

Report to the General Assembly:

Workgroup Study of the  
Impact of Body Worn Cameras on  
Workload in Commonwealth's Attorneys' Offices

*Compensation Board*

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# Contents

Introduction .....	4
Authority .....	6
Background .....	7
Existing Workload Factors and Staffing .....	8
Change Factors Affecting Workload .....	10
New Rules for Pre-Trial Discovery in Criminal Cases .....	10
Body Worn Camera Footage and Viewing Responsibilities .....	12
Research and Data Availability.....	14
Surveys of Commonwealth’s Attorneys.....	14
Research Studies/Reports and Contacts, Other Jurisdictions.....	15
Data Availability and Findings .....	17
Final Considerations and Workgroup Recommendations .....	19
Appendix A – Workgroup Members .....	22
Appendix B – Allocation of State-funded Staffing and Needs under Compensation Board Staffing Standards; Locally-funded Staffing .....	24
Appendix C – Summary of Prosecutors’ Ethical Duties.....	28
Appendix D – Commonwealth’s Attorney Survey Results .....	32
Appendix E – Detailed Data Collected by Henrico County Commonwealth’s Attorney’s Office Related to Body Worn Camera Footage, Comparison with Caseload Data .....	38
Appendix F – Workgroup Agency Representative Comments Regarding Other Impacts on Law Enforcement and the Court System of Body Worn Cameras .....	39
Appendix G – House Appropriations Committee Staff Retreat Presentation on Body Worn Cameras and Commonwealth’s Attorney Workload, November 13, 2018 .....	47
Appendix H – Workgroup Recommended Budget Amendment .....	64
Appendix I – Bureau of Justice Assistance/Body Worn Camera Training and Technical Assistance: “Policy Considerations for Body Worn Cameras in Prosecutor Offices” by Damon Mosler, Deputy District Attorney, San Diego County District Attorney’s Office .....	66

## Introduction

The Compensation Board is pleased to present this report summarizing the review by a workgroup of the impact on the workload of Commonwealth's Attorneys' offices of the use of body worn cameras (BWCs) by law enforcement officers within the jurisdictions they serve, pursuant to Chapter 2 of the 2018 Special Session I Virginia Acts of Assembly. This report presents the findings of the group's review of processes related to body worn camera footage, judicial input and ethical considerations, policies and practices used in other states, fiscal and staffing challenges and other workload-related issues, and presents recommendations of the group having budgetary or legislative impact, as sought in the provisions directing the study.

Workgroup members in this review included representatives of the Virginia Association of Commonwealth's Attorneys, Virginia Association of Counties, and the Virginia Municipal League as well as representatives of the Court of Appeals of Virginia, the Virginia State Bar and the Virginia Sheriffs' Association. Other workgroup participants included staff of multiple state agencies, including the Department of Criminal Justice Services, the Virginia Indigent Defense Commission, Virginia State Police, Commonwealth's Attorneys' Services Council, the administrative office of the courts - Office of the Executive Secretary of the Supreme Court, and staff of the Compensation Board. Staff of the House Appropriations and Senate Finance Committees also attended the meetings.

A great deal of the focus of the workgroup's review and discussion was focused on defining responsibilities of the Commonwealth's Attorney's office where body worn camera (BWC) footage exists in the areas of viewing, redaction and the prosecutor's ethical obligations. Also, discussions focused on law enforcement practices for recording footage that would be considered evidentiary, and how that footage is tagged to specific events and the means by which it is shared with prosecutors. Workgroup members were presented with information obtained from surveys of Commonwealth's Attorneys regarding BWC footage received and viewed, information regarding state-funded staffing and shortfalls that currently exist under staffing standards as well as existing local funding supporting staff, and data that generally defines caseload and overall workload of Commonwealth's Attorneys' offices. Other studies and reports on these issues from across the country were also reviewed.

The workgroup convened in three meetings in the fall of 2018; while significant information was gathered and shared during these meetings and recommendations were developed, the group determined that sufficient information does not exist at this time to fully measure workload in a consistent manner. Consequently, a recommendation is included that the group be continued for a two-year period for the purposes of gathering and analyzing data to develop more comprehensive measures to quantify workload.

The Compensation Board would like to thank the workgroup members for their time and contributions to the study, both in meetings and beyond, including survey data collections, contacts with jurisdictions across the country, and insights and inputs from their various areas of expertise. Questions or comments regarding this report should be directed to Robyn M. de Socio, Executive Secretary for the Compensation Board, at (804) 225-3439 or via e-mail at [robyn.desocio@scb.virginia.gov](mailto:robyn.desocio@scb.virginia.gov).

## **Authority**

### **Chapter 2, Item 73, paragraph U. (2018 Special Session I Virginia Acts of Assembly)**

“U. The Executive Secretary of the Compensation Board shall convene a working group comprised of representatives of the Supreme Court, Department of Criminal Justice Services, Commonwealth's Attorneys, local governments, and other stakeholders deemed appropriate by the Executive Secretary to investigate how body worn cameras have or may continue to impact the workloads experienced by Commonwealth's Attorneys offices. The working group shall examine processes, relevant judicial decisions, practices, and policies used in other states, potential financial and staffing challenges, and other related issues to determine workload impacts, and to develop recommended budgetary and legislative actions for consideration during the 2019 Session of the General Assembly. The Executive Secretary of the Compensation Board shall submit the recommendations of the working group to the Chairmen of the House Appropriations and Senate Finance Committees by December 1, 2018. All state agencies and local subdivisions shall provide assistance as requested by the working group.”

## Background

For a number of years, law enforcement agencies have been leveraging technology to improve transparency and accountability, reduce liability, and generally improve trust in daily interactions with the public. Body worn cameras are an example of technology that can aid in reducing use-of-force incidents or provide swift resolution to complaints against law enforcement officers in their behavior or actions.

Across the country, law enforcement agencies have deployed body worn cameras (BWCs) among their law enforcement officers in many jurisdictions with consideration given to the one-time cost of purchasing cameras, and in this implementation have also considered and planned for ongoing costs of footage storage, supervisory review, etc. Studies, best practices, and model policies for the implementation of BWCs among law enforcement abound across the country, and the Department of Criminal Justice Services published its own Model Policy on Body Worn Cameras for law enforcement agencies in Virginia in October, 2015. However, consideration of costs beyond law enforcement implementation and maintenance has been secondary, minimal, or nonexistent. Inclusion of the Commonwealth's Attorney in original planning and discussions for implementation of BWCs has varied across localities in Virginia, but most Commonwealth's Attorneys indicated they were not consulted, or were simply notified of implementation plans.

In recent years, Commonwealth's Attorneys have begun to vocalize concerns regarding increased workload in their offices related to footage that is generated from the implementation of BWCs among their local law enforcement agencies. The Virginia Association of Commonwealth's Attorneys (VACA) has prioritized funding to address workload resulting from BWC footage as one of its high priority needs over the last two legislative sessions. During the 2018 Session of the General Assembly, amendments were reported by subcommittees of both the House Appropriations and Senate Finance Committees in response to this concern. Both amendments required localities that had implemented BWCs among their local law enforcement agencies to provide additional locally-funded staff to support the increased workload in their Commonwealth's Attorney's office. The Senate Finance Committee amendment required a ratio for local funding of one full-time Assistant Commonwealth's Attorney for every 50 BWCs deployed, and the House Appropriations Committee amendment required local funding for staff be provided but did not require a specific ratio.

Local governments expressed opposition to the reported amendments containing local mandates, and the legislature ultimately approved language in Chapter 2, 2018 Special Session I Acts of Assembly that the Executive Secretary of the Compensation Board convene a working group to investigate how BWCs impact the workloads of Commonwealth's Attorneys' offices and to develop recommendations for consideration by the 2019 General Assembly. Participants in the workgroup may be found in Appendix A of this report.

## Existing Workload Factors and Staffing

Major concerns expressed by localities for a mandate on local governments to provide staffing support resulting from BWC implementation are based upon the matter of existing funding in support of Commonwealth's Attorneys' offices.

In providing state support for Commonwealth's Attorneys, the Compensation Board is responsible for establishing individual budgets for the operation of 120 Commonwealth's Attorneys' offices, which includes primarily salary funding to support the elected Commonwealth's Attorney, Assistant Commonwealth's Attorneys, and paralegal and administrative support staff in these offices. The legislature establishes a fixed dollar appropriation of \$74 million and a fixed number of staff positions to be allocated among the 120 offices. The current allocation of positions includes 120 Commonwealth's Attorneys, 613 Assistant Commonwealth's Attorneys, and 504 paralegal and administrative support staff positions.

