TRACKING POLICE MISCONDUCT

How Prosecutors Can Fulfill Their Ethical Obligations and Hold the Police Accountable

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Institute for Innovation in Prosecution at JOHN JAY COLLEGE

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Introduction

Although most police officers perform their duties honorably and with integrity across the country, the murder of George Floyd and so many others serve as a stark reminder that some officers engage in misconduct. Prosecutors are in a unique position to hold those officers accountable, especially if they make efforts to monitor and investigate acts of dishonesty, bias, and other damaging behavior of police officers.

Traditionally, prosecutors do not track police misconduct in an organized, systematic way.[1] Instead, line prosecutors primarily share information with each other about problematic officers by word-of-mouth, and anecdotally, if at all. Prosecutors do not have the authority to terminate a police officer's employment; therefore, police officers with a known history of misconduct may still participate in arrests and the prosecution of cases. As a result, a prosecutor's office that does not have a formal system to track police misconduct risks having prosecutors fail to comply with their legal obligations. In addition, without a tracking mechanism, line prosecutors may be surprised at trial by the defense or unwittingly contribute to a wrongful conviction.

To systematically track police misconduct, a growing number of prosecutors are creating internal disclosure lists,[2] or databases of police officers with a history of wrongdoing. A police disclosure list enables prosecutors to methodically gather information about police misconduct that constitutes impeachment evidence and disclose it to the defense. Every prosecutor's office should maintain a list in some form so that prosecutors can fulfill their ethical duties and meet the public's growing demand for police accountability. Ideally, a national database consisting of police misconduct would provide prosecutors with information about all police officers. Indeed, federal lawmakers have proposed legislation to create a national registry of police misconduct. However, even if such a law is passed, the registry will not likely capture all instances of police misconduct, such as wrongdoing discovered by a local prosecutor. Until a comprehensive federal database exists, the onus is on local prosecutors to track police misconduct so that they fulfill their legal and ethical obligations.

This guide explains why it is crucial for prosecutors to have a police disclosure list and describes the most important issues to consider when creating one. To produce this guide, the IIP interviewed high-ranking prosecutors throughout the country. We also reviewed written policies about their police disclosure lists and have compiled many of those protocols in a separate Appendix. Our hope is that upon reviewing this guide, prosecutors will develop or improve upon their own mechanisms for tracking police misconduct. By following these recommendations, prosecutors can fulfill their ethical duties and hold the police accountable, while also protecting the due process rights of police officers.

1 "Misconduct" in this guide refers to, among other things, untruthfulness or deception regarding facts in a report, statement, or testimony; conduct that would be a violation of an individual's constitutional rights; bias or prejudice against an individual, class, or group of persons; improper use of force against an individual; altering, tampering, concealing, or misuse of evidence.
2 Some offices refer to these lists as "*Giglio* lists," "*Brady* lists," and "do-not-call lists." It should also be noted some offices do not maintain an actual list, but instead maintain a centralized repository to track police misconduct. This paper refers generally to all mechanisms that track police misconduct as "police disclosure lists."

Why Should Prosecutors' Offices Have a Police Disclosure List?

There are four reasons why every prosecutor's office should have a disclosure list. First, while the law does not explicitly mandate that prosecutors maintain such a list, *Brady v. Maryland*[3] and its progeny clearly require prosecutors to proactively seek and disclose impeachment material related to a testifying police officer.[4] This has been interpreted to require prosecutors to inform the defense of a police officer's prior misconduct in cases that were prosecuted by the same office, even if by a different line prosecutor.[5] The best way to ensure that a prosecutor's office **complies with its ethical and legal obligations** under *Brady* is to implement a mechanism that tracks police misconduct. A well-organized database or "police disclosure list" centralizes information about police officers that prosecutors can then provide to the defense. [6]

Second, a prosecutor can more easily **determine whether an officer can be trusted** to provide a true account of the alleged crime if the prosecutor knows a police officer involved in the case has a troubled history. A prosecutor's primary concern is justice, not securing a conviction. Therefore, the involvement of an officer who has a documented history of misconduct in a case should not be merely viewed as a hurdle for a prosecutor to overcome in obtaining a conviction. Rather, the involvement of an officer with a history of misconduct should be considered a potential red flag and cause for further investigation. Given that official misconduct accounts for over half of exonerations,[7] any prosecutor interested in pursuing the truth and administering justice should know if their case has been tainted by an officer with a history of wrongdoing.

