Best Practices for Navigating *Brady v. Maryland* in Oregon

March 31, 2014

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BEST PRACTICES for Navigating *Brady v. Maryland* in Oregon:
Disclosure of Material, Exculpatory or Impeachment Evidence

Executive Summary for Prosecutors

The Statewide Protocol Workgroup was convened to engage a broad spectrum of law enforcement entities in a discussion of Brady v. Maryland. The primary objective was to determine if consistent, statewide practices could be developed for Oregon's public safety communities.

The universal message was to develop a process that was consistent and fair, rooted in good communication, applied across Oregon, and endorsed by District Attorneys.

The attached documents reflect the Committee's work product. The first document (Attachment A) creates a menu of best practices, underscoring necessary elements endorsed by the Workgroup. Different county jurisdictions may choose to meet these benchmarks using individualized procedure. The second document (Attachment B) is a guideline, providing law enforcement with examples to better assess whether a particular set of circumstances or conduct may implicate Brady and its progeny. The third document (Attachment C) articulates those scenarios that may or may not implicate Brady, but nonetheless result in a prosecutorial decision not to call a professional as a witness in a court of law.

The following considerations are imbedded in the recommendations:

- Compliance with the law
- Ensure that Law Enforcement is provided an opportunity to be heard
- Respect labor practices and labor agreements
- Honor the legal and ethical obligations of prosecutors
- Communicate effectively with Law Enforcement Management, impacted law enforcement officers and their representatives
- Retain local flexibility and autonomy developing and implementing Brady-related procedures

Recommendations for Law Enforcement

Understanding that a Brady designation for a law enforcement witness occurs solely at the discretion of the prosecutor, law enforcement agencies must take steps to address circumstances as a result. This must be approached from two perspectives; first, prevention of such issues, and second, management of Brady challenges imposed upon law enforcement. These steps necessarily include keeping sound internal affairs policies that are supported by consistent, fair and balanced accountability and disciplinary processes. Law enforcement leadership must take the initiative to partner with prosecutors, and train personnel on the Brady issue. Agencies should implement comprehensive and consistent Brady policies reflective of best practice such as those recommended as models by organizations such as the International Association of Chiefs of Police (IACP) and the Police Executive Research Forum (PERF).

Further, under state and federal law, a law enforcement agency's obligation to disclose exculpatory or impeachment information arises in the context of a particular prosecution. Law enforcement partners are nonetheless encouraged to consider adopting policies and employment practices that allow disclosure when an agency makes a determination that an employee has been untruthful, has committed a crime, is biased, or has suppressed evidence. Sound procedure should include review of relevant allegations to consider whether they are sustained, whether their nature requires disclosure, and whether the impacted witness has pending cases that require immediate discovery of potential Brady material. Recognizing that prosecutors have a further ethical obligation to disclose any such material, open communication lines between law enforcement leadership, labor leadership and the prosecutor must be established and maintained.

Training

Finally, the Workgroup identified training as a necessary component of sound Brady policy. Comprehensive training designed to ensure a consistent, statewide approach to Brady and its adopted procedures that reaches every impacted law enforcement discipline is thus recommended. It is further prudent to ensure on-going assessment of Oregon's implementation and compliance with the relevant law.

Attachment A

Best Practices and Recommendations for DA Brady Disclosure & Lack of Confidence Process Regarding Professional Witnesses

DA Decision-Making Process: comprehensive Brady procedure should include ways to identify and discern potentially discoverable information and/or identify witnesses whose conduct may disqualify them as testifiers. Best practices for this process should include:

~Identification of potential Brady cases or disqualification concerns
- -consider standards for dishonesty [*see guidelines for Brady Disclosure*]
- -consider standards for lack of confidence cases [*see Guidelines for Assessment*]

~Gathering of relevant information-DA is responsible for material known to DA and/or in DA's possession or control
- -not merely allegation or rumor
- -seek investigatory reports/Internal Affairs information
- -request further information via affected witness/counsel

~Review of information with a Brady 'resource team' and/or Brady MAP (see below)
- -consider using senior DDA staff to roundtable individual cases; seek opinions and input; employ comparative analysis to similar situations; consider ramifications for past, present and future cases
- -consider Law Enforcement Command Staff input (see also below)

~Tiered level of Brady designations
- -Brady obligations *NOT* implicated by conduct
- -*Disclosure of Brady Material Required*
- -Witness is *disqualified* from testimony (non-usable witness)

DA Notification Process:

~Create and maintain method to identify and preserve affected witnesses and their level of appropriate Brady disclosure. Review open/pending/affected cases so proper notice may be made. Methodology requires:
- -frequent updating
- -accessibility by all DDAs
- -reliable way to advise DDAs of changes/additions

~Maintain open communication with Law Enforcement Command Staff
- -seek input from command staff *prior* to any formal Brady decision
- -consider status of Internal Affairs investigation-when will it be complete? Can disclosure decision wait for investigation's completion?

