



LEGAL DEFENSE TRUST TRAINING BULLETIN

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MORE ON THE *BRADY* ISSUE *Attorney General Takes An Unexpected Position*

Just two weeks ago we reported to you¹ that the Attorney General was preparing to issue a published Attorney General Opinion on the subject of the prosecutor's duty to learn of "*Brady* material" within the personnel records of police witnesses who will be testifying for the People. *Brady* material would include sustained findings of misconduct involving dishonesty, false reports, lying or acts of moral turpitude.

Despite what we are about to tell you, the basic message of both the previous *Brady* Training Bulletin, and the earlier one² on the absolute need for credibility, truth, honesty and veracity within the ranks of the police, is unaffected by this latest development. We must recognize that sheriffs and chiefs likely will not retain deputies or officers who have been dishonest in duty-related matters. This is still the basic message, and it is a sound premise worthy of reliance and belief.

That much being said, what has the

Attorney General to say about all of this? The answer is, not too much; at least not for those who were expecting a formal Attorney General Opinion on the subject. Unlike statutes or appellate court opinions published in the official reports, an Attorney General Opinion does not have the force of the law. It is however, considered to be "persuasive authority", albeit not building precedent. Courts, prosecutors' offices and law enforcement agencies in particular, will generally follow and be guided by them.

Hence, the proposed Attorney General Opinion on the duty of prosecutors and law enforcement agency heads with respect to disclosure of *Brady* material, is of significant interest to all of those within the criminal justice system.

Simply stated, the Attorney General has apparently decided not to publish an opinion on this "duty". In a letter to all District Attorneys, Attorney General Bill Lockyer has stated "There is no need at this time to establish (in an Opinion) any expanded protocol for prosecutorial review of the personnel files of material-witness peace officers for exculpatory evidence".

The letter points out that police agencies have been urged by their legal advisors to develop an expanded protocol for

¹"The New Threat to Police Careers: Revisiting *Brady v. Maryland*" Volume II Issue 8.

²"Truth or Consequences: The Path To Career Destruction" Volume II, Issue 6.

the prosecutor's review of police personnel files. Attorney General Lockyer concludes that

prosecutors *have no duty* to review the personnel files of these witness-officers. Thus, no special protocol is necessary. Criminal defendants and their counsel can utilize the so-called *Pitchess* motion procedure to discover impeachment evidence in officers' files if, following an *in camera* review, a judge orders the information disclosed. Prosecutors do not participate in a *Pitchess* motion, because they also are precluded from invading police personnel records (with limited exceptions not relevant here) by virtue of *Penal Code Section 832.7*. Since they don't have ready access, they have no duty. On the other hand, the *Pitchess* motion procedure is codified in *Evidence Code Section 1043* which contains a protocol that can be used by a criminal defendant to locate evidence of dishonesty, and acts of moral turpitude, provided a court permits it, after an *in camera* review.

So at this time, there is no Attorney General Opinion to look to for guidance, but based upon the Lockyer letter, neither prosecutors nor sheriffs and chiefs have any duty to look through personnel records of witness-officers.

We don't believe we have seen the last of this issue, because of the persistent and intense interest of the entire criminal justice system.

Until something more definitive is circulated, we recommend that chiefs and sheriffs refrain from issuing any internal protocols to provide for this review and that agencies *resist* any effort by prosecutors to review personnel records of officer-witnesses, outside of the *Pitchess* motion protocol. Agency legal advisors should be consulted regarding individual agency concerns.

We will keep you posted on developments as they occur.