The third reason prosecutors should maintain a police disclosure list is a strategic one. **Defense attorneys, particularly public defense organizations, have begun compiling their own databases** that can be used to surprise prosecutors who do not track police misconduct themselves. For instance, the Legal Aid Society in New York created a database that gathers information from civil rights lawsuits, criminal court decisions, and social media content for its attorneys. There is also a growing number of accountability organizations that are creating public databases of civilian complaints against police officers, such as the Invisible Institute's Citizens Police Data Project in Chicago. Prosecutors will not be caught off guard during the cross-examination of their police witnesses at trial if they know about the officers' prior misconduct.

The fourth reason why prosecutors should track police misconduct is to demonstrate to their community that they will **hold police officers accountable**. For example, a prosecutor's decision to include a police officer in a database for a single, relatively minor incident of misconduct demonstrates to the public that the prosecutor's office takes all allegations of official wrongdoing seriously. By having a tracking mechanism - and by making the protocols for that system publicly available - prosecutors can show their community that they are holding the police accountable.

3 *Brady v. Maryland*, 373 U.S. 83 (1963).

4 *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

5 *See Benn v. Lambert,* 283 F.3d 1040, 1053 (9th Cir. 2002) ("Similarly, the disclosure requirements set forth in *Brady* apply to a prosecutor even when the knowledge of the exculpatory evidence is in the hands of another prosecutor." (citations omitted)).

6 Maintaining a disclosure list also guards against the loss of institutional memory. Small offices with a single prosecutor on staff may believe that a disclosure list is unnecessary because they are aware of the small number of officers with a history of wrongdoing. However, if that prosecutor leaves office without having created a disclosure list, their knowledge of those police officers cannot be communicated to the incoming prosecutor in an organized way.

7 *Percentage Exonerations by Contributing Factor*, National Registry of Exonerations (2021).

Recommendations For Creating, Maintaining, and Using a Police Disclosure List

For the reasons stated in the introduction above, all prosecutors' offices should implement a mechanism to track police misconduct. Below are several recommendations for prosecutors to consider as they develop their own police disclosure list and protocol.

Recommendation #1: Collect as much information as possible about police misconduct from local police departments.

Prosecutors can obtain information about police misconduct from a variety of sources. These sources include civil lawsuits filed by those who interact with the police, social media posts by police officers,[8] and a local police department's disciplinary records relating to civilians' complaints. Social media posts, as well as the existence or settlement of a civil lawsuit against a police officer, are relatively easy to find because they are often publicly available. However, internal disciplinary records require substantial effort to obtain because of state confidentiality laws, and are discussed below.

Because police are potentially considered an extension of the prosecution under *Brady*,[9] it is in the interest of all parties (the police, prosecutors, and the community at large) for the police to disclose all instances of police misconduct - no matter how minor - to prosecutors. The prosecutor's office can, in turn, determine which information must be disclosed to the defense.

Prosecutors' offices use different methods to obtain disciplinary records from police departments, which are often shielded from public view. Many states provide some level of confidentiality regarding police personnel records.[10] Therefore, generally speaking, prosecutors will encounter the fewest obstacles in obtaining disciplinary records if they convince high-ranking police officials to systematically share this information. Ideally, elected prosecutors will have a collaborative relationship with law enforcement to streamline the information-sharing process. However, prosecutors must make clear that they have a legal obligation to disclose impeachment material about officers to the defense, and therefore will seek court orders to obtain the documents if law enforcement declines to cooperate.

For offices that have a collaborative relationship with law enforcement, **a memorandum of understanding (MOU) with their local police department** can specify what, when, and how the police will convey the existence of pending or sustained investigations regarding disciplinary actions to the prosecutor's office. A MOU with the local police chief(s) in which the police department[11] provides information about pending or sustained disciplinary investigations will save a prosecutor's office a lot of time and effort in obtaining those materials. A MOU provides a clear advantage over an informal

8 Social media posts by police officers are a growing source of potential impeachment material.

9 *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *Carrillo v. County of Los Angeles*, 798 F.3d 1210, 1220 (9th Cir. 2015) ("Because police officers play an essential role in forming the prosecution's case, limiting disclosure obligations to the prosecutor would undermine *Brady* by allowing the investigating agency to prevent production by keeping a report out of the prosecutor's hands." (citations and quotations omitted)); *Moldowan v. City of Warren*, 578 F.3d 351, 379 (6th Cir. 2009) ("Although the prosecutor undoubtedly plays a 'special role' in 'the search for truth in criminal trials,' the police also play a unique and significant role in that process, and thus also are bound by the government's constitutional obligation to 'ensure that a miscarriage of justice does not occur'" (citations omitted)).