The mission of the Compensation Board includes the "fair and reasonable" allocation of the funding appropriated by the General Assembly, and in the allocation of positions and related salary funding, the Board has established staffing standards that provide an objective formula for the determination of position and funding needs payable by the Commonwealth. As the Commonwealth, by statute, obligates the Commonwealth's Attorney to the prosecution of felonies in Circuit Court, this workload provides the foundation for Compensation Board staffing standards for Assistant Commonwealth's Attorney positions. A representation of the workload related to felony case prosecution in circuit court is demonstrated in staffing standards by two workload statistics: the number of felon defendants, as represented in the Supreme Court's annual caseload data; and the number of felon sentencing events, reported to the Virginia Criminal Sentencing Commission. A best fit formula was devised for Assistant Commonwealth's Attorney staffing using these statistics as a comparable representation of felony workload across all offices.

However, it has been a decade since new funding and positions have been appropriated to the Compensation Board for allocation to Commonwealth's Attorneys' offices to support growth in their felony caseloads. The last time additional resources were provided for this purpose was in FY08, and since that time, the number of additional Assistant Commonwealth's Attorney positions needed statewide to support only felony caseload in Circuit Court has grown to 102 positions, with a related need for support staff of 57 positions. As funding to address growth in workload and position needs is not regularly available, the Compensation Board employs a position reallocation policy that provides for the reallocation of positions from offices that exceed standards for felony workload (due to workload declines) to those offices that show a need for additional positions in accordance with the standards. However, reallocations are not regular occurrences, leaving some offices that have seen larger increases in workload to have increased staffing needs that cannot be met.

The Code of Virginia also provides that Commonwealth's Attorneys may, at their discretion, prosecute misdemeanor offenses; the majority of Commonwealth's Attorneys consider it their

obligation to their local citizens that they also prosecute certain traffic cases, such as DUI, etc., and certain classes of misdemeanor cases in the lower courts and in varying circumstances, especially where a defense attorney is representing the defendant or where a term of incarceration could result. In a recent survey of all Commonwealth's Attorneys' offices, all but 2 Commonwealth's Attorneys indicated that they prosecute these other cases in addition to just those felonies they are required to prosecute by statute.

In order to manage the additional workload of prosecuting traffic and other misdemeanor offenses across the courts in their jurisdictions, many Commonwealth's Attorneys have sought and received funding for additional staff beyond what the Compensation Board provides from their local governments. In many localities, local support for additional staff has also been necessary due to insufficient staffing for felony workload where the Compensation Board's staffing standards have not been funded, and where budget reductions impacting positions and salaries over the past decade have necessitated supplanting with local resources. Finally, while efforts to improve state-funded salary levels for Assistant Commonwealth's Attorneys have been made in recent years (FY14-FY15), many localities also provide significant funding to supplement salaries in an attempt to be more competitive and to address variations in cost-of-living in different areas of the Commonwealth (the Compensation Board is not funded to provide a salary differential for Northern Virginia or any other areas of the Commonwealth).

On an annual basis, as a part of each office's budget request to the Compensation Board, Commonwealth's Attorneys report additional staff positions and funding provided by other fund sources (e.g. locality, federal/other grants, asset forfeiture, etc.). In January, 2018, officers reported receiving locality funding to support the equivalent of an estimated 49 additional Assistant Commonwealth's Attorneys and 103 additional paralegal and support staff (not including victim/witness coordinator) positions statewide. Reported funding from local governments to support these positions, and from a combination of "other" sources to support another 60 positions, totals \$9.8 million. Also, Commonwealth's Attorneys statewide report an additional \$19.1 million (plus benefits) in locally funded salary supplements is provided on top of the \$71.3 million in salary and fringe benefit costs funded by the Compensation Board. A portion of these local salary supplements represent full funding for an additional 13 Assistant Commonwealth's Attorney positions and 31 paralegal and support staff positions that are allocated but unfunded by the Compensation Board due to previous budget reductions. Detailed data regarding the allocation of state- and locally-funded staffing, and staff needs according to Compensation Board standards for state funding, can be found in Appendix B.

In addition to the locality funds committed to Commonwealth's Attorneys' offices for local salary supplements and locally funded positions to address non-felony workload or shortages in Commonwealth funding for felony workload, some localities have provided added resources to address workload resulting from the implementation of body worn cameras. In a series of recent surveys of Commonwealth's Attorneys regarding body worn cameras (where 114 of 120 responded), responses indicated that while BWCs have been implemented in 84 localities, 21 localities provided funding in the equivalent of 38.5 attorney and/or administrative positions (13 in the City of Virginia Beach) to support new workload impacts resulting from the implementation of body worn cameras among law enforcement officers within the locality.

## Change Factors Affecting Workload

While existing Compensation Board staffing standards will capture changes in felony caseload and reflect an increased (or decreased) need for state-funded attorney positions, other outside factors are impacting the amount of time required to handle even an unchanged number of felony cases, that will not be reflected under current staffing standards.

Body worn cameras (BWCs) deployed by law enforcement add evidence requiring review by the prosecutor, which is a significant investment of time beyond the previous time necessary to read a law enforcement report regarding events that transpired. However, recent changes to the Supreme Court of Virginia's rules for pre-trial discovery in criminal cases, in conjunction with vast growth of BWC footage, will also add to the workload of prosecutors in Commonwealth's Attorneys offices even where caseload is unchanged, due to further time involved in meeting the requirements of the new Rules.

### New Rules for Pre-Trial Discovery in Criminal Cases

In order to capture the impact of the new Rules on felony caseload in circuit court, the Compensation Board would need to work with the Virginia Association of Commonwealth's Attorneys to identify a methodology change for its staffing standards, that would likely result in increases to the numbers of Assistant Commonwealth's Attorneys and support staff required statewide beyond the current staffing need that is presently not funded. However, the new Rules will add to workload for all case types, including traffic cases and misdemeanor cases in the lower courts, which are not considered in Compensation Board staffing standards for staff funding by the Commonwealth.

Workgroup member James McCauley, Ethics Counsel for the Virginia State Bar, provides the following summary regarding the new Rules of the Supreme Court of Virginia for Pre-Trial Discovery in Criminal Cases:

"On September 5, 2018, the Supreme Court of Virginia approved substantial amendments to Rules 3A:11 and 3A:12, but delayed the implementation of those changes until July 1, 2019, in order to enable the Virginia General Assembly to consider additional funding for prosecutors, both to handle the new discovery rules and to review and process the footage from police body cameras, a task that can be highly time-consuming.

The principal Rule of the Supreme Court governing discovery in criminal matters originating in the Circuit Courts is Rule 3A:11. Discovery in criminal matters in the District Courts is governed by Rule 7C:5, for General District Courts, and Rule 8:15, for the Juvenile and Domestic Relations District Courts. Additional rules which may affect, either directly or tangentially, discovery in criminal matters include Rule 1:16 (governing the form of all pleadings including "requests for discovery"), Rule 1A:4 (governing the conduct of counsel admitted *pro hac vice*), and Rule 3A:12 (governing requests for subpoenas and subpoenas *duces tecum*).

Under current Rule 3A:11, the prosecutor is required, upon motion, to permit inspection and copying any relevant written or recorded statements or confessions made by the accused, or the substance of any oral statements or confessions made by the accused to any law enforcement officer, the existence of which is known to the prosecutor; and written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests, other scientific reports, and written reports of a physical or mental examination of the accused or the alleged victim made in connection with the particular case, or copies thereof, that are known by the Commonwealth's attorney to be within the possession, custody or control of the Commonwealth. Upon written motion of an accused a court shall order the Commonwealth's attorney to permit the accused to inspect and copy or photograph designated books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, that are within the possession, custody, or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. Discovery under the new Rule would include the discovery permitted under the current Rule.

The amended rules add to the discovery permitted by the current rules. The amended rules would require prosecutors, upon motion, to allow defense counsel to inspect and review any relevant reports prepared by law enforcement officers, including any written witness statements or written summaries of oral statements contained within such reports. The Commonwealth's attorney may, but is not required, to provide copies of such information to defense counsel. Some Commonwealth's attorneys have an "open file" discovery policy and do not require the filing of a motion by defendant for discovery. The new rules also require the prosecutor to allow the accused to inspect, review and copy any written or recorded statements, or the substance of any oral statements, made by a co-defendant or co-conspirator that the Commonwealth intends to introduce into evidence against the accused at trial. In addition, the amended rules also create mutual obligations on the defense and prosecution relating to the exchange of witness lists and expert witness information. The new rules would allow the prosecutor to redact certain information for the protection of victims and witnesses and designate evidence or material as "Restricted Dissemination Material," either by agreement or by court order if the accused seeks to remove the redaction or "Restricted Dissemination Material" designation. While an accused could view material designated as "Restricted Dissemination Material," the defense counsel may not provide the accused with a copy. The material provided under the new Rule would not normally be available to the public. Any material or evidence disclosed or discovered pursuant to the newly amended Rule and filed with the clerk of court shall be placed under seal until it is either admitted as an exhibit at a trial or hearing or the court enters an order unsealing the specified material or evidence. Upon a sufficient showing, the court may enter a protective order that discovery or inspection be denied, restricted or deferred or such other appropriate relief. Revised Rule 3A:11 would not authorize discovery of prosecutors' work product, including internal reports, memoranda and other internal documents. Names of confidential informants could remain confidential unless the informant is to testify at trial."

