


SPECIAL DIRECTIVE 18-02

TO: All DEPUTY DISTRICT ATTORNEY PERSONNEL

FROM: JACKIE LACEY   
District Attorney

SUBJECT: REPLACEMENT OF CHAPTER 14 OF THE LEGAL POLICIES  
MANUAL ON DISCLOSURE OF EXCULPATORY AND  
IMPEACHMENT INFORMATION

DATE: MARCH 15, 2018

In February of 2017, the Los Angeles County District Attorney's Office revised its policy regarding the disclosure of exculpatory and impeaching information concerning law enforcement officers and other recurrent witnesses, implementing the Officer and Recurrent Witness Information Tracking System (ORWITS). In implementing the policy, experience has revealed the need to revise our practice to ensure we meet our constitutional duties and ethical obligations more effectively. Toward that end, this Special Directive announces the creation of a BRADY database to work alongside ORWITS. Working in conjunction with one another, the databases shall be collectively referred to as the Discovery Compliance System (DCS). The DCS, administered by the Discovery Compliance Unit (DCU), will improve the capacity for deputies to comply with constitutional and statutory discovery obligations, ensure defendants receive a fair trial, protect recurrent witnesses from unfair surprise, and preserve the integrity of convictions.

This Special Directive supersedes Special Directive 17-03, moves existing section 14.06.03 (Police Informant Records) of the Legal Policies Manual (LPM) to section 19.06, replaces the remainder of Chapter 14 of the LPM in its entirety (attached) and informs deputies of the following:

- The creation of the DCS, which will provide information pertaining to recurrent witnesses;
- Prosecutorial disclosure obligations; and
- The procedures for inclusion of information concerning recurrent witnesses into the DCS.

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Attachment

## **CHAPTER 14**

### **DISCLOSURE OF EXCULPATORY AND IMPEACHING INFORMATION**

#### **14.01 INTRODUCTION**

A California prosecutor's obligation to provide exculpatory and impeaching information arises from the federal Due Process Clause of the Fourteenth Amendment, as applied by the United States Supreme Court in *Brady v. Maryland* (1963) 373 U.S. 83, and California's Criminal Discovery Statute, as codified in Penal Code section 1054.1(e). Additionally, Rule 5-110 of the California Rules of Professional Conduct requires that prosecutors timely disclose all evidence or information that tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when relieved of this responsibility by a protective order of the court.

The failure to provide exculpatory and impeaching information may violate Rule 5-220 of the Rules of Professional Conduct, Penal Code section 141(a), and trigger a report to the State Bar if the reversal of a judgment is based in whole, or in part, on prosecutorial misconduct. Moreover, the United States Supreme Court has indicated that the prudent prosecutor should resolve doubtful questions in favor of disclosure.

The Office's policy is to adhere to these obligations regardless of materiality to ensure defendants receive a fair trial and to preserve the integrity of convictions. All deputies are required to comply with the law regarding the disclosure of exculpatory and impeaching information, to resolve doubtful questions in favor of disclosure, and to follow the policies and procedures set forth herein.

#### **14.02 THE BRADY RULE**

A deputy has an affirmative duty to disclose all favorable material evidence on the issue of guilt or punishment possessed by the prosecution team, irrespective of a defense request. Favorable evidence consists of exculpatory information or impeaching information that undermines the credibility of a prosecution witness.

Examples of exculpatory evidence include information that:

- Directly opposes guilt;

- Negates an element of a charged offense;

- Supports defense testimony;

- Supports an affirmative defense;

- Supports a defense motion;

- Mitigates punishment;

Examples of impeaching evidence include:

Felony convictions involving moral turpitude;

Misdemeanor or other conduct that reflects on believability;

Misconduct involving moral turpitude;

False reports by a prosecution witness;

Pending criminal charges against a prosecution witness;

Parole or probation of a prosecution witness;

Evidence contradicting a prosecution witness's statements or reports;

Evidence undermining a prosecution witness's expertise (e.g. inaccurate statements or expert opinions);

Evidence of misconduct by a Board of Rights or Civil Service Commission that reflects on a prosecution witness's truthfulness, bias, or moral turpitude;

Evidence that a prosecution witness has a reputation for untruthfulness;

Evidence that a prosecution witness has a racial, religious, or personal bias against the defendant individually or as a member of a group; and

Promises, offers, or inducements to a prosecution witness, including a grant of immunity.

