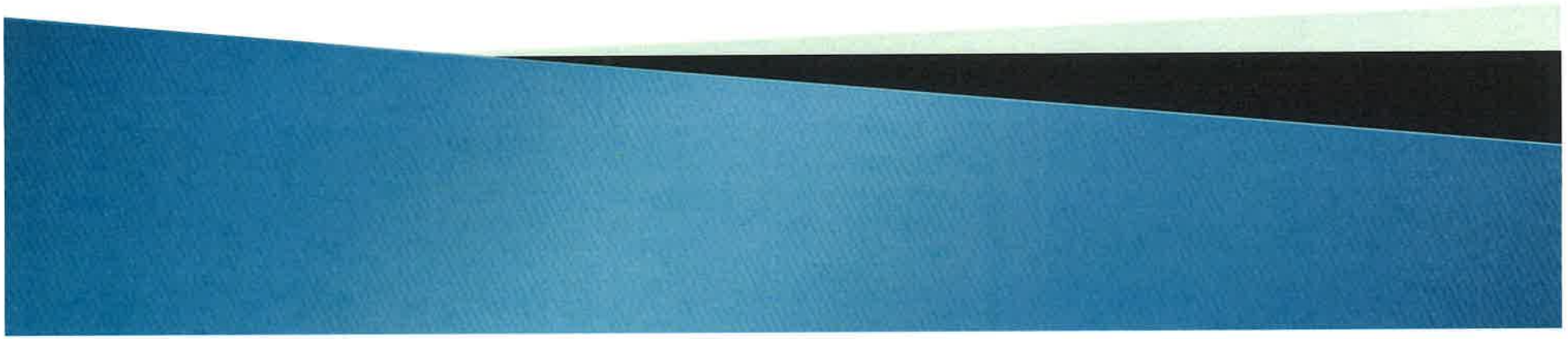
AGENDA

DISCOVERY
October 9, 2017
8:30 a.m. – 12:00 p.m.
Lower Plaza Assembly Room
Instructor: Senior Deputy District Attorney Kevin Drescher

8:30 – 8:35 a.m.	Policy regarding misdemeanor pretrial diversion (Brent Nibecker)
8:35 – 8:40 a.m.	Policy regarding compliance with discovery (Michael Schwartz)
8:40 a.m. – 10:00 a.m.	AB 1901/PC 141(c)
	Rules of Professional Conduct, rule 5-110
	Brady v. Maryland
10:00 a.m.– 10:10 a.m.	BREAK
10:10 a.m. – 11:10 a.m	Prosecution's statutory discovery obligations
11:10 am. – 11:20 a.m.	BREAK
11:20 a.m. – Noon	Defense's statutory discovery obligations
	(If time) Third party discovery issues

THIRD PARTY DISCOVERY

Dori Ahana, Marin District Attorney's Office
May 2017 CDAA Discovery Seminar



THIRD PARTY DISCOVERY

Dori Ahana, Marin District Attorney's Office
May 2017 CDAA Discovery Seminar

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What is Third Party Evidence?

- Evidence that the prosecution team does not possess information or materials

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Who is a "third party?"

- Not a party to the pending litigation
- Any person or entity other than prosecution team or defendant(s)

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HOW DO WE OBTAIN 3RD PARTY EVIDENCE?

4

How do we get 3rd party evidence?

- There are five common methods of obtaining discovery from 3rd parties:
  - 1) Subpoena
  - 2) Subpoena "plus"
  - 3) Court order
  - 4) Consent or acquiescence
  - 5) CPRA or FOIA

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How do we get 3rd party evidence?

SUBPOENA

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How do we get 3rd party evidence?

- **Discovery by Testimonial Trial Subpoena**
  - PC 1330: Can subpoena 3rd parties to appear as witnesses in a criminal trial/hearing.
    - Nearby witnesses (less than 150 miles from courthouse)
    - Witnesses more than 150 miles away (subpoena can issue upon showing that testimony is "material" and attendance is "material and necessary")

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How do we get 3rd party evidence?

- If witness disobeys subpoena:
  - Court may hold witness in contempt (5 days jail and $1,000 fine)
    - PC 1331 (authorizing contempt)
    - CCP 1218 (detailing contempt penalties)
    - PC 1332: if court finds witness is "material witness" and that it has GC to believe witness will not appear unless security is required or IC may 1) require posting of security or 2) incarcerate pending testimony
      - Factors: nature of charges, materiality of testimony, length of detention, likelihood of appearance, age/maturity, harm, financial impact, potential continuance of trial/hearing, less obtrusive alternatives

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How do we get 3rd party evidence?

- **Exception DV/SA cases:**
- If Victim is subpoenaed and FTAs
- PC 881 gives us authority to request and have court issue body attachment
- But CCP 1219(b) provides that once witness/victim comes to court, they cannot be incarcerated based on a finding of contempt for refusing to testify. "Coercive confinement" is prohibited.
  - Sometimes immunity needs to be conferred if take the 5th
  - Before holding a victim in contempt we request under CCP 1219(b) that the victim is referred to meet with a DV counselor (confidential per EC 1037.2)
- Can still be held in contempt under CCP 1209(a)(5,8,9) for disobeying court order, interference with court proceedings, and refusal to answer as witness.
- Can be sanctioned under CCP 1218 ($$ or DV counseling)

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How do we get 3rd party evidence?

- **If witness is in custody**
  - Can apply to court for removal order transferring prisoner to your courthouse (PC 2621 and 1567)
  - No subpoena is necessary
  - If prisoner is housed out of county, party seeking order must file an affidavit showing prisoner's testimony is "material and necessary"
  - Cannot get removal order for investigative purposes

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How do we get 3rd party evidence?

- **Discovery by SDT (documentary subpoena)**
  - DA, defense attorney, investigator may all issue a SDT in a criminal case (PC 1326)
  - SDT must contain language commanding the witness to appear before an indentified judge in an identified county and location at an identified date/time, as a witness in an identified action, and to bring identified documents to court
    - Must bear qualified signature & specify date of return
    - Must direct documents be returned *to the court* and not to the SDTing party
    - No GC affidavit required

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How do we get 3rd party evidence?

- **Service of subpoenas:**
  - On adult civilian witness: personal service (PC 1328(a)) OR by mail/messenger
  - On minor civilian witness: service on minor's parent/guardian OR CFS/juvenile probation (if delinquent, truant, dependent) OR guardian ad litem (PC 1328(b))
  - On LE officer:
    - Personal service
    - Substituted service (2 copies to officer's supervisor or designated agent
      - Supervisor/agent can refuse to accept service if unable to deliver copy or complete service
      - Inability of supervisor/agent to perfect service is not attributable to DA who effected service properly to defeat due diligence (*Jensen v. Sup. Ct.* (2008) 160 Cal.App.4th 266, 274)

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How do we get 3rd party evidence?

- **Response to SDT:**
  - Party can appear and move to quash
    - Objection to disclosure either because 1) statutory procedures for SDT not followed, 2) documents confidential/privileged
    - Standing: 3rd party/custodian of documents or any party to criminal litigation
  - Produce the documents in person
  - Produce the documents to court without appearance
    - If 3rd party receives SDT for business records and 3rd party not party to litigation and not where COA arose then can produce documents without appearing (EC 1560 and 1326(b)/(c)) with affidavit

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How do we get 3rd party evidence?

- **Business records affidavit:**
  - Attach affidavit completed by custodian that states: (EC 1561)
    - Affiant is authorized custodian and has authority to certify records
    - Attached documents are true copy of all the records described in SDT
    - Records prepared in the ordinary course of business at or near the time of the act, condition, or event,
    - Identity of the records
    - Description of mode of preparation of the records
    - Sealed envelope with title of case, case number, witness name/info
    - Affidavit authenticates records and lays bus. rec. foundation (EC 1271)

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How do we get 3rd party evidence?

- **Court must review SDT and responsive documents before disclosure**
  - Unless there is a reason for ex parte or in camera review both DA and defense has right to be present
  - Documents must be opened in the presence of all parties
  - Notice required to opposing party (DA/defense) to effectuate DP right to be heard & Marsy's law
  - Up to court as to whether opposing party may participate in the hearing

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How do we get 3rd party evidence?

- **Court review of documents:**
  - If NO assertion of privilege
    - Court must still consider:
    - Whether SDT sets forth "plausible justification" for records including the basis for their relevance and admissibility.
    - Is material adequately described
    - Whether material is reasonably available to subpoenaing party from other sources
    - Would disclosure violate 3rd party confidentiality or privacy rights or protected gov't interest
    - Whether SDTing party acted timely and whether response to SDT would necessitate unreasonable delay of trial
    - Whether production would unreasonably burden 3rd party

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How do we get 3rd party evidence?

- **Court review of documents:**
  - If assertion of privilege
    - Court must:
      - Find good cause for the disclosure (see previous slide)
      - Determine whether the documents are privileged
      - If so, whether SDTing party has an interest that overrides privileges
    - Ex parte sealed filings and hearings are disfavored
    - In camera hearings (PC 1326(c)) is mechanism by which the court can examine documents to determine if the SDTing party is entitled to receive them
    - Court cannot order SDTing party to share documents with opposing party other than as is required under PC 1054.1/1054.3

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How do we get 3rd party evidence?

SUBPOENA PLUS

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How do we get 3rd party evidence?

- **Subpoena "plus"**
  - Need to do more to justify disclosure
  - Common Subpoena plus scenarios:
    - HIPPA compliance (notification to patient or protective order)
    - Pupil records (notice to parents and student)
    - State agency records (Information Practices Act: reasonable efforts to notify person whose information is sought)
    - Financial records (Financial Privacy Act: notice to person whose records are sought)

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How do we get 3rd party evidence?

- **Administrative Subpoena**
  - CA St. Agencies (including DOJ) can issue administrative subpoenas to assist the prosecution/investigation of a criminal case (GC 11400 et seq. and 11180)
    - If subpoena is issued for an "adjudicative proceeding"/evidentiary hearing before the agency then the APA (Administrative Procedures Act GC 11400 governs)
    - If subpoena is issued for investigative purposes without a pending hearing (APA or non-APA [GC 11180] procedures can be used)

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How do we get 3rd party evidence?

- APA: can issue documentary subpoenas supported by GC providing for return with affidavit and without appearance. Failure to respond can be handled at hearing.
- Non-APA: can issue documentary subpoenas as long as 1) it is issued by head of state agency/designee, 2) relevant to agency matters/investigation, 3) request is definite, 4) consistent with state and federal constitution (ie. Not violative of 4th/5th A.)
  - No good cause requirement
  - Petition if non-compliance, followed by OSC, and hearing

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How do we get 3rd party evidence?

COURT ORDER

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How do we get 3rd party evidence?

- Personnel records of peace officers
  - Court order following *Pitchess* procedure (EC 1043-1047)
- Grand jury TX
  - Court order following *In camera* review for relevant, admissible, or impeachment evidence PC 924.2 and 924.6
- Medical Information
  - HIPPA court order 45 CFR 164.512(e)(1)(i)
  - CMIA court order CC 56.10(b)(1)
  - If not privileged or confidential under HIPPA/CMIA LEA can get court order upon showing of GC {PC 1543(a)(2)/(c)– SW and consent also valid}

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How do we get 3rd party evidence?

- **Court order for substance abuse program records (42 U.S.C. 290dd and 9 CCR 9866)**
- **Court order to unseal and disclose sealed court records**
- **Court order to disclose Juror's personal ID information (CCP 206(g), 237)**
- **Court order to obtain Pupil records (Educ. Code 49077)**

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How do we get 3rd party evidence?

- Utility Records & Escrow or Title Records
  - LEA can by ex parte application obtain information relevant or material to ongoing investigation of PC 186.10/186.11 (money laundering/white collar crimes)
- Trap/Trace & Pen Register*
  - LEA can get incoming and outgoing caller information with court order under 18 USC 3122, 3123
  - Relevant to ongoing criminal investigation
  - Now CA law authorizes as well (Cal ECPA)

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How do we get 3rd party evidence?

- Search warrant (special issues)
  - For privileged information (in possession of 3rd party attorney, doctor, psychotherapist, clergy)
    - LEA accompanied by special master (PC 1524(c)) to advise target which documents are sought, help conduct search, seal documents that target or special master believes are privileged
    - Target can challenge legality of search & privilege issues
  - For evidence from 3rd party's body (such as blood or bullets) upon PC and other factors:
    - Reliability of method, seriousness of offense, society's interest, impt of evidence vs. severity of intrusion (prolonged, uncomfortable, unsafe, undignified)
  - SW provider for ECI (see later discussion)

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How do we get 3rd party evidence?

- Immunity
  - Purpose: overcome 3rd party 5th A. privilege
  - DA can grant use, derivative use, or transactional immunity to witness. PC 1324/1324.1
    - Court must grant immunity unless clearly contrary to public interest
    - Transactional immunity only in misdemeanor cases
    - Immunity does not protect witness from perjury
    - No defense right to have court immunize a witness (some courts commented that if recognized it would be in situation where evidence proffered would be exculpatory)

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How do we get 3rd party evidence?

- Court order to compel mental examination of 3rd parties
  - Defense may request court compel 3rd party witness submit to psychological or neurological examination to assess competency to testify (*People v. Ayala* (2000) 23 Cal.4th 225)
  - But not to assess credibility (see PC 1112 – relating to SA witness/victim) or for polygraph
- Court order for "commissioned examination" for defense
  - Deposition out of "material" out of state witness for defense (PC1349 - 1362)
  - 3 days notice to DA
  - Different from conditional examinations (DA cannot request)
  - Timing: after Indictment or Information
  - Court will designate commissioner to conduct deposition
  - Use in lieu of live testimony at trial/hearing

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How do we get 3rd party evidence?

