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# LEGAL DEFENSE TRUST TRAINING BULLETIN

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## NEW STATUTE PROTECTS AGAINST “BRADY LIST” EXCESSES

### *New Section 3305.5 Is Added To Bill Of Rights Act (POBRA)*

by

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### WELCOME NEWS!

Senate Bill 313 was signed by Governor Brown on October 12, 2013, effective January 1, 2014, which adds new section 3305.5 to the Public Safety Officers’ Procedural Bill of Rights Act (**POBRA**, referring to the shorthand title “Peace Officers’ Bill of Rights Act”) at Government Code §§ 3300, *et seq.* The purpose of the new statute is to prevent law enforcement agencies from taking punitive action against peace officers, *solely because the officers are listed or identified in a “Brady Alert System,” or on a “Brady List” maintained by the local prosecutor’s office.*

Unfortunately, over the years since 1997 when “Brady material” in your personnel record became something to

worry about, many law enforcement managers equated presence on a *Brady* list with “unfitness to perform police duties.” So, the deputies or officers under the *Brady* cloud were either “benched” or terminated. These policies reflected a fundamental misunderstanding of a prosecutor’s decision to include a deputy’s or officer’s identity in the *Brady* system. Understanding the effect of this new legislation requires a little review of *how and why* an officer is entered in the system, and *what it means* to be included.

### WHAT THE NEW LEGISLATION SAYS

*Government Code* § 3505.5 reads,

**3305.5.**

(a) A punitive action, or denial of promotion on grounds other than merit, shall not be undertaken by any public agency against any public safety officer solely because that officer's name has been placed on a Brady list, or that the officer's name may otherwise be subject to disclosure pursuant to *Brady v. Maryland* (1963) 373 U.S. 83.

(b) This section shall not prohibit a public agency from taking punitive action, denying promotion on grounds other than merit, or taking other personnel action against a public safety officer based on the underlying acts or omissions for which that officer's name was placed on a Brady list, or may otherwise be subject to disclosure pursuant to *Brady v. Maryland* (1963) 373 U.S. 83, if the actions taken by the public agency otherwise conform to this chapter and to the rules and procedures adopted by the local agency.

(c) Evidence that a public safety officer's name has been placed on a Brady list, or may otherwise be subject to disclosure pursuant to *Brady v. Maryland* (1963) 373 U.S. 83, shall not be introduced for any purpose in any administrative appeal of a punitive action, except as provided in subdivision (d).

(d) Evidence that a public safety officer's name was placed on a Brady

list may only be introduced if, during the administrative appeal of a punitive action against an officer, the underlying act or omission for which that officer's name was placed on a Brady list is proven and the officer is found to be subject to some form of punitive action. If the hearing officer or other administrative appeal tribunal finds or determines that a public safety officer has committed the underlying acts or omissions that will result in a punitive action, denial of a promotion on grounds other than merit, or any other adverse personnel action, and evidence exists that a public safety officer's name has been placed on a Brady list, or may otherwise be subject to disclosure pursuant to *Brady v. Maryland* (1963) 373 U.S. 83, then the evidence shall be introduced for the sole purpose of determining the type or level of punitive action to be imposed.

(e) For purposes of this section, "Brady list" means any system, index, list, or other record containing the names of peace officers whose personnel files are likely to contain evidence of dishonesty or bias, which is maintained by a prosecutorial agency or office in accordance with the holding in *Brady v. Maryland* (1963) 373 U.S. 83.

