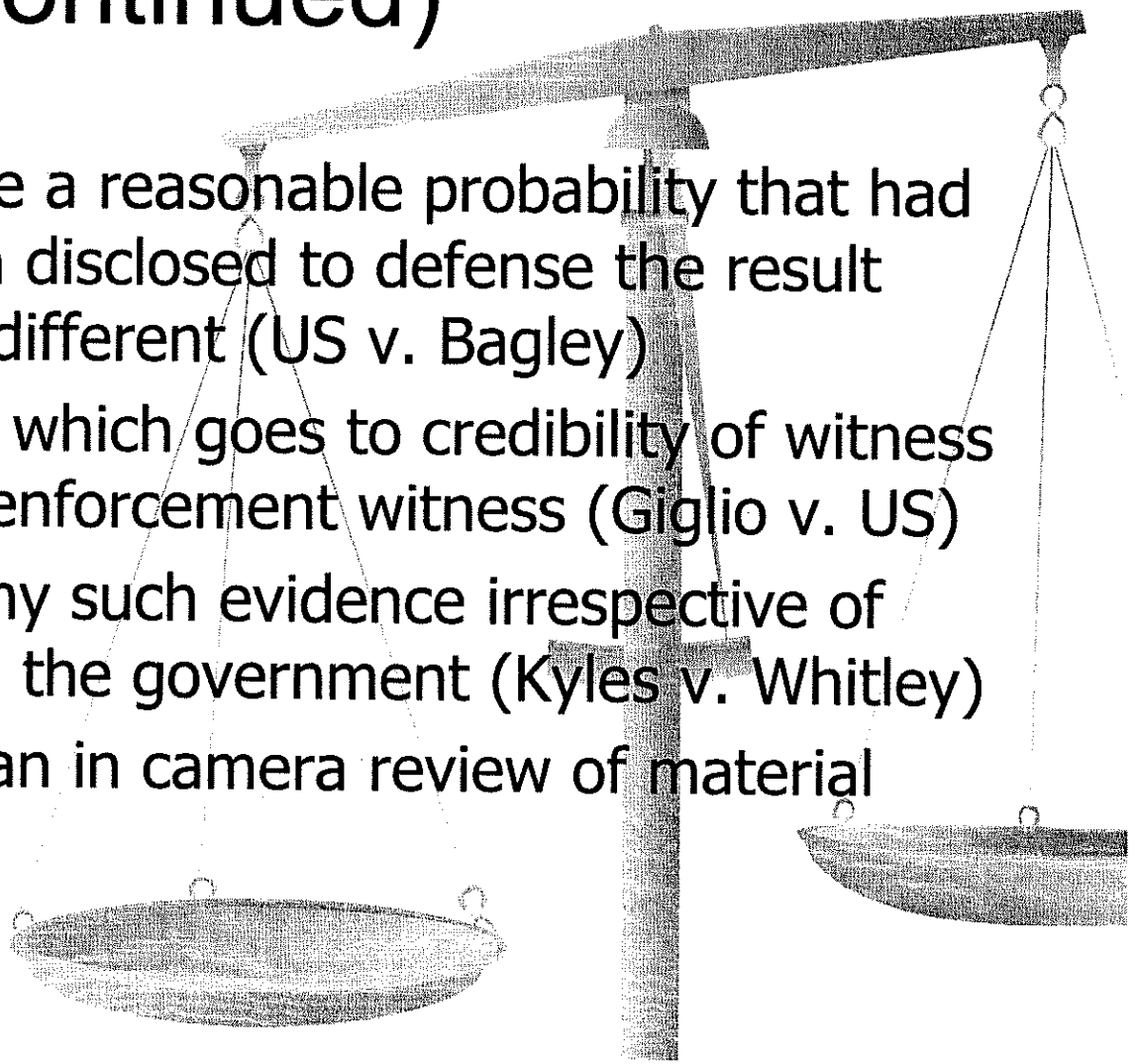
Brady v. Maryland: What is it and what does it require?

- Brady is NOT just a Maryland Case
- Prosecution is required to disclose to the defense evidence favorable to the defendant
  - Applies to both guilt and punishment
  - Favorable if helps defendant or hurts prosecution
  - Good faith irrelevant
  - Doesn't need to be specific request (US v. Agurs)



Brady v. Maryland: What is it and what does it require? (continued)

- Standard: Is there a reasonable probability that had the evidence been disclosed to defense the result would have been different (US v. Bagley)
- Includes evidence which goes to credibility of witness including the law enforcement witness (Giglio v. US)
- Duty to learn of any such evidence irrespective of where it resides in the government (Kyles v. Whitley)
- Judge may make an in camera review of material



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TRAINING BULLETIN

Vol. II, Issue No. 8 — August 1999 (Revised September 2004)

"THE UNTOUCHABLES"–*NEVERMORE?*

By Michael P. Stone, Esq.

One evening in 1999, I sat down with a legal newspaper, the Los Angeles Daily Journal. On page 6, I found an article entitled "The Thin Blue Lie--Current Police Scandals Recall a Decade-Old Saga of Complicity and Corruption."

Immediately I tensed, and braced myself for another assault on the profession I have loved for 37 years. The article was written by Thomas A. Hagemann, now a white-collar criminal defense attorney in Houston. It turns out that his connections to "L.A. Police Scandals" dates back a decade, when he was the Assistant United States Attorney placed in charge of, at least then, the most notorious local police scandal of the times-- "Majors II". Majors II involved the corruption of a team of narcotic detective veterans, and their sergeants, in the Los Angeles Sheriff's Department. The case unfolded during investigation by a combined team of Sheriff's people and FBI, to reveal veteran dope cops "skimming" tens of thousands of dollars off of cash seizures from crooks, after obtaining the crooks' all-important disclaimer: "I've never seen that money before" or "I don't know where that money came from---it's not mine". The lion's share of the seizures followed proper distribution back to the Department pursuant to asset forfeiture protocol. But, considering the level of the crooks Majors II dealt with, and the frequency of their "swoops", single "skims" of twenty or thirty thousand dollars can add up fast. The question is, when is it enough to corrupt?