- Court order for access to private citizen's home or property
  - Movant must show plausible justification that access will promote fair trial/ascertainment of facts (e g. crime scene)
- Court order under Welfare and Institutions Code section 827 for disclosure of juvenile court records
  - (discussed in detail later)

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How do we get 3rd party evidence?

- If privilege asserted for evidence sought by subpoena, subpoena "plus", or court order court may be required to conduct *in camera* hearing to determine 1) whether privilege applies (EC 915) 2) overriding interest in disclosure (*Brady* favorable & material and 6th A. right to effective confrontation & cross examination)

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How do we get 3rd party evidence?

CONSENT OR ACQUIESCENCE

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How do we get 3rd party evidence?

- **DA/defense can interview witnesses to crimes if they consent**
  - Crime victims have constitutional right to decline under Marsy's law
  - It is victim's/witness' choice to be interviewed
    - grand jury witnesses can only be interviewed after Indictment
- **DA/defense can interview jurors** if more than 24 hrs since trial concluded if they consent
- **3rd party can consent** to disclosure of records including:
  - Medical, substance abuse, financial, state agency personal information, utility records, escrow/title, and ISP
- **Acquiescence** occurs when privilege is not asserted and/or 3rd party is given notice and opportunity to object and does not

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Other court orders . . .

- Welfare and Institutions Code section 827 orders relating to juvenile records

Relevant statutes re: juvenile records

- **Welf. & Ins. Code §827:** This statute governs juvenile case file inspection and dissemination of information contained therein. There are certain classes of people who are able to inspect records, including the District Attorney, without permission of the court. However, dissemination of any information must proceed with court approval.

Relevant statutes re: juvenile records

- **Welf. & Ins. Code §828**: This statute discusses disclosure of records when a minor is taken into custody by law enforcement, generally when a police report is generated but no action is taken by Juvenile Probation or the District Attorney.

Relevant statutes re: juvenile records

- **California Rules of Court Rule 5.552**: This rule of court covers the procedure of obtaining juvenile records under Welf. & Ins. Code §827

Juvenile records

- Not appropriate to call witnesses to talk about information within juvenile case file to circumvent disclosure process under W&I 827
  - (*City of San Diego v. Superior Court* (1981) 136 Cal App.3d 236, 239)
- Accordingly testimony of social workers must be sought via W&I 827
  - Except where testimony is based on witness' own percipient observations (see *People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1314-1316)

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Who can inspect a juvenile file?

- Court personnel
- The district attorney, a city attorney, or city prosecutor authorized to prosecute criminal or juvenile cases under state law
- The minor who is the subject of the proceeding
- The minor's parents or guardian if minor is under 18 years of age
- The attorneys for the parties, judges, referees, other hearing officers, probation officers, and law enforcement officers who are actively participating in criminal or juvenile proceedings involving the minor.
- The county counsel, city attorney, or any other attorney representing the petitioning agency in a dependency action.
- The superintendent or designee of the school district where the minor is enrolled or attending school
- Members of the child protective agencies

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Who can inspect a juvenile file?

- The State Department of Social Services,
- Authorized legal staff or special investigators who are peace officers employed or authorized by the State Department of Social Services
- Members of a child's multidisciplinary team/persons/agencies
- Judge, commissioner or other hearing officer assigned to a family law case involving the minor
- A court appointed investigator who is actively participating in a guardianship case involving a minor
- Child support agency for establishing paternity and enforcing child support orders
- Juvenile justice commissions
- Any other person who may be designated by court order of the judge of the juvenile court upon filing a petition.

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Procedure to Obtain and Disseminate Juvenile Records

- See Cal Rules of Court Rule 5.552 and JV-570
  - File petition with a civil court number using the form entitled Petition for Disclosure of Juvenile Court Records (*see* JV-570).
  - Attempt to review documents you seek to obtain them and describe in detail records sought
  - Identify location of record (probation file, court file, CFS, LEA)

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Procedure to Obtain and Disseminate Juvenile Records

- Identify the nature of the pending proceeding for which you want to use/disclose the requested records, including the role/relationship the minor has to that proceeding, such as defendant, prosecution witness
- Establish relevance to pending proceeding e.g. relevant to gang allegation or *Brady*
  - *(J.E. v. Superior Court* (2014) 223 Cal.App.4th 1329, 1338)

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Procedure to Obtain and Disseminate Juvenile Records

- 10 day notice of petition (to CC, DA, minor, atty of minor, parent/guardian, probation, CFS, CASA)
- Documents to be served include:
  - Request for disclosure of juvenile case file (JV 570)
  - Notice of Request for Disclosure of Juvenile case file (JV 571)
  - Blank Copy of Objection to Release of Juvenile case file (JV 572)

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Procedure to Obtain and Disseminate Juvenile Records

- Court undertakes in camera review of file and any objections
- Court must find that the need for discovery outweighs the policy considerations favoring confidentiality.
- The court may permit disclosure only insofar as is necessary, and only if petitioner shows by a preponderance of the evidence that records requested are necessary and have substantial relevance to the legitimate need of the petitioner. (*See* Cal. Rules of Ct., Rule 5.552(e)(6)).

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Procedure to Obtain and Disseminate Juvenile Records

- Among the factors that should be taken into consideration when the defendant is requesting information that might impeach a prosecution witness is a defendant's right to confront and cross-examine the witness.
  - (See ***Davis v. Alaska*** (1974) 415 U.S. 308, 320 [defense has right to impeach witness with being on juvenile probation notwithstanding confidentiality of juvenile files]; accord ***Foster v. Superior Court*** (1980) 107 Cal.App.3d 218, 229.)

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Procedure to Obtain and Disseminate Juvenile Records

- The prosecution **should not and cannot** provide such records to the defense absent a court order
  - (See Welf. & Inst. Code, § 827(a)(4) [prohibiting dissemination of juvenile records by receiving agencies]; *J.E. v. Superior Court* (2014) 223 Cal.App.4th 1329, 1337.)
- Nor may the defense seek to subpoena those records from the police department; a court order must be obtained ordering release.
  - (See *Wescott v.County of Yuba* (1980) 104 Cal.App.3d 103, 105-109.)

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Procedure to Obtain and Disseminate Juvenile Records

- To comply with our *Brady* obligations you can:
  - 1) File our own W&I 827 petition to obtain and disseminate information to defense; or
  - 2) Notify the defense that there may be exculpatory information in the juvenile file and let the defense file their own petition

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Special issue: Sealed juvenile records and Brady

- **Welf. & Ins. Code §781:**
  - Timing: The person or the county probation officer may, 5 years or more after the jurisdiction of the juvenile court has terminated OR in a case in which no petition is filed, five years or more after the person was cited to appear before a probation officer or was taken before a probation officer pursuant to Section 626 or was taken before any officer of a law enforcement agency, or, in any case, at any time after the person has reached 18 years of age.
  - Standard: He/she has not been convicted of a felony or of any misdemeanor involving moral turpitude and that rehabilitation has been attained to the satisfaction of the court.
  - Result: Sealing; proceedings in the case shall be deemed never to have occurred; relief 290 req.

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Special issue: Sealed juvenile records and Brady

- **Welf. & Ins. Code §781:**
  - Exceptions: Court shall not order the person's records sealed in any case in which the person has been found by the juvenile court to have committed an offense listed in subdivision (b) of Section 707 when he or she had attained 14 years of age or older.
  - Exception for transferred juvenile cases (WI 707.1) – subject not a fit and proper subject for juvenile court treatment

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Special issue: Sealed juvenile records and Brady

- **Welf. & Ins. Code §781:**
  - Retention/destruction: Unless for good cause the court determines that the juvenile court record shall be retained, the court shall order the destruction of a person's juvenile court records that are sealed pursuant to this section as follows: five years after the record was ordered sealed, if the person who is the subject of the record was alleged or adjudged to be a person described by Section 601; or when the person who is the subject of the record reaches 38 years of age if the person was alleged or adjudged to be a person described by Section 602,
    - except that if the subject of the record was found to be a person described in Section 602 because of the commission of an offense listed in subdivision (b) of Section 707 when he or she was 14 years of age or older, the record shall not be destroyed.
    - Access allowed for data collection (WI 787)

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Special issue: Sealed juvenile records and Brady

- **Welf. & Ins. Code §786:**
  - Timing: (a) If a minor satisfactorily completes (1) an informal program of supervision pursuant to Section 654.2, (2) probation under Section 725 (non-wardship probation), or (3) a term of probation for any offense, the court shall order the petition dismissed. The court shall order sealed all records pertaining to that dismissed petition in the custody of the juvenile court, and in the custody of law enforcement agencies, the probation department, or the Department of Justice.

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Special issue: Sealed juvenile records and Brady

- **Welf. & Ins. Code §786:**
  - Standard: satisfactory completion of an informal program of supervision or another term of probation described in subdivision (a) shall be deemed to have occurred if the person has no new findings of wardship or conviction for a felony offense or a misdemeanor involving moral turpitude during the period of supervision or probation and if he or she has not failed to substantially comply with the reasonable orders of supervision or probation that are within his or her capacity to perform.

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Special issue: Sealed juvenile records and Brady

- **Welf. & Ins. Code §786:**
  - Result: Upon the court s order of dismissal of the petition, the arrest and other proceedings in the case shall be deemed not to have occurred .
  - Not required to dismiss/seal prior petition or petitions that have been filed or sustained against the individual (unless standards met)
  - Exception: if the petition was sustained based on the commission of an offense listed in subdivision (b) of Section 707 that was committed when the individual was 14 years of age or older unless the finding on that offense was dismissed or was reduced to a lesser offense that is not listed in subdivision (b) of Section 707.

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Special issue: Sealed juvenile records and Brady

- **Welf. & Ins. Code §786:**
  - Access and inspection still allowed:
- 1) determine if minor eligible or suitable for DEJ or informal probation.
- 2) determine minor's previous court ordered programs/placements & suitability for services
- 3) determine appropriate juvenile court disposition in new felony 602 case
- 4) transfer hearing
- 5) data collection (WI 787)

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Special issue: Sealed juvenile records and Brady

- General rule: WI 827 does not give the court authority to allow 3rd party access to sealed records
  - Proceeding is deemed not to have existed (*Parnett v. Superior Court* (1989) 212 Cal.App.3d 1261 holding civil court could not compel person to reveal relevant material facts when source of facts was sealed juvenile proceeding).
  - *In re James H.* (2007) 154 Cal.App.4th 1078: WI 827 does not authorize release of sealed records for use in SVP proceeding

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Special issue: Sealed juvenile records and Brady

- *J.E. v. Superior Court* (2014) 223 Cal.App.4th 1329
  - Did not specifically deal with sealed records
  - Brady disclosure may be required even where evidence subject to state privacy privilege as in the case of confidential juvenile records
  - Usually confined to materials within prosecution team.
  - In limited circumstances Brady obligation includes the duty to seek out critical impeachment evidence in records that are reasonably accessible to prosecution but not to defense (at p. 1335)
  - Recommendation: File records under seal and request review at in camera hearing (*J.E.* authorized procedure; see also *Pennsylvania v. Ritchie* (1987) 480 U.S. 39)

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WHAT IS A PROSECUTOR'S ROLE WHEN THE DEFENSE FILES 3RD PARTY SUBPOENA?

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What is our role when it comes to defense SDTs of 3rd party records?

- When a defendant has issued a SDT the court may order an in camera hearing to determine whether or not the defense is entitled to receive the documents. The court *may not order the documents disclosed to the prosecution except as required by Section 1054.3.*" (Pen. Code, § 1326(c).)
- Penal Code section 1054.3 only requires disclosure of documents that "the defendant intends to offer in evidence at trial." (Pen. Code, § 1054.3(a).)

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What is our role when it comes to defense SDTs of 3rd party records?

- Do we get notice and opportunity to be heard?
- *Kling* v. *Superior Court* (2010) 50 Cal.4th 1068
- Issue: whether PC 1054.3 prohibited 1) DA participation in hearing, 2) DA knowing identity of SDT'd 3rd party, nature of documents requested, and 3) basis of SDT

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What is our role when it comes to defense SDTs of 3rd party records?

- Procedural history:
- Trial court: docket contained date SDT'd materials received by court and SDT'd 3rd party; did not give notice to and allow DA participation in in camera hearings; allowed unsealing of unprivileged portions of TX
- Ct of Appeal: DA could get notice of and be present at the hearing, but we could not learn identity of SDT'd 3rd party and nature of documents requested, could not participate in *in camera* hearing.

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What is our role when it comes to defense SDTs of 3rd party records?

- CA SUPREMES:
  - Defendant cannot get 3rd party records until court holds a hearing to determine if requesting party is entitled to receive them
    - PC 1326(c) applies equally to DA and defense
    - But defense unlike DA can make an offer of proof at in camera hearing if to do otherwise would reveal defense strategies and work product
    - Sealing the defense filings is appropriate *only* if there is a risk of revealing privileged information and a showing that filing under seal is the only feasible way to protect that required information. (*Kling* at p. 1075)

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What is our role when it comes to defense SDT of 3rd party records?

- DA has right to notice and to be present
- DA **may** participate and argue
- DA's due process right to a meaningful opportunity to be heard **may** require disclosure of the identity of the SDT'd party and nature of documents sought
  - (*Kling* at p. 1078, citing to Cal. Const., art. I, § 29.)

