

Police Officer Truthfulness and the *Brady* Decision

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Truthfulness and the 1963 *Brady* decision have become hot topics in law enforcement circles. Although years went by without much concern with the *Brady* decision, recent U.S. Supreme Court decisions have enforced *Brady* to include evidence maintained in a police officer's personnel files. Under *Brady*, evidence affecting the credibility of the police officer as a witness may be exculpatory evidence and should be given to the defense during discovery. Indeed, evidence that the officer has had in his personnel file a sustained finding of untruthfulness is clearly exculpatory to the defense. To remind the reader, in 1963 the Supreme Court ruled in *Brady v. Maryland* that the defense has the right to examine all evidence that may be of an exculpatory nature. This landmark case stands for the proposition that the prosecution will not only release evidence that the defendant might be guilty of a crime but also release all evidence that might show that the defendant is innocent as well.

Today many police executives have recognized the importance of officer credibility and have established a "No Lies" proclamation. As simple as No Lies sounds, it is far more complex and difficult to manage. Lies are not a fixed target; rather, deception exists on a continuum, from what is commonly called social lies or little white lies to egregious misconduct that warrants dismissal or prosecution. The true challenge is in dealing with deceptive conduct that lies somewhere in the middle of the continuum—not so far on one end of the continuum for termination and not far enough toward the other end of the continuum to be justifiable or excusable.

No Lies

Law enforcement executives have responded to these judicial decisions by imposing strict rules and, on the surface, No Lies seems great. This black-and-white rule certainly appears to be one upon which everyone can agree. To achieve a goal of maintaining the officer's and the department's credibility, ruling out all lies is the simplest solution and the easiest to enforce. But are police administrators really prepared to enforce the rule as it is communicated in the No Lies maxim?

There is an adage in management circles that rules should be explained and tools provided so employees can achieve the vision set out for them. No Lies, however, does not express the true concern of police administrators. Rather, the concern is with improper, intentional, deceptive conduct that affects an officer's credibility, whether that deceptive conduct consists of lying, making material omissions, or engaging in other unacceptable deliberate actions.

Not only should there be a policy defining improper, intentional, deceptive misconduct but there should also be a clear definition of deceptive conduct that is accepted by an agency. In police work, deceptive conduct in some areas is not only condoned but also encouraged or even required. The key to developing a policy is an understanding of the difference between deceptive conduct and deceptive misconduct.

What Is Lying?

In *Lying* (New York: Vintage, 1999), Sissela Bok defines a lie as any intentionally deceptive stated message. According to Bok, these are statements that are communicated either verbally or in writing. Lying is a subset of the larger category of deception, and deception is undertaken when one intends to dupe others by communicating messages meant to mislead

and meant to make the recipients believe what the agent (the person performing or committing the act) either knows or believes to be untrue. Deception encompasses not only spoken and written statements but any conduct that conveys a message to the listener. Deceptive conduct can range from verbal statements or writings to physical expressions such as a shoulder shrug, eye movement or silence—any intentional action that conveys a message.

Historically, not all intentionally deceptive conduct in social interactions has been considered improper. Indeed, as early as the Middle Ages, Saint Thomas Aquinas classified deceptive conduct as helpful, joking, or malicious. Aquinas argued that lying helpfully and lying in jest may be acceptable forms of conduct, whereas telling malicious lies, lies told deliberately to harm someone, was a mortal sin.

Acknowledging that some deceptive conduct is acceptable helps to define deceptive misconduct. For example, the classic dilemma, argued about for centuries, is what to do if a murderer approaches you and asks the location of his intended victim. If you tell the truth, the murderer will kill the victim. If you lie, the intended victim will have the opportunity to escape. Although this hypothetical dilemma forces you to choose between insufficient options with no other choices, it is illustrative of Aquinas's argument. Lying to a murderer to protect a potential victim is helpful, and it may be both morally and ethically the proper thing to do because it is the lesser of evils under the circumstances.

Lies Justified by Investigative Necessity

In the performance of their duties, police officers frequently engage in a significant amount of deceptive conduct that is essential to public safety. Consider lying to suspects, conducting undercover operations, and even deploying unmarked cars.

Presenting a suspect with false evidence, a false confession of a crime partner, or a false claim that the suspect was identified in a lineup are but a few of the deceptive practices that police officers have used for years during interrogations. These investigatory deceptive practices are necessary when no other means would be effective, when they are lawful, and when they are aimed at obtaining the truth.