10 *See* Evan G. Hebert, *To Protect, Serve, and Inform: Freedom of Information Act Requests and Police Accountability*, 19 Tex. Tech. Admin. L.J. 271, 280 (2018).

11 It should be noted that in some jurisdictions, prosecutors can benefit from communicating not just directly with police departments, but also with city attorneys, police union representatives, and others who may influence how disciplinary records are released.

agreement because it makes clear to the police department what information it must send to the prosecutor's office. In addition, the prosecutor can make the MOU public so the community knows the police have agreed to send internal disciplinary information to the prosecutor's office.[12] Even if elected prosecutors do not enter a MOU with their local police department, elected prosecutors should meet with law enforcement and learn how the department processes complaints of officer misconduct.

12 Buncombe, North Carolina is an example of a jurisdiction in which local police officials and the District Attorney publicly signed a MOU in the summer of 2020 to create a more efficient way for prosecutors to obtain information about police misconduct.

Examples in Practice

Santa Clara County District Attorney's Office

Santa Clara, California's District Attorney's Office has a MOU with its 15 partnering law enforcement agencies in which the police give the District Attorney's Office information related to criminal convictions or substantiated disciplinary complaints of "conduct that potentially constitutes *Brady* information[.]" *See* Santa Clara County *Brady* Protocol for Law Enforcement 2015 (page 3).[13]

13 The IIP gathered and compiled into a separate Appendix the written policies of offices from around the country.

Buncombe County District Attorney's Office

Buncombe, North Carolina's District Attorney's Office has a MOU with the Asheville Police Department, in which the police must notify the District Attorney's Office regarding the use of excessive or deadly force; that an officer has been charged with a misdemeanor or felony offense; or there is a sustained administrative finding of misconduct that constitutes *Brady*. *See* Memorandum of Agreement Uniform Policy and Procedure Between Buncombe County Office of the District Attorney and Asheville Police Department (page 2).

Bernalillo County District Attorney's Office

The Bernalillo County, New Mexico District Attorney's Office requires its prosecutors to send a questionnaire to all officers they intend to call as a witness. The questionnaire asks, among other things, whether an administrative investigation determined the officer engaged in misconduct involving dishonesty. *See* Bernalillo County District Attorney's Office Questionnaire. If the officer responds "no" to all the questions, the prosecutor must verify with the law enforcement agency that the officer provided accurate information. If the officer answers "yes" to any of the questions, the prosecutor is required to ask the law enforcement agency for more details about the misconduct. *See* Bernalillo County *Giglio* Policy of the Second Judicial District Attorney's Office (pages 4-5). The District Attorney's Office explained that it asks officers to fill out the questionnaire, even though it will eventually verify the officer's answers with the police department, in part because the answers may inform prosecutors of wrongdoing that occurred during employment at a different agency. In other words, the questionnaire may give insight into misconduct that the employing agency may not be aware of.

As mentioned above, *Brady* requires prosecutors to obtain and disclose any information that bears on the credibility of a witness. To fulfill their *Brady* obligations, prosecutors demand a wide variety of internal disciplinary information from their local police departments. Examples of what forms of misconduct prosecutors across the country explicitly request from their police departments include information about:

- An officer who is **named in a criminal complaint or indictment**, or is the subject of an ongoing criminal investigation;
- An officer who has a misdemeanor or felony **conviction**;
- An officer who is the subject of a **pending investigation, sustained finding, or conclusion**

by the law enforcement agency for any of the following:

- Misrepresentation or **failure to disclose a material fact** on the officer's employment application;
- **Untruthfulness or deception** regarding facts in a report, statement, or testimony at a hearing or other official proceeding or investigation concerning conduct of the officer or others;
- Conduct that would be a violation of an individual's **constitutional rights**;
- **Bias or prejudice** against an individual, class, or group of persons;
- Improper **use of force** against an individual;
- Altering, tampering, concealing, or **misuse of evidence**; and
- Evidence of **incompetence**, including mishandling evidence.[14]

Some offices request information **beyond specific acts of misconduct**. For example, in addition to acts of "dishonesty" or "bias," the Franklin County, Pennsylvania's District Attorney requires its police department to inform its office of misconduct that "negatively affects the integrity of a prosecution or investigation." *See* Franklin County District Attorney *Giglio* Protocol (page 2).