~Consider convening **multidisciplinary advisory panel (Brady MAP)** for *confidential, non-binding consultation* prior to final decision:
- -consider including: other DA representative with Brady decision-making experience, law enforcement administration representative from uninvolved agency, non-management law enforcement representative from uninvolved agency

-Mechanics of discussion, information dissemination, and recommendations can be at DA discretion

~Create opportunity for affected witness to be heard as soon as practicable

-formal letter to affected witness that notifies of Brady inquiry and allows for that person to present further information to DA for additional review:

-Review process, procedure and deadlines at DA discretion depending on case. If requested, an in-person meeting with affected witness is recommended.

~Send formal decision letter to agency that clearly delineates Brady designation and ramifications for DA's use of that employee as a witness.

~Employ use of Judicial Review when necessary

-when appropriate, seek *in camera* review for potential disclosure information. Request order from court for discovery.

-utilize protective orders prior to disclosure to defense.

-seek Pre-Trial rulings on admissibility; consider including witness' counsel in admissibility litigation.

~Communicate with Defense Bar-it is the duty of the DA. As appropriate, consider:

-individualized case by case disclosure

-blanket letter notification to all local defense counsel

~Communicate with Other Affected Agencies/Partners.

Attachment B

Guidelines for Brady Disclosure
'Dishonesty'

The following non-exclusive list serves as a guideline to determine whether a particular set of circumstances or conduct implicate Brady.
(generalized tiers: 1. witness disqualification; 2. disclosure; 3. non-Brady material)

Intentional and Malicious Deceptive Conduct (Tier 1)-will likely result in termination from employment and disqualification as witness. This type of dishonesty usually has a direct nexus to employment. For example:

- Deceptive conduct in formal setting: testimony, affidavit, police report, official statement, internal affairs investigation (was there a finding of dishonesty in IA investigation?)
- Tampering with or fabricating evidence
- Deliberate failure to report criminal conduct by other officers
- Willfully making a false statement to another officer on which other officer relies in official setting
- Criminal conduct resulting in conviction that is fraudulent in nature-e.g. perjury, forgery, theft
- Repeated, habitual or a pattern of dishonesty, however minor, during internal affairs investigation
- Persistent dishonesty following *Garrity* warning or following administrative action
- Other deceitful acts that demonstrate disregard for constitutional rights of others or the laws, policies and standards of proper police practice

Conduct Intended to Deceive but Not Malicious in Nature (Tier 2)-will likely require disclosure but may not disqualify as a witness and may not result in termination. While not condoned, this type of dishonesty is limited to a specific time and circumstance and may be explained in one extenuating circumstance. For example:

- A simple exculpatory 'no' when faced with an allegation of misconduct
- A deceptive statement made in an effort to conceal minor unintentional misconduct (such as negligent loss of equipment)
- A purely private, off-duty statement intended to deceive another about private matters (such as being involved in extra-marital affair)
- An isolated dishonest act that occurred years prior
- A spontaneous, thoughtless statement made under stressful circumstances that is later recognized as misleading and is corrected
- Isolated 'Administrative Deception' related to minor employment matters (e.g. a call in sick when not really ill, a misleading claim of unavailability for a shift)

Excusable or Justified Deception (Tier 3)-will likely not require Brady disclosure of any type and will not be considered impeachment material even if it results in some sort of disciplinary action. For example:

- Inaccurate or false statements based on misinformation or a genuine misunderstanding of the applicable facts, procedures or law

- Investigatory tactics that are deceptive but lawful (e.g. lies told to a suspect in interrogation or interview)
- Lies told in jest concerning trivial matters or to spare another's feelings
- Negligence in reporting facts or providing misleading information to the public that later turns out to be false
- Nonmaterial exaggerations, boasting or embellishments in descriptions of events or behaviors of others

Attachment C

Guidelines for Assessment of 'Lack of Confidence' Professional Witnesses

The DA maintains the discretion and authority to disqualify a professional witness from testimony based upon a lack of confidence that the witness can withstand the strict scrutiny necessary for law enforcement professionals. While these witnesses may not require Brady disclosure under the law, the DA may decide that their background, criminal behavior or reputation is such that they cannot be called by the State.

The same process as outlined in Attachment A is recommended.