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What is our role when it comes to defense SDT of 3rd party records?

- *Kling* court rejected defense argument that the process would 1) inhibit defense investigation, 2) impair defendant's right to counsel
- Defendant protected by redaction of privileged or work product material, and by PC 1054.3's requirement that disclosure only has to happen when defendant intends to offer material in evidence at trial
- Some of hearing may also be conducted ex parte to protect defendant's rights, but court cautioned that this was **extraordinary** and noted **general disfavor** of ex parte proceedings. (*Kling* at p. 1079.)

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What is our role when it comes to defense SDT of 3rd party records?

- Effect of Proposition 9, the Victims' Bill of Rights Act of 2008 (Marsy's Law)?
- Victims have the right to prevent the disclosure of confidential information or records to the defense which could be used to locate or harass the victim or the victim's family or which disclose confidential communications made in the course of medical or counseling treatment, or which are otherwise privileged or confidential by law. (Cal. Const., art. I, § 28, subd. (b)(4).)"

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What is our role when it comes to defense SDT of 3rd party records?

- DAs can move to quash (*Kling* at p. 1078.)
- DAs can brief and argue appropriate scope of 3rd party discovery in *amicus-like* way
  - Point out Marsy's law, statutory privileges (EC 915-1070), and privacy interests
  - Point out that court is authorized to act on its own to protect 3rd party's interests (*Rudnick v. Superior Court* (1974) 11 Cal.3d 924, 932-933; see also *People v. Pack* (1988) 201 Cal.App.3d 679, 685.)
  - Has defense made a good cause showing of need for documents? (*Kling* at p. 1074; *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1045.)

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What is our role when it comes to defense SDT of 3rd party records?

- Can defense submit a *sealed* affidavit in support of disclosure or for an *in camera*/ex parte hearing
- There should be hearing on propriety of sealing (*Garcia* v. *Superior Court* (2007) 42 Cal.4th 63, 73.)
- Questions at hearing: 1) will disclosure to DA lighten DA's burden or help to establish guilt 2) Constitutional or statutory privilege or immunity?
  - If no, then no sealing, full opportunity for DA to participate

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PRIVILEGES, OBJECTIONS TO, AND METHODS OF DISCLOSURE

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FEDERAL CONSTITUTIONAL & STATUTORY PRIVILEGES

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- 5th A. privilege against self-incrimination
  - Waiver (ie. Put mental state at issue)
  - Forfeiture (not asserted)
  - Immunity (use, derivative use, transactional)
- 14th A. DP right to personal informational privacy
  - Substantive Due Process component of US Constitution
  - Right to make/keep personal decisions private (ie birth control)
  - Informational privacy (information collected by federal authorities)
  - Qualified privilege balanced against interest in disclosure
- Secrecy of fed GJ proceedings (Fed. R. Crim P. 6(e))
  - Can petition the federal court to disclose GJ matter
  - Show particularized need to avoid injustice and need for disclosure outweighs privacy interest

68

- **Public Health Service Act/Substance Abuse Records (42 U.S.C. 201 et seq.)**
  - Consent or court order (good cause avert subs. risk of death/SBI)
  - DA seeks info for crim. investigation/prosecution (notice/patient oppty to be heard, crime serious involving death or SBI, records disclose valuable info, other means to get information are not available)
  - Defense seeks info (notice/oppty to be heard, good cause because public interest outweigh risk of disclosure, no other means)
- Classified Information Procedures Act/National Security (18 U.S.C 1 et seq.)
  - No unauthorized disclosure for reasons of nat onal security
  - The Act authorizes redaction of classified information or substitute a summary of information to defense with court permission

69

- **HIPPA (42 U.S.C. 1320(d) administered through regulations, Title 45 of Code of Federal Regulations)**
- Disclosure may occur by:
  - Consent
  - Court order
  - Subpoena/SDT (notice & no objection by patient OR protective order requested limiting use/disclosure & destruction/return of info)
  - Search warrant
  - Grand jury subpoena
  - Administrative subpoena (relevant to legitimate LE inquiry)
  - Locate individual (limited info for purpose of identifying or locating suspect, fugitive, material witness or missing person)
  - Suspected crime victims (Vic consent OR if unable to consert, information needed to ascertain if crime occurred and delay adverse to investigation)
  - Crime occurred at premises of covered entity
  - Covered entity provided emergency care and disclosure necessary to alert LE of crime
  - Patient is victim of abuse, neglect, or DV, disclosure authorized by Victim or law and disclosure necessary to prevent serious harm to Vic or others.

70

- Bank Secrecy Act/Suspicious Activity reports (12 CFR 21.11)
  - SARs are confidential
  - But the information and documentation underlying the SARs report is NOT
- **Conf. of sealed court records/proceedings (*U.S. v. Index Newspapers LLC* (9th Cir. 2014) 766 F.3d 1072)**
  - Need to either show not properly sealed or compelling public interest
- **Conf. of DOJ crim. history (28 U.S.C. 534)**
  - Subject of Rap Sheet and LE has access

71

- Driver's (DMV) Privacy Protection Act (18 U.S.C. 2721-2725)
  - Protects personal identifying information (ie. photograph, SS#, DL#, address, medical/disability info)
  - Can obtain as part of an investigation or as discovery in criminal cases
- **Privacy Protection Act/Newsperson's/Author's right not to have materials searched/seized pursuant to investigation (42 U.S.C. 2000aa)**
  - If work product, PC to believe possessor committed/committing a crime to which materials relate AND necessary to prevent death/SBI
  - If not work product, disclosure necessary because subpoena result in destruction/detrimental delay

72

- Electronic Communications Privacy Act (18 U.S.C. 2701 et seq.)
  - Little impact on CA disc, as it defers to CA disc. law & not ground for suppression
  - Subscriber/transaction records (SDT, 18 USC 2703d ct order, SW, consent, Admin/GJ sub, fraud by subscriber)
    - Subscriber information: name, address, local/LD connection records, session times/durations, length of service, types of service
    - Transaction records: more than subscriber information, IP addresses, header and routing information of e-mails, location data (historical)
      - Real time location data – get warrant (fed courts divided on whether a cell phone customer has REP in locational data – Tracker? Consensual if leave in operational mode? Similar to PR/TT?)
  - Real time incoming and outgoing call data, not content (relevant to ongoing criminal investigation)
    - Outgoing calls from number (pen register)
    - Incoming calls from number (trap and trace device)
  - Content (generally: consent, SW, emergency, inadvertent discovery by LE and information relates to crime)

73

STATE CONSTITUTIONAL PRIVILEGES

74

- State Right to Privacy (Cal. Const., art I,1)
  - Three prerequisites:
    - 1) legally protected privacy interest (medical/mental health records, homes, identities of crime victims)
    - 2) reasonable expectation of privacy (widely accepted community norms)
    - 3) disclosure would be a serious invasion of privacy (judicial balancing of need vs. degree of invasion)
  - Non-peace officer employee records
    - *In re Clergy Cases I* (2010) 188 Cal.App.4th 1224, 1235; *Riske* v. *Superior Court* (2016) 6 Cal.App.5th 647, 662
    - Civil cases likely no disclosure
    - Criminal cases – balancing test privacy vs. compelling need

75

- **Marsy's law/Crime Victims' Bill of Rights Article I, section 28 Cal. Const.**
  - 1) Be treated with fairness & respect for privacy & dignity; 2) free from intimidation, harassment, abuse; 3) reasonably protected from defendant; prevent disclosure of confidential info/records to defendant/representatives that can be used to locate/harass or which diclose confidential/privileged info; 4) refuse an interview, deposition, discovery request by defendant/representative and to set reasonable conditions of any interview

76

- **Marsy's law/Crime Victims' Bill of Rights Article I, section 28 Cal. Const.**
  - Victim= person who suffers direct or threatened physical, psych, or financial harm as a result of commission/attempted commission of crime
  - Effect = raises statutory privilege or victim's right to oppose discovery to constitutional right which can be weighed against def's competing right to obtain information
  - *Kling*: DA has right to obtain notice of 3rd p sub to assert victim's Marsy's law rights

77

- **Newsperson's Immunity "Shield Law" (Cal. Const., Art I, 2(b)): prohibits a court from holding publisher, editor, reporter in contempt for refusing to disclose unpublished information/sources of information**
  - DA cannot overcome by asserting our right tc DP
  - Immunity can be overcome if can show non-disclosure would deprive def of const. right to a fair trial

78

- **Voter's Privilege (Cal. Const., Art. II, 7)**
  - Voting shall be secret
  - Exceptions:
    - Where the voter voted illegally
    - Where the voter previously made unprivileged disclosure of his/her vote

79

- **Trade Secret Privilege (EC 1060 et seq.)**
  - Privilege to refuse to disclose the secret and to prevent another from disclosing it
  - Purpose: secret information essential to continued operation of a business or industry are protected against unnecessary disclosure
  - Can be waived by failure to assert
  - Does not apply where will conceal fraud or create injustice
  - If asserted, public excluded from criminal proceeding and/or articles with trade secrets sealed
  - To compel disclosure movant must prove existence of trade secret, relevant/material to COA, nct disadvantageous, not unduly burdensome, no reasonable alternatives
  - Protective order to protect integrity of secret

80

STATE STATUTORY PRIVILEGES

81

State Evidentiary Privileges

82

Evidentiary privileges

- **Attorney Client (EC 954)**
  - Client has a privilege to refuse to disclose and prevent another from disclosing a confidential communication between client and lawyer
  - Statutory; no constitutional basis
  - DA not have this privilege – rely on official info privilege
  - Lawyer = person authorized to practice law & whom client reasonably believes to be a lawyer

83

- Confidential communication = "information transmitted between the two in the course of that relationship and in confidence"
  - Statements by lawyer including legal opinions & advice
  - Statements by client to lawyer & anyone aiding in representation (expert/inv)
  - Observations by lawyer/inv as a result of conf. communications (physical evidence) – privilege not apply if lawyer/inv destroys or alters evidence
  - Statements of client's "agent"

84

- NOT confidential communication=
  - Existence of A/C relationship, client's identity & address, fee arrangement (if legit need)
  - Unprivileged facts underlying confidential communication
  - Facts that are not confidential communicat ons (examined by MH experts)
  - Lawyer's statements to 3rd party outside A/C relationship
  - Client's statements to 3rd party outside A/C relationship

85

- Exceptions to Privilege:
- 1) Waiver: when a person without coercion either discloses a significant part of the communication or consents to disclosure (including failure to claim privilege)
  - Def's stmts to MH or other expert, A/C privilege waived if:
    - Defense discloses, expert relies upon or discloses, OR expert reviews in advance of testimony
    - Claims of IAC by attorney
- 2) Crime-fraud exception: atty services were sought to aid in commission or plan to commit crime or fraud

86

- Belongs to client, but can be asserted by atty
- May not give way to def's constitutional rights (ie. Right to favorable material evidence – may not be enough to invade A/C relationship
- May give way: Compelling need to confront and cross examine (ie. Defense needs A/C info to cross prosecution witness) -- analysis does effective cross-ex require disclosure of A/C protected info?

87

- **Attorney Work Product (CCP 2018.030 & PC 1054.6)**
  - Purpose encourage preparation of cases with privacy necessary to investigate not only the favorable but also unfavorable aspects of cases
  - Prevents attys from taking advantage of adversary's preparation
  - Core privilege: bars discovery of atty's impressions, conclusions, opinions, legal research or theories
  - Non-core work product *qualified* privilege unless unfairly prejudice other side: underlying facts (like trial diagrams, expert opinions, that form basis for conclusions/opinions etc.)

88

- **Psychotherapist-Patient Privilege (EC 1014)**
  - Patient has privilege to refuse to disclose and to prevent another from disclosing confidential communication b/w patient with psychotherapist
  - Purpose of consultation/examination matters
    - Consults/examined for purposes of diagnosis, research on problems, OR preventative, palliative, or curative treatment of mental or emotional condition
    - Psychotherapist: practice med substantially psychiatry, licensed psychologists, social worker/MFT engaged in applied psychotherapy – or those who work under their supervision -- psych/MH RN, Clinical nurse specialist (specializing in psych/MH nursing), lic clinical counselors/educational psychologists

89

- Confidential communication: information transmitted between P & P during course of that relationship which includes 1) info obtained by examination, 2) diagnosis
- Remains confidential even if disclosed to 3rd parties who are present to further interest of patient in consultation or to whom disclosure is reas. necessary to accomplish purpose of psychotherapy (therapist tells court that def failed to attend sessions as ordered OK vs. therapist telling court about their talks during sessions NOT OK.)