Several offices, such as the Prosecuting Attorney's Office in Snohomish County, Washington, **limit the types of pending complaints** that will lead an officer to be added to a disclosure list. That office will add someone to the list if he or she has a pending investigation that has "remained open and undecided for 30 days or more beyond the agency's customary target time period for completion of such investigations." *See* Snohomish County Potential Impeachment Disclosure Protocols (pages 3-4). The benefit of such a policy is that the line prosecutor (and therefore defense) will be notified of mere pending investigations, thereby promoting transparency. At the same time, this policy takes into consideration the due process rights of the accused officer by limiting the disclosure of complaints that are merely pending, and not substantiated.[15] Offices should consider adding an officer to the list if an allegation of serious misconduct is pending against them, in part because internal and criminal investigations of official wrongdoing can take a long time. In such situations, it may be appropriate to submit the material for *in camera* review for a judge to determine whether the information must be turned over to the defense.

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14 Most of this specific list is included in the Philadelphia District Attorney's policy. *See* Philadelphia District Attorney's Office's Mission Statement and Request for Compliance Regarding Police Misconduct Disclosure (pages 3-4).

15 It should be noted that some police departments substantiate very few complaints against their officers. For example, an independent agency found the New York City Police Department failed to adequately investigate claims of misconduct. Although prosecutors must consider the due process rights of police officers, they must also acknowledge the potentially skewed perspective of official misconduct they receive from their law enforcement partners.

Recommendation #2: Provide staff with clear policies and training so they are aware of their legal obligations if they discover official misconduct in their cases.

Although the vast majority of allegations of police misconduct come from community members, prosecutors occasionally learn of police impropriety first-hand. For instance, a line prosecutor may obtain, from a civilian, video footage of an arrest that substantially differs from the officer's initial account of their encounter with a suspect. All prosecutors' offices should have a policy in place to ensure that **staff members report potential wrongdoing by police officers**. Ideally, such information should be sent immediately to a single person or unit within the office that maintains the office's police disclosure list.

Examples in Practice

San Francisco District Attorney's Office

In the San Francisco District Attorney's Office, all employees must inform the office's Trial Integrity Unit of any alleged police misconduct or evidence they discover that impacts the credibility of an officer within two business days so that the office's *Brady* Committee can review the materials. *See* San Francisco Internal *Brady* Policy (page 5).

Franklin County Prosecuting Attorney's Office

In Franklin County, Pennsylvania, line prosecutors are required to report misconduct they observe or learn of through their investigations to the office's First Assistant District Attorney (the elected prosecutor's second in command). *See* Franklin County District Attorney *Giglio* Protocol (page 2).

King County Prosecuting Attorney's Office

In King County, Washington, any line prosecutor who becomes aware of potential *Brady* material regarding a police officer must inform a supervisor. If the supervisor believes that the information could constitute *Brady* material, they will direct the line prosecutor to prepare a memorandum summarizing the material. The supervisor then presents the memorandum and all related evidence to the office's *Brady* Committee. In most circumstances, the Prosecuting Attorney's Office will forward the allegation to the local police department's internal affairs unit for investigation, and rely on the result of that investigation to determine whether the officer should be added to the disclosure list. For instance, if the internal affairs division concludes that the allegation is "substantiated," the officer would likely be added to the list. *See* King County Prosecuting Attorney's Office *Brady* Committee Protocol (pages 3-5).

Bexar County Criminal District Attorney's Office

In Bexar County, Texas, staff members that become aware of possible misconduct must report the incident to their supervisor, who in turn informs the Chief of Litigation. The Chief of Litigation will then forward the matter to the Ethical Disclosure Unit (if it concerns untruthfulness, general misconduct, or a questionable search) or the Civil Rights Division (if the allegation involves a custodial death, excessive use of force, or civil rights violation). The Ethical Disclosure Unit Attorney or the Chief of the Civil Rights Division will then make a recommendation as to whether to add the officer to the database. That recommendation is considered by the Chief of Litigation, the First Assistant, and the District Attorney, who collectively decide whether the officer should be added to the database. *See* Bexar County Criminal District Attorney's Office's Government Witness Misconduct Reporting Flowchart.