When favorable material evidence is contained in the prosecuting attorney's file, the deputy is in actual possession of the evidence and shall disclose it. Additionally, a deputy shall disclose favorable material evidence in the possession of the "prosecution team," including "information possessed by others acting on the government's behalf that [was] gathered in connection with the investigation" (*Strickler v. Greene* (1999) 527 U.S. 263, 281). "Prosecution team" includes crime labs and sexual assault response teams (*People v. Uribe* (2008) 162 Cal.App.4<sup>th</sup> 1457).

A deputy's opinion regarding trial issues is work product and not discoverable under *Brady*. In contrast, deputies have a duty to immediately correct the testimony of a People's witness known to be false or misleading.

Occasionally, deputies may learn that a peace officer's personnel file contains potentially impeaching information when, for example, they find out a peace officer is placed on administrative leave. In those circumstances, deputies shall inform the defense of the possible existence of impeaching information and may file a *Pitchess* motion to access the information.

When a *Pitchess* motion is made by the prosecution or the defense and the court releases the impeaching information, a deputy shall ensure a protective order is issued pursuant to Evidence Code section 1045(e) and place the information in a sealed envelope in the DA file indicating it is protected pursuant to Evidence Code section 1043. The deputy shall send a memorandum, along with all moving papers, to the Discovery Compliance Unit (DCU) stating the court ordered the disclosure of impeaching evidence, but **shall not** inform the DCU of the specific information disclosed. The DCU shall enter the witness's name into the DCS and note a Pitchess motion was granted.

California courts have held that prosecutors must disclose impeachment information before a defendant pleads guilty or no contest. Information establishing the factual innocence of a defendant, or that is otherwise materially exculpatory, shall be disclosed as soon as it becomes known. Plea waivers are neither intelligent nor voluntary if they are entered without knowledge of material evidence withheld by the prosecution. The Office's policy, therefore, is to disclose impeachment information prior to obtaining a plea of guilty or no contest from a defendant.

#### *Commentary*

*Although the Brady rule does not require the disclosure of impeaching evidence before a defendant pleads guilty or no contest, the California courts have upheld a due process requirement to do so. The integrity of the conviction requires disclosure of impeachment information prior to obtaining a plea of guilty or no contest from a defendant.*

### **14.03 PENAL CODE SECTION 1054.1**

Penal Code section 1054.1 provides:

The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney, or if the prosecuting attorney knows it to be in the possession of the investigating agencies:

- (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.
- (b) Statements of all defendants.
- (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.
- (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.
- (e) Any exculpatory evidence.
- (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial,

including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.

Penal Code section 1054.1(d) imposes a broader statutory duty upon a deputy to disclose all felony convictions of a material witness, not just felony convictions involving moral turpitude as required by *Brady* and its progeny. The duty to disclose felony convictions extends to those that have been expunged pursuant to Penal Code section 1203.4.

Penal Code section 1054.1(e) expands the *Brady* rule, requiring a prosecutor to disclose to the defendant *any* exculpatory evidence, not just *material* exculpatory evidence. Similar to their *Brady* obligation, deputies may also file a *Pitchess* motion to comply with their Penal Code section 1054.1(e) duties. If, in this circumstance, a People's *Pitchess* motion is filed and granted, the deputy shall notify the defense of such. The deputy shall request permission from the court to disclose any exculpatory or impeaching information obtained from the *Pitchess* to the defense along with a protective order prohibiting the defense from disseminating the information beyond the prosecution of the case.