The early 60's television drama was a favorite of mine: "The Untouchables". Bob Stack as Elliott Ness, leading his team of clean-handed and pure of spirit agents in all-out war on organized crime, shooting it out with the Mafia, knocking over stills, and crashing speakeasies. The term "untouchable" of course refers to the immunity of Ness and his men to corruption, in a time when police were perhaps, the most corruptible in modern history. It was great stuff. It seems that, to every last man and woman who has stood to be sworn after months of police academy training, we believe that we, and all our brothers and sisters in the Thin Blue Line, are "untouchable". That means that we are "incorruptible". When we hear that some of our brethren have moved the line, and are corrupted by the spoils of crime, it makes us feel sick, deep in the gut.

So when I forced myself to read on in Mr. Hagemann's article, I could feel it; and there it was, again: the "code of silence". The article detailed how the prosecutors and investigators cracked open the Majors II scandal--and how they "turned" the sergeant, Robert Sobel, into a government witness against the team that he led, and those with whom he had shared, perhaps hundreds of thousands of dollars of dirty money.

About half way through the article, Hagemann begins to describe, based on his interviews with Sobel, the process of police corruption:

> ***To hear Sobel (and the other deputies who cooperated later) tell it, something akin to corruption starts the minute a fresh-faced cadet hits the mean streets, as the clarity of the police academy and the training manual fades in the distance. An arrestee gives you some lip; you ratchet the cuffs down a little tighter. That doesn't help. The next time, always remembering the time before, you toss the arrestee against the car with a little more gusto. Little things, little steps, little decisions made each day. Lines get blurred.***
>
> ***As the months passed and I spent many days listening to Sobel, I realized how much of the story of police corruption revolved around drugs. The temptation to skim came from the constant contact with outlandish sums of untraceable drug proceeds. The temptation to take "extraordinary measures" to put away dope dealers came, in part, from the intensity of the rhetoric about the "war on drugs". Narco-wars require narco-warriors.***

The article then focused on the author's question: "What is to be done?" After reeling through the obvious answers, better screening of applicants, better and more training, zealous supervision, and prosecution of corruption, Hagemann concludes: "Nothing can be done".

He writes that there are three reasons for this "dead-end". The first is that police must necessarily have extraordinary power, if they are to do so what society asks of them--and, power corrupts. Second, a code of silence exists--but it begins because cops go where no one else goes; they see what no one else sees; they do what no one else does. Those who do not go, see and encounter what cops do, would not understand--so they are not told. Hence, the "code" is an inevitable part of police work. A "conspiracy of silence" begins, but there is nothing evil, nor corrupt about it--at least in the beginning. Finally, Mr. Hagemann notes, "If you ask enough people--good, bad or indifferent people— to go into a room with a bag of apparently untraceable cash, someone will unzip the bag and take a bundle. If you ask enough people to risk their lives in a high speed chase, sooner or later, someone is going to beat the living hell out of a suspect. That is no excuse; that is however, a fact."

Mr. Hagemann leaves us there. And if we accept his conclusion about the inevitability of police corruption, then we have never been, nor will we ever be, untouchable. But somehow, if we can come to understand the process *within the profession;* if we can recognize the ways in which we begin to slowly, even imperceptibly,

move the line, whether by "extraordinary measures" to deal with crooks and gangs, or using just a little more force than the situation requires, or forgetting our commitment just once in awhile--all for the "right" reasons, of course, we may yet remain, *untouchable.*

If there are any questions or comments raised by this article, feel free to give us a call at (626) 683-5600.

About the author:

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TRAINING BULLETIN

Vol. VII, Issue No. 6

Revised September 2004

"*BRADY* MATERIAL"--2005

Protocols for Disclosure of Brady Information in Police Personnel Records to Prosecutors and Criminal Defendants - - The Los Angeles County Model.

by Michael P. Stone, Esq.
and Muna Busailah, Esq.

May 28, 2002– was the effective date of District Attorney Steve Cooley's (then) 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. The policies were revised in December 2002. This bulletin reports on the developments through September 2004.

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 information 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 "prosecution team", including the police, to at a minimum, facilitate the prosecutor's compliance with the *Brady* obligations, by assisting in the identification of

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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.

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" extend 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 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,

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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.

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 02-07 and 02-08" (December 2002).[4] The superseded Directives are 02-04 and 02-05.

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 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.

[4] The full texts of these directives are available at the L.A. District Attorney's website, at http://da.co.la.ca.us/sd02-07 (and 02-08).htm.

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 02-07, pages 1 and 2, 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 possible *Brady* material, using a specially-designed form which is to be completed by the agency and returned to the prosecutor (see attached "*Brady* Request Form"). 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 02-07, 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 02-08, pages 3, 4.)

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 02-08 states:

> This 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. 02-08, pages 5, 6.)

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).)

A "Brady Compliance Division" within the District Attorney's office is charged with operation of the *Brady* Alert System. The standard to be applied is "clear and convincing evidence" that potential impeachment material is reliable and credible before it will be entered in the Brady Alert System. Before the information is entered, the officer is notified, permitted to see the information, and allowed an "appeal" of sorts to challenge the accuracy of the information.

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.