Recommendation #3: Designate a person or group of people responsible for deciding which officers are added to the office's police disclosure list. In addition, develop a standard of proof that must be met for an officer to be added to the list.

Most offices that have a disclosure list have a designated person who maintains the list. Typically, police departments and line prosecutors will report allegations of misconduct to that individual. Once the designated point of contact in a prosecutor's office learns of possible police misconduct - whether in the form of a substantiated civilian complaint or evidence uncovered by a line prosecutor - the office must determine who will be added to the disclosure list. Many offices with a *Brady* protocol **specify that a "*Brady* Committee," which typically includes senior and executive level prosecutors**, will decide whether to include an officer in their police disclosure list.

Examples in Practice

San Francisco District Attorney's Office

In the San Francisco District Attorney's Office, the *Brady* Committee consists of eight senior prosecutors. The protocol specifies that at least four members must be at a meeting to constitute a quorum and that an officer is placed on the list if a simple majority of present committee members vote to add the officer. The District Attorney reviews the *Brady* Committee's recommendation within ten days, after which the Committee's decision becomes final. *See* San Francisco Internal *Brady* Policy (page 12).

Philadelphia District Attorney's Office

In Philadelphia, three members of the District Attorney's Conviction Integrity Unit review referrals of allegations of police misconduct. The group discusses who to add to the office's database, and the Chief of the Unit makes the final decision. The District Attorney himself will decide when to place an officer on the list in difficult or potentially controversial matters.

In addition to having a designated person or group of people decide who to add to the police disclosure list, it is helpful to have a **clearly defined standard of proof** that must be met before placing an officer on the list. A common concern among police officers is that their names will be placed on the list arbitrarily and without sufficient investigation. The prosecutor's office can assure law enforcement that officers are only placed on the list after the allegation has been investigated.

Examples in Practice

Buncombe County & San Francisco District Attorney's Offices

In Buncombe, North Carolina, the District Attorney requires "substantial information" as a standard of proof for disclosure from the police to the District Attorney's Office. San Francisco also uses a "substantial information" standard. Although the two policies differ slightly in how they define "substantial information," both require that the allegation is not "based on mere rumor, unverifiable hearsay, or a simple and irresolvable conflict in testimony about an event[.]" *See* Memorandum of Agreement Uniform Policy and Procedure Between Buncombe County Office of the District Attorney and Asheville Police Department (page 2). In San Francisco, if the *Brady* Committee determines that further investigation is required to determine whether the standard has been met, then it will forward the matter to the law enforcement agency to investigate internally. *See* San Francisco Internal *Brady* Policy (page 7).

King County Prosecuting Attorney's Office

King County, Washington's Prosecuting Attorney has a different approach. That office emphasizes that its *Brady* Committee does not serve as a "clearinghouse" for allegations. Rather, it only places officers on the list if the police department is investigating, or has substantiated, an internal complaint against the officer. Therefore, if an employee of the King County Prosecuting Attorney's Office discovers evidence that may reveal police misconduct, the person must send that information to the Police Department's Internal Affairs Division for investigation. In other words, the prosecutor's office *avoids* positioning itself as an investigating agency of police misconduct unless the misbehavior constitutes a crime.

Recommendation #4: If the policy states that only "material" information will be included in the police disclosure list, the policy should take an expansive view of what constitutes a "material" disclosure.

Brady and its progeny have made clear that under federal law, prosecutors are only required to disclose exculpatory and impeachment evidence that is "material." In *United States v. Bagley*, the Supreme Court stated information is "material" if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 473 U.S. 667, 682 (1985). A protocol that uses a materiality standard should **err on the side of caution**, and include any disclosure on a list that in certain contexts, may render the information material.

Some offices have a policy that explicitly goes beyond the materiality standard. For instance, the San Francisco District Attorney's Office has an explicit policy "to disclose favorable information to the defense, regardless of its materiality" in light of a Ninth Circuit decision that suggested prosecutors disclose information whether or not it is material. *See* San Francisco Internal *Brady* Policy (pages 2, 6). The Santa Clara County District Attorney's Office also indicated that the law in California requires disclosure of any favorable evidence,[16] and that it is the office's policy to disclose such information regardless of materiality. Similarly, the District Attorney's Office in Bexar County, Texas indicated it does not conduct a materiality analysis in part because a state statute requires disclosure of impeachment evidence regardless of its materiality. [17]

16 *See* Cal. Penal Code § 1054.1(e) ("The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies . . . [a]ny exculpatory evidence.").
17 *See* Tex. Code of Crim. Proc. Ann. art. 39.14(h) ("The state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.").