90

- Exceptions to privilege (EC 912, 1016-1027)
- 1) Waiver:
  - Does not assert priv. or discloses communications
  - Tenders mental or emotional state defense (communications relevant to that defense not priv; but if A/C protected, A/C not waived until defense discloses or defense expert takes stand)
  - Competency (EC 1025)
  - Defense expert reviews conf. comm. before or during testimony
  - Parole/probation required waiver (sex offender waive privilege as part of SO mgmt program)

91

- 2) Stmts made to court ordered psychotherapist during examination (but not if court ordered for purposes of counseling/treatment)
- 3) RC to believe dangerous (to anyone) & disclosure necessary to prevent danger (EC 1024; *Tarasoff v. Regents of U of Cal; Menendez v. Sup. Ct.* (1992) 3 Cal.4th 435)
- 4) Consult psychotherapist to aid in commission of crime or tort or escape or avoid detection for crime/tort
- 5) Required reports to public office (EC 1026)
- 6) Mandatory reporter (child abuse and neglect reporting—PC 11166)

92

- **Self incrimination (EC 940)**

- **Spousal privilege (for witness spouse) not to testify against party spouse (EC 970-973)**
  - Exceptions:
    - criminal proceedings where one spouse is charged with crimes against spouse, child, parent, relative, or cohabitant
    - Crime incidentally committed against 3rd person during crime involving spouse
    - Bigamy
    - Criminal failure to provide necessities to spouse/child (PC 270/270a)
    - Pre-marital crime

93

- **Conf. marital communications (EC 980)**
  - Unlike spousal privilege (not to testify), confidentiality of communications shared while married can extend beyond termination of marriage
  - N/A to IA
  - Both spouses may claim
  - Communication = written or oral
  - Exceptions:
    - Crime committed against person or property of spouse/child
    - Crime against 3rd person during crime against spouse
    - Bigamy
    - Criminal failure to provide necessities to spouse/wife
    - Communication made to enable/aid anyone to commit a crime or fraud

94

- **Physician patient (EC 994)**
  - Protects disclosure of confidential communication made at time of relationship between patient, physician, (and 3rd party if necessary to effectuate treatment)
  - Can only be claimed by either the patient or patient's representative OR if authorized, physician at time of confidential communication
  - Exceptions:
    - Patient is litigant or patient's medical condition at issue
    - Criminal proceedings
    - Disciplinary (licensing) proceedings
    - Competency proceedings
    - If physician services were obtained to enable commission of crime or tort or detection/apprehension

95

- **Penitent and clergy member (EC 1033/1034)**
  - Protects "penitential communications", those communications made in confidence to a member of the clergy
  - Not all communications privileged – depends on the context, e.g. confession to crime or avoiding apprehension for crime – no indication it was a religious confession.
    - Purpose = secular or religious?
    - Was he/she functioning as clergyman when received information?
    - What training/position in religious institution?

96

- **Sex assault victim and counselor**
- **(EC 1035 et seq.)**
  - Sex assault victim is one who consults the counselor for the purpose of securing advice or assistance concerning a mental, physical or emotional condition caused by a sexual assault
  - Protects all information communicated regarding present and past or subsequent sexual assault/sexual conduct
  - May be claimed by SA victim and counselor must claim
  - Balancing test: may disclose if information is relevant to sexual assault that is basis of criminal proceeding and probative value outweighs effect of disclosure on victim
  - Hearing where counselor questioned

97

- **DV victim and counselor (EC 1037 et seq.)**
  - DV (as defined in FC 6211)
  - Protects information between victim and counselor regarding all incidents of domestic violence
  - May be claimed by victim, must be claimed by counselor
  - Exception: mandatory report of child abuse (PC 11166)
  - Balancing test: court may compel disclosure where information is relevant to DV that is subject of criminal proceeding and where probative value outweighs effect on victim, counseling relationship, and counseling services

98

- **HT victim and caseworker (EC 1038 et seq.)**
  - Privilege for confidential communications between HT victim and HT caseworkers
  - Protects information regarding all incidents of HT shared between victim and caseworker and necessary 3rd parties
  - Victim and caseworker holds privilege
  - Balancing test: information is relevant to criminal prosecution and probative value outweighs effect of disclosure on victim, caseworker, counseling services
  - Disclosure may be required if victim is deceased or not complaining witness in criminal action against defendant

99

- **Official Information Privilege (EC 1040)**
  - Official information is that which is acquired by public employee in course of duty, not open or officially disclosed to public (ie. Sealed SW or wiretap application)
  - Different from Informant Identity Privilege EC 1041 (OIP protects what CI says not who he/she is)
  - Can apply to peace officer personnel/IA files
  - CDCR "C" confidential files on inmates
    - *People* v. *Landry* (2016) 2 Cal.5th 52, 71
    - Protect informant information/institutional security

100

- **Official Information Privilege (EC 1040)**
  - Two levels protection:
    - 1) absolute (statutory e.g. state/military secrets, not just confidential, disclosure is forbidden even in context of litigation and
    - 2) conditional (judicial balancing/discretion – LE investigative reports, prison inmate records, parole records, applications for SWs & wiretaps, IA reports, DA records relating to selective/vindictive prosecution)

101

- Discretionary balancing test:
  - Assess need for preserving the information's confidentiality; effect of disclosure on public processes and procedures (ie. integrity of ongoing criminal investigation, use of info as LE tool, promises/assurances made by LE re: confidentiality, importance of confidentiality to encourage candid discussion necessary to achieve public entity's function
  - Necessity for disclosure (impt to fair trial?)
  - Alternatives to full disclosure (partial redaction?)
  - Consent by public entity to disclosure

102

- Litigating privilege (after DA assertion of privilege – EC 1042)
  - Defense: prima facie showing for disclosure (information is material to litigation)
  - Court: *In camera* hearing to examine info & hear LE argument why info should not be disclosed
  - If info sought for purpose beyond 1538.5, must be full scale adversarial hearing following *in camera* for court to decide:
    - Whether privilege applies (sealing appropriate? If refuse to comply with disclosure – contempt or lesser charges)
    - Is information material to 1538.5 or guilt (material = relevant AND if not disclosed deprives def of fair trial)
      - Surveillance vantage point: observations unchallenged? Corroborated? Useful for cross-ex?
      - Alternatives?
      - If material: disclose OR adverse ruling/def freed

103

- **Informant Identity Privilege (EC 1041)**
  - Protects CI ID and any communications tending to reveal CI identity
  - Who is CI?
    - Person furnished information to LE officer
    - Furnished in confidence
    - Disclosure forbidden or is against public interest (Irrelevant: CI subjective intent/desire, CI danger)

104

- **Informant Identity Privilege (EC 1041)**
- DA: Assert by sealing SW/AW/wiretap application/affidavits OR PC1054.6 withhold from discovery b/c privileged
- Defense: show competing interest that overrides public entity's assertion
  - CI material witness: CI could provide exonerating info, relevant info to defense, Or info essential to fair trial
    - YES: participated in crime, percipient witness
    - NOT: may be relevant, point the finger of suspicion at def "tip", only inculpating information
  - Motion to unseal/disclose and/or motion to quash/traverse & 1538.5

105

- Court *in camera* hearing:
  - Procedure: DA/LE disclose ID and explain why not material witness; no need produce CI, defense can submit Qs, seal transcript
  - Ruling: If disclosure not forbidden & CI is material witness: disclose (name/contact info/assist with locating) or dismissal
  - Quash/Traverse & 1538.5 motions: question is whether there is "reasonable probability def would prevail"
    - If NOT, then deny unsealing/disclosure/1538.5/Q & T
    - If YES, then DA has choice to 1) disclose or 2) accept adverse ruling on 1538.5/Q & T

106

- **LE personnel information privilege (pc 832.7, 832.5, 832.8)**
  - Protects information within 1) personnel records, 2) complaints by members of public
    - Personnel records: Any file under peace or custodial officer's name that encompasses personal data, performance evaluations, employee advancement, appraisals, or discipline, citizen complaints and their investigations, IA reports
    - Privilege held by officer and employing LE agency
    - DA and defense need to comply with statutory requirements for disclosure also known as "*Pitchess* procedure" (*Alford v. Sup. Ct.* (2003) 29 Cal.4th 1033 and *People v. Sup. Ct. (Johnson)* (2015) 61 Cal.4th 696
    - [*Pitchess v. Sup. Ct. of L.A.* (1974) 11 Cal.3d 531 codified in EC 1043-1047 "*Pitchess procedure*"]

107

- Exceptions to *Pitchess* procedure
  - Waiver (by officer disclosure to DA)
  - DA invest. of officer (PC 832.7 – only right of access)
  - LEA review file for impeachment information
  - Officer, subject to disciplinary investigation, makes a public statement knowing it is false concerning investigation/discipline
- Common Uses:
  - LE officer lied, used excessive force, violent therefore coerced confession, planted evidence, racial bias
- Timing (includes PH, 1538.5, Trial, PV)

108

- *Pitchess* procedure:
  - File written motion that identifies proceedings in which discovery is sought, the party seeking discovery, officer involved, agency with custody of records, and description of records sought
  - Affidavit/declaration showing good cause for discovery/disclosure (need not be based on personal knowledge, low standard)
    - Agency possesses information sought
    - Records "material" to pending litigation
    - Materiality under *Pitchess* more broad & lower threshold than *Brady*
      - *Pitchess:* materiality = relevance
      - *Brady:* materiality = in addition to relevance lock to fairness of proceeding

109

- Movant must show specific & plausible factual scenario that demonstrates officer misconduct
- Link between information sought and proposed defense
- Attach police report if alleging excessive force
- Proof of Svs: LEA, opposing party, officer
- Filed 16 days prior to hearing date
- Consider seeking sealing of affidavit

110

- *Pitchess* hearing:
  - Key participants: movant (usually defense), officer, agency/custodian, DA has right to notice and can participate with leave of court
  - If motion granted, in camera hearing occurs
    - Custodian of records sworn and states what documents from personnel file was brought to hearing
    - Court reviews documents
    - Court states for record what documents were examined and keeps list
    - Court decides what documents contain information "relevant to the subject matter involved in pending litigation"
    - What is not relevant: 1) material that pre-dates litigation by 5+ years or post-dates conviction/R&J, "remote" 2) conclusions of officer investigating citizen complaint, 3) officer not present at incident, 4) may be sought elsewhere (other than through personnel records, 5) information sought relates to policies or pattern of conduct of employing agency – public records
    - Seal transcript

111

- *Pitchess* ruling/disclosures:
  - If court finds file contains no relevant information, it denies motion.
  - If court finds relevant information it discloses as follows:
    - 1) disclose name, address, telephone number of those who have witnessed/complained of prior misconduct
    - 2) if insufficient (witness cannot be located or does not remember), then court may pursuant to follow-up *Pitchess*, disclose reports, statements, documentation
    - 3) where relevant information relates to same incident as in current criminal case or where motion is a *Pitchess-Brady-Johnson* motion reports, statements, documentation may be provided in the first instance
    - 4) always include protective order limiting disclosure to specific proceedings (EC 1045)

112

- **Grand Jury Proceedings (*Daily Journal Corp. v. Sup. Ct.* (1999) 20 Cal.4th 1117)**
  - Exception GJ proceedings relate to current prosecution
    - Non-capital case: Def gets TX of testimonial portion of GJ or any other documents/exhibits to allow challenge
    - Capital case: complete TX
    - Public: 10 days after disclose testimonial part of TX to defense it is open to public unless court determines sealing necessary for venue issues (size of jury pool, publicity, prejudice)
  - Exception GJ proceedings contain impeachment or relevant material to current prosecution

113

- **Sealed Court Records/Proceedings (WI 345, 676, 827, CRC 2.550)**
  - SW or AW – public upon return or 10 days unless sealed
  - GJ TX – public 10 days after delivery of Indictment to defense unless sealed
  - Dependency/Delinquency proceedings confidential (but see WI 676)
  - Transcripts for *in camera* or *Marsden* hearings sealed
  - Probation officer file confidential (PC 1203.10)
  - Probation reports filed with court – public within 60 days of R&J; after 60 days conditionally confidential (PC 1203.05)
  - CDCR diagnostic reports confidential (PC 1203.03)

114

- Procedure for sealing (Cal. R. Ct. 2.550)
- Court needs to balance 1st A. right held by press and public to access public documents against judicial duty to control adverse publicity to protect right of an accused to fair trial
  - Overriding interest supporting sealing
    - Privileges/official information/continuing investigation
    - Pre-trial publicity affecting def's right to fair trial
    - Prejudice to parties absent sealing
    - Sealing narrowly tailored
    - No less restrictive means

115

- **Juror Identification (CCP 237, 206)**
  - Pre-verdict identity/questionaires are public
  - Following verdict juror's personal ID information are sealed
    - Can move to access information if necessary for new trial motion or other lawful purpose.
    - Good cause = 1) juror misconduct occurred, 2) further investigation for new trial
    - Court can convene a hearing to determine if 1) juror objects 2) provide another opportunity to show GC
    - Disclosure if ordered can be limited. Juror can assent to interview and juror need not discuss.
    - Questionaires are public with juror's personal ID info redacted
    - Q? as to whether juror's notes are confidential

116

PROCEDURAL & RECORDS PRIVILEGES

117

- Rape Victims (PC 293)
  - Confidential although DA might provide to defense pursuant to discovery obligations
- Criminal History Record (PC 13300, 11105)
  - Only accessible by DA, defendants (own rap sheet), defense attys (if legally required)
- Coroner Inquest Info (GC 27491.8)
  - Generally inquests (investigations into COD) are public except where 1) SDT'd record is privileged 2) SDT'd record from LEA relating to death caused by LE officer
- Good cause delay/withholding (PC 1054.7)
  - Good cause is where there is a threat or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or compromise of other investigations by LE

118

- Confidentiality of Medical Info. Act (CC 56 et seq.)
  - Purpose: provide for confidentiality of medical information while permitting certain reasonable and limited uses of that information
  - Exceptions for DA: 1) written consent, 2) court order, 3) subpoena, 4) general information unless objection, 5) incapacitated patient's caretaker, 6) SW, 7) coroner's inquest
- Medical Review Board records (EC 1157)
  - Proceedings/records of review committees that are required to evaluate and improve quality of care
  - Q? exception in criminal cases?