About the author:

Michael P. Stone and Muna Busailah, shareholders in Michael P. Stone, P.C., Lawyers. Michael P. Stone is a Pasadena, California-based police defense lawyer. His firm's practice is limited to representation of local, state and federal officers, and agencies in criminal, civil, administrative and appellate matters in state and federal courts

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MICHAEL P. STONE

Attachment: Brady Information Request Forms, 3pp.

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fax (909) 653-1943

DISTRICT ATTORNEY
REQUEST THAT LAW ENFORCEMENT CONDUCT
A REVIEW OF ITS FILES FOR
POSSIBLE *BRADY* DOCUMENTS

The Office of the Los Angeles County District Attorney has determined that the following employees of your department may be material witnesses in:

People v._____
Case #_____

Therefore, it is requested that_____ review any files in your agency in order to locate any possible *Brady* documents for:

Brady is information or evidence that: (1) impeaches a prosecution witness; or (2) tends to exonerate a defendant. Evidence of conduct involving dishonesty or improper use of force or tending to show bias, which occurs in the course of exercising peace officer powers (pursuant to P.C. section 830.1) and while interacting with the public or when engaging in investigatory functions, may be deemed *Brady* documents.

We are NOT seeking unsubstantiated allegations of misconduct.

If no *Brady* documents are located for any of the above-listed employees, please so indicate on this form and return it to:

Head Deputy or Deputy-in-Charge_____
at_____
on or before_____

If *Brady* documents do exist for any of the above-listed employees, please identify the name, ID number and employment status of any such employee on this form and return it as indicated above.

ONLY INDICATE THE EXISTENCE OF POSSIBLE *BRADY* DOCUMENTS ON THIS FORM. DO NOT RETURN OR DISCLOSE ANY DOCUMENTS.

Thereafter, the District Attorney's Office will file a motion requesting that your department bring any possible *Brady* documents to court. Procedures set forth in Evidence Code sections 1043-1047 will be followed. The court will review any documents *in camera* in order to decide whether to release any possible *Brady* documents to both the prosecution and defense.

The obligation to provide *Brady* documents is ongoing. If your department receives any new *Brady* document regarding your above-listed employees, notify Head Deputy or Deputy-in-Charge _____ immediately.

_____ _____
Date Deputy District Attorney

_____ No document reasonably foreseen as constituting *Brady* documents exists for any of the above-named employees.

_____ Possible *Brady* documents exist for the following employees:

_____ _____
Date Name - Print

_____
Signature

_____
ID Number

_____
Telephone Number

GUIDELINES

Examples of possible impeachment evidence of a material witness include but are not limited to:

1. False reports by a prosecution witness.
2. Pending criminal charges against a prosecution witness.
3. Parole or probation status of the witness.
4. Evidence contradicting a prosecution witness' statements or reports.
5. Evidence undermining a prosecution witness' expertise.
6. A finding of misconduct by a Board of Rights or Civil Service Commission that reflects on the witness' truthfulness, bias or moral turpitude.
7. Evidence that a witness has a reputation for untruthfulness.
8. Evidence that a witness has a racial, religious or personal bias against the defendant individually or as a member of a group.
9. Promises, offers or inducements to the witnesses, including a grant of immunity.
10. An employee presently under suspension.

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TRAINING BULLETIN

Vol. II, Issue No. 7 | July 1999 (Revised August 2004)

"TRUTH OR CONSEQUENCES?"
(THE PATH TO CAREER DESTRUCTION)

Truth, honesty and veracity are character traits that we all agree are essential qualities in law enforcement candidates. Police agencies would not think of hiring an applicant who had demonstrated a lack of honesty, either in his or her background, or in the application process itself. Any of us who might be called upon to describe the most important attribute necessary to law enforcement officers would list personal integrity first.

Why is it then, when everyone recognizes that honesty and truthfulness are indispensable to continued career vitality, too many of our colleagues, when put to the test, fail, and are surprised to learn that they will not retain their positions?

In 1967, I was sworn in as a police officer in a San Francisco Bay Area suburb. It was no different then. Credibility was something, even back in those years, that was simply not to be compromised. And since then, nothing in this profession has changed in a way that would de-emphasize or undercut the central prominence of truthfulness on the job. Indeed, as the notion of a police "code of silence" has become public concern, the focus on personal integrity and credibility becomes ever clearer.

Accordingly, we would expect to see a corresponding reduction in the number of cases where deputies and officers are charged with and disciplined for "false and misleading" statements. Unfortunately, this has not happened. I haven't seen statistics, but being exposed, day in and day out, to a wide spectrum of internal investigations in southern California, it strikes me that we have a serious problem confronting us: our members need, more than ever, to understand that there is no way back from material lies and false denials made during any official inquiry.

An important part of this understanding includes contemplation of the reasons why deception and attempts at it are not, and cannot be tolerated. A law enforcement officer is expected to speak that truth in a variety of duty-related contexts, including, of course, testifying. But just like any other witness, an officer who testifies or forswears an affidavit, automatically puts his or her own credibility in issue. When one's credibility is in issue, his or her *character* for truth, honesty, and veracity is also in issue. The most common way of attacking a person's character for truth, honesty and veracity is to show that the person has a poor reputation for these character traits. This is demonstrated most powerfully, by showing specific, identified instances of lying, misleading, or deception. It follows then, that a party who wishes to attack the veracity of a testifying officer, should be permitted to do so by proof that the officer has deceived, or tried to, in the past, in a duty-related matter. If the officer has violated his duty to speak the truth in the past, then his credibility under oath is seriously compromised.

