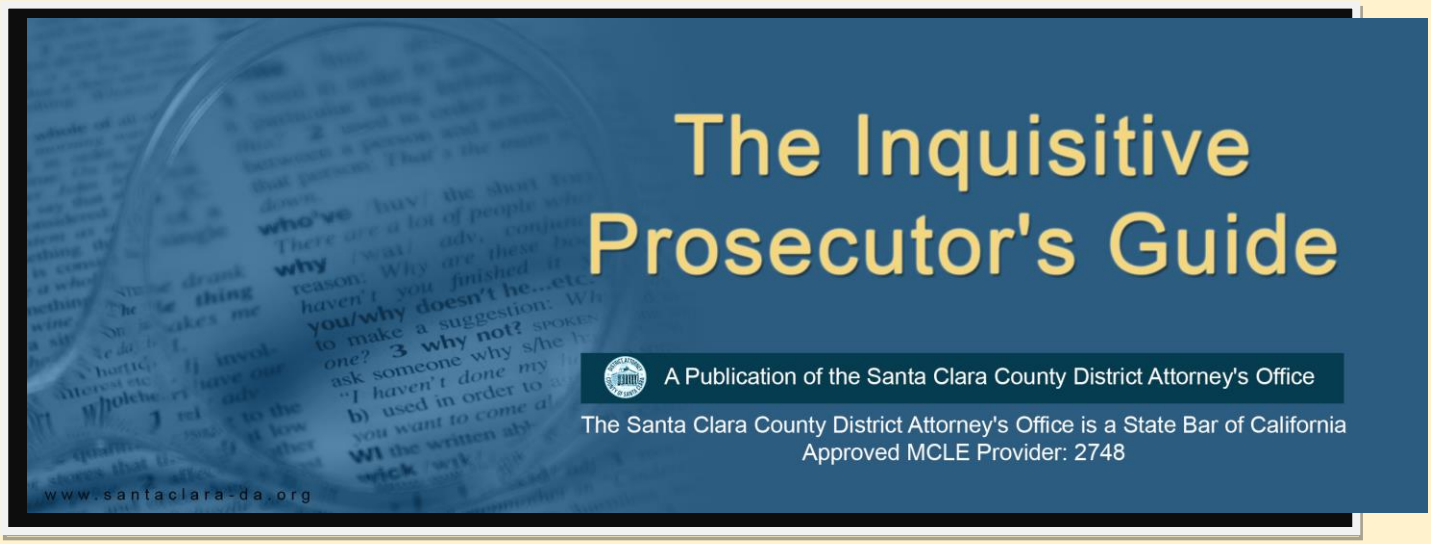

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2019-IPG-40 (UPDATED BASIC BRADY, STATUTORY & ETHICAL DISCOVERY OBLIGATIONS OUTLINE)

The Basic *Brady*, Statutory, and Ethical Discovery Obligations Outline

(2019 Edition)*

***This outline owes its genesis to materials compiled by the original guru of discovery, retired Contra Costa County Senior Deputy District Attorney Douglas Pipes.**

This special edition of the Inquisitive Prosecutor's Guide is not accompanied by a podcast.

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TABLE OF CONTENTS

I. THE PROSECUTOR'S FEDERAL DUE PROCESS (*BRADY*) DISCOVERY OBLIGATIONS 1

1. What evidence is a prosecutor obligated to disclose under the federal constitution? 1

A. Does the Duty to Disclose *Brady* Evidence Exist Regardless of Whether the Defense Requests the Evidence? 2
B. Can a Due Process Violation Be Found Regardless of the Intent of the Prosecutor? 2

2. What is "evidence" for purposes of the *Brady* rule? 3

A. A Prosecutor's Work Product (Theories of the Case, Suspicions, or Thought Processes) is Not Evidence 3
B. Officers' Opinions Regarding the Strength of a Case Are Not Evidence 4
C. Rumor or Mere Speculation is Probably Not Evidence 4
D. Pending Investigations 5

3. What is considered "favorable evidence" for purposes of deciding whether a prosecutor has a due process obligation to disclose favorable, material evidence? 6

A. Generally 6
i. Can a Prosecutor Take into Consideration the Credibility of the Source of the Information in Deciding Whether it is "Favorable?" 6
B. Neutral or Inculpatory Evidence is Not "Favorable" Evidence 7
C. Highly Speculative or Insubstantial "Leads" are Not "Favorable" Evidence 7
D. Inadmissible Evidence 8
E. Penalty Mitigation 9
F. Conflicting or Inconsistent Statements 10
G. Failure of Recollection 10
H. Prior False Reports 10
i. "False" Reports of Sexual Assault 10
ii. False Claims to Police 11
I. Claims of Officers Lying at Trial 11
J. Adverse Judicial or Administrative Findings 12
i. Express or Implied Judicial Findings Regarding Witness Credibility 12
ii. Administrative Findings 14
iii. Placement on Administrative Leave or Termination 15
K. Civil Suits 16
L. Civil Settlements Suits 18
M. Unfavorable Character Evidence of Prosecution Witnesses 18
N. Inaccuracy, Incompetency, or Mistakes of Witnesses 19
i. Past Errors at Crime Labs (Not Necessarily by Testifying Criminalist) 21
O. Promises, Offers, Inducements 23
i. In General 23

ii. Secret Deals 24
iii. Security Arrangements and Relocation Expenses 24
iv. Victim Compensation 25
v. Witness Fees and Incidentals 27
vi. Witness is Informant 27
vii. Witness is Jailhouse Informant 30
viii. Grants of Immunity 30
ix. Negotiations With Nontestifying Codefendants 31
x. Unsuccessful Attempts to Get Benefits 31
P. Criminal and Noncriminal Misconduct Involving Moral Turpitude 32
i. Impeachment With Felony Convictions Involving Moral Turpitude 32
ii. Impeachment with Conduct Underlying Felony Convictions of Moral Turpitude 32
iii. Impeachment with Misdemeanor Convictions Involving Moral Turpitude or Conduct Underlying Misdemeanor Convictions Involving Moral Turpitude 34
iv. Impeachment with Juvenile Adjudications or Conduct Underlying Juvenile Adjudications Involving Moral Turpitude 35
v. Impeachment with Criminal Conduct Involving Moral Turpitude Not Resulting in Felony or Misdemeanor Conviction 35
vi. Impeachment with NonCriminal Conduct of Moral Turpitude 36
a. Adultery 37
vii. Impeachment with Convictions Subject to Penal Code Section 1203.4, 1203.41, or 1203.4a Relief or a Pardon Prevent Use of the Conviction for Impeachment 38
a. Penal Code section 1203.4 Relief 38
b. Penal Code section 1203.41 Relief 39
c. Penal Code section 1203.4a Relief 40
d. Pardons 40
viii. Least Adjudicated Elements Test 41
Q. Parole or Probation Status 41
R. Pending Charges 43
i. Against Witness 43
ii. Against Relative of Witness 44
S. Unlawful Alien (Illegal Immigrant) Status 44
T. Prosecution Efforts to Keep a Witness From Being Deported (S, T, & U Visas) 46
U. Mental health or Emotional Instability 49
i. Witness Previously Found Incompetent to Stand Trial (Pen. Code § 1368) 50
ii. Witness Previously Subject to 72-Hour Commitment (Welf. & Inst. Code § 5150) 50
V. Alcohol or Drug Use 51
W. Bias (Including Group Bias and Alleged Bias Stemming From Threats) 52
i. Racial or Ethnic Bias 52
ii. Bias Based on Defendant Having Threatening the Witness 52
iii. Bias Based on Relationship Between Prosecutor (or Prosecution Team Member) and Witness 52
X. Contradictory Evidence 53
Y. Rehearsed Testimony 53
Z. Coerced Testimony 53

AA. Witness Identification Problems 53
BB. Third Party Guilt 54
CC. Witness' Reluctance to Testify or Request to Drop Charges 54

4. Can evidence supporting defense theories that are unknown or not obvious to the prosecution be deemed favorable evidence? 56

5. What is considered "material evidence" for purposes of deciding whether a prosecutor has a due process obligation to disclose favorable, material evidence? 57

A. General Definition 57
B. Materiality is Tied to the Nature of the Hearing at Issue in California 59
C. Standard Sounds Like Standard on Review but It Applies at Any Point 61
D. When Will Impeachment Evidence Be "Material" for ***Brady*** Purposes? 62
E. In Deciding Whether Evidence is Material, Is It Proper to Consider How Nondisclosure Affected the Defense Investigation and Strategy? 63
F. Does the Fact the Defense Requested the Information Have Any Bearing on the Materiality of the Evidence? 64
G. Should a Prosecutor Take into Consideration the Credibility of the Witness Who Provided the Allegedly Exculpatory Evidence in Deciding Whether Evidence is *Material* for ***Brady*** Purposes? 64
H. Can Cumulative Evidence Ever Be Considered Material for *Brad*y Purposes? 67

6. What does it mean for evidence to have been "suppressed" by the prosecution for purposes of deciding whether a prosecutor has a due process obligation to disclose favorable, material evidence? 67

7. When will evidence be deemed to be "in possession of the prosecution" for purposes of deciding whether a prosecutor has a due process obligation to disclose favorable, material evidence? 68

A. The Prosecution Team in General 68
B. Actual Knowledge is Not Required - Knowledge Can Be Constructive 71
C. What Role Does the Fact the Evidence is "Reasonably Accessible" to the Prosecution Play in Deciding Whether the Evidence is in the Possession of Prosecution Team? 71
   i. Can Evidence in the Physical Possession of the Prosecution Team be Deemed Outside the "Possession" of the Prosecution Team if the Evidence is Not Reasonably Accessible to Members of the Team? 73
D. Do All Courts Agree that There Must be Reasonable Access to the Information for the Information to Be Deemed to Be in Possession of the Prosecution Team? 75
E. Partial Membership 76
F. Other Agencies Acting on Behalf of the Prosecution or Assisting the Prosecution 77
   i. Crime Labs 78
   ii. Agency/Persons Conducting Sexual Assault Examination 80
   iii. Agencies Providing Criminal History Records 81
   iv. CalGang Database 82

v. Police Officer Rapsheets 84
a. Alternatives to Running Officer Rapsheets 85
b. Defense *Brady/Pitchess* Motions for Officer Rapsheets 87
vi. Law Enforcement Agencies That Provide Limited Assistance as to Ancillary Crimes 89
G. Are All Prosecutors in the Same Office Considered Part of the Prosecution Team for Purposes of Imputing Knowledge of *Brady* material 89
H. Are All Members of the Investigating Agency Part of the Prosecution Team for Purposes of Imputing Knowledge of *Brady* Material 94
I. Are All Experts Who Testify as Prosecution Witnesses Members of the Prosecution Team? 99

8. When will evidence *not* be considered to be "in possession of the prosecution" for purposes of deciding whether a prosecutor has a due process obligation to disclose favorable, material evidence? 100

A. Third Parties 100
B. Other Police Agencies 100
C. Peace Officer Personnel (*Pitchess*) Files 101
i. Are Peace Officer Personnel Files Considered Third Party Records? 102
ii. In Light of *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, Can it be Assumed that *Pitchess* Files are Not in the Constructive Possession of the Prosecution 105
iii. It is Truly Unresolved Whether *Brady* Information Contained in *Pitchess* Files is in the Constructive Possession of the Prosecution When that Information is Already *Known* to the Prosecutor or Other Prosecutors in the Same Office 109
iv. Statements of Witnesses to the Pending Charges Contained in *Pitchess* Files 113
D. Court and Probation Records 114
i. Civil Suits 114
E. Juvenile Files 116
i. Juvenile Court Has Control of Records 116
ii. What Are Juvenile Records? 116
iii. Police Records of Juveniles 116
a. Does the Juvenile Court Control Records of a Police Department Involving Mere Contact with a Juvenile if the Juvenile Was Not Detained or Taken into Custody? 117
iv. Prosecutorial Access to Juvenile Records 119
v. Prosecutorial Use of Juvenile Records in Court 120
vi. Defense Access to Juvenile Records of Defendant 121
vii. Defense Access to Juvenile Records of Co-Defendants (Redaction Issues) 121
viii. Defense Access to Juvenile Records of Witnesses 121
ix. Handling Defense Requests for Juvenile Records of Witnesses 124
x. Sealed (or Destroyed) Records 126
a. What Should a Prosecutor Do if the Prosecutor is Aware of *Brady* Information Contained in a Juvenile File That Has Been Sealed Pursuant to a Statute With No Exception Allowing Prosecutorial Access to Meet a Discovery Obligation? 128

xi. Information Concerning Juveniles Obtained Outside the Context of Juvenile Proceedings 129
F. Victim Witness Advocates 129
G. Victims, Witnesses, and Their Attorneys 133
i. Law Firms Representing Victims 134
H. All Other Government, Quasi-governmental, and Private Entities (Absent Employment or Use of the Entity by the Prosecution Team) 136
I. Caveat re: Third Party Material Provided to Prosecution Team 137

9. Is there a duty to inform the defense of *Brady* material known to the prosecutor to be in the possession of third parties? 137

10. Failure to disclose evidence is the same as "suppressing" evidence for purposes of the *Brady* rule 137

11. If the defense is fully aware of the existence of *Brady* evidence and/or has an opportunity to obtain *Brady* material through the exercise of reasonable diligence, can there be a violation of the *Brady* rule? 138

A. Does Suppression Occur if the Prosecution Does Not Specifically Identify Where Material Evidence is Located but the Evidence is Still Reasonably Available to the Defense by the Exercise of Due Diligence? 139
B. Is Evidence Suppressed if Information is Disclosed to the Head of the Public Defender's Office - Even if the Information is Not Directly Provided to the Public Defender Handling the Defendant's Case? 143
C. Is Evidence (Such as Defendant's Own Statement) Suppressed if the Defendant (But Not) Defense Counsel Knows or Should Know About the Information? 143
D. The People Have No Duty to Point Out Where, in the Discovery Provided, the Exculpatory Information is Contained 145
E. Open File or Other Potentially Misleading Discovery Policies 146
F. Disclosure by Way of Motion in Limine 147

12. Who ultimately decides whether evidence is *Brady* material? 148

A. Generally 148
B. Judicial Intervention 148

13. *When* does *Brady* material have to be disclosed? 149

A. Generally 149
B. Any Duty to Disclose *Brady* Evidence Before Entry of Plea? 150
i. Evidence Bearing on Impeachment and Affirmative Defenses 150
ii Material Favorable Evidence Bearing on Guilt or Innocence 152
C. Any Duty to Disclose *Brady* Evidence Before PX? 153
D. Any Duty to Disclose *Brady* Evidence After Trial? 155

14. Does the obligation to provide *Brady* material apply in juvenile proceedings? 156

15. What is the obligation of the *police* or other entities assisting the prosecution to provide *Brady* material? 156

16. Are there different standards for determining whether due process has been violated by government's failure to disclose favorable material evidence than when determining whether due process has been violated by government's failure to prevent the use of false evidence? 158

II. THE PROSECUTOR'S STATE CONSTITUTIONAL DISCOVERY OBLIGATIONS 162

III. THE PROSECUTOR'S STATUTORY DISCOVERY OBLIGATIONS 164

1. In general 164

A. CDS is the Exclusive Means to Compel Discovery Between the Parties 164

2. What information is a prosecutor statutorily obligated to disclose? 165

3. Does the CDS govern discovery from third parties? 166

4. What does it mean to "disclose" for purposes of Penal Code section 1054.1? (Does the duty to disclose require the prosecution to make copies of the discovery for the defense?) 166

A. Disclosure of Child Pornography: Penal Code Section 1054.10 168

5. Do the People have any statutory duty to highlight the exculpatory portions of materials provided in discovery? 168

6. What does it mean for "materials and information" to be in the "possession of the prosecuting attorney" under section 1054.1? 169

A. Any Difference Between "Possession" for Purposes of Section 1054.1 and "Possession" for *Brady* Purposes? 169

7. Is there a conflict between the statutory requirement of disclosing the names and addresses of witnesses and Marsy's Law? 173

A. Subdivision (b)(4): Prohibition on Disclosure of Victim Information 173
B. Subdivision (b)(5): Victims Right to Refuse Interviews 174

8. Does the CDS require disclosure of the phone numbers of witnesses? 175

9. Does the obligation to disclose the addresses of witnesses extend to peace officers? Even if they are retired? 176

10. What does "intends to call" mean for section 1054.1 purposes? 179

11. Does the obligation to disclose names and addresses of witnesses under section 1054.1(a) apply to rebuttal witnesses? 181

12. Does the prosecutor have a duty to disclose impeaching information about a witness where the prosecutor intends merely to ask about the impeaching information, but does not intend to call someone as a witness to prove the impeaching information? 182

13. If a prosecutor interviews a witness who the *defense* intends to call, must the witness' statement be disclosed to the defense? 183

14. Does the prosecution have a duty to disclose impeaching information about a witness the prosecutor does not intend to call? 184

15. How broad is the statutory obligation under section 1054.1(b) to provide statements of all defendants? 186

16. Do felony convictions not involving moral turpitude have to be disclosed pursuant to section 1054.1(d) even if the conviction is inadmissible and/or the prosecution is unaware of the conviction? 187

17. How broad is the definition of "exculpatory evidence" under section 1054.1(e)? 188

A. Does the Term "Exculpatory" Under 1054.1(e) Include Impeaching Evidence? 190

18. Does the prosecution have to obtain and provide to the defense police reports relating to prior arrests or convictions of prosecution witnesses? 191

19. What, if any, is the prosecutor's obligation to provide law enforcement "training manuals?" 193

20. Does the obligation under section 1054.1(f) to provide witness statements extend to the raw notes of an interview of the witness – even if the notes have been incorporated into a report? 195

21. Does the obligation under section 1054.1(f) to disclose witness statements extend to "oral statements" of witnesses? 196

22. Is the prosecution required to provide the raw notes or data of an *expert*? 197

A. Does the Duty to Provide an Expert's Notes Change Depending on Whether a Formal Report is Written? 198

23. Is the prosecution required to disclose the reports or other evidence *relied upon* by an expert? 198

A. Evidence Code Section 721 and 771 200

24. Does the prosecution have an obligation to provide reports made by an expert witness in unrelated cases? 201

25. Does section 1054.1(f)'s requirement to disclose witness statements require the disclosure of work product? 201

26. Is the prosecution obligated to write down or record oral statements provided by witnesses? 203

27. Does the prosecutor have an obligation to disclose *everything* a witness says? 204

28. Does the prosecutor have a statutory obligation to obtain and/or disclose statements of police officer witnesses to a criminal case if the statements were made by officers during a parallel internal affairs investigation? 205

29. Is the statutory duty to disclose information met if the defense either possesses or can reasonably obtain the information on its own? 208

IV. REDACTING POLICE REPORTS 209

1. Does the prosecution have any duty to redact police reports to exclude Information about the witnesses under section 1054.2? 209

2. Does the defense or the court have any duty to redact police reports under section 1054.2? 210

V. THE RECIPROCAL DISCOVERY PROVISIONS OF SECTION 1054.3 210

1. State constitutional basis for reciprocal discovery 211

2. The statutory language of Penal Code section 1054.3(a) 211

3. The reciprocal discovery provisions of section 1054.3 do not violate either the state or federal constitution or any privilege 211

4. Case law interpretation of defense obligations 212

5. Defense obligations to disclose statements taken from prosecution witnesses 212

6. Defense obligations to disclose statements of witnesses for the *co-defendant* to the prosecution 213

7. Statements or reports of defense experts 215

8. Statements of defendant to experts 215

9. Penal Code section 1054.3(b): examination of defendants who place mental state in issue 219

A. Statutory Language of Penal Code Section 1054.3(b) 220
B. The Constitutionality of Penal Code Section 1054.3(b) 221
C. Section 1054.3(b)'s Applicability in Insanity Cases 222
D. Section 1054.3's Applicability in Capital Cases 225
E. Section 1054.3's Applicability in Insanity, Mental Retardation, and Competency Cases 225
F. How "Timely" Does a "Timely Request by the Prosecution" Have to Be? 226

10. Reciprocal discovery between co-defendants 227

11. Penal Code section 1054.3 applies to the penalty phase of capital cases 229

12. Duty to disclose evidence aside from statutory duty 230

VI. THE IMPACT OF THE DISCOVERY STATUTE ON THE COLLECTION OF "NONTESTIMONIAL EVIDENCE" (PENAL CODE SECTION 1054.4) 230

1. Statutory language of Penal Code Section 1054.4 230

2. What is "nontestimonial" evidence under section 1054.4? 230

VII. WHEN MUST STATUTORILY-MANDATED DISCOVERY BE DISCLOSED? 232

1. Penal Code Section 1054.7 statutory language 232

2. Does statutorily-mandated discovery have to be disclosed before a guilty plea? 232

3. Does statutorily-mandated discovery have to be disclosed before px? 232

4. Does discovery have to be disclosed before trial? 235

A. Disclosure Generally Required at Least 30 Days Before Trial 235
i. Must a Witness List Be Provided 30 Days Before Trial? 235
B. How Immediate is "Immediately?" 236
C. If a Prosecutor Discloses Discovery Immediately After Learning of Discovery, Will That Always Be Sufficient to Comply With the Mandate of Section 1054.7? 236
D. Is it a Violation of the Discovery Statute if Discovery is Not Disclosed 30 Days Before Trial But the Trial is Continued? 237
E. Can a Court Order Statutorily-Mandated Discovery Outside of 30 Days Before Trial? 238

5. Is there a violation of the discovery statute if the discovery is disclosed after the trial has begun? 238

6. Can disclosure of discovery be deferred or even foreclosed? 240

A. Penal Code Section 1054.7 240
B. Is the Defense Entitled to Either Notice of the In Camera Hearing or to Participate in the Hearing in Some Fashion? 240
C. Is Hearsay Admissible at an In Camera Hearing Under Section 1054.7? 243
D. What Constitutes "Good Cause" Under Section 1054.7? 245
E. What Does Not Constitute "Good Cause" Under Section 1054.7? 247
F. Denial of Identity of Witnesses: Pre-Trial Versus Trial 248
G. Denial of Current Address of Witness 249
H. Deferred Disclosure by the *Defense* in General and in the Penalty Phase 250
I. Are the Provision of Section 1054.7 Allowing for Deferral, Restriction, or Denial of Discovery Constitutional? 250

VIII. SANCTIONS FOR VIOLATIONS OF THE DISCOVERY STATUTES 250

1. Statutory language of Penal Code section 1054.5(b)&(c) 251

2. Can there be a violation of the discovery statute even though there is no violation of the prosecutor's constitutional discovery obligations? 251

3. Dismissal of a case is not an appropriate sanction unless dismissal is required by the federal constitution 252

4. Exclusion of evidence is not an appropriate sanction unless *all* other options are exhausted 253

5. Is there a sanction of first resort? 255

6. Can a trial court consider the effect of the discovery violation on a codefendant in deciding what sanction to impose? 257

7. When should an instruction telling the jury about the discovery violation be given? 257

8. Can the trial court sanction an attorney for contempt and impose a monetary fine for a discovery violation? 261

9. Can a jury be instructed that the police failed to provide timely discovery? 262

10. Can sanctions be imposed if the party seeking sanctions is himself in violation of the discovery statute? 263

11. Can sanctions be imposed after the trial is concluded? 263

12. Can a violation of the discovery statute result in a reversal of a case? 264

13. Penal Code 1424.5 Sanction of Recusal and/or Reporting of Prosecutor to State Bar 264

IX. JUDICIAL DISCOVERY ORDERS OUTSIDE THE SCOPE OF THE DISCOVERY STATUTE 265

1. Can a judge order the prosecution to disclose discovery not mandated by the California discovery statute? 265

2. Can the prosecution challenge a discovery order issued by a judge? 270

A. Penal Code section 1512 270
B. Writ of Prohibition or Mandate 270

X. WHAT OTHER STATUTES GOVERN DISCOVERY IN CRIMINAL CASES ASIDE FROM THE CALIFORNIA DISCOVERY STATUTE? 270

1. Express statutory provisions 270

2. Privileges (Penal Code section 1054.6) 272

3. Can the CDS be circumvented by utilizing the California Public Records Act? 272

A. Use of the CPRA to Obtain Peace Officer Personnel Records: Penal Code Section 832.7 (as of January 1, 2019) 273

4. Can the defense circumvent the CDS by requesting records on potential witnesses pursuant to Penal Code section 11105 as amended in 2019? 273

A. How Will the Change in Language to Section 11105 Impact the Local Prosecutor's Obligations Regarding Criminal History Information about Trial Witnesses? 275

XI. WHAT RULES GOVERN DISCOVERY IN PROCEEDINGS *OTHER THAN* CRIMINAL JURY TRIALS? 276

1. Competency hearings (Penal Code section 1369) 276

2. Grand jury proceedings 276

3. Habeas proceedings 278

4. Juvenile proceedings 279

A. Applicability of Constitutional Due Process Discovery Obligations 279
B. Applicability of the California Discovery Statute (Pen. Code § 1054 et seq.) 279

C. Applicability of Rules of Court (Rule 5.546) 279
i. Language of Rule 5.546 279
ii. Sanction of Dismissal Under Subdivision (j) of Rule 5.546 281

5. Mentally disordered offender trials (Penal Code section 2972) 282

6. NGI commitment proceedings (Penal Code section 1026.5) 282

7. Preliminary examinations 282

8. Pre-trial motions (motions to suppress evidence or statements, suggestive identification motions, speedy trial motions, etc.) 283

9. Probation, parole, mandatory supervision and PRCS revocation hearings 286

10. Sexually violent predator hearings (Welfare & Institutions Code section 6600 et seq.) 287

XII. POST-CONVICTION STATUTORY DISCOVERY IN DEATH OR LWOP CASES (PENAL CODE SECTION 1054.9) 287

1. Statutory language of Penal Code section 1054.9 288

2. Is Penal Code section 1054.9 inconsistent with the CDS? 289

3. Is there any time limit on filing a section 1054.9 motion? 289

4. What materials is defendant entitled to receive under section 1054.9? 289

5. Are there limits on the discovery that must be provided to the defense? 290

6. Does the defendant have to make any showing the evidence requested exists? 290

7. Does the defendant have to show the evidence requested is material? 291

8. Does the prosecution have a duty to disclose evidence in the possession of any law enforcement agency that assisted in the prosecution of the defendant? 291

9. Does section 1054.9 only kick in once a habeas petition or other writ is filed? 292

10. Can a defendant obtain an order requesting the preservation of the evidence described in section 1054.9 before filing a habeas petition? 292

11. What costs can the prosecution recoup for the examination and copying of materials covered by section 1054.9? 293

12. Can the prosecution insist on providing copies for a fee instead of allowing the defendant to examine the documents? 294

13. Can a motion for postconviction discovery be denied solely due to a defendant's inability to pay in advance for copies of the discovery? 294

14. Can a motion under section 1054.9 be summarily denied without a hearing on defendant's inability to pay? 295

XIII. IF EVIDENCE IS "DISCOVERABLE," DOES THAT MEAN IT IS ALWAYS ADMISSIBLE? 295

XIV. DOES THE PROSECUTOR HAVE ANY *ETHICAL* DISCOVERY OBLIGATIONS (BEYOND ANY CONSTITUTIONAL OR STATUTORY DUTIES)? 296

1. California Rule of Professional Conduct 3.4(b): Fairness to Opposing Party and Counsel 297

2. California Rule of Professional Conduct 3.8(d): Special Responsibilities of a Prosecutor 297

3. California State Bar Rule 3.8 (f) & (g): Special Responsibilities of a Prosecutor (Post-Verdict Obligations) 299

4. California State Bar Rule 5.1: Responsibilities of Managerial and Supervisory Lawyers 301

5. California State Bar Rule 5.2: Responsibilities of a Subordinate Lawyer 304

6. Sanction of recusal and report to State Bar for intentional prosecutorial misconduct: Penal Code section 1424.5 305

XV. THE CRIME OF INTENTIONALLY SUPPRESSING MATERIAL EXCULPATORY EVIDENCE: PENAL CODE SECTION 141(c) 307

XVI. OBTAINING POTENTIALLY PROTECTED OR PRIVILEGED RECORDS FROM THIRD PARTIES: SELECTED TOPICS 308

1. Obtaining records from third parties in general (subpoenas) 308

A. Penal Code Sections 1326 and 1327 & Evidence Code Sections 1560 and 1561 308
B. Can a Defense Attorney Subpoena Non-Business Records from a Private Individual and Can an Individual or Prosecutor Do Anything About It? 312

2. Obtaining DMV records 314

3. Obtaining Medical records 315

A. California State Constitutional Right of Privacy in Medical Records 315
B. HIPAA (Health Insurance Portability and Accountability Act) 316
i. What Types of Records are Protected by HIPAA? 316
ii. What are the Exceptions that Will Allow Law Enforcement or the Prosecution to Obtain the Types of Records Protected by HIPAA? 316
C. Confidentiality of Medical Information Act 320
i. What Types of Records are Protected by CMIA? 320
ii. What are the Exceptions that Will Allow Law Enforcement or the Prosecution to Obtain the Types of Records Protected by CMIA? 321
D. Drug or Alcohol Treatment Records 322
i. Protections Created by Federal Statute 323
a. What Drug and Alcohol Treatment Records are Federally Protected? 323
b. What Does a Prosecutor Need to Do to Obtain Drug and Alcohol Treatment Records from Federally Assisted Programs? 323
ii. Protections created by California Statutes 324

XVII. WHAT IS THE PROSECUTOR'S ROLE WHEN IT COMES TO DEFENSE SUBPOENAS FOR RECORDS FROM THIRD PARTIES? 324

1. The statutes relevant to subpoenas for records from third parties 324

2. To what extent does the prosecution get to know about defense subpoenas for third party records and participate in the hearing on whether those records are disclosed to the defense? 325

3. May a prosecutor file a motion to quash a defense subpoena for records from third parties? 328

A. Just Because Records are Subpoenaed Does Not Mean Defendant Gets Them 329
B. Privileged or Otherwise Confidential Information 330
C. Information Protected by the State Constitutional Right of Privacy 331
D. Defense Interest in Disclosure 333

4. Is the defense entitled to an in camera hearing on whether subpoenaed records should be released and, if so, can the affidavit in support of the request for the in camera hearing be sealed? 334

XVIII. DEFENSE FISHING EXPEDITIONS FOR POTENTIAL EVIDENCE OF THIRD-PARTY GUILT 336

1. What is the prosecutor's obligation to search for evidence of third party guilt requested by the defense? 337

A. The People Have No Duty to Search for Records of Alleged Third Party Culpability Not Deemed to Be in Possession of the Prosecution Team 337
i. Records in the Possession of Non-Investigating Agencies 337
ii Records in the Possession of the Investigating Agencies 338

B. Before the Defense is Entitled to an In Camera Review of Alleged Third Party Culpability Evidence and/or Before the Prosecution May Be Ordered to Search for Such Evidence, the Defense Must Describe the Information Sought With Specificity and Must Make, At Least, a Showing of Plausible Justification for Disclosure 339

C. Before the Prosecution May Be Ordered to Search for Records of Alleged Third Party Culpability Evidence and/or Before a Court May Grant a Request for Subpoenaed Records of Such Evidence the Defense Must Show Their Interest in Having the Prosecution or Law Enforcement Agency Search for Records is Sufficiently Great that it Justifies Requiring the Search Notwithstanding the Burden Placed on the Government in Obtaining the Records and Notwithstanding the Fact that the Records May be Privileged or Protected by the State Constitutional Right of Privacy 341

D. When is a Defendant Entitled to Discovery of Documents Allegedly Containing Third Party Culpability Evidence? 343
i. Factors in the Balancing Test 343
a. Privacy Rights of Victims, Witnesses and Suspects 344
b. Governmental Interest in Protecting Official Information 345
c. Governmental Interest in Avoiding Unduly Burdensome Requests 346
ii. Cases Applying the Balancing Test to Documents Reviewed in Camera 346

2. The standard of review for denial of discovery of alleged third party guilt on appeal 349

XIX. PROSECUTORIAL *BRADY/PITCHESS* MOTIONS FOR INFORMATION CONTAINED IN PEACE OFFICER PERSONNEL FILES 350

1. What is a *Brady*/*Pitchess* motion? 350

2. Who can bring a *Brady*/*Pitchess* motion? 351

3. Who responds to a *Brady*/*Pitchess* motion? 351

4. When should a *Brady*/*Pitchess* motion be filed? 351

5. Is there any notice requirement when filing a *Pitchess* motion? 352

A. Generally 352
B. Is Counsel for Defendant in the Criminal Case Entitled to Notice or to Participate in a Prosecutorial *Brady/Motion*? 352
C. Does the notice requirement apply to "follow-up" motions requesting supplemental information? 354

6. What is the threshold showing that must be made before a court will Conduct an in camera examination of personnel files pursuant to a *Brady/Pitchess* motion? 354
A. Materiality Relates to the Pending Litigation 354
B. Is there a Difference in the "Good Cause" Showing that Must be Met Depending on Whether the Party Requesting the Information is the Prosecution or the Defense? 355
C What Type of Good Cause Showing Will be Sufficient to Obtain the Release of the Files in Response to Prosecution *Brady-Pitchess* Motion When No "*Brady* Tip" has Been Provided to the Prosecution? 357

7. Can the declaration in support of a Prosecution *Brady-Pitchess* motion be filed under seal? 359

A. What Procedures Must be Followed When the Party is Seeking to File a Declaration or Affidavit Under Seal in a *Brady/Pitchess* motion? 359
i. Is Sealing Only Available to Protect the Attorney-Client or Work Product Privilege? 360
ii Can the Sealed Affidavit Filed in Support of a *Brady/Pitchess* Motion be Revealed to a City Attorney? 360

8. Is there any requirement that the Brady/*Pitchess* motion filed include police reports relating to the criminal case? 361

9. What happens if the threshold showing is met? 361

A. Who is Present at the In Camera Hearing? 361
B. Is a Transcript Made of the In Camera Hearing? 361
C. What Types of Records are Considered "Personnel Records" for Purposes of the *Pitchess* Statutes? 361
i. Does the Complaint (or Investigation of the Complaint) Have to Both Concern an Event Involving and Officer and Pertain to the Performance of His or Her Duties? 362
ii If there are Other Kinds of Information, Not Specifically Identified in the Statute, Located in an Officer's Personnel File, is that Information Subject to the *Pitchess* Protections? 362
iii. Are Records Pertaining to "Police Review Commission Hearings" Subject to the *Pitchess* Procedures? 363
iv. Is Body Camera or Dashboard Video Footage a "Personnel Record?" 363
D. Who is Responsible for Bringing the Records to the In Camera Hearing? 363
E. Can the Custodian of Records "Winnow Out" the Personnel Records Before Bringing the Records to the In Camera Hearing? 363
F. Can the Custodian of Records Decline to Bring Records Pertaining to Complaints Made Against the Officer that are More than 5-Years Old? And, if so, May the Complaints Be Released "? 364

10. Under circumstances should information not be released? 365

A. Evidence Code section 1045(b)(1): Complaints More than 5-Years Old 365
B. Evidence Code Section 1045(b)(2): Conclusions 365

C. Evidence Code Section 1045(b)(3): Remoteness 366
D. Evidence Code Section 1047: Officers Not Present at Arrest 366
E. Can Information that Would be Inadmissible at Trial be Considered "Relevant Evidence" Subject to Release? 367
F. Can Pending or Incomplete Investigations of Complaints be Disclosed? 368
G. Competing Interest in Nondisclosure 368

11. How "much" information should be released? 368

12. If insufficient information is released to allow the prosecutor to determine whether the information falls under the *Brady* rule, what should the prosecutor do? (Follow up *Brady/Pitchess* motions) 369

A. Does the "Follow-Up" Motion Have to Meet the Same Notice Requirements as the Initial *Brady-Pitchess* Motion? 369
B. Can the Agency with the Records Challenge Any Claims Made in the Follow-Up Motion as to Why the Initial Disclosure Was Insufficient? 370

13. Where must the records be kept that have been reviewed by the court? 370

14. If information is disclosed to the prosecution pursuant to a *Brady-Pitchess* motion, is it subject to a protective order prohibiting its use in any proceeding other than the proceeding for which it was initially obtained? 370

15. Can information released to the prosecution in one proceeding be retained and disclosed as necessary in a different proceeding if the information initially released constitutes favorable material impeaching an officer in a future case? 371

16. If the party who obtained *Pitchess* information develops "derivative information" through interviews of the witnesses or other persons whose names were provided, can the "derivative information" be used in another proceeding? 373

A. Is *Pitchess*-Protected Information Disclosed in Court Still Subject to a Protective Order? 373

17. If another agency (other than the peace officer's employing agency) comes into possession of peace officer personnel records, would the *Pitchess* procedures still govern disclosure of the records? 374

18. Do the *Pitchess* procedures protect an officer from being asked on the stand about his or her personnel records? 374

19. If a prosecutor obtains records subject to the *Pitchess* protections without first filing a *Pitchess* motion (i.e., pursuant to the "investigation exception" of section 832.7 or consent from the officer), is the prosecutor still precluded from using it in court? 375

20. Do the *Pitchess* procedures protect the records of retired officers? 375

21. Do the *Pitchess* procedures govern disclosure of personnel records of federal agents? 376

22. How can the personnel records of federal agents be obtained? 376

A. Getting Federal Records is Tough 376
B. What Should Prosecutors be Prepared to Do to Obtain the Personnel Records of Federal Agents? 378

23. Can a state court order the prosecutor to obtain the personnel files of federal agents? 381

24. Can an officer bring a civil suit for wrongful dissemination of personnel records? 382

25. What is the standard of review when challenging a court's determination to release (or not release) personnel records? 382

XX. THE PROS AND CONS OF *BRADY* TIP SYSTEMS 383

XXI. THE ROLE OF THE PROSECUTOR IN *DEFENSE PITCHESS* MOTIONS 386

XXII. STANDARD OF REVIEW FOR ALLEGED DISCOVERY VIOLATIONS 387

1. Claims of failure to provide discovery required by due process (*Brady*) 387

A. Can a New Trial Motion be Based on a Claimed *Brady* Violation? 387

2. Claims that a *Brady* obligation is being improperly imposed 388

3. Claims of failure to provide discovery required by statute (Pen. Code § 1054.1) 388

4. Claims the court improperly allowed the prosecution to delay, defer, or deny disclosure of discovery under Penal Code section 1054.7 388

5. Claims the court improperly imposed a sanction under section 1054.5 388

6. Claims the court improperly denied a request for release of peace officer personnel records 389

XXIII. CIVIL LIABILITY OF PROSECUTORS AND INSPECTORS FOR *BRADY* VIOLATIONS 389

1. Prosecutors Have Absolute Immunity for Most Discovery Violations 389

2. Employees of the Prosecutor's Office, Such as Investigators or Inspectors, Have the Same Immunity as Prosecutors to the Extent 391

XXIV. THE LOSS OR DESTRUCTION OF EVIDENCE 391

1. What are the rules regarding loss or destruction of evidence? 391

2. What are the rules regarding the duty to collect evidence? 391

A. No General Duty to Collect Evidence 391
B. Duty to Collect Less Than Duty to Preserve 393

XXV. OTHER SELECTED DISCOVERY-RELATED ISSUES 393

1. Should prosecutor's offices set up "informant banks?" 393

2. When are a prosecutor's discovery obligations when it comes to "proffers" or immunized statements by cooperating co-defendants? 397

3. What is the prosecution's discovery obligation when it comes to post arrest "jail calls?" 400

A. Are Undelivered Recordings in the Possession of the Prosecution Team? 401
B. Do Copies of the Recordings Have to be Turned Over to the Defense Once They Come into the Possession of the Prosecution - Even If The Recordings Are Not Relevant to the Case? 403
C. Do the Recordings Have to be Turned Over to the Defense Immediately –Even if the Prosecution Has Not Yet Listened to Them? 405
D. Do the Recordings Have to be Turned Over if They Are Only Going to Be Used to Impeach a Witness? 408
E. Will Failure to Turn Over the Recordings Before Trial Prevent Their Use at Trial? 409
F. Some Practical Considerations Re: Jail Calls 410
G. Are Prosecutors in Constructive Possession of Calls that Are Kept on Systems to Which Prosecutor Has Complete and Immediate Access 411

4. What is the prosecutor's obligation to disclose the death or unavailability of a witness before a guilty plea? 412

A. Is There a Duty to Disclose the Death of a Witness Before a Guilty Plea? 412
B. Is There a Duty to Disclose the Unavailability of a Witness Before a Guilty Plea? 414

GENERAL DISCOVERY CHECKLIST 416

I. THE PROSECUTOR'S FEDERAL DUE PROCESS (*BRADY*) DISCOVERY OBLIGATIONS

In ***Berger* v. *United States*** (1935) 295 U.S. 78, the Supreme Court declared:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, ***the twofold aim of which is that guilt shall not escape nor innocence suffer***." (***Id***. at p. 88; ***Young* v. *U.S. ex rel. Vuitton et Fils S.A.*** (1987) 481 U.S. 787, 803, emphasis added.)