Consider the following under the totality of the circumstances:

- Witnesses with pending criminal cases
- Witnesses with criminal convictions
- Witness who may have committed a crime but investigation or prosecution is barred (e.g. by statute of limitations)
- Scope and seriousness of crime committed or alleged to have been committed (e.g. person or bias crimes versus strict liability offenses)
- Admissibility of crime or bad act
- Bias (is there evidence of bias or prejudice contained in more than an isolated complaint, investigation, report or in social media?)
- Opinions of colleagues (e.g. what would testimony be by others in agency as to the individual's reputation for honesty?)

It is further recommended that the DA provide the foundation and basis of knowledge upon which a lack of confidence decision is made to the affected witness upon notification [See DA Notification Process under Attachment A].

Brady: Ethics Subgroup Report

The Ethics Subgroup identified certain issues and hopefully developed some ideas as to how the issues should be decided. When discussing the obligation a prosecutor has in regards to what is referred to as Brady material, there are two components that must be examined. The first obligation regarding exculpatory evidence is described within the disciplinary rules of the bar association of which the prosecutor is a member. Their research found that while there are specific disciplinary rules governing prosecutors and their duties concerning exculpatory evidence, there are constitutional requirements regarding exculpatory evidence that appear to be outside the scope of the disciplinary rules. While these are two distinct obligations, often times they become intermixed. Our purpose is to solely examine the ethical responsibilities of the prosecutor.

Ethical Obligation

In considering the ethical obligations of a prosecutor as it pertains to the disciplinary rules of the Oregon State Bar, we have developed several questions to address. They are:

1. What do the disciplinary rules of the State Bar require a prosecutor to do? Is there a duty under the rules to look for exculpatory evidence? If such a duty does exist, to what extent does the prosecutor have to go? For example, must the prosecutor personally review the agency's case file to learn if there is exculpatory evidence, or can the prosecutor rely on the police to do that? Must the prosecutor look at the personnel file of an officer to determine if there is impeachment material in the file, or can the prosecutor rely upon the agency head to notify the prosecutor of this information?

2. Assuming such evidence is found, to what extent does the prosecutor's office have to maintain such evidence for disclosure in future cases? For example, does the material that should be maintained pertain only to government employees or agents, or must it also include any such evidence about any civilian witness who may or may not be a witness in the future?

3. Does this obligation extend beyond investigative and personnel files of the prosecutor's office, or an agency working on behalf of the government for civilian witnesses, such as a victim or an eyewitness to the crime? Specifically, outside of providing criminal convictions and material in the investigative file, does the prosecutor have a duty to search out other material? For example, would the prosecutor need to talk to neighbors, co-workers, family etc., to determine if the civilian witness is not trustworthy?

4. An additional potential ethical obligation that needs to be addressed pertains to a witness that the prosecutor does not believe to be trustworthy. For example, what is the prosecutor to do when he does not believe that a particular police officer is trustworthy? The belief may not be based upon a specific set of facts and may be nothing more than a personal opinion. Is the prosecutor ethically required to disclose that opinion? Is the prosecutor ethically prohibited from calling the witness?

Discussion

We need to point out that in Oregon there is a dearth of case law, disciplinary board opinions, and ethics opinions that specifically define the obligations of a prosecutor under the appropriate rules. The specific rule is ORPC 3.8(b). There is not any Oregon Supreme Court case law interpreting this rule or its predecessor under the Oregon Code of Professional Responsibility (DR 7-103).

ORPC 3.8(b) states: The prosecutor in a criminal case shall: …(b) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Knowledge means actual knowledge which may be inferred from the circumstances. See, ORPC 1.0(h).

The rule does not use the phrase "exculpatory evidence". Instead, the rule uses the phrase "all evidence or information …that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor."

This rule is identical to ABA rule 3.8(d). The first issue is whether the rule is more extensive than the constitutional obligation of disclosure. For example, Brady and its progeny hold that the evidence to be disclosed has to be "material". The ABA has taken the position that the rule does not limit the evidence to be disclosed to be material. The ABA opines that the rule requires prosecutors to disclose favorable evidence to the defense, regardless of whether it is material or not, so that the defense can decide on its utility. It is our opinion that the State Bar will interpret ORPC 3.8(b) in the same manner. (Accord, In re Tuttle, 19 Oregon DB Reporter 216 (2005), where a prosecutor was suspended for 30 days for failing to give information to the defense regarding the credibility of a victim. The prosecutor, as part of her defense, indicated that one of the reasons she did not disclose the evidence was that she did not believe the evidence was true. The trial panel apparently believed that her opinion that the evidence was not true did not matter.)

The literal reading of ORPC 3.8 does not establish a duty to undertake an investigation in search of exculpatory evidence. Relying upon ORPC 3.8 would indicate that a prosecutor only has a duty to disclose exculpatory evidence actually known by the prosecutor and that the prosecutor has no duty to seek out that information. However, we would note that the Bar's General Counsel believes this rule will be violated if a prosecutor is willfully ignorant of this material and fails to investigate or disclose such information.