Under recent interpretations of the *Brady* doctrine, prosecutors are under a duty to disclose to the defense that an officer-witness has been deceptive about material issues in a duty-related incident. Police administrators are being urged to disclose these facts to the prosecutor. In certain cases of which I am personally aware, prosecutors have notified departments that they will not file cases from reporting officers who have deceived their supervisors in serious official matters. Such an officer will likely be deemed unfit, and subject to discharge, as a consequence.

Today, a police administrator, faced with an employee who has attempted deception in a material matter, can be counted on to simply avoid the problem of the untruthful officer-witness, and terminate the officer upon the *first* determination that he or she has lied. In connection with this, chiefs and sheriffs have applied phrases like "*zero tolerance*" and "*you lie, you die*" to this issue of officer veracity.

Let us be clear, *if one attempts deception about a material or substantial issue in any duty-related context, one must also assume that termination will result*. Further, there will be no ability to secure public law enforcement employment ever again. It is as simple as that.

Why do officers lie? Sometimes, it is out of a desire to avoid, at any cost, admissions of misconduct. It is done with full knowledge of the consequences, and it is a deliberate effort to cover up wrongdoing. Clearly this demonstrates unfitness, standing alone.

In other, perhaps most cases, officers lie out of undue fear of the consequences, or out of ignorance, or in a sudden, knee-jerk response to an unanticipated question or inquiry. In these cases, time to reflect and persuasion will often dissuade the officer from going through with the lie. The problem is, usually there isn't the time or opportunity for reflection or persuasion, and unfortunately, the lie is spoken.

The reality is, however, it doesn't matter whether the lie results from premeditation, or is rather the influence of fear, ignorance or surprise. A lie is a lie.[1]

There are some among us, unfortunately, who whenever and however they are put to the test, will fail it, because they lack the central character trait: integrity. There is nothing we can do for them. They don't belong in our ranks, and they need to be identified and eliminated.

But what do we do about fear, ignorance, and surprise, when there isn't time for reflection, consideration, consultation or persuasion? It takes this: each member must periodically contemplate the place of honesty and integrity in his or her profession, reaffirming that it simply cannot be compromised, recognizing that any failure to speak the truth will lead to career destruction, and committing to himself or herself that, in any circumstance where there is a duty to speak, it will only be the truth. In this way, just as we mentally prepare ourselves for the sudden and unexpected incident on the street, we mentally prepare for the unexpected or stressful inquiry about something we have done, or have failed to do. Just as "muscle memory" aids the officer in the sudden deadly or violent confrontation, "ethical memory" will lead us in the right way when our actions are questioned. But just like shooting, defensive tactics, gun retention and all officer safety techniques, we must think about our integrity and honesty, practice it always, and commit to apply it when the circumstances are presented. We need to do this enough so that it is always the *automatic response*--then fear, ignorance and surprise will not exact such a heavy toll in police careers.

If you don't believe this, consider: how many of our comrades have lost their jobs because they lied in cases where the underlying misconduct, even if

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[1] We also need to recognize that not every false statement or deception demonstrates unfitness. Rather, the focus of this paper is upon those false statements about serious and substantial issues in a duty-related matter; those that are intended to cover up serious misconduct, violate a person's liberty, or present false evidence, for example.

admitted, would not have resulted in termination? In my own experience, *most* terminations for lying are in this category. If you are still unpersuaded, know this: One should not seek out an ethical lawyer or representative for representation if one plans to lie--he or she will not participate, because *today's lie becomes tomorrow's perjury*. Believe this as if your career depended upon it, because it does.

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TRAINING BULLETIN

Vol. VI, Issue No. 2 February 2003

SOME POINTS ABOUT POLICE TESTIMONY

IN ANY INVESTIGATION OR TESTIMONY, ALWAYS TAKE TIME TO REVIEW PRIOR STATEMENTS

A recent case we handled underscores the need for law enforcement officers to take the time to carefully review any prior statements they have made before testifying about the subject matter of the prior statement, and before giving a subsequent statement about the same events. Sounds simple enough, doesn't it? **The idea of refreshing one's recollection from a prior report, statement or recording is so basic, as to hardly require emphasis, right?**

Yet, in considering the hundreds of times and myriad of situations I have seen officers and deputies crucified with "prior inconsistent statements" over the past 35 years, I have concluded that the proposition requires review, and most of all, your thoughtful consideration.

So much of what we write about in articles and bulletins, and speak about in seminars, is designed to warn you about dangers, and preserve your professional careers. This is most certainly another one of those. Please take these points seriously. Remembering to do the things we describe in the article which follows can mean the difference from saving, or losing, your career.

Of course, these points, like many of those we have urged upon you before, go to that single, most important peace officer character trait: INTEGRITY. Your *character*, and your *reputation*, for truth, honesty and veracity are as important to your professional career, as is your ballistic vest or body armor to your survival, when someone tries to take you out.

Almost all that we have written before on this subject has been in the form of (1) explaining why dishonesty, however slight or seemingly harmless, is not acceptable; and (2) encouraging you to embrace and practice ethical standards in all that you do. This we have done, by demonstrating that today, more than ever, dishonest words and reports, whether under oath or not, will just *not* be tolerated in any law enforcement organization. An officer or deputy with a poor character or reputation for truth, honesty and veracity is of *no value* to law enforcement.

Over the years, we have heard some colleagues enjoin representatives for officers who are under investigation to "admit nothing, deny everything, demand proof!" This always seems to trigger smiles and chuckles in the audience at seminars. And the

reason it does is because it is not serious, or to be taken seriously. But I worry about that when I hear it; *is this the message we want to send*?

Even if said in jest, doesn't it tend to suggest that it is okay to conceal the truth, at least until that time when you are directly confronted with a question that

requires a "yes" or "no" answer? It is risky business, my friends. Most law enforcement officials regard the failure to bring forward pertinent facts reasonably called for in a question, to be as evil as the false affirmative response. "Well, I was never specifically, narrowly, and directly asked that *particular* question" doesn't go very far these days to extricate a member from a "false and misleading" charge.