1. What evidence is a prosecutor obligated to disclose under the federal constitution?

A prosecutor's constitutional obligation to provide discovery derives from the due process clause of the Fourteenth Amendment. (***Brady* v. *Maryland*** (1963) 373 U.S. 83, 86-87.) In ***Brady* v. *Maryland*** (1963) 373 U.S. 83, the Supreme Court held that the prosecution must reveal to the defense "evidence **favorable** to an accused upon request . . . where the evidence is **material** either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (**Id**. at p. 87.)

There are three components of a true ***Brady*** violation: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." (***Skinner* v. *Switzer*** (2011) 562 U.S. 521, 536; ***Strickler* v. *Greene*** (1999) 527 U.S. 263, 281-282; **accord** ***People* v. *Letner*** (2010) 50 Cal.4th 99, 176; ***People* v. *Salazar*** (2005) 35 Cal.4th 1031, 1042-1043.) In ***In re Sassounian*** (1995) 9 Cal.4th 535, the California Supreme Court specifically disapproved any prior decisions construing the federal constitutional obligation to disclose as requiring disclosure of any evidence other than evidence that is both favorable and material. (**Id**. at p. 543, fn. 5.) "[I]t is not correct to state, for example, that 'the prosecution's duty of disclosure extends to all evidence that reasonably appears favorable to the accused…'" (**Ibid; but see** this outline, section I-5-C at pp. 61-62.)

"There is no general constitutional right to discovery in a criminal case, and ***Brady*** did not create one[.]" (***Weatherford* v. *Bursey*** (1977) 429 U.S. 545, 559; **accord** ***Kaley* v. *United States*** (2014) 134 S.Ct. 1090, 1101.) "***Brady*** merely serves to '"restrict the prosecution's ability to suppress evidence rather than to provide the accused a right to criminal discovery."'" (***People* v. *Mena*** (2012) 54 Cal.4th 146, 160 citing to ***People* v. *Morrison*** (2004) 34 Cal.4th 698, 715.)

The **only** substantive discovery mandated by the United States Constitution is "***Brady*** exculpatory evidence." (***People* v. *Superior Court (Meraz)*** (2008) 163 Cal.App.4th 28, 50; ***Jones* v. *Superior***

Court (2004) 115 Cal.App.4th 48, 62; ***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, 1314.)

The purpose behind the rule in ***Brady*** is "not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur" (***United States* v. *Bagley*** (1985) 473 U.S. 667, 675) and that "criminal trials are fair" (***Brady* v. *Maryland*** (1963) 373 U.S. 83, 86). "Placing the burden on prosecutors to disclose information 'illustrate[s] the special role played by the American prosecutor in the search for truth in criminal trials.'" (***Amado* v. *Gonzalez*** (9th Cir. 2013) 734 F.3d 936, 948 citing to ***Strickler* v. *Greene*** (199) 527 U.S. 263, 281.)

For there to be any **constitutional** obligation on the part of the prosecution to provide information to the defense: the following must be shown.

1. The information constitutes "evidence."
2. The information is "favorable" to the defense.
3. The information is "material" (i.e., failure to disclose the evidence must be prejudicial to the defense in that there is a reasonable probability that had the information been disclosed the result of the trial would have been different)
4. The information must have been "suppressed" by the prosecution (i.e., the information be in the actual or constructive possession of the "prosecution team" or the prosecution must be aware the information exists, *and* the prosecution must have failed to disclose the information, *and* the information must not be known to the defense and available to them through the exercise of reasonable diligence).

A. Does the Duty to Disclose *Brady* Evidence Exist Regardless of Whether the Defense Requests the Information?

In ***United States* v. *Agurs*** (1976) 427 U.S. 97, the Supreme Court held the duty to disclose favorable material evidence was not dependent on a request by the defense. (**Id**. at p. 107.) The standard of materiality is the same regardless of whether there has been no request for discovery, a general request for discovery, or a specific request for discovery. (***United States* v. *Bagley*** (1985) 473 U.S. 667, 682.) Albeit, a misleading or incomplete response to a specific request may allow a greater consideration of the impact of nondisclosure on trial strategy. (**Id**. at pp. 682-683.)

B. Can a Due Process Violation Be Found Regardless of the Intent of the Prosecutor?

"[T]he suppression of evidence that is materially favorable to the accused violates due process regardless of whether it was intentional, negligent, or inadvertent." (***IAR Systems Software, Inc.* v. *Superior Court*** (2017) 12 Cal.App.5th 503, 514; ***People* v. *Superior Court (Meraz)*** (2008) 163 Cal.App.4th 28, 47-48.)

2. What is "evidence" for purposes of the *Brady* rule?

A. A Prosecutor's Work Product (Theories of the Case, Suspicions, or Thought Processes) is Not Evidence

"The animating purpose of ***Brady*** is to preserve the fairness of criminal trials. However, fairness does not encompass an obligation on the prosecutor's part to reveal his or her strategies, legal theories, or impressions of the evidence." (***Morris* v. *Ylst*** (9th Cir. 2006) 447 F.3d 735, 742.) "[A] prosecutor has a constitutional duty to reveal exculpatory evidence—including otherwise privileged work product—under ***Brady*** principles." (***People* v. *McClinton*** (2018) 29 Cal.App.5th 738, 765.) However, "a prosecutor's work product is not discoverable under ***Brady*** unless the material contains underlying exculpatory facts." (***People* v. *McClinton*** (2018) 29 Cal.App.5th 738, 765 (rev. filed); **accord *Lopez* v. *Ryan*** (9th Cir. 2011) 630 F.3d 1198, 1210 ["a prosecutor's opinions and mental impressions of the case are not discoverable under ***Brady*** unless they contain underlying exculpatory facts."]; **see also *Hickman* v. *Taylor*** (1947) 329 U.S. 495, 511 [distinguishing between *opinions* expressed in attorney work product and *facts* disclosed in attorney work product]; ***Williamson* v. *Moore*** (11th Cir.2000) 221 F.3d 1177, 1182;

> **Editor's note**: **See** this outline, section III-25, at pp. 201-202 [discussing what constitutes protected "work product" for purposes of the California discovery statute].

In ***People* v. *Seaton*** (2001) 26 Cal.4th 598, a prosecutor relied on, and made arguments based upon, the opinion of a pathologist who testified for the prosecution in the guilt phase of a trial even though the prosecutor had written an internal memorandum critical of the pathologist after the guilt phase (but before the penalty phase) and was aware of two other memorandums by other prosecutors criticizing the pathologist. The memo written by the prosecutor who argued the case (i) questioned the validity of the pathologist's opinion that, subject to a few exceptions, blood flowing from a person does not clot (based on a contrary testimony given by a defense expert); (ii) stated the pathologist had not obtained or read his autopsy notes before testifying; (iii) stated the pathologist had testified certain wounds were incisions although his notes described them as lacerations; and (iv) stated that the pathologist was sloppy in procedure and careless in the preparation of reports. The memos written by the other two prosecutors complained about discrepancies between what the pathologist observed and recorded and what he later testified to in court. (**Id**. at pp. 646-650.)

The ***Seaton*** court held that if the prosecution becomes aware of information that casts doubt on the accuracy of the testimony of one of its expert witnesses, it must disclose that evidence if it is material. (**Id**. at p. 649.) However, the court found that the memos did not have to be disclosed since prosecutors are not obligated to reveal their own doubts about the validity of the testimony of their own witness so long as those doubts are based solely on the evidence presented at trial. (**Id**. at p. 648; **see also *Beaman* v. *Souk*** (C.D. Ill. 2014) 7 F.Supp.3d 805, aff'd sub nom. ***Beaman* v. *Freesmeyer*** (7th Cir.

2015) 776 F.3d 500 ["the Court is aware of no authority requiring a prosecutorial decision to be unanimous, or creating an obligation under ***Brady*** to disclose any lack of unanimity" among prosecutors].)

The ***Seaton*** court noted every lawyer makes an internal assessment of the strength and weaknesses of his witnesses as the trial proceeds. Such assessment need not be revealed to the opposing party. (**Id**. at p. 649.) However, the ***Seaton*** court also said, notwithstanding the lack of duty to disclose internal doubts about the accuracy of expert testimony when those doubts arise during trial, and regardless of the fact that attorneys may ethically present evidence they suspect, but do not know, is false, prosecutors **remain under the solemn obligation to present evidence only if it advances rather than impedes the search for truth and justice**. (**Id**. at p. 649.)

Hence, "[a] prosecutor who, before trial, seriously doubts the accuracy of an expert witness's testimony should not present that evidence to a jury, especially in a capital case." (**Id**. at p. 650; **see also *Shelton* v. *Marshall*** (9th Cir. 2015) 796 F.3d 1075, 1077 [indicating prosecution's own "serious doubts" as to witness' mental competence (as shown by an attempt to keep evidence of witness' capacity away from the jury) "might have diminished the State's *own credibility* as a presenter of evidence"].)

B. Officers' Opinions Regarding the Strength of a Case Are Not Evidence

In ***People* v. *Price*** (1991) 1 Cal.4th 324, the court held that a memorandum written by Department of Justice investigator, noting disagreements with coworkers and supervisors about which materials should be disclosed to the defense and expressing his personal feelings about these disputes, contained nothing of legitimate use to the defense. (**Id**. at p. 494.)

In ***Beaman* v. *Souk*** (C.D. Ill. 2014) 7 F.Supp.3d 805, aff'd sub nom. ***Beaman* v. *Freesmeyer*** (7th Cir. 2015) 776 F.3d 500, the court held that so long as the defense is provided the information that would have "led some investigators to form the opinion that the case was weak or remained unsolved[,]" the "*opinions themselves* are not also ***Brady*** material." (***Souk*** at pp. 822-823, emphasis added.) ***Woods* v. *McKee*** [unreported] (E.D. Mich. 2015) 2015 WL 5697591, at *8 [officers' *opinions* about who committed offense are not evidence and are inadmissible at trial; nor were such opinions ***Brady*** material since it was speculation they would lead directly to admissible evidence].)

C. Rumor or Mere Speculation is Probably Not Evidence

Cases discussing the ***Brady*** rule always define it as barring the suppression of "evidence." (**See e.g.**, ***Strickler* v. *Greene*** (1999) 527 U.S. 263, 280; ***Brady* v. *Maryland*** (1963) 373 U.S. 83, 87.)

In ***Smith* v. *Stewart*** (9th Cir. 1998) 140 F.3d 1263, a case in which the defendant was charged with robbery-murder, the court held there was no ***Brady*** violation where the prosecution did not tell the defense that the police had heard about a *rumor* in the community to the effect that the defendant's

brother was in the car with defendant but that defendant himself had gone into the store to commit the robbery. (**Id**. at p. 1273 [and questioning whether the information was even "favorable" in finding it was not material]; **see also *United States* v. *Souffront*** (7th Cir. 2003) 338 F.3d 809, 823 [no ***Brady*** violation where, at the time of defendants' trial, all the AUSAs knew was that there were unsubstantiated allegations against several Chicago police officers, but none directly accusing the witness of misconduct]; ***United States* v. *Villarreal*** (5th Cir.1992) 963 F.2d 725, 730 [no ***Brady*** duty where new evidence was little more than rumor and "d[id] not rise above the level of conjecture, hearsay, or speculation"]; ***United States* v. *Diaz*** (2nd Cir. 1990) 922 F.2d 998, 1006 [no ***Brady*** violation where government may have had "suspicions" that informant-witness had stolen money but did not have actual knowledge witness had done so until after trial had concluded]; ***United States* v. *Watson*** (1st Cir.1996) 76 F.3d 4, 7-8 [no ***Brady*** violation when an inculpatory *rumor* contained in pre-sentence report was not disclosed]; **but see *United States* v. *Kiszewski*** (2nd Cir. 1989) 877 F.2d 210, 215-216 [trial court should have examined the personnel records of a government witness that included allegations that he was "on the take," even though an FBI investigation had exonerated the witness on that charge].)

D. Pending Investigations

In ***United States* v. *Agurs*** (1976) 427 U.S. 97 there is a footnote suggesting that prosecutors have no "obligation to communicate preliminary, challenged, or speculative information[.]" (**Id**. at p. 109, fn. 16.) Prosecutors often rely on this footnote to argue there is no duty to disclose a pending internal investigation because a pending investigation is necessarily "preliminary" information. (**See *Tate* v. *Wood*** (2d Cir. 1992) 963 F.2d 20, 25; ***United States* v. *Veras*** (7th Cir. 1995) 51 F.3d 1365, 1374 ["Carefully read, ***Agurs*** and ***Tate*** do suggest that purely speculative and preliminary information may be withheld"].) However, at what stage a particular investigation goes past the preliminary or speculative stage is often a subject of dispute.

In the Ninth Circuit case of ***United States* v. *Olsen*** (9th Cir. 2013) 704 F.3d 1172, the court rejected the argument that since an internal investigation into a forensic scientist employed by the Washington State Patrol (WSP) was still pending, the prosecution had no duty to turn over impeachment information relating to that investigation. (**Id**. at pp. 1182-1183.) The actual language used in ***Olsen*** related more to the question of whether it was proper to consider the evidence "favorable," than whether it was discoverable: "In the government's view, apparently, no matter what the investigative file contained—even perhaps a sworn affidavit by [the scientist] himself admitting that [wrongdoing] - this evidence would not be favorable under ***Brady*** until the administrative decisionmaker concluded that such conduct violated [the employing agencies'] regulations. This position is untenable under ***Brady***, and the government's tenacious adherence to it is mystifying." (***Olsen*** at p. 1182.) And the Ninth Circuit ultimately found the evidence was not material. Nevertheless, the implication was that such information should ordinarily be disclosed. (***Olsen*** at p. 1182, 1183, fn. 3; ***Everhart* v. *United States*** (W.D. Wash 2017) 2017 WL 1345573, at *3 [citing to ***Olsen*** in support of the proposition that while "the information

described by the Government in its sealed briefing deals with an ongoing investigation, it is still impeachment evidence that the Government must disclose"]; **see also *People* v. *Hubbard*** (NY 2014) 45 Misc.3d 328, 334 [prosecution was in possession of fact an IA investigation *was ongoing* which related to alleged officer misconduct during a prior interrogation]; ***United States* v. *Veras*** (7th Cir. 1995) 51 F.3d 1365, 1374 [pending investigation into officer who allegedly stole money during police searches and from government informants and lied on search warrants was beyond preliminary stage where the one U.S. Attorney's Office "thought enough of its involvement with [the officer] in pending future cases to recuse itself from proceeding further with its own investigation and transferred the investigation to [a different U.S. Attorney's Office] and the information "had some grounds and was of a serious enough nature that the investigation proceeded for well over two years"]; **cf.**, ***City of Los Angeles* v. *Superior Court*** (2002) 29 Cal.4th 1, 13 ["the ***Pitchess*** scheme does not delay discovery of citizen complaints until an investigation is completed or even until the officer has filed his response. Rather, when the proper showing is made, citizen complaints are discoverable even if the investigation of those complaints is still incomplete"].)

Editor's note: If a prosecutor is aware of a pending investigation into a witness who is going to testify, the safest course is to alert the court of the investigation at an ex parte in camera hearing pursuant to Penal Code section 1054.7 and ask to defer disclosure until the investigation is complete. (**See *United States* v. *Bulger*** (1st Cir. 2016) 816 F.3d 137, 151-155; this outline, section VII-6 at p. 240.

3. What is considered "favorable evidence" for purposes of deciding whether a prosecutor has a due process obligation to disclose favorable, material evidence?

A. Generally

"Evidence is 'favorable' if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses." (***In re Miranda*** (2008) 43 Cal.4th 541, 575; ***In re Sassounian*** (1995) 9 Cal.4th 535, 544.) Favorable evidence has also been described as "evidence that the defense could use either to impeach the state's witnesses or to exculpate the accused" and "exculpatory evidence" has been broadly described as "evidence that tends to exonerate the defendant from guilt." (***J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1335.)

(i) Can a Prosecutor Take into Consideration the Credibility of the Source of the Information in Deciding Whether it is "Favorable?"

In deciding whether evidence is "favorable," the fact the witness who supplied the information is not very credible is irrelevant. "It is not the role of the prosecutor to decide that facially exculpatory evidence need not be turned over because the prosecutor thinks the information is false." (***In re Miranda*** (2008) 43 Cal.4th 541, 577; **see also *Smith* v. *Cain*** (2012) 132 S.Ct. 627, 630 [holding that a witness's inconsistent statements were subject to disclosure notwithstanding government's "argument … that the jury could have disbelieved [the] undisclosed statements"]; ***United States* v. *Bulger*** (1st

Cir. 2016) 816 F.3d 137, 155 [upholding trial court's refusal to order disclosure of anonymous letter claiming officer engaged in criminal conduct where allegation found to be unsubstantiated but stating "our conclusion today by no means suggests that the government can sidestep its ***Brady*** obligations simply by conducting its own investigation and determining that potentially discoverable allegations are unsubstantiated"].)

Editor's note: If the information is privileged or otherwise protected, a prosecutor still may need to determine whether the favorable information is "material." (**See** this outline section X-2 at p. 272.)

B. Neutral or Inculpatory Evidence is Not "Favorable" Evidence

In ***People* v. *Burgener*** (2003) 29 Cal.4th 833, the California Supreme Court cited to two federal cases for the proposition that there is no duty to disclose evidence that is neutral or inculpatory. (**Id**. at p. 875, citing to ***United States* v. *Flores-Mireles*** (8th Cir. 1997) 112 F.3d 337, 340 and ***United States* v. *Arias-Villanueva*** (9th Cir. 1993) 998 F.2d 1491, 1506.) Applying this rule, the California Supreme Court in ***People* v. *Burgener*** (2003) 29 Cal.4th 833, held the prosecutor had no constitutional duty to disclose a threat made by the defendant to the witness because evidence of the threat was not "favorable" to the defense. (**Id**. at p. 875.) And in ***People* v. *Ashraf*** (2007) 151 Cal.App.4th 1205, the court held there was no constitutional duty to disclose evidence tending to show the defendant had a motive to attack the victim. (**Id**. at p. 1213.)

C. Highly Speculative or Insubstantial Leads are Not "Favorable" Evidence

In ***People* v. *Burgener*** (2003) 29 Cal.4th 833, the California Supreme Court suggested that evidence that is "speculative" is not favorable evidence for ***Brady*** purposes. (**Id**. at p. 875, citing to ***United States* v. *Flores-Mireles*** (8th Cir. 1997) 112 F.3d 337, 340 and ***United States* v. *Arias-Villanueva*** (9th Cir. 1993) 998 F.2d 1491,1506; **see also *United States* v. *Prochilo*** (1st Cir. 2011) 629 F.3d 264, 268-269 [where "the government maintains that it has turned over all material impeachment evidence, speculation is insufficient to permit even an in camera review of the requested materials"]; ***Barker* v. *Fleming*** (9th Cir. 2005) 423 F.3d 1085, 1099 [no ***Brady*** violation where theory of favorability of undisclosed evidence was mere speculation].)

In ***People* v. *Gutierrez*** (2003) 112 Cal.App.4th 1463, the court stated that ***Brady*** does not require "the disclosure of information that is mere speculative value" without identifying whether that is due to the fact the information is not favorable or is not material. (**Id**. at p. 1472; **see also *People* v. *Zaragoza*** (2016) 1 Cal.5th 21, 52 ["speculation that favorable and material evidence might be found does not establish a violation of ***Brady***"].)

In ***Downs* v. *Hoyt*** (9th Cir. 2000) 232 F.3d 1031, the prosecution did not turn over information on some 100 leads contained in the sheriff's file, including pictures and names of suspects, license plate numbers of vehicles matching the description given by the defendant, and names and phone numbers of

citizens and law enforcement officials with potentially relevant information. (**Id**. at pp. 1036-1037.) Nevertheless, the Ninth Circuit held that "***Brady*** does not require a prosecutor to turn over files reflecting leads and ongoing investigations where no exonerating or impeaching evidence has turned up." (**Id**. at p. 1037.)

In ***Jarrell* v. *Balkcom*** (11th Cir. 1984) 735 F.2d 1242, the court held no ***Brady*** violation occurred where the prosecution failed to produce names and evidence concerning hundreds of other possible suspects, where such "suspects" were merely talked to by police to see what possible evidence they might have had, and none of the persons were suspects in the sense that the investigation actually focused on them. (**Id**. at p. 1258.)

In ***United States* v. *Jordan*** (2d Cir. 1968) 399 F.2d 610, the court suggested ***Brady*** "does not require the government to disclose the myriad immaterial statements and names and addresses which any extended investigation is bound to produce" because the evidence was not favorable, albeit without clearly identifying whether that was the sole basis for the inapplicability of the ***Brady*** rule. (**Id**. at p. 615.)

In ***Beaman* v. *Souk*** (C.D. Ill. 2014) 7 F.Supp.3d 805 [aff'd sub nom. ***Beaman* v. *Freesmeyer*** (7th Cir. 2015) 776 F.3d 500] a criminal defendant cum plaintiff sued the police department for failure to turn over evidence. In ruling against plaintiff, the court held that "[e]vidence of potential leads that were not pursued" was not "evidence that shows the Plaintiff did not commit the crime. In any investigation, there are likely to be leads that are not pursued. Investigators must make decisions about how to use their resources to investigate cases." (***Beaman* v. *Souk*** at p. 822.) The court distinguished two cases relied upon by the plaintiff because the withheld evidence was evidence indicating someone else had committed the crime, "not a list of leads generated by police officers or vague opinions as to the status of the case." (**Id**. at p. 823.)

D. Inadmissible Evidence

In ***Woods* v. *Bartholomew*** (1995) 516 U.S. 1, the United States Supreme Court held that failure to disclose evidence that a witness had failed a polygraph was not a ***Brady*** violation since the evidence was inadmissible and thus there was no "reasonable probability" that had the evidence been disclosed the result at trial would have been different. (**Id.** at p. 6.) However, the High Court has "never announced a bright line rule that only admissible evidence is 'material' for purposes of a ***Brady*** violation." (***People* v. *Hoyos*** (2007) 41 Cal.4th 872, 919; **accord *In re Miranda*** (2008) 43 Cal.4th 541, 576 ["***Woods*** did not establish that inadmissible evidence can never be material for purpose of a ***Brady*** claim"].)

In ***Hoyos***, the California Supreme Court recognized that federal and state courts are split over whether the failure to disclose inadmissible evidence is a ***Brady*** violation; with some courts holding that "unless the undisclosed evidence would have been admissible at trial, it need not have been disclosed under

Brady" and other courts rejecting "admissibility as a prerequisite for determining ***Brady***'s applicability as long as the information would have led to admissible evidence or been useful to the defense in structuring its case." (***Hoyos***, at p. 919; **see also *Ellsworth* v. *Warden*** (1st Cir. 2003) 333 F.3d 1, 5 [federal circuits are split on whether a defendant has a viable ***Brady*** claim if the withheld evidence itself is inadmissible but most circuits addressing the issue have said ***Brady*** applies if the withheld evidence would have led directly to material admissible evidence].)

The ***Hoyos*** court declined to state which line of cases it agreed with because the evidence in question in ***Hoyos*** *was* admissible in the defendant's trial, albeit only against the co-defendant. (**Ibid**.)

In ***People* v. *Santos*** (1994) 30 Cal.App.4th 169, the court held the defense was entitled to discovery of misdemeanor convictions - even though such convictions were inadmissible hearsay - because disclosure of the existence of such convictions would "assist the defendant in obtaining direct evidence of the misdemeanor misconduct itself." (**Id**. at p. 179.) In ***Kelvin L.* v. *Superior Court*** (1976) 62 Cal.App.3d 823, the court in a juvenile case held that "discovery is not limited to admissible evidence, but encompasses information which may lead to relevant evidence." (**Id**. at p. 828.) However, ***Kevin L***. pre-dates enactment of the CDS and thus is of limited precedential value. (**Cf**., ***People* v. *Jackson*** (2005) 129 Cal.App.4th 129, 170-172 [requiring disclosure of *all* wiretapped conversations of defendant, notwithstanding relevance, in part, because they might lead to discovery of relevant evidence]; ***Larry E.* v. *Superior Court*** (1987) 194 Cal.App.3d 25, 32 [***Pitchess*** discovery is not limited to admissible evidence, but encompasses information which may lead to relevant evidence].)

Editor's note: Of course, whether the undisclosed evidence would have been admitted at trial will always be a significant factor in deciding whether the evidence is material. As to whether evidence impeaching a person who is not called to testify is favorable evidence, **see** this outline, section III-14 at pp. 184-185.

E. Penalty Mitigation

Evidence which mitigates the potential punishment a defendant may be favorable evidence. In fact, in the seminal case of ***Brady* v. *Maryland*** (1963) 373 U.S. 83 itself, the evidence that was not disclosed was evidence bearing not on the guilt of the defendant but on the proper punishment. (**Id**. at p. 87.) In a death penalty case, information that potentially mitigates punishment covers a wide variety of evidence. (**See** Pen. Code, § 190.3(k) [permitting the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."].)

Nevertheless, as illustrated in the case of ***People* v. *Sattiewhite*** (2014) 59 Cal.4th 446, not everything under the sun constitutes favorable evidence. In ***Sattiewhite***, the defendant claimed the prosecution violated the ***Brady*** rule because it did not turn over evidence the victim's mother and son opposed the death penalty for defendant. (**Id**. at p. 486.) The ***Sattiewhite*** court rejected this claim because the views of the victim's relatives as "to the appropriate punishment was irrelevant and inadmissible" with "no bearing on the defendant's character or record or any circumstance of the offense." (**Id**. at p. 487.)

F. Conflicting or Inconsistent Statements

A government witness' prior inconsistent statement clearly satisfies the first requirement of a ***Brady*** violation - that the evidence be "favorable" to the defendant. (***Smith* v. *Cain*** (2012) 132 S.Ct. 627, 630-631; ***In re Miranda*** (2008) 43 Cal.4th 541, 576.) Minor inconsistencies in a witness' statement may not, however, constitute evidence that is "material" for ***Brady*** purposes. (**See e.g., *People* v. *Cook*** (2006) 39 Cal.4th 566, 589; ***Knighton* v. *Mullin*** (10th Cir. 2002) 293 F.3d 1165, 1174: ***State* v. *Nightengale*** (La. Ct. App. 2002) 818 So.2d 819, 825.)

G. Failure to Remember

A witness's failure of recollection can have exculpatory impeachment value and should be disclosed. (**See e.g., *State* v. *Eley*** (La. Ct. App. 2016) 203 So.3d 462, 473.)

H. Prior False Reports

i. "False" Reports of Sexual Assault

Evidence that a complaining witness has previously falsely accused someone of sexual assault or molestation is relevant on the issue of the complaining witness' credibility. (***People* v. *Miranda*** (2011) 199 Cal.App.4th 1403, 1424; ***People* v. *Tidwell*** (2008) 163 Cal.App.4th 1447, 1457; ***People* v. *Franklin*** (1994) 25 Cal.App.4th 328, 335; ***People* v. *Adams*** (1988) 198 Cal.App.3d 10, 18; ***People* v *Burrell-Hart*** (1987) 192 Cal.App.3d 593, 597-600.) Evidence of such a false accusation is relevant and admissible notwithstanding Evidence Code sections 782 or 1103(c), which generally place strict limits on the use of prior sexual activity by the victim in a sexual assault case. (**See *People* v. *Tidwell*** (2008) 163 Cal.App.4th 1447, 1455-1456.)

However, "[a] prior accusation of rape is relevant to the complaining witness's credibility, but ***only if*** the accusation is shown to be false." (***People* v. *Winbush*** (2017) 2 Cal.5th 402, 469, emphasis added.) For it to be relevant, "the defense would have had to establish both that the accusation was made and that it was false." (**Ibid**; **accord *People* v. *Alvarez*** (1996) 14 Cal.4th 155, 200-210; ***People* v. *Bittaker*** (1989) 48 Cal.3d 1046, 1097; ***People* v. *Miranda*** (2011) 199 Cal.App.4th 1403, 1424; ***People* v. *Tidwell*** (2008) 163 Cal.App.4th 1447, 1457.) If the complaint of being previously sexually assaulted is true, it has no relevance to impeachment. (***People* v. *Alvarez*** (1996) 14 Cal.4th 155, 201; ***People* v. *Neely*** (1964) 228 Cal.App.2d 16, 18; **see also *People* v. *Sully*** (1991) 53 Cal.3d 1195, 1221.) Irrelevant evidence is not favorable evidence and thus, absent a showing the prior accusation was false, it is not discoverable.

ii. False Claims to Police

In ***Benn* v. *Lambert*** (9th Cir. 2002) 283 F.3d 1040, the court held the fact an informant-witness had, in the past, repeatedly lied to law enforcement was discoverable ***Brady*** information. (**Id**. at p. 1056; **accord *Carriger* v. *Stewart*** (9th Cir. 1997) 132 F.3d 463, 479-480; ***United States* v. *Brumel-Alvarez*** (9th Cir.1992) 991 F.2d 1452, 1463; **see also *Gonzalez v. Wong*** (9th Cir. 2011) 667 F.3d 965, 981 [occasions when witness faked committing suicide in order to obtain prison transfers or otherwise influence his placement within the prison system" potentially impeaching]; Evid. Code, § 780(e) [permitting factfinder to consider a witness' character for honesty or veracity or their opposites in assessing witness credibility].)

I. Claims of Officers Lying at Trial

In ***People* v. *Jordan*** (2003) 108 Cal.App.4th 349, the People put on a gang expert witness. After the trial, the defense learned that in two other unrelated criminal trials, defendants had alleged the same gang expert had fabricated evidence. In one of those unrelated trials, the defendant had testified the gang expert had used excessive force during a detention and fabricated evidence of possession of narcotics to justify the use of force. That defendant did not file a complaint about the conduct until after his own case had been reversed on appeal. In the other unrelated trial, the defendant testified that he was approached by the gang expert and threatened with being imprisoned for life if he did not identify gang members from a book of photographs; that the gang expert stopped him two months later and planted cocaine on him; and that the conduct resulted in the defendant being falsely convicted. That defendant also did not file a citizen's complaint. (**Id**. at p. 356.)

On appeal, the defense claimed the prosecution had an obligation to reveal this information. However, the ***Jordan*** court held the prosecution has no duty "to catalog the testimony of every witness called by the defense at every criminal trial in the county, cull from that testimony complaints about peace officers and disclose those complaints to the defense whenever the People called the peace officer as a witness at another trial." (**Id**. at p. 361.) Moreover, "**it does not appear that a claim of peace officer misconduct, asserted only at an unrelated criminal trial by a defendant trying to avoid criminal liability, constitutes favorable evidence within the meaning of *Brady***." (**Id.** at p. 362.) Such complaints "do not immediately command respect as trustworthy or indicate actual misconduct on the part of the officer" - even if the unrelated trial results in an acquittal. (**Ibid.**)

The ***Jordan*** court did note, however, that defense complaints about peace officers advanced at unrelated criminal trials might provide corroboration for a request for discovery under ***Pitchess*** in an appropriate case and contrasted defendant's complaints about an officer in an unrelated trial with "citizen's complaints of officer misconduct which the officer's employer has sustained as true." (**Id**. at p. 362.)

J. Adverse Judicial or Administrative Findings

i. Express or Implied Judicial Findings Regarding Police Credibility

Sometimes the credibility of an officer who is testifying in a particular criminal case is called into question by the trier of fact either expressly (i.e., by a finding that the officer intentionally or with reckless disregard for the truth included false information in an affidavit) or implicitly (i.e., by a refusal to hold a defendant to answer or by granting a motion to suppress when the officer's testimony, if believed, would have established probable cause to hold the defendant to answer or to deny the motion to suppress). This can also occur in civil cases in which a judge rules in favor of a plaintiff suing the police and/or states on the record that the officer lied. Does this constitute favorable evidence? Is the fact of the judicial conclusion (*as opposed to the facts underlying the conclusion*) even admissible evidence in a subsequent prosecution?

Evidence that a finder of fact believes a witness to have lied seems to fall into the category of inadmissible lay opinion. In effect, the judicial determination is just another witness' opinion about whether an officer lied in a specific instance. And, in *general*, it is improper for one witness to opine upon another witness' credibility. (**See *People* v. *Melton*** (1988) 44 Cal.3d 713, 744 ["Lay opinion about the veracity of particular statements by another is inadmissible on that issue]:***United States* v. *Moreland*** (9th Cir. 2007) 509 F.3d 1201, 1212-1213; ***United States* v. *Combs*** (9th Cir. 2004) 379 F.3d 564, 572; ***United States* v. *Geston*** (9th Cir.2002) 299 F.3d 1130, 1135-1137; ***United States* v. *Sanchez*** (9th Cir. 1999)176 F.3d 1214, 1219-1221; **but see *People v. Chatman*** (2006) 38 Cal.4th 344, 383 [explaining the type of situation when asking one witness if another witness has lied is not objectionable].) Indeed, allowing in a judicial opinion carries additional risks that even a lay person's opinion does not carry. (**See *United States* v. *Lopez*** (1st Cir. 1991) 944 F.2d 33, 38 ["the credibility assessment made by the presiding judge at an unrelated trial would have entailed a grave risk that the jury might abnegate its exclusive responsibility to determine the credibility of the testimony given by the officer at appellant's trial."]; ***United States* v. *Sine*** (9th Cir. 2007) 493 F.3d 1021, 1033 ["actual testimony from a judge unduly can affect a jury" and "jurors are likely to defer to findings and determinations relevant to credibility made by an authoritative, professional factfinder rather than determine those issues for themselves"]; ***Nipper* v. *Snipes*** (4th Cir. 1993) 7 F.3d 415, 416 ["judicial findings of fact 'present a rare case where, by virtue of their having been made by a judge, they would likely be given undue weight by the jury, thus creating a serious danger of unfair prejudice.'"]; ***Johnson* v. *Colt Indus. Operating Corp.*** (10th Cir. 1986) 797 F.2d 1530, 1534 ("[T]he admission of a judicial opinion as substantive evidence presents obvious dangers. The most significant possible problem posed by the admission of a judicial opinion is that the jury might be confused as to the proper weight to give such evidence."].)

