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**MEMORANDUM**

**TO: Snohomish County LEA Command Staff**

**FROM: Matt Baldock**

**DATE: February 3, 2022**

**RE: New PID Questionnaire Policy**

Law Enforcement Colleagues:

Beginning February 28, 2022, the SCPAO will be implementing a new policy requiring DPAs to send questionnaires to all witnesses in trial-bound cases, seeking to identify any potentially exculpatory information known to the witnesses. This memorandum is intended to explain the reasons for this new policy and to address some of the questions and concerns I can reasonably anticipate coming from LEAs.

*Legal and Procedural Underpinnings of Policy*

A criminal defendant’s right to Due Process includes the right to be informed of all exculpatory information known to the “prosecution team.”[[1]](#footnote-1) This amounts to an affirmative obligation on DPAs to seek out and disclose all such information (thus, the use of the questionnaire for law enforcement witnesses).

Separately, CrR 4.7(d) requires DPAs to attempt to obtain material or information in the knowledge, possession, or control of civilian witnesses and victims if such material or information would be discoverable if in the knolwedge, possession, or control of the PA’s Office (thus, the use of the questionnaire for civilian witnesses).

While there isn’t anything new about our PID/Brady and discovery obligations, there has been a marked shift in the last few years in the way the courts (at both the appellate and trial levels) define those obligations, trending toward more liberal requirements for disclosure. At the same time, courts are increasingly willing to impose substantial sanctions (e.g., suppression of evidence, dismissal of counts/cases, etc.) even for good faith violations of the rules. (Consider the recent decision from the Court of Appeals in City of Seattle v. Lange, for example). Our new policy adds some redundancy to our existing practices and should help ensure that our DPAs—and by extension, your officers—consistently meet our discovery and Brady/PID obligations.

 *Practice Points*

**How/when in the life of a case will the questionnaires be sent to witnesses?** The PA policy will require DPAs/staff to send questionnaires to witnesses as soon as it becomes reasonably apparent that a case is headed to trial. Although the internal procedures haven’t yet been finalized, this will likely coincide with the issuance of subpoenas. The questionnaires are formatted so that they can be easily completed electronically, so we are contemplating sending/receiving them primarily via email or through an online application (similar to a Doodle poll).

**What will the PA’s Office do with this information?** Again, these questionnaires are an extension of our discovery and Brady/PID obligations. Therefore, any information provided in response to these questionnaires will be provided to the defense.

**What happens if a witness refuses to answer the questions?** These questionnaires reflect the efforts by the PA’s Office to identify and provide to defense counsel all discovery and Brady/PID information. The PA’s Office does not, however, have the ability or authority to compel witnesses to answer these questions. If a witness fails to respond to the questionnaire or otherwise declines to answer the questions, the assigned DPA will inform defense counsel of that fact and it will then be up to defense counsel to decide how to proceed—liklely either attempting to obtain the information in a defense interview, filing a motion for a deposition or a court order compelling a response from the witness, or letting it go.

**What if answering the questionnaire requires disclosure of sensitive/personal information?** It is possible that truthful responses to the questionnaire may, on occasion, require a witness to disclose sensitive or personal information. If there is some pronounced concern about dissemination of such information, that should be communicated to the assigned DPA who can then consider whether to address the issue with the court in the form of a motion for an in camera review or for a protective order.

**Disclosure in discovery is not the same as relevant and admissible at trial.** It important to remember that our discovery and Brady/PID obligations are much more broad than the evidence rules dictating relevance and admissibility at trial. In practice, this means that in many cases Brady/PID information is provided to the defense but never introduced at trial.

*Conclusion*

While it is true that this new practice will cause some extra work for PA employees and witnesses, the payoff will be in reducing the likelihood of adverse case outcomes resulting from inadvertent discovery violations. Please feel free to contact me if you have any questions.

1. “Prosecution team” includes all employees of the prosecutor’s office, officers and all employees of a police agency, and forensic scientists and all employees of a government laboratory. [↑](#footnote-ref-1)