But what about the member who, while not *intending* to deceive, fails through innocent misrecollection, failed recollection, or carelessness to offer an accurate account of an event? While not having the *intent* to lie or deceive, the member nevertheless offers a provably incorrect statement. Is that *lying*? No. Could it be misconduct? Yes. But here is the real question: Might the Chief or Sheriff, or a judge or jury *think* the member is lying? Of course. Truth be told, innocent mistakes in recollection or in testifying can produce disastrous consequences, because someone with the authority to decide, thinks the inconsistencies are *not* "innocent", but rather willful fabrication.

So, apart from refusing to *lie* about anything in official matters, we need to make sure that our statements, reports and testimonies are as *accurate as possible*. If we can avoid inaccuracy and inconsistency, then our "honest" statements, writings and reports will not be viewed with suspicion and distrust. In other words, don't permit the opportunity for a decisionmaker to decide whether your incorrect or inconsistent statement is the product of innocent mistake or willful fabrication. Sometimes it is not easy to determine, leading to the possibility that a truly innocent but mistaken member is branded a liar and fired.

Okay, so how to do this? We start with the simple proposition that *human memory is not like fine wine, which gets better with age.* As a trial lawyer and cross-examiner, I am accustomed to both asking and hearing others ask a witness, "So, would you say your memory of the event is better now, three years later, than it was on the date you gave this statement?" When you hear this, you know one of two things has happened; either (1) the witness has *contradicted* his earlier statement and affirmed that his current recollection is accurate, regardless of his prior statements; or (2) the witness has said something inconsistent with his earlier statement, but, as yet, doesn't realize his testimony is different.

In the first situation, the witness likely will stick with his current testimony, and either explain why his current testimony is more accurate than the statement three years ago, or he will agree with the examiner that indeed his memory has "improved with age", which is of course highly improbable because it is inconsistent with human memory and experience.

In the second situation, the witness, once confronted with the prior statement, will probably concede that the earlier statement is more accurate and recant the current testimony – but always, the question could be argued: innocent misrecollection or an attempt to deceive?

Misrecollection and failed recollection are neither uncommon nor alarming. *But in a profession that places such a high premium on truth and accuracy, it is important to consider the quest for accuracy in statements, testimony and reports, to be second only to honesty.* Usually, if members testify, speak or write inconsistently with a prior statement or report, it is because they have not sufficiently prepared for the subsequent statement, testimony or report by carefully reviewing all *previous* statements, reports or recordings. The purpose of this is to refresh the recollection before giving *subsequent inconsistent* testimony or statements.

If we agree that memory doesn't age well, even over a week, than we must also concede that it is much safer to review and refresh, instead of counting on our unaided memory to recall everything exactly the same at a subsequent time.

A witness who is testifying in a court and who wishes to refresh his memory about an event *before* answering a question will be permitted to do so, so

long as the witness can say that the earlier statement or report contains information that will permit the witness to testify more accurately by refreshing the recollection.

What would you say about a witness who, despite that an earlier statement or report he gave was made when the events were very fresh in his recollection, eschewed the opportunity to review his prior statement or recording, preferring to rely instead on his independent, unaided recollection? Doesn't a witness, particularly an officer or deputy in official matters, have a duty to make sure his or her testimony is as accurate as possible?

The law recognizes that the quest for truth in official proceedings is enhanced if witnesses refresh their recollections whenever possible. In fact, the Public Safety Officers' Procedural Bill of Rights Act ("POBRA") at California *Government Code* § 3303 (g.) specifically provides that if an officer is under investigation and subjected to interrogation, the officer *shall be permitted* to have access to any prior recording or statement (including a summary) he gave, before being interrogated at a second or subsequent time. The purpose of this rule, is to ensure that members are not put to "memory tests" in successive interrogations, creating the potential for inconsistent recollections to be turned into false statements.

Memory is influenced by other variables besides time; for example, exhaustion, stress, emotion, inattention, carelessness, laziness, and many others. Why risk giving inaccurate testimony if there is an opportunity for you to review your prior statements? Would you ever go to court to testify in a criminal case without reviewing throughly your arrest report? If not, why do the equivalent in an administrative investigation, or a criminal investigation?

Department managers and association leaders will, I suppose, eternally disagree over whether a "witness" officer or deputy has the right to representation when giving a statement in an investigation. That is not the point of this article. Whether a representative is present or not, if you are providing a written statement, keep a copy or obtain a copy *and* review it carefully before writing, testifying or speaking in an interview at a subsequent time about the event. If you are interviewed in a tape-recorded session, have *your own* tape recorder on, as well, and review the recording carefully before any subsequent interview.

In all cases, before a second or subsequent interview, always demand the opportunity to listen to your previous interview recording before participating in a subsequent interview or interrogation, even if you don't have your own recording.

This is not so that you can perpetuate a false statement. Rather it is to protect you from unjust results of innocent misrecollection or failed recollection. Look out for yourself – nobody else owns that job.

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Police Officer Truthfulness and the *Brady* Decision

By Jeff Noble, Commander, Irvine, California, Police Department

Truthfulness and the 1963 *Brady* decision have become hot topics in law enforcement circles.Although years went by without much concern with the Brady decision, recent U.S. Supreme Court decisions have enforced *Brady* to include evidence maintained in a police officer's personnel files. Under *Brady,* evidence affecting the credibilityof the police officer as a witness may be exculpatory evidence and should be given to the defense during discovery. Indeed, evidence that the officer has had in his personnel file a sustained finding of untruthfulness is clearly exculpatory to the defense. To remind the reader, in 1963 the Supreme Court ruled in *Brady* v. *Maryland* that the defense has the right to examine all evidence that may be of an exculpatory nature. This landmark case stands for the proposition that the prosecution will not only release evidence that the defendant might be guilty of a crime but also release all evidence that might show that the defendant is innocent as well.