Moreover, a judicial determination that an officer was not telling the truth, when offered in a subsequent trial, is quintessential hearsay if offered to show the officer did not tell the truth on a prior occasion. (**See** Evid. Code, § 1200(b) ["Except as provided by law, hearsay evidence is inadmissible"]; ***People* v. *Thoma*** (2007) 150 Cal.App.4th 1096, 1101 ["a statement in the record of conviction that is offered to prove the truth of the matter stated must fall within an exception to the hearsay rule"]; **cf**., ***People* v. *Monterroso*** (2004) 34 Cal.4th 743, 778 [the fact a witness has been arrested for a crime is not admissible to impeach a witness because the fact of the arrest does not prove the conduct occurred - the conduct itself must be established]; ***People* v. *Wheeler*** (1992) 4 Cal.4th 284, 288 [the fact of the conviction of a misdemeanor remains inadmissible under traditional hearsay rules when offered to prove that the witness committed misconduct bearing on his or her truthfulness]; **but see** Evid. Code, § 452.5 [creating hearsay exception allowing computer-generated records of convictions to be used to prove underlying conduct].)

"A court judgment is hearsay 'to the extent that it is offered to prove the truth of the matters asserted in the judgment.' [Citation omitted] . . . It is even more plain that the introduction of discrete judicial factfindings and analysis underlying the judgment to prove the truth of those findings and that analysis constitutes the use of hearsay." (***United States* v. *Sine*** (9th Cir. 2007) 493 F.3d 1021, 1036.) Numerous courts have recognized the basic principle that "judicial findings of facts are hearsay, inadmissible to prove the truth of the findings unless a specific hearsay exception exists." (***United States* v. *Sine*** (9th Cir. 2007) 493 F.3d 1021, 1036;]; **accord *United States* v. *Stinson*** (9th Cir. 2011) 647 F.3d 1196, 1211; ***Herrick* v. *Garvey*** (10th Cir. 2002) 298 F.3d 1184, 1191–1192; ***United States* v. *Jones*** (11th Cir. 1994) 29 F.3d 1549, 1554; **see also *United States* v. *Jeanpierre*** (8th Cir. 2011) 636 F.3d 416, 423 [noting a majority of federal circuit courts considering the issue have so held but leaving open question].) These courts have found no hearsay exception would permit introduction of the findings.

> **Editor's note**: Federal Rule 803(8)(A)(iii) [formerly 803(8)(C)] creates a hearsay exception which allows hearsay "in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation[.]" The courts condemning admission of judicial findings regarding credibility reject the idea such findings are admissible under this hearsay exception because that exception applies to administrative, not judicial, fact finding. (**See e.g.**, ***Nipper* v. *Snipes*** (4th Cir. 1993) 7 F.3d 415, 417 and ***United States* v. *Jones*** (11th Cir. 1994) 29 F.3d 1549, 1554.) And in any event, there is no comparable California hearsay exception.

However, in the case of ***Milke* v. *Ryan*** (9th Cir. 2013) 711 F.3d 998, the Ninth Circuit held evidence that an officer had lied under oath in a criminal proceeding was favorable evidence in a subsequent case where the officer was testifying as a witness – albeit in a case where there were ***multiple*** findings in past cases that the officer had lied. (**Id**. at pp. 1012-1016.) Moreover, *other* federal circuit courts have held that a judge has the discretion to allow witnesses, including police officers, to be cross-examined about prior occasions when the witnesses' testimony in other cases had been criticized by a court as

unworthy of belief. (**See *United States* v. *Woodard*** (10th Cir. 2012) 699 F.3d 1188, 1194-1196; ***United States* v. *White*** (2d Cir. 2012) 692 F.3d 235, 249; ***United States* v. *Cedeño*** (2d Cir. 2011) 644 F.3d 79, 82–83; ***United States* v. *Dawson*** (7th Cir. 2006) 434 F.3d 956, 957–959; ***United States* v. *Whitmore*** (D.C. Cir. 2004) 359 F.3d 609, 619–622; ***United States* v. *Terry*** (2d Cir. 1983) 702 F.2d 299, 316.)

Some of these courts have refused to draw a distinction between a judicial finding that a witness was not credible and a finding that the witness lied. (**See *United States* v. *Woodard*** (10th Cir. 2012) 699 F.3d 1188, 1194 ["A finding that a witness is not credible is not fundamentally different from a finding that the witness lied. It often just reflects a fact finder's desire to use more gentle language"]; ***United States* v. *White*** (2d Cir. 2012) 692 F.3d 235, 249 [same].)

Assuming that such evidence can constitute favorable evidence, some courts have laid out factors that help determine the relevancy and probative value of a prior court's finding that a witness had lied: "(1) whether the prior judicial finding addressed the witness's veracity in that specific case or generally; ... (2) whether the two sets of testimony involved similar subject matter"; (3) "whether the lie was under oath in a judicial proceeding or was made in a less formal context"; (4) "whether the lie was about a matter that was significant"; (5) "how much time had elapsed since the lie was told and whether there had been any intervening credibility determination regarding the witness"; (6) "the apparent motive for the lie and whether a similar motive existed in the current proceeding"; and (7) "whether the witness offered an explanation for the lie and, if so, whether the explanation was plausible." (**See *United States* v. *Woodard*** (10th Cir. 2012) 699 F.3d 1188, 1195; ***United States* v. *Cedeño*** (2d Cir. 2011) 644 F.3d 79, 82, 83.)

> **Editor's note**: As to whether such evidence is within the possession of the prosecution, **see** this outline, section I-7-D at pp. 75-76.)

ii. Administrative Findings

Is the fact that there has been a departmental administrative finding that an officer-witness engaged in misconduct "favorable" evidence? Certainly, the underlying misconduct itself may be favorable. But whether administrative conclusions can be considered favorable is similar to the question whether judicial conclusions may be considered favorable. (**See** this outline, section I-3-J-i at pp. 12-1.)

Indeed, when it comes to conclusions from an internal affairs investigation, there is a specific *statutory* bar to its disclosure. (**See** Evid. Code, § 1045(b)(2) [excluding from disclosure in "any criminal proceeding the conclusions of any officer investigating a complaint filed pursuant to Section 832.5 of the Penal Code"].) On the other hand, in ***People* v. *Jordan*** (2003) 108 Cal.App.4th 349, the court strongly indicated "citizen's complaints of officer misconduct which the officer's employer has ***sustained*** as true" are favorable evidence that should be disclosed. (**Id.** at p. 362, emphasis added.)

iii. Placement on Administrative Leave or Termination

Sometimes prosecutors become aware that an officer has been placed on administrative leave or have been terminated from their employment without ever learning the reason why the officer has been placed on administrative leave or terminated. In such circumstances, is there any statutory or constitutional obligation of the prosecution to alert the defense to this fact?

There are many reasons why an officer may be terminated or placed on administrative leave that have nothing to do with the officer's credibility. The mere fact, *alone*, that an officer has been terminated or placed on administrative *should* not logically be considered "favorable" evidence. (**See *People* v. *Garcia*** (unpublished) 2017 WL 1101414, at *3 [where prosecutor and trial court made this argument].)

In ***People* v. *Suff*** (2014) 58 Cal.4th 1013, the defendant claimed the trial court improperly excluded evidence that the lead detective in serial killer case was indicted for multiple crimes involving moral turpitude and had been terminated from the police department where, inter alia, the detective had not yet been tried, there were proof problems (including that the primary witness against the detective had died) and multiple witnesses would be required. (**Id**. at pp. 1065-1067.) In upholding the exclusion and reasons for termination, the California Supreme Court noted "the unexplained fact that [the detective] had been terminated from the police department was irrelevant." (**Id**. at p. 1067; **see also *Bush* v. *State*** (Ala. Crim. App. 2009) 92 So.3d 121, 149 [the allegation that a prosecution expert "had been disciplined certainly was not exculpatory"].)

However, there are out of state cases dictating a contrary conclusion. (**See *Snowden* v. *State*** (Del. 1996) 672 A.2d 1017, 1024 [holding trial court had duty to review personnel records of testifying police officer at defense request *because* it was not disputed that the *officer had been terminated* and the prosecutor did not represent the personnel files had been examined to ascertain if they contained ***Brady*** material]; ***Garden* v. *Sutton*** (1996) 683 A.2d 1041, 1044 [civil case finding plaintiff should have been allowed to cross-examine officer about his termination from the force because it would "temper any undue assumptions" arising from the witness's "association with the police department" which might tend "to provide an independent guarantee of trustworthiness"]; ***State* v. *Brown*** (unreported Arizona case) 2010 WL 685621, *7 [same].)

Because placement on administrative leave is much more common (and a less serious sanction) than termination, the reasons for finding the mere fact of termination not to be relevant would apply with even greater force to finding the mere fact of placement on administrative leave not to be relevant.

On the other hand, in the case of ***People* v. *Lewis*** (2015) 240 Cal.App.4th 257, the court held that the prosecution's failure to disclose even the mere fact that an officer was on administrative leave "denied the defendant a full opportunity to develop potential arguments and case strategy[.]" (**Id**. at p. 267 [albeit in circumstances where the prosecution knew the reasons underlying the placement].)

As a practical matter, it would probably be a good idea to investigate further the reasons behind the termination or administrative leave. The officer *could* potentially be asked about the reasons for the termination of imposition of discipline. In ***Becerrada* v. *Superior Court*** (2005) 131 Cal.App.4th 409, the court specifically held "an officer remains free to discuss with the prosecution any material in his files, in preparation for trial," and the "officer practically may give to the prosecution that which it could not get directly." (**Id**. at p. 415; **see also** Govt. Code, § 3306.5(a)&(b) [public safety officer is entitled to "inspect personnel files that are used or have been used to determine that officer's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action" and the request must be complied with in "a reasonable period of time after" being made].) However, simply getting the officer's consent to disclosure *may* not be enough to allow further disclosure since the privilege against disclosure of official police records is held both by the individual officer involved and by the police department who employs the officer. (***Abatti* v. *Superior Court*** (2003) 112 Cal.App.4th 39, 57; ***Davis* v. *City of Sacramento*** (1994) 24 Cal.App.4th 393, 401; ***City of Hemet* v. *Superior Court*** (1995) 37 Cal.App.4th 1411, 1430; ***San Francisco Police Officers' Assn.* v. *Superior Court*** (1988) 202 Cal.App.3d 183, 189.) Moreover, "while the privilege against disclosure is held by both the individual officer and the police department [citation omitted], the statute gives the authority to waive a hearing only to the agency, and not to the individual officer." (***Michael* v. *Gates*** (1995) 38 Cal.App.4th 737, 744, citing to Evid. Code, § 1043(c).)

The officer would have a right to decline to provide any information as the privilege created by the ***Pitchess*** statutes "applies to both pretrial discovery and to live testimony." (***Fletcher* v. *Superior Court*** (2002) 100 Cal.App.4th 386, 403 citing to ***Hackett* v. *Superior Court*** (1993) 13 Cal.App.4th 96, 98 and ***City of San Diego* v. *Superior Court*** (1981) 136 Cal.App.3d 236, 239.)

Whether trying to obtain the information could be done by way of a ***Brady/Pitchess*** motion is debatable – especially if the department provides no other information. Assuming the fact an officer has been terminated or is currently on administrative leave is not itself protected information under the ***Pitchess*** statutes, prosecutors may want to front the information regarding termination so that a motion in limine preventing the defense from eliciting it on cross-examination may be heard.

K. Civil Suits

By Witness Against Defendant

If a victim or witness in a criminal case has filed a civil suit against the defendant, this is favorable evidence because it provides a potential motive to testify in a manner helpful to success in the civil suit. "Introduction of the existence of the civil suit in a criminal case is permissible 'to show the complainant's possible bias and interest in the outcome of the case.'" (***In re R.D***. (Pa. Super. Ct. 2012) 44 A.3d 657, 676.) However, "[t]he specific details of a lawsuit filed by a complainant are irrelevant to establishing

the complainant's bias or motive." (***Commonwealth* v. *Hanford*** (Pa. Super. Ct. 2007) 937 A.2d 1094, 1099

Against Witness

It is not unusual these days for officers to be sued in civil court for violations of a defendant's civil rights. These suits often allege the use of excessive force, violations of the Fourth Amendment, or violations of the due process clause. They may even be civil suit in which the officers are sued based on things having nothing to do with police work, i.e., a breach of contract. When can such suits be considered favorable evidence?

Setting aside the question of whether the fact a civil suit has been filed against an officer is in the possession of the prosecution team (**see** this outline, section I-8-D-i at pp. 114-115), the question of whether a civil suit is "favorable" evidence raises several sub-issues. First, is the mere fact a civil suit has been filed against an officer favorable evidence? Second, are the allegations as laid out in the complaint favorable evidence? Third, is a finding by the jury "against" the officer favorable evidence? Fourth, can the testimony introduced at the civil suit be favorable evidence?

The mere fact a civil suit has been filed seems of little value - akin to the claims of defendants at trial that an officer lied, which under ***People* v. *Jordan*** (2003) 108 Cal.App.4th 349, 362 are not favorable evidence. (**See** this outline, section I-3-I at p. 11.) Similarly, the fact that unsubstantiated allegations are made in the civil suit also seems akin to the "complaints" in ***People v. Jordan*** (2003) 108 Cal.App.4th 349. As noted in ***People* v. *Smith*** (NY 2016) 57 N.E.3d 53, "[t]he fact that a lawsuit has been commenced—like the fact of an arrest—has little to no probative value with regard to the officer's credibility." (**Id**. at p. 64.) And "defendants should not be permitted to ask a witness if he or she has been sued, if the case was settled (unless there was an admission of wrongdoing) or if the criminal charges related to the plaintiffs in those actions were dismissed. (**Id**. at p. 59.)

In ***People* v. *Coleman*** (Ill. 2002) 794 N.E.2d 275, the court cited a series of cases in support of its conclusion that "[m]ere evidence of a civil suit against an officer charging some breach of duty unrelated to the defendant's case is not admissible to impeach the officer." (**Id**. at p. 279.) However, the court in ***People* v. *Garrett*** (2014) 18 N.E.3d 722 [23 N.Y.3d 878] came to a different conclusion. There, the court addressed whether failure to disclose the fact a federal civil action had been brought against a homicide detective who interrogated defendant violated the ***Brady*** rule. (**Id**. at p. 880.) In the prior civil suit, the plaintiff claimed the homicide detective had coerced a confession by repeatedly striking the plaintiff in the head with a telephone book while he was handcuffed and physically forced him to sign a written confession. (**Id**. at p. 880.) The ***Garrett*** court found the suit was "favorable" evidence because it had an "impeachment character" that favored defendant's false confession theory. (**Id**. at p. 886.) However, the ***Garrett*** court did not find a ***Brady*** violation because the evidence was not held to be in the possession of the prosecution nor was it held to be material information.

Moreover, in ***People* v. *Smith*** (NY 2016) 57 N.E.3d 53, while the court stated the fact a civil suit has been filed is not relevant, it also stated, "subject to the trial court's discretion, defendants should be permitted to ask questions based on the specific allegations of the lawsuit if the allegations are relevant to the credibility of the witness." (**Id**. at p. 59.)

The question of whether a jury or court finding against an officer in a civil suit constitutes favorable evidence is an open question. The finding itself should be inadmissible for the same reasons that a judicial or administrative finding should be inadmissible. (**See** this outline, section I-3-J-i&ii at pp. 12-15.) But the underlying facts could potentially be favorable evidence and if a prosecutor ***is aware*** of a civil suit where the officer was *successfully* sued for engaging in conduct that bears on the officer's credibility or on a relevant character trait, then the safer course would be to treat it as favorable evidence.

> **Editor's note**: Presumably, facts could arise during testimony in a civil suit that bear on a witness's credibility that would not be reflected in the complaint filed. In those circumstances, even if the prosecutor were aware of the civil suit in general, there would not be a good reason for imputing knowledge of such testimony to the prosecution.

L. Civil Settlements

A civil settlement of a suit is not evidence that the defendant in the suit committed any wrongdoing. (**See *People* v. *Cumberworth*** (unreported) 2006 WL 3549939, at *4 ["Since settlement of a lawsuit does not establish the allegations of the complaint were true, settlement of a lawsuit cannot lead to a permissible inference of wrongdoing."].) Accordingly, the fact that a witness settled a suit alleging wrongdoing is not, *by itself*, exculpatory; **but see *People* v. *Muniz*** (1989) 213 Cal.App.3d 1508, 1515 [Evidence Code section 1152, which precludes admission of *offers* to compromise or furnish money to another who has sustained a loss or damage, is not applicable in criminal cases].)

M. Unfavorable Character Evidence of Prosecution Witnesses

If a prosecution witness has a character trait (or habit and custom) that would help bolster the defense case, this can be favorable evidence for the defense. For example, in a case in which the defendant is accused of battery on a police officer and is raising the defense that he acted in response to an officer's use of excessive force, evidence that the officer had a habit of using excessive force could be favorable evidence. (**See *People* v. *Sons*** (2008) 164 Cal.App.4th 90, 95, 99 [evidence that officer had nine complaints made against him for excessive force, verbal discourtesy, and profanity had a tendency in reason to bolster [defendant's] theory that the [officer] was overly aggressive and used excessive force in his encounter with [defendant]" and characterizing prosecutor's failure to disclose such evidence as "deplorable"]; ***Mellen* v. *Winn*** (9th Cir. 2018) 900 F.3d 1085, 1096 [evidence that sister of star witness called her "biggest liar she had ever met" was favorable evidence].)

N. Inaccuracy, Incompetency, or Mistakes of Witnesses

A witness' incompetence or bungling *in the charged case* undoubtedly constitutes favorable evidence.

In ***United States* v. *Howell*** (9th Cir. 2000) 231 F.3d 615, for example, an officer had mistakenly written in the police report that money was found on one defendant when in fact it was found on the other defendant. Despite the fact the correct information actually helped establish the complaining defendant's guilt, the court found the existence of the error was ***Brady*** material. The court reasoned that indications of conscientious police work will enhance probative force and slovenly work will diminish it. Thus, information that might raise opportunities to attack the thoroughness and good faith of the investigation can constitute exculpatory, material evidence. (**Id**. at p. 625, citing to ***Kyles* v. *Whitley*** (1995) 514 U.S. 419, 443, 446.)

Minor inaccuracies contained in a witness' statement – even in the charged case - may not be deemed "material" favorable evidence. (**See *People* v. *Padilla*** (1995) 11 Cal.4th 891, 929; **see also *State* v. *Sholes*** (La., 2007) 920 So.2d 212 [fact prior statements of witnesses to police contained slight inaccuracies in the witnesses' description of defendant's physical characteristics and omitted some narrative details offered by their trial testimony did not make reports material such that failure to disclose reports was ***Brady*** violation].)

However, whether incompetence or bungling on a *prior occasion unrelated to the charged case* will be held to be favorable (and/or material) evidence is another story. The answer will likely turn on whether the "sloppiness" in work involved an isolated mistake (or even a few isolated mistakes) or involved a pattern of sloppiness or mistakes rising to the level of a habit or character trait.

A *pattern* of mistakes is likely to be deemed favorable evidence but not a single isolated incident.

In ***People* v. *Garcia*** (1993) 17 Cal.App.4th 1169, a CHP accident reconstruction expert testified in defendant's case. After defendant's conviction, the prosecution learned that the expert was no longer being used because of faulty and improper calculations. This was brought to the attention of the local district attorney's office which did its own review of a dozen cases (albeit not defendant's case) where the expert had testified and located errors with respect to speed calculations in five of them. Although it was not clear whether the expert used the improper calculation in the defendant's case, the fact that the expert had used the wrong calculation in *other cases* was deemed exculpatory evidence in the defendant's case. (**Id**. at p.1180.)

In ***United States* v. *Olsen*** (9th Cir. 2013) 704 F.3d 1172, the court held information in a report that was generated as part of an internal investigation into a forensic scientist was favorable evidence that should have been disclosed. The investigation arose based on claims that, in previous cases, the scientist offered statistical conclusions regarding hair sample identifications that were not consistent with scientific principles and had substantially overstated the number of cases in which he had conducted

hair analyses. (**Id**. at p. 1179.) The internal report included several evaluations of the scientist's work by other experts, including forensic chemists who called into question the scientist's diligence and care in the laboratory, his understanding of the scientific principles about which he testified in court, and his credibility on the witness stand. The reviewing experts noted, among other things, the presence of unexplained contaminants in his laboratory. (**Id**. at pp. 1179-1180.) The Ninth Circuit found the peer evaluation was favorable to the defense for two reasons. First, it provided evidence the scientist's lab work was characterized by sloppiness and haste as it criticized the scientist for (i) his reliance on "speed and shortcuts," and (ii) for unaddressed contamination of laboratory materials and an inaccurate test. (**Id**. at p. 1181.) Second, the peer evaluation reported "small misstatements made in a number of testimonies," "a tendency for conclusions to become stronger as the case developed, from notes to written report to testimony," and testimony that was either unsupported by the data or outside the scientist's field of expertise. The Ninth Circuit held that while these findings largely bore on the scientist's willingness to offer unwarranted scientific conclusions, they also spoke to his "truthfulness on a more general level, by suggesting a proclivity to shade his testimony in favor of the government's case. As such, they could have been used to question the accuracy of his account about the care with which he examined [defendant's] items and thus call into question his credibility as a witness." (**Id**. at p. 1182.)

In ***Aguilar* v. *Woodford*** (9th Cir. 2013) 725 F.3d 970 [discussed in this outline, section I-7-G at p. 90] the court held the prosecution had a duty to disclose evidence in a pending case that a police scent dog had a history of mistaken identifications in past cases and those misidentifications had caused a court in a previous case to exclude handler testimony relating to a scent identification. The prior exclusion was based, in part, on the dog having identified two *different* men as the source of scent on a murder suspect's shirt four year earlier and on having identified someone as the perpetrator of a crime in another case where the person identified was in prison at the time the crime was committed. (**Id**. at pp. 980-982; **see also *State* v. *Davila*** (Wash. 2015) 357 P.3d 636 [fact criminalist fired after receiving poor evaluations for roughly five years and audit of work revealed errors in the vast majority of her cases was favorable evidence]; (***Adlof* v. *Civil Service Commission*** (unpublished) 2003 WL 535369, *7 [pattern of misrepresenting or mischaracterizing witness statement involving at least six cases would be admissible impeachment evidence if deputy called as a witness in future prosecutions].)

On the other hand, a single mistake on a past case should **not** be deemed favorable evidence. Otherwise, no person on earth could ever testify without being impeached. An isolated unintentional mistake cannot constitute conduct of moral turpitude, i.e., conduct that reveals dishonesty, a "general readiness to do evil," "bad character," or "moral depravity." (***People* v. *Castro*** (1985) 38 Cal.3d 301, 306.) Thus, it could not be used to impeach the credibility of the witness.

Moreover, a single mistake (or even several mistakes over the course of a career) hardly establishes a character trait; and even if making an isolated mistake *could* somehow qualify as evidence of a character trait, it still would be inadmissible. (**See** Evid. Code, §§ 1101(a) ["Except as provided in this section and

in section 1102, 1103, 1108 and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion"] and 1104 ["Except as provided in Sections 1102 and 1103, evidence of a trait of a person's character with respect to care or skill is inadmissible to prove the quality of his conduct on a specified occasion"]; California Law Revision Comment to Evidence Code section 1104 ["The purpose of the rule is to prevent collateral issues from consuming too much time and distracting the attention of the trier of fact from what was actually done on the particular occasion. Here, the slight probative value of the evidence balanced against the danger of confusion of issues, collateral inquiry, prejudice, and the like, warrants a fixed exclusionary rule."]; **see also *Commonwealth* v. *Cruz*** (2001) 53 Mass.App.Ct. 393, 407-408 [trial judge properly barred defense "from impeaching the prosecution's two medical experts with evidence of their alleged isolated mistakes or inconsistencies in wholly unrelated prior cases" as such evidence was, "under well-established principles, either legally irrelevant to the reliability of the experts' testimony here or, if marginally relevant, was excludable in the judge's discretion as an unduly time-consuming, collateral and confusing diversion"]; ***People* v. *Cacini*** (Ill. App. Ct. 2015) 45 N.E.3d 738, 757 [trial court properly declined to release allegations of misconduct from officer files where, inter alia, a "review of the nature of the complaints does not reveal a series of similar incidents spanning several years"]; **but see *People* v. *Baldenegro*** (unpublished) 2017 WL 1179453, *15 [finding 3 mistakes by criminalist over 10-year period relevant, albeit not material – discussed in greater depth in this outline, section I-3-N-I at p. 22].)

It goes without saying that evidence a witness has made a single or even several mistakes over the course of a career would not amount to "a consistent, semi-automatic response to a repeated situation" and thus could not qualify for admission as habit or custom evidence under Evidence Code section 1105. (**See *Bowen* v. *Ryan*** (2008) 163 Cal.App.4th 916, 926.)

(i) <u>Past Errors at Crime Labs (Not Necessarily by Testifying Criminalist)</u>

In ***Woods* v. *Sinclair*** (9th Cir. 2014) 764 F.3d 1109, a defendant claimed a violation of the ***Brady*** rule occurred because the prosecution failed to disclose a DNA laboratory's "general practice of peer review and destruction of erroneous draft reports" and that, in a different case, the analyst destroyed an erroneous report. The Ninth Circuit upheld a state court finding that the prosecution did *not* have a duty to disclose a DNA lab's general practices and procedures and that the "general practice of peer review and destruction of erroneous draft reports was not exculpatory material" in the defendant's case where the instances of having to redo an erroneous report had occurred less than ten times out of the thousands of "autorads th[e] lab has developed[,]" there was no evidence of such redo in defendant's case, and the analyst's mistake in the other case occurred *after* the analyst testified in defendant's case. (**Id**. at pp. 1126-1128.) The ***Sinclair*** court did, however, "recognize that destruction of a draft report that excluded a defendant as a match with a suspect's DNA would likely violate ***Brady*** in light of the report's impeachment value." (**Id**. at p. 1127.)

In ***People* v. *Cordova*** (2015) 62 Cal.4th 1042, the defense moved to obtain records from a private forensic laboratory that did DNA testing for law enforcement "documenting instances of contamination, also known as records of false positives or unintended transfers of DNA." (**Id**. at p. 121.) The prosecution and/or a member of the laboratory pointed out that such "misadventures" were rare, totaling about a dozen from over 1,000 cases (which all would have to be reviewed). In addition, it was pointed out the company's records involved requests from criminal defense attorneys (which might potentially disclose information unknown to the prosecution) and the laboratory would require "anyone who examined them to sign an agreement that the information would not be disclosed." (**Id**. at p. 121.) After several hearings on the discovery issue, the *trial court* denied the discovery request. It found that while the laboratory was part of the prosecution team regarding the testing done in the case before it, it was not part of the prosecution team regarding its testing in other cases. It found that the other tests were not readily accessible to the prosecution: ("the district attorney has no legal right and no ability to review those files or compel the laboratory in question, Forensic Science Associates, to produce them"). It also found that "the cost and labor involved in reviewing those files would be considerable." (**Id**. at p. 123.) Finally, it found "no showing has been made at this juncture, that any of such records of these other cases contain any exculpatory, or potentially exculpatory information," and that without such a showing, it was not prepared to order the production of any of the records at this point." (**Id**. at p. 122.) In the California Supreme Court, the defense claimed this was error and that the evidence of mistakes in other cases (and/or the fact the laboratory failed to keep the records sought) should have been disclosed pursuant to ***Brady*** and its progeny, as well as by the statutory discovery provisions. (**Id**. at p. 123.) Unfortunately, the California Supreme Court did "not decide (1) whether, in some other case, a defendant would be entitled to information of the kind sought here; (2) whether Forensic Science was part of the government team for all purposes; or (3) whether the court was correct in requiring defendant to subpoena the company directly." (**Id**. at p. 124.) Instead, they held the information sought "could not have been significantly exculpatory and was certainly not material in the ***Brady*** sense." (**Id**. at p. 124; **see also *Hampton* v. *State*** (Nev. 2013) [unpublished and unciteable] 2013 WL 485832, *1-*2 [Evidence forensics laboratory made a mistake in DNA analysis with respect to unrelated case involving another individual around the same time as defendant's DNA samples were being analyzed, and that the mistake led laboratory to reanalyze more than 200 cases was not material evidence under ***Brady*** even though jury may have given the DNA less weight if it had heard about error].)

In the unreported case of ***People* v. *Baldenegro*** (unpublished) 2017 WL 1179453, the defendant claimed the prosecution violated ***Brady*** by failing to disclose records from the crime lab documenting that (i) the testifying criminalist had failed to discover a discrepancy in another criminalist's report during her review of the other criminalist's report; (ii) another criminalist had found DNA from another female lab employee when testing a swab for DNA; and (iii) the testifying criminalist found the same female DNA in two cases, indicating "carry-over" contamination. (**Id**. at p. *13.) The appellate court upheld the conviction, finding the records not to be material since they "had minimal value in terms of

casting doubt upon the accuracy" the DNA analysis in this case before it; but did state that the evidence of the testifying criminalist's errors in performing DNA analysis was relevant impeachment evidence. (**Id**. at p. *15.)

O. Promises, Offers, Inducements

i. In General

The prosecutor has a duty to "disclose to the defense and jury any inducements made to a prosecution witness to testify and must also correct any false or misleading testimony by the witness relating to any inducements." (***People* v. *Masters*** (2016) 62 Cal.4th 1019, 1067; ***People* v. *Phillips*** (1985) 41 Cal.3d 29, 46; **see also *Maxwell* v. *Roe*** (9th Cir. 2011) 628 F.3d 486, 510 ["In general, ***Brady*** requires prosecutors to disclose any benefits that are given to a government informant, including any lenient treatment for pending cases."].) And there is a corresponding "duty to learn of any possible inducements made by law enforcement officers or other agents of the state." (***People* v. *Masters*** (2016) 62 Cal.4th 1019, 1067.)

This includes promises that are not express, but merely tacit or implied. (**See *Sivak* v. *Hardison*** (9th Cir. 2011) 658 F.3d 898, 910; **cf.**, ***United States* v. *Rodriguez*** (9th Cir. 2014) 766 F.3d 970, 988 [just because government initiated the process to reduce testifying witness' sentence on the same day the jury found defendants guilty does not establish promise was made].) Additionally, all inducements to an informant to testify must be disclosed to defense, *even if* the prosecutor is not aware of the inducement and it includes open-ended promises. (***In re Jackson*** (1992) 3 Cal.4th 578, 589-600.)

> **Editor's note**: FYI - It is improper to "offer a witness an inducement conditioned on the state's obtaining a conviction based on the witness's testimony," and "testimony elicited on the basis of such a condition may not properly be admitted at trial." (***In re Jackson*** (1992) 3 Cal.4th 578, 597.)

In ***Maxwell* v. *Roe*** (9th Cir. 2011) 628 F.3d 486, the Ninth Circuit held the prosecution had a duty not only to disclose the "deal" worked out between the defense attorney and the prosecution but also was required to disclose the fact the informant "pursued an additional benefit to himself—independent of and subsequent to the agreement worked out by his public defender[.]" (**Id**. at p. 510 [albeit noting it would also qualify as "***Brady***" material because it would have impeached the informant's contrary testimony at trial].)

In ***Phillips* v. *Ornoski*** (9th Cir. 2012) 673 F.3d 1168, the Ninth Circuit held there was a duty to disclose an offer being made to a witness in exchange for the witness' testimony – even though the offer was refused- where the witness testified she did not expect any benefit in exchange for her testimony under the theory the earlier offer would help establish she did, in fact, have good reason to expect leniency. (**Id**. at pp. 16-17.)

Any payments to witnesses qualify as favorable evidence. (**See *United States* v. *Sedaghaty*** (9th Cir. 2013) 728 F.3d 885, 898-899.) As does "an agreement to put in a good word" on behalf of a prosecution witness in a pending case. (***Doe* v. *Ayers*** (9th Cir. 2015) 782 F.3d 425, 433, fn. 12.)

Any agreement under which the informant provides information in exchange for efforts to keep him safe by maintaining him in county jail instead of returning him to state prison is favorable evidence. (***People* v. *Masters*** (2016) 62 Cal.4th 1019, 1067-1068.)

ii. Secret Deals

Deals in which the prosecution agrees with an attorney representing a testifying witness who is facing criminal charges to dismiss or reduce those charges with the understanding that the attorney is not to tell the witness of the agreement (i.e., so that the witness can truthfully state she is aware of no benefits being provided) are discoverable. The failure to disclose such an agreement not only may violate ***Brady*** but failure to correct the witness' testimony she is receiving no benefit may violate the rule laid out in ***Napue* v. *Illinois*** (1959) 360 U.S. 264 that the government is obligated to correct any evidence introduced at trial that it knows to be false. (**See *Phillips* v. *Ornoski*** (9th Cir. 2012) 673 F.3d 1168, 1182-1186; ***Hayes* v. *Brown*** (9th Cir.2005) 399 F.3d 972, 891-983; **see also *People* v. *Morris*** (1988) 46 Cal.3d 1, 32 [full disclosure of any agreement between the prosecution and a witness or witness' attorney required regardless of whether witness has been fully informed of the agreement].) In ***Phillips* v. *Woodford*** (2001) 267 F.3d 966, the court held a prosecutor's attempt to "insulate" the witness from being aware of negotiations between the witness' attorney and the prosecution was "deplorable." (**Id**. at p. 984.) The court also explained that an attorney who conceals from her client the existence of a plea bargain or immunity agreement, and allows her client to testify without any knowledge of the agreement she had reached on her behalf has plainly violated her ethical duty to keep the witness reasonably informed of significant developments regarding her case (Cal. Bus. and Prof. Code § 6068(m)), and her duty to explain the matter to the extent reasonably necessary to permit the witness to make informed decisions regarding her representation (Model Code of Professional Conduct Rule 1.4 (1983)). (**Id**. at p. 984, fn. 11; **see also *Shelton* v. *Marshall*** (9th Cir. 2015) 796 F.3d 1075, 1077 [***Brady*** violated by nondisclosure of aspect of plea agreement under which attorney for charged witness agreed not to seek competency evaluation of witness until after he testified for prosecution].)

iii. Security Arrangements and Relocation Expenses

Making arrangements to help protect the safety of a witness who has cooperated is not the type of benefit that necessarily must be disclosed under ***Brady***. (**See *People* v. *Curl*** (2009) 46 Cal.4th 339, 352-357.) However, if the witness has received monies in order to cover the relocation of the witness, this fact probably needs to be disclosed. (**See *People* v. *Verdugo*** (2010) 50 Cal.4th 263, 284-285; **see also *People* v. *Gray*** [unreported] 2013 WL 12072300, at *20; ***People* v. *Richards*** [unreported] 2012 WL 3726974, *13-*15 [indicating trial court properly ordered disclosure of financial benefits

witness received from California state witness protection program]; ***People* v. *Blackman*** (Ill. 2005) 836 N.E.2d 101, 107; ***White* v. *Steele*** (8th Cir. 2017) 853 F.3d 486, 492 [assuming without deciding that paying for one week at hotel and $1,000 to relocate had to be disclosed].)

iv. Victim Compensation

There are not a lot of cases discussing the prosecution's duty to disclose the fact that a victim is seeking compensation from the state. The issue was raised in ***Brown* v. *Gonzales*** (C.D. Cal. 2014) 2014 WL 8622753. In ***Brown***, the prosecutor's office, as required by law (**see** Cal. Gov't Code § 13962) notified three victims of defendant's sexual assaults that each of them was entitled to apply for reimbursement under California's victim's compensation fund for certain expenses, such as medical expenses and relocation expenses. The victims applied for and received some compensation for relocation costs, lost wages, medical treatment and mental health counseling. The prosecutor was unaware that any compensation had been paid out before trial since the fund "is run by a government entity separate from the prosecutor's office," the fund "plays no role in the investigation or prosecution of criminal suspects, and it does not notify the prosecutor's office when eligible crime victims apply for or receive compensation." (**Id**. at p. *12.) However, the information came to light after the jury reached its verdict, but before sentencing, when the trial court "asked the prosecutor to determine whether or not any restitution should be paid as a result of the criminal convictions" and "the prosecutor had someone in the prosecutor's office search the database of the government entity that runs the victims compensation fund." (**Ibid**.)

In both the state court of appeal and federal district court, the defendant claimed the requests constituted impeachment evidence, as it showed a motive for the victims who sought money under the fund to fabricate their allegations of sexual misconduct and the prosecutor violated ***Brady*** by failing to disclose this fact. (**Id**. at p. *12.) The state court of appeal held the information was not material and that the information was not in the prosecution's constructive possession until after the jury reached its verdict. (**Id**. at p. *13.)