## Body Worn Camera Footage and Viewing Responsibilities

With changes to the Rules forthcoming in July, 2019, the need to address position and funding shortfalls under current Compensation Board staffing standards and to determine how staffing needs will be addressed to handle the additional time investment required for viewing footage from BWCs becomes even more significant.

During the 2018 legislative session, Commonwealth's Attorneys presented their concerns regarding growing workload resulting from BWC footage, and localities expressed their concerns regarding a mandate that would require local governments to fund the staffing impacts. Commonwealth's Attorneys presented a recommended formula of one attorney position for every 50 BWCs deployed based upon statistics that considered prosecutor time and hours of footage produced, and localities presented a number of questions regarding where the responsibility should lay for providing funding, how much footage is required to be viewed, and what type of position might be responsible for viewing the footage in preparation for prosecution.

During the workgroup meetings conducted in the fall of 2018, workgroup participants all agreed that the case preparation time where BWC footage exists is now greater than before the introduction of BWCs. However, there was a great deal of discussion regarding whether viewing of video footage was required to be handled by a prosecutor, or whether less costly resources, such as police department employees, or administrative or paralegal employees in the Commonwealth's Attorneys' offices, might be capable of meeting the viewing requirements necessary for case preparation. While it may be possible for certain other employees in the Commonwealth's Attorney's office to log video footage received from law enforcement and attach it to cases under review by prosecutors, and perhaps to handle any technical redaction work that may be necessary for preparation for the defense for discovery purposes or for presentation in court, it was determined that the prosecuting attorney is obligated to review all footage related to the case. Specifically, workgroup members Judge Robert Humphreys of the Virginia Court of Appeals and James McCauley of the Virginia State Bar advised participants that constitutional jurisprudence from the United States Supreme Court, Rule 3A:11 of the Rules of the Supreme Court of Virginia and Rule 3.8 of the Code of Professional Conduct for lawyers in Virginia all require that prosecutors examine all evidence gathered in a criminal case for the purpose of satisfying various constitutional, judicial and ethical requirements. BWC video footage which is generated in connection with any felony or misdemeanor case prosecuted must be examined by a prosecutor to determine evidentiary value, whether it contains exculpatory evidence (that could exonerate the defendant, tends to negate guilt, mitigate the degree of the offense, reduce the sentence of the defendant, or impeach a witness), and to disclose the contents to defense counsel.

There was additional discussion in the workgroup meetings regarding whether it might not be necessary to view video footage where the prosecutor has been told that a defendant is going to plead guilty, and preparation for trial may no longer be necessary. From a practical standpoint, however, defense attorneys may not often give prosecutors notice of an intent to plead guilty until shortly before a scheduled trial, and a defense attorney should only do so

after reviewing all the evidence provided by the prosecutor, including any BWC footage. In most cases, a prosecutor would need to prepare for a case to go to trial and may only be told otherwise at the last minute. Additionally, even if a defendant does plead guilty, issues of non-compliance could arise in an appeal, especially in a situation where footage may have contained exculpatory evidence.

Workgroup member James McCauley, Ethics Counsel for the Virginia State Bar, has provided a detailed analysis regarding prosecutors' ethical duties as it relates to this evidence, which can be found in Appendix C. After lengthy discussions in the workgroup meetings, Mr. McCauley summarized that "(n)o one questions that the increasing usage of BWCs by law enforcement officers will impact greatly the workload of prosecutors charged with responsibility for the content of video footage that must be processed, reviewed and analyzed in order for a prosecutor to discharge his or her legal obligations under the new discovery rules, *Brady* law, and ethical duties under the cited rules. Existing prosecutors' workloads will be significantly increased by the time taken to review footage derived from BWCs. To comply with legal and ethical standards, Commonwealth's Attorneys must staff more lawyers or decline handling cases. Breaching the legal and ethical standards is obviously not an option."

## Research and Data Availability

As a means of identifying the workload impact of body worn cameras (BWCs) on Commonwealth's Attorneys' offices and quantifying that workload, the workgroup reviewed surveys completed by Commonwealth's Attorneys, reviewed a limited number of available reports that have begun to document efforts across the country to address workload on prosecutors from BWCs, and Commonwealth's Attorney members of the workgroup reached out to identified colleagues in other states where such efforts have been documented.

### Surveys of Commonwealth's Attorneys

In February, 2018, when representatives of the Virginia Association of Commonwealth's Attorneys were speaking with members of the 2018 General Assembly regarding their concerns about workload impacts of BWCs, they conducted a survey of their colleagues across Virginia to find out about numbers of cameras deployed and quantity of footage provided by law enforcement agencies for review by prosecutors. As a part of the workgroup study in the fall of 2018, the survey was expanded to gather further information regarding BWCs and video footage, prosecutor duties undertaken beyond felony caseload required by statute, and whether local staffing resources are provided for general office operation and whether new local resources have been provided to address workload resulting from the implementation of BWCs.

As noted previously, 114 of 120 (95%) Commonwealth's Attorneys responded to one or more of the surveys. Of those responding, 84 offices indicated local law enforcement had implemented or was in the process of implementing body worn cameras, with a total of 7,486 cameras deployed; among these offices, 21 (25%) had received additional staff resources to support additional workload. Added resources noted included a combination of support staff and/or attorney staff positions, adding resources to make part-time positions full-time, or adding resources to supplement the salaries of existing positions; in total, funding in the equivalent of 38.5 attorney and/or administrative positions was provided. Six Commonwealth's Attorneys indicated their locality was considering the implementation of body worn cameras, and 24 indicated that body worn cameras had not been implemented. Of those reporting BWCs, 18 Commonwealth's Attorneys in counties reported cameras had been deployed by a town police department within their county; some of these also had cameras deployed by county law enforcement. Three Commonwealth's Attorneys reported cameras had been deployed by a college or university police department within the jurisdiction of their city in addition to the deployment by their city police department.

Of the 84 offices reporting implementation of BWCs, 51 reported approximate hours of video footage over a 12-month period, totaling 181,192 hours of footage. While some offices were able to quantify hours, quite a few provided figures that had to be estimated, and a number of offices did not have or were unable to obtain the information for the survey. Details of the survey responses by office are included in Appendix D. House Appropriations Committee staff attended workgroup meetings and prepared a related retreat presentation prior to the

completion of the workgroup review for the Committee in November, 2018, also using data from the survey. A copy of the presentation, including additional summaries of the survey data, is included Appendix G.

### Research Studies/Reports and Contacts, Other Jurisdictions

While limited research exists in the public realm and reports are only newly becoming available related to workload for prosecutors resulting from BWCs, the workgroup was able to locate and review a handful of relevant reports. Two reports were most relevant to the work of the group: “Police Body Worn Cameras: What Prosecutors Need to Know”, published in March, 2018 by Prosecutor’s Center for Excellence and White & Case LLP (PCE/White & Case); and a report provided by the Baltimore County State’s Attorney Office entitled “Body-Worn Camera Video Evidence Study”, produced on October 1, 2018 as part of a study conducted by The Justice Management Institute in Arlington, Virginia on behalf of Baltimore County, Maryland.

The PCE/White & Case report (2018) represents a comprehensive summary of the current knowledge related to body worn cameras and the implications and considerations for prosecutors. It provides background information regarding the technology and its implementation by law enforcement agencies, system capabilities, how videos are “tagged” by law enforcement identifying whether they contain evidence, and tying the videos to certain cases, equipment and storage costs as well as storage volume and retention considerations for law enforcement. The report further summarizes information regarding prosecutor coordination with law enforcement for viewing access and information sharing policies, and ultimately how the BWC program affects technology needs in prosecutors’ offices, staffing needs in prosecutors’ offices, viewing and redaction responsibilities of prosecutors and access to videos by defense counsel, or access by witnesses in cases of use of force against law enforcement (PCE/White & Case report [2018] can be located at [https://pceinc.org/wp-content/uploads/2018/03/20180301-Police-Body-Worn-Cameras\\_What-Prosecutors-Need-to-Know-White-and-Case-and-PCE.pdf](https://pceinc.org/wp-content/uploads/2018/03/20180301-Police-Body-Worn-Cameras_What-Prosecutors-Need-to-Know-White-and-Case-and-PCE.pdf)).