Some, like John P. Crank and Michael A. Caldero in *Police Ethics* (Cincinnati: Anderson, 1999), have argued that accepting these types of deceptive practices places the police on a slippery slope, which will create a belief by officers that all deception is acceptable, or a perception by the public that diminishes the trustworthiness of officers. It may be true that some persons who engage in serious misconduct began with minor acts of deception, but it does not follow that all deception is a gateway to serious misconduct. Most police officers can distinguish the differences and do not conclude that specific, lawful deception implies the rightness of all deception. The majority of police officers are quite capable of applying the Constitutional test of whether that deceit would make innocent persons confess to a crime that they did not commit.

Lies Made in Jest

Where specific lies can be supported by rational argument as justified, other lies may be deemed excusable by the same type of ethical analysis. Lies made in jest, although sometimes callous and hurtful, do not affect an officer's credibility unless they are in such bad taste that they call into question the person's judgment in general. Between officers, embellishments and exaggerations are commonplace in the descriptions of the misfortunes of others. A sense of humor, even where some deception is involved, can and does help responsible persons cope with great stress and grim circumstances. Indeed, a sense of humor and a sense of proportion may be inseparable under the worst circumstances. Although humor is an acceptable practice at the appropriate time, humor is not a shield to the disciplinary process. When jokes become intentionally harmful to others, they become malicious lies that should be dealt with accordingly. Agency leaders should not strive to create such a sterile workplace that humor is forbidden, for they would succeed only in making themselves objects of derision and ridicule. Police leaders should seek to establish and enforce reasonable standards.

Deception concerning trivial matters, often told to spare another's feelings may also be excusable. These white lies are meant not for any personal gain but rather for social courtesy. Not every social situation calls for the whole truth. How

Officer Truthfulness: Relevant Case Law

Haney v. City of Los Angeles, 109 Cal. App. 4th 1 (2003).

Ziegler v. City of South Pasadena, 73 Cal.App.4th 391 (1999).

Brogan v. United States, 118 S. Ct. 805 (1998).

LaChance v. Erickson, 118 S. Ct. 753 (1998).

Ackerman v. State Personnel Board, 145 Cal. App. 3d 395 (1983).

Gee v. California State Personnel Board, 5 Cal. App. 3d 713 (1970).

Brady v. Maryland, 83 S. Ct. 1194 (1963).

do I look? What do you think? Sometimes benign statements or tactful silence are the most appropriate responses.

In *The Varnished Truth* (Chicago: University of Chicago Press, 1994), David Nyberg asserts that acts of deception are such common practice in human communication that deceptive conduct would be impossible to prevent entirely by any rule, law, policy, or manner of enforcement. From the social kindness of white lies to embellishments, exaggerations, and boastful behavior, we frequently conceal the truth for a variety of reasons. We not only condone these activities but also teach our children the art of deception from an early age. Children learn from their parents, friends, television, books, and other sources how to deceive. Children quickly learn how to maintain a poker face, so their hand is not easily identified by their body language, or in sporting activities where young athletes fake a throw or head-fake an opponent by looking one way and going another.

Our laws and culture have even created exceptions to the unvarnished truth such as in advertising, recognizing that there is speech that tends to embellish the value of a product, but because these speech patterns are so common and easily recognized, they do not dupe a reasonable, mature person into a false belief. This exception, called puffery, encompasses terms like "world's best," "the greatest," "the purest," and so on.

Malicious Lies

Although lies justified by necessity, lies told in jest, and white lies may be acceptable forms of deception in law enforcement, malicious lies are the true evil of officer misconduct. The difference between lies justified by necessity or lies made in jest and malicious lies is the presence of actual malice by the communicator. Here, malice would include not only lies told

with a bad intent but also lies that exceed the limits of legitimacy.

For example, a police officer may be tempted to testify falsely to imprison a criminal. The officer's intent may be a worthy objective to the public; removing a criminal from society and the officer may validate his intent in his own mind by believing that he is engaging in a greater good. But this lie would violate the standard by which we would say the lie was reasonable and appropriate under the circumstances given the status obligations of the person engaging in the lie. Although the intent may be legitimate, the actions are malicious. This malice is the motive by which any sense of limits or constraint or fidelity to law and policy is destroyed.