The federal district court held that even if the prosecutor had constructive possession of the purportedly suppressed information, the *Brady* claim would fail for three reasons. First, the information was not "suppressed" because the information "was equally available to both the prosecutor and defense counsel." Because the prosecutor's office had nothing to do with the administration of the fund and was handled by a separate government agency with no ties to law enforcement or to the prosecution of defendant, "defense counsel could have inquired whether any victims sought any money under the fund just as easily as could have the prosecutor." (**Id**. at p. *13.) The federal district court discounted the fact the prosecutor's office advised the victims that they could seek funds as victims of a crime because "defense counsel undoubtedly was aware or should have been aware, the prosecutor had a legal obligation to inform the victims that they could seek money under the victims' fund." (**Ibid**.) Second,

there was no prejudice (i.e., the evidence was not material) since "[n]one of the victims inquired about receiving money from the victim's compensation fund. Rather, they were informed that they could seek funds by the prosecutor's office." (**Id**. at p. *14.) Thus, the jury would be disinclined to believe that the prospect of obtaining money from the fund motivated the three victims to come forward, especially "considering the relatively minor amounts of money that the victims sought under the state's compensation fund." (**Id**. at p. *14.) Moreover, "the money that the victims received from the state's victim compensation fund was not contingent on their willingness to testify at trial." (**Ibid**.) Thus, it would have little bearing on the witnesses' credibility. (**Ibid**.) Third, nothing in the record suggests that the jury's knowledge of the three witnesses' efforts to obtain money under the victims compensation fund would have undermined any critical aspect of the prosecution's case. (**Ibid** [and noting there was testimony "that at least one witness had, in fact, sought money under the state's fund"].) Technically, though, while the federal court came close to finding, it did not find the evidence was neutral or "unfavorable" evidence. (**See also *Commonwealth* v. *Torres*** (Mass. 2018) 98 N.E.3d 155, 162 [victim compensation not akin to inducement, or reward between the prosecutor and a witness because it is a government benefit program administered by an entity distinct from the district attorney's office].)

There is one federal case that articulated a theory under which such request would, at least, be deemed favorable (but not material) evidence – albeit where there was a closer connection between the prosecutor's office and the compensation fund. In ***Moore* v. *Marr*** (10th Cir. 2001) 254 F.3d 1235, the victim applied for just under $10,000 in victim compensation payments under Colorado law. He also applied for, and received, a $500 emergency payment. The program administering such payments was run with the help of the district attorney's office. The defense claimed this information was discoverable because the potential to receive victim compensation payments gave the victim a powerful incentive to paint himself as the victim, i.e., the victim could not collect the money unless he could show that the defendant attacked him and that defendant did not act in self-defense. (**Id**. at p. 1244.) The Tenth Circuit did not actually decide the question of whether such evidence was favorable because it found the evidence was not material and decided there was no ***Brady*** violation on that ground. However, the court did indicate that the evidence "may well have been 'favorable' within the meaning of ***Brady***" under the theory of relevance articulated by the defense. (**Id**. at p. 1244.) Additionally, the court found the evidence could be viewed as favorable under the theory that "introduction of [the victim's] application for emergency payments could have supported an assertion that [the victim] was in dire financial straits and thus had a greater incentive to vilify [the defendant]." (**Id**. at pp. 1244-1245.) The court rejected the idea that because a conviction was not necessary for victim compensation payments to be approved by the Board, the application was not favorable. In rejecting this idea, the court pointed out that the Board would not likely ignore the fact of an acquittal in making their determination of whether to dispense the funds while the victim's payment would likely be guaranteed in the event of a conviction. (**Id**. at p. 1245; **see also *Tears* v. *State*** (Tenn. Crim. App., 2013) Slip Copy, 2013 WL 6405734, *32 [finding no ***Brady*** violation for failure to disclose state victim compensation fund paid out $20,000 for

victim's hospital bills where defense counsel knew about it – but didn't ask about it because "*it would be unethical for me to try to paint it as he is being bribed by the State because that it not what it is*"].)

v. Witness Fees and Incidentals

If a witness or victim receives a witness fee for testifying in court or is reimbursed for gas or food to come to court, is that favorable evidence?

Minor witness fees or reimbursement are unlikely to ever be deemed "material" information for ***Brady*** purposes, but they are technically "favorable" evidence. (**See *United States* v. *Sipe*** (5th Cir. 2004) 388 F.3d 471, 488-489 [indicating evidence of witness fees and travel fees could show bias but were cumulative and thus immaterial under ***Brady***]; ***United States* v. *Wicker*** (5th Cir. 1991) 933 F.2d 284, 292-293 [finding evidence prosecution provided witness fees and paid for witness expenses constitutes impeachment evidence, but finding no ***Brady*** violation where the procedure for paying of witness fees was public information, the defense knew the government was paying for at least a portion of witness' expenses during trial, and no specific request for witness fee information was made by the defense].)

However, if the witness fee is statutorily mandated, then it is not even "favorable" evidence. (**See *United States* v. *Schneider*** (3d Cir. 2015) 801 F.3d 186, 202.)

vi. Witness is Informant

Certainly, if the witness acted as informant in the case in which the informant testified as a witness, this information is favorable evidence. For example, in ***Banks* v. *Dretke*** (2004) 540 U.S. 668, the High Court held that the fact that a witness was a paid informant *in the case against the defendant* was favorable evidence under ***Brady***. (**Id**. at p. 691; **see also *Gentry* v. *Sinclair*** (9th Cir. 2013) 705 F.3d 884, 905 [fact witness was a paid informant for the same county employing the detectives and prosecutors who investigated and prosecuted defendant has impeachment value].)

However, the fact that a witness has ***previously*** worked as an informant for law enforcement in other cases has also been viewed as favorable evidence – albeit not universally.

In ***People* v. *Kasim*** (1997) 56 Cal.App.4th 1360, the court held that evidence that a witness had previously received benefits for cooperating with law enforcement in *other* cases was discoverable. (**Id**. at pp. 1381-1382; **see also *Kennedy* v. *Superior Court*** (2006) 145 Cal.App.4th 359, 380 [holding evidence witness had habit of snitching in exchange for leniency and other benefits could be relevant to impeach witness]; ***Mellen* v. *Winn*** (9th Cir. 2018) 900 F.3d 1085, 1099 [likely ***Brady*** violated by failure to obtain and review star witness' status as an informant with other local law-enforcement agencies prior to trial, particularly where witness had previously disclosed she had helped another detective with a different homicide investigation; and defense counsel specifically questioned whether

witness was a paid informant]; ***United States* v. *Si*** (9th Cir. 2003) 343 F.3d 1116, 1123 [reports about witness' *ongoing* informant status in unrelated cases favorable, albeit not material, evidence] ***United States* v. *Rodriguez*** (9th Cir. 2014) 766 F.3d 970, 989 ["it is arguable that the government was required to disclose" that the witness served as a DEA informant]; ***People* v. *Jones*** (unpublished) 2015 WL 5062483, at *6 [witness' prior work as informant was favorable but not material]; ***United States* v. *Lopez-Rivas*** (unpublished) 2015 WL 3957777, *1 [confidential informant's former unrelated work as a paid informant for DEA was favorable, but not material evidence]; ***State* v. *Williams*** (Md. 2006) 896 A.2d 973, 976, 993-994 [***Brady*** violated where it was never disclosed a prosecution witness had been a long-time paid registered informant with his own confidential informant number and had previously cooperated with the State Attorney's Office in a number of cases - even though neither the prosecutor handling the charged case nor the homicide detective who handled the case was aware of witness' status as informant; albeit there was also evidence witness had made efforts *on his own* to obtain leniency in pending criminal cases based on his cooperation in the charged case].)

In ***Maxwell* v. *Roe*** (9th Cir. 2011) 628 F.3d 486, the court held the prosecution should have disclosed a testifying witness's *prior* work as a police informant – even though the witness *was revealed* as having provided information in the pending case – where fact the witness was experienced and "sophisticated" would have undermined a contrary impression created by the informant. (**Id**. at pp. 511-512.)

In ***Benn* v. *Lambert*** (9th Cir. 2002) 283 F.3d 1040, the court held the defense was entitled to any evidence that the police knowingly allowed the informant-witness to continually use drugs while acting as an informant since this constituted a benefit that would have provided the witness with a motive to provide the prosecution with inculpatory information, even if he had to fabricate it. (**Id**. at p. 1056.)

In ***People* v. *Wright*** (NY 1995) 658 N.E.2d 1009, a female defendant was charged with assaulting a male victim. Which person instigated the assault was in dispute. The arresting detectives initially confirmed some aspects of the defendant's account but at trial supported the victim's version. The court held that the failure to disclose that the male victim had been a police informant on prior occasions with the same police department employing the detectives violated the ***Brady*** rule because it could have provided the jury with a motive for the police detectives to favor the victim over defendant and explain why the detectives switched to a version of the facts that supported the victim's story in all aspects. (**Id**. at p. 138.)

<u>Moreover, the fact a witness has acted as an informant has not been viewed as "favorable" evidence where there is no indication the informant is testifying to curry favor</u>.

In ***Gibson* v. *Commissioner of Correction*** (Conn. App. Ct. 2012) 41 A.3d 700, the court held the fact an eyewitness to a shooting acted as a paid informant in unrelated cases did not tend to show that she had a bias in the state's favor or a motive to testify falsely on the state's behalf where there was no evidence she was financially compensated for the information that she provided in connection with this

case or that she obtained any other type of consideration for her cooperation with the police in relation to the shooting incident. The court held the fact the witness' status as an informant could be used to show it was to her advantage to provide helpful information to the police was "at best, marginally favorable" to the defendant. (**Id**. at pp. 709-710.)

In ***United States* v. *Hamaker*** (11th Cir.2006) 455 F.3d 1316, the court held any error in a court's failure to require government in bank fraud prosecution to make prior disclosure of a witness' status as confidential informant in unrelated narcotics prosecution did not prejudice defendants and did not warrant new trial because: (i) the witness' status was "at best marginal impeachment evidence" rather than exculpatory evidence; (ii) the witness had no pending criminal charges and was not at risk of being prosecuted in instant case; (iii) the witness' past criminal record was disclosed and formed the basis for impeachment at trial; (iv) the trial court gave a cautionary instruction after the witness' status was discovered mid-trial; and (v) the witness was only minor witness for government. (**Id**. at p. 1328.)

Editor's note: Arguably this case only holds the evidence was not material.

In ***People* v. *Mauro*** (NY 1996) 167 Misc.2d 951, the court held a witness' status as police informant years prior to the charged offense was not favorable or material to defendant's case where: (i) the witness was a percipient witness to a shooting; (ii) there was no cooperation agreement between the police and the witness to induce his testimony at the *defendant*'s trial; (iii) the prior relationship between police detectives and witness was not favorable to defendant since the motive to lie or the bias of the detectives was not at issue (the crucial issue in case was identity); (iv) other witnesses corroborated the witness' testimony; and (v) even though jury was not informed that witness was informant as quid pro quo for obtaining more lenient sentence, the underlying acts of witness' prior charged crime was presented to the jury. (**Id**. at pp. 954-955.)

Finally, failure to disclose the fact a witness has worked in other cases as an informant will not always be *material* evidence.

In ***Payton* v. *Cullen*** (9th Cir. 2011) 658 F.3d 890, the court held that evidence a witness (who testified about statements made by the defendant) had been working as a "government agent" for the police at the time he spoke with the defendant was "helpful" impeachment, especially considering the witness denied working for any law enforcement agency during that time frame when he testified. However, the Ninth Circuit held the failure to disclose this information did not rise to the level of a ***Brady*** violation since: (i) the witness was not working as a government agent in defendant's case nor specifically at the precise moment he spoke with the defendant; (ii) the jury knew about the witness' felony convictions and plea agreement for testifying; and the information provided by the informant was somewhat cumulative. (**Id**. at pp. 895-896; **see also *United States* v. *Wright*** (8th Cir. 2017) 866 F.3d 899, 909-910 [failure to disclose impeachment evidence regarding four witnesses' cooperation with police in unrelated cases prior to defendant's trial did not violate ***Brady***, since evidence was not material].) ***People* v. *Sibadan***

(N.Y. App. Div. 1998) 240 A.D.2d 30, 35 [where there was no evidence witness was promised anything for his previous cooperation with the police in exchange for cooperating in the case against defendant, but it was disclosed witness was given favorable plea agreement in exchange, no ***Brady*** violation in failure to disclose prior informant status].)

IMPORTANT POINT: Because a witness' status and identity as an informant is protected by the official information privilege (Evid. Code, §§ 1040, 1041), before releasing this information to the defense, a prosecutor must first go in camera and have a judge decide whether, and how much, information regarding the witness' history as an informant should be disclosed. It is **not necessary** to provide the specifics of the past cases. (**See *United States* v. *Si*** (9th Cir. 2003) 343 F.3d 1116, 1122-1123.)

INFORMANT BANKS: For a general discussion of whether the duty to disclose the informant status of a witness requires establishing informant banks, **see** this outline, section XXV-1 at pp. 393-396.

vii. Witness is a Jailhouse Informant

There is a special statute in California relating to jailhouse informants that requires, inter alia, the prosecution to provide "a written statement setting out any and all consideration promised to, or received by, the in-custody informant" to "the defendant or the defendant's attorney prior to trial and the information contained in the statement shall be subject to rules of evidence." (Pen. Code, § 1127a(c).) The statute defines an "in-custody informant" as "a person, other than a codefendant, percipient witness, accomplice, or coconspirator whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution." (Pen. Code, § 1127a(a).)

> **Editor's note**: Attempts to amend the statute to require additional information be provided in a manner unnecessary, onerous, and dangerous have so far been unsuccessful. (**See** AB 359 [2017-2018 Legislative Session].) Expect additional attempts to require more discovery in a manner necessitating the creation of informant banks in the future.

viii. Grants of Immunity

Any grant of immunity to a witness in exchange for testifying is favorable evidence. (**See *Horton* v. *Mayle*** (9th Cir. 2005) 408 F.3d 570, 578-582 [***Brady*** violated by failure to disclose a deal between the police and the witness whereby witness agreed to testify as the prosecution's star witness in exchange for immunity for anything he did on the weekend of the murder]; ***LaCaze* v. *Warden Louisiana Correctional Institute*** (5th Cir. 2011) 645 F.3d 728 , 735-736 [fact witness requested *son* not be prosecuted, and received assurance his son would not be prosecuted, was ***Brady*** material]; ***Smith* v. *State*** (Md. Ct. Spec. App. 2017) 165 A.3d 561, 590 [request of witness for dismissal of charges against her grandson was favorable impeachment evidence].)

Even an informal grant of immunity (i.e., an informal promise from the government that a witness would not be prosecuted if the witness cooperated) is favorable evidence. (**See e.g.**, ***United States* v. *Mazzarella*** (9th Cir. 2015) 784 F.3d 532, 536, 538.)

ix. Negotiations With Nontestifying Codefendants

The fact that the prosecution has entered into negotiations with a non-testifying codefendant is not, without more, exculpatory. (***United States* v. *Inzunza*** (9th Cir. 2011) 638 F.3d 1006, 1021.) (**See** this outline, section XXV-2 at pp. 397-400 [discussing a prosecutor's discovery obligations when it comes to statements or proffers by cooperating witnesses or co-defendants who wish to turn state's evidence.)

x. Unsuccessful Attempts to Get Benefits

Indeed, even if a witness was unsuccessful in the attempt to get benefits in return for testimony, the fact the witness even made the attempt is "favorable" evidence. (**See *Wearry* v. *Cain*** (2016) 136 S.Ct. 1002, 1007 [citing to ***Napue* v. *Illinois*** (1959) 360 U.S. 264, 270 for the proposition that "even though the State had made no binding promises, a witness' *attempt* to obtain a deal before testifying was material because the jury "might well have concluded that [the witness] had fabricated testimony in order to curry the [prosecution's] favor"]; **accord *People* v. *Dickey*** (2005) 35 Cal.4th 884, 907-909; ***LaCaze* v. *Warden Louisiana Correctional Institute*** (5th Cir. 2011) 645 F.3d 728, 736; **see also *United States* v. *Mazzarella*** (9th Cir. 2015) 784 F.3d 532, 536 [witness' e-mail indicating that she might wish to work for the FBI one day, and asking the agent to keep an eye out for job openings in the local field office" could be used to undercut witness' credibility even though the statement "may have been a literal hope or a casual joke"].)

However, if the *prosecution* offers a plea deal to the witness and the witness rejects the offer, this is probably not discoverable. "***Giglio*** does not require disclosure of rejected plea offers; the duty to disclose is dependent upon the existence of an agreement between the witness and the government." (***White* v. *Steele*** (8th Cir. 2017) 853 F.3d 486, 491-492; ***United States* v. *Rushing*** (8th Cir. 2004) 388 F.3d 1153, 1158; **accord *Collier* v. *Davis*** (7th Cir.2002) 301 F.3d 843, 849–50; ***Alderman* v. *Zant*** (11th Cir.1994) 22 F.3d 1541, 1555.)

> **Editor's note**: What if the defense attorney asks the prosecution for an offer of a defendant cum potential witness (without consulting with the defendant beforehand) and the prosecution then comes back with an offer which the defendant cum potential witness declines? Discoverable? If the defense counsel is viewed as an agent of the defendant in this context, then it might be. (**But see *United States* v. *Inzunza*** (9th Cir. 2011) 638 F.3d 1006, 1021 ["The fact that the prosecution has entered into negotiations with a non-testifying codefendant is not, without more, exculpatory."]

P. Criminal and Noncriminal Misconduct Involving Moral Turpitude

A comprehensive list of all the crimes held to involve moral turpitude (or not to involve moral turpitude) is included as a separate handout entitled "LIST OF CRIMES THAT HAVE BEEN HELD TO INVOLVE MORAL TURPITUDE" (February 11, 2019 version)

i. Impeachment With Felony Convictions Involving Moral Turpitude

Evidence Code section 788 specifically allows a witness to be impeached with prior felony convictions. Case law has required that the conviction involve a crime of moral turpitude. (***People* v. *Castro*** (1985) 38 Cal.3d 301, 314-316.) A felony conviction of moral turpitude may still be excluded, however, pursuant to Evidence Code section 352. (***People* v. *Castro*** (1985) 38 Cal.3d 301, 317.) Moreover, the prior conviction may be challenged on the ground it is an invalid conviction. "[T]he use of a constitutionally invalid prior conviction to impeach testimonial credibility is improper, and that to allow such impeachment is error under California law." (***People* v. *Trujeque*** (2015) 61 Cal.4th 227, 279.)

ii. Impeachment with Conduct *Underlying* Felony Conviction

Generally, if a defendant is being impeached with a prior felony conviction, the scope of inquiry "does not extend to the facts of the underlying offense." (***People* v. *Gutierrez*** (2018) 28 Cal.App.5th 85, 88; ***People* v. *Shea*** (1995) 39 Cal.App.4th 1257, 1267.) "Evidence of prior felony convictions offered for this purpose is restricted to the name or type of crime and the date and place of conviction." (***People* v. *Allen*** (1986) 42 Cal.3d 1222, 1270; ***People* v. *Gutierrez*** (2018) 28 Cal.App.5th 85, 88.) Although, it has long been the rule that inquiry can extend to the underlying facts *if* "the witness has first attempted to mislead the jury or minimize the facts of the prior offense." (***People* v. *Ardoin*** (2011) 196 Cal.App.4th 102, 120 [citing cases].)

In 1982, voters passed Proposition 8, which enacted article I, section 28 of the California Constitution. The "Right to Truth in Evidence" provision of Proposition 8, currently codified as subdivision (f)(2), provides in pertinent part that "relevant evidence shall not be excluded in any criminal proceeding." And subdivision (f)(4) of section 28 allows prior felony convictions to "be used without limitation for purposes of impeachment." (Cal. Const., art. I, § 28, subd. (f)(4).) Based on Proposition 8, the California Supreme Court in ***People* v. *Wheeler*** (1992) 4 Cal.4th 284 held a witness or defendant could be impeached with misconduct that did not result in a felony conviction. "The inescapable conclusion [of the holding in ***Wheeler***] is that now, the conduct underlying a felony conviction is admissible when it is relevant to impeach a witness, unless the trial court finds that it is more prejudicial than probative." (***People* v. *Gutierrez*** (2018) 28 Cal.App.5th 85, 89.) Although ***Wheeler*** involved a misdemeanor conviction that had been offered for impeachment, the rationale given for allowing the underlying conduct to be used for impeachment had nothing to do with the fact the underlying act involved *misdemeanor* misconduct as opposed to felony misconduct. The holding of the court was that courts

had broad discretion to admit or exclude "acts of dishonesty or moral turpitude" relevant to impeachment. (**Id**. at p. 288.) The court did not state nor imply that the conduct involved had to be misdemeanor conduct.

Nevertheless, even post-***Wheeler***, case have held "that the facts and circumstances underlying prior offenses are inadmissible for impeachment purposes, unless the witness has first attempted to mislead the jury or minimize the facts of the prior offense." (***People* v. *Ardoin*** (2011) 196 Cal.App.4th 102, 120 [citing cases].)

In ***People* v. *Smith*** (2003) 30 Cal.4th 581, the California Supreme Court left open the question of whether the pre-***Wheeler*** rule still applied to prevent impeachment with the conduct underlying a felony conviction absent equivocation by the witness. (**Id**. at p. 635; **see also *People* v. *Ardoin*** (2011) 196 Cal.App.4th 102, 120 [noting issue was open but finding such evidence still subject to section 352].) In ***People* v. *Clark*** (2011) 52 Cal.4th 856, the California Supreme Court stated—citing ***Wheeler*** and the Truth-in-Evidence provision—"A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court's exercise of discretion under Evidence Code section 352." (**Id**. at p. 931.) Moreover, the California Supreme Court stated in ***People* v. *Contreras*** (2013) 58 Cal.4th 123: "the law provides that *any criminal act or other misconduct* involving moral turpitude suggests a willingness to lie and is not necessarily irrelevant or inadmissible for impeachment purposes." (**Id**. at p. 157, fn. 24, emphasis added.) However, in ***People* v. *Casares*** (2016) 62 Cal.4th 808, the California Supreme Court stated: "Under California law, the right to cross-examine or impeach the credibility of a witness concerning a felony conviction does not extend to the facts underlying the offense." (**Id**. at p. 830.)

In ***People* v. *Gutierrez*** (2018) 28 Cal.App.5th 85, the appellate court got the chance to clear up some of the confusion. In that case, the trial court allowed impeachment with a felony evading conviction involving a stolen car and also permitted the prosecutor to ask, "isn't it true you took a vehicle ... without the owner's permission." (**Id**. at pp. 87-88.) On appeal, the defendant argued this question constituted improper impeachment with the conduct underlying the felony conviction, citing to ***People* v. *Casares*** (2016) 62 Cal.4th 808, 830.) However, the ***Gutierrez*** court held the statement in ***Casares*** was dictum and was inconsistent with the California Supreme Court's decisions in ***Wheeler*** and ***Clark***. (***Gutierrez*** at p. 90.)

The ***Gutierrez*** court recognized "that when a prior felony conviction has been introduced to impeach, ***ordinarily*** the trial court should exclude evidence of the underlying conduct." (**Id**. at p. 90.) This is because in "many instances, the conduct underlying a felony adds nothing to the probative value of the felony, while at the same time it increases the prejudicial effect." (**Ibid** [and noting that "in these situations—. . . the Truth-in-Evidence provision, which expressly preserves Evidence Code section 352, does not change this outcome].) For example, the fact that a murder was committed with a knife (as in

Casares) would have no "additional bearing on" whether the defendant "might lie on the stand" beyond what the mere fact of the prior conviction for murder would establish yet it "would tend to repulse the jury and [] taint its evaluation of his testimony." (**Ibid**.) Similarly, "the bare fact that a witness has a prior conviction for robbery is sufficient to show dishonesty. Additional details—e.g., regarding the nature of the force or fear involved or the nature of the property taken—are likely to be more prejudicial than probative." (**Ibid**.)

However, the ***Gutierrez*** court went on to hold that where, as in the case before it, "the conduct underlying the felony added significant probative value" it is admissible. The court observed that while the prior felony conviction for evading a police officer in violation of Vehicle Code section 2800.2 is a crime of moral turpitude, that crime "does not particularly show dishonesty" whereas "[t]he underlying fact that defendant took a car without the owner's consent substantially augmented the showing of dishonesty." (**Id**. at pp. 90-91.) The court also rejected the argument it should have been excluded under section 352 - notwithstanding defendant's contention it was not that probative because he had also been impeached with a robbery conviction. (**Id**. at p. 91.)

In light of ***Gutierrez***, the **bottom line** for prosecutorial ***discovery*** purposes is that in some cases the underlying circumstances may be more favorable than the fact of the mere conviction and, *if* providing the defendant with simply the fact of the conviction *would not allow* the defendant to discover the underlying facts probative on the witness's credibility, the prosecution may have a duty to disclose the underlying police reports (or at least provide enough information to the defense to find these reports). Similarly, if a defendant was arrested or charged with a crime of moral turpitude, but only pled to a crime that did not involve moral turpitude, the prosecutor should probably disclose the arrest or charges.

iii. Impeachment with Misdemeanor Convictions Involving Moral Turpitude or Conduct Underlying Misdemeanor Convictions Involving Moral Turpitude

Once upon a time the law prevented a witness from being impeached with a misdemeanor conviction. This was based on the notion that, unlike with a felony conviction (which is specifically admissible as an exception to the hearsay rule pursuant to Evidence Code section 788), there was no hearsay exception for misdemeanor convictions. In 1992, however, the California Supreme Court in ***People* v. *Wheeler*** (1992) 4 Cal.4th 284 held that, in light of Proposition 8, a witness could be impeached with ***conduct*** involving moral turpitude even if it did not result in a felony conviction (**see above**). Nevertheless, the ***Wheeler*** court stuck to the position that *the fact of the conviction* of a misdemeanor remains inadmissible under traditional hearsay rules when offered to prove that the witness committed misconduct bearing on his or her truthfulness. (**Id**. at p. 288.) Ten years later, in ***People* v. *Duran*** (2002) 97 Cal.App.4th 1448, an appellate court concluded that Evidence Code § 452.5(b), which was enacted after ***Wheeler***, created "a new hearsay exception for certified official court records of conviction, which may be offered to prove not only the fact of conviction, but the commission of the underlying offense." (**Id**. at p. 1460; **accord *People* v. *Rauen*** (2011) 201 Cal.App.4th 421, 425-427

[regardless of whether plea is no contest]; ***People* v. *Wesson*** (2006) 138 Cal.App.4th 959, 968; ***People* v. *Lopez*** (2005) 129 Cal.App.4th 1508, 1522, fn. 8; **see also *People* v. *Cadogan*** (2009) 173 Cal.App.4th 1502, 1507, 1514-1515 [concurring in ***Duran***'s interpretation of section 452.5 but finding it improper to ask defendant if he had been convicted].) Note, however, that "to the extent such misconduct amounts to a misdemeanor . . ., it carries less weight in proving lax moral character and dishonesty than does either an act or conviction involving a felony." (***People* v. *Contreras*** (2013) 58 Cal.4th 123, 157, fn. 24.)

iv. Impeachment with Juvenile Adjudications or Conduct Underlying Juvenile Adjudications Involving Moral Turpitude

In ***People* v. *Lee*** (1994) 28 Cal.App.4th 1724 the court held, "under ***Wheeler***, at least in cases which do not fall under Welfare and Institutions Code section 1772, the prosecution may introduce prior conduct evincing moral turpitude even if such conduct was the subject of a juvenile adjudication, subject, of course, to the restrictions imposed under Evidence Code section 352 and other applicable evidentiary limitations." (**Id**. at p. 1740; **see also *People* v. *Bedolla*** (2018) 28 Cal.App.5th 535, 550 [criminal conduct that was the subject of a juvenile adjudication admissible to impeach].)

A juvenile adjudication no less than a misdemeanor conviction is hearsay if offered to prove the underlying circumstances. But Evidence Code § 452.5(b) (**see** this outline, section I-3-P-iii at pp. 34-35), allowing for "certified official court records of *conviction*" to prove the commission of the underlying crime, cannot be used as an easy work around because it does not apply to juvenile adjudications as juvenile adjudications are not convictions. (**See *People* v. *Sanchez*** (1985) 170 Cal.App.3d 216, 218 ["juvenile's delinquency may consist of felony activity, but an adjudication as such is not a felony conviction"], emphasis added.) Proof of the underlying conduct will be required although an admission to truth of the allegations in the prior juvenile case should also suffice. (But see

v. Impeachment With Criminal Conduct Involving Moral Turpitude *Not* Resulting in Felony or Misdemeanor Conviction

In ***People* v. *Wheeler*** (1992) 4 Cal.4th 284, the California Supreme Court held that Proposition 8, the "Truth in Evidence" amendment to the California Constitution (Cal. Const., art. I, § 28(d)) abrogated the rule that felony convictions are the only form of conduct evidence admissible to impeach the credibility of a witness (**see** Evid. Code, §§ 787, 788). (**Id**. at p. 292.) Instead, the ***Wheeler*** court held Proposition 8 gave "criminal courts broad discretion to admit or exclude ***acts*** of dishonesty or moral turpitude 'relevant to impeachment[.]'" (**Id**. at p. 288; ***People* v. *Doolin*** (2009) 45 Cal.4th 390, 443 emphasis added; **see also *People* v. *Harris*** (2005) 37 Cal.4th 310, 337 ["[p]ast criminal *conduct* involving moral turpitude . . . is admissible to impeach, subject to the court's discretion under Evidence Code section 352"]; ***City of Los Angeles* v. *Superior Court*** (2002) 29 Cal.4th 1, 21 ["nonfelony *conduct* involving moral turpitude is admissible to impeach a witness"]; this outline, section I-3-P-ii, pp. 32-33.)

vi. Impeachment with Noncriminal Conduct of Moral Turpitude

Witnesses may be impeached with conduct that may not even be a crime. (**See *People* v. *Contreras*** (2013) 58 Cal.4th 123, 157, fn. 24; ***People* v. *Clark*** (2011) 52 Cal.4th 856, 930-933 [defendant properly impeached with his own admissions that he feigned a suicide attempt in a juvenile detention facility, that he traveled around the country without paying for transportation, sometimes by robbing people, and that he made false statements to gain admission to the psychiatric unit of a county medical center]; ***People* v. *Ayala*** (2000) 23 Cal.4th 225, 273 [proper to allow impeachment with fact witness had lied to prison officials for years about membership in gang to obtain transfer from one prison to another]; ***People* v. *Chan*** (2005) 128 Cal.App.4th 408, 418 [false statement to police regarding actual address by 290 registrant is conduct involving moral turpitude and available for impeachment]; ***People* v. *Rivera*** (2003) 107 Cal.App.4th 1374, 1380 ["Immoral conduct is admissible for impeachment even . . . if the conduct did not constitute a criminal offense"]; ***People* v. *Lepolo*** (1997) 55 Cal.App.4th 85, 90 [in deciding to allow misconduct for impeachment it is not important that the specific crime be designated]; **see also *Gentry* v. *Sinclair*** (9th Cir. 2013) 705 F.3d 884, 905 [officer could have been impeached with fact he had lied to obtain search warrants in other cases].) Note, however, that "to the extent such misconduct amounts to a misdemeanor ***or is not criminal in nature*** it carries less weight in proving lax moral character and dishonesty than does either an act or conviction involving a felony." (***People* v. *Contreras*** (2013) 58 Cal.4th 123, 157, fn. 24, emphasis added.)

Editor's note: When impeachment evidence does not result in a conviction ***and is disputed***, courts rarely admit it – even when the prior evidence suggests the witness might have committed perjury. (**See *People* v. *Lucas*** (2014) 60 Cal.4th 153, 239-242 [upholding exclusion of evidence that detectives had allegedly violated a suspect's ***Miranda*** rights, gave misleading testimony about the ***Miranda*** violation, and gave false testimony in another unrelated case based on traditional section 352 concerns, including that evidence would "take weeks" to put on and one of the detectives was actually going to be called as a *defense* witness]; ***People* v. *Suff*** (2014) 58 Cal.4th 1013, 1065 [upholding exclusion of evidence that lead detective in serial killer case was indicted for multiple crimes involving moral turpitude and had been terminated from the police department where, inter alia, the detective had not yet been tried, there were proof problems (including that the primary witness against the detective had died) and multiple witnesses would be required]; ***People* v. *Sapp*** (2003) 31 Cal.4th 240, 289 [preventing cross-examination at penalty phase of prosecution expert about the fact that he had earlier been charged with 43 counts of Medi–Cal fraud where counts were dismissed four years earlier after expert prevailed in a motion to suppress and remaining evidence was insufficient – even though in another case, where cross-examination on issue was allowed, expert's testimony was stricken because he refused to answer questions about crimes]; ***People* v. *Dement*** (2011) 53 Cal.4th 1, 51 [in case where defense attempted to impeach a witness who had previously been convicted of murder with the fact that when the witness testified in the prior murder case he offered testimony blaming another person for the murder but later accepted full responsibility for the murder, trial court acted properly in allowing witness to be impeached with murder but refusing to allow any reference to the witness changing his story after being convicted because, inter alia, it was not apparent that the witness' "testimony in his murder trial was false, as opposed to his later statements to prison personnel"]; ***People* v. *DeSantis*** (1992) 2 Cal.4th 1198, 1226–1227 [upholding trial court's refusal to allow a witness to be impeached with fact that in prior unrelated case the witness testified he'd been told by the prosecutor to leave out certain portions of his story while testifying and did so at first but then, on cross-examination, acknowledged his "perjury" and volunteered to the court that his testimony had not been the whole truth because, inter alia, it was questionable whether perjury had actually occurred (the record most strongly suggested that the witness—who appeared to be an unsophisticated and artless individual—was simply told by the prosecution before the prior proceeding to avoid certain areas of testimony and focus on others) and because the underlying circumstances may have even added to the witness' credibility]; ***People* v. *Jennings*** (1991) 53 Cal.3d 334, 371 [upholding trial court's refusal to allow prosecution witnesses to be impeached with the fact they hadn't revealed their income as prostitutes when applying for county welfare benefit under oath because, inter alia, one witness told the prosecutor she would invoke her Fifth Amendment rights if asked about it and because the prosecutor said the other was not receiving county assistance at the relevant times in question].)

a. Adultery

Is adultery conduct involving moral turpitude that may be used to impeach? At one time, adultery (in conjunction with cohabitation) was considered a crime in California. (**See e.g**., former Pen. Code, § 269a; ***People* v. *Collins*** (1917) 35 Cal.App. 175.) Moreover, is there really much significant difference between in engaging in an act of prostitution (**see *People* v. *Chandler*** (1997) 56 Cal.App.4th 703, 708 ["Evidence the victim participated in a form of prostitution is conduct involving moral turpitude which is admissible for impeachment"]) and engaging in adultery?

However, adultery it is no longer considered criminal conduct. Penal Code section 269a was repealed in 1975. And unless the adultery has bearing on a witness's motive or bias or is otherwise relevant (**see e.g**., ***People* v. *Houston*** (2005) 130 Cal.App.4th 279, 307 [evidence of extramarital affairs relevant to motive in murder case]; ***Winfred D.* v. *Michelin North America, Inc***. (2008) 165 Cal.App.4th 1011, 1026 ["an extramarital affair may be admissible where it has a connection to a substantive issue and goes to motive"]), past incidents of adultery are generally not considered to have probative value on a witness's credibility. As pointed out in ***Winfred D.* v. *Michelin North America, Inc.*** (2008) 165 Cal.App.4th 1011: "Ordinarily, evidence of marital infidelity would be inadmissible on grounds that it lacks relevance and amounts to a 'smear' upon the [witness's] character" . . . , and "its inflammatory nature far outweigh[s] any probative value . . ." (**Id**. at p. 1026.) "Just as evidence of a woman's unchaste behavior is no longer admissible on the issue of credibility unless it tends to show bias—for example, if she had an intimate relationship with a party or witness [citations omitted] —neither is evidence of a man's sexual conduct [citations omitted]." (**Id**. at p. 1034.) "Further, a 'witness may have a strong reason to lie [about illicit, intimate relationships]" . . . such that he 'may not [be] cross-examine [d] ... upon [that] collateral matter [] for the purpose of eliciting something to be contradicted'." (**Ibid**.)

Accordingly, evidence that a witness has engaged in adulterous conduct is not discoverable insofar as it bears on credibility alone. (**See *Winfred D.* v. *Michelin North America, Inc***. (2008) 165 Cal.App.4th 1011, 1026; ***People* v. *Monreal*** (1907) 7 Cal.App. 37, 38 [upholding refusal of trial court to admit "testimony tending to show that a witness had been guilty of adultery shortly before offering herself as a witness" as a result of "the acts not bearing upon the matter in issue"]; ***State* v. *Moses*** (1999) 143 N.H. 461, 465 [an adulterer may be a competent witness and may not be impeached on cross-examination based solely on the existence of an adulterous relationship when the relationship is collateral to the charged crimes and citing several cases in support of the proposition that "[c]ross-examining a witness about marital infidelities, whether committed with the defendant or another, is generally not a proper basis for impeachment"]; ***Hill* v. *State*** (Tex. Crim. App. 1980) 608 S.W.2d 932, 935 ["we fail to see how the allegation of adultery in a divorce petition could have any probative value on the issue of [the witness'] credibility"]; ***United States* v. *Ostrer*** (S.D.N.Y. 1976) 422 F. Supp. 93, 98 ["In these times of recorded and widely publicized Presidential and Congressional adulterers, massage parlors with neon signs, and street corner pandering, which claims constitutional protection, we suspect

that many of our jurors selected within a fifty mile radius of Foley Square are licentious, or have friends who are. Moss neither raped nor seduced Miss Gold; the activities of these mature consenting adults would not, in our view, if known to the jury, impeach any witness."].)

vii. Impeachment with Convictions Subject to Penal Code Section 1203.4, 1203.41, or 1203.4 Relief or a Pardon Prevent Use of the Conviction for Impeachment?

a. Penal Code Section 1203.4 Relief

The granting of section 1203.4 relief prevents a defendant from being impeached with the "expunged" conviction if the defendant *is a witness* in a criminal or civil case but **not** if the defendant takes the stand in his own defense in a subsequent criminal trial. (Evidence Code section 788(c); ***People* v. *Field*** (1995) 31 Cal.App.4th 1778, 1785, 1787, fn. 4.)