From a staffing needs perspective, the report identifies studies of staff needs based upon footage quantities for viewing and redaction, and recommends a simple determination of staff need based upon average numbers of arrests by officers with body worn cameras and average video recording times to determine the quantity of video footage a prosecutor’s office will receive, and the consider prosecutor office policies to calculate the staff need. The report also identifies a handful of offices across the country that have provided staffing for various functions.

As it pertains to prosecutor staffing, the most commonly cited estimate of staff need is 1 position per every 100 cameras deployed by law enforcement. In attempting to identify the source of this ratio, Chief Deputy Commonwealth’s Attorney Susan Hooks of the Virginia Beach Commonwealth’s Attorney’s office ultimately reached the City Prosecutor’s office in Phoenix, Arizona. This office is responsible for prosecuting misdemeanor criminal cases for the City of Phoenix, and prepared estimates of time involved in reviewing and processing video evidence

based upon BWC footage from city police. The estimate of 100:1 resulted from this analysis, but continues to evolve as law enforcement policies change, such as when cameras are turned on and off, as additional cameras are added, and as legislative changes impacting redaction are approved, and a more conservative ratio may be under consideration (closer to 75:1).

Additional contact was made with Damon Mosler, Deputy District Attorney at San Diego County District Attorney's Office, who is actively involved with the Bureau of Justice Assistance (BJA) and has been involved in the production of many of the documents found online related to BWCs and prosecutors. Mr. Mosler is currently participating with a workgroup of the BJA studying three jurisdictions in California, Texas and New York. In the San Diego County District Attorney's Office, they are staffed with 300 attorney positions, and have approximately 3,800 BWCs deployed among law enforcement officers.

Finally, Susan Hooks of the Virginia Beach Commonwealth's Attorney's office also spoke with Scott Shellenberger, State's Attorney for Baltimore County Maryland, regarding the County's study on BWCs and the need for additional prosecutors. This office also handles all felonies and misdemeanors that could result in a term of incarceration, handling approximately 45,000 cases per year, and having been provided 11 staff positions as a result of workload arising from BWCs. Mr. Shellenberger provided a copy of the report completed by the Justice Management Institute, referenced above.

Prosecutors agree and the PCE/White & Case report also indicates that added workload from BWC footage originates from the time variation between a summarizing police report and footage from all cameras present at an incident. Prosecutors quoted in the PCE/White & Case report agree with comments from Colin Stolle, Commonwealth's Attorney for the City of Virginia Beach, made during workgroup meetings as well as before legislators during the 2018 session, that police information formerly provided to prosecutors as a one-page police report is, with BWC footage, replaced with hours of footage from cameras from multiple officers being on-site at an incident for the full period of time of the encounter with law enforcement, whether a DUI case or a domestic situation.

Viewing responsibilities and the prosecutor's ethical obligations have been well defined by workgroup discussions, but Commonwealth's Attorneys have additional responsibilities for redaction of certain information from video footage prior to disclosure to defense counsel in discovery, and in preparation for presentation at trial. While there is no specific statute pertaining to what must be redacted from video footage prior to discovery, specific information is not subject to public disclosure and must be redacted prior to presentation at trial. Personal identifying information and medical information that may be disclosed in video footage, images of victims, witnesses, individuals under protective orders and minors, information regarding confidential informants to law enforcement officers, and commands used by law enforcement with canines, may all be subject to redaction prior to presenting at trial and/or before disclosure to defense counsel. Various reports have indicated that redaction time can take from 1-1/2 to 4 times the length of the video.

In the Justice Management Institute's report (October 1, 2018) on the Baltimore County Justice System, a study was conducted using data of incidents and videos for a six-month period in 2018 from the police department and prosecutor's office to review the impact of BWCs on case processing and trial preparation workload of prosecutors and public defenders, as well as impacts on the court system. The study included detailed analysis of numbers of videos, minutes of videos, and numbers of incidents that fall into similar crime categories as those prosecuted by most Commonwealth's Attorneys in Virginia: misdemeanors and traffic cases that may lead to arrest or jail time, and class 1 & 2 felonies and other felonies. At the time of the study, the Baltimore County State's Attorney's office had 11 funded positions designated for handling workload from BWC footage, and in the first six months of 2018 had received 115,102 videos related to 32,528 incidents in the categories noted above, with 402,054 minutes (6,701 hours) of video ultimately representing incidents that become cases for the State's Attorney's office (out of total minutes in these categories for this period of 1.1 million, or 18,678 hours). Based upon this workload and available staff time, the report indicated a need for six further staff positions, however, the report also suggests that certain redaction process changes may mitigate the additional staff need.

The study conducted in Baltimore County represents a thorough, data driven approach to quantify workload in a prosecutor's office, with significant input and data provided for analysis by the Police Department and State's Attorney's office. While a similar data driven study in Virginia could assist in determining a methodology to quantify workload and identify a standard for staffing, sufficient data is not currently collected in a consistent manner by Commonwealth's Attorneys, and it is unknown whether such data is currently available in a consistent manner from local law enforcement agencies that have deployed cameras.

#### Data Availability and Findings

Limited data has been gathered and used to identify potential staff need among Commonwealth's Attorneys in Virginia. In the City of Virginia Beach, Commonwealth's Attorney Colin Stolle analyzed data from calendar year 2014 arrests and determined that if body worn cameras were deployed to all police officers, there would have been over 14,000 hours of BWC footage for review by the Commonwealth's Attorney's office. Based upon an estimate of 2,000 available hours of work time per full-time equivalent (FTE) position, there would be 7 FTE positions needed to view 2,000 hours of BWC footage. This would also equate to approximately 1 FTE per 50 body worn cameras, and this estimated need was included as the proposed standard in the Senate Finance Committee recommended amendment during the 2018 legislative session. While the City of Virginia Beach has provided added resources to the Commonwealth's Attorney's office for the handling of BWC footage, the City is still rolling out its deployment of cameras in a phased approach and statistics regarding actual numbers of videos and hours of footage is not yet available.

As a participant in the workgroup, the Hanover County Sheriff's office provided data projecting annual statistics for types of cases, numbers of videos produced, and hours of video produced. The Sheriff's office has deployed 150 body worn cameras and projects 5,371 annual hours of footage from 13,331 annual videos, with projected charges of 61 serious felonies, 652 other

felonies, 2,020 criminal misdemeanors and 5,553 traffic charges, totaling 8,287 annual charges. While only 9% of projected charges are felonies, approximately 15% of videos represent felony charges, and 23% of footage hours represent felony charges. While the Commonwealth's Attorney indicates these hours of footage are provided, statistics are not currently available regarding staff time involved in reviewing the footage for case preparation. Additionally, these statistics do not include additional footage generated from BWC's worn by police officers in the Town of Ashland, within Hanover County, that were deployed several years ago.

The most significant collection of data related to BWC footage and staff time devoted to viewing footage for case preparation in Virginia exists from Henrico County Commonwealth's Attorney Shannon Taylor. Henrico County Police Department began deploying body worn cameras to its officers in March, 2015. Beginning in mid-2016, the Commonwealth's Attorney began tracking and collecting detailed data regarding prosecutor time for each defendant, felony and misdemeanor case, numbers of officers and BWC videos provided for each case, and hours spent viewing video footage and on the cases based upon BWC video footage. In this locality, the Commonwealth's Attorney does not have direct access to all video footage captured by the police department, but rather seeks video footage when needed for specific cases. Data regarding the total footage available from the police department has not been gathered for different case types, but the footage requested for viewing by the Commonwealth's Attorney's office totaled on average 2,006 hours per year for an average of 2,191 cases annually over the past three years, with 48% of the hours viewed representing felony cases. Details of data compiled by the Commonwealth's Attorney's office, along with caseload data from the Henrico County courts, can be viewed in Appendix E.

Importantly, both of the previously mentioned reports speak to the lack of full resources available to review all BWC footage in prosecutor offices resulting in a need to triage viewing of footage, based upon such circumstances as footage containing victims and witnesses and/or the seriousness of the offense, requests for discovery by defense counsel and the nearness of the trial date. Similarly, Henrico County Commonwealth's Attorney Shannon Taylor spoke in the workgroup meeting of her office's need to triage BWC footage viewing to meet defense counsel discovery requests given limited staff resources. While the county has provided the Commonwealth's Attorney's office with some additional part-time resources to address BWC footage, a comparison of the footage hours viewed by staff in the office versus the caseload flowing through the courts in Henrico County make it clear that resources are not available to do anything but triage viewing according to defense counsel needs. Significant added resources would be needed to enable prosecutors to view all footage related to all active cases on a proactive basis.

