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MEMORANDUM

TO: Deputy Prosecuting Attorneys, Criminal Division

FROM: Adam Cornell, Prosecuting Attorney AC

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RE: Prosecutorial Obligations Under the Discovery Rules – A Reminder

The pivotal role we play in the administration of criminal justice carries with it immense responsibility and breathtaking discretionary power. It is noble and often difficult work. We should always be resolute when justified, concede when just, and unyieldingly discharge our obligations with dignity and integrity. In doing so, we are guided by decisional authority, the Criminal Rules, and the Rules of Professional Conduct.

From time to time, it is important that we be reminded of how these obligations apply to our daily work. To that end, what follows is a reminder. It is not a comprehensive review of our discovery-related responsibilities. Rather, it covers several problematic areas that have been identified by Assistant Chief Deputy Prosecuting Attorney Seth Fine and Appeals Unit Lead Deputy Prosecuting Attorney Kathleen Webber. I fully endorse their legal analysis and advice and I expect all Criminal Division attorneys to adhere to the following obligations.

1. Impeachment information relating to potential witnesses must be disclosed prior to the omnibus hearing. If additional information becomes available later, it must be disclosed as soon as possible. Impeachment includes any material change in pretiral statements and any consideration that a witness would consider to be a benefit.

2. Plea agreements with prospective witnesses, and any related statements or recordings, must be disclosed.

Under CrR 4.7(a)(3), a prosecutor must disclose "any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged." Such disclosure does not depend on any request from the defense. This requirement extends to information that could be used to impeach a State's witness. *See Strickler v. Greene*, 527 U.S. 263, 280 (1999). It specifically includes inducements offered for the witness's testimony. *See United States v. Bagley*, 473 U.S. 667 (1985).

If a plea agreement is reached with a co-defendant who provides additonal information to law enforcement, that information could be used to impeach the witness, and/or may be independently exculpatory. Insofar as the evidence is potential impeachment, disclosure obligations turn on whether there was a reasonable possibility that the person would testify as a State's witness. Insofar as it is independently exculpatory, however, it must be disclosed. In that case, whether we intend to have the witness testify is irrelevant because the defense might choose to do so.

Note too, under CrR 4.7(h)(1), it is not proper to impede opposing counsel's investigations. Among other things, this means that we should not conduct pre-trial proceedings in a way that is solely intended to hamper defense access to evidence.

3. Prior to entry of an omnibus order, we need to review the defendant's discovery demands and object as necessary.

   Our omnibus orders set a date for "the exchange of the requested information and materials." This language is likely to be interpreted as incorporating defense discovery demands. If we are not prepared to comply with those demands, we need to object at the omnibus hearing.

4. For discovery purposes, a person must be treated as a "witness" whenever there is a reasonable possibility that the person will testify.

   Discovery obligations apply whenever there is a reasonable possibility the the information will be used at trial. *State v. Dunivin*, 65 Wn. App. 728, 829 P.2d 799 (1992). Additionally, if a new witness becomes known after the omnibus hearing, relevant discovery must be provided promptly. CrR 4.7(h)(2).

5. Witness safety concerns do not justify withholding information that is otherwise subject to discovery. If disclosure would place a witness in danger, a protective order should be sought.

   Negotiations with potential witnesses may take into account valid purposes, such as protection of the witness's safety. Witness safety concerns do not, however, justify a unilateral decision to withhold evidence that is otherwise subject to discovery. If disclosure of particular information would endanger a witness, the proper course is to seek a protective order under CrR 4.7(h)4).

6. If we are threatening to add additional counts for trial, discovery should be provided as if those counts were already charged.

   An information may be amended pretrial "if substantial rights of the defendant are not prejudiced." CrR 2.1(d). If a defendant has been warned that we intend to add a charge, doing so will usually not prejudice the defendant's substantial rights. This assumes, however, that the defense has received full discovery relating to the additional charge. If they have not, then a late amendment may deprive the defendant of the substantial right to adequate pre-trial preparation.

   This means that if we intend to add an additional count for trial, we must treat that count for discovery purposes as if it were already charged. If discovery relating to that charge is available prior to the omnibus hearing, it should be provided at that time. Otherwise, it should be provided as soon as possible after it becomes unavailable.