It is important to note, however, that while the fact of the witness' conviction would be excluded, the ***conduct*** underlying the conviction might still be admissible (subject to Evidence Code section 352) for purposes of impeachment. (**See *People* v. *Wheeler*** (1992) 4 Cal.4th 284,292, 295; ***People* v. *David*** (unpublished) 2010 WL 1891714, *4 [defense argument that statutory rape underlying conviction dismissed per § 1203.4 should have been admitted to impeach prosecution witness raised but not decided].) Section 1203.4 relief only results in the elimination of the conviction (and even then, only for certain purposes); it does not retroactively make the ***underlying conduct*** disappear. And since it is the underlying conduct that would be used to impeach, section 1203.4 relief arguably is irrelevant to whether the underlying information may be used and is discoverable. (**Cf.**, ***People* v. *Zeigler*** (2012) 211 Cal.App.4th 638, 675 [notwithstanding dismissal of conviction pursuant to Pen. Code, § 1210.1(d)(1), which relieved a defendant of all "penalties and disabilities" stemming from the conviction, *underlying conduct* could be considered in deciding whether to grant certificate of rehabilitation under Pen. Code, § 4852.01 et seq.].) On the other hand, in ***People* v. *Field*** (1995) 31 Cal.App.4th 1778, the court held that Proposition 8 did not abrogate section 788(c)'s prohibition on use of an "expunged" conviction for purposes of impeaching witness because, inter alia, Proposition 8 simply states all relevant evidence is admissible and an expunged conviction is no longer relevant. The reason the ***Field*** court held an "expunged" conviction was no longer relevant is because a conviction is only relevant to credibility if it involves moral turpitude and the legislative purpose behind section 1203.4 relief is that "no convicted person discharged after probation thenceforth should be regarded as one possessed of the degree of turpitude likely to affect his credibility as a witness." (**Id.** at p. 1790.) If section 1203.4 relief not only vitiates the conviction but reflects a legislative determination that the person should not be treated as lacking in credibility, a reasonable argument can be fashioned that such relief would also render the underlying conduct irrelevant to credibility. (**But see *People* v. *Martinez*** (2002) 103 Cal.App.4th 1071, 1080, fn. 9 [declining to address question of whether, notwithstanding the holding in ***Field***, Proposition 8 (see Cal. Const. art. I, § 28, subds. (d)-(f)) abrogated any limitations on the use of prior convictions in a criminal proceeding].)

Editor's note: Because it is an open question whether a prosecution witness may properly be impeached with the conduct underlying a conviction dismissed pursuant to section 1203.4, it is safer to assume that such impeachment is permissible and to disclose the information.

b. Penal Code section 1203.41 Relief

Evidence Code section 788(c), which discusses 1203.4 relief does not reference section 1203.41 relief. Thus, section 788(c) does **not** resolve the question of whether a felony conviction that has been dismissed pursuant to section ***1203.41*** may be used to impeach a *witness or a defendant*. Evidence Code section 788(d) provides that a conviction could be used for impeachment unless "The conviction was under the laws of another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to a procedure substantially equivalent to that referred to in subdivision (b) or (c)." But subdivision (d) of section 788 does not apply to *California* convictions.

Indeed, because 788(c) makes no reference to section 1203.41, it is open question whether a conviction dismissed per section 1203.41 can be used to impeach any witness, including a defendant. If section 788(c) is taken out of the picture as inapplicable, the question of whether the prior conviction dismissed pursuant to section 1203.41 is not clear. This is because it is not clear whether or not the fact a person is able to be impeached with a prior conviction should be viewed as a "penalty or disability" that falls into the category of a criminal penalty or disability that is wiped out by obtaining relief from statutes like section 1203.4 or 1203.41. If it *is* the kind "penalty or disability" that is wiped out by the relief provided by statutes like 1203.4, then it should *inadmissible* for use as impeachment in *any* case regardless of whether the person being impeached is a defendant or a witness. If it is *not* the kind that is wiped out by the relief provided by statutes like section 1203.4, then it should be *admissible* for impeachment of *any* witness, including a defendant.

Some guidance in answering the question may be taken from Federal Rule of Evidence, Rule 609 - the federal rule of evidence most comparable to Evidence Code section 788. Under subdivision (c) of that rule, a witness may not be impeached by a prior conviction if the witness has received a ***pardon*** based on a finding of innocence, or a pardon based on a finding of ***rehabilitation*** (so long as the witness has not been convicted of any further felonies). However, that rule ***permits*** a witness to be impeached by a prior conviction if the witness has had his or her civil rights restored ***short of a pardon***. The advisory committee's note to Rule 609(c) provides: "A pardon or its equivalent granted solely for the purpose of restoring civil rights lost by virtue of a conviction ***has no relevance*** to an inquiry into character." (Emphasis added by P&A.) Using federal Rule 609(c) as a lodestar, it appears that obtaining section 1203.41 relief would not prevent a person from being impeached with the prior conviction regardless of whether the person is a witness or a defendant –since obtaining such relief is not the same as obtaining a pardon (compare § 1203.41 with § 4800 et seq.) and obtaining section 1203.41 relief does not *necessarily* require a showing of rehabilitation. On the other hand, an argument can be made that

section 1203.41 discretionary relief would not be granted absent a showing of rehabilitation (i.e., the showing necessary for a court to exercise its discretion in the interest of justice implicitly requires some showing of rehabilitation).

An argument could also be made that section 788 reflects a policy determination as to how convictions that have been dismissed pursuant to statutes *like* 1203.4 should be treated, and thus even though section 788 does not specifically mention 1203.41 it provides guidance in how prior convictions dismissed pursuant to that section 1203.41 should be used. (**Cf.**, ***Oranen* v. *Bruckman*** (unreported) 2007 WL 4110631, *11 "[although section 788 only references felony convictions, surely ***the policy*** which bans the use of expunged felonies applies equally, indeed to a greater extent, to expunged misdemeanor convictions," emphasis added].)

Regardless, even assuming section 1203.41 *does* wipe out a conviction in a way that prevents use of the ***conviction*** for impeachment purposes, there still remains the question of whether the conduct ***underlying a conviction*** involving moral turpitude may be used for impeachment pursuant to ***People* v. *Wheeler*** (1992) 4 Cal.4th 284. This is an open question e*ven when it comes to convictions that have been dismissed pursuant to section 1203.4.* (**See** this outline, section I-3-P-vii-a at p. 38.)

Bottom line: Because it is an open question whether a *prosecution* witness may properly be impeached with the conduct underlying a conviction dismissed pursuant to section 1203.4 or with the conduct underlying a conviction dismissed pursuant to section 1203.41 (or even the conviction itself), it is safer to assume that such impeachment is permissible, and the underlying conduct is discoverable.

c. Penal Code section 1203.4a relief

It is open question whether a conviction dismissed per section 1203.4a can be used to impeach a witness. The analysis of the issue will be the same as the analysis used in determining whether the conduct underlying a conviction that has been dismissed pursuant to section 1203.41 may be used for impeaching a witness or a defendant. (**See** this handout, section I-3-P-vii-b at pp. 39-40.)

d. Pardons

Evidence Code section 788(a) provides that a witness may not be impeached with a conviction where "[a] pardon based on his innocence has been granted to the witness by the jurisdiction in which he was convicted." However, if the conviction was pardoned for reasons other than because of the witness' innocence of the crime, the pardon may still be used for impeachment purposes, albeit the fact the pardon would also be admissible. (**See *People* v. *Biggs*** (1937) 9 Cal.2d 508, 514; ***People* v. *Hardwick*** (1928) 204 Cal. 582, 594.)

While the fact of the witness' conviction would be excluded if the witness had received a direct pardon based on a finding the witness was innocent of the crime, the conduct underlying the conviction arguably

may still be admissible (subject to Evidence Code section 352) for purposes of impeachment. (**See *People* v. *Wheeler*** (1992) 4 Cal.4th 284,292, 295.) On the other hand, the fact the witness has received a pardon will undoubtedly be a factor weighing heavily in favor of excluding either the underlying conduct or the conviction itself (if Proposition 8 eliminated its mandatory exclusion) pursuant to Evidence Code section 352. And even if the court decides to permit impeachment, the court would also be required to admit evidence of the pardon. (**See *People* v. *Biggs*** (1937) 9 Cal.2d 508, 514; ***People* v. *Hardwick*** (1928) 204 Cal. 582, 594.)

viii. Least Adjudicated Elements Test

A witness may only be impeached with a felony conviction if it qualifies as a crime of moral turpitude under the least adjudicated elements ("LAE") test, i.e., when one can reasonably infer moral turpitude "from the elements of the offense alone—without regard to the facts of the particular violation[.]" (***People* v. *Thomas*** (1988) 206 Cal.App.3d 689, 698 quoting ***People* v. *Castro*** (1985) 38 Cal.3d 301.) However, the LAE test should not apply when impeaching with misconduct that did ***not*** result in a felony conviction. In the latter circumstance, moral turpitude is not determined by whether the conduct constitutes a crime but by whether the conduct itself involves moral turpitude. (**See *People* v. *Alvarez*** (1996) 14 Cal.4th 155, 201, fn. 11; **see also *People* v. *Ayala*** (2000) 23 Cal.4th 225, 273 [proper to allow impeachment with fact witness had lied to prison officials for years about membership in gang to obtain transfer from one prison to another]; ***People* v. *Lepolo*** (1997) 55 Cal.App.4th 85, 90 [in deciding to allow misconduct for impeachment it is not important that the specific crime be designated]; ***People* v. *Garcia*** (2004) 116 Cal.App.4th 404 [disapproving the assumption that courts are confined to the LAE of a misdemeanor for which the person was convicted when determining whether the underlying conduct constitutes evidence of moral turpitude, albeit in the ***nonpublished*** portion of later depublished case].)

Q. Parole or Probation Status

Under the current law, the fact that a witness is presently on probation, ***regardless of the nature of the conduct*** for which the witness was placed on probation has generally been held to be information that may be used to impeach a witness and is discoverable. (**See *People* v. *Dyer*** (1988) 45 Cal.3d 26, 49-50; ***People* v. *Coleman*** (2014) 230 Cal.App.4th 1379, 1390; ***J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1335; ***People* v. *Hayes*** (1992) 3 Cal.App.4th 1238, 1245; ***People* v. *Jimenez*** (1985) 171 Cal.App.3d 411, 416; ***People* v. *Adams*** (1983) 149 Cal.App.3d 1190, 1193; ***People* v. *Espinoza*** (1977) 73 Cal.App.3d 287, 291.) The *rationale* for allowing such impeachment is that the witness will have a motive to lie so as to avoid revocation of probation, not because the *underlying crime* bears on the witness' credibility. (**See *Davis* v. *Alaska*** (1974) 415 U.S. 308, 317-318 [defense should have been allowed to impeach witness with fact witness was on juvenile probation under rationale that "vulnerable status as a probationer" permitted an "inference of undue pressure"]; ***People* v. *Adams*** (1983) 149 Cal.App.3d 1190, 1194-1995 [potential bias of

a prosecution witness could be shown by evidence that he was on probation following his juvenile adjudication of grand theft because his status as a probationer left him vulnerable to law enforcement pressure; **see also *People* v. *Harris*** (1992) 3 Cal.App.4th 1238, 1243, 1245 [court characterized evidence of probation status of a witness as the type of information that is both discoverable and admissible because of its potential impact on credibility, albeit not addressing whether such information would be material in the case before it].)

However, in ***People* v. *Chatman*** (2006) 38 Cal.4th 344, the California Supreme Court upheld the exclusion of evidence that a witness was on probation where there was no evidence (nor an offer of proof) that the witness was attempting to curry favor with the prosecution and there was no specific showing that her probationary status could have affected her testimony. (**Id**. at p. 374.) Similarly, in ***People* v. *Brady*** (2010) 50 Cal.4th 547, the court upheld a trial judge's refusal to allow an eyewitness to be impeached with the fact he was on misdemeanor summary probation for domestic battery where the defendant made no showing that eyewitness actually was offered leniency or threatened with retaliation by the prosecution, and trial prosecutor had not even been aware that eyewitness was on probation until his criminal record was checked during course of defendant's trial. (**Id**. at p. 560.) In ***People* v. *Carpenter*** (1999) 21 Cal.4th 1016, the court upheld exclusion of evidence that a witness was on probation where the trial court had permitted the defense to inquire into whether the witness had received any promises or expected any benefits. (**Id**. at pp. 1050-1051.) And in ***People* v. *Harris*** (1989) 47 Cal.3d 1047, the court upheld the trial judge's ruling to exclude evidence that a prosecution witness was on misdemeanor probation and in custody for another offense at the time of trial where there was an "absence of any offer of proof by defendant that [the witness] had been threatened with probation violation, or other sanctions, or had been offered incentives for his testimony[.]" (**Id**. at p. 1091 [and distinguishing case from ***Davis* v. *Alaska*** (1974) 415 U.S. 308 because the defendant in ***Davis*** did not have the opportunity to make an offer of proof as to the witness's potential bias or motive because a hearing pursuant to Evidence Code section 402 did not occur]; **see also *Irby* v. *State*** (Texas 2010) 327 S.W.3d 138, 148-151 [rejecting argument that the fact witness is on probation is always admissible and explaining there must be some logical connection between the fact or condition that *could* give rise to a potential bias or motive and the actual existence of any bias or motive].)

Editor's note re: Probationary Status of Police Officers: When the witness is a police officer, the rationale for allowing impeachment with the fact the witness is on probation becomes even less compelling. An officer who is subpoenaed to the stand to testify regarding an arrest is *not* testifying in a particular manner because he is vulnerable to pressure if he fails to cooperate with law enforcement – the general rationale for allowing such impeachment (**see** this outline, section I-3-R at p. 43). The officer ***is*** law enforcement, and there already exists a myriad of legitimate reasons for an officer to testify in a manner that disadvantages the defendant. Any additional motivation to do so because the officer is on probation is either nonexistent or negligible. Further, when an officer is on probation for an offense in a *different* county, this de minimus motivation becomes even more attenuated. However, no case has directly confronted the issue and it is theoretically possible a court will view the fact an officer is on probation as even more probative than when a civilian witness is on probation under the rationale that an officer on criminal probation is already on tenterhooks and is not going to further risk his job status by alienating the prosecutor with testimony that might favor the defense. Also, all the reasons for not allowing a witness to be impeached with probationary status when no promises have been made to the witness or the witness is not facing a pending violation apply with even greater force to police officers.

R. Pending Charges

i. Against Witness

The fact that a prosecution witness is facing pending criminal matters "constitutes evidence 'favorable' to the defense, in that a jury could view this circumstance as negatively impacting the credibility of testimony by the witness that was helpful to the prosecution." (***People* v. *Letner*** (2010) 50 Cal.4th 99, 176; **see also *J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1335; ***People* v. *Coleman*** (2014) 230 Cal.App.4th 1379, 1390; ***People v. Hayes*** (1992) 3 Cal.App.4th 1238, 1245 [a post-Prop 115 case citing to pre-Prop 115 case of ***People* v. *Coyer*** (1983) 142 Cal.App.3d 839, 842 for proposition that a "defendant is entitled to discovery of criminal charges currently pending against prosecution witnesses anywhere in the state']; ***Kennedy* v. *Superior Court*** (2006) 145 Cal.App.4th 359, 379 [fact charges are pending against a prosecution witness *at the time of trial* is relevant for impeachment purposes].) The theory is that it may show that the witness, by testifying, is seeking favor or leniency. (***People* v. *Martinez*** (2002) 103 Cal.App.4th 1071, 1080.)

When prosecutors are unaware of a pending case, the defendant must show that the prosecution could have obtained the information through "a routine check of FBI and state crime databases, including a witness' state 'rap sheet.'" (***Vega* v. *Johnson*** (5th Cir. 1998) 149 F.3d 354, 363.)

However, while pending charges are discoverable, a trial court can probably exclude evidence of the pending charges on *relevancy* grounds if it can be shown the witness is not seeking favor or leniency. (**Cf., *People* v. *Brady*** (2010) 50 Cal.4th 547, 560 [discussed in this outline, section I-3-Q at p. 42]; ***People* v. *Chatman*** (2006) 38 Cal.4th 344, 374 [discussed in this outline, section I-3-Q at p. 42]; **see also *People* v. *Letner*** (2010) 50 Cal.4th 99, 177 [evidence that witness gave inculpatory information regarding defendant *before* facing pending charges undermined claim nondisclosure of evidence of pending charges against witness at trial violated ***Brady***]; ***Irby* v. *State*** (Tex. 2010) 327 S.W.3d 138,

149 [evidence that a witness is on probation or is facing pending charges, "is not relevant for purposes of showing bias or a motive to testify absent some plausible connection between that fact and the witness's testimony"]; ***Bowling* v. *Commonwealth*** (Ky. 2002) 80 S.W.3d 405, 411 [witness's pending indictments in an adjacent county were insufficient to infer that the witness was motivated to testify in an effort to curry favor with the Commonwealth's Attorney, especially since "the prosecuting attorney, in reality, had no jurisdiction to grant any leniency to the witness with respect to charges in another county"]; ***Davenport* v. *Com***. (Ky. 2005) 177 S.W.3d 763, 769 [same].)

Courts have also found that the fact a witness is facing pending charges is not necessarily *material* under ***Brady***. In ***People* v. *Letner*** (2010) 50 Cal.4th 99, the court held that the failure to disclose evidence of pending charges against a prosecution witness did not rise to the level of a ***Brady*** violation because such evidence was not material where: (i) none of the pending charges (two counts of petty theft and one count of writing a bad check) were particularly serious; (ii) the witness' said she did not speak with the prosecutor about the pending charges, did not expect or receive any benefits for testifying, did not alter her testimony as a result of the pending matters, and had requested (and the court had ordered) that her jail sentence be suspended so she would not be in the jail while defendants also were incarcerated there; (iii) the witness had previously testified at the preliminary hearing consistently with her trial testimony and the preliminary hearing had occurred *before* she was facing pending charges; and (iv) there was other evidence introduced bearing on the witness' credibility, including her obvious personal bias against the defendant and some inconsistency between her earlier report to the police and her trial testimony. (**Id**. at pp. 177-178.)

ii. <u>Against Relative of Witness</u>

In ***People* v. *Crawford*** (1967) 253 Cal.App.2d 524, the court held that a prosecution witness could be impeached with the fact that the *wife* of a witness had recently been arrested but not if the witness was unaware of the arrest. (**Id**. at pp. 533-534; **see also *United States* v. *Lankford*** (11th Cir.1992) 955 F.2d 1545, 1549, fn. 9 [holding it was error to limit cross-examination of the chief government witness regarding the fact his son had recently been arrested for selling twenty pounds of marijuana, even though the witness had made no deal with the government, since the witness' desire to cooperate may have in fact been motivated by an effort to prevent such an investigation]; ***LaCaze* v. *Warden Louisiana Correctional Institute*** (5th Cir. 2011) 645 F.3d 728 , 735-736 [fact witness requested that son not be prosecuted was ***Brady*** material].)

S. <u>Noncitizenship (aka "Illegal Immigrant") Status</u>

The fact a witness is an undocumented immigrant is arguably favorable evidence. A prosecutor can impeach a defense witness with the fact the witness is an undocumented immigrant. (**See *People* v. *Viniegra*** (1982) 130 Cal.App.3d 577 [no prosecutorial misconduct or abuse of the trial court's discretion in permitting prosecution to show defense witness was an unlawful alien and ask if he was

testifying for defendant out of fear he would otherwise be turned in as an illegal alien]; **cf.**, ***Hernandez* v. *Paicius*** (2003) 109 CA4th 452, 460-461[civil case finding error to try and impeach plaintiff with fact he was illegal immigrant].)

No published California case has directly addressed whether the *defense* can impeach a prosecution witness with the fact he or she is undocumented but arguably the defense would be permitted to do so under one of two theories: (i) that a person unlawfully in this country might be vulnerable to pressure, real or imagined, from the government (**see *People* v. *Turcios*** (1992 Ill.) 593 N.E.2d 907, 919; ***People* v. *Austin*** (1984 Ill.) 463 N.E.2d 444, 452) or (ii) that the unlawful presence in this country constitutes fraudulent conduct (**see *People* v. *Gonzalez*** (2002 NY) 748 N.Y.S.2d 233, 234).

The latter theory is particularly dubious in light of language from the recent California Supreme Court decision in ***In re Garcia*** (2014) 58 Cal.4th 440, a case involving whether an undocumented immigrant was fit to practice law in California. The ***Garcia*** court stated that the "fact that an undocumented immigrant is present in the United States without lawful authorization does not itself involve moral turpitude or demonstrate moral unfitness so as to justify exclusion from the State Bar[.]" (**Id** at p. 460.) The ***Garcia*** court pointed out that while "an undocumented immigrant's presence in this country is unlawful and can result in a variety of civil sanctions under federal immigration law (such as removal from the country or denial of a desired adjustment in immigration status) (8 U.S.C. §§ 1227(a)(1)(B), 1255(i)), an undocumented immigrant's unauthorized presence does not constitute a criminal offense under federal law and thus is not subject to criminal sanctions." (**Ibid**; **see also *Velasquez* v. *Centrome, Inc.*** (2015) 233 Cal.App.4th 1191, 1215 [prejudicial error to admit evidence of immigration status in personal injury lawsuit where the plaintiff's immigration status was entirely irrelevant to the claims at trial]; ***People* v. *Guzman*** (unreported) 2012 WL 1159008, *3-*6 [proper to prohibit cross-examination about witness' immigration status under section 352 where there was no evidence of promised or anticipated favorable treatment by the prosecutor before witness reported rape]; ***People* v. *Sedej*** (unreported) 2013 WL 1277309 [upholding exclusion even assuming illegal immigration is crime of moral turpitude]; ***People* v. *Talamantes*** (unreported) 2008 WL 244520, *5 [same and upholding trial court's exclusion under section 352 grounds]; ***People* v. *Scales*** (unreported) 2004 WL 1759259, *7 [finding judge properly excluded fact prosecution witness was illegal immigrant because illegal immigration status did not, per se, reflect a pattern of deceit relevant to witness' credibility given the variety of ways an undocumented person can enter the United States, including by being brought here as a child, and finding it properly excluded under section 352 even if it was relevant to credibility]: ***People* v. *Espinoza*** (unreported) 2007 WL 2310118, *6-7 [leaving open question of whether illegal immigration status involves moral turpitude but noting that "considering the current politically charged nature of illegal immigration, someone on the jury could have been unduly prejudiced against" the witness because of his illegal entry]; ***Irby* v. *State*** (Texas 2010) 327 S.W.3d 138, 152 ["It is not enough to say that all witnesses who may, coincidentally . . . be in the country illegally, or have some other

'vulnerable status' are automatically subject to cross-examination with that status regardless of its lack of relevance to the testimony of that witness"].)

Evidence Code section 351.4 places limits on use of a person's immigration status in criminal proceedings. Section 351.4 provides: "(a) In a criminal action, evidence of a person's immigration status shall not be disclosed in open court by a party or his or her attorney unless the judge presiding over the matter first determines that the evidence is admissible in an in camera hearing requested by the party seeking disclosure of the person's immigration status."

However, subdivision (b) provides: "This section does not do any of the following:

(1) Apply to cases in which a person's immigration status is necessary to prove an element of an offense or an affirmative defense. ¶ (2) *Limit discovery in a criminal action*. ¶ (3) Prohibit a person or his or her attorney from voluntarily revealing his or her immigration status to the court." (Emphasis added.)

Warning: Be aware that ancillary issues regarding the credibility of a witness who is an undocumented immigrant might crop up involving the falsification of government documents, fabrication on employment applications, etc. (**See *People* v. *Michael*** (unreported) 2013 WL 1277309. The fact a witness has lied about his or her immigration status or has presented false documentation is probably favorable (albeit not necessarily material) evidence. (**See *People* v. *Samaniego*** (unpublished) 2011 WL 2453475, *1, fn. 2.)

T. Prosecution Efforts to Keep a Witness From Being Deported is Favorable Evidence (S, T, and U Visas)

Certainly, if the state took action to prevent the deportation of the witness in order to permit the witness to testify, this would be favorable (and perhaps material) evidence for the defense. (**See *People* v. *Kasim*** (1997) 56 Cal.App.4th 1360, 1384 [holding that the prosecution withheld critical discoverable evidence when it failed to disclose acts taken to aid a key witness avoid deportation]; ***United States* v. *Blanco*** (9th Cir. 2004) 392 F.3d 382, 392 [fact informant who testified as a witness was an undocumented immigrant and was allowed to stay in the country on a special visa was ***Brady*** material]; ***TXI Transp. Co.* v. *Hughes*** (Tex. 2010) 306 S.W.3d 230, 244 [noting that the only context where courts have widely accepted using evidence of the fact a witness is an undocumented immigrant for impeachment is in criminal trials where a government witness's immigration status may indicate bias, and "particularly where the witness traded testimony for sanctuary from deportation"].)

U Visas

Under the "Battered Immigrant Women Protection Act of 2000," a victim of domestic violence can receive some protection against deportation. The mechanism by which such a victim is permitted to legally stay in the United States is called a U Visa. (**See *Fonseca-Sanchez* v. *Gonzales*** (7th Cir.

2007) 484 F.3d 439, 443, fn. 4.) Under federal immigration regulations (8 C.F.R. § 214.14 (2012)), an illegal alien who is the victim of certain criminal offenses, including rape or sexual abuse, can apply for a "U Visa" providing temporary relief from deportation, and acquire temporary non-immigrant legal status if local law enforcement authorities certify that the alien would be of assistance in an investigation or prosecution. (**See *People* v. *Guzman*** (unreported) 2012 WL 1159008, *3.) There are several criteria in order to obtain U-Visa status. The applicant(s) must demonstrate: (1) that they have suffered substantial physical or mental abuse as a result of having been the victim of qualifying criminal activity; (2) they must possess information concerning the qualifying criminal activity; and (3) they must have been helpful, are being helpful, or are likely to be helpful in the investigation or prosecution of the qualifying criminal act. (**See** 8 U.S.C. § 1101(a)(15)(U)(i).)

California Penal Code section 679.10 requires various entities, including police agencies and prosecutor's offices, upon request, to certify the victim was "helpful" on Form I-918 Supplement B (the federal form used to provide certification that the victim of human trafficking or one of several the other designated crimes has been helpful in the detection or investigation or prosecution of those designated crimes) for purposes of obtaining a U visa. (**See** Pen. Code, § 679.10.)

S Visas

"The U.S. Department of Homeland Security can provide an "S Visa" to a non-citizen who has assisted a law enforcement agency as a witness or an informant, permitting them to remain in this country on account of that assistance. Only a federal or state law enforcement agency, or a U.S. Attorney's Office, may submit a request for an 'S Visa.' An 'S Visa' is issued for three years, and no extensions are granted. If the individual completes the terms of his "S Visa," then the law enforcement agency may later submit an application for permanent residence (a "green card") on the individual's behalf." (***In re Ippolito*** (S.D. Ga., Jan. 30, 2015) 2015 WL 424522, at *4; see also https://www.justice.gov/jm/criminal-resource-manual-1862-s-visa-program-eligibility

T Visas

Similarly, victims of human trafficking may receive some protection against deportation. The mechanism by which the victim is permitted to legally stay in the United States is called a T Visa. An individual may apply for T Visa status if he or she is or has been a victim of a severe form of trafficking in persons. A T-visa expires four years from the date of approval and may be extended if the individual's presence is necessary to assist in the investigation or prosecution of trafficking in persons. (8 U.S.C. § 1101(a) (15)(T)(i); 8 C.F.R. § 214.11(p)(1).) To apply, the individual must provide evidence demonstrating that the applicant is a victim of a severe form of trafficking in persons, physically present in the United States on account of a severe form of trafficking in persons, complied with any reasonable request for assistance in the investigation or prosecution of acts of severe forms of trafficking in persons, or has not attained 15 years of age, and would suffer extreme hardship involving unusual and severe harm if he or

she were removed from the United States. (8 C.F.R. § 214.11(d)(iv)-(vii).) Unlike applicants for U visas, T visa applicants who are minors or who are unable to cooperate due to physical or psychological trauma may be exempt from this cooperation requirement. (8 U.S.C.A. § 1101 (a)(15)(T).)

Penal Code section 679.11 requires various entities, including police agencies and prosecutor's offices, upon request, to fill out a Form I-914 Supplement B Declaration of Law Enforcement Officer for Victim of Trafficking in Persons (the federal form used to provide certification that the person was a victim of human trafficking and has complied with reasonable requests from law enforcement to help in the investigation or prosecution of human trafficking) for purposes of obtaining a T visa. It is almost identical in procedures to Penal Code section 679.10. (Pen. Code, § 679.11.)

The fact a victim is eligible for the advantages conveyed from obtaining a U Visa, S Visa, or a T Visa could be used to potentially impeach the witness by showing the victim has motive to accuse a defendant of a crime and thus if the victim has sought a U Visa, S Visa, or T Visa, such information is likely discoverable. (**See e.g.**, ***Romero–Perez* v. *Commonwealt***h (K.Y.Ct.App. 2016) 492 S.W.3d 902, 906 ["One can readily see how the U–Visa program's requirement of 'helpfulness' and 'assistance' by the victim to the prosecution could create an incentive to victims hoping to have their U–Visa's granted. Even if the victim did not outright fabricate the allegations against the defendant, the structure of the program could cause a victim to embellish her testimony in the hopes of being as 'helpful' as possible to the prosecution."]; ***State* v. *Valle*** (Oregon 2013) 298 P.3d 1237, 1243-1244 [victim's application for U-visa was relevant impeachment evidence, admissible in sexual abuse trial since it could allow the jury to infer that victim had a personal interest in testifying in a manner consistent with her application for opportunity to remain in country]; ***United States* v. *Sipe*** (5th Cir. 2004) 388 F.3d 471, 488-489 [fact government allowed witnesses to stay in United States is impeaching evidence of bias]; ***People* v. *Zuniga*** (unpublished) 2015 WL 4554285, at *6 [finding trial court erred in restricting cross-examination of witness about his status as U Visa holder since it was relevant to show motive and/or bias, and was relevant to his credibility – albeit error was harmless]; ***Briggs* v. *Hedgpeth*** (N.D. Cal. – unpublished) 2013 WL 245190 [preclusion of cross-examination on victim's immigration status and availability of immigration benefits violated defendant's right to confrontation, though error found harmless where, inter alia, victim had given prior statements to investigating officers before they mentioned possibility of seeking U Visa as crime victim]; ***People* v. *Wong*** [unreported] 2004 WL 3015782, *9 [domestic violence victim]; ***United States* v. *Valenzuela*** [unreported federal decision] 2009 WL 2095995, *4 [human trafficking victims]; **but see *People* v. *Escamilla*** (unpublished) 2016 WL 7030713, at *4 [upholding trial court's preventing impeachment of sexual assault minor victim and her parents where there was no evidence they knew of the U Visa program at the time she made her allegations, nothing suggested the family had seen advertising for U Visas or that they faced a threat of adverse immigration consequences or feared removal – and noting as well that relevance of application was minimal in establishing a motive for *maintaining* the allegations]; ***People* v. *Guzman***

(unreported) 2012 WL 1159008, *3 [trial court properly excluded evidence of fact witness was illegal alien and eligible for U-Visa where no evidence witness knew about U-Visa before she was assaulted and no evidence witness had any discussions with, or expected any help from, the prosecutor or law enforcement regarding her citizenship status].)

If a relative of the victim has applied for a U-Visa based on the victim's allegations, this is also potentially impeaching (and thus, favorable) evidence. (**See *Oregon* v. *Del Real–Garvez*** (Oregon 2015) 346 P.3d 1289, 1290 [evidence that victim knew her mother's immigration status and knew mother had applied for a U–Visa based on victim's allegations against defendant was relevant impeachment evidence]; ***People* v. *Mitchell*** (unreported) 2017 WL 4161678, at *3 [mother's U–Visa inquiry was favorable material that should have been disclosed because request gave her son an incentive to provide favorable testimony to the prosecution to obtain the valuable benefit of legal residency for the mother].)

Editor's note: As Assistant District Attorney Michael Schwartz of Ventura County has pointed out: "One of the requirements for the visa is that the victim not unreasonably refuse to cooperate. And even if we sign a certification and the victim later refuses to cooperate, we are supposed to notify the immigration authorities. So, the theory on cross-examination would be that the victim is only saying what they think the DA wants to hear in order to get a visa." (**But see** 8 U.S.C.A. § 1101 (a)(15)(T) [T visa applicants who are minors or who are unable to cooperate due to physical or psychological trauma may be exempt from this requirement].)

U. Mental Health or Emotional Instability

"A person's credibility is not in question merely because he or she is receiving treatment for a mental health problem." (***People* v. *Pack*** (1988) 201 Cal.App.3d 679, 686; **see also *People* v. *Abel*** (2012) 53 Cal.4th 891, 931.) Indeed, "[t]he use of psychiatric testimony to impeach a witness is generally disfavored." (***People* v. *Lucas*** (2014) 60 Cal.4th 153, 278, fn. 45; ***People* v. *Marshall*** (1996) 13 Cal.4th 799, 835.) However, "the mental illness or emotional instability of a witness can be relevant on the issue of credibility, and a witness may be cross-examined on that subject, ***if*** such illness affects the witness's ability to perceive, recall or describe the events in question." (***People* v. *Samuels*** (2005) 36 Cal.4th 96, 116; ***People* v. *Gurule*** (2002) 28 Cal.4th 557, 591-592; **accord *People* v. *Verdugo*** (2010) 50 Cal.4th 263, 292.) (Emphasis added.)

In ***People* v. *Abel*** (2012) 53 Cal.4th 891, the court held the nondisclosure of psychiatric records relating to a witness' mental health problems did not violate ***Brady*** nor impact a defendant's ability to prepare and/or present a defense since nothing in the records suggested the witness "suffered from delusions or hallucinations, nor do they contain any reports of cognitive difficulties or other problems that could have affected [the witness'] ability to perceive, recall, or describe events, or her ability or willingness to tell the truth." (**Id**. at p. 931.) The ***Abel*** court recognized that there were references in the records to an "antisocial personality disorder" and "psychopathy," but observed the terms were not defined, and that even if in some contexts they might be used to describe traits relevant to credibility, in

the instant case they generally referred to the difficulties the witness was experiencing adjusting to prison life, not information bearing on credibility. (**Id**. at p. 932.)

In ***United States* v. *Butt*** (1st Cir. 1992) 955 F.2d 77, the court drew a distinction between psychological diagnoses like depression or other personality defects and more serious mental conditions like schizophrenia, noting "federal courts appear to have found mental instability relevant to credibility *only where*, during the time-frame of the events testified to, the witness exhibited a pronounced disposition to lie or hallucinate, or suffered from a severe illness, such as schizophrenia, that dramatically impaired her ability to perceive and tell the truth." (**Id**. at pp. 82-83; **accord *United States* v. *Kohring*** (9th Cir. 2011) 637 F.3d 895, 910 [and rejecting notion law enforcement agent's *informal* diagnosis of witness' mental stability could be ***Brady***]; **see also *Browning* v. *Trammell*** (10th Cir. 2013) 717 F.3d 1092, 1105 [citing to ***Butt*** in support of conclusion that information contained in psychiatric evaluation evincing, "among other things, memory deficits, magical thinking, blurring of reality and fantasy, and projection of blame onto others" was "classic impeachment evidence"]; ***Gonzalez* v. *Wong*** (9th Cir. 2011) 667 F.3d 965, 983 [citing to ***Butt*** and characterizing schizophrenia as a mental condition that made the witness "prone to lying" – **ed. note**: ***Wong*** notwithstanding, schizophrenia is considered potentially impeaching because of accompanying hallucinations and not intentional mendacity; **but see *United States* v. *Smith*** (CADC 1996) 77 F.3d 511, 516 [suggesting test in ***Butt*** may be "too narrow a rule of admissibility"].)

(i) <u>Witness Previously Found Incompetent to Stand Trial (Pen. Code § 1368)</u>

Cases addressing the question of whether the fact a witness has previously been found incompetent pursuant to Penal Code section 1368 is discoverable information are next to nonexistent. There are two cases (both stemming from the same set of facts) out of the Ninth Circuit holding ***Brady*** was violated by nondisclosure of aspect of plea agreement under which an attorney for charged witness agreed not to seek competency evaluation of witness until after the witness testified for prosecution. (***Shelton* v. *Marshall*** (9th Cir. 2015) 796 F.3d 1075, 1077; ***Silva* v. *Brown*** (9th Cir. 2005) 416 F.3d 980, 987–988.) In ***Silva***, the court stated that "evidence that calls into question a witness's competence to testify is powerful impeachment material." (**Id**. at pp. 987-988.) However, whether ***prior*** findings a witness is unable *to assist in his defense* under section 1368 calls into question a witness' present *competence to testify* may be less probative or not probative at all. (**Cf**., ***State* v. *Rauch*** (Mo. Ct. App. 2003) 118 S.W.3d 263, 273 ["A prior adjudication of mental incompetence or a past record of confinement in a mental hospital is not conclusive; to be declared incompetent to testify, a witness must exhibit some mental infirmity and fail to meet one or more of the traditional criteria for witness competence."].)

(ii) <u>Witness Previously Subject to 72-Hour Commitment (Welf. & Inst. Code § 5150)</u>

The question sometimes arises whether the fact a witness has been temporarily committed pursuant to Welfare and Institutions Code section 5150 constitutes favorable evidence. That section allows for a 72-

hour commitment of a person who "as a result of a mental health disorder, is a danger to others, or to himself or herself, or gravely disabled" for "assessment, evaluation, and crisis intervention, or placement for evaluation and treatment in a facility designated by the county for evaluation and treatment and approved by the State Department of Health Care Services." (Welf. & Inst. Code, § 5150.) No case has directly spoken to the issue. In ***People* v. *Kuhn*** (unpublished) 2003 WL 1879844, the court assumed, without deciding that as a matter of practice the prosecutor should have disclosed the witness had recently been hospitalized involuntarily because of an attempted suicide for reasons not having to do with the pending case. (**Id**. at p. *4.)

