
Civil Rights & Judiciary Committee

HB 1088

Brief Description: Concerning potential impeachment disclosures.

Sponsors: Representatives Lovick, Goodman, Fitzgibbon, Johnson, J., Slatter, Wylie, Ramos, Bateman, Berry, Dolan, Tharinger, Simmons, Ryu, Ramel, Shewmake, Leavitt, Senn, Peterson, Gregerson, Valdez, Callan, Chopp, Duerr, Ormsby, Taylor, Lekanoff, Santos, Macri, Frame, Orwall, Berg, Pollet and Harris-Talley.

Brief Summary of Bill

- Requires the Washington Association of Prosecuting Attorneys to update its policy addressing potential impeachment disclosures and develop and maintain online training for potential impeachment disclosures consistent with the policy.
- Requires law enforcement agencies to report to prosecuting authorities an officer's misconduct affecting credibility or any act of an officer that may be potentially exculpatory to a defendant.
- Requires law enforcement agencies, prior to hiring any peace officer with previous law enforcement experience, to inquire whether the peace officer has ever been subject to potential impeachment disclosure.

Hearing Date: 1/20/21

Staff: Edie Adams (786-7180).

Background:

Prosecutors have an affirmative duty to disclose exculpatory evidence to the defense. This duty arises from constitutional due process requirements, as well as court rules and rules of professional conduct for prosecuting attorneys.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

Under the United States Supreme Court case *Brady v. Maryland* (Brady) and subsequent case law, the prosecution is required to disclose evidence that is both favorable to the accused and material to either guilt or punishment. The duty to disclose applies even if the defense has not requested the information. This obligation extends not only to potentially exculpatory evidence, but also to evidence impeaching the credibility of a government witness. Potential impeachment evidence includes information that a reasonable person could view as impairing the witness' credibility or competence. With respect to police officers who are government witnesses, impeachment evidence can include a prior conviction related to dishonesty, misconduct involving dishonesty or abuse of authority, and evidence tending to show a bias or some motive to lie.

Court rules and professional conduct rules also address the duty of prosecutors to disclose exculpatory evidence. Under Criminal Rule 4.7, a prosecutor must disclose to the defense any material or information within the prosecutor's knowledge that tends to negate the defendant's guilt as to the offense charged. The rule also specifically requires disclosure of prior criminal convictions of any government witness. Rule of Professional Conduct 3.8 establishes special responsibilities of prosecutors, and provides an obligation for a prosecutor to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.

Washington Association of Prosecuting Attorneys Model Policy.

In 2013 the Washington Association of Prosecuting Attorneys (WAPA) developed a model policy on potential impeachment disclosures. The model policy provides guidance to prosecuting attorneys on the scope of the duty of disclosure. Under the model policy, the prosecuting attorney has the obligation to make determinations regarding whether information is potentially exculpatory and subject to disclosure. The duty to disclose extends to any information that tends to negate the defendant's guilt, including any prior convictions as well as information that a reasonable person, knowing all the relevant circumstances, could view as impairing the credibility of an officer that will or could be called to testify in a criminal proceeding. The model policy also addresses procedures to be followed when making potential impeachment disclosure determinations and maintenance of any list potential impeachment disclosures.

Washington Association of Sheriffs and Police Chiefs Model Policy.

The Washington Association of Sheriffs and Police Chiefs (WASPC) also has adopted a model policy that addresses potential impeachment disclosure information that may be in the possession of law enforcement agencies. Under WASPC's model policy, law enforcement agencies must investigate all complaints against their officers. An agency must review all internal investigation files to determine if there is potential impeachment information on any officers who may be called as witnesses. The agency must disclose any potential impeachment information discovered to the prosecutor, and must notify the prosecuting attorney any time the agency becomes aware of new potential impeachment information.

Summary of Bill:

Washington Association of Prosecuting Attorneys Model Policy.

The Washington Association of Prosecuting Attorneys (WAPA) must update its best practices policy addressing potential impeachment disclosures pursuant to *Brady v. Maryland* and subsequent cases within 6 months of the effective date of the act. The WAPA must consult with the following entities in updating the policy: Washington State Association of Municipal Attorneys, Washington Association of Sheriffs and Police Chiefs, Washington Council of Police and Sheriffs, Fraternal Order of Police, and Washington State Patrol Troopers Association.

The policy must provide guidance for: (i) the types of conduct that should be recognized as potentially exculpatory or as creating potential impeachment material; (ii) how information about an officer or officer conduct should be shared and maintained; and (iii) when an officer's information or name may be removed from any list of potential impeachment disclosures.

The WAPA must develop and maintain online training for potential impeachment disclosures consistent with its policy, subject to amounts appropriated for this purpose. The online training must be developed no later than June 30, 2022.

Law Enforcement Responsibilities.

A law enforcement agency must report to prosecuting authorities the discovery of an act of an officer that may be potentially exculpatory to a criminal defendant, or an official determination that an officer has engaged in misconduct affecting his or her credibility. The report must be made to the prosecuting authority of any jurisdiction in which the officer may testify as a witness within 10 days of the agency's discovery of the act or official determination of misconduct.

Prior to hiring a peace officer with previous law enforcement experience, a law enforcement agency must inquire as to whether the officer has ever been subject to potential impeachment disclosure, and must verify the officer's response with the prosecuting authorities in the jurisdictions of the officer's previous employment. The fact that an officer has been subject to impeachment disclosure is not, in and of itself, a bar to employment.

Appropriation: None.

Fiscal Note: Requested on January 18, 2021.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.