Today many police executives have recognized the importance of officer credibility and have established a "No Lies" proclamation. As simple as No Lies sounds, it is far more complex and difficult to manage. Lies are not a fixed target; rather, deception exists on a continuum, from what is commonly called social lies or little white lies to egregious misconduct that warrants dismissal or prosecution. The true challenge is in dealing with deceptive conduct that lies somewhere in the middle of the continuum—not so far on one end of the continuum for termination and not far enough toward the other end of the continuum to be justifiable or excusable.

No Lies

Law enforcement executives have responded to these judicial decisions by imposing strict rules and, on the surface, No Lies seems great. This black-and-white rule certainly appears to be one upon which everyone can agree. To achieve a goal of maintaining the officer's and the department's credibility, ruling out all lies is the simplest solution and the easiest to enforce. But are police administrators really prepared to enforce the rule as it is communicated in the No Lies maxim?

There is an adage in management circles that rules should be explained and tools provided so employees can achieve the vision set out for them. No Lies, however, does not express the true concern of police administrators. Rather, the concern is with improper, intentional, deceptive conduct that affects an officer's credibility, whether that deceptive conduct consists of lying, making material omissions, or engaging in other unacceptable deliberate actions.

Not only should there be a policy defining improper, intentional, deceptive misconduct but there should also be a clear definition of deceptive conduct that is accepted by an agency. In police work, deceptive conduct in some areas is not only condoned but also encouraged or even required. The key to developing a policy is an understanding of the difference between deceptive conduct and deceptive misconduct.

What Is Lying?

In *Lying* (New York: Vintage, 1999), Sissela Bok defines a lie as any intentionally deceptive stated message. According to Bok, these are statements that are communicated either verbally or in writing. Lying is a subset of the larger category of deception, and deception is undertaken when one intends to dupe others by communicating messages meant to mislead and meant to make the recipients believe what the agent (the person performing or committing the act) either knows or believes to be untrue. Deception encompasses not only spoken and written statements but any conduct that conveys a message to the listener. Deceptive conduct can range from verbal statements or writings to physical expressions such as a shoulder shrug, eye movement or silence—any intentional action that conveys a message.

Historically, not all intentionally deceptive conduct in social interactions has been considered improper. Indeed, as early as the Middle Ages, Saint Thomas Aquinas classified deceptive conduct as helpful, joking, or malicious. Aquinas argued that lying helpfully and lying in jest may be acceptable forms of conduct, whereas telling malicious lies, lies told deliberately to harm someone, was a mortal sin.

Acknowledging that some deceptive conduct is acceptable helps to define deceptive misconduct. For example, the classic dilemma, argued about for centuries, is what to do if a murderer approaches you and asks the location of his intended victim. If you tell the truth, the murderer will kill the victim. If you lie, the intended victim will have the opportunity to escape. Although this hypothetical dilemma forces you to choose between insufficient options with no other choices, it is illustrative of Aquinas's argument. Lying to a murderer to protect a potential victim is helpful, and it may be both morally and ethically the proper thing to do because it is the lesser of evils under the circumstances.

Lies Justified by Investigative Necessity

In the performance of their duties, police officers frequently engage in a significant amount of deceptive conduct that is essential to public safety. Consider lying to suspects, conducting undercover operations, and even deploying unmarked cars.

Presenting a suspect with false evidence, a false confession of a crime partner, or a false claim that the suspect was identified in a lineup are but a few of the deceptive practices that police officers have used for years during interrogations. These investigatory deceptive practices are necessary when no other means would be effective, when they are lawful, and when they are aimed at obtaining the truth.

Some, like John P. Crank and Michael A. Caldero in *Police Ethics* (Cincinnati: Anderson, 1999), have argued that accepting these types of deceptive practices places the police on a slippery slope, which will create a belief by officers that all deception is acceptable, or a perception by the public that diminishes the trustworthiness of officers. It may be true that some persons who engage in serious misconduct began with minor acts of deception, but it does not follow that all deception is a gateway to serious misconduct. Most police officers can distinguish the differences and do not conclude that specific, lawful deception implies the rightness of all deception. The majority of police officers are quite capable of applying the Constitutional test of whether that deceit would make innocent persons confess to a crime that they did not commit.

Lies Made in Jest

Where specific lies can be supported by rational argument as justified, other lies may be deemed excusable by the same type of ethical analysis. Lies made in jest, although sometimes callous and hurtful, do not affect an officer's credibility unless they are in such bad taste that they call into question the person's judgment in general. Between officers, embellishments and exaggerations are commonplace in the descriptions of the misfortunes of others. A sense of humor, even where some deception is involved, can and does help responsible persons cope with great stress and grim circumstances. Indeed, a sense of humor and a sense of proportion may be inseparable under the worst circumstances. Although humor is an acceptable practice at the appropriate time, humor is not a shield to the disciplinary process. When jokes become intentionally harmful to others, they become malicious lies that should be dealt with accordingly. Agency leaders should not strive to create such a sterile workplace that humor is forbidden, for they would succeed only in making themselves objects of derision and ridicule. Police leaders should seek to establish and enforce reasonable standards.

Deception concerning trivial matters, often told to spare another's feelings may also be excusable. These white lies are meant not for any personal gain but rather for social courtesy. Not every social situation calls for the whole truth. How do I look? What do you think? Sometimes benign statements or tactful silence are the most appropriate responses.