The answer to the question likely turns on when the commitment occurred, the reason for the commitment, if the person was actually placed in a facility for treatment and evaluation, the nature of the mental health disorder at issue, and the type of defense being raised. A court is unlikely to find the fact that an adult victim of a robbery was once evaluated for suicidal thoughts as a teenager and released without a commitment constitutes relevant favorable evidence. On the other hand, a court is likely to find the defense would be entitled to 5150 records where the defense to the murder charge is that the victim killed himself and the victim was recently committed and treated for being suicidal.

V. <u>Alcohol or Drug Use</u>

The use or addiction to intoxicants can, in certain circumstances, be favorable evidence under ***Brady***. (**See *Benn* v. *Lambert*** (9th Cir. 2002) 283 F.3d 1040, 1056 [evidence that the informant-witness was using drugs *during* the trial would reflect on his competence and credibility as a witness and should have been disclosed to the defense]; ***In re Sodersten*** (2007) 146 Cal.App.4th 1163, 1232 [possibility the witness "was on PCP the night of the murder would likely have substantially changed how jurors evaluated his ability to perceive"].)

However, the rule in California is that "narcotic addiction, or expert testimony as to the effects of the use of such drugs, is not considered admissible to impeach the credibility of a witness unless followed by testimony tending to show that he was under the influence while testifying, or when the events to which he testified occurred, or that his mental faculties were actually impaired by the habit." (***People* v. *Smith*** (1970) 4 Cal.App.3d 403, 412; **accord *People* v. *Viniegra*** (1982) 130 Cal.App.3d 577, 581; ***People* v. *Hernandez*** (1976) 63 Cal.App.3d 393, 405; ***People* v. *Ortega*** (1969) 2 Cal.App.3d 884, 902; **see also *Mellen v. Winn*** (9th Cir. 2018) 900 F.3d 1085, 1098–1099 ["evidence of prior drug use is not probative of a witness's credibility, absent other evidence linking the drug use to a 'motivation, bias, or interest in testifying' or indicating that the witness was 'intoxicated while testifying.'"].)

Moreover, keep in mind, that "[e]vidence of habitual narcotics … use is not admissible to impeach perception or memory unless there is expert testimony on the probable effect of such use on those faculties." (***People* v. *Wilson*** (2008) 44 Cal.4th 758,794, citing to ***People* v. *Balderas*** (1985) 41 Cal.3d 144, 191 and ***People* v. *Pargo*** (1966) 241 Cal.App.2d 594, 600.)

W. Bias

"Evidence probative of a testifying witness's credibility, including the potential for bias, is evidence favorable to the accused." (***People* v. *Morris*** (2004) 34 Cal.4th 698, 714, citing to ***United States* v. *Bagley*** (1985) 473 U.S. 667, 676; **see also** Evid. Code, § 780(f) [allowing consideration of bias in assessing credibility of witness].) "A witness may be cross-examined about the group membership he shares with a party to the action, 'such common membership is a factor that tends to impeach a witness' testimony by establishing bias.'" (***People* v. *Holt*** (1984) 37 Cal.3d 436, 455-456.) For example, a prosecution witness' membership in a rival gang to the defendants' gang is favorable evidence. (**See *Clark* v. *O'Leary*** (7th Cir. 1988) 852 F.2d 999, 1006.)

i. Racial/Ethnic Bias

"Racial prejudice is a prototypical form of bias [and] "[t]he same may be said, we believe, about prejudice based on ethnicity or national origin." (***Gonzales* v. *State*** (1996) 929 S.W.2d 546, 551 [albeit finding statement by officer on previous case "niggers and ... Mexicans need to go back where you come from" was properly excluded in present case involving officer's testimony against Mexican American because evidence would have an undue tendency to focus the jury's attention on the officer's bias against blacks—that was irrelevant to the officer's credibility as a witness"]; **see also *State* v. *Williams*** (N.J.Super.A.D.,2008) 956 A.2d 375 [defense entitled to discovery of officer's personnel file relating to use of racial epithet in referring to the defendant].)

ii. Bias Based on Defendant Having Threatened the Witness

The fact that a defendant has threatened a witness or a person associated with the witness is probably ***not*** favorable evidence. In ***People* v. *Burgener*** (2003) 29 Cal.4th 833, the court held the prosecutor had no constitutional duty to disclose a threat made by the defendant to the witness because evidence of the threat was not "favorable" to the defense. (**Id**. at p. 875.) And in ***People* v. *Verdugo*** (2010) 50 Cal.4th 263, the court noted the fact a witness was threatened by defendant's family "hardly prove[d] defendant's innocence" and tended to show the witness "might have a reason to minimize defendant's culpability, not a reason to exaggerate his culpability." (**Id**. at p. 283.)

iii. Bias Based on Relationship Between a Prosecutor (or Prosecution Team Member) and a Witness

When will a romantic or close relationship between the prosecutor (or a member of the prosecution team) and a witness constitute "favorable" evidence? There are not a lot of cases addressing this issue and it can become particularly dicey when the "relationship" is an illicit one. (**See *Spirko* v. *Mitchell*** (6th Cir. 2004) 368 F.3d 603, 613 [finding that failure to disclose intimate relationship during trial between a prosecution witness and prosecution's chief investigator did not violate the ***Brady*** rule because it was not sufficiently probative to have created a doubt about the verdict but stating "we do not

entirely subscribe to the district court's conclusion that (the witness') relationship with the investigator would have had no impact on the jury's assessment of her credibility"].)

X. Contradictory Evidence

Evidence that contradicts or undermines the prosecution theory of the case or testimony of a prosecution witness is favorable evidence for the defense. For example, in ***People* v. *Filson*** (1994) 22 Cal.App.4th 1841, the court held the prosecution had a duty to disclose a tape recorded statement of defendant made two hours after the commission of the crime potentially showing defendant was intoxicated where the defendant was putting on an intoxication defense to the crime and the victim and investigating officer had testified defendant was not intoxicated. (**Id**. at p. 1848; **see also *Comstock* v. *Humphries*** (9th Cir. 2015) 786 F.3d 701 [prosecution had duty to disclose fact victim of alleged theft of a ring had stated he might have lost ring before it was allegedly stolen].)

Y. Rehearsed Testimony

Evidence that witness was "coached" or "scripted" may be favorable evidence. For example, in ***In re Sodersten*** (2007) 146 Cal.App.4th 1163, the court noted that tape- recorded statements of a young child "practicing" her testimony should have been disclosed where the tape would have disclosed uncertainty in the witness' identification and raised questions about her being influenced in making her identification. (**Id**. at pp. 1224-1228.) In ***Pederson* v. *Fabian*** (8th Cir. 2007) 491 F.3d 813, 826, the court held if the jury had been informed a witness was provided a written summary of the witness' police statement and grand jury testimony, the jurors may have viewed the witness as less credible than they otherwise deemed him to be. (**Id**. at p. 826 [albeit finding evidence had only limited impeachment value because the scope of the witness' testimony exceeded the scope of the summary and thus it was not material evidence under ***Brady***]; ***People* v. *Valencia*** (2008) 43 Cal.4th 268, 283 [finding it proper for prosecutor to question defense witnesses about how many times they have spoken with the defense because it bears on witness' credibility]; ***State* v. *Rivera*** (R.I. 2010) 987 A.2d 887, 898 [fact witness rehearsed testimony bears on credibility of witness].)

Z. Coerced Testimony

Evidence that the witness was subjected to an improper and coercive interrogation before giving a statement that is beneficial to the prosecution "engenders significant questions about the credibility of the beneficial statement." (***In re Sodersten*** (2007) 146 Cal.App.4th 1163, 1224; **see also *People* v. *Memro*** (1985) 38 Cal.3d 658, 685–687 [complaints by person alleging coercive techniques in questioning are relevant to bolster a defendant's claim of involuntariness in the interrogation setting].)

AA. Witness Identification Problems

In ***Carrillo* v. *County of Los Angeles*** (9th Cir. 2015) 798 F.3d 1210, the court allowed a civil suit for violating the ***Brady*** rule to proceed against a police officer because the officer failed to disclose several

circumstances surrounding a witness' identification of the defendant, including (i) that before the witness identified the defendant's photo from a line-up, he selected several other photos; (ii) on the previous identifications, the officer told the witness the earlier photos "could not be the suspect shooter"; (iii) that after the witness selected the defendant's photo, the officer affirmed he had made the right choice; and (iv) the officer threatened the witness upon learning the witness was planning to recant his identification. (**Id**. at p. 1227.)

BB. Third Party Guilt

Evidence that someone other than the defendant committed the crime is favorable evidence. (**See *Carrillo* v. *County of Los Angeles*** (9th Cir. 2015) 798 F.3d 1210, 1226; ***Williams* v. *Ryan*** (9th Cir.2010) 623 F.3d 1258, 1265.)

> **Editor's note**: **See** this outline, section XVI at pp. 308-324, discussing what prosecutors are obligated to do (or not do) when the defense is seeking evidence of third-party guilt.

CC. Witness' Reluctance to Testify or Request to Drop Charges

The fact a witness is reluctant to testify is probably not, *in and of itself*, favorable evidence. (**See *Ramirez* v. *United States*** (D.C. 1985) 499 A.2d 451, 454 ["reluctance to testify ... without more, [has] no bearing on the witness' credibility."]; ***Hendricks* v. *State*** (Fla. Dist. Ct. App. 1978) 360 So.2d 1119, 1123 [same].) Almost all witnesses (honest or not) have some reluctance to testify.

Whether the witness' reluctance is even relevant, let alone exculpatory, should turn on the reason for the reluctance. For example, in ***State* v. *Neal*** (unpublished Kan. Ct. App. 2004) 85 P.3d 228 [2004 WL 421972], the defendant claimed the prosecution violated ***Brady*** by failing to disclose the fact the witness did not want to testify and did not want the case to proceed. (**Id**. at p. *4.) The defendant argued this evidence would have "called into question the veracity of her initial report and could have given a jury the impression that [the witness] was willing to tell the police a false story but unwilling to tell the same story under oath." (**Ibid**.) However, the court of appeal rejected the claim since the witness' "testimony at the plea-withdrawal hearing that she had told the prosecutor she did not want to go through with the case was not impeachment because it did not show she fabricated the story." (**Ibid**.) Moreover, if the reason for the reluctance stems from a concern about retaliation or being subjected to pressure by friends or family of the defendant, that is generally viewed as *bolstering* the credibility of a witness who testifies despite such concerns or pressure. (**See e.g**., ***People* v. *Merriman*** (2014) 60 Cal.4th 1, 86 ["A witness who testifies despite fear of recrimination of any kind by anyone is more credible because of his or her personal stake in the testimony...."; **see also *People* v. *Williams*** (2013) 58 Cal.4th 197, 270-271; ***People* v. *Valdez*** (2012) 55 Cal.4th 82, 135; ***People* v. *McKinnon*** (2011) 52 Cal.4th 610, 668.) On the other hand, if the witness claims she is reluctant to testify *for a reason* that would be favorable to the defense, there is little doubt such reluctance would be exculpatory. (**Cf**., ***Ramirez* v. *United States*** (D.C. 1985) 499 A.2d 451, 454 [upholding preclusion of defense

questioning on witness's reluctance to testify where reason witness gave for wanting to "'back out of it,' apart from his not feeling well, was his own recent adverse encounter with the criminal justice system" and witness "denied any possibility that his reluctance might result from a fear that his testimony would not be true"]; ***Hendricks* v. *State*** (Fla. Dist. Ct. App. 1978) 360 So.2d 1119, 1123 [upholding preclusion of defense cross-examination regarding witness' reluctance to testify and distinguishing circumstances where it was apparent the witnesses' testimony was affected by financial considerations].)

Technically, it should not change the analysis much if the prosecutor threatens the witness with arrest or other consequences if the witness fails to show up – so long as the threat is not accompanied by coercion to testify *in a particular way*. Nevertheless, courts may view an unadorned threat to arrest or arrest of the witness for failure to appear as favorable (albeit not material) evidence for the defense. (**See e.g., *Pruitt* v. *McAdory*** (7th Cir. 2003) 337 F.3d 921, 926 [evidence that prosecutor brought the witness before a judge and secured an appearance bond before the trial was "certainly favorable" to the defendant "in the sense that it would have given him another basis on which to question the motivation" but it was not *material* where defense knew of witness' reluctance to testify].)

Similarly, a victim's request to drop criminal charges is also probably not, in and of itself, favorable evidence. Whether it constitutes favorable evidence should turn on the *reason* why the witness wants the charges dropped. If the reasons the witness desires the charges dropped do not help show the defendant is innocent, the request is likely not favorable evidence. For example, in ***Holloway* v. *State*** (Miss. Ct. App. 2015) 196 So.3d 962, the court upheld the exclusion of evidence that a sexual assault victim stated she had tried "to drop [charges] so many times and they said that they don't plan on dropping any—the district attorney—so I don't know how I would go about dropping them." (**Id**. at p. 969.) The conversation occurred between the victim and an attorney for a different charged perpetrator. The defendant argued this was exculpatory evidence, but the appellate court observed that during that same conversation, the witness explained she wanted the defendant to do community service and pay fines, acknowledged that the defendant and another co-defendant committed the crime, that the attorneys for the other co-defendants were putting pressure on her to drop the charges, and that the other attorneys wanted her to lie about the story. (**Ibid**.) The appellate court ruled: "Read in context, the evidence is not relevant. [The victim's] desire to drop the charges against [the co-defendants] "did not make it more or less probable that [defendant] Holloway did or did not rape her." (**Ibid**.) The court went on to note that the irrelevance of the evidence was "especially true here, where the evidence is overwhelming that [the victim] was lobbied and pressured to lie and say that the assaults never occurred." (**Id**. at pp. 969-970.) The final reason the court gave for finding the evidence irrelevant was that it is the *State*'s decision to prosecute and uphold the laws of the state. (**Id**. at p. 970.) In other circumstances (such as a request based on fear of retaliation), the evidence can be *incriminatory*. (**Cf**. this outline, section I-3-CC at pp. 54-55 [discussing cases finding reluctance to testify in face of threats bolsters the witness's credibility].)

Expect defense counsel to argue that if there is any ambiguity regarding the rationale for the victim's wanting the charges dismissed, the request should be disclosed since *one* reasonable inference is that the witness does not want to testify out of fear of perjuring herself. Whether this argument will fly is questionable (**cf.**, ***State* v. *Neal*** (unpublished Kan. Ct. App. 2004) 85 P.3d 228 [2004 WL 421972], at p. *4]), but prosecutors can avoid having to litigate this question by making sure to explore the victim's rationale for wanting the charges dismissed.

Editor's note: Even assuming the witness's statement is not exculpatory, it may very well be viewed as a relevant statement of a prosecution witness, triggering the statutory duty to disclose under Penal Code section 1054.1(f).

4. Can evidence supporting defense theories that are unknown or not obvious to the prosecution be deemed favorable evidence?

Sometimes the defense will argue that the prosecution failed to disclose "favorable" evidence that would have supported a particular defense theory. The general definition of "favorable" evidence is often simply stated as evidence that hurts the prosecution or helps the defense. (**See e.g.**, ***In re Miranda*** (2008) 43 Cal.4th 541, 575.) There is no stated qualification that whether the evidence falls into this definition turns on whether the prosecutor was or should have been aware of defense theory of innocence that is never conveyed to the prosecution.

However, as pointed out by the California Supreme Court in ***In re Steele*** (2004) 32 Cal.4th 682: "Implicitly, ***Brady*** requires the prosecution to disclose only evidence that is favorable and material ***under the prosecution's evidence or theory of the case***." (**Id.** at p. 699, emphasis added.) "Otherwise, the prosecution effectively would be required to do what ***Brady*** does not require, that is, to 'deliver [its] entire file to defense counsel' (***United States* v. *Bagley***, supra, 473 U.S. at p. 675, 105 S.Ct. 3375) in order to avoid withholding evidence that may, or may not, become favorable and material depending on whatever unknown and unknowable theory of the case that the defendant might choose to adopt." (***Steele*** at p. 699; **see also *Woods* v. *Sinclair*** (9th Cir. 2014) 764 F.3d 1109, 1127 ["prosecutor's duty to disclose under ***Brady*** is limited to evidence a reasonable prosecutor *would perceive at the time* as being material and favorable to the defense."], emphasis added; ***United States* v. *Salyer*** (unreported E.D. Cal. 2010) 2010 WL 3036444, *5 [decision whether evidence constitutes ***Brady*** evidence "is made from the prosecution's vantage point, not a speculative insight into defense counsel's theory of the defense"].)

"It is one thing to expect the prosecution to know about its own case and to provide the defense with evidence weakening that case. It is quite different to expect it to be alert to information unrelated to its case that might support a defense theory, especially given the unlimited range of potentially mitigating evidence." (***In re Steele*** (2004) 32 Cal.4th 682, 700.) As noted in ***United States* v. *Comosona*** (10th Cir.1988) 848 F.2d 1110, "[t]o hold otherwise would impose an insuperable burden on the

Government to determine what facially non-exculpatory evidence might possibly be favorable to the accused by inferential reasoning. We are confident that the Supreme Court did not intend the ***Brady*** holding to sweep so broadly." (**Id**. at pp. 1115; **see also *Harris* v. *Kuba*** (7th Cir.2007) 486 F.3d 1010, 1016 ["***Brady*** does not require that police officers or prosecutors explore multiple potential inferences to discern whether evidence that is not favorable to a defendant could become favorable."]; **cf**., ***Newsome* v. *McCabe*** (7th Cir. 2001) 260 F.3d 824, 824 ["police need not spontaneously reveal to prosecutors every tidbit that with the benefit of hindsight (and the context of other evidence) could be said to assist defendants."].)

However, if the defendant specifically asks the prosecution to provide certain information, the situation may be different. "In some circumstances, the obligation to disclose evidence favorable to the defendant may require the prosecution to provide materials that the defendant specifically requests as potential exculpatory materials even if their potential exculpatory nature would not otherwise be apparent to the prosecution." (***In re Steele*** (2004) 32 Cal.4th 682, 700; **see also *People* v. *Lewis*** (2015) 240 Cal.App.4th 257, 265.)

Editor's note: Whether defense counsel should be permitted to explain the exculpatory value of the evidence ex parte under the guise of protecting the work-product privilege or the attorney-client privilege should be assessed in light of the current case law on the propriety of such ex parte showings (**see** this outline, section XVI-4 at pp. 334-336).

In any event, courts may disagree with prosecutors over whether a "theory of innocence" is or is not difficult to discern – and thus it behooves prosecutors to "think like a defense attorney" as best as possible when it comes to assessing the exculpatory value of evidence and disclose evidence that could support any reasonably likely theory of the defense.

5. What is considered "material evidence" for purposes of deciding whether a prosecutor has a due process obligation to disclose favorable, material evidence?

A. General definition

Evidence is material "only 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. *Lucas*** (2014) 60 Cal.4th 153, 274 citing to ***United States* v. *Bagley*** (1985) 473 U.S. 667, 682; **accord *Kyles* v. *Whitley*** (1995) 514 U.S. 419, 433.)

Whether there is a reasonable probability of a different result is an objective test, "based on an 'assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision,' and not dependent on the 'idiosyncrasies of the particular decisionmaker,' including the 'possibility of arbitrariness, whimsy, caprice, "nullification," and the like.' [Citation]." (***In re Sassounian*** (1995) 9 Cal.4th 535, 544.)

"Materiality … requires more than a showing that the suppressed evidence would have been admissible [citation], that the absence of the suppressed evidence made conviction 'more likely' [citation], or that using the suppressed evidence to discredit a witness's testimony 'might have changed the outcome of the trial' [citation]." (***People* v. *Salazar*** (2005) 35 Cal.4th 1031, 1043.)

Moreover, in determining the materiality of evidence that was not disclosed, "the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" (***Kyles* v. *Whitley*** (1995) 514 U.S. 419, 434; **accord *Turner* v. *United States*** (2017) 137 S.Ct. 1885, 1893; ***Cone* v. *Bell*** (2009) 556 U.S. 449, 469–470.)

Put another way, "the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." (***United States* v. *Agurs*** (1976) 427 U.S. 97, 108.) That is, the defendant must show the lack of disclosure was prejudicial: "Evidence is not 'material' unless it is 'prejudicial,' and not 'prejudicial' unless it is 'material.'" (***Bailey* v. *Rae*** (9th Cir. 2003) 339 F.3d 1107, 1116, fn. 6; **see also *People* v. *Lucas*** (2014) 60 Cal.4th 153, 274 [the prejudice that must ensue for a true ***Brady*** violation to occur "focuses on 'the materiality of the evidence to the issue of guilt or innocence'"].)

Finally, "while the tendency and force of undisclosed evidence is evaluated item by item, its cumulative effect for purposes of materiality must be considered collectively." (***Kyles* v. *Whitley*** (1995) 514 U.S. 419, 436-437, and fn. 10; **accord *Wearry* v. *Cain*** (2016) 136 S.Ct. 1002, 1007; ***People* v. *Brown*** (1998) 17 Cal.4th 873, 887)

In ***In re Sassounian*** (1995) 9 Cal.4th 535, the California Supreme Court specifically disapproved of California decisions that defined the materiality of evidence under the Fourteenth Amendment's due process clause more broadly than as described above. (**Id**. at p. 544 [overruling ***People* v. *Morris*** (1988) 46 Cal.3d 1, 30, fn. 14 and ***In re Jackson*** (1992) 3 Cal.4th 578, 595].) The ***Sassounian*** court admonished: "[I]t is not correct to state, for example, that 'evidence is "material" which "tends to influence the trier of fact because of its logical connection with the issue."' (**Id**. at p. 545, fn. 6.)

As can be seen, the High Court has used different, or at least, alternative language in describing what constitutes "material" evidence under the ***Brady*** rule. This tradition was continued in the recent High Court case of ***Wearry* v. *Cain*** (2016) 136 S.Ct. 1002.

This is what the ***Wearry*** court said (with alternate citations and sub-quotation marks omitted): "Evidence qualifies as material when there is any reasonable likelihood it could have affected the judgment of the jury. ***Giglio***, supra, at 154 (quoting ***Napue v. Illinois***, 360 U.S. 264, 271). To prevail

on his ***Brady*** claim, Wearry need not show that he "more likely than not" would have been acquitted had the new evidence been admitted. ***Smith v. Cain***, 132 S.Ct. 627, 629–631. He must show only that the new evidence is sufficient to "undermine confidence" in the verdict." (***Wearry*** at p. 1006.)

The definition provided in the first sentence of the quote imports language from ***Giglio* v. *United States*** (1972) 405 U.S. 150 at p. 154, which in turn was quoting from ***Napue* v. *Illinois*** (1959) 360 U.S. 264, 271. However, that language from ***Giglio*** and ***Napue*** reflects the standard for determining whether a new trial "is required if 'the *false testimony* could . . . in any reasonable likelihood have affected the judgment of the jury." (***Giglio*** at p. 154, emphasis added.) This outline will provide a further discussion of the distinction between a due process claim based on failure to disclose evidence and a due process claim based on presenting false testimony (or allowing false testimony to go uncorrected) at section I-16 at pp. 158-161.)

Suffice to say, the definition of "material" expressed in the first sentence of the quote in ***Wearry*** (i.e., a reasonable likelihood the evidence "***could have***" affected the judgment of the jury) seems like an easier standard to meet than the more oft-expressed standard of a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding ***would have*** been different" (***Kyles* v. *Whitley*** (1995) 514 U.S. 419, 433; ***United States* v. *Bagley*** (1985) 473 U.S. 667, 682). Accordingly, expect defense counsel to use the definition expressed in that first sentence of ***Wearry***.

However, the latest case from the United States Supreme Court has **affirmed the traditional standard**: "[E]vidence is 'material' within the meaning of ***Brady*** when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." (***Turner* v. *United States*** (2017) 137 S.Ct. 1885, 1893.)

> **Editor's note**: As a practical matter, lower courts inclined to overturn a verdict for failure to disclose evidence can already justify whatever decision they make without having to choose between these two alternate definitions by resorting to the commonly cited and amorphous language found in many High Court cases: "A 'reasonable probability' of a different result" is one in which the suppressed evidence "'undermines confidence in the outcome of the trial.'" (***Turner* v. *United States*** (2017) 137 S.Ct. 1885, 1893.)

B. Materiality is Tied to the Nature of the Hearing at Issue in California

Numerous courts have held that the Due Process obligation to disclose favorable material evidence (i.e., the ***Brady*** obligation) is a trial right. (**See e.g.**, ***United States* v. *Mathur*** (1st Cir. 2010) 624 F.3d 498, 507 ["It is, therefore, universally acknowledged that the right memorialized in ***Brady*** is a trial right."]; ***Poventud* v. *City of New York*** (2d Cir. 2014) 750 F.3d 121, 154 ["***Brady*** is a trial right, formulated to safeguard the fairness of trial outcomes; it does not require disclosure of impeachment evidence during pretrial events, however critical"]; ***United States* v. *Moussaoui*** (4th Cir. 2010) 591 F.3d 263, 285 ["The ***Brady*** right . . . is a *trial* right"].)

Nevertheless, California courts have applied a version of the ***Brady*** rule outside the context of trial. When doing so, these courts have held the question is not whether the undisclosed evidence would have been reasonably probable to result in a different ***verdict*** but whether the undisclosed evidence would have been reasonably probable to result in a different outcome at the ***relevant motion or hearing***. For example, when it comes to whether there has been a due process violation for failure to disclose evidence before preliminary examination, "the precise scope of a defendant's due process right to disclosure and the determination of whether that right has been violated are necessarily tailored to the context and purpose of the preliminary hearing." (***Bridgeforth* v. *Superior Court*** (2013) 214 Cal.App.4th 1074, 1087, citing to ***Merrill* v. *Superior Court*** (1994) 27 Cal.App.4th 1586, 1596–1597 and ***People* v. *Harris*** (1985) 165 Cal.App.3d 1246, 1264.) "Accordingly, the standard of materiality is whether there is a reasonable probability that disclosure of the exculpatory or impeaching evidence would have altered the magistrate's probable cause determination with respect to any charge or allegation." (***Bridgeforth* v. *Superior Court*** (2013) 214 Cal.App.4th 1074, 1087, citing to ***Merrill* v. *Superior Court*** (1994) 27 Cal.App.4th 1586, 1596–1597.)

Similarly, in ***United States* v. *Gamez-Orduno*** (9th Cir. 2000) 235 F.3d 453, the Ninth Circuit stated that "[t]he suppression of material evidence helpful to the accused, whether at trial or on a ***motion to suppress***, violates due process if there is a reasonable probability that, had the evidence been disclosed, the ***result of the proceeding*** would have been different." (**Id.** at p. 461; ***United States* v. *Fernandez*** (9th Cir. 2000) 231 F.3d 1240, 1248 [noting that "***Brady*** merely requires the government to turn over the evidence in time for it to be of use at trial" but also that "***the due process principles*** announced in ***Brady*** and its progeny must be applied to" certain pretrial proceedings, such as suppression hearings", emphasis added]; **see also *United States* v. *Lee Vang Lor*** (10th Cir. 2013) 706 F.3d 1252, 1259 ["Whether or not ***Brady*** applies at the suppression stage, we can at least assume that Defendant might be deprived of a 'full and fair evidentiary hearing' if the Government withholds material evidence."].)

> **Editor's note**: **See also** this outline, section XI-8 at pp. 283-285 [discussing the application of ***Brady*** at motions to suppress and in other pre-trial contexts].

Bottom line: Although compelling arguments can be made that the holding in ***Brady*** itself does not require disclosure of ***any*** evidence at a pre-trial hearing, if the prosecution team is aware of evidence that could result in the granting of a pre-trial motion to suppress or dismiss, failure to disclose this information will likely be seen as a violation of due process *in general*. When the defense is claiming the prosecutor failed to disclose evidence at a pre-trial hearing, it is more productive to focus on the issue of whether there was a reasonable probability the result of the pre-trial proceeding would have been different had the undisclosed evidence (usually impeachment evidence) been made available.

C. Standard Sounds Like Standard on Review but It Applies at Any Point

Although the test for determining whether evidence is material sounds like the standard used by a reviewing court, when the question involves the alleged suppression of evidence at trial, the test **is always the same** regardless of whether the issue rises in advance of trial, during trial, or after trial. (**See *United States* v. *Agurs*** (1976) 427 U.S. 97, 107-108; ***City of Los Angeles* v. *Superior Court*** (2002) 29 Cal.4th 1, 8; ***People* v. *Davis*** (2014) 226 Cal.App.4th 1353, 1363.)

First Caveat: The United States Supreme Court has warned: "Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure." (***United States* v. *Agurs*** (1976) 427 U.S. 97, 108.)

Second Caveat: The Ninth Circuit has recently indicated that when it comes to the prosecutor's obligation to disclose evidence *before or during* trial, the evidence need not be material, just "favorable." The language used can be confusing, but if properly parsed, it is clear that the duty to disclose merely favorable evidence ***is not required by due process***.

In ***United States* v. *Olsen*** (9th Cir. 2013) 704 F.3d 1172, the court, in dicta, stated: the "trial prosecutor's speculative prediction about the likely materiality of favorable evidence, however, should not limit the disclosure of such evidence, because it is just too difficult to analyze before trial whether particular evidence ultimately will prove to be 'material' after trial. In other words, the Ninth Circuit indicated that the "retrospective definition of materiality is appropriate only in the context of appellate review, and that trial prosecutors must disclose favorable information without attempting to predict whether its disclosure might affect the outcome of the trial." (**Id**. at p. 1183, fn. 3; **see also *Vaughn* v. *United States*** (D.C. 2014) 93 A.3d 1237, 1263 ["The materiality assessment this court conducts on appellate review is necessarily different from the materiality assessment the government can make pretrial when assessing its ***Brady*** obligations"].)

In ***United States* v. *Lucas*** (9th Cir. 2016) 841 F.3d 796 [discussed in greater depth in this outline, section IX-1 at pp. 267-269], the Ninth Circuit seemed to agree a prosecutor could consider the materiality of evidence in deciding whether it should be disclosed: "While ***Olsen*** encouraged prosecutors to err on the side of disclosure, it did not alter the fundamental construct of ***Brady***, which makes the prosecutor the initial arbiter of materiality and disclosure." (***Lucas*** at p. 809 [and finding, accordingly, that unless the defendant "can make a showing of materiality or demonstrate that the government has withheld favorable evidence, he must rely on 'the prosecutor's decision [regarding] disclosure.'"].) This distinction between what the test of materiality is and what the prosecutor "should do" can be seen in ***United States* v. *Price*** (9th Cir. 2009) 566 F.3d 900, where the court recommended that the "'materiality' standard usually associated with ***Brady*** ... should not be applied to pretrial discovery of exculpatory materials.... [J]ust because a prosecutor's failure to disclose evidence

does not violate a defendant's due process rights does not mean that the failure to disclose is proper.... [T]he absence of prejudice to the defendant does not condone the prosecutor's suppression of exculpatory evidence [ex ante].... [Rather,] the proper test for pretrial disclosure of exculpatory evidence should be an evaluation of whether the evidence is favorable to the defense." (**Id**. at p. 913, fn. 14, emphasis added.)

Editor's note: To the extent the footnote in ***Olsen*** can be interpreted as indicating a prosecutor violates due process by failing to turn over *non-material* favorable evidence, or that the test of materiality turns on *when* the decision is being made, **it is incorrect**. "[T]he obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ***ethical*** or ***statutory*** obligations[.]" (***Cone* v. *Bell*** (2009) 556 U.S. 449, 470 fn. 15 [**see** this outline, section XIV at pp. 296-305 [discussing ethical discovery duties of prosecutors]; section III-17, pp. 188-190 [discussing prosecutor's statutory duties to disclose "exculpatory evidence" per § 1054.1(e)].) But the "Due Process Clause of the Fourteenth Amendment, as interpreted by ***Brady***, ***only*** mandates the disclosure of material evidence[.]" (**Id**. at p. 1783, fn. 15, emphasis added.)

D. When Will Impeachment Evidence Be "Material" for *Brady* Purposes?

"In general, impeachment evidence has been found to be material where the witness at issue 'supplied the only evidence linking the defendant(s) to the crime' [citations], or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case [citation].'" (***People* v. *Letner*** (2010) 50 Cal.4th 99, 177; ***People* v. *Salazar*** (2005) 35 Cal.4th 1031, 1050; **see also *Smith* v. *Cain*** (2012) 132 S.Ct. 627, 630 [finding undisclosed statements impeaching witness' testimony regarding identification of defendant were material where testimony was only evidence linking defendant to crime]; ***United States* v. *Ruiz*** (2002) 536 U.S. 622, 628 [characterizing ***Giglio* v. *United States*** (1972) 405 U.S. 150, 154 as defining "exculpatory evidence" to include "'evidence affecting' witness 'credibility,' where the witness' 'reliability' is likely '*determinative of guilt or innocence*'"]; ***United States* v. *Blanco*** (9th Cir.2004) 392 F.3d 382, 387 ["Impeachment evidence is favorable ***Brady/Giglio*** material 'when the reliability of the witness may be determinative of a criminal defendant's guilt or innocence"].)

On the other hand, "evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict." (***Smith* v. *Cain*** (2012) 132 S.Ct. 627, 630.) "[I]mpeachment evidence is not material if the testimony of the witness was corroborated, or when the suppressed evidence 'merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable.'" (***Gotti* v. *United States*** (S.D.N.Y. 2009) 622 F.Supp.2d 87, 95, citing to ***United States* v. *Payne*** (2nd Cir. 1995) 63 F.3d 1200, 1210.) Several different appellate courts in California have specifically adopted ***Payne*** in this regard, albeit in unpublished opinions. (**See e.g.,** ***People* v. *McKean*** [unreported] 2006 WL 2497591, *19; ***In re Gordon*** [unreported] 2002 WL 1163606, *11; ***People* v. *Vigas*** [unreported] 2005 WL 2857755, *7; **see also *People* v. *Clark*** (2011) 52 Cal.4th 856, 952 [evidence of witness's prior misdemeanor welfare

fraud conviction not material because witness was not primary witness and her testimony was not only evidence linking defendant to the crime]; ***Lopez* v. *Ryan*** (9th Cir. 2011) 630 F.3d 1198, 1210 ["Evidence that is merely cumulative is not material"].)

E. <u>In Deciding Whether Evidence is Material, Is It Proper to Consider How Nondisclosure Affected the Defense Investigation and Strategy?</u>

It is often said that "[m]ateriality includes consideration of the effect of the nondisclosure on defense investigations and trial strategies." (***People* v. *Verdugo*** (2010) 50 Cal.4th 263, 279; ***People* v. *Martinez*** (2009) 47 Cal.4th 399, 454; ***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1132.) However, the *focus* in deciding materiality is not on the ability of the defense to prepare for trial unless the prosecution misleads the defense.

In ***United States* v. *Agurs*** (1976) 427 U.S. 97, the High Court specifically **<u>rejected</u>** a standard that focused "on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence." (**Id**. at p. 113.) The ***Agurs*** court stated: "Such a standard would be unacceptable for determining the materiality of what has been generally recognized as "***Brady*** material" for two reasons. First, that standard would necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense. Second, such an approach would primarily involve an analysis of the adequacy of the notice given to the defendant by the State, and it has always been the Court's view that the notice component of due process refers to the charge rather than the evidentiary support for the charge." (**Id**. at p. 113, fn. 20; **see also *United States* v. *Bencs*** (6th Cir. 1994) 28 F.3d 555, 560 ["Materiality pertains to the issue of guilt or innocence, and not to the defendant's ability to prepare for trial"]; ***Com.* v. *Williams*** (Pa. 2014) 105 A.3d 1234, 1244 ["The United States Supreme Court has never held ***Brady*** materiality is measured in terms of 'effects on the defense strategy'" and finding defendant did not make out a ***Brady*** violation based on a claim that essentially amounted to his arguing the failure to disclose led him to perjure himself at trial]; ***DeLuca* v. *State*** (Md. Ct. Spec. App. 1989) 553 A.2d 730, 746 [***Brady*** is concerned with a direct impact on guilt or innocence rather than an impact on the conduct of the trial].)

Whether the prosecution will be viewed as misleading the defense, however, can rest on whether the defense has made a specific request for information and whether there has been an incomplete or misleading response by the prosecution in assessing the impact of nondisclosure. If there has been a request followed by an incomplete or misleading response, then emphasis may be more heavily placed on the impact of nondisclosure on trial strategy and tactics. (**See *United States* v. *Bagley*** (1985) 473 U.S. 667, 682, ["the reviewing court may consider directly any adverse effect that the prosecutor's ***failure to respond*** might have had on the preparation or presentation of the defendant's case." emphasis added]; **See** also this outline, immediately below, section I-5-F at p. 64.)

F. Does the Fact the Defense Requested the Information Have Any Bearing on the Materiality of the Evidence?

As noted earlier, the due process duty to disclose evidence is not contingent upon a defense request for the evidence. (***United States* v. *Agurs*** (1976) 427 U.S. 97, 107.) However, "the presence or absence of a specific request at trial is relevant to whether evidence is material under this test." (***People* v. *Uribe*** (2008) 162 Cal.App.4th 1457, 1472.) "[I]n determining whether evidence was material, 'the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case.'" (***In re Steele*** (2004) 32 Cal.4th 682, 701.)