We could find no direct definition of willful ignorance. However, the issue was discussed in the case of In re Albrecht, 333 Or 520 (2002). Using language discussed throughout the opinion, most notably the dissent, the following seems to be the best definition. In order for a lawyer's ignorance to be deliberate or willful, the lawyer must have been presented with facts that put him on notice that exculpatory type evidence probably

exists, and then the lawyer must have failed to investigate those facts, thereby deliberately declining to verify or discover the exculpatory evidence.

In short, ORPC 3.8 requires the disclosure of exculpatory evidence, regardless of whether it is material or not. The rule does not require that the prosecutor conduct an investigation to look for such evidence. However, the prosecutor cannot be willfully ignorant of such material.

There are other ethical rules that can be violated when a prosecutor fails to disclose exculpatory evidence. ORPC 3.4(1) states that a lawyer shall not:"(a) knowingly and unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.

A lawyer shall not counsel or assist another person to do any such act."The Oregon Supreme Court in State v. York, 291 Or 535, 540 (1981), implied that a violation of DR 7-109, the predecessor of ORPC 3.4(b), could result in discipline of a prosecutor if the prosecutor improperly withheld Brady material.

Other rules may also be applicable to this analysis. ORPC 1.1 states that a lawyer "shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." This rule may have Brady implications if a prosecutor does not live up to his/her Brady obligations. As our client is the State, failure to provide Brady material can jeopardize prosecutions, which is not in the best interest of our client. (See, Connick v. Thompson, 131 S.Ct. 1350 (2011), the US Supreme Court set aside a $14 million jury verdict against the New Orleans District Attorney for failure to properly train his prosecutors in their Brady obligations. In setting aside the verdict, the US Supreme Court noted that the district attorney could rely on the fact that his prosecutors, as lawyers, have had training as part of their schooling and continuing legal education as to Brady principles and that he could rely on that training to decide if he needed to provide training on Brady issues. Given this principle, it would seem that a prosecutor's failure to provide Brady material out of ignorance that he/she should do so would bring this rule into play.)

Questions

With the above information, we will attempt to answer the questions set forth above.

Question #1 - It is our opinion that a prosecutor must disclose all evidence that prosecutor has knowledge of that is favorable to a defendant regardless of whether it is material or not. The rule does not require that prosecutor to conduct an investigation to find such evidence, but at the same time, the prosecutor cannot be "willfully ignorant" of such information. To that extent, we believe the prudent prosecutor will notify the various police agencies it works with that they should disclose to the prosecutor any information that would "tend to negate the guilt of the defendant" so that it can then be disclosed to the defense. This notification should be made in writing to document that such a request was made. Absent a prosecutor's knowledge that such evidence exists in relation to particular case, we do not believe that under this rule the prosecutor has a duty to inspect personnel files or other sources to determine if such evidence exists.

Question # 2 - We believe that the prosecutor's office must maintain some sort of data base that all prosecutors in the office have access to. Because "actual knowledge" can be

inferred from the circumstances, we believe that the knowledge of one prosecutor in the office likely will be imputed to be known by all other prosecutors in the office. This data base should include specific facts that would have bearing on Brady issues. For example (this is not an exclusive list): a. Identifying witnesses who have been given any sort of incentive or a deal in return for testimony; or b. Witnesses, civilian or police, who based upon specific facts, have been found not to be trustworthy.

The question has been raised as to whether this list would be a public record. The most likely answer is that the list would be a public record. We could find no exemption that would specifically exempt such a list. If there is a need for legislation, perhaps an exemption for the list would be helpful.

Question #3 - As stated above, the rule does not impose an affirmative obligation on the prosecutor to conduct an investigation to locate the existence of exculpatory evidence. Again, the prosecutor cannot be willfully ignorant. If the prosecutor has reason to believe that it does exist, the prudent prosecutor would determine if in fact such evidence did exist.

Question #4 - This question addresses the ethical obligation of a lawyer when faced with the situation that a witness is not trustworthy. We believe the situation is governed by ORPC 3.3(a)(3). It states: A lawyer shall not knowingly: …"offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if permitted, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false."

It is our opinion that a prosecutor can call a witness who in the opinion of the prosecutor is not trustworthy so long as the prosecutor does not reasonably believe that the testimony to be provided in the specific case by the witness is false.

However, the prosecutor must disclose the evidence to the defense that shows that the witness is not trustworthy regardless of its materiality.

We do not believe the rule requires a prosecutor to disclose a personal opinion of the prosecutor as to the trustworthiness of the witness if the opinion is based solely such things as a "gut instinct" or personal intuition.

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