The Legislative Counsel's Digest for Senate Bill 313 (DeLeón) reads,

*The Public Safety Officers Procedural Bill of Rights Act prohibits any punitive action, or denial of promotion on grounds other than merit, against a*

*public safety officer, as defined, without providing the officer with specified administrative procedural protections, including, but not limited to, the officer's right to inspect his or her own personnel file and an opportunity for the officer to file an administrative appeal under certain conditions.*

*This bill would prohibit a public agency from taking punitive action, or denying promotion on grounds other than merit, against a public safety officer, because the officer's name was placed on a "Brady list," as defined. The bill would further prohibit the introduction of any evidence in an administrative appeal of a punitive action or a civil proceeding between the public safety officer and an office or public agency that the officer's name was placed on a Brady list, except as provided. The bill would specifically not prohibit a public agency from taking punitive or personnel action against a public safety officer based on the underlying acts or omissions for which that officer's name was placed on the Brady list.*

We have written a number of articles and training bulletins on *Brady* issues over the last 14 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. But this is where new § 3305.5 comes in, to prevent punitive action *solely* because a member is on a *Brady* list. Nevertheless, it 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 and 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"<sup>1</sup> 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*

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"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.

***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 possible *Brady* material in an officer's records, in appropriate cases.

But statutes in California which were enacted nearly four decades ago in response to *Pitchess v. Superior Court*, 11 Cal.3d 531 (1974)<sup>2</sup>, 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

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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.

and material to the proponent's case.<sup>3</sup>

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

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*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.*

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 ARE BRADY POLICIES NECESSARY, AND HOW DO THEY 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, 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.

## THE LOS ANGELES COUNTY MODEL

In 2002, former Los Angeles County District Attorney Steve Cooley promulgated Special Directives 02-07 and 02-08. In a nutshell, these Directives established formal *Brady* policies for the District Attorney's Office, and established an automated "*Brady Alert System*." Deputy District Attorneys are required to query the system whenever they are considering whether to file a case, and at various points thereafter. All prosecution witnesses (police and experts) are queried, to assist prosecutors in complying with their *Brady* obligations by identifying and locating "*Brady material*" on police witnesses and experts. The current District Attorney, Jackie Lacey, has continued and expanded the *Brady* policies. For example, there is a full-time "Brady Compliance Unit," staffed by experts in *Brady* obligations. For a full exposition of the Los Angeles County model, see "Special Directives 13-01, 13-02," which supersede "Special Directives 10-05 and 10-06," retrievable at [www.da.co.la.ca.us](http://www.da.co.la.ca.us).

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 Steve Cooley and Jackie Lacey to consider the interests of individual officers in the privacy of the records is apparent. For at least that, these officials Steve Cooley ought to be vigorously commended.

The entire 1999-2000 LAPD "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 do not occur. This is the part of the movement that is most likely to affect you, as an individual. The tragedy for the thousands upon thousands of honest and dedicated cops is that police testimony is now, more than ever before, subject to attack or scrutiny as suspect, or unreliable without corroboration. Once upon a time, a police officer's testimony given under oath in a trial, had a certain quality as inherently truthful, because, after all, "this is a police officer". Lay jurors, at least, on the whole, used to accept an officer's words as the truth of the matter, absent compelling evidence to the contrary. We wonder whether that acceptance will ever prevail again?

Like it or not, the disintegration of the credibility of the police witness in the eyes of many is deeply imbedded in these developments.

### **WHAT ARE THE KEY FEATURES OF THE *BRADY* POLICIES AND PROTOCOLS?**

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. 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 (the “*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. 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 “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.

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 “BRADY MATERIAL” IS LOCATED ON ME, WILL IT END UP IN ANY DATABASE?

Yes, possibly. The District Attorney has implemented a “*Brady* Alert System”, to include both known and current *Brady* information. 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).)**

The “Brady Compliance Unit” 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. In order for material to be included, it must be reliable and credible by clear and convincing evidence.

## 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 supports them.**

**This new statute recognizes that there is a huge difference between having your identity placed in a *Brady* system, and being classified as “unfit” by your employer. While learning that your name and**

**information concerning you is in a *Brady* system is *not good news*, it is no longer determinative of fitness for police assignment. It is rather the underlying facts about the acts or omissions that will show evidence of unfitness, upon which punitive action may be based.**

Michael P. Stone and Muna Busailah are the founders of Stone Busailah, LLP, A Partnership of Professional Corporations, and a highly specialized police law and litigation firm for over 30 years, comprised of eight lawyers in Pasadena and Riverside, California.