It is important to understand that motive or intentions can be mixed, so that a person may deceive in order to pursue some worthwhile, utilitarian goal (such as public safety) and at the same time have a malicious disregard for the rights of the suspect and for the laws, policies, and limits that apply to policing. This willingness to betray basic principles of honesty attacks the very public safety that the person believes himself to be pursuing. A police officer who by malicious disregard goes beyond the limits of legitimacy is a threat to the public safety, since the officer may end up violating anybody's rights, and this poisons the idea that the lie is advancing public safety.

Deception Continuum

Perhaps it is easier to assess intentional deceptive conduct on a continuum. At one end is intentional, malicious, deceptive conduct that will take one of three forms:

- Deceptive action in a formal setting, such as testifying in court or during an internal affairs investigation
- Failure to bring forward information involving criminal action by other officers, also known as observing the so-called code of silence
- Creation of false evidence that tends to implicate another in a criminal act

Intentional, malicious, deceptive conduct in any of these three areas will permanently destroy an officer's credibility. Should an officer violate these standards, there is no alternative in an employment context other than termination or permanent removal from any possible activity where the officer could be called upon to be a witness to any action.

At the other end of the continuum are lies justified by necessity, which may be defended, based on the circumstances and excusable lies, including lies made in jest and white lies, which like minor embellishments and exaggerations are not intended to harm others or convey a benefit to the communicator. These types of deceptions are at least excusable if not acceptable.

Deceptive conduct at either end of the continuum can be dealt with easily. At one end, the conduct does no harm and no action is necessary. At the other end, there is great harm and there is no option other than the termination of the officer's employment. The problem is not the conduct at the ends of the continuum, but rather the conduct that falls somewhere in between. Consider the following example:

A supervisor asks an officer whether a particular report has been completed. The report itself is of very little consequence, and the question was prompted by a routine administrative action rather than any specific employee concern. The officer has not submitted the report but quickly replies that the report has been turned in, fearing what would be at most a minor counseling by the supervisor. The officer then immediately completes the report and turns it in before the supervisor can discover the lie.

In this example, the officer was dishonest. He was asked a direct question by a supervisor and he failed to respond truthfully. Although the officer had no opportunity for reflection, there is no excuse for his misconduct. The question was not posed as part of a formal process, the officer was not engaging in an action to protect another officer, and there was no conduct that would place a community member at risk of a false prosecution. Similarly, there is no evidence that the officer's deceit was either justified or excusable.

What is left is conduct that falls somewhere in the middle of the continuum. The officer's response is certainly not acceptable, but it leaves the question of whether it is far enough on the other end of the continuum to be grounds for termination. There is a strong argument for termination in this case. After all, the officer was asked a direct question by a supervisor about a work-related subject and the officer responded untruthfully. The difficulty for managers is balancing the need of the department and community to have officers that are beyond reproach against the recognition that all officers are human beings and that they have human failings. The officer's response may best be described as a spontaneous, unintelligent statement, and there are other factors that should be considered in making a final determination. Is the officer remorseful? Does the officer recognize the error? Does the officer have an otherwise acceptable record with the department? Was the underlying issue one of very little consequence?

Consider the following:

A dispatcher asks an officer if he is available for a call. The officer radios that he is out of service and unavailable, when in fact he does not want to receive a call because it is near the end of his shift. Based on the officer's statement, the dispatcher assigns the calls to another officer.

As in the last scenario, the officer's conduct is neither justifiable nor excusable. However, the conduct probably does not amount to the end of the scale that mandates termination. It is this type of intentional, deceptive, misconduct that can be termed "administrative deception" that creates consternation for police management. The conduct may not warrant termination, but a sustained finding of untruthfulness creates a *Brady* issue that many believe will prohibit the officer from continuing his employment. The question then becomes, does *Brady* mandate termination on the basis of any lie or act of deception?

Brady Analysis

The No Lies rule causes managers to deem that *Brady* has taken their discretion away on these cases that fall outside the justified or excusable categories. But removing management discretion is not the *Brady* rule. *Brady* stands for the proposition that evidence that may be exculpatory in nature must be given to the defense. In a case where an officer will be testifying as a witness to an event, the officer's credibility is a material issue and his lack of credibility is clearly potentially exculpatory evidence and therefore sustained findings of untruthfulness must be revealed.