119

- Substance Abuse Treatment (9 Cal. Code Reg. 9866(c), HS 11845.5, 11842.5)
  - Records of identity, diagnosis, prognosis, or treatment of any patient that are maintained in connection with alcohol or other drug abuse treatment of prevention program not licensed by DMV are confidential
  - DMV licensed programs – like DUI programs may be accessed by complying with public health service act requirements (42 CFR 2.65)
    - Notice to patient and opportunity by heard
    - Demonstrate extremely serious nature of crime, reasonable likelihood records will disclose information of substantial value to prosecution, other ways of obtaining information not available, public interest outweighs patient's interest.

120

- CA Rt. To Financial Privacy Act (GC 7470 et seq.)
  - Protects confidential relationship between customer and financial institutions/citizen's right of privacy with governmental interest
  - How DA can obtain financial records:
    - Written authorization (name of public agency, purpose for disclosure, specify financial records, expiration date for authorization, notice of right to revoke authorization), signature
    - SW – notice unless court orders notice delayed/withheld
    - SDT generally: 1) DA serve SDT on financial institution and customer (GC 7476), 2) wait 10 days to make sure notice to customer, 3) court finds customer received notice or DA exercised due diligence and customer did not move to quash
    - Fraud: 1) DA certifies a crime report re: fraud filed (no need consent), 2) ID theft crime report, 3) Victim is institution

121

- Pupil Records (EC 49076, 49077)
  - DA can obtain by SDT if reasonable efforts made to notify parent/guardian & it is for purposes of conducting a criminal investigation
  - Court order or parental consent
- Information Practices Act (CC 1798)
  - Covers personal information held by State agencies
  - Can disclose with consent, SDT, SW, criminal/licensing/regulatory investigations
- DMV records (VC 1808 et seq.)
  - Generally public except DMV will not disclose:
    - abstract of accident or conviction more than 10 yrs old (if DUI), more than 7 years old (if 2or more points, more than 3 years old in all other cases, another person at fault
    - Suspensions/revocations if more than 3 yrs after reinstated, anytime after reinstatement if suspension truancy, vandalism, child support, juvi adjudications & if set aside or stayed by court
    - DL photograph (phew!) and residential address

122

- Political Vote (EC 1050)
  - Like federal privilege against disclosure
  - Exception: illegal voting or previous disclosure
- Taxpayer records
  - What is confidential?
    - Property owner's & retailer's statement to tax assessor (Rev. Code 451 and 7056)
    - Federal and state income tax returns (Rev. Code 19542)
    - Applies to tax consultants
    - Exceptions: waiver, eligibility for certain tax exemptions, child/spousal support, IRS examination of audit, civil damages

123

- Child Abuse and Neglect Reports (PC 11167.5, 11166.2, 11166.05)
  - Mandated confidential. DA/LEA can obtain if investigating such crimes, not defense.
- Inmate Case Records (PC 2081.5)
  - "Case records" of inmates have qualified privilege against disclosure
  - They include: 1) All information received by CDCR from court, probation, LEA, DA, DOJ, other interested persons, and 2) record of diagnostic findings, actions, dispositions re: classification, treatment, employment, training, discipline
  - Usually are accessible by DA however if custodial authority is part of prosecution team
  - Different from "C" file records
- Cal ECPA

124

California's Electronic Communications Privacy Act "Cal ECPA"

- New rules for LE access to Electronic Communications/Device Info (ECI/EDI)
  - SB 178 (effective 1/1/16) added PC 1546, 1546.1, 1546.2, 1546.4
  - SB 1121 (signed 9/23/16) amends PC 1546, 1546.1, 1546.2 and 1534 (tracker warrants)
  - SB 1924 (signed 9/23/16) amends PC 638.52 and PC 1546.1 and adds PC 638.54 and 638.55 (relating to pen register and trap trace)

125

Cal ECPA

- Main statutes:
  - PC 1546: Definitions
  - PC 1546.1: Requirements/restrictions on searching for and seizing EC, EI, ECI, EDI (consent, exigency, warrants, and orders)
  - PC 1546.2: Notice and delayed notice
  - PC 1546.4: Suppression Remedy

126

Cal ECPA

- Main definitions:
  - "Electronic communication" (EC): The transfer of signs, signals, writings, images, sounds, data, or intelligence of any nature . . . By a wire, radio, electromagnetic, photoelectric, or photo-optical sytem
  - "Electronic Communication Information" (ECI): Any information about an electronic communication or the use of an electronic communication service such as:
    - Content of communication, sender/recipient information, time/date of communications, location information, IP address
    - Does not include subscriber information (contact info, account number, length of service, types of services)
  - "Electronic Device Information" (EDI): Any information stored on or generated through the operation of an electronic device including current and prior locations.

127

Cal ECPA

- Can compel production of and access to ECI or EDI from service provider or other entity (PC 1546.1) by:
  - Warrant
  - Wiretap order (PC 629.50 et seq.)
  - Elec. Reader Records order (CC 1798.90 et seq.)
  - Subpoena (if not for investigation/prosecution)
  - Voluntary disclosure by service provider
    - note: must be destroyed within 90 days unless specific consent, court order, or child pornography for database
    - Jail calls
  - Pen Register/Trap Trace (PC 630 et seq.)

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Cal ECPA

- Can access EDI by communication with Device (PC 1546.1) by:
  - Warrant*
  - Wiretap order
  - Tracking device warrant (PC 1524(a)(12) & PC 1534(b))
  - Pen Register or Trap Trace
  - Specific Consent of authorized possessor
  - Lost/Stolen/Abandoned (can access only to find owner or authorized possessor)
  - Emergency (death/SBI) – 3 ct days/911 caller exception
  - Detention facility
  - Parole/PRCS
  - Probationers/MS/Pre-trial release (clear and unambiguous E-search terms)*
    - Passwords (*In re Carlos H.* (2017) A148154 1st DCA unpublished)

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Cal ECPA

- Form of warrant:
  - Describe with particularity:
    - Time periods (if possible)
    - Target individuals or accounts
    - Applications/services covered
    - Types of information sought
  - If directed at service provider (SP), SW must include order requiring SP to do Business Records Custodian Affidavit (like with SDTs)

130

Cal ECPA

- **Biometric password language for warrant:**

- During the execution of this search warrant, law enforcement personnel are authorized to depress the fingerprints and/or thumbprints of any person, who is located at the SUBJECT PREMISES during the execution of the search and who is reasonably believed by law enforcement to be a user of a fingerprint sensor-enabled device that is located at the SUBJECT PREMISES and falls within the scope of the warrant, onto the fingerprint sensor of the device (only when the device has such a sensor) in order to gain access to the contents of any such device.

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Cal ECPA

- **Biometric password language for affidavit (1):**

As discussed herein, based on your affiant's training and experience he believes that digital devices will be found during the search. Your affiant knows from my training and experience and his review of publicly available materials that Apple Inc., Motorola, HTC, and Samsung, among other companies, produce devices that can be unlocked by the user with a numerical or an alpha-numerical password, or, for some newer versions of the devices, with a fingerprint placed on a fingerprint sensor. Each company has a different name for its fingerprint sensor feature; for example, Apple's is called "Touch ID." Once a user has set up the fingerprint sensor feature in the security settings of the device, the user can unlock the device by placing a finger or thumb on the device's fingerprint sensor. If that sensor recognizes the fingerprint or thumbprint, the device unlocks. Most devices can be set up to recognize multiple prints, so that different prints, not necessarily from the same person, will unlock the device. In your affiant's training and experience, users of devices with a fingerprint sensor feature often enable that feature, because it unlocks the phone more quickly than the entry of a passcode or password but still offers a layer of security.

In some circumstances, fingerprint sensors will not work, and a passcode must be entered to unlock the device. For example, with Apple, Touch ID will not work if: (1) more than 48 hours have passed since the device has been unlocked, (2) the device has been turned on or restarted, (3) the device has received a remote lock command, or (4) five attempts to match a fingerprint have been unsuccessful. Other brands have similar restrictions. Your affiant does not know the passcodes of the devices likely to be found at the SUBJECT PREMISES.

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Cal ECPA

- **Biometric password language for affidavit (2):**

For these reasons, while executing the warrant, law enforcement will likely need to use the fingerprints or thumbprints of any user(s) of any fingerprint sensor-enabled device(s) to attempt to gain access to that device while executing the search warrant. The warrant seeks the authority to compel the use of the fingerprint and/or thumbprint of every person who is located at the SUBJECT PREMISES during the execution of the search and who is reasonably believed by law enforcement to be a user of a fingerprint sensor-enabled device that is located at the SUBJECT PREMISES and falls within the scope of the warrant. The investigating agency may not be able to obtain the contents of the devices if those fingerprints are not used to access the devices by depressing them against the fingerprint sensor at the time of the search. Although your affiant does not know which of the fingers are authorized to access on any given device, your affiant knows based on his training and experience that it is common for people to use one of their thumbs or index fingers for fingerprint sensors, and in any event all that would result from successive failed attempts is the requirement to use the authorized passcode or password.

133

Cal ECPA

- Notice requirements (warrant/emergency)
  - Notice to targets/(DOJ website)
  - Inform them that information compelled/requested
  - Describe with "Reasonable specificity" nature of investigation
  - Served or delivered by registered or first class mail, email or other means reasonably calculated to be effective
  - Must include copy of warrant or fact statement of emergency (and following delay order, reason for delay and summary of information obtained)
  - Contemporaneous with SW service
  - Can delay for up to 90 days with 90 day extensions thereafter if "adverse result" (destruction of evidence, witness intimidation, flight, etc.)

134

Cal ECPA

- Sealing Requirements:
  - Any information obtained that is unrelated to the SW objective must be sealed and cannot be disclosed, used, or further reviewed unless per court order
  - But court can issue a retention/disclosure/further review & use order if PC to believe information is relevant to active investigation or such action is otherwise required by state/federal law*
    - PC 1546.1(d)(2) allows unrelated material to be retained/disclosed with court order or pursuant to PC 1054.1/1054.7 discovery requirements

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Cal ECPA

Stipulation:

Each of the parties to this stipulation, by way of the signature of their counsel below, seeks an order from the Court, under Penal Code Section 1546.1(d)(2), permitting the full review, use, and disclosure of all items obtained by way of search warrant in this case by any of the parties involved in these actions (insert case number(s)). The parties believe that the entire contents of any information obtained by way of search warrant are the proper subject of discovery under Penal Code Sections 1054.1 and 1054.7 and further believe that it is appropriate for each party to review the entire information to independently assess its potential relevancy under state and federal law (e.g., Brady material), including material that may appear on its face to be unrelated to the objectives of the search warrants.

Order:

Based on the stipulation of the parties above, and good cause appearing therefor, IT IS ORDERED AS FOLLOWS: Pursuant to Penal Code Section 1546.1(d)(2), any information obtained by way of search warrant may be reviewed by, used by, and disclosed to any of the parties to the actions in Marin County Superior Court case numbers (insert case number(s)) unless and until further modified by order of the Court.

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Cal ECPA

- Suppression of Evidence (PC 1546.4)
  - Challenge via motion to suppress under PC 1538.5
  - Override Truth-in-Evidence Provision (because passed by more than 2/3 vote of legislature)
  - Universal Standing: Any person in a trial, hearing, or proceeding may move to suppress any electronic information obtained or retained in violation of SB 178 or 4th Amendment

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CPRA AND FOIA

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California Public Records Act (CPRA)

- CPRA (GC 6250 et seq.)
  - Grants the public conditional right to inspect and obtain copies of records of state and local government agencies
  - Interplay with Criminal Discovery Statutes
    - If State/local agency part of prosecution team, then CPRA likely cannot be used to obtain discovery
    - CPRA does not provide for "discovery"
    - It is a mechanism for public can get records independent of litigation
    - Would create inconsistent discovery obligations
      - CPRA scope beyond that of 1054.1
      - "investigative files" not disclosable under CPRA
      - 30 days prior to trial vs. 10 days following request

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CPRA

- Procedure:
  - 1) Request to inspect or for copies to agency
    - Any person/entity may inspect or obtain copies (at their expense) of any public record
    - Public record is any "writing" containing information related to public's business prepared, owned, or retained by state or local agency
    - Not include databases of information
      - See *San Jose v. Sup. Ct.* (2017) ___ Cal.4th ___ (2017 WL 818506) (writings prepared and/or retained by employees on personal devices constitute agency records subject to CPRA)
    - State agency is not the court
    - Filed court documents can be obtained through CPRA to DA
    - If "member of public" makes request agency is required to assist by helping identify responsive records and suggesting ways to overcome obstacles to access

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CPRA

- Procedure:
- 2) Agency responds to request
  - 10 days to determine if request seeks copies of disclosable public records in its possession
  - Promptly notify requestor of agency's determination
  - The agency can have 14 additional days to comply with notice to requestor that request:
    - Requires research or obtaining documents from remote/other locations
    - Requires examination of a voluminous amont of records
    - Consultation with other interested agency required
    - Requires writing computer program or constructing computer report to extract data
  - Must give estimate of time it will take to comply
  - Not required to provide list of withheld documents

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CPRA

- Procedure:
- 2A) Are records exempt?
  - Specific categories of records are exempt:
    - Public records that are exempt or privileged elsewhere pursuant to law, including evidentiary privileges (GC 6254(k)):
      - Peace officer personnel records
      - Attorney/client privileged records
      - Marsy's Law confidential records
      - Juvenile case files
      - Probation report information
      - Coroner's Inquest records
      - RAP sheets

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CPRA

- Procedure:
- 2A) Are records exempt?
  - Specific categories of records are exempt:
    - Investigative files exemption (GC 6254(f)) for LE related records that cannot be disclosed to persons other than other DAs
    - Purpose: protect witnesses, victims, investigators, evidence and investigative techniques, effectuate investigations, encourage candor, and recognize sensitivity of information in criminal cases