In *The Varnished Truth* (Chicago: University of Chicago Press, 1994), David Nyberg asserts that acts of deception are such common practice in human communication that deceptive conduct would be impossible to prevent entirely by any rule, law, policy, or manner of enforcement. From the social kindness of white lies to embellishments, exaggerations, and boastful behavior, we frequently conceal the truth for a variety of reasons. We not only condone these activities but also teach our children the art of deception from an early age. Children learn from their parents, friends, television, books, and other sources how to deceive. Children quickly learn how to maintain a poker face, so their hand is not easily identified by their body language, or in sporting activities where young athletes fake a throw or head-fake an opponent by looking one way and going another.

Our laws and culture have even created exceptions to the unvarnished truth such as in advertising, recognizing that there is speech that tends to embellish the value of a product, but because these speech patterns are so common and easily recognized, they do not dupe a reasonable, mature person into a false belief. This exception, called puffery, encompasses terms like "world's best," "the greatest," "the purest," and so on.

Malicious Lies

Although lies justified by necessity, lies told in jest, and white lies may be acceptable forms of deception in law enforcement, malicious lies are the true evil of officer misconduct. The difference between lies justified by necessity or lies made in jest and malicious lies is the presence of actual malice by the communicator. Here, malice would include not only lies told with a bad intent but also lies that exceed the limits of legitimacy.

For example, a police officer may be tempted to testify falsely to imprison a criminal. The officer's intent may be a worthy objective to the public; removing a criminal from society and the officer may validate his intent in his own mind by believing that he is engaging in a greater good. But this lie would violate the standard by which we would say the lie was reasonable and appropriate under the circumstances given the status obligations of the person engaging in the lie. Although the intent may be legitimate, the actions are malicious. This malice is the motive by which any sense of limits or constraint or fidelity to law and policy is destroyed.

It is important to understand that motive or intentions can be mixed, so that a person may deceive in order to pursue some worthwhile, utilitarian goal (such as public safety) and at the same time have a malicious disregard for the rights of the suspect and for the laws, policies, and limits that apply to policing. This willingness to betray basic principles of honesty attacks the very public safety that the person believes himself to be pursuing. A police officer who by malicious disregard goes beyond the limits of legitimacy is a threat to the public safety, since the officer may end up violating anybody's rights, and this poisons the idea that the lie is advancing public safety.

Deception Continuum

Perhaps it is easier to assess intentional deceptive conduct on a continuum. At one end is intentional, malicious, deceptive conduct that will take one of three forms:

- Deceptive action in a formal setting, such as testifying in court or during an internal affairs investigation
- Failure to bring forward information involving criminal action by other officers, also known as observing the so-called code of silence
- Creation of false evidence that tends to implicate another in a criminal act

Intentional, malicious, deceptive conduct in any of these three areas will permanently destroy an officer's credibility. Should an officer violate these standards, there is no alternative in an employment context other than termination or permanent removal from any possible activity where the officer could be called upon to be a witness to any action.

At the other end of the continuum are lies justified by necessity, which may be defended, based on the circumstances and excusable lies, including lies made in jest and white lies, which like minor embellishments and exaggerations are not intended to harm others or convey a benefit to the communicator. These types of deceptions are at least excusable if not acceptable.

Officer Truthfulness: Relevant Case Law

Haney v. *City of Los Angeles*, 109 Cal. App. 4th 1 (2003).

Ziegler v. *City of South Pasadena*, 73 Cal.App.4th 391 (1999).

Brogan v. *United States*, 118 S. Ct. 805 (1998).

LaChance v. *Erickson*, 118 S. Ct. 753 (1998).

Ackerman v. *State Personnel Board*, 145 Cal. App. 3d 395 (1983).

Gee v. *California State Personnel Board*, 5 Cal. App. 3d 713 (1970).

Brady v. *Maryland*, 83 S. Ct. 1194 (1963).

Deceptive conduct at either end of the continuum can be dealt with easily. At one end, the conduct does no harm and no action is necessary. At the other end, there is great harm and there is no option other than the termination of the officer's employment. The problem is not the conduct at the ends of the continuum, but rather the conduct that falls somewhere in between. Consider the following example:

> *A supervisor asks an officer whether a particular report has been completed. The report itself is of very little consequence, and the question was prompted by a routine administrative action rather than any specific employee concern. The officer has not submitted the report but quickly replies that the report has been turned in, fearing what would be at most a minor counseling by the supervisor. The officer then immediately completes the report and turns it in before the supervisor can discover the lie.*

In this example, the officer was dishonest. He was asked a direct question by a supervisor and he failed to respond truthfully. Although the officer had no opportunity for reflection, there is no excuse for his misconduct. The question was not posed as part of a formal process, the officer was not engaging in an action to protect another officer, and there was no conduct that would place a community member at risk of a false prosecution. Similarly, there is no evidence that the officer's deceit was either justified or excusable.

What is left is conduct that falls somewhere in the middle of the continuum. The officer's response is certainly not acceptable, but it leaves the question of whether it is far enough on the other end of the continuum to be grounds for termination. There is a strong argument for termination in this case. After all, the officer was asked a direct question by a supervisor about a work-related subject and the officer responded untruthfully. The difficulty for managers is balancing the need of the department and community to have officers that are beyond reproach against the recognition that all officers are human beings and that they have human failings. The officer's response may best be described as a spontaneous, unintelligent statement, and there are other factors that should be considered in making a final determination. Is the officer remorseful? Does the officer recognize the error? Does the officer have an otherwise acceptable record with the department? Was the underlying issue one of very little consequence?