Recommendation #5: Have an appeals process in place so that officers can, if they wish to challenge their designation on the police disclosure list, voice their opposition.

Generally, prosecutors' offices either thoroughly investigate claims of police misconduct or rely on the conclusion of a police department's internal investigation before adding an officer to their police disclosure list. Therefore, it is rare that an officer is removed from a list once they are placed on it. However, several prosecutors' offices allow officers to challenge their placement on a police disclosure list. Prosecutors should have a policy that permits officers to submit documentation challenging the office's decision. In addition, prosecutors should consider developing standards to determine whether an officer should be removed from the list.

Having an **appeals procedure for officers, in addition to an initial vetting process for claims of misconduct** (whether it be the police department's internal investigation, an investigation conducted by a different agency, or an investigation by the prosecutor's office) demonstrates that the prosecutor intends to give police due process before adding them to the police disclosure list. It also reassures law enforcement that the prosecutor's office is not adding the names of police officers in an arbitrary manner.[18]

18 Most offices that have a written policy regarding their police disclosure list make clear that even if a prosecutor discloses the alleged police misconduct to the defense, the prosecutor reserves the right to oppose its admissibility on various grounds - including relevance. In addition, the inclusion of an officer's name on a list does not always constitute a comment on that officer's viability as a witness. For example, the Bexar County, Texas District Attorney's Office has a written policy that states, "The mere fact that a recurring government witness has been added to the Disclosure List is not an admission or comment by the Bexar County Criminal District Attorney's Office about that individual's credibility as a witness, on that individual's reputation, or on that individual's ability to serve in their current professional capacity. The government witness's inclusion on the Disclosure List does not constitute a conclusion that the recurring government witness has committed misconduct." *See* Bexar County Criminal District Attorney's Office's Ethical Disclosure Unit Policy (page 3). Similarly, the Maricopa County Attorney's Office policy states, "Material that must be disclosed is not always admissible evidence in trial. The DCA shall determine whether the law enforcement integrity information in a particular case is admissible and what arguments to make regarding admissibility." *See* Maricopa County Attorney's Office Prosecution Policies and Procedures (page 4).

Examples in Practice

Philadelphia District Attorney's Office

In Philadelphia, police officers can contact the District Attorney's Conviction Integrity Unit if they oppose their designation on the list. One officer was removed after the officer demonstrated, through an attorney, that the officer was placed on the list for factually incorrect reasons.

San Francisco District Attorney's Office

The San Francisco District Attorney's Office has an appeals process in which the *Brady* Committee will consider a claim, usually through an attorney, that an officer should be removed from the list.

Santa Clara District Attorney's Office

Santa Clara, California's District Attorney's Office will consider removing someone from its list if multiple judges rule the material does not constitute *Brady*.

King County Prosecuting Attorney's Office

In King County, Washington, the *Brady* Committee will revisit its decision to add an officer to its list if new evidence comes to light or if the finding of misconduct is later dismissed. King County's policy makes clear that negotiated resolutions in lieu of discipline will not result in an officer being removed from the list. In contrast, dismissals of an allegation obtained through recognized due process procedures will result in the officer being removed from the list. *See* King County Prosecuting Attorney's Office *Brady* Committee Protocol (page 3). Finally, like Santa Clara, King County will reconsider a witness's placement on the disclosure list if court rulings clarify whether certain misconduct must be disclosed.

Snohomish County Prosecuting Attorney's Office

In Snohomish, Washington, the Prosecuting Attorney's Possible Impeachment Disclosure Committee will consider removing an officer from its list if it learns of "new, credible and material evidence creating a reasonable likelihood of doubt" regarding an initial determination by the Committee, or if the "agency finding of misconduct is later dismissed based on substantive evidence related to the allegation itself." *See* Snohomish County Potential Impeachment Disclosure Protocols (page 4).

Recommendation #6: Consider having two separate lists or categories of officers - one that merely requires disclosure to the defense, and another that bars calling that officer as a witness in a hearing or trial, or as an affiant in a search warrant.