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CPRA

- Procedure:
- 2A) Are records exempt?
  - Exempt investigative file records include:
    - Records of complaints to AG, DOJ, or any state or local LE agency (regardless of whether proceeding is ongoing or case filed)
    - Records of (law violation) investigations conducted by these agencies
    - Records of intelligence information or security procedures of these agencies
      - Information that may identify individuals involved in organized crime and confidential sources of information
      - Official information (EC 1040), criminal history/RAP
    - Investigatory or security files compiled by other state or local LEA including for purposes of correctional, LE, or licensing purposes (has to be prospect of criminal or other LE proceedings) – want to avoid shielding disclosable material by just dropping it in inv. file

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CPRA

- Procedure:
- 2A) Are records exempt?
  - Exempt Investigative file records DO NOT include:
    - Arrest information of anyone arrested by the LEA (GC 6254(f)(1)): full name and occupation, physical description, DOB, time/date of arrest & booking, location of arrest, factual circumstances surrounding the arrest, bail amount, time/manner of release, where arrestee held, charges and outstanding warrants/holds

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CPRA

- Procedure:
- 2A) Are records exempt?
  - Exempt Investigative file records DO NOT include:
    - Complaints or requests for assistance: time, date, substance of, location of occurrence/complaint/req. for assistance, time and nature of response
      - If criminal investigation involved also provide name/age of victim, factual circumstances surrounding incident, general description of injuries, property, or weapons
    - Do NOT disclose name if victim if DV/SA (confidential under PC 293), victim does not consent to disclosure, contact information to any victim to an arrestee/defendant
    - Incident information to victims, their insurers, any one who suffered bodily injury or property damage or loss from crime including name/address of involved parties, witnesses, description of property involved, date, time, location of incident, witness statements (not CIs)

146

CPRA

- Procedure:
- 2A) Are records exempt?
  - Can still refuse to disclose documents if disclosure would:
    - Endanger the safety of a witness or other person involved in the investigation, or
    - Endanger the successful completion of the investigation or a related investigation, or
    - Information reflects the analysis or conclusions of the investigating officer
  - Examples of exempt documents:
    - Autopsy/coroner reports
    - Gang or organized crime data base information
    - Security/safety procedure manuals for LEA
    - Parole files
    - RAP sheets
    - Records of investigations for CCW permit

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CPRA

- Procedure:
- 2A) Are records exempt?
  - Yes if preliminary drafts, notes, inter/intra agency memos, where there is pending litigation and agency is a party, highly personal privacy infringing material, DNA profiles
  - Can still refuse to disclose under the catch all (GC 6255) where agency can establish that on the facts of a particular case the public interest is served by not disclosing a record clearly outweighs public interest served by disclosure of record
    - Examples: disclosure endangers others (mere assertion insufficient), burden on agency, extraordinary costs to agency, deliberative process
    - But exemptions are the exception and public policy favors disclosure

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CPRA

- Procedure:
- 2B) Even if exempt, disclose anyway?
  - Note that foregoing reliance on an exemption in one instance may mean it is waived and cannot be asserted at another time
  - Disclosing public record from one state/local agency to another does not waive an exemption so long as the receiving agency agrees to treat it as confidential

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CPRA

- Procedure:
- 3) Challenges to non-disclosure
  - If requesting party is DA, we can petition Superior court to compel agency to permit inspection/copies if more than 10 working days have passed since request made
  - If requesting party is anyone else then a verified petition for declaratory or injunctive relief to compel disclosure must be filed with court; taxpayer suit for waste/illegal use of public funds by agency
  - A person mentioned in disclosed CPRA documents can file a reverse CPRA action for declaratory relief that challenges disclosure

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Freedom of Information Act (FOIA)

- Similar to CPRA, requires every federal agency upon request to make promptly available to any person records so long as request reasonably describes those records
- Exemptions:
  - LE records if disclosure would interfere with enforcement proceedings, deprive a person of a right to a fair trial or impartial adjudication, invasion of personal privacy, involves a conf dential source or information
  - Personnel and medical files as it would be an unwarranted invasion of personal privacy

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Thank you and good luck!

- Contact information:
  - Dori Ahana, Marin District Attorney's Office dahana@marincounty.org, (415) 473-6474
- References:
  - Basic *Brody* and Statutory Discovery Obligations, Jeff Rubin, Santa Clara DA's Office
  - Cal ECPA/SB 178 materials by Cindy De Silva, San Joaquin DA's Office
  - California Criminal Discovery, 5th Edition, Justice Brian M. Hoffstadt

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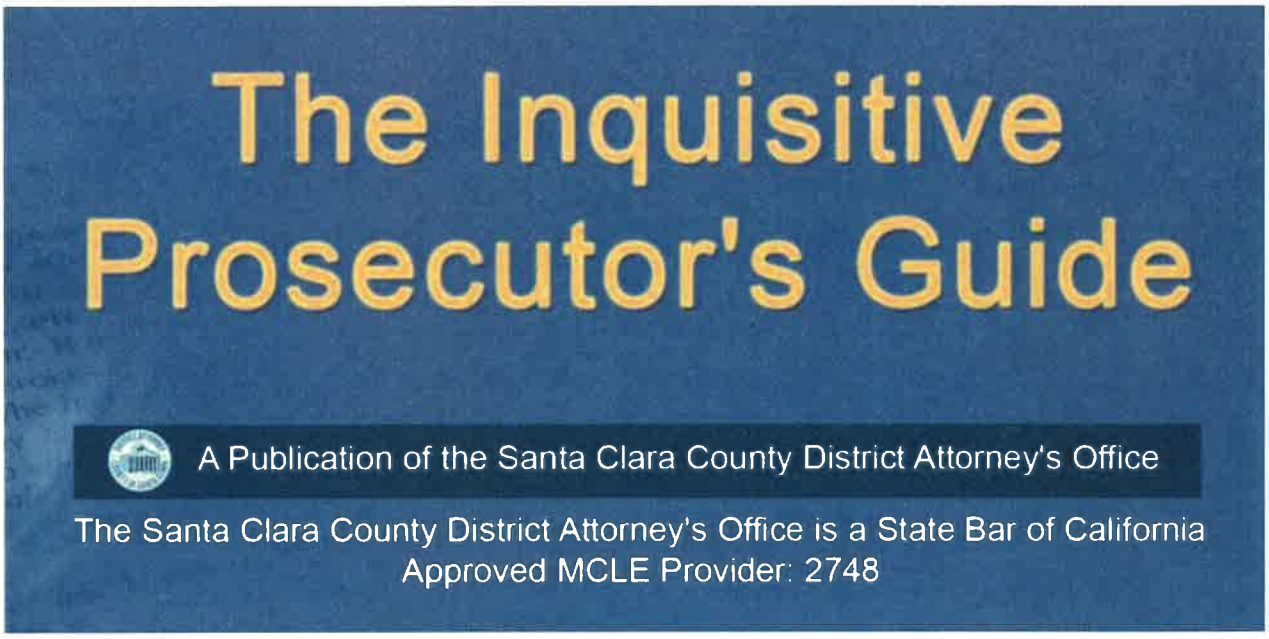

Excerpts from Pages 141-143, 144-145

What does "intends to call" mean for section 1054.1 purposes?

The California Supreme Court has identified the phrase "persons the prosecutor intends to call as witnesses at trial" in Penal Code section 1054.1(a) as referring to all witnesses the prosecution "reasonably anticipates it is likely to call." (***People* v. *Tillis*** (1998) 18 Cal.4th 284, 287; ***Izazaga* v. *Superior Court*** (1991) 54 Cal.3d 356, 376, fn. 11.) Accordingly, "[f]ailure to disclose the address of a victim who is reasonably expected to testify at trial would violate the prosecution's obligation under section 1054.1, subdivision (a)." (***People* v. *Bohannon*** (2000) 82 Cal.App.4th 798, 805.)

Editor's note: The reciprocal discovery provision of the CDS requires defense lawyers to provide the names and addresses of "persons, other than the defendant, he or she intends to call as witnesses at trial[.]" (Pen. Code, § 1054.3(a).) The definition of "intends" in section 1054.3(a) has the same meaning as "intends" in section 1054.1(a). (**See *People* v. *Tillis*** (1998) 18 Cal.4th 284, 290, fn. 3; ***Izazaga* v. *Superior Court*** (1991) 54 Cal.3d 356, 376, fn. 11.)

The California Supreme Court has stated that, in determining whether an attorney "reasonably anticipates" calling a witness, counsel is not licensed "to temporize about his or her intentions in the face of clear indications on the record that counsel in fact intends to call a particular witness." (***People* v. *Tillis*** (1998) 18 Cal.4th 284, 293; **see also *Sandeffer* v. *Superior Court*** (1993) 18 Cal.App.4th 672, 678 [presuming court may order defense counsel to produce information or

materials the court reasonably finds have been improperly withheld, notwithstanding counsel's protestations to the contrary].)

The ***Tillis*** court pointed to its earlier decision in ***Izazaga*** **v.** ***Superior Court*** (1991) 54 Cal.3d 356, as an example of case where it was clear the defense reasonably anticipated calling a witness because an investigator had interviewed the witness, the witness was present in the courtroom, and counsel asked the court to order the witness to return on the day the case was trailed for trial. (***Tillis*** at p. 293, citing to ***Izazaga*** at p. 136; **see also** ***People*** **v.** ***Hammond*** (1994) 22 Cal.App.4th 1611, 1624 [quoting ***Taylor*** **v.** ***Illinois*** (1987) 484 U.S. 400, 413-414 for the proposition that it is "reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed"]; ***People*** **v.** ***Jackson*** (1993) 15 Cal.App.4th 1197, 1202 [upholding sanction of exclusion for failure to disclose witness where trial court refused to believe defense counsel's claim he did not decide to call defense investigator who took clearly exculpatory declaration against interest from unavailable witness until moments before the investigator was called to testify].)

In the unpublished decision of ***People*** **v.** ***Le*** 2006 WL 2949021, the prosecution failed to disclose a letter written by the defendant to his girlfriend and several taped jailhouse conversations between the defendant and his girlfriend that strongly suggested defendant was asking his girlfriend to create a false alibi until cross-examination of the defendant. The attorney general conceded the discovery violation notwithstanding the trial prosecutor's claim he had not "intend" to use this material until the defendant testified inconsistently with the belatedly disclosed evidence. (**Id**. at pp. *9-*10.)

In ***People*** **v.** ***Riggs*** (2008) 44 Cal.4th 248, a case where a pro per defendant failed to disclose some alibi witness until after the prosecution rested, the California Supreme Court upheld a trial court's determination that the defendant violated his statutory discovery obligation because a "defendant, charged with capital murder, would reasonably anticipate that it was likely he would call as witnesses family members who purportedly knew that he was several hundred miles away from the scene of the crime when the murder was committed." (**Id**. at p. 306 [and making this finding despite defendant's undisputed claim that he had not disclosed the witnesses because they had moved and he had only recently learned where they were residing].) The ***Riggs*** court called into question the notion that a party may properly claim that they do not "intend" to call a witness until the party knows they will be "able" to call the witness. (**Id**. at p. 309, fn. 20.) Rather, the court held that a mere lack of knowledge of the whereabouts of a witness does not constitute good cause for not disclosing the name of the witness. (***People*** **v.** ***Riggs*** (2008) 44 Cal.4th 248, 309-310, fn. 29.)

In contrast, until counsel knows what the witness is actually going to say, it cannot reasonably be said counsel intends to call the witness at trial. (**See** ***People*** **v.** ***Walton*** 143 (1996) 42 Cal.App.4th 1004, 1017 [even if the prosecutor knows the name of a witness, until the prosecutor actually locates the witness and determines what the witness is going to say, the prosecutor cannot be said to "intend to call" the witness].)

As a practical matter, many trial courts are reluctant to question a defense attorney's representation as to when the intent to call a witness was formed, relying on language from ***Sandeffer* v. *Superior Court*** (1993) 18 Cal.App.4th 672 that "the determination whether to call a witness is peculiarly within the discretion of counsel" and that "[e]ven when counsel appears to the court to be unreasonably delaying the publication of his decision to call a witness, it cannot be within the province of the trial judge to step into his shoes." (**Id.** at p. 678.)

Moreover, sometimes delaying the decision whether or not to call a witness *is* legitimate. As noted in ***People* v. *Hammond*** (1994) 22 Cal.App.4th 1611, "during the trial process, things change and the best laid strategies and expectations may quickly become inappropriate: witnesses who have been interviewed vacillate or change their statements; events that did not loom large prospectively may become a focal point in reality. Thus, there must be some flexibility." (**Id.** at p. 1624.)

It remains an open question whether determination of a party's asserted intent to call a witness involves an objective or subjective evaluation of the facts. (***People* v. *Riggs*** (2008) 44 Cal.4th 248, 309, fn. 29; ***People* v. *Tillis*** (1998) 18 Cal.4th 284, 290.)