Consider the following:

> *A dispatcher asks an officer if he is available for a call. The officer radios that he is out of service and unavailable, when in fact he does not want to receive a call because it is near the end of his shift. Based on the officer's statement, the dispatcher assigns the calls to another officer.*

As in the last scenario, the officer's conduct is neither justifiable nor excusable. However, the conduct probably does not amount to the end of the scale that mandates termination. It is this type of intentional, deceptive, misconduct that can be termed "administrative deception" that creates consternation for police management. The conduct may not warrant termination, but a sustained finding of untruthfulness creates a *Brady* issue that many believe will prohibit the officer from continuing his employment. The question then becomes, does Brady mandate termination on the basis of any lie or act of deception?

Brady *Analysis*

The No Lies rule causes managers to deem that *Brady* has taken their discretion away on these cases that fall outside the justified or excusable categories. But removing management discretion is not the *Brady* rule. *Brady* stands for the proposition that evidence that may be exculpatory in nature must be given to the defense. In a case where an officer will be testifying as a witness to an event, the officer's credibility is a material issue and his lack of credibility is clearly potentially exculpatory evidence and therefore sustained findings of untruthfulness must be revealed.

It seems that the analysis often stops at this point, suggesting that if there is evidence regarding an officer's credibility, the officer can no longer be placed in a position where he may become a percipient witness in an investigation. If that evidence is that the officer violated the far right of the continuum—deception in a formal process, participation in a code of silence, or planting evidence—both *Brady* and responsible management principles dictate the termination of the employee. But what if the misconduct is in the middle area of the continuum? Working through the complete *Brady* analysis and court evidence admission process will help the manager make this determination.

First, it is important to understand that even though the defense gets the information—and they should get it—there is no guarantee that the defense will be able to present the evidence of officer misconduct to the jury. It is the court, not the defense, that makes this determination. In its decision to admit evidence, the court will weigh the evidence to determine if it is more probative than prejudicial. Not all evidence of deceptive conduct by an officer will be admissible.

Think about an officer who engages in a secretive extramarital affair. At a minimum, the officer has lied to a spouse and broken a vow (an oath) to remain faithful. If there is evidence that the officer has maliciously lied for his own benefit, it certainly follows that the officer's credibility and testimony may be questioned. Although the officer may have committed a mortal sin according to Aquinas, the evidence of the officer's deception will probably never be heard in court. This type of evidence would be prejudicial against the officer's credibility, but at the same time it offers very little probative evidence on the officer's credibility while testifying in court and therefore most judges would not permit this evidence to be introduced.

Courts are likely to treat many administrative lies in the same manner. The court would probably view these administrative lies as evidence that would uniquely tend to evoke an emotional bias against the officer as an individual and would have very little effect on the issues. But even if the court allows the evidence to be presented to the jury the analysis has not been completed. The prosecutor will be able to present evidence in an effort to rehabilitate the officer. How long ago did the misconduct occur? Was it of a relatively minor administrative issue? Did the officer show appropriate contrition? Was the officer punished? Did the misconduct occur more than once? Has the officer received training as a result of the discipline? Did the officer that made the statement immediately make a subsequent truthful admission? Is there evidence that the officer's conduct has changed?

Police managers should weigh all of the factors of deceptive actions that fall at the middle of the continuum and use their management discretion on a case-by-case basis. In some cases, termination will follow. In others, it may not.

Managers should also be warned that there would be a strong temptation to use euphemisms in describing the officer's misconduct to protect the officer and the agency against potential *Brady* issues. In the examples cited above, managers may choose to discipline for the underlying misconduct—failing to complete a report and failing to respond to a call, rather than disciplining the officers for their statements. This type of discipline would send the wrong statement to both the officers and the organization. The officers should be disciplined for their deceptive misconduct as well as the underlying conduct. If management did anything else they would be engaging in intentional deceptive misconduct on a greater level than the officer. In the above examples, the officers' statements were spontaneous, where management's actions to discipline for only the underlying misconduct were thoughtfully chosen to hide the officer's deceit.

The key in making a decision regarding a particular middle-of-the-continuum deception is whether management can defend their decision or thoughtfully tell their story. The decision must be able to withstand rigorous analysis from those on all sides of the issue. In making the

final decision, the chief of police must determine whether he or she can stand in front the community and defend the department's position. If so, then the chief should deal with the issue directly and honestly; if not, there is no alternative other than termination.

No Lies has started a conversation, but refinement of that discussion focuses our energy on the areas of deceptive conduct that cause the real concern for police administrators. In law enforcement, malicious deceptive conduct includes intentional deceptive conduct in a formal setting, the code of silence, and the false implication of another in a criminal act. A violation of any of these precepts should effectively and permanently end an officer's career. Both honesty and the reputation for honesty in law enforcement are absolutely essential. Those who are not able to meet these expectations simply are not able to fulfill the essential job requirements of a peace officer.

Law enforcement managers should be able to recognize deceitful conduct at either end of the scale and deal with the conduct appropriately. The issues that fall somewhere in the middle of the continuum are obviously much more difficult. The issue is not whether these middle ground deceptions are acceptable; they clearly are not. Any intentional deceptive conduct that is not justified or excusable is inappropriate. The issue for police managers is whether they have management discretion and whether there is any punishment available to them other than termination. The answer is that police chiefs have discretion available to them and that not every act of intentional deception may be worthy of termination. But management must be warned that with their discretion comes a duty to punish the inappropriate behavior and the willingness to deal with the officer's action for years in the future.

In life, there are often second chances, and sometimes even more. In law enforcement, there are no second chances when it comes to the integrity of our officers and ourselves. In law enforcement, malicious deceptive conduct is untenable and cannot be tolerated at any level in the organization. ❖