#### *Commentary*

*Deputies shall not utilize Chapter 14 as a substitute for researching legal issues that may arise in a case. Prior to trial, deputies should meet with the investigating officer to review their entire file to make certain they are in possession of all evidence relevant to the case.*

### **14.04 TIMING OF DISCLOSURE**

For felonies, deputies shall disclose any potentially exculpatory and/or impeaching information before the preliminary hearing, including evidence that may impeach a witness's statement introduced at the preliminary hearing pursuant to Proposition 115. Deputies shall also disclose any potentially exculpatory and/or impeaching evidence learned after the preliminary hearing as soon as it becomes known.

For misdemeanors, deputies shall disclose any potentially exculpatory and/or impeaching information before any substantive hearing or at least 30 days before trial. If the information is not known or reasonably accessible to the deputy 30 days before trial, it shall be disclosed as soon as it becomes known.

During trial, a deputy shall continue to comply with *Brady* and Penal Code section 1054(e)'s discovery obligations and provide potentially exculpatory and/or impeachment evidence as soon as it becomes known. After trial, a deputy who acquires information which casts doubt upon the correctness of a conviction shall promptly disclose to the defense the new, favorable evidence.

#### *Commentary*

*In certain situations, deputies may request that the court deny or restrict discovery disclosures. Penal Code section 1054.7 permits discovery disclosures to be denied, restricted, or deferred upon a showing of good cause, i.e., concerns for witness safety, for the possible loss or*

*destruction of evidence, or for the possible compromise of other investigations by law enforcement.*

#### **14.05 DISCOVERY COMPLIANCE SYSTEM**

The Discovery Compliance System (DCS) is a secure computer program comprised of the Brady and Officer and Recurrent Witness Information Tracking System (ORWITS) databases, which contain summaries of impeaching and potentially impeaching information regarding recurrent witnesses obtained from a variety of sources. The term “recurrent People’s witness” includes peace officers, experts, and other witnesses whom the Office reasonably expects to testify in multiple cases.

The DCU shall maintain the DCS, along with the underlying documents for each entry. The DCU shall also determine whether information pertaining to a recurrent witness shall be placed into the Brady or ORWITS databases. The DCS is interfaced with the Adult and Juvenile Subpoena Management Systems to notify a deputy by way of the Master Witness List (MWL) that a recurrent People’s witness is in the DCS.

Whenever the MWL indicates “Check BRADY/ORWITS” alongside a subpoenaed recurrent witness’s name, the handling deputy shall manually access the DCS to check the accuracy of the MWL prior to making any disclosures regarding a recurrent witness. When a deputy adds a recurrent witness to the MWL, or corrects information therein, he or she shall simultaneously check the DCS for an entry associated with the individual.

Through an icon on their computer workstations, deputies and paralegals can manually search the DCS by entering a DR number, court case number, or DA case number and the recurrent witness’s name or employee number. Deputies and paralegals shall be authorized to access the DCS only as necessary to perform their official duties. A security log is built into the DCS which tracks every inquiry. Misuse of this system may subject an employee to disciplinary action.

A deputy has an on-going duty to disclose exculpatory and impeaching information contained within the DCS. To meet this obligation, a deputy shall, at a minimum, check the DCS prior to the preliminary hearing and 30 days before trial.

##### *Commentary*

*The effectiveness of the DCS/Subpoena Management interface system relies on the complete and accurate input of the names and employee numbers of recurrent witnesses into PIMS by Office support staff members at the time of case filing. Filing deputies and support staff members shall proactively seek to obtain full and accurate names and employee numbers of all recurrent witnesses before case filing, or as soon as possible thereafter. Support staff members shall bring post-filing corrections of recurrent witnesses’ names or employee numbers to the attention of handling deputies so that the handling deputies may conduct a manual check of the DCS with the corrected information.*