## **Final Considerations and Workgroup Recommendations**

Significant discussion took place during workgroup meetings extending beyond the topics covered in detail in this report. The group took time to learn about and discuss the differences among represented localities, from police departments and a sheriff's office, regarding their methods of implementing body worn cameras, challenges of storage, access and handling the footage, including discussions of tagging videos as evidence and sharing footage with prosecutors. The group also examined arrest data and caseload data from recent years to consider the degree of Commonwealth's Attorney workload related to felony versus misdemeanor caseload. This data will be helpful for further quantitative analysis to determine a staffing standard should additional data regarding video footage and hours to be viewed by prosecutors become more consistently available.

Beyond local governments, Commonwealth's Attorneys, and legal authorities, the workgroup included representatives from other agencies, such as Virginia State Police, Virginia Indigent Defense Commission, and other court representatives to incorporate other perspectives into the study. Virginia State Police was included in the work group to incorporate the perspective of a state-level law enforcement agency with the potential to implement body worn cameras at a statewide level, as well as for the agency to be aware of the challenges that extend beyond the impact to law enforcement, to other areas of the criminal justice process, of a decision regarding such an implementation. Presently, the Virginia State Police is conducting a pilot program with body worn cameras, with five cameras deployed in one district (in Chesterfield County). If the Commonwealth contemplates a requirement that localities provide staff support to Commonwealth's Attorneys when implementing body worn cameras among locality law enforcement agencies, then the Commonwealth must consider the implication on the workload of Commonwealth's Attorneys of a state law enforcement agency implementing body worn cameras in its local districts. Additionally, Lieutenant Tom Cunningham of the Virginia State Police provided additional comments on the potential impact to law enforcement agencies in the case that Commonwealth's Attorneys are unable to continue prosecution of certain cases absent sufficient resources to meet their professional and ethical obligations when dealing with significant BWC footage. These comments can be found in Appendix F.

In addition to offering their perspectives from different positions in the criminal justice process, representatives from other agencies such as the Courts and the Virginia Indigent Defense Commission had the opportunity to share concerns regarding how BWC deployment among law enforcement officers and the availability of significant footage impacts their operations in their parts of the criminal process, as these areas were also not likely contemplated in local decisions to implement BWCs (note that these areas are considered in the Justice Management Institute study of Baltimore County). Although these areas are not related to prosecutor workload and are outside of the scope of the study pursuant to the budget language in Chapter 2, the group felt it important to highlight these areas of further study that should be undertaken by the appropriate agency or within the judicial system. Comments from the Virginia Indigent Defense Commission and Judicial Operations of the Chesterfield Circuit Court as to impacts in these other areas of the criminal justice process are also included in Appendix F.

Although not workgroup members, staff members of the House Appropriations Committee and Senate Finance Committee also attended some of the workgroup meetings. Prior to the completion of the meetings and review by the workgroup, House Appropriations Committee staff presented information from the surveys and discussions of the workgroup in a retreat presentation to the Committee in November, 2018. Presentation materials are included in Appendix G to this report.

At the conclusion of the workgroup meetings, several recommendations were formulated. Although local governments and Commonwealth's Attorneys expressed some disagreement regarding a mandated formula for staffing, and a one-size fits all approach, this sub-group of members met separately to develop an agreement regarding local support for staffing for BWC workload. While the workgroup agreed that insufficient data is available to establish a permanent standard, the workgroup also understood that waiting for sufficient data to become available would continue to place Commonwealth's Attorneys in an untenable position with regard to their workload. Consequently, the recommendations of the workgroup include continuing the group to gather sufficient data, and a staffing requirement that allows the opportunity for agreement between the local government and Commonwealth's Attorney before a fixed staffing requirement would go forward as a default result. All members felt strongly that a commitment from local governments to provide staffing support for BWC workload needs to be accompanied by a commitment from the Commonwealth to fund the shortfall in positions due to Commonwealth's Attorneys for felony prosecutions that many localities are currently covering with local resources.

Based upon the discussion, research, and reviews conducted over the past several months, the workgroup submits the following recommendations:

- Recommendation 1: That the Commonwealth fully fund existing Compensation Board approved staffing standards for Commonwealth's Attorneys' offices; as many localities provide additional staff resources using local funding to support felony workload in the Commonwealth's Attorney's office where staffing standards needs have not been met, the ability to address workload needs from BWC implementation is hampered. While full state funding of staffing standards to provide the 102 Assistant Commonwealth's Attorney positions due statewide carries a cost of \$6.4 million per year, with an additional cost of \$1.6 million per year for the 57 paralegal and administrative staff positions due statewide, the workgroup acknowledges that consideration of a phased-in approach over a limited number of years along with a commitment to full funding may be reasonable.
- Recommendation 2: That budget language be approved to provide for local agreements between Commonwealth's Attorneys and their local governments to provide staff funding to support added workload caused by BWCs; however, a minimum staffing requirement of one Assistant Commonwealth's Attorney position for every 75 body worn cameras deployed is required when mutual agreement cannot be reached between the Commonwealth's Attorney and the locality. Agreements reached between the Commonwealth's Attorney and local government are to be effective July 1, 2019 through June 30, 2021, with changes by agreement in the interim and in accordance with any increases in BWC deployment. Any previous

appropriation of staff resources by localities for the purposes of addressing BWC workload already in effect would be credited to the locality and incorporated into the agreement. Note that even with this recommendation, Commonwealth's Attorneys may not be able to gain access to resources through their county or city where other law enforcement agencies may deploy body worn cameras that will impact the workload of the Commonwealth's Attorney's office. For example, towns within counties with their own police departments and police departments of colleges and universities may choose to deploy BWCs, where these entities have no authority to appropriate staff support to Commonwealth's Attorneys' offices. Additionally, if the Virginia State Police were to implement a BWC program beyond its current pilot of 5 body worn cameras, the impact on local Commonwealth's Attorneys could be significant. According to a presentation by House Appropriations Committee Staff, other state law enforcement agencies have not deployed BWCs, but their decision to do so would likewise impact the Commonwealth's Attorneys of the communities in which they serve.

- Recommendation 3: That the workgroup established pursuant to the study language in Chapter 2 be continued through December, 2020 to allow for data to be gathered and reported from all Commonwealth's Attorneys' offices and law enforcement agencies on a regular basis; the data collected would be used by the workgroup for quantitative analysis to identify a standard for staffing needs based upon footage generated as evidence for criminal cases from BWCs. With the workgroup extension, a follow-up report with the potential for recommendations of new minimum standards for staffing needs for Commonwealth's Attorneys to handle BWC workload would be completed by December 1, 2020. Proposed budget language agreed upon by workgroup members, including local government representatives and Commonwealth's Attorney representatives, can be found in Appendix H.
- Recommendation 4: That any planning for new or expanded implementation of BWCs, whether among county or city law enforcement agencies, or whether among state law enforcement agencies, town police departments, or police departments of colleges and universities, must include the involvement of the Commonwealth's Attorney and an analysis of the workload impact on the Commonwealth's Attorney's office. A Body-Worn Camera Training and Technical Assistance document entitled "Policy Considerations for Body Worn Cameras in Prosecutor Offices" written by Damon Mosler, Deputy District Attorney at San Diego County District Attorney's Office and supported by the Bureau of Justice Assistance of the U.S. Department of Justice, was recently published and provides a concise description of considerations for prosecutors as a part of the implementation of BWCs among law enforcement, including considering how to handle legal and ethical requirements, and determination of what staffing resources will be required to review, edit and transcribe video footage. The technical assistance document can be found in Appendix I.

## **Appendix A – Workgroup Members**

### **Virginia Association of Commonwealth's Attorneys (VACA):**

- Colin Stolle, Commonwealth's Attorney, City of Virginia Beach
- Shannon Taylor, Commonwealth's Attorney, Henrico County
- David Ledbetter, Commonwealth's Attorney, City of Waynesboro
- Donald Caldwell, Commonwealth's Attorney, City of Roanoke
- Susan Hooks, Chief Deputy Commonwealth's Attorney, City of Virginia Beach

#### **Other Attendees:**

- Michael Doucette, Executive Director, Virginia Association of Commonwealth's Attorneys

### **Virginia Association of Counties (VACO):**

- C. Matt Harris, Deputy County Administrator, Chesterfield County
- Mary Ann Curtin, Director of Intergovernmental Relations, Chesterfield County
- Tim Hall, County Administrator, Henry County

#### **Other Attendees:**

- Katie Boyle, Director of Governmental Affairs, Virginia Association of Counties

### **Virginia Municipal League (VML):**

- Morgan Whayland, Intergovernmental Relations Officer, City of Norfolk
- Captain Marion Miles, City of Norfolk Police Department
- Deputy Chief Tony Zucaro, City of Virginia Beach Police Department
- Lieutenant Scott Wichtendahl, City of Virginia Beach Police Department

#### **Other Attendees:**

- Michelle Gowdy, Executive Director, Virginia Municipal League
- Janet Areson, Director of Policy Development, Virginia Municipal League