In ***Tillis***, the defense called an expert witness to testify regarding the effects of drug abuse on the mental condition of the defendant. On cross-examination, the prosecution asked the expert if he had been arrested for snorting cocaine during a lunch break while testifying as an expert in another case. The defense later objected that they had not been given notice the prosecutor planned to ask about the expert's arrest. When the case got before the California Supreme Court, the parties spent a fair amount of time arguing over what it meant to "reasonably anticipate" calling a witness. However, the court stated the real issue was whether the "information" the prosecutor had queried about on cross-examination fell within any of the categories of discovery covered by the CDS. The court held it did not. The fact of the expert's drug use and related arrest was not, per se, a witness's name or address (§ 1054.1, subd. (a)); a statement by defendant (§ 1054.1, subd. (b)); real evidence (§ 1054.1, subd. (c)); a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial (§ 1054.1, subd. (d)); exculpatory evidence (§ 1054.1, subd. (e)); or a written or recorded statement of the witness, or a report of a statement of the witness (§ 1054.1, subd. (f)). (**Id.** at pp. 288-294.)

The court concluded that since the information did not necessarily require a "witness" for it to be admissible (i.e., it could be admitted as a certified public record or prior recorded testimony of the witness sought to be impeached) and since it would be mere speculation to conclude that the prosecution intended to call a witness (as opposed to merely asking about the prior incident or proving it without a witness), there was no violation of the discovery statute. (**Id.** at pp. 288-292.)

The ***Tillis*** court specifically rejected the defendant's argument that the due process clause requires disclosure of "all the details that will be used to refute an opposing party's witness[.]" (**Id.** at pp. 294-295; ***Coronado* v. *Almager*** (C.D. Cal. 2009) [unreported] 2009 WL 2900288, *12 ; **see also *People* v. *Wilson*** (2005) 36 Cal.4th 309, 333 [no discovery violation where prosecution did not disclose investigative report on defense

witness because defendant "fail[ed] to show how the prosecution violated section 1054.1's discovery obligations by not disclosing information on a witness the defense intended to present"]; ***People* v. *Cox*** [unreported] 2013 WL 97429, *6 ["nothing in the plain language of the statute requires the prosecution to disclose the existence of any misdemeanor conduct or conviction of a witness that the defense intends to call to testify"]; ***People* v. *Burchfield*** (unpublished) 2003 WL 1084872, *7 [prosecutor had no duty to disclose that witness defense intended to call was terminated from the county medical examiner's office for fraud].)

The party holding impeachment evidence, including the statement taken from the opposing party's witness, may withhold disclosure of that statement unless and until the party holding the impeachment evidence reasonably anticipates calling a witness to complete the impeachment. (**See *Hubbard* v. *Superior Court*** (1997) 66 Cal.App.4th 1163, 1165-1170.) Even where defense counsel *uses* a statement taken by a defense investigator of a prosecution witness during examination of the witness, this does not mean the statement must be turned over unless it can be shown defense counsel intends to call the defense investigator. (**See *People* v. *Ary*** (unreported) 2008 WL 2212381, pp. *17-19.)
Of course, there is both a constitutional and a statutory obligation on the part of the ***prosecution*** to reveal statements made by defense witnesses if those statements are exculpatory. (**See *Brady* v. *Maryland*** (1963) 373 U.S. 83, 87; Pen. Code, § 1054(e).)

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Brady disclosures [MCLE]

Elia Pirozzi *is a judge of the San Bernardino County Superior Court.*

Under the 14th Amendment to the U.S. Constitution, the prosecution must disclose to the defense evidence favorable and material to the accused either to guilt or punishment (i.e., exculpatory evidence). *Brady v. Maryland*, 373 U.S. 83 (1963). Bench officers and attorneys handling criminal cases must be familiar with this important area of law.

The objective of this article and self-study test is to review *Brady* disclosures required by the Constitution. Readers will learn about the prosecution's duty under *Brady*, limitations on the duty, what constitutes favorable and material evidence, and how the *Brady* duty intersects with the right to discovery under *Pitchess v. Superior Court*, 11 Cal. 3d 531 (1974).

Brady Duty

Brady and its progeny serve "'to restrict the prosecution's ability to suppress evidence rather than to provide the accused a right to criminal discovery.'" *People v. Williams*, 58 Cal. 4th 197 (2013), quoting *People v. Morrison*, 34 Cal. 4th 698 (2004). "In order that a defendant may secure a fair trial as required by the due process clause, 'the prosecution has a duty to disclose all substantial material evidence favorable to an accused. That duty exists regardless of whether there has been a request for such evidence, and irrespective of whether the suppression was intentional or inadvertent.'" *Izazaga v. Superior Court*, 54 Cal. 3d 356 (1991).

"By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model. The [U.S. Supreme] Court has recognized, however, that the prosecutor's role transcends that of an adversary: he 'is the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *United States v. Bagley*, 473 U.S. 667 (1985). Therefore, the *Brady* rule does not displace the adversary system as the primary means by which truth is uncovered. The prosecution's discovery obligations under Penal Code Section 1054.1 are independent from its constitutional duty under *Brady*.

There are three parts to a *Brady* violation: (1) Evidence must be favorable to the accused (i.e., exculpatory or impeaching); (2) evidence must be suppressed by the state; and (3), suppressed evidence must be material to guilt or punishment (i.e., prejudice must have ensued). *Strickler v. Greene*, 527 U.S. 263 (1999).

Brady applies in criminal trials, including the penalty phase of a death penalty trial. *Banks v. Dretke*, 540 U.S. 668 (2004). *Brady* also applies in preliminary hearings. *People v. Gutierrez*, 214 Cal. App. 4th 343 (2013); *see Bridgeforth v. Superior Court*, 214 Cal. App. 4th 1074 (2013) (the standard of materiality in a preliminary hearing is whether there is a reasonable probability that disclosure of the evidence would have altered the magistrate's probable cause determination). In addition, *Brady* applies to juvenile delinquency proceedings. *J.E. v. Superior Court*, 223 Cal. App. 4th 1329 (2014).

The constitutional duty of disclosure:

* is exclusive to the prosecution. *In re Brown*, 17 Cal. 4th 873 (1998).

* includes impeachment evidence. *Bagley*.

* extends past the prosecution's file, applying to favorable evidence known by others acting on government's behalf, including the police. *Kyles v. Whitley*, 514 U.S. 419 (1995).

* is a continuing obligation. *Imbler v. Pachtman*, 424 U.S. 409 (1976).

Limitations on Duty

A prosecutor has no general duty to obtain and disclose all evidence that might be

beneficial to defense. *People v. Panah*, 35 Cal. 4th 395 (2005). "[T]he law does not impose upon law enforcement agencies the requirement that they take the initiative, or even any affirmative action, in procuring the evidence deemed necessary to the defense of an accused." *In re Koehne*, 54 Cal. 2d 757 (1960). "There is no general duty on the part of the police or the prosecution to obtain evidence, conduct any tests, or 'gather up everything which might eventually prove useful to the defense.'" *In re Littlefield*, 5 Cal. 4th 122 (1993). But the prosecutor must undertake a complete examination of the facts of the case and explore any leads developed by such facts in the interest of fundamental fairness and due process.

If the exculpatory value of evidence is not readily apparent, a specific request by the defense is required to trigger the duty of disclosure. *In re Steele*, 32 Cal. 4th 682 (2004). If the material in question is in the possession of the defense or available via reasonable diligence, there is no duty to disclose. *People v. Salazar*, 35 Cal. 4th 1031 (2005). The prosecution does not have a constitutional duty under *Brady* to disclose *inculpatory* evidence the prosecution intends to introduce at trial. *Gray v. Netherland*, 518 U.S. 152 (1996). However, the prosecution does have a statutory duty to make such a disclosure under Penal Code Section 1054.1.

The prosecutor does not have a duty to provide the defense with evidence to impeach the prosecutor's witnesses prior to plea bargaining. *United States v. Ruiz*, 536 U.S. 622 (2002). The California Supreme Court has seemingly left open the issue of whether exculpatory evidence must be disclosed prior to entry of guilty plea. *See In re Miranda*, 43 Cal. 4th 541 (2008) ("Nor need we decide the broad question whether or to what extent the prosecution has a duty to disclose evidence favorable to a criminal defendant before the defendant pleads guilty"). Nevertheless, failure to disclose exculpatory evidence prior to a plea could warrant withdrawal of the guilty plea. *See People v. Ramirez*, 141 Cal. App. 4th 1501 (2006) ("the least surprise or influence causing a defendant to plead guilty when he has any defense at all should be sufficient cause to permit a change of plea from guilty to not guilty").

Evidence that Is Favorable and Material

"Evidence is 'favorable' if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses." *In re Sassounian*, 9 Cal. 4th 535 (1995). Such items include information which could tend to exonerate or mitigate punishment, evidence which helps to establish a defense, material relating to a witness's mental or physical history tending to adversely reflect on credibility and information that testimony was motivated by animosity against a defendant.

Exculpatory and impeachment evidence also includes information relating to charges pending against prosecution witnesses. *People v. Martinez*, 103 Cal. App. 4th 1071 (2002); *People v. Coyer*, 142 Cal. App. 3d 839 (1983). Such evidence is useful to the defense because the defense during trial "is permitted to inquire whether charges are pending against a witness as a circumstance tending to show that the witness may be seeking leniency through testifying." *People v. Claxton*, 129 Cal. App. 3d 638 (1982). Also, the defense is entitled to know whether a prosecution witness is on probation. *Millaud v. Superior Court*, 182 Cal. App. 3d 471 (1986). *Millaud* held, "Such information must be provided regardless whether the witness is within the jurisdiction; for, even though the prosecutor may have no actual influence over a witness's probationary status, 'it is the witness' subjective expectations, not the objective bounds of prosecutorial influence, that are determinative' for purposes of impeachment."

In order to establish a violation of due process under *Brady*, the defense must establish that the favorable evidence which was not disclosed was *material* to either guilt or punishment, irrespective of good faith or bad faith of the prosecution. Evidence is material "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *People v. Masters*, 62 Cal. 4th 1019 (2016); *Cone v. Bell*, 556 U.S. 449 (2009). Materiality thus "requires more than a showing that the suppressed evidence would have been admissible, that the absence of the suppressed evidence made conviction 'more likely,' or that using the suppressed evidence to discredit a witness's testimony 'might have changed the outcome of the trial.'" Under *Kyles*, while the tendency and force of undisclosed evidence is evaluated item by item, its cumulative effect for purposes of materiality must be considered collectively.

The requirement of materiality ensures that a violation is established only when there was a reasonable probability that the accused did not receive a fair trial, one "resulting in a verdict worthy of confidence." *Kyles*. Although *Brady* disclosure issues may arise "in advance of," "during," or "after trial" the test is always the same - *Brady* materiality is a constitutional standard required to ensure that nondisclosure will not result in the denial of defendant's due process right to a fair trial. *United States v. Agurs*, 427 U.S. 97 (1976); *Eulloqui v. Superior Court*, 181 Cal. App. 4th 1055 (2010). The inquiry as to materiality includes consideration of the adverse effect of nondisclosure on defense investigations and trial strategies (i.e., preparation and presentation of the defendant's case). *People v. Verdugo*, 50 Cal. 4th 263 (2010); *People v. Hoyos*, 41 Cal. 4th 872 (2007).

Intersection of *Brady* and *Pitchess*

A *Pitchess* motion is used to discover information in a law enforcement officer's personnel file or other police agency record that is relevant to a criminal case, such as an officer's alleged prior use of excessive force or falsification of information. A criminal defendant claiming police misconduct "may compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial" (i.e., prior use of excessive force, racial or ethnic bias, falsification of information, or planting evidence). The motion is codified in Evidence Code Section 1043. *Pitchess* discovery is available in a variety of contexts, including criminal and civil cases as well as administrative proceedings. Evid. Code Section 1043(a).

In order to obtain *Pitchess* discovery, the defense must identify purported officer misconduct, describe a proposed defense; establish a "logical link" between the pending charge and the proposed defense and articulate how the requested discovery will support the defense or impeach the officer's version of events. *Warrick v. Superior Court*, 35 Cal. 4th 1011 (2005).

"Under *Brady*, evidence is 'material' only if it is reasonably probable a prosecution's outcome would have been different had the evidence been disclosed. [citation omitted.] By contrast, '[u]nder *Pitchess*, a defendant need only show that the information sought is material "to the subject matter involved in the pending litigation." ([Evid. Code,] § 1043, subd. (b)(3).) Because *Brady*'s constitutional materiality standard is narrower than the *Pitchess* requirements, any [information] that meets *Brady*'s test of materiality necessarily meets the relevance standard for disclosure under *Pitchess*. ([Evid. Code,] § 1045, subd. (b).)'" *People v. Superior Court (Johnson)*, 61 Cal. 4th 696 (2015).

In *Johnson*, the California Supreme Court held that the prosecution must comply with the *Pitchess* procedures under Evidence Code Section 1043 before it could examine officer personnel records for material subject to *Brady* disclosure. The court reversed the Court of Appeal and concluded that permitting the defense to seek its own *Pitchess* discovery preserves the defendant's due process rights under *Brady* - the prosecution has no constitutional duty to conduct the defendant's *Pitchess* investigation for him. *Johnson*. Johnson determined, "Because a defendant may seek potential exculpatory information in ... personnel records just as well as the prosecution, the prosecution fulfills its *Brady* obligation if it shares with the defendant any information it has regarding whether the personnel records contain *Brady* material, and then lets the defense decide for itself whether to file a *Pitchess* motion."

Penal Code section 141

(a) Except as provided in subdivisions (b) and (c), a person who knowingly, willfully, intentionally, and wrongfully alters, modifies, plants, places, manufactures, conceals, or moves any physical matter, digital image, or video recording, with specific intent that the action will result in a person being charged with a crime or with the specific intent that the physical matter will be wrongfully produced as genuine or true upon a trial, proceeding, or inquiry, is guilty of a misdemeanor.