*Deputies reviewing matters for filing shall check the DCS before filing complaints, if practical. Deputies presenting cases to the Grand Jury shall check the DCS before eliciting testimony from a recurrent witness. If practical, deputies reviewing declarations in support of arrest warrants and affidavits in support of search warrants shall check the DCS before*

*approval. If a declarant or affiant is listed in the DCS, deputies shall recommend using another peace officer as a declarant or affiant or disclosing a summary of the potential impeachment material for the magistrate's consideration.*

#### **14.05.01 BRADY DATABASE**

The BRADY database shall contain all exculpatory and impeaching information of recurrent witnesses that is discoverable per se. This includes felony and misdemeanor convictions or other misconduct that reflects on the credibility of a witness. This information shall be disclosed to the defense even if the recurrent witness will not be called to testify.

#### **14.05.02 ORWITS DATABASE**

ORWITS is an informational database that contains material on recurrent witnesses that may be constitutionally or statutorily discoverable depending on the facts of a case. The handling deputy shall make this determination after consultation with his or her Deputy-in-Charge (DIC) or Head Deputy. The decision whether to disclose information obtained from the DCS shall be made before the preliminary hearing, and for misdemeanors, before any substantive hearing.

Information in ORWITS may not appear impeaching on its face, but may become relevant in a proceeding. Reasonable minds may differ on whether information is impeaching. Additionally, the relevance of potentially impeaching information to the particular facts of a case can vary greatly. Accordingly, ORWITS information shall be kept separate and apart from *Brady* information.

#### *Commentary*

*Maintaining information in ORWITS shall: (i) keep deputies informed of its existence; (ii) protect recurrent witnesses from having the information improperly raised in a court proceeding; and (iii) protect the integrity of convictions.*

#### **14.06 DISCLOSURE OF INFORMATION OBTAINED FROM DCS**

Deputies shall note information learned from the DCS database in the DA file and make certain the information remains confidential. Use or disclosure of the material beyond that necessary to prosecute the case shall be avoided. Disclosure of DCS information shall be made on the record or in writing and noted in the DA file. The disclosing deputy shall request a protective order, limiting use of the information to the case before it is provided to the defense. A template for a protective order can be found in the Lotus Notes database under the DCS icon.

Opinions contained within the DCS are privileged work product, pursuant to Code of Civil Procedure section 2018.030(a), and not discoverable under Penal Code section 1054 or the California Public Records Act (CPRA). The exemption from CPRA disclosure is not waived when a deputy, in the discharge of his or her legal obligations, provides defense counsel with potentially impeaching information learned from the DCS, because its disclosure is required by law (Government Code section 6254.5 subdivision (b)).

## **14.07 ENTRY INTO DCS AND THE REVIEW PROCESS**

The DIC of the DCU shall enter all information into the DCS. Information entered into this system is not an endorsement or a final determination of its validity. Entries of recurrent witnesses into the DCS shall be removed only in cases of mistaken identity.

### **14.07.01 CONFIDENTIAL NOTIFICATION TO RECURRENT WITNESS AFFECTED BY DCS ENTRY**

When the DCU enters information involving a peace officer or expert witness into the DCS, the DIC of the DCU shall simultaneously notify the recurrent witness, his or her employing agency's head, the Office's Law Enforcement Liaison, and the Chief of the Bureau of Investigation by confidential correspondence. The correspondence shall also inform the recurrent witness of the process by which entries into the DCS may be reviewed and that materials submitted may be discoverable.

### **14.07.02 ENTRY INTO THE BRADY DATABASE**

When a recurrent witness is entered into the BRADY database, the recurrent witness may, at any time, seek reconsideration of the DCU's decision by submitting a letter to the DIC of the DCU. The letter shall include the reasons challenging the entry along with any supporting documents.