### **Virginia Sheriffs' Association:**

- Major Michael Trice, Office of Hanover County Sheriff David Hines
- Captain Rickey Dandridge, Office of Hanover County Sheriff David Hines

#### **Other Attendees:**

- John Jones, Executive Director, Virginia Sheriffs' Association

## **Workgroup Members (continued)**

### **Court System Participants**

#### **Court of Appeals of Virginia:**

- The Honorable Robert Humphreys, Judge, Court of Appeals of Virginia

#### **Circuit Courts:**

- Tricia Muller, Administrator of Judicial Operations, Chesterfield Circuit Court

#### **Virginia State Bar:**

- James McCauley, Ethics Counsel, Virginia State Bar

#### **Office of the Executive Secretary of the Supreme Court:**

- Kristi Wright, Director of Legislative and Public Relations, Office of the Executive Secretary of the Supreme Court
- Dorian Dalton, Staff Attorney, Office of the Executive Secretary of the Supreme Court
- Jaime Reyes, Records Management Services Manager, Office of the Executive Secretary of the Supreme Court

#### **Virginia Indigent Defense Commission:**

- Jacob Lubetkin, Policy Analyst, Virginia Indigent Defense Commission

## **Other Agency Participants**

#### **Virginia State Police:**

- Lieutenant Tom Cunningham, Jr., Information and Communication Technologies, Virginia State Police

#### **Department of Criminal Justice Services:**

- Erik Smith, Manager, Law Enforcement, Policy and Standards, Department of Criminal Justice Services

#### **Commonwealth's Attorneys' Services Council:**

- Jane Chambers, Director, Commonwealth's Attorneys' Services Council

#### **Senate Finance Committee Staff:**

- Adam Rosatelli, Legislative Fiscal Analyst, Senate Finance Committee Staff

#### **House Appropriations Committee Staff:**

- Michael Jay, Legislative Fiscal Analyst, House Appropriations Committee Staff

#### **Compensation Board Staff:**

- Robyn de Socio, Executive Secretary, Compensation Board
- Charlotte Lee, Budget Manager, Compensation Board
- Mark Pellett, Management & Financial Analyst, Compensation Board

**Appendix B – Allocation of State-funded Staffing and Needs under  
Compensation Board Staffing Standards; Locally-funded Staffing**

## Appendix C – Summary of Prosecutors’ Ethical Duties

James McCauley, Ethics Counsel for the Virginia State Bar, has provided the following summary regarding prosecutors’ ethical duties:

### *“The Brady Rule and the Prosecutor’s Ethical Duty To Disclose Exculpatory Evidence*

*Brady v. Maryland*, 373 U.S. 83, 87 (1963), holds that “the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” The duty to disclose such evidence is applicable even though there has been no request by the accused, and the duty encompasses impeachment evidence as well as exculpatory evidence. Under a line of cases beginning with *Brady v. Maryland*, 373 U.S. 83 (1963), the U.S. Supreme Court has held that prosecutors have an obligation under the due process clauses of the Fifth and 14th Amendments to disclose exculpatory evidence that is material to the guilt or sentencing of a defendant. The duty to disclose also applies to evidence that would tend to impeach the credibility of a government witness whose testimony was central to the government’s case. *Giglio v. United States*, 405 U.S. 150 (1972). In the context of using a BWC, video footage that is inconsistent with a victim’s or government witness’ account or statement, for example, could be impeachment material a prosecutor may be obligated to disclose or make available to the defense. While the disclosure obligations set forth in *Brady* and *Giglio* appear to be broad, they are in fact more narrowly construed by the courts. First, the prosecution’s duty to disclose turns on whether the evidence is “material.” The Supreme Court has defined evidence as material “when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” *Cone v. Bell*, 129 S.Ct. 1769, 1783 (2009). *But see Workman v. Commonwealth*, 272 Va. 633, 636 S.E.2d 368 (2006) (The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence).

Moreover, the prosecutor has an affirmative duty to seek out exculpatory evidence because the Commonwealth is charged with the duty to disclose exculpatory evidence regardless of any failure by the police to bring favorable evidence to the prosecutor's attention. *Kyles v. Whitley*, 514 U.S. 419 (1995). *See also Workman v. Commonwealth*, 272 Va. 633, 636 S.E.2d 368 (2006) (In order to comply with *Brady*, therefore, the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police).

Further, as the Supreme Court stated in *Kyles v. Whitley*, it is the prosecutor alone, not the police, that must assess the “materiality” of the evidence. In a discussion about staffing and resources for Commonwealth’s attorneys, these legal requirements are important as they require the prosecutor to not only to request BWC footage from law enforcement officers, but also personally review the footage, or risk a *Brady* violation that may cause a continuance, mistrial or reversal of a conviction.

While the obligation to disclose *Brady/Giglio* material is limited in a number of respects, prosecutors also have an independent ethical obligation with regard to disclosure of exculpatory evidence. Rule 3.8(d) of the Virginia Rules of Professional Conduct requires a prosecutor to “make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court.”

The ethical duty to disclose exculpatory evidence differs from the prosecutor’s duty to disclose *Brady/Giglio* material in three respects. First, the exculpatory evidence does not have to meet the “materiality” test, and need only negate guilt, mitigate the degree of the offense or reduce the punishment. As the Virginia State Bar’s Standing Committee on Legal Ethics has stated, Rule 3.8(d) “is not limited to ‘material’ evidence, but rather applies to all evidence which has some exculpatory effect on the defendant’s guilt or sentence.” Legal Ethics Opinion 1862.

Second, the prosecutor does not have an affirmative duty to search for exculpatory evidence under the ethics rule. The ethics rule requires only disclosure of evidence the prosecutor *knows* to be exculpatory, i.e., tends to negate guilt. Third, the ethics rule requires the prosecutor to disclose known exculpatory evidence *as soon as practicable*, a more demanding standard that leaves little room for delay once evidence comes to a prosecutor’s attention. Virginia Legal Ethics Op. 1862. Impliedly, this means a prosecutor must disclose exculpatory evidence of which the prosecutor has knowledge during plea negotiations, unless the evidence is impeachment only. *United States v. Ruiz*, 536 U.S. 622 (2002)(A guilty plea waives defendant’s *Brady* right to disclosure of material *impeachment* evidence). See also ABA Formal Opinion #09-454 (Timely disclosure means prior to any guilty plea proceeding.)

#### *The Prosecutor’s Ethical Duties of Diligence and Competence*

Like all lawyers, Commonwealth’s attorney must practice competently and diligently. The “Scope” section for the Rules of Professional Conduct states that the rules “apply to all lawyers, whether practicing in the private or public sector.” Rule 1.1 requires an attorney to provide competent representation for his client; the rule defines “competent” as including “the legal knowledge, skill thoroughness and preparation reasonably necessary for the representation.” Further pertinent clarification is found in Comment 5 to Rule 1.1; “adequate preparation” is presented as an aspect of the duty of competence. Rule 1.3 requires an attorney to perform his legal services with diligence and promptness. Comment 1 to that rule notes that a lawyer should control his work load, “so that each matter can be handled adequately.” Also, Comment 2 to that rule explains that the duty of diligence includes *timely* performance of the legal work. As expressed in that comment, a “client’s interests often can be adversely affected by the passage of time or the change of conditions.”

Rules 1.1 and 1.3 are without exceptions. There is no language in the Rules of Professional Conduct creating a different standard for prosecutors to act competently and diligently. Nor is it a defense to a bar disciplinary complaint that a lawyer’s failure to act competently and diligently was caused by an overwhelming workload. Lawyers, and their supervisors, are

expected to control their workload and not undertake more work than they can handle diligently and competently. This means declining a new representation if the lawyer has reached the maximum capacity under which he or she can represent a client with competence and diligence.

Rule 1.16 (a) of the Rules of Professional Conduct requires that a lawyer not continue or undertake representation if the representation cannot be performed without violating the Rules of Professional Conduct. Comment [1] to Rule 1.16 states “[a] lawyer should not accept or continue representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.”

In Legal Ethics Opinion 1798, the Virginia State Bar’s Standing Committee on Legal Ethics quoted with approval language from the Arizona Bar:

Ethical Rule 1.16 makes clear that a lawyer with a maximum caseload must decline new cases or terminate representation where the representation will result in violation of the Rules of Professional Conduct or other law. Consequently, where the demands of an extreme caseload make an attorney unable to devote sufficient attention to a particular case, acceptance of that case will cause a violation of Ethical Rules 1.1 on competent representation, 1.3 on attorney diligence and 1.16 for failing to decline or terminate representation where the representation will violate these rules.

Thus, a lawyer who accepts more cases than he can competently prosecute will be committing an ethical violation.