(b) A peace officer who knowingly, willfully, intentionally, and wrongfully alters, modifies, plants, places, manufactures, conceals, or moves any physical matter, digital image, or video recording, with specific intent that the action will result in a person being charged with a crime or with the specific intent that the physical matter, digital image, or video recording will be concealed or destroyed, or fraudulently represented as the original evidence upon a trial, proceeding, or inquiry, is guilty of a felony punishable by two, three, or five years in the state prison.

(c) A prosecuting attorney who intentionally and in bad faith alters, modifies, or withholds any physical matter, digital image, video recording, or relevant exculpatory material or information, knowing that it is relevant and material to the outcome of the case, with the specific intent that the physical matter, digital image, video recording, or relevant exculpatory material or information will be concealed or destroyed, or fraudulently represented as the original evidence upon a trial, proceeding, or inquiry, is guilty of a felony punishable by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months, or two or three years.

(d) This section does not preclude prosecution under both this section and any other law.

S239387

ADMINISTRATIVE ORDER 2017-04-26

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

ORDER RE REQUEST FOR APPROVAL OF AMENDMENTS TO RULE 5-110 AND RULE 5-220 OF THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA.

On January 9, 2017, the Board of Trustees of the State Bar of California filed a request for approval of recommended amendments to rule 5-110 and rule 5-220 of the California Rules of Professional Conduct. (Bus. & Prof. Code, § 6076.) The request is granted in part and denied in part.

The request to add paragraphs (A), (B), (C), (F), (G), and (H), and Discussion paragraphs [1], [2], and [5] through [9] to rule 5-110, and to add a discussion paragraph to rule 5-220, is granted. These amendments are set forth in the approved versions of rule 5-110 and rule 5-220 appended as Attachment 1 to this order, and are effective May 1, 2017.

The request to add paragraph (D) to rule 5-110 and its related Discussion paragraphs [3] and [4], concerning prosecutors' ethical pretrial disclosure obligations, is denied. The court directs the Board to consider the alternative revisions set forth in Attachment 2 to this order, and to assess whether any such revisions may warrant further public comment. Additionally, the court requests that the Board explain the meaning of the terms "cumulative disclosures of information" as used in the second sentence of Discussion paragraph [3], or alternatively, consider removing this portion of the sentence from the Discussion paragraph. To the extent the Board chooses to recommend any revisions to rule 5-110(D) and Discussion paragraphs [3] and [4], the Board may submit such revisions for court approval immediately following its consideration of such revisions. For the present time, paragraph (D) and Discussion paragraphs [3] and [4] shall be designated as "reserved," as set forth in the approved version of rule 5-110 appended as Attachment 1 to this order.

The request to add paragraph (E) to rule 5-110, regarding the conditions that must be present before a prosecutor may issue a subpoena to a lawyer to present evidence about a former or current client, is denied. The court directs the Board to reconsider whether this is an ethical obligation that should be imposed on all attorneys, not only prosecutors. To the extent the Board chooses to recommend a more broadly applicable rule patterned on

the language in proposed rule 5-110(E), the court directs the Board to reconsider whether substitution of the terms "reasonably necessary" for "essential" under proposed paragraph (E)(2), and "reasonable" for "feasible" under proposed paragraph (E)(3), would be appropriate. The Board may submit a recommendation for a new or revised rule on this subject matter at any time it deems appropriate.

In light of the court's decision to not approve proposed rule 5-110(E), paragraphs (F), (G), and (H), and references thereto, shall be relabeled as paragraphs (E), (F), and (G), respectively, as set forth in the approved version of rule 5-110 appended as Attachment 1 to this order.

It is so ordered.

CANTIL-SAKAUYE

Chief Justice

WERDEGAR, J.

Associate Justice

CHIN, J.

Associate Justice

CORRIGAN, J.

Associate Justice

LIU, J.

Associate Justice

CUÉLLAR, J.

Associate Justice

KRUGER, J.

Associate Justice

ATTACHMENT 1

Rule 5-110 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(A) Not institute or continue to prosecute a charge that the prosecutor knows is not supported by probable cause;

(B) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(C) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal has approved the appearance of the accused in propria persona;

(D) *Reserved.*

(E) Exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 5-120.

(F) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) Promptly disclose that evidence to an appropriate court or authority, and

(2) If the conviction was obtained in the prosecutor's jurisdiction,

(a) Promptly disclose that evidence to the defendant unless a court authorizes delay, and

(b) Undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(G) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Discussion

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient

evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Rule 5-110 is intended to achieve those results. All lawyers in government service remain bound by rules 3-200 and 5-220.

[2] Paragraph (C) does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent. Paragraph (C) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] *Reserved.*

[4] *Reserved.*

[5] Paragraph (E) supplements rule 5-120, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. Paragraph (E) is not intended to restrict the statements which a prosecutor may make which comply with rule 5-120(B) or 5-120(C).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rule 3-110, Discussion.) Ordinarily, the reasonable care standard of paragraph (E) will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (F) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (F) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 2-100.)

[8] Under paragraph (G), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of paragraphs (F) and (G), though subsequently determined to have been erroneous, does not constitute a violation of rule 5-110.

(Adopted, eff. May 1, 2017.)

Rule 5-220 Suppression of Evidence

A member shall not suppress evidence that the member or the member's client has a legal obligation to reveal or produce.

Discussion

See rule 5-110 for special responsibilities of a prosecutor.

(Adopted, eff. May 1, 2017.)

ATTACHMENT 2

Proposed alternative revisions to Rule 5-110(D) and Discussion paragraphs [3] and [4] for consideration by the State Bar's Board of Trustees

The prosecutor in a criminal case shall:

. . .

(D) Make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, ~~or~~ mitigates the offense, ~~and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor that the prosecutor knows or reasonably should know~~ or mitigates the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal~~;~~. This obligation includes the duty to disclose information that casts significant doubt on the accuracy or admissibility of witness testimony or other evidence on which the prosecution intends to rely;

. . .

[3] The disclosure obligations in paragraph (D) ~~include exculpatory and impeachment material relevant to guilt or punishment and~~ are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny. Nevertheless, ~~Although~~ rule 5-110 ~~does not incorporate the *Brady* standard of materiality, it~~ is not intended to require disclosure of cumulative ~~disclosures of~~ information or ~~the disclosure of~~ information that is protected from disclosure by federal or California laws and rules, as interpreted by cases law or court orders. Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts. A disclosure's timeliness will vary with the circumstances, and rule 5-110 is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

[4] The exception in paragraph (D) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

OFFICIAL RECORD OF ATTENDANCE FOR CALIFORNIA MCLE

Provider: Ventura County District Attorney's Office

Provider Number: 1130

Title of Activity: Discovery

Date(s) of Activity: October 9, 2017

Time of Activity: 8:30 a.m. to 12:00 pm.

(City/State): Ventura, CA

TOTAL ELIGIBLE CALIFORNIA MCLE CREDIT HOURS: 3 hours

Including the following sub-field credits:

Legal Ethics: 1 hour

Elimination of Bias in the Legal Profession: _____

Competence Issues: _____

NAME OF ATTENDEE	CALIFORNIA STATE BAR NO.	ATTENDEE SIGNATURE
Michael Kern	282770	
Linda Groberg	113712	
Kim Gibbons	89604	
Brian Kafel	138176	
Paul Benjamin	306066	
Stephanie Ramirez	315629	
Thomas Frye	183593	
Melissa Sattler	201456	
Lisa Lyndaker	180458	
Brendon Yeaton	311308	
Greg Agron	311844	
Ben Moreno	306915	
Jillian Ewan	305904	
Marie Deravedrigan	285039	
Andrew Sullivant	264745	
Ryan Sheahan	259142	
Christina Catapano	293541	
Jennie Turiff	249157	
Rafael Orellana	271281	

REMINDER TO PROVIDER: Keep this record of attendance for 4 years after the date of completion of this activity.
Questions: Email providers@calbar.ca.gov.

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Competence Issues: _____

NAME OF ATTENDEE	CALIFORNIA STATE BAR NO.	ATTENDEE SIGNATURE
John Steele		
David Russell	116469	
Ernesto Arcos	103190	
Rebecca Day	128101	
Greg Totten	106639	
Jesus Spitman	279642	
Theresa Pillsbury	181251	
Dominic Gordon	229420	
Michael Cayle	149785	
Brent Nibecker	253186	
Thomas Dunlay	240148	
Mike Frawley	131643	
Cindy Naylor	202828	
Erin Meister	253615	
Blake Heller	245165	
John Moore	258119	
Sara Brucker	266511	
Maere Fox	137325	
Laurel McIntyre	163071	

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NAME OF ATTENDEE	CALIFORNIA STATE BAR NO.	ATTENDEE SIGNATURE
Kathleen LaSalle	164358	
Kelly Keenan	149111	
Brandon Cook	219630	
Chrystina Jenson	177947	
Chong-hwa Lee	274706	
Danny Ko	265279	
David Kwon	268064	
Chris Harman	155353	
Jennifer Lyons	#210414	
Miles Weiss	167835	
Scott Hiendlmeyer	~~#3~~ 144523	
Craig Garden	295663	
Jan Maurizi	117323	
JoAnn Roth	~~104~~ 198654	
Susan Paul	283062	
Stacy Ratner	126223	
Richard Simon	109914	
Tate McCallister	235272	
Marc Leventhal	139523	

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Competence Issues: _____

NAME OF ATTENDEE	CALIFORNIA STATE BAR NO.	ATTENDEE SIGNATURE
Michael D. Schwartz	09112	
Thomas B Johnson	156570	
STUART GARDNER	256654	
Heather Sweatman	314828	
Tyler Faremba		
Christine Mitchell		
William Hughes	155992	
Catherine Voelker	232-444	
amber lee	258101	
Emma Levey	311848	
Ramon Montes	198651	
DAVE BARNES	248873	
Anne Spillner	234180	
Maureen Byrne	~~#[illegible]~~ 46616	
Phillipa Cruickshank	293646	
Ethel Hernandez	277016	
[illegible]	212385	
Mike Hampalone		
PAUL FELDMAN	~~[illegible]~~ 251496	

REMINDER TO PROVIDER: Keep this record of attendance for 4 years after the date of completion of this activity.
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Including the following sub-field credits:

Legal Ethics: 1 hour

Elimination of Bias in the Legal Profession: _____

Competence Issues: _____

NAME OF ATTENDEE	CALIFORNIA STATE BAR NO.	ATTENDEE SIGNATURE
William Taylor Waters	245590	930AM - 12 noon
Erik Nasarenko	251700	10 AM - Noon
Edward Andrews	268479	

REMINDER TO PROVIDER: Keep this record of attendance for 4 years after the date of completion of this activity.
Questions: Email providers@calbar.ca.gov.

ACTIVITY EVALUATION FORM FOR CALIFORNIA MCLE

Please complete and return to Provider (Please Print)

Provider Name: Ventura County District Attorney's Office Provider Number: 1130

Title of Activity: Discovery

Date(s) of Activity: October 9, 2017

Time of Activity: 8:30 a.m. to 12:00 p.m.

Location of Activity: Hall of Administration, Lower Plaza Assembly Room

Please indicate your evaluation of this course by completing the table below

Question	Yes	No	Comments
Did this program meet your educational objectives?	☐	☐	
Were you provided with substantive written materials?	☐	☐	
Did the course update or keep you informed of your legal responsibilities?	☐	☐	
Did the activity contain significant professional content?	☐	☐	
Was the environment suitable for learning (e.g., temperature, noise, lighting, etc.)?	☐	☐	

Please rate the instructor(s) of the course below

Instructor's Name and Subject Taught	On a scale of 1 to 5, with 1 being Poor and 5 being Excellent, please rate the items below	Rate 1 – 5
Kevin Drescher, Discovery	Overall Teaching Effectiveness	___
	Knowledge of Subject Matter	___

Instructor's Name and Subject Taught	On a scale of 1 to 5, with 1 being Poor and 5 being Excellent, please rate the items below	Rate 1 – 5
	Overall Teaching Effectiveness	___
	Knowledge of Subject Matter	___

Instructor's Name and Subject Taught	On a scale of 1 to 5, with 1 being Poor and 5 being Excellent, please rate the items below	Rate 1 – 5
	Overall Teaching Effectiveness	___
	Knowledge of Subject Matter	___

CERTIFICATE OF ATTENDANCE FOR CALIFORNIA MCLE

Top portion of form to be completed by the Provider

It is preferred that the form is pre-printed with the attendees name and bar number.

Provider Name: Ventura County District Attorney's Office

Provider Number: 1130

Title of Activity: Discovery

Date(s) of Activity: October 9, 2017

Time of Activity: 8:30 a.m. to 12:00 p.m.

Location of Activity (City/State): Ventura, CA

This Activity qualifies for: Participatory ☑ Self-Study ☐

Total California MCLE Credit Hours for the above activity: 3 hours, including the following sub-field credits:

- Legal Ethics: 1 hour
- Recognition and Elimination of Bias: _____
- Competence Issues: _____

Bottom portion of form to be completed by the Attorney <u>after</u> participation in the above-referenced activity

By signing below, I certify that I participated in all, or some*, of the activity described above and am therefore entitled to claim the following California MCLE credit hours:

Total California MCLE Credit Hours: _____, including the following sub-field credits:

- Legal Ethics: _____
- Recognition and Elimination of Bias: _____
- Competence Issues: _____

(You may not claim credit for the subfields above unless the provider is granting credit in those areas above.)

Print Your Name (clearly): _____

Your California State Bar Number: _____

Signature: _____

* partial participation hours must be pro-rated