7. New information obtained after the disclosure deadline must be disclosed "promptly."

   When trial is impending, we should make special efforts to ensure that the information is dislcosed as quickly as possible. We should not wait for the paperwork to be processed, if this will result in any substantial delay. For example, if the new information is a plea agreement with a testifying co-defendant we should not wait for paperwork to be filed with the clerk's office and scanned into Odyssey.

8. If a person has made statements that tend to prove the defendant's innocence, we must disclose them, whether or not we intend to call that person as a witness.

   Statements that "tend to prove the defendant's innocence" are not limited to information that completely exonerates the defendant. Any new information that has the potential to negate an element of the offense, or decrease the defendant's culpability in the commission of the offense should be disclosed. Whether the statements appear to be credible or not does not determine whether the statements should be disclosed.

9. We need to review our files with the lead detective, to make sure that we have received (and disclosed) all relevant reports.

10. We must disclose discoverable information within our knowledge, even if we do not have a written report. If we can't obtain written documentation promptly, we should provide the defense with a summary of the information.

    Under CrR 4.7(a)(4), a prosecutor's discovery obligations extend to material and information within the knowledge, possession, or control of member of the prosecuting attorney's staff. The lack of written documentation does not excuse us from disclosing information that we know about. We are required to disclose discoverable information, whether or not it is set out in a written report. When we are aware that police have obtained information that is subject to discovery, we

should ask the police for written documentation. If we do not obtain the documentation promptly, we should provide the defense with a summary. When possible, disclosure should occur before the omnibus hearing. CrR 4.7(a)(1).

11. We need to be aware of the status of any intended laboratory testing. We should do what we can to ensure that the tests are completed far enough in advance of trial to allow the defense to respond. Upon defense request, we should give a realistic date by which testing will be completed. If we don't know the anticipated timeline, we must contact the crime lab and thereafter forward the information we receive to the defense. We also need to communicate clearly about when and whether testing should be conducted.

    The defense is entitled to discovery of any expert witnesses and their reports. CrR 4.7(a)(1)(iv), (2)(ii). When experts are involved, the defense should have a reasonable opprotunity to examine the reports, consult with their own experts if necessary, and prepare a response. This is not possible if the testing is delayed until shortly before trial.

    When testing has been ordered in a charged case, we need to be aware of the status of the testing. If there have been delays, we should do what we can to ensure that the tests are completed sufficiently in advance of trial. The defense should be notified of the anticipated timeline. We also need to clearly communicate with the detective or other expert about when and whether testing should be conducted.

    There are special problems with regard to testing firearms for operability. We will usually want to have such testing conducted if the defendant is charged with a crime involving possession or use of a firearm, or if a firearm enhancement is alleged. When possible, we need to ensure that the testing is conducted far enough in advance of trial that the defense will be able to respond.

12. We should be conscious of whether testing could destroy potentially-exculpatory evidence. If it could, the defense must be given advance notice and an opportunity to object before the testing is completed.

    Almost any testing may involve destruction of some potential evidence. It is important, therefore, to consider whether the testing will destroy or otherwise compromise the evidence collected. In the context of DNA, we should be aware of whether the testing will use up the sample provided. Regarding touch DNA, the concern is whether the possible presence of DNA will be obscured through handling by a third party. For fingerprints, any ungloved touching of a piece of evidence that could reveal fingerprints has the potential to smear or obscure those fingerprints.

    An order requiring preservation of evidence does not ordinarily preclude testing of evidence. Nonetheless, we need to be mindful that some judges may take the position that any evidence destroyed is potentially exculpatory, and violates the omnibus order requiring preservation of physical evidence.

We should be able to deal with these concerns by providing adequate advance notice. If destructive testing is anticipated, the defense should be given advance notice. The notice could state that the testing will occur on or about some specified date (after confirming the same with the detective and/or the crime lab), unless the defense objects in advance. If the testing has not been completed prior to omnibus, this could be included in the omnibus order. If there is an objection, we should get the matter noted for hearing promptly.

13. If you are unclear about any of the above, consult with your supervisor or a more senior DPA.

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