It seems that the analysis often stops at this point, suggesting that if there is evidence regarding an officer's credibility, the officer can no longer be placed in a position where he may become a percipient witness in an investigation. If that evidence is that the officer violated the far right of the continuum—deception in a formal process, participation in a code of silence, or planting evidence—both *Brady* and responsible management principles dictate the termination of the employee. But what if the misconduct is in the middle area of the continuum? Working through the complete *Brady* analysis and court evidence admission process will help the manager make this determination.

First, it is important to understand that even though the defense gets the information—and they should get it—there is no guarantee that the defense will be able to present the evidence of officer misconduct to the jury. It is the court, not the defense, that makes this determination. In its decision to admit evidence, the court will weigh the evidence to determine if it is more probative than prejudicial. Not all evidence of deceptive conduct by an officer will be admissible.

Think about an officer who engages in a secretive extramarital affair. At a minimum, the officer has lied to a spouse and broken a vow (an oath) to remain faithful. If there is evidence that the officer has maliciously lied for his own benefit, it certainly follows that the officer's credibility

and testimony may be questioned. Although the officer may have committed a mortal sin according to Aquinas, the evidence of the officer's deception will probably never be heard in court. This type of evidence would be prejudicial against the officer's credibility, but at the same time it offers very little probative evidence on the officer's credibility while testifying in court and therefore most judges would not permit this evidence to be introduced.

Courts are likely to treat many administrative lies in the same manner. The court would probably view these administrative lies as evidence that would uniquely tend to evoke an emotional bias against the officer as an individual and would have very little effect on the issues. But even if the court allows the evidence to be presented to the jury the analysis has not been completed. The prosecutor will be able to present evidence in an effort to rehabilitate the officer. How long ago did the misconduct occur? Was it of a relatively minor administrative issue? Did the officer show appropriate contrition? Was the officer punished? Did the misconduct occur more than once? Has the officer received training as a result of the discipline? Did the officer that made the statement immediately make a subsequent truthful admission? Is there evidence that the officer's conduct has changed?

Police managers should weigh all of the factors of deceptive actions that fall at the middle of the continuum and use their management discretion on a case-by-case basis. In some cases, termination will follow. In others, it may not.

Managers should also be warned that there would be a strong temptation to use euphemisms in describing the officer's misconduct to protect the officer and the agency against potential *Brady* issues. In the examples cited above, managers may choose to discipline for the underlying misconduct—failing to complete a report and failing to respond to a call, rather than disciplining the officers for their statements. This type of discipline would send the wrong statement to both the officers and the organization. The officers should be disciplined for their deceptive misconduct as well as the underlying conduct. If management did anything else they would be engaging in intentional deceptive misconduct on a greater level than the officer. In the above examples, the officers' statements were spontaneous, where management's actions to discipline for only the underlying misconduct were thoughtfully chosen to hide the officer's deceit.

The key in making a decision regarding a particular middle-of-the-continuum deception is whether management can defend their decision or thoughtfully tell their story. The decision must be able to withstand rigorous analysis from those on all sides of the issue. In making the

final decision, the chief of police must determine whether he or she can stand in front of the community and defend the department's position. If so, then the chief should deal with the issue directly and honestly; if not, there is no alternative other than termination.

No Lies has started a conversation, but refinement of that discussion focuses our energy on the areas of deceptive conduct that cause the real concern for police administrators. In law enforcement, malicious deceptive conduct includes intentional deceptive conduct in a formal setting, the code of silence, and the false implication of another in a criminal act. A violation of any of these precepts should effectively and permanently end an officer's career. Both

honesty and the reputation for honesty in law enforcement are absolutely essential. Those who are not able to meet these expectations simply are not able to fulfill the essential job requirements of a peace officer.

Law enforcement managers should be able to recognize deceitful conduct at either end of the scale and deal with the conduct appropriately. The issues that fall somewhere in the middle of the continuum are obviously much more difficult. The issue is not whether these middle ground deceptions are acceptable; they clearly are not. Any intentional deceptive conduct that is not justified or excusable is inappropriate. The issue for police managers is whether they have management discretion and whether there is any pun-

ishment available to them other than termination. The answer is that police chiefs have discretion available to them and that not every act of intentional deception may be worthy of termination. But management must be warned that with their discretion comes a duty to punish the inappropriate behavior and the willingness to deal with the officer's action for years in the future.

In life, there are often second chances, and sometimes even more. In law enforcement, there are no second chances when it comes to the integrity of our officers and ourselves. In law enforcement, malicious deceptive conduct is untenable and cannot be tolerated at any level in the organization. ❖