Within 90 calendar days of receiving the letter, the DIC of the DCU shall review the materials submitted and decide if the recurrent witness shall remain in the BRADY database, be transferred into ORWITS, or be removed entirely from the DCS due to mistaken identity. If the DIC of the DCU decides the recurrent witness shall remain in the BRADY database, the recurrent witness may address that decision in writing to the Bureau of Prosecution Support Operations (BPSO) Bureau Director. If requested by the recurrent witness, final review of the BPSO Bureau Director's decision shall be based on the material provided and conducted by three legal Bureau Directors designated by two Assistant District Attorneys.

### **14.07.03 ENTRY INTO THE ORWITS DATABASE**

Entries of recurrent witnesses into ORWITS shall not be reviewed except in cases of mistaken identity. Recurrent witnesses may, however, submit documentation to the DCU to address their entry into the database. The submitted documents shall be included as part of the recurrent witness's ORWITS entry and accessible to all deputies carrying out their official functions. In certain circumstances, the DCU may transfer a recurrent witness from ORWITS into the BRADY database when additional information is received indicating such a transfer is warranted. When a transfer occurs, the DCU shall notify the recurrent witness and their agency head by confidential correspondence.

When the DCU is notified that a court has granted a *Pitchess* motion, the DIC of the DCU shall enter the recurrent witness's name into ORWITS. Thereafter, the DIC shall notify the recurrent witness and their agency head of the ORWITS entry by confidential correspondence.

## **14.08 DEPUTY REFERRALS OF POTENTIALLY IMPEACHING INFORMATION**

Deputies shall refer potentially impeaching information regarding recurrent witnesses to the DCU.

#### **14.08.01 FILINGS AND DECLINATIONS**

Deputies shall forward to the DCU a copy of all filings and declinations that list a recurrent witness as a defendant or suspect. Forwarded information shall include a copy of the complaint and supporting documentation.

#### **14.08.02 DEPUTY REFERRALS**

Deputies who learn of potentially impeaching information about a recurrent witness shall promptly inform their Deputy-in-Charge (DIC) or Head Deputy. When a deputy refers potentially impeaching information about a recurrent witness to his or her DIC, the DIC shall also inform his or her Head Deputy of the referral. The Head Deputy shall consult with the recurrent witness' agency head, or their designee to ensure the information is complete and accurate. In consulting with the agency head, or their designee, the Head Deputy shall avoid obtaining information from a recurrent witness's personnel file.

The Head Deputy in conjunction with the deputy shall then prepare a referral memorandum through the chain of command detailing the information. Supporting documentation, if any, shall be attached to the memorandum. Referrals shall be worded carefully. Premature conclusions shall be avoided.

When the Bureau Director receives the information, he or she shall reach out to the recurrent witness's employing agency head, or their designee, and inform them of the referral to the DCU. The Bureau Director shall then forward the memoranda to the Bureau of Prosecution Support Operation (BPSO) Bureau Director for entry into the DCS. The BPSO Bureau Director, in consultation with the DIC of the DCU, shall review the information to determine whether it shall be placed in the Brady or ORWITS database.

When the BPSO Bureau Director determines that a referral involves potential criminal conduct of a peace officer, the BPSO Bureau Director shall forward the memorandum to the Head Deputy of the Justice System Integrity Division (JSID) for review. If the BPSO Bureau Director determines that a referral involves potential criminal conduct of a recurrent People's witness other than a peace officer, he or she shall forward the memorandum to the appropriate Line Operations supervisor. When appropriate, the BPSO Bureau Director shall instruct the DIC of the DCU to enter the information into the DCS pending a filing decision by JSID or Line Operations.

When the information is potentially impeaching, but does not involve criminal conduct, the BPSO Bureau Director shall instruct the DIC of the DCU to enter the information into the DCS.

#### **14.09 DISCOVERY COMPLIANCE SYSTEM MANUAL**

In addition to the LPM, deputies shall consult the Discovery Compliance System (DCS) Manual for guidance in fulfilling their discovery obligations. The DCS Manual has been uploaded to LADAnet under Library>Office Manuals>[DCS Manual](#).