Several offices have instituted two different lists within their databases or have placed officers in two separate categories within a single list. The purpose of having two lists or categories is to **distinguish officers who have a history of misconduct so egregious that prosecutors will not use their testimony at all**, from officers about whom prosecutors merely have impeachment material to disclose. The advantage of drawing a line between these two groups of officers is that the policy makes clear that not all officers with a history of misconduct are viewed in the same way.

Examples in Practice

Philadelphia District Attorney's Office

In Philadelphia, the office divides officers within its disclosure list between "Category 1" and "Category 2." The former indicates there is a presumption against calling the officer as a witness in a case without the District Attorney's approval. The second merely notes that the prosecutor may need to disclose information to the defense.

Santa Clara District Attorney's Office

Five years ago, Santa Clara, California divided its list into two separate databases. Officers on the "*Brady* List" present a clear cut case of dishonesty or other obvious impeachment material. Being placed on the "*Brady* List" leads to major ramifications for the officer, including difficulty in getting hired elsewhere in California as a police officer. In contrast, the office's "Disclosure List" is used for officers about whom a disclosure is required, but where the District Attorney's Office believes the incident falls in a "grey" area.[19]

19 An example of such a "grey" area is when a judge might rule that a police officer willfully lied during a hearing, but the District Attorney's Office does not necessarily agree.

Bexar County Criminal District Attorney's Office

Bexar County, Texas has a "Disclosure List" that includes information about a recurring government witness that may be favorable to the defense and must be disclosed. Those on the "Do Not Call List," however, are people whose credibility is "so impaired as to warrant special review of any case in which the individual may appear as a witness for the prosecution." *See* Bexar County Criminal District Attorney's Office's Ethical Disclosure Unit Policy (pages 4-6).

Recommendation #7: Ensure line prosecutors become aware as early as possible if their case includes officers on the police disclosure list.

A police disclosure list is only useful to the extent that line prosecutors have access to the information it contains and disclose the material to defense counsel. Prosecutors' offices should **make the information accessible to line prosecutors early in the case**, preferably before charging. Of course, such information should be stored in a secure manner with clear rules for staff members not to share the material outside of formal disclosures to defense attorneys.

Examples in Practice

King County Prosecuting Attorney's Office

In King County, Washington, line prosecutors are notified of the officer's placement on the list repeatedly throughout the life of a case, including at the charging stage and whenever they subpoena the officer to appear for court. Although rare, the Prosecuting Attorney's Office has declined to charge people when the line prosecutor learns that an officer is on the disclosure list because of a serious history of misconduct (for instance, when that officer is the sole witness to a crime).

Ramsey County Attorney's Office

In Ramsey County, Minnesota, line prosecutors learn which officers involved in their case are on the list when they are assigned a case.

Maricopa County Attorney's Office

In Maricopa County, Arizona, prosecutors (or their support staff) are instructed to verify whether officers in the case are in the database whenever a case is "opened" or "transferred." *See* Maricopa County Attorney's Office Prosecution Policies and Procedures (page 3).

Recommendation #8: Train and require prosecutors to disclose information in the police disclosure list to defense counsel as early as possible.

Although federal law does not require the prosecution to disclose impeachment material of a witness to the defense before a defendant pleads guilty,[20] a policy that **encourages early disclosure** will ensure fairness, prevent wrongful convictions, and restore our communities' trust in the criminal justice system. Some office policies emphasize the need to disclose any *Brady* information at the outset of a case.

20 *United States v. Ruiz*, 536 U.S. 622 (2002).

Examples in Practice

Philadelphia District Attorney's Office

In Philadelphia, line prosecutors must check the database "as soon as practicable," including at charging and when officers are subpoenaed to appear in court. *See* Philadelphia District Attorney's Office's Mission Statement and Request for Compliance Regarding Police Misconduct Disclosure (page 5).

King County Prosecuting Attorney's Office

In order to promote transparency, prosecutors should disclose an officer's prior misconduct to the defense even if they do not intend on calling that officer as a witness. Prosecutors in King County, Washington are instructed to make disclosures regardless of the line prosecutor's decision to call an officer on the police disclosure list to the stand.

Recommendation #9: Support efforts to make substantiated claims of police misconduct more accessible to the public.