Moreover, "an ***incomplete*** response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued." (***In re Steele*** (2004) 32 Cal.4th 682, 700, emphasis added.) "And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption.'" (***In re Steele*** (2004) 32 Cal.4th 682, 700; ***People* v. *Uribe*** (2008) 162 Cal.App.4th 1457, 1472.). Thus, "the reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response. (***United States v. Bagley*** (1985) 473 U.S. 667, 683.)

G. Should a Prosecutor Take into Consideration the Credibility of the Witness Who Provided the Allegedly Exculpatory Evidence in Deciding Whether Evidence is *Material* for *Brady* Purposes?

Although the credibility of a witness does not generally play in role in deciding whether evidence is favorable (**see** this outline, section I-3-A-i at p. 6.), the credibility of the source *should* play some role in assessing whether the evidence is material. This is because the undisclosed testimony of a witness who is obviously lying or crazy or heavily biased will have less impact on the outcome of a case than an obviously truthful, sane, and unbiased witness.

The "Supreme Court has unambiguously assigned the duty to disclose [under ***Brady***] solely and exclusively to the prosecution . . ." (***IAR Systems Software, Inc.* v. *Superior Court*** (2017) 12 Cal.App.5th 503, 514, 515.) In a typical case, where a defendant makes only a general request for ***Brady*** material, "it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the

prosecutor's decision on disclosure is final." (***Pennsylvania* v. *Ritchie*** (1987) 480 U.S. 39, 59; **see also *In re Brown*** (1998) 17 Cal.4th 873, 878, 881 ["Responsibility for ***Brady*** compliance lies exclusively with the prosecution . . . the duty is nondelegable . . ."].)

This responsibility appears to include deciding whether the evidence is sufficiently substantial to rise to the level of ***Brady*** evidence. As pointed out in ***United States* v. *Agurs*** (1976) 427 U.S. 97, the State is not obligated "to communicate preliminary, challenged, or speculative information." (**Id**. at p. 109, fn. 16; **see also *People* v. *Gutierrez*** (2003) 112 Cal.App.4th 1463, 1471 ["***Brady***, however, does not require the disclosure of information that is of mere speculative value"].)

Moreover, in ***People* v. *Jordan*** (2003) 108 Cal.App.4th 349, the court implicitly held that the source of impeachment evidence may be taken into consideration when deciding whether evidence is favorable evidence under ***Brady***. Specifically, the ***Jordan*** court stated, "it does not appear that a claim of peace officer misconduct, asserted only at an unrelated criminal trial by a defendant trying to avoid criminal liability, constitutes ***favorable*** evidence within the meaning of ***Brady***." (**Id.** at p. 362, emphasis added.) In addition, the court ***went on to say*** such complaints "do not immediately command respect as ***trustworthy*** or indicate actual misconduct on the part of the officer" - even if the unrelated trial results in an acquittal. (**Ibid,** emphasis added.) And in ***In re Cox*** (2004) 30 Cal.4th 974, the fact the allegedly exculpatory evidence was found to be patently untrue essentially absolved the prosecution of any ***Brady*** duty to turn the evidence over to the defense. (**Id**. at p. 1008.)

On the other hand, both the California Supreme Court and the Ninth Circuit have stated: "[i]t is not the role of the prosecutor to decide that facially exculpatory evidence need not be turned over because the prosecutor thinks the information is false." (***In re Miranda*** (2008) 43 Cal.4th 541, 577 and ***United States* v. *Alvarez*** (9th Cir.1996) 86 F.3d 901, 905; **see also *Tennison* v. *City and County of San Francisco*** (9th Cir. 2009) 570 F.3d 1078, 1094 [indicating that if there is a question about the reliability of exculpatory information, it is not the prerogative of the prosecutor to preemptively decide the question].)

Some prosecutors find it difficult to reconcile the language in ***Miranda*** and ***Alvarez*** with the notion that the prosecutor retains discretion in deciding whether to turn over facially exculpatory evidence. However, there is no real inconsistency.

The question of whether a prosecutor believes a witness is lying is a ***different*** question than whether the prosecutor believes a claim of misconduct constitutes ***material*** evidence under ***Brady***. Indeed, a prosecutor may believe a witness is telling the truth and yet conclude that it is not information that must be disclosed under ***Brady***.

Both the California Supreme Court in ***Miranda*** and the Ninth Circuit in ***Alvarez*** cite to ***Kyles* v. *Whitley*** (1995) 514 U.S. 419 in support of the proposition that "[i]t is not the role of the prosecutor to

decide that facially exculpatory evidence need not be turned over because the prosecutor thinks the information is false at issue." In particular, the ***Miranda*** and ***Alvarez*** courts point to the following statement from ***Kyles***: "[i]t is 'the criminal trial, as distinct from the prosecutor's private deliberations' that is the 'chosen forum for ascertaining the truth about criminal accusations.'" (***Kyles*** at p. 440.)

However, shortly before making that statement, the ***Kyles*** court made it clear that adopting a "materiality" requirement in deciding whether there has been a ***Brady*** violation "must accordingly be seen as leaving the government with ***a degree of discretion***" and assigning to the prosecution (which alone can know what is undisclosed) "***the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached***." (***Kyles* v. *Whitley*** (1995) 514 U.S. 419. 437, emphasis added.) In other words, the prosecutor, in deciding whether to disclose evidence, gets to assess materiality.

The statement in ***Miranda*** and ***Alvarez*** that "[i]t is not the role of the prosecutor to decide that facially exculpatory evidence need not be turned over because the prosecutor thinks the information is false" must be taken in context as referring to the fact that facially exculpatory evidence should ordinarily be treated as ***favorable*** evidence, notwithstanding a prosecutor's belief that the allegation is false. But this does not mean the prosecutor must also assume that, in the context of a given case, such evidence is always favorable or, more significantly, always material. Indeed, the quote from ***Kyles*** is ensconced in a paragraph that **implicitly accepts** the proposition it is the prosecutor's responsibility to conduct an assessment of whether evidence is favorable material evidence, else why would there be the need to caution prosecutors to "resolve doubtful questions in favor of disclosure." (***Kyles*** at p. 439, quoting ***United States* v. *Agurs*** (1976) 427 U.S. 97, 108.)

At the same time, courts want prosecutors to realize that it is not always easy to assess the materiality of the evidence and thus, to help preserve the trial as the "chosen forum for ascertaining the truth about criminal accusations," they caution prosecutors to err on the side of disclosure. (***Miranda***, at p. 577; ***Alvarez***, at p. 905.) This is good advice even when it is clear the evidence is ***not*** material, since there may be a statutory obligation (**see** this outline, section III-17 at pp. 188-190) and/or an ethical obligation (**see** this outline, section XIV-2 at pp. 297-299) to turn over such evidence. (**See *United States* v. *Van Brandy*** (9th Cir.1984) 726 F.2d 548, 552 ["where doubt exists as to the usefulness of evidence, [the prosecutor] should resolve such doubts in favor of full disclosure ..."].)

Editor's note: Normally, the distinction between favorable evidence and favorable material evidence **is not usually important on a practical level** - since the prosecutor should disclose most favorable evidence under the statutory duty to disclose exculpatory evidence pursuant to Penal Code section 1054.1(e) or pursuant to a prosecutor's ethical duty. However, the distinction can become significant when deciding whether there is a duty to turn over favorable "materials or information . . . which are privileged pursuant to an express statutory provision." (Pen. Code, § 1054.6.) In that circumstance, the statutory or ethical duty to disclose favorable evidence does not necessarily warrant disclosure and ***unilateral*** disclosure may violate the law. (**See *Rezek* v. *Superior Court*** (2012) 206 Cal.App.4th 633, 643.)

H. Can Cumulative Evidence Ever Be Considered Material for *Brady* Purposes?

It is often said that if suppressed evidence is "merely cumulative," then the failure to disclose is not a violation. (**See *United States* v. *Kohring*** (9th Cir. 2011) 637 F.3d 895, 902; ***Lopez* v. *Ryan*** (9th Cir. 2011) 630 F.3d 1198, 1210 ["Evidence that is merely cumulative is not material"]; ***United States* v. *Strifler*** (9th Cir.1988) 851 F.2d 1197, 1202 [same]; ***United States* v. *Anzalone*** (9th Cir. 1989) 886 F.2d 229, 233 [similar].)

On the other hand, it has also been said "the government cannot satisfy its ***Brady*** obligation to disclose exculpatory evidence by making some evidence available and claiming the rest would be cumulative." (***United States* v. *Yepiz*** (9th Cir. 2016) 844 F.3d 1070, 1076 citing to ***Carriger* v. *Stewart*** (9th Cir. 1997) 132 F.3d 463, 481; **see also *Gonzalez* v. *Wong*** (9th Cir. 2011) 667 F.3d 965, 984.)

Bottom line: This apparent inconsistency should just be attributed to semantics or differing views on what it means for evidence to be cumulative. The fact evidence is cumulative is OF COURSE highly relevant to whether the evidence would change the outcome of a trial. But there remains a possibility that cumulative evidence could potentially tip the outcome of a trial. It is not a big deal if a prosecutor fails to disclose a witness has a misdemeanor conviction while disclosing four impeaching felonies. But if the prosecution discloses one eyewitness to an event who disputes the defendant was the shooter and fails to disclose three other eyewitnesses who also dispute the defendant was the shooter, a ***Brady*** violation is going to be found – even though the three additional witnesses are "cumulative."

6. What does it mean for evidence to have been "suppressed" by the prosecution for purposes of deciding whether a prosecutor has a due process obligation to disclose favorable, material evidence?

For the evidence to have been suppressed by the prosecution, the information must

(i) be in the actual or constructive possession of the "prosecution team" *or* the prosecution must be aware the information exists,

(ii) the prosecution must have failed to disclose the information, and

(iii) the information must *not* be known to the defense and available to them through the exercise of reasonable diligence

(**See generally *In re Steele*** (2004) 32 Cal.4th 682, 696-697 ["a prosecutor does not have a duty to disclose exculpatory evidence or information to a defendant unless the prosecution team actually or constructively possesses that evidence or information"]; ***People* v. *Salazar*** (2005) 35 Cal.4th 1031, 1049 ["evidence is not suppressed unless the defendant was actually unaware of it and could not have discovered it '"by the exercise of reasonable diligence."'"].)

7. When will evidence be deemed to be "in possession of the prosecution" for purposes of deciding whether a prosecutor has a due process obligation to disclose favorable, material evidence?

A. The Prosecution Team in General

"A prosecutor's duty under *Brady* to disclose material exculpatory evidence extends to evidence the prosecution or the ***prosecution team*** knowingly possesses or has the right to possess." (***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, 1314-1315 (emphasis added; **accord *Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, 902-903; ***People* v. *Gutierrez*** (2003) 112 Cal.App.4th 1463, 1475.)

A prosecutor will be held to be in possession of "***Brady*** evidence" if the evidence is in the possession of the "prosecution team." Members of the prosecution team include:

1. Any prosecutor who has handled the case and *maybe all* prosecutors in the same office

2. Any investigator/inspector with the prosecutor's office who handled the case and *maybe all* investigator/inspectors in the same office

3. Any member of the investigating agency who was personally involved in the investigation of defendant and *maybe all* members of the investigating agency

4. Persons who acted on the government's behalf or assisted the government's case and *maybe all* members of the agency employing those persons

The concept of the "prosecution team" (i.e., for purposes of determining whether the prosecution is in possession of evidence that it is obligated to provide to the defense) is now well established in California law. (**See *People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696,709; ***People* v. *Lucas*** (2014) 60 Cal.4th 153, 274; ***People* v. *Whalen*** (2013) 56 Cal.4th 1, 64; ***People* v. *Clark*** (2011) 52 Cal.4th 856, 981; ***Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, 904; ***In re Steele*** (2004) 32 Cal.4th 682, 697; ***People* v. *Superior Court (Dominguez)*** (2018) 28 Cal.App.5th 223, 234; ***IAR Systems* v. *Superior Court (Shehayed)*** (2017) 12 Cal.App.5th 503, 514; ***J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1335; ***People* v. *Uribe*** (2008) 162 Cal.App.4th 1457, 1476; ***People* v. *Gutierrez*** (2003) 112 Cal.App.4th 1463, 1475; ***People* v. *Abatti*** (2003) 112 Cal.App.4th 39, 54; ***People* v. *Jordan*** (2003) 108 Cal.App.4th 349, 358; ***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, 1314-1315.)

The concept of the "prosecution team" arose as a tool to help determine the scope of a prosecutor's obligations and derives from various principles articulated in the case law. Among these principles:

"The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." (***People* v. *Masters*** (2016) 62 Cal.4th 1019, 1067; ***People* v. *Letner and Tobin*** (2010) 50 Cal.4th 99, 175; **accord *Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, 902; ***In re Brown*** (1998) 17 Cal.4th 873, 879; ***People* v. *Abatti*** (2003) 112 Cal.App.4th 39, 53.) The same rule applies to those who "assist" the government's case. (**See *In re Brown*** (1998) 17 Cal.4th 873, 879; ***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, 1314-1315; ***People* v. *Uribe*** (2008) 162 Cal.App.4th 1457, 1476; ***People* v. *Jordan*** (2003) 108 Cal.App.4th 349, 358.) "The scope of the prosecutorial duty to disclose encompasses not just exculpatory evidence in the prosecutor's possession but such evidence possessed by investigative agencies to which the prosecutor has reasonable access." (***IAR Systems Software, Inc.* v. *Superior Court*** (2017) 12 Cal.App.5th 503, 514; ***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, 1314-1315; ***People* v. *Kasim*** (1997) 56 Cal.App.4th 1360, 1380 citing to ***People* v. *Robinson*** (1995) 31 Cal.App.4th 494, 499.)

Conversely, "information possessed by an agency that has no connection to the investigation or prosecution of the criminal charge against the defendant is not possessed by the prosecution team, and the prosecutor does not have a duty to search for or to disclose such material.' [Citation.]" (***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1133; ***In re Steele*** (2004) 32 Cal.4th 682, 697; **accord *Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, 902; ***People* v. *Ervine*** (2009) 47 Cal.4th 745, 768.) "[T]he prosecution team does ***not*** include federal agents, prosecutors, or parole officers who are ***not involved in the investigation***." (***IAR Systems Software, Inc.* v. *Superior Court*** (2017) 12 Cal.App.5th 503, 516, emphasis added.)

"The prosecution is under no obligation to turn over materials not under its control." (***United States* v. *Aichele*** (9th Cir.1991) 941 F.2d 761, 764.) "While the prosecution must disclose any information within the possession or control of law enforcement personnel, it has no duty to volunteer information that it does not possess or of which it is unaware." (***United States* v. *Hsieh Hui Mei Chen*** (9th Cir.1985) 754 F.2d 817, 824; **see also *United States* v. *Graham*** (6th Cir.2007) 484 F.3d 413, 417 ["***Brady*** clearly does not impose an affirmative duty upon the government to take action to discover information which it does not possess"].)

On the other hand, as pointed out in a pair of recent cases, there is "no clear test to determine when an individual is a member of the prosecution team." (***People* v. *Superior Court (Dominguez)*** (2018) 28 Cal.App.5th 223, 234 and ***IAR Systems* v. *Superior Court (Shehayed)*** (2017) 12 Cal.App.5th 503, 516; **accord *United States* v. *Meregildo*** (S.D.N.Y. 2013) 920 F.Supp.2d 434, 441; **see also *Chandras v. McGinnis*** [unreported E.D.N.Y.] 2002 WL 31946711, *7 ["the exact point at which government agents can fairly be categorized as acting on behalf of the prosecution, thus requiring the prosecutor to seek out any exculpatory or impeachment evidence in their possession, is uncertain."]

However, the appellate court in ***Dominguez*** and ***IAR*** have attempted to provide a rough framework.

"At its core, members of the team perform investigative duties and make strategic decisions about the prosecution of the case." (***Dominguez*** at p. 235; ***IAR*** at p. 516.) "Yet the "'team may also include individuals who are not strategic decision-makers,'" e.g., "'testifying police officers and federal agents who submit to the direction of the prosecutor and aid in the [g]overnment's investigation.'" (**Ibid**; **see e.g.**, ***United States* v. *Bin Laden*** (S.D.N.Y. 2005) 397 F.Supp.2d 465, 481 [finding that agents of the United States Marshals Service's Witness Security Program were members of the prosecution team because, at the prosecutors' request, the agents installed and continuously operated video-teleconference equipment "in order to further the Government's investigation"].)

"To be sure, "'[i]nteracting with the prosecution team, without more, does not make someone a team member.'"" (***Dominguez*** at p. 235; ***IAR*** at p. 517; **see e.g.**, ***United States* v. *Stewart*** (S.D.N.Y. 2004) 323 F.Supp.2d 606, 616-618 [declining "to impute knowledge of a forensic expert from the Secret Service lab who provided trial support for the prosecution and testified as an expert."].) "In some cases, when an individual is significantly involved with the prosecution, the presence of a single factor may warrant imputation." (***IAR*** at p. 517.)

"But greater involvement with the team makes imputation more likely. In that vein, relevant circumstances include "'whether the individual actively investigates the case, acts under the direction of the prosecutor, or aids the prosecution in crafting trial strategy.'"" (**Ibid**.)

"Likewise, since the underlying justification is imputation, the question can also be phrased as one "'of agency law: should a prosecutor be held responsible for someone else's actions?'"" (***Dominguez*** at p. 235; ***IAR*** at p. 518.) "This, in turn, requires consideration of—in simple terms—the "degree of control" the prosecution exercises over the ostensible agent." (**Ibid**.) "[T]he issue, in essence, is whether the prosecution has exercised such a degree of control over the nongovernmental actor or witness that the actor or witness's actions should be deemed to be those of the prosecution for purposes of ***Brady*** compliance." (***IAR*** at p. 518.)

"[T]he prosecution's disclosure obligations from our statutory scheme and from ***Brady*** are distinct." (***Dominguez*** at p. 235.) "Yet case law interpreting whose information is subject to disclosure by the prosecution under these respective authorities can overlap." (***Dominguez*** at p. 235 citing to ***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, 1311.) "Indeed, our Supreme Court has more than once interpreted the statutory discovery requirements with respect to this particular issue as 'consistent with' the prosecution's ***Brady*** obligations." (***Dominguez*** at p. 235 citing to ***In re Steele*** (2004) 32 Cal.4th 682, 696 and ***Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, 904.) And "[t]here is no reason to assume the ... statutory phrase ["in the possession of the prosecuting attorney or ... investigating agencies" (§ 1054.1)] assigns the prosecutor a broader duty to discover and disclose

evidence in the hands of other agencies than do Brady and its progeny." (***Dominguez*** at p. 235 citing to ***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1133–1134.)

> **Editor's note**: For a more expansive discussion of what "in the possession of the prosecuting attorney or ... investigating agencies" means for purposes of Penal Code § 1054.1, see this outline, section III-6 at pp. 169-172)

B. Actual Knowledge is Not Required - Knowledge Can Be Constructive

It is not required that the prosecution actually be aware of material within the possession of the investigating agency. A prosecutor will be deemed to be possession of favorable material evidence that is "known only to police investigators and not to the prosecutor[.]" (***Youngblood* v. *West Virginia*** (2006) 547 U.S. 867, 869; **accord *People* v. *Whalen*** (2013) 56 Cal.4th 1, 64 [prosecutor had a constitutional duty to disclose exculpatory, material evidence in possession of member of prosecution team "regardless whether the prosecutor was personally aware of the existence of the evidence"].) "[A]ny argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials." (***Kyles* v. *Whitley*** (1995) 514 U.S. 419, 438; ***In re Brown*** (1998) 17 Cal.4th 873, 879, 880-881; **see also *Tennison* v. *City and County of San Francisco*** (9th Cir. 2009) 570 F.3d 1078,1087 [noting restricting ***Brady*** duty to materials within actual possession of prosecutor "would undermine ***Brady*** by allowing the investigating agency to prevent production by keeping a report out of the prosecutor's hands until the agency decided the prosecutor ought to have it, and by allowing the prosecutor to tell the investigators not to give him certain materials unless he asked for them"]; ***United States* v. *Blanco*** (9th Cir.2004) 392 F.3d 382, 388 [same].)

The prosecution has "a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." (***Kyles* v. *Whitley*** (1995) 514 U.S. 419, 437-438.) "[A]ny favorable evidence known to the others acting on the government's behalf is imputed to the prosecution. 'The individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation." (***People* v. *Uribe*** (2008) 162 Cal.App.4th 1457, 1475.)

C. What Role Does the Fact the Evidence is "Reasonably Accessible" to the Prosecution Play in Deciding Whether the Evidence is in the Possession of Prosecution Team?

There is some confusion as to the role "reasonable accessibility" plays in determining whether evidence is in possession of the prosecution team. But this is what *should* be and is *likely* the rule: Evidence must be reasonably accessible to prosecutors for it to be deemed to be in possession of the prosecution team. But accessibility is only one factor to consider in determining whether the evidence is possessed by the prosecution team – it is not a synonym for "possession" itself. If this were not the case, prosecutors would be deemed to be in possession of all easily-searched for information on the internet.

In ***Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, the California Supreme Court borrowed from federal case law the following **three**-part ***Brady*** inquiry in deciding whether a defendant was entitled to postconviction discovery under section 1054.9: "'(1) whether the party with knowledge of the information is acting on the government's "behalf" or is under its "control"; (2) the extent to which state and federal governments are part of a "team," are participating in a "joint investigation" or are sharing resources; ***and*** (3) whether the entity charged with constructive possession ***has "ready access" to the evidence.'"*** (***Id***. at p. 904, emphasis added; **see also *IAR Systems* v. *Superior Court (Shehayed)*** (2017) 12 Cal.App.5th 503, 516.)

This principle that "reasonable accessibility" is just a factor in assessing possession was also highlighted in ***J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, where the court stated the obligation to seek out impeachment evidence in records "reasonably accessible" to the prosecution "does ***not mean*** that the prosecution must routinely review all available files for evidence that might impeach a prosecution witness." (**Id**. at p. 1336. fn. 6, emphasis added.) Rather, whether such a duty exists depends on "such factors as whether a request has been made by the defense; the prosecution's ***ease of access*** to the information; and the likelihood of evidence favorable to the defense (sic)." (**Id**. at p. 1336, fn. 6, emphasis added, and citing to two federal cases: ***United States* v. *Brooks*** (D.C.Cir.1992) 966 F.2d 1500, 1503–1504 [finding prosecution should inspect files when "there is an explicit request for an apparently very easy examination, and a non-trivial prospect that the examination might yield material exculpatory information"] and ***United States* v. *Joseph*** (3d Cir.1993) 996 F.2d 36, 40–41 [absent request by defense, prosecution need not search "unrelated files to exclude the possibility, however remote, that they contain exculpatory information"]; **see also *United States* v. *Reyeros*** (3d Cir. 2008) 537 F.3d 270, 281 [in deciding whether prosecution is in constructive possession of evidence, a court considers, inter alia, "whether the entity charged with constructive possession has 'ready access' to the evidence"]; ***United States* v. *Risha*** (3d Cir. 2006) 445 F.3d 298, 304 [same]; ***In re Pratt*** (1999) 69 Cal.App.4th 1294, 1317 ["information subject to disclosure by the prosecution [on discovery] [is] that '*readily available*' to the prosecution ***and not accessible to the defense***.", emphasis added].)

The rule may be somewhat different when it comes to statutory discovery obligations (**see** this outline, section III-6-A at p. 169), but, for ***Brady*** *purposes*, courts have only held the prosecution to be in possession of information that is neither physically possessed nor *actually* known to any member of the prosecution team on the sole ground it is "reasonable accessible" when the information is found in criminal history records that are easily accessed by the prosecution and are not accessible to the defense. (**See *People* v. *Santos*** (1994) 30 Cal.App.4th 169, 177 [ruling evidence of witness misdemeanor convictions disclosable under ***Brady*** necessarily presumed convictions within possession of prosecution]; ***People* v. *Hayes*** (1992) 3 Cal.App.4th 1238, 1244 [ruling evidence of victim's criminal convictions, pending charges, status of being on probation, acts of victim's dishonesty, and false reports of sexual assault disclosable under ***Brady*** necessarily presumed convictions within possession of

prosecution]; ***United States* v. *Perdomo*** (3d Cir.1991) 929 F.2d 967, 971 [local criminal history rapsheet from Virgin islands was within possession of federal prosecution team because it was "readily available" to the prosecution]; ***Sutton* v. *Bell*** (E.D. Tenn. 2011) 2011 WL 1225891, *14, fn. 21 [in "certain cases courts have found knowledge outside the prosecution team's files may be imputed to the prosecutor or a duty to search may be imposed where a search for readily available background information is routinely performed, such as routine criminal background checks of witnesses"]; ***Bowling* v. *Com***. (Ky. 2002) 80 S.W.3d 405, 410-411 ["knowledge may be imputed to the prosecutor, or a duty to search may be imposed, *in cases where a search for readily available background information is routinely performed, such as routine criminal background checks* of witnesses" but "the government has no duty to disclose what it does not know and could not have reasonably discovered" and "[a]bsent a showing that the prosecution would have turned up an indictment pending in a different county *as part of a routine criminal background check*, knowledge of the indictment cannot be imputed upon the prosecution" emphasis added]; ***Hollman* v. *Wilson*** (3rd Cir. 1998) 158 F.3d 177, 181 [noting there is a duty to search "accessible files," but finding no discovery violation for failure to turn *over criminal records of a witness* where the information was overlooked because the witness was given two different criminal identification numbers and thus the missing information was not "readily available" to the prosecution]; ***People* v. *Lopez*** (unpublished) 2016 WL 1244729 [treating CalGang database as equivalent to rapsheets]; **but see *In re State ex rel. Munk*** (Tex. App. 2014) 448 S.W.3d 687, 692-693 [disagreeing that prosecution is in possession of certain national criminal data bases just because prosecution has access to those databases, noting "the fact that one may have access to information does not mean that the person has possession of all information that he or she could potentially access," and finding "access to information does not equate to knowledge that the information exists, which is a component under ***Brady***"].)

i. Can Evidence in the Physical Possession of the Prosecution Team be Deemed Outside the "Possession" of the Prosecution Team if the Evidence is Not Reasonably Accessible to Members of the Team?

The absence of reasonable accessibility can defeat a claim the evidence is in the possession of the prosecution team. While evidence in the *physical* possession of the prosecution team is generally considered "possessed" by the prosecution team, there should not be a constitutional violation if the favorable material evidence is not reasonably accessible to the prosecution team. As repeatedly stated by the California Supreme Court "a criminal defendant's right to discovery is based on the fundamental proposition that the accused is entitled to a fair trial and the opportunity to present an intelligent defense in light of all relevant and ***reasonably accessible information***." (***People* v. *Thompson*** (2016) 1 Cal.5th 1043, 1095; ***People* v. *Hobbs*** (1994) 7 Cal.4th 948, 965, emphasis added.)

In the California case of ***People* v. *Jordan*** (2003) 108 Cal.App.4th 349, the court accepted the concept that actual possession without knowledge does not always equate to possession for ***Brady*** purposes. In

Jordan, the People put on a gang expert witness. After the trial, the defense learned that in two other unrelated criminal trials defendants had alleged that the gang expert had fabricated evidence. The defense claimed the prosecution had a duty to reveal his evidence. One of the reasons the appellate court gave for denying defendant's claim was that prosecution has no duty "to catalog the testimony of every witness called by the defense at every criminal trial in the county, cull from that testimony complaints about peace officers and disclose those complaints to the defense whenever the People called the peace officer as a witness at another trial." (**Id**. at p. 361.) The court observed that, "a rule requiring disclosure of defense complaints made at unrelated criminal trials would transform the prosecution into a '*Brady* vessel' of information that had to be disclosed every time the People called a peace officer witness." (**Id**. at p. 362.)

This principle was directly discussed in ***People* v. *Shakur*** (1996) 648 N.Y.S.2d 200 where the court stated: "as information in various other law enforcement files becomes more and more removed from the case on trial, and when it therefore becomes more speculative to think that any relevant information even exists, the duty of the prosecutor to investigate far flung police files must, of necessity, diminish. A prosecutor is not constructively aware of police files unrelated to the case on trial unless there exists some reason to believe a file contains relevant information. Otherwise, a conscientious prosecutor would have to search every police department file, whether related to the case on trial or not, in order to be certain of fulfilling his ***Brady*** obligation. That is clearly not required." (**Id**. at p. 206.)

One example of a situation in which information could technically be viewed as being in possession of the prosecution team (i.e., because the investigating officer is aware of information in their own personnel files) but is still not usually considered to be in the possession of the prosecution team due to lack of reasonable access to the information, is when information unknown to the prosecutor is contained in a police officer's personnel file. (**See e.g**., ***People* v. *Gutierrez*** (2003) 112 Cal.App.4th 1463, 1475 [prosecution's duty under ***Brady*** to disclose material exculpatory evidence only applies to evidence that is "actually or constructively in its possession or accessible to it" and "the prosecutor does not generally have the right to possess and does ***not have access to confidential peace officer*** files"], emphasis added; **see also** this outline, section I-8-C at pp. 101-109.)

In ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, the California Supreme Court *could* have reasoned that the People had no obligation to obtain personnel files by finding officer personnel files were not reasonably accessible to the prosecution. However, the California Supreme Court chose not to *directly* adopt this approach: "Defendant argues that the district attorney has an obligation under ***Brady*** to provide material exculpatory information possessed by any member of the prosecution team, including the police department. The district attorney and police department respond that although in general the prosecutor's obligation to provide ***Brady*** material extends to what the police know, the obligation extends only to what the police know about the specific case and does not go so far as to include confidential personnel records the police department maintains in its administrative capacity.

We need not resolve this dispute, because we conclude instead that the prosecution has no ***Brady*** obligation to do what the defense can do just as well for itself." (***Johnson*** at p. 715, emphasis added.)

Editor's note: That being said, the California Supreme Court in ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696 *did* favorably cite to the decision in ***People* v. *Gutierrez*** (2003) 112 Cal.App.4th 1463 and other decisions which essentially find the lack of reasonable access to peace officer records absolves the prosecution of the duty to search for information in those files that is unknown to the prosecution. (**See *Johnson*** at pp. 713.)

D. Do All Courts Agree that There Must be Reasonable Access to the Information for the Information to Be Deemed to Be in Possession of the Prosecution Team?

Not all courts necessarily agree there must be reasonable access to the information in order for the information to be deemed in "possession" of the prosecution team. In ***Crivens* v. *Roth*** (7th Cir. 1999) 172 F.3d 991, the Seventh Circuit, quoting language from ***United States* v. *Perdomo*** (3d Cir.1991) 929 F.2d 967 that "the availability of information is not measured in terms of whether the information is easy or difficult to obtain but by whether the information is in the possession of some arm of the state" (***Roth*** at pp. 996-998.) Albeit the statement was made in support of finding prosecutor had duty to turn over a *rapsheet of a witness*. (See this outline, section I-7-C at pp. 71-72.)

In ***Milke* v. *Ryan*** (9th Cir. 2013) 711 F.3d 998, the Ninth Circuit effectively held that the prosecution was in possession of evidence that a detective who testified for the prosecution had previously been found to have lied by judges in four completely unrelated court cases and to have violated a defendant's constitutional rights in four other unrelated court cases because the Maricopa County "prosecutor's office" and/or the Phoenix "police" had knowledge of these other court cases. (**Id**. at p. 1016; **see also** p.1013 [noting the cases in which the detective lied under oath "all involved the Maricopa County Attorney's Office and the Phoenix Police Department—the same agencies involved in prosecuting Milke"].) In support of this conclusion, the Ninth Circuit pointed that, in between the time the defendant was convicted and sentenced, the same prosecutor's office and police department handling Milke's case "were actively dealing with [the detective's] misconduct in another murder case [Jones]" and that "this must surely have reminded the Maricopa County Attorney's Office and the Phoenix Police Department of [the detective]' propensity to commit misconduct." (**Id**. at p. 1017.) The Ninth Circuit went on to point out that the same prosecutor handling the Jones case [but not Milke's case] also handled one of the other cases (King) involving the detective being caught in a lie and being found to have violated a defendant's rights, as well as a suppression motion in yet another case (Mahler) that arose involving a claim the detective violated the Fifth Amendment. (**Id**. at p. 1017.) The Ninth Circuit inferred this set of circumstances provided "all the more reason to conclude that [the prosecutor handling Jones, King, and Mahler] and his colleagues in the Maricopa County Attorney's Office were intimately familiar with [the detective's] pattern of misconduct." (**Id**. at p. 1017.) The Ninth Circuit said, "as the state absorbed the loss of the Jones confession in November 1990 and prepared arguments to

save the physical evidence in Jones from suppression, it must have occurred to [the prosecutor handling Jones and King] or ***someone*** in the prosecutor's office or the police department (or both) that [the detective] was also the key witness in the high-profile case against Debra Milke—a case where the defendant was still at trial, actively fighting for her life. Yet no one saw fit to disclose this or any of the other instances of [the detective's] misconduct to Milke's lawyer. (**Id**. at p. 1017, emphasis added.)

To the extent the Ninth Circuit was imputing knowledge to the prosecutor handling the ***Milke*** case based on its inference that he or other prosecutors in the same office had ***actual*** knowledge of all the cases in which the officer testified, it would not necessarily stand for the proposition that the prosecution had reasonable access to possession of the information from the other unrelated cases. But the Ninth Circuit then went on find there would be a ***Brady*** violation ***even if there was not actual knowledge*** of the detective's misconduct. (**Id**. at p. 1017.)

It is difficult to say that the information imputed to the prosecution team was "reasonably accessible" to a district attorney's office where there was no evidence that Maricopa County District Attorney (which prosecutes 35,000 felony cases a year) had any ability to keep track of an officer's alleged courtroom "misconduct," which *took a team of ten defense team researchers in post-conviction proceedings, working eight hours a day for three and a half months, nearly 7000 hours to locate.* (**See *Milke*** at p. 1018)

Editor's note: Concededly, the holding in ***Milke*** may also be viewed as simply providing a very broad interpretation of what "reasonably accessible" means and not as a repudiation of the principle that "reasonable access" is an aspect of possession. Moreover, it is possible to craft an argument that ***Milke*** should be confined to circumstances where failure to provide information in previous court cases *is coupled with a denial of the right to an officer's personnel file* – as occurred in ***Milke***. The ***Milke*** court did note, at p. 1018, that "suppression of the personnel file and suppression of the court documents run together" and that had the defense "been given the full run of evaluations in the [detective's] personnel file, she would have found cases [the detective] worked on"].) However, this comment by the Ninth Circuit was not proffered as a particularly significant factor and the court did not find that all the prior cases in which the detective was found to have engaged in misconduct would have been revealed had the personnel file been disclosed. In any event, as a Ninth Circuit decision it is not binding on California courts.

E. Partial Membership

An investigative agency can have a partial membership in the prosecution team when a government agency that has been involved with the investigation of the criminal case, also has separate and distinct non-investigative functions that it performs which are unrelated to the investigation of the criminal charges. This concept was first recognized in ***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, where the court held that when the Department of Corrections investigates an in-prison crime, only that portion of the Department of Corrections that was involved in the investigation of the crime is a member of the prosecution team. (**Id**. at p. 1317.) As explained in ***Barrett***, the Department of Corrections has a hybrid status since it has both investigatory and non-

investigatory functions. Its primary function is to supervise, manage and control the state prisons "in connection with its administrative and security responsibilities in housing California felons while they serve their sentences." (**Ibid**.) In its non-investigatory capacity, the CDC "is not part of the prosecution team. (**Id**. at 1317.) Thus, the ***Barrett*** court concluded, "if the defendant wants discovery from [Department of Corrections] regarding its non investigatory function, the defendant must use traditional third party discovery tools, such as a subpoena duces tecum." (**Id**. at 1318, emphasis added.) The prosecutor does not have an obligation to search or disclose the records of those portions of a multi-function government agency that are not a part of the prosecution team. (**Id**. at pp. 1318-1318.) Since then, the concept has gained general acceptance in California courts. (**See *County of Placer* v. *Superior Court (Stoner)*** (2005) 130 Cal.App.4th 807, 814; ***In re Steele*** (2004) 32 Cal.4th 682, 701 [citing ***Barrett*** with approval]; ***Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, 902 [same]; ***Shorts* v. *Superior Court*** (2018) 24 Cal.App.5th 709, 726, fn. 11; ***People* v. *Superior Court (Dominguez)*** (2018) 28 Cal.App.5th 223, 236; ***People ex rel. Lockyer* v. *Superior Court*** (2004) 122 Cal.App.4th 1060, 1077.)

> **Editor's note**: In ***Barrett***, the "types" of materials that were deemed to be outside the possession of the prosecution team were fairly extensive. (**See *People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, 1309-1310 [listing 17 categories of materials in CDC but not prosecution team possession, including medical and psychological files of defendant, policy and procedure manuals, incident logs, and movement sheets].) When confronted with a request for materials from other "dual function" agencies, it can be worthwhile to compare the types of materials requested by the defense with the various materials discussed in ***Barrett***.

In the case of ***People* v. *Cordova*** (2015) 62 Cal.4th 104, the *trial court* found that a crime lab that had tested DNA in the defendant's case was part of the prosecution team regarding the testing done in the case before it, but it was not part of the prosecution team regarding its testing in *other* cases. The trial court said these other tests were not readily accessible to the prosecution and "the district attorney has no legal right and no ability to review those files or compel the laboratory in question, Forensic Science Associates, to produce them." (**Id**. at pp. 122-123.) Unfortunately, the California Supreme Court did not decide whether this "partial team" analysis was correct because it was able to decide the question on grounds that the information sought was not significantly exculpatory or material. (**Id**. at pp. 121-123; **see** this outline at I-3-N-i at p. 22.)