In LEO 1798 the Committee concluded that “a Commonwealth’s Attorney who operates with a caseload so overly large as to preclude competent, diligent representation in each case is in violation of the ethics rules.”

If a Commonwealth’s Attorney’s office has lawyers who are charged with managing and supervising Assistant Commonwealth’s Attorneys, those managing and supervising lawyers owe ethical duties required by Rule 5.1 of the Rules of Professional Conduct. Rule 5.1 (a) requires that a lawyer in a managerial position make reasonable efforts to ensure that the office has measures in place so that lawyers in the office conform to the Rules of Professional Conduct. Also, paragraph (b) of Rule 5.1 states that where one attorney has direct supervision over another lawyer, the supervisor should make reasonable efforts to ensure the other lawyer complies with the Rules of Professional Conduct. As the Ethics Committee stated in LEO 1798:

Those provisions do place responsibility on the shoulders of a Commonwealth’s Attorney for having in place policies and procedures to establish an office that practices within the parameters of the Rules of Professional Conduct and that the Commonwealth’s Attorney properly supervise the Assistant Commonwealth’s Attorneys reporting to him to assure ethical compliance. Attorney Smith in struggling with his caseload and missing important deadlines

was under the supervision of the Commonwealth's Attorney. That lead attorney in deciding the case load to be borne by Attorney Smith is in a position to render impossible Attorney Smith's ability to work competently and diligently. Where a supervising attorney assigns a caseload so large as to preclude any hope of the supervised attorney's ethically representing the client (or clients), that supervisor would be in violation of Rule 5.1.

. . . if a Commonwealth's Attorney has in fact assigned such an impermissibly large caseload to an Assistant Commonwealth's Attorney, the facts that the client is the amorphous Commonwealth and that the Commonwealth's Attorney has himself a large caseload provide no safe harbor from the requirements of Rule 5.1."

## **Appendix D – Commonwealth’s Attorney Survey Results**

## Appendix E – Detailed Data Collected by Henrico County Commonwealth’s Attorney’s Office Related to Body Worn Camera Footage, Comparison with Caseload Data

Henrico County Statistics	Annualized Statistics*			3-Year Average	%
	CY 2016	CY 2017	CY 2018		
Total Felony Cases Viewed	1,076	657	841	858	39%
Total Misdemeanor Cases Viewed	1,566	1,231	1,203	1,333	61%
Total All Cases Viewed	2,642	1,888	2,044	2,191	
Total Felony Hours Viewed	1,122	804	940	955	48%
Total Misdemeanor Hours Viewed	1,121	960	1,071	1,051	52%
Total All Hours Viewed	2,243	1,764	2,011	2,006	
Average footage hours per Felony Case	1.0	1.2	1.1	1.1	
Average footage hours per Misdemeanor Case	0.7	0.8	0.9	0.8	
Average footage time per All Case Types	0.8	0.9	1.0	0.9	
Maximum footage hours per Case	12.0	21.0	7.3	13.4	
Cases with greater than 5 footage hours	15	20	11	15.33	
Felony Cases with > 5 footage hours	13.5	17.0	8.3	12.9	
Misdemeanor Cases with > 5 footage hours	1.5	3.0	2.7	2.4	
Total footage hours, cases with > 5 hours	109.9	182.5	65.0	119.1	
Total All Defendants with Footage Viewed	2,300	1,726	1,835	1,954	
Average footage hours per Defendant	1.0	1.0	1.1	1.0	
Max footage hours per Defendant	15.8	25.0	15.5	18.8	
Commenced Circuit Court Felonies	3,524	4,552	3,862	3,979	
GDC Criminal Felony Filings**	5,132	5,640	5,012	5,261	
GDC Criminal Misdemeanor Filings	7,748	8,220	7,868	7,945	
GDC Traffic Felony Filings	181	191	214	195	
GDC Traffic Misdemeanor Filings	10,537	11,649	11,354	11,180	
JDR Felony Filings	1,262	1,189	1,048	1,166	
JDR Misdemeanor Filings	3,133	2,815	2,710	2,886	

\*Henrico County Comm Atty BWC data for CY2016 begins May, 2016; data for CY2018 ends Sep, 2018; annual figures are projected. \*\*GDC Felony filings include filings as felonies in General District Court that are subsequently certified to Circuit Court, and are included in Commenced CC Felonies; Some Felony Filings in GD are subsequently reduced to lesser offenses.

## **Appendix F – Workgroup Agency Representative Comments Regarding Other Impacts on Law Enforcement and the Court System of Body Worn Cameras**

- Judicial Operations, Chesterfield Circuit Court
- Virginia State Police
- Virginia Indigent Defense Commission

Judicial Operations, Chesterfield Circuit Court Representative  
Comments on the Impacts of Digital Evidence on Trial Courts

All digital evidence is a challenge for the courts. While Body Worn Cameras (BWCs) exacerbate the volume, digital evidence is a major disruptor to the way courts traditionally have done business. Some of the issues highlighted here would be appropriate for further study by an appropriate legislative or judicial policymaking body.

Impacts on technology in courtrooms. Presently, no Virginia blueprint exists to guide courts on what technology should exist in general and limited jurisdiction courtrooms to allow for the use of digital evidence in court proceedings. While Virginia courthouse facility guidelines speak generally to technology, they are not sufficiently detailed to inform a procurement effort to update courtrooms to however current standards may be defined. A baseline is needed for what attorneys, *pro se* litigants, jurors, and others should reasonably expect to find at their disposal in a courtroom/courthouse. Such direction also needs to address network capacity in court facilities if the Commonwealth intends to access cloud-stored evidence during trial. Streaming to one courtroom may work seamlessly; however, sufficient bandwidth to simultaneously stream in multiple courtrooms becomes problematic. While it would be informative for the state to provide a template to establish reasonable expectations, by statute, the funds to address courtroom technology are the responsibility of local government to provide, as this is defined as part of the facility. The Chesterfield Circuit Court regularly receives complaints from attorneys and the public about the state of courtroom technology. These complaints, along with an assessment earlier this year from the Center for Legal and Court Technology at the William & Mary School of Law, formed the basis of a capital budget request Chesterfield's three courts jointly submitted to the County to address technology in our 17 operational courtrooms. We estimate this effort will cost the County approximately \$3 million over the next 2 years just to bring us current. That is a significant ask of local government. It also includes addressing the unique restrictions court administrators are learning about to outfit a historic courtroom with technology, as a museum essentially was put back into regular service 4 years ago when the 12th Circuit received an additional judge for whom there was no courtroom.

Impacts on technology in clerks' offices. The many legal and procedural implications to preserving the record when it includes digital evidence are well known, most notably storing digital evidence and matching it to case files. The trial courts eagerly await state legislative, court rule, and policy direction that will address, among other things, the challenge of how to facilitate the viewing and copying of digital evidence by authorized parties. I am told a pending Supreme Court Rule related to digital exhibits and pleadings is forthcoming. In Chesterfield, no Clerk's Office is presently equipped with a vehicle to provide to those authorized to view digital

evidence that must remain in the Court's custody, nor do they have the hardware to copy it, as they would with a paper file for a fee.

Impacts on court personnel who must support all court technology. Most Virginia courts do not have the local or state resources to employ technology specialists as court staff. I am fairly certain this dire need is not even a factor in court staffing formulas. While some courts are tackling this in creative ways, even in a large jurisdiction such as Chesterfield, we just this fiscal year are getting our first dedicated IT support position (from the locality) to be shared among all three courts and the drug court programs. Having to troubleshoot, often immediately so if during a court proceeding, places a tremendous burden on court employees serving as de facto IT and audio-visual support for everything in their court including courtroom technology. This is specialized knowledge that typically is far outside the jobs they were hired to do and on top of their primary workload of case processing activities.

Impacts on court personnel who handle case processing and customer service. If prosecutors elect to shift resources by not handling some or all misdemeanors in the district courts, this will have SIGNIFICANT impacts on the already very limited human resources in those courts. While the Chesterfield courts did not publicly comment as things unfolded locally earlier this year, for approximately five months, as you know, this was the case in the Chesterfield General District Court. Personally, I found what my General District Court administrator colleagues had to deal with during this time, and still are, literally jaw-dropping in terms of the magnitude and volume of work it added for court staff (continuance requests, discovery motions, responding to victim inquiries in person and over the phone on topics such as restitution, creation of new forms for police to use, etc.). It would be worthwhile to meet with the Clerk of Court to gain a full appreciation of the toll this added workload took on her and her staff and to document what occurred. Further, as mentioned in one of the workgroup meetings, the majority of Virginia's district courts are woefully understaffed. Just in Chesterfield, the Office of the Executive Secretary staffing study indicates the General District Court requires 12 additional positions, and the Juvenile & Domestic Relations Court requires 4 additional positions *before* you factor in additional workload generated by digital evidence. *Should a local Commonwealth's Attorney decline to prosecute misdemeanors indefinitely, I believe it will cripple the district courts.* While I cannot speak to the local impact on the police department of having to prepare for and participate in court proceedings without prosecutors, I imagine it likewise was significant. I would *guess* it also probably translated to officers spending more time in court.