Most offices that have a police disclosure list have not made their list public. Prosecutors have expressed concerns about statutes that shield police personnel records from public view, and do not want to be subject to litigation by police officers or departments for violating those laws. Some also worry that police departments will refuse to continue to grant access to disciplinary records. Others believe that while a prosecutor must disclose to the defense any impeachment material pertaining to officers, making such information public is a responsibility that extends well beyond a prosecutor's duties and is within the purview of local or state legislatures.

The above concerns are valid and should give prosecutors pause before releasing their police disclosure lists to the public. However, elected prosecutors can promote transparency by **advocating for laws that give the public more access to the disciplinary records of police officers**. Using the prosecutor's visible role to promote such legislation will advance the growing call for more police accountability.

Examples in Practice

Bernalillo District Attorney's Office

In Bernalillo County, New Mexico, the District Attorney's Office has made efforts to be transparent regarding its *Giglio* disclosures. The office's police disclosures, based on a policy implemented in October 2020, are posted online. When prosecutors ask their partnering law enforcement agencies for information about an officer's disciplinary history, most of the agencies provide a written summary of past misconduct (but not the underlying disciplinary records themselves). The prosecutor will then notify defense counsel that *Giglio* information exists regarding a specific officer, along with the summary from the police department.

One of Bernalillo County's law enforcement agencies has asked that the District Attorney's Office review the personnel records on site instead of requiring a summary. For disclosures pertaining to that agency, the prosecutors review the personnel records themselves, create a written summary of the *Giglio* information, and then send that summary to the defense.

In addition, prosecutors would benefit from having more access to the police disclosure lists of other offices, particularly in neighboring jurisdictions. Police officers may transfer within a state to another department, and though case law does not require a prosecutor to become aware of an officer's misconduct in a different jurisdiction, that information is crucial to ensuring fairness and transparency in the criminal justice system. As an example, in the fall of 2020, the Arizona Prosecuting Attorneys' Advisory Council launched a public database that includes police officers from disclosure lists throughout the state. Prosecutors can support legislation to make police records more accessible to the public and agree to share their list with other prosecutors in their state to prevent a police officer from evading accountability by simply moving to a nearby jurisdiction.

Recommendation #10: Engage with the local police department(s) to explain the purpose of the police disclosure list and to address their concerns before implementing the policy.

Leaders of police departments are often skeptical of, or even hostile to, the creation of a police disclosure list. Some view the mere existence of a list as anti-police and fear that the database is used to unfairly stigmatize police officers. Prosecutors should create and maintain a police disclosure list notwithstanding police criticism for the reasons stated at the beginning of this guide.

However, prosecutors can **explain to law enforcement why the list is being created and the policies that are in place** to protect the rights of officers. Representatives from the prosecutor's office can reassure the police that being included in the database does not necessarily "blacklist" an officer or "end their career." While this process will not likely eliminate all of law enforcement's concerns, it may reduce hostility from the police and make it easier to obtain internal disciplinary information about the officers in the future.

Examples in Practice

Bexar County Criminal District Attorney's Office

When prosecutors in Bexar County, Texas, created a database of officers with a history of misconduct, representatives from that office met with police agencies in that jurisdiction. The prosecutors gave a presentation that explained the purpose of the database, and described the procedure that prosecutors would follow before any officer was added to the list. *See* Bexar County Criminal District Attorney's Ethical Disclosure Unit PowerPoint.

Bexar County prosecutors also informed their law enforcement partners that being added to the database would not necessarily preclude them from testifying. In addition, the prosecutors clarified that the District Attorney's Office would not always concede at trial that the disclosed impeachment material was admissible. Representatives from the Bexar County District Attorney's Office reported that these meetings and educational outreach brought about more cooperation from the police agencies, and less hostility toward the new practice.

Recommendation #11: Educate the community about the existence of the police disclosure list and the option of making a complaint about a police officer directly to the prosecutor's office.

To promote transparency, the elected prosecutor should **inform their community about the office's police misconduct database and protocol surrounding said database**. The public should know, for instance, what makes an officer eligible to be placed on a list and the consequences of such placement (i.e. whether a disclosure will simply be made to the defense or if there is also a "do-no-call" category within the list). Ideally, a designated liaison who understands the protocol in detail will answer any questions from the community about the database.

In addition, some community members may not feel comfortable filing a complaint with the police department. Therefore, particularly if a prosecutor's office has a division dedicated to investigating corruption or official misconduct, community members should be given an avenue to file a complaint directly with that unit.