Impacts on judicial and court personnel staffing studies. Questions include: will criminal cases need to be set for longer times to accommodate a higher volume of digital evidence if most cases now will have some amount of video? And, if only some courtrooms are equipped with the capabilities to view digital evidence due to hardware cost or streaming limitations, do we have to schedule fewer criminal dockets? With digital evidence, since a higher number of

defendants likely will plead guilty in matters that previously would have gone to trial, will it be at a rate high enough to offset other cases taking longer to try? Will issues with proprietary software be resolved so judges and juries can efficiently view and authenticate digital evidence? Will digital evidence become a factor in the various staffing models for judges and court personnel? Statewide, the district courts are understaffed by 271 positions, not including the dozens of judges slated to be added July 1, 2019 with no corresponding court support staff.

Impacts on case processing time guidelines. In circuit courts, we cannot meet the criminal guidelines now. Absent sufficient resources for prosecutors and defense attorneys to review digital evidence prior to district court hearings, will a higher rate of continuance requests be granted at the lower level for the opportunity to do so thus resulting in more delay? Will determination of the authenticity of video evidence add meaningful time to court hearings? Typically, by the time indictments are handed down, cases are near or already exceeding case processing guidelines.

If you or anyone may find it helpful to speak to my court administrator colleagues in Chesterfield as a group about the impact of digital evidence in all its forms, from all its sources, on criminal and civil case processing in Virginia's trial courts, I would be happy to arrange it.

Tricia D. Muller  
Administrator of Judicial Operations  
Chesterfield Circuit Court Judges' Chambers

Virginia State Police Representative Comments on  
Impacts on Law Enforcement Officers and Courts of a  
Discontinuation of Prosecutor Presence in General District Court

If the Compensation Board Body Worn Camera Study Workgroup recommends the discontinuation of a prosecutor in the courtroom for the prosecution of misdemeanors (except domestic violence offenses), [or if a Commonwealth's Attorney were to discontinue such prosecution], the workgroup should consider the impact to Virginia law enforcement officers and the judicial process.

Without the prosecutorial engagement of the Commonwealth's Attorney's Office for all misdemeanors (particularly jailable offenses) during pretrial and court proceedings, members of the workgroup have identified potentially significant impacts for law enforcement, judges, court officials, and their respective roles within the judicial process.

In the absence of a prosecutor during General District Court proceedings, two members of our workgroup expressed concern regarding the law enforcement officer's inability to 'argue' their respective case before the court. Police officers are not equipped to argue the law, file or respond to motions or make objections and, in some courts, officers are not permitted to make motions or proffer points of the law.

Another potential impact in the absence of a prosecutor during DUI cases is the possibility Virginia courts experience a reduction in the number of DUI convictions statewide, thereby generating significant concern by organizations such as MADD, AAA, Drive Smart, etc. likely resulting in engagement with their respective legislators to voice their concerns.

A careful assessment was recently conducted of the existing "Court Organization and Procedure" curriculum and lesson plan currently utilized to provide all Virginia Department of State Police sworn law enforcement personnel with instruction for successful court preparation and testimony. The current curriculum is insufficient to adequately provide troopers with the ability to serve as a proxy or representative for the Commonwealth during court and pre-trial (discovery) proceedings.

Specific areas not currently addressed during existing instruction include:

- How to negotiate a Motion for Discovery;
- Obtain a robust understanding of the Rules of Evidence, e.g., when to engage, considerations for, procedural protocols, etc.;
- How to navigate and prosecute complex requirements for a DUI conviction;

- Comprehensively understand all Elements of an Offense and the ability to provide testimony for each.

In addition to incorporating substantive classroom and practical instruction within the Court Organization and Procedure class, other related legal courses and lesson plans will require significant revisions including the capstone course, “Moot Court”, a mock exercise taking place in a courtroom with a judge and prosecutor where students are required to testify and demonstrate a sufficient understanding of court procedures.

Should the workgroup recommend to the Virginia General Assembly the elimination of Commonwealth’s Attorney’s Office services for misdemeanors, [or should a Commonwealth’s Attorney choose to discontinue such prosecution] it is estimated Virginia law enforcement officers will need a minimum of four additional hours of instruction.

Further, the Department of Criminal Justice Services (DCJS) may be required to establish new compulsory minimum training standards to address the increased roles and responsibilities for law enforcement performing the roles traditionally carried out by the Commonwealth’s Attorney.

Lastly, in addition to training provided for law enforcement, judges may require training, guidance, and “best practices” awareness and considerations associated with conducting hearings held in General District Court.

Lieutenant Thomas A. Cunningham, Jr.  
Virginia State Police  
Information and Communication Technologies Division

**Appendix G – House Appropriations Committee Staff Retreat Presentation on  
Body Worn Cameras and Commonwealth’s Attorney Workload, November 13,  
2018**

## **Appendix H – Workgroup Recommended Budget Amendment**

Workgroup Recommended Amendment to Item 70 of Chapter 2, 2018 Special Session I Acts of Assembly, adding new language as follows:

“J. 1. Any locality in the Commonwealth that employs the use of body worn cameras for its law enforcement officers shall be required to establish and fund one full-time equivalent entry-level Assistant Commonwealth's Attorney, at a salary no less than that established by the Compensation Board for an entry-level Assistant Commonwealth's Attorney, at a rate of one Assistant Commonwealth's Attorney for up to 75 body worn cameras employed for use by local law enforcement officers, and one Assistant Commonwealth's Attorney for every 75 body worn cameras employed for use by local law enforcement officers, thereafter. However, with the consent of the Commonwealth's Attorney, a locality may provide their Commonwealth's Attorney's office with additional funding, using a different formula than stated above, as needed to accommodate the additional workload resulting from the requirement to review, redact and present footage from body worn cameras. If, as of July 1, 2019, a locality is providing additional funding to the Commonwealth's Attorney's office specifically to address the staffing and workload impact of the implementation of body worn cameras on that office, that additional funding shall be credited to the formula used in that locality. Any agreed upon funding formula between the impacted Commonwealth's Attorney and the locality employing body worn cameras shall be filed with the Compensation Board by July 1, 2019 and shall remain in effect unless modified by the agreement of both parties until June 30, 2021. Thereafter, any agreed upon funding formula between the impacted Commonwealth's Attorney and the locality employing body worn cameras shall be filed with the Compensation Board by July 1st of each year and shall remain in effect unless modified by the agreement of both parties until June 30th of the following year. The term “locality” means every county or independent city with an Attorney for the Commonwealth. The term “employed for use” includes all body worn cameras maintained by the law enforcement agency or agencies of that locality, regardless of any temporary inoperability.

2. The working group convened by the Executive Secretary of the Compensation Board pursuant to Chapter 2, Item 73, U (2018 Special Session I Acts of Assembly) shall be maintained to continue to study the impact of body worn cameras on the workload of Commonwealth's Attorney offices, providing an additional report to the Chairmen of the House Appropriations and Senate Finance Committees by December 1, 2020. During this timeframe, each Commonwealth's Attorney office in a locality that employs body worn cameras, in conjunction with the law enforcement agency using body worn cameras, shall report to the Compensation Board the following information on a quarterly basis, in a format prescribed by the Board:

- a. The number of hours of body worn camera video footage received from their law enforcement agencies. The number of hours should additionally be broken down into corresponding categories of felonies, misdemeanors and traffic offenses. Any recorded event that results in charges for two or more of the above categories shall be reported in the most serious offense category;
- b. The number of hours spent in the course of redacting videos; and
- c. Any other data determined relevant and necessary by the Compensation Board for this analysis.

3. Should a Commonwealth's Attorney office in a locality that employs body worn cameras fail to report to the Compensation Board the information above for two consecutive quarters, that locality may discontinue for the following fiscal year that additional funding to the Commonwealth's Attorney office that is specifically appropriated to address the staffing and workload impact of the implementation of body worn cameras on that office.

4. The workgroup shall utilize the reported information to examine the staffing challenges and workload impact on Commonwealth's Attorneys' offices of the implementation of body worn cameras over this added time and make any additional recommendations in the subsequent report, including but not limited to recommending a different staffing formula than stated above."

**Appendix I – Bureau of Justice Assistance/Body Worn Camera Training and Technical Assistance: “Policy Considerations for Body Worn Cameras in Prosecutor Offices” by Damon Mosler, Deputy District Attorney, San Diego County District Attorney’s Office**