F. Other Agencies Acting on Behalf of the Prosecution or Assisting the Prosecution

Whether a person or agency that is not the investigating agency will be deemed to be on the prosecution team is often determined by whether the person or agency is viewed as having been "acting on the government's behalf" or "assisting the government's case." (***People* v. *Uribe*** (2008) 162 Cal.App.4th 1457, 1476.)

i. Crime Labs

Crime labs that conduct tests on forensic evidence for the prosecution are generally considered part of the prosecution team. (**See *People* v. *Superior Court (Dominguez)*** (2018) 28 Cal.App.5th 223, 232 [discussed in greater depth in this outline, section I-7-F at p. 79]; ***In re Brown*** (1998) 17 Cal.4th 873, 879-880; ***People* v. *Uribe*** (2008) 162 Cal.App.4th 1457, 1479-1480.) Albeit a crime lab that is run by a district attorney's office or the investigating agency is going to be viewed as more firmly ensconced within the prosecution team than a private laboratory that contracts with the prosecution or law enforcement agency to conduct testing on a temporary or annual basis. Moreover, whether a crime lab is a partial or full team member is open to some dispute and will likely turn on what documents are being sought (e.g., whether results of the test conducted in the defendant's case are in the possession of the prosecution team is a different question than whether reports generated by the same criminalist in other cases or general policy manuals are within possession of the prosecution team).

In ***People* v. *Cordova*** (2015) 62 Cal.4th 1042, the *trial court* ruled that the defense was not entitled to receive records of past mistakes of a crime lab involving the testing of DNA in cases unrelated to the case pending against the defendant. The reasoning of the trial court (at least in part) was that while the laboratory was part of the prosecution team regarding the testing done in the *case before it*, it was not part of the prosecution team regarding its testing in *other* cases. (**Id**. at p. 121.) Unfortunately, the California Supreme Court did not decide whether the crime lab was part of the government team for all purposes because it was able to decide the issue against the defense on a separate ground. (**Id**. at p. 124; **but see *United States* v. *Sebring*** (N.M.Ct.Crim.App.,1996) 44 M.J. 805 [holding prosecution had duty to provide the results of any "inspections, examinations, validations, or other verification" of the drug laboratory quality control program, as well as any records showing problems involving laboratory equipment and employee errors, negligence and misconduct should have been disclosed under the applicable statutory requirement to provide "scientific tests or experiments" under ***Brady*** obligation].)

Editor's note: An issue that sometimes crops up is how *much* information is the defense entitled to receive when asking for records from the crime laboratories that process biological evidence on behalf of law enforcement. Certainly, the results of the tests will be deemed to be in the possession of the prosecution team and likely the notes relating to the actual work. But the defense often seeks other records from the laboratory such as records of equipment maintenance, lab protocols, etc. Because these records can be very extensive, and because the labs often require the prosecution to pay for the cost of copying the records, it can be very onerous for the lab to comply and very expensive for the prosecution to obtain them. There is no case in California addressing how broad the scope of the prosecution duty is to provide such materials, and judges go both ways on the issue. However, at least to the extent the information sought is not directly related to the analysis of the samples provided by law enforcement, a good argument can be made that the laboratory is only a partial member of the prosecution team and thus materials not directly related to the actual analysis should not be deemed to be within third party control in the much the same way that the administrative manuals and other materials generated by the Department of Corrections in ***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305 were deemed to in the possession a third party. (**See** this outline, section I-7-E at p. 76)

In ***People* v. *Superior Court (Dominguez)*** (2018) 28 Cal.App.5th 223, the San Diego Police Department crime lab tested swabs from a pair of blood-soaked gloves found near the scene of the crime using a "probabilistic genotyping" software program. The program used (STRmix) was purchased from a research institute ("ESR") owned by the New Zealand government by way of a distributor located in the United States. (**Id**. at p. 228.) Under the terms of purchase agreement, the recipient of the information could not disclose or release "protected information" relating to and including the STRmix program to any third party without the specific prior written consent of ESR or otherwise permitted in agreement. The terms of the agreement also required that if the recipients (or affiliates of the recipients) were legally compelled to disclose the protected information, the recipients had to give notice to ESR so ESR could seek appropriate relief such as a sealing order or waive such relief. If no such protective order or waiver was obtainable, the recipients of the software could disclose that portion (and only that portion) of the protected information they were legally compelled to disclose and had to make "reasonable efforts to obtain reliable assurance that confidential treatment will be accorded by any person to whom any Protected Information is so disclosed." (**Id**. at pp. 228-229.)

The defense requested four categories of information from the prosecution: "(1) the STRmix user manual and any related updates; (2) the STRmix software program and any related updates; (3) the STRmix program's source code; and (4) ESR's internal validation studies and related documents." (**Id**. at p. 228.) The prosecutor responded by declaring the lab could not provide "(1) the user manual because 'it is copyrighted by ESR'; (2) the software because it would 'not work without a license,' which only ESR could furnish; (3) the source code because the lab '[d]oes not have knowledge or capacity' to do so; and (4) ESR's general internal validation records, presumably because the lab did not have them." (**Id**. at p. 228.) However, the prosecutor said that ESR indicated it would produce all four pursuant to its "Defense Access Policy," which required execution of a nondisclosure agreement (NDA). (**Ibid**.) The defense then made a motion to compel disclosure, asserting that ESR was part of the prosecution team and so the onus was on the People to obtain documents from it. The defense rejected the possibility of obtaining the material under a nondisclosure agreement since, according to defense counsel, his right to a fair trial and effective cross-examination overrode any intellectual property concerns and the agreement might interfere with his use of the materials to defend his client. Separately, though, the defense sent a subpoena duces tecum directly to ESR, which was served on ESR's distributor in the United States. (**Id**. at p. 229.)

The trial court almost immediately held a hearing on the motion to compel in the absence of any representative from ESR. At the hearing, it was established that the lab would receive periodic software upgrades and infrequent technical assistance. Moreover, the lab initially sent nine of its analysts to a weeklong training conducted by ESR but since then all the lab's analyst training relating to the program was conducted in-house. The lab did not receive any help from ESR in the instant case. (**Id**. at pp. 229-230.) The lab independently validated the STRmix program before using it on any casework – which

would have revealed (but did not) any major problem with the underlying source code. Documentation of the lab's validation studies was publicly available on the San Diego Police Department's website. The lab did not rely on, nor possess, ESR's internal validation studies and did not have access to the source code underlying the program. The lab had the user manual for the program, but it was copyrighted and the lab's contract with the company prevented its distribution. (**Id**. at p. 230.)

The trial court found ESR to be part of the prosecution team to the extent that its program was used to generate evidence and ordered the People had to furnish the materials requested. The trial court rejected the idea of having defense counsel sign a nondisclosure agreement and concluded any issues involving ESR's intellectual property rights could resolved with a protective order. (**Id**. at pp. 230-231.)

On appeal, the appellate court held conclude ESR was **not** a member of the prosecution team, notwithstanding the fact that they provided the software, software updates, and some training. (**Id**. at pp. 232, 235-236.) Accordingly, the People were not obliged to produce the materials solely in the possession of ESR. These materials were the STRmix program's source code (inaccessible to the lab despite its possession of the software) and ESR's internal validation studies and related documents. (**Ibid**.) The appellate court rejected the notion that since "the STRmix program usurps the lab analyst's role in providing the final statistical comparison . . . the program—not the analyst—is effectively the source of the expert opinion rendered." (**Id**. at p. 237.) It also rejected the notion that just because it was easier for the prosecution to obtain the materials than the defense, this meant the materials should be treated as being in the possession of the prosecution. (**Id**. at p. 239.)

The appellate court held (based on the People's concession) that the user manual was in possession of the prosecution team. The appellate court also accepted that the software program itself was in possession of the crime lab based on the People's concession – albeit wondering how practically it could be produced. Significantly, the court indicated that absent the concession, it would not find the software program to be in the lab's possession because the lab had only a limited license to use the program on a particular number of computers and the software would not work without a license – which only ESR could issue. (**Id**. at pp. 232-233.) Nevertheless, the appellate court ultimately found the People had no obligation to produce the *software* in their possession because it did not fall under any category of evidence listed in section 1054.1 other than "exculpatory" evidence and any showing the software was exculpatory was too speculative. (**Id**. at pp. 240-241.) And it found the People did not have an obligation to produce the manuals in their possession because the manuals were subject to the trade secret privilege of Evidence Code section 1060 and the trial court should not have ruled on the privilege without hearing from ESR first. (**Id**. at pp. 241-243.)

ii. Agency/Persons Conducting Sexual Assault Examination

In ***People* v. *Uribe*** (2008) 162 Cal.App.4th 1457, the court held that members of a Sexual Assault Response Team ("SART"), i.e., physicians who performed an evidentiary medical examination that was

initiated through a referral by the police in their investigation of a report of criminal conduct, were part of the prosecution team. (**Id**. at pp. 1476-1481; **see also *People* v. *Superior Court (Dominguez)*** (2018) 28 Cal.App.5th 223, 236; ***IAR Systems Software, Inc.* v. *Superior Court*** (2017) 12 Cal.App.5th 503, 523***; People* v. *Vargas*** (2009) 178 Cal.App.4th 647, 660; ***McCormick* v. *Parker*** (10th Cir. 2016) 821 F.3d 1240, 1247-1248 [sexual assault nurse examiner is on prosecution team, but noting it was *not* holding "that all medical professionals treating survivors of sexual abuse are automatically members of the prosecution team for ***Brady*** purposes" nor that an expert with no pre-charge investigatory role].)

iii. Agencies Providing Criminal History Records

If the prosecution has reasonable access to the database of an agency that maintains criminal records, the agency will be considered part of the prosecution team for purposes of determining whether those criminal records are in the possession of the prosecution team. (**See *People* v. *Martinez*** (2002) 103 Cal.App.4th 1071, 1078 [prosecution has due process duty to check rapsheets of witnesses]; ***People* v. *Santos*** (1994) 30 Cal.App.4th 169, 177 [ruling evidence of witness misdemeanor convictions disclosable under *Brady* necessarily presumed convictions within possession of prosecution]; ***People* v. *Hayes*** (1992) 3 Cal.App.4th 1238, 1244 [ruling evidence of victim's criminal convictions, pending charges, status of being on probation, acts of victim's dishonesty, and false reports of sexual assault disclosable under ***Brady*** necessarily presumed convictions within possession of prosecution]; ***United States* v. *Perdomo*** (3d Cir.1991) 929 F.2d 967, 971 [local criminal history rapsheet from Virgin islands was within possession of federal prosecution team because it was "readily available" to the prosecution].)

In ***J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, the court stated "in limited circumstances the prosecution's ***Brady*** duty may require disclosure of exculpatory and impeachment information contained in materials that are not directly connected to the case. For example, particularly upon the request of the defense, the prosecution has the duty to seek out critical impeachment evidence in records that are "'reasonably accessible'" to the prosecution but not to the defense." (**Id**. at p. 1335.) However, with the exception of ***In re Pratt*** (1999) 69 Cal.App.4th 1294 (which involved records that were *in the physical possession of, and known to*, members of the prosecution team) all the cases it cited to illustrate that principle involved criminal history databases

> **Editor's note**: Rap sheets themselves are not discoverable. (***People* v. *Roberts*** (1992) 2 Cal.4th 271, 308; ***People* v. *Santos*** (1994) 30 Cal.App.4th 169, 175.) However, "much, if not all of the information contained in the rap sheets is discoverable. [Citations.]" (Cal. Crim. Law Procedure & Practice (2014) § 11.8, p. 250 (CEB); ***People* v. *Coleman*** (unpublished) 2016 WL 902638, at *8.) **But see** Pen. Code, § 11105(b)(9) [discussed in this outline, section X –4 at pp. 273-276

Prosecutors will also be deemed to be in possession of: local criminal history databases (i.e., CRIMS or CORPUS) (**see *United States* v. *Perdomo*** (3rd Cir. 1991) 929 F.2d 967, 971) and federal FBI and NCIC records (**see *United States* v. *Auten*** (5th Cir. 1980) 632 F.2d 478, 481; **but see *In re State***

ex rel. Munk (Tex. App. 2014) 448 S.W.3d 687, 692-693.) Because prosecutors also have easy access to DMV records, it may be that the prosecution will be deemed to be in possession of information contained therein as well. (**But see *People* v. *Ocegueda*** [unreported] 2002 WL 1283552, at p. *8 [no discovery violation where prosecutor did not disclose a certified copy of a Department of Motor Vehicles printout showing in a hit and run case the vehicle driven by defendant was registered to another person because the "statutory discovery scheme simply does not apply to discovery from third parties, such as the Department of Motor Vehicles"].)

On the other hand, databases of criminal history from other states are not reasonably accessible to the prosecution and thus the prosecution should not be deemed to be in possession of information contained in out-of-state rapsheets that is not contained in the FBI database. (**See *United States* v. *Young*** (7th Cir. 1994) 20 F.3d 758, 764 [declining to find ***Brady*** violation where government diligently searched national and local files for information about witness's criminal history but failed to search records of other states]; **see also *Hollman* v. *Wilson*** (3rd Cir. 1998) 158 F.3d 177, 181.) Similarly, since prosecutors do not have access to criminal rapsheets from other *counties* (except to the extent they are contained in the Department of Justice records), it is unlikely the prosecution will be deemed to be in possession of information contained only in other counties' local criminal databases.

iv. <u>CalGang Database</u>

The CalGang database is a statewide database containing information about persons designated as suspected gang members or associates of gang members. (**See** Pen. Code, § 186.34.) According to CALGANG's Advisory Committee, a name may be added to the database based on nothing more than information that a "[s]ubject has been seen frequenting gang areas" and "has been seen affiliating with documented gang members." Cal. Gang Node Advisory Comm., Policy and Procedures for the CALGANG® System 7 (Sept. 27, 2007), available at http://ag.ca.gov/calgang/pdfs/policy_procedure.pdf.

In ***People* v. *Lopez*** (unpublished) 2016 WL 1244729, the defendant was convicted after a second trial of several offenses based on shooting at two victims, killing one of them. The defense was misidentification. At trial, the defendant sought discovery of whether the victims were gang members, including any field interview cards that showed gang participation by the victims. (In the first trial, the living victim had stated he was affiliated with a gang). The prosecution responded that it had asked the gang investigator for the information requested by the defense, and that no such information was found. However, the defendant believed that it was likely that the victims would have had police encounters or field interview cards and asked that the prosecution be required to search the CalGang database to ascertain if there were any documented encounters with the victims. The defendant asserted any gang affiliation would affect the victim's credibility and that a gang witness might shade his testimony or lie to implicate the defendant, a possible rival gang member, in a gang crime. The prosecutor (who was unfamiliar with the CalGang database stated the investigating agency does not rely on the CalGang

database, and he did not know whether the police had searched that database in investigating the instant matter. (**Id**. at pp. 7-8.) The trial court indicated that it believed the prosecution would have access to the CalGang database, and expected it to be searched; moreover, it expected that if the information sought was found, the information would be provided unless protected by a privilege. Nevertheless, the trial court declined to order the prosecution to conduct the search or to conduct a hearing into the gang officer's efforts to locate gang information related to the victims. (**Id**. at pp. *8-*9.) The issue did not go away and later, in a trial brief, the prosecutor asked that the defendant be prohibited from asking the gang expert about the CalGang database. The prosecutor said he had made numerous requests for any gang cards, contacts, or police reports linking the victim to a gang, but nothing was found; and that if the CalGang database existed, the information contained therein was privileged under Evidence Code section 1040. The prosecutor further argued that it was not required to produce information in the possession of other agencies not involved in the investigation or prosecution of the case. The trial court granted the prosecution's motion. (**Id**. at p. *9.)

On appeal, the defendant claimed a ***Brady*** violation. The People responded by pointing out that none of the three prongs (favorability, materiality, or suppression) were shown. The appellate court did not dispute the point, but nonetheless held the trial court had erred in not ordering the prosecution to check the CalGang database. The appellate court held that the CalGang database was in the possession of the prosecution because the prosecution had reasonable access to it in the same way as the prosecution had reasonable access to other criminal history databases. (**Id**. at pp, *9-*11.) Moreover, it held the prosecutor should have had his team access that database. (**Id**. at p. *11.) The appellate court disregarded the argument that since the prosecution did not use the CalGang database in their investigation of the subject crimes, it did not have to search the database and provide any responsive information. (**Id**. at p. *13.)

The appellate court then ruled the trial court must "order the prosecution team to search that database to determine whether it contains any information regarding the victims. If it does, then the prosecution team shall produce such information for an in camera inspection by the court. After reviewing the evidence, the court must determine if it is material under ***Brady***. . . If the court makes such a determination, it shall turn over the information to [the defendant] and order a new trial. However, prior to turning over the information, the prosecutor may argue the information is privileged under Evidence Code section 1040 and the court can consider the issue and act accordingly. If the CalGang database does not contain material information about the victims, then the judgment is ordered reinstated and affirmed." (**Id**. at pp. *14-*15.)

Editor's note: We respectfully suggest that there are a couple of things wrong with this opinion, but the most significant aspect of the opinion (i.e., that the CalGang database is within the possession of the prosecution team because it is reasonably accessible to members of the prosecution team) is probably correct - especially in light of some of the evidence discussed in the opinion indicating the investigating agency has access to the database. Where the opinion arguably goes wrong is assuming that even if the database is within the prosecution's possession, the court has the authority to require the prosecution to conduct its investigation in a particular manner. Compare ***Lopez*** with ***People* v. *Coleman*** (unpublished) 2016 WL 902638 [discussed in this outline, section I-7-F-v at p. 86] and ***People* v. *Rose*** (2014) 226 Cal.App.4th 996 (taken up for review on a different issue and depublished) [discussed in this outline, section I-7-F-v at p. 87].) Moreover, absent some greater showing there actually exists information in the CalGang database, the trial court cannot be said to have abused its discretion in refusing to order the prosecution to access it. Mere speculation that such information might exist and might not have been disclosed is insufficient to establish a violation of Brady. (**See *People* v. *Mena*** (2012) 54 Cal.4th 146, 160, ["***Brady*** merely serves "'to restrict the prosecution's ability to *suppress* evidence rather than to provide the accused a right to criminal discovery,'" original italics.)

v. Police Officer Rapsheets

Police officer criminal records may or may not be deemed reasonably accessible to the prosecution notwithstanding their inclusion in a criminal database. The question of whether prosecutors are in constructive possession of information that might impeach an officer contained in a *criminal history* database is a ***different*** question than whether prosecutors are in constructive possession of *peace officer personnel files*.

The only published case to hint that information about police officers maintained in a criminal history database is off-limits absent compliance with the ***Pitchess*** scheme is the case of ***Garden Grove Police Department* v. *Superior Court (Reimann)*** (2001) 89 Cal.App.4th 430. In ***Garden Grove***, the defendant asked the district attorney to run criminal record checks on the officers involved in the defendant's arrest and to "provide information of crimes or acts of moral turpitude or misdemeanor or felonious behavior or convictions." The defendant also sought "specific acts of misconduct" and "other acts done under 'color of authority'" to "impeach the credibility" of the officers. (**Id**. at p. 433.) When the district attorney declined, the defendant filed a motion requesting the information. Both the police department and the district attorney filed motions in oppositions. (**Id**. at p. 432.) The trial judge ordered the district attorney to run criminal records checks on the officers. And because the district attorney needed the officers' birth dates to run the criminal records checks, the judge ordered the police department to disclose the birth dates to the district attorney. The judge left the determination whether the evidence was ultimately discoverable for later. (**Id**. at p.432.)

The police department then filed a writ of mandate seeking to vacate the order requiring it to disclose the officers' birth dates to the district attorney. (**Id**. at p. 432.) The appellate court granted the writ, finding the trial court abused its discretion when it ordered the police department to disclose the birth dates of the police officers to the District Attorney "for the purpose of running criminal records checks." (**Id**. at p. 431.)

Garden Grove may be read as generally condemning the running of police officer criminal records absent compliance with the ***Pitchess*** procedures (which would indicate that such records are third party records). But it is also plausibly read as standing only for the proposition that seeking access to information *about peace officer dates of birth* requires compliance with the ***Pitchess*** procedures. (**See *Fletcher* v. *Superior Court*** (2002) 100 Cal.App.4th 386, 401-402 [stating ***Garden Grove*** "informs us ***only*** that the birth date of a police officer is covered by Penal Code section 832.8 and can be discovered only by means of a ***Pitchess*** motion" emphasis added.)

In ***People* v. *Little*** (1997) 59 Cal.App.4th 426, the court held that information contained in databases that are reasonably accessible to members of the prosecutor's office is in the constructive possession of the prosecution team. (**Id**. at pp. 432-433; **see also *United States* v. *Perdomo*** (3rd Cir. 1991) 929 F.2d 967, 971; ***United States* v. *Auten*** (5th Cir. 1980) 632 F.2d 478, 481; ***United States* v. *Lujan*** (D.N.M. 2008) 530 F.Supp.2d 1224, 1258-1259 [discussing numerous federal cases to this effect].)

However, the finding in ***Little*** was specifically based on the fact that when it came to DOJ rapsheets, the information in the rapsheets was "reasonably accessible" to the prosecution. (**Id**. at p. 433.) Thus, an argument can be made that prosecutors are not in constructive possession of the criminal history of police officers, since absent an officer's date of birth, an officer's rapsheet ***is not reasonably accessible*** to the prosecution. (**See *Garden Grove***, at p. 432; **see also *People* v. *Gutierrez*** (2003) 112 Cal.App.4th 1463, 1475 [prosecution's duty under ***Brady*** to disclose material exculpatory evidence only applies to evidence that is "actually or constructively in its possession or accessible to it" and "the prosecutor does not generally have the right to possess and does not have access to confidential peace officer files"]; this outline, section I-7-C at p. 71-75.)

Nevertheless, an equally plausible argument may be made that, in many instances, the prosecution *can* check an officer's criminal records without having the officer's date of birth. For example, if the officer's name is unique, or by narrowing down the list of potential candidates with the same name based on race, ethnicity, approximate age, and criminal record. It may take longer to conduct a search for the records, but such searches are routinely conducted for witnesses whose date of birth is unknown. Moreover, if the lack of a date of birth for a police officer witness places an officer's rapsheet outside the constructive possession of the prosecution, then the lack of a date of birth about *any* witness would place that witness's rapsheet outside the constructive possession of the prosecution. This is a dubious proposition. (**Cf**., ***People* v. *Martinez*** (2002) 103 Cal.App.4th 1071, 1080 [discounting prosecution's argument that failure to disclose prosecution witness' criminal history was excusable on ground the prosecution did not have the witness' date of birth and the witness had a common name].)

a. <u>Alternatives to Running Officer Rapsheets</u>

If the prosecution has a mechanism for providing the defense any information in the officer's rapsheet without having to actually run the rapsheet, there is no need for the defense to file a motion seeking the

officer's DOB. For example, to avoid having to run officer rapsheets on every witness, a prosecutor's office could make arrangements with the local police departments that will ensure that discoverable arrests or convictions of an officer will be conveyed to the prosecutor's office. (**See e.g., *People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 706-709 [discussing San Francisco Police Department's agreement with the prosecution to provide "***Brady*** tips" if officer personnel file contains potentially favorable material information]; **but see *Association for Los Angeles Deputy Sheriffs* v. *Superior Court*** (S243855) [pending before the California Supreme Court on the issue of whether departments can provide "***Brady*** tips" and discussed in this outline, section XIX-6-C at pp. 357-358].)

Moreover, if there is an alternative mechanism for obtaining the information from the rapsheet, there is a good argument that a judge cannot order the prosecution to run police officer rapsheets.

In ***People* v. *Coleman*** (unpublished) 2016 WL 902638, the trial court ordered the prosecution to comply with their ***Brady*** obligation but declined to grant the defense request that the prosecution be ordered to run rapsheets on all prosecution witnesses including any police witnesses. (**Id**. at p. *4.) On appeal, the defendant claimed this was error. The appellate court acknowledged that the prosecution had a duty to learn of material impeachment information about police officer witnesses within the prosecution's constructive possession. (**Id**. at p. *8.) Moreover, the court assumed that the information in the officer rapsheets *was* within the constructive possession of the prosecution. (**Ibid**.) However, the appellate court held that "even when material information is within the constructive possession of the prosecution, ***Brady*** does not empower a defendant to compel the precise manner by which prosecutors learn whether such information exists. To be sure, prosecutors need some mechanism for ensuring they learn of ***Brady*** material within their constructive possession. (**See *Giglio v. United States*** (1972) 405 U.S. 150, 154; **see also *Johnson***, *supra*, 61 Cal.4th at pp. 706–706, 721.) But the choice of that mechanism is within district attorneys' broad 'discretionary powers in the initiation and conduct of criminal proceedings,' which 'extend from the investigation and gathering of evidence relating to criminal offenses [citation], through the crucial decisions of whom to charge and what charges to bring, to the numerous choices the prosecutor makes at trial regarding "whether to seek, oppose, accept, or challenge judicial actions and rulings."' (***People* v. *Eubanks*** (1996) 14 Cal.4th 580, 589.) As such, that choice 'generally is not subject to supervision by the judicial branch.'" (***Coleman*** at p. *8 [albeit also cautioning, at p. *9, the prosecution bears the risk of reversal if the adopted procedures are inadequate and ***Brady*** material is not disclosed"].) The ***Coleman*** court also rejected the defense claim that the prosecution was obligated under Penal Code section 1054.1(d), which requires disclosure of felony convictions [**see** this outline, section III-16 at p. 187], to run the rapsheets. The ***Coleman*** court held while the case ***People* v. *Little*** (1997) 59 Cal.App.4th 426 requires prosecutors to inquire about the existence of felony convictions of witnesses and disclose them, it did "not compel the means by which prosecutors 'inquire' of the existence of such felony convictions. That the "prosecution must investigate key prosecution witness' criminal history and disclose felony convictions" (***J.E.* v. *Superior Court***

(2014) 223 Cal.App.4th 1329, 1335) does not require the prosecution to run a rap sheet as part of that investigation." (***Coleman*** at p. *11.)

Similarly, in the case of ***People* v. *Rose*** (2014) 226 Cal.App.4th 996 (taken up for review on a different issue and **depublished**), the appellate court agreed that a court could not force the prosecution to run officer rapsheets. As in ***Coleman***, the court held prosecutors "need some mechanism for ensuring that they learn of ***Brady*** material within their constructive possession" but finding "the choice of that mechanism is within district attorneys' broad 'discretionary powers in the initiation and conduct of criminal proceedings[.]'" (***Rose*** at p. 1006 [albeit also finding "a ***Brady*** claim may lie if a defendant is prejudiced because a prosecutor failed to obtain favorable evidence that was readily available by running a rap sheet"].)

However, *if there is **not** an effective alternative mechanism set up to meet this obligation*, it is more difficult to argue that there is no duty to run the officer rapsheets, especially once an officer's date of birth has been provided to the prosecution. (**See *People* v. *Custodio*** (unreported) 2013 WL 2099725, *9 [discussed in this outline, section I-7-F-v-b, at pp. 87-88].)

It is *possible* that the duty to inquire can be met by simply asking the officer for his or her own criminal history. (**Cf.**, ***Alford* v. *Superior Court*** (2003) 29 Cal.4th 1033, 1046, fn. 7 [noting that when an officer whose records are at issue is in some way "affiliated with the prosecution team," the prosecution has the ability, which the defense ordinarily does not, to interview the officer concerning any possible impeachment material]; ***Becerrada* v. *Superior Court*** (2005) 131 Cal.App.4th 409, 415 [noting "an officer remains free to discuss with the prosecution any material in his [*Pitchess*] files, in preparation for trial," and that the "officer practically may give to the prosecution that which it could not get directly" but also leaving open the question of whether doing so "could result in a waiver of the officer's privacy rights"].) However, the officer would, at least arguably, have a right to decline to provide the prosecutor with information contained in his criminal history file. And relying on the officer is fraught with its own type of issues as illustrated in the unpublished decision of ***People* v. *Custodio*** (unreported) 2013 WL 2099725 [discussed in this outline, immediately below].

b. **Defense *Brady/Pitchess* Motions for Officer Rapsheets**

In light of ***Garden Grove***, defense attorneys will occasionally file ***Brady/Pitchess*** motions requesting a court to release a police officer's DOB so that the information can then be provided to the prosecution for purposes of allowing the prosecution to run the officer's rapsheets. (**See e.g.**, ***People* v. *Custodio*** (unreported) 2013 WL 2099725.) However, as long as the prosecution has a mechanism for disclosing to the defense discoverable information in an officer's rapsheet, a defense motion for the officer's DOB is superfluous. (**See *People* v. *Coleman*** (unpublished) 2016 WL 902638, *11 [denial of a ***Pitchess*** motion requesting an officer's date of birth is not prejudicial where it is sought only to allow the prosecution to run a criminal background check since the prosecution has no obligation to run an

officer's rapsheet if there is a mechanism for information in that rapsheet to be disclosed].) If the prosecution represents it has provided the defense with the discovery to which it is entitled, it is doubtful the defense could make the necessary showing for the release of that information - unless the defense had independent evidence of the officer's misconduct. (**See** this outline, section IX-1 at pp. 265-269.)

Editor's note: The case of ***People* v. *Custodio*** (unreported) 2013 WL 2099725, illustrates the morass that can be created when a court entertains a defense ***Brady/Pitchess*** motion seeking records tending to show the officers had been arrested for or convicted of crimes of moral turpitude and an order requiring the police department to disclose the officers' birthdates. The trial court granted the ***Pitchess*** request for in camera review of the officers' files, but found no information required to be disclosed to the defense. Nevertheless, it ordered disclosure of the officers' birth dates. (**Id**. at p. *5.) The defense then provided the officers' DOBs to the prosecution and initially convinced the trial court to order the prosecution to use those dates to run criminal records checks on the officers and disclose its findings in the presence of defense counsel. However, the trial court changed its mind after the prosecution said it had asked the officers for their criminal history information and disclosed to defense counsel that each officer had a single conviction, one of which was for "wet reckless" (a reduced version of driving under the influence) from 1995 and one of which was for reckless driving. (**Id**. at p. *5.)

Editor's note within a note: This disclosure probably should not have been made by the prosecution since none of the aforementioned offenses was a crime of moral turpitude. (**See** ***People v. Maestas*** (2005) 132 Cal.App.4th 1552, 1556 [even felony convictions not involving moral turpitude are inadmissible for impeachment as a matter of law].)

The defense then asked the trial court to order disclosure of the police reports associated with the officers' offenses so they could be reviewed for possible impeachment material. The prosecutor objected that the offenses did not reflect moral turpitude. Defense counsel argued that because of plea bargaining or other factors, the ultimate disposition might not reflect the actual conduct involved. The trial court denied the defense request, as well as its subsequent request for the court to review the police reports in camera to see if the circumstances of the offenses revealed any tendency toward untruthfulness. (**Id**. at p. *6.) After the case was submitted to the jury, defense counsel found out that the "wet reckless" conviction had occurred in 1999, instead of 1995. This caused a big ruckus about whether the officer had lied about the date and/or whether the prosecutor had misrepresented what the officer told him about the date of the conviction. Defense counsel argued the officer had lied to the prosecutor about his record while the prosecutor objected to this characterization, saying the officer was "candid about something that took placed in the 1990s." (**Id**. at *6.) The trial court then ordered the prosecutor to provide it with the officer's rap sheet, which established that there had been a DUI conviction (not a wet reckless), it had occurred in 1999, and it carried a ten-day jail sentence. Further explanation by the prosecutor as to what was actually said caused the trial court to question (but not make any factual findings regarding) the credibility of both the officer and the prosecutor. The trial court eventually instructed the jury that there had been a conversation between the prosecutor and the officer regarding the officer's criminal record and that the officer "represented that he had a wet reckless, alcohol-related reckless driving, which is a lesser offense of driving under the influence of alcohol, in 1995. But it's been ascertained that he actually had a driving under the influence of alcohol in 1999. So it's something that you should be aware of, and I'm not going to categorize it as being truthful or untruthful, but that was what was told to the District Attorney, and then the facts were different from what he was told ..." (**Id**. at pp. *7-8.) The appellate court ultimately held that, under the circumstances, there was neither a ***Brady*** violation nor prejudice resulting from any error by the trial court. However, the appellate court did indicate it had difficulty accepting the idea that the prosecution may avoid running an officer's rapsheet when the "prosecutor's failure to run a rap sheet results in nondisclosure or inaccurate disclosure of information that is required to be provided to the defense[.]" (**Id**. at p. *9.) In addition, the appellate court seriously questioned whether the prosecution could meet its obligation to inquire into information that might be in an officer's rapsheet by asking the officer to disclose it. (**Id**. at pp. *5, *9 [quoting ***Hill* v. *Superior Court of Los Angeles County*** (1974) 10 Cal.3d 812, 819 for the proposition that it "cannot be assumed that a person will give accurate and complete information regarding any prior felony convictions he may have" and noting that the case before it demonstrated "the same is true of a person's record of misdemeanor convictions"].) Prosecutors and courts need to avoid traveling down this kind of rabbit hole.

vi. Law Enforcement Agencies That Provide Limited Assistance as to Ancillary Crimes

Is a law enforcement agency that investigated an offense that is being used as a prior bad act or as evidence in the penalty phase of a trial on the prosecution team?

Some guidance in answering this question was provided in ***Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890. In ***Barnett***, the California Supreme Court held that out-of-state law enforcement agencies and officers who assisted California prosecutors in finding and interviewing witnesses who later testified to prior violent crimes committed by the defendant in the penalty phase of trial were not members of the prosecution team for purposes *of section 1054.9* and thus, materials (interview notes) which those agencies possessed (and which the California prosecutors did not possess) could not be deemed to be in the possession of California prosecution team within the meaning of Penal Code section 1054.9. (**Id**. at pp. 903-906.)

While the ***Barnett*** court stated it was not deciding "*definitively* whether the out-of-state agencies would have been considered part of the prosecution team under *pretrial* discovery rules" (**id**. at p. 906, emphasis added), the analysis and federal cases the court cited in support of its conclusion that section 1054.9 did not require the prosecution to turn over materials of out-of-state agencies that merely assisted the California prosecution for a specific duty (such as supplying the district attorney with information concerning "other crimes" evidence and helping the prosecution get in touch with the victims of those other crimes), would equally support the notion that such agencies are not part of the prosecution team in a pre-trial discovery context. (**But see *Shorts* v. *Superior Court*** (2018) 24 Cal.App.5th 709, 725 [for section 1054.9 purposes, the defense entitled to preservation of information possessed by agencies that investigated crimes and alleged prior criminal conduct that were the subject of evidence introduced by the prosecutor at the guilt and penalty phases of his capital trial].)

G. Are All Prosecutors in the Same Office Considered Part of the Prosecution Team for Purposes of Imputing Knowledge of *Brady* material?

Information known to members of the "prosecution team" is considered to be in the possession of the prosecutor for ***Brady*** purposes even if the information is not actually known to the prosecutor handling the case. (**See *Kyles* v. *Whitley*** (1995) 514 U.S. 419, 438; ***People* v. *Jordan*** (2003) 108 Cal.App.4th 349, 358.)

Neither the United States Supreme Court nor any California court has directly confronted the issue of whether ***every*** prosecutor in a district attorney's office is on the prosecution team. (**See *People* v. *Clark*** (2011) 52 Cal.4th 856, 982 [leaving open issue of whether the welfare fraud unit of a prosecutor's office is part of the prosecution team in a criminal case not involving the welfare fraud unit].) Thus, it remains an open question whether a prosecutor will be deemed to be in possession of exculpatory information known to another prosecutor in the office when the prosecutor in possession of the

exculpatory information has no involvement in the prosecution of the defendant and is unaware there is any on-going prosecution of the defendant or that the information possessed has any exculpatory value to that prosecution.

Case Law and Argument Supporting the Idea that *All* Prosecutors in the Same Office are Part of the Prosecution Team

The Ninth Circuit has strongly indicated that information in the possession of one prosecutor can be deemed to be in the possession of all prosecutors in the office - at least in certain circumstances.

In ***Aguilar* v. *Woodford*** (9th Cir. 2013) 725 F.3d 970, the prosecution relied upon evidence from a dog handler that a scent dog (Reilly) had matched a scent from defendant's clothing with the scent from a vehicle used to commit a murder – albeit the scent from the vehicle could only establish the defendant was in the vehicle *after* the murder occurred. However, the prosecution did not disclose evidence to the defense casting doubt on the accuracy of Reilly's scenting abilities. (**Id**. at pp. 971, 975.) As it turned out, six months before the defendant's trial, a dog handler was called to testify about a scent identification made by Reilly in a *different* trial (*People v. White*). The case of *White* was handled by the same district attorney's office that handled defendant's trial – though different prosecutors were involved. In the *White* case the prosecution stipulated Reilly had identified two *different* men as the source of scent on the murder suspect's shirt four year earlier and more recently had identified an individual who was in prison at the time the crime was committed as the perpetrator of a crime. In the *White* case, the trial court ultimately excluded the dog scent evidence because it found flaws in the dog scent procedures the dog handler used with Reilly. (**Id**. at p. 980.)

After the *White* case concluded (but before the ***Aguilar*** case was tried), the Los Angeles County Public Defender wrote a letter to then Los Angeles District Attorney Steven Cooley which detailed the facts in the *White* case and stated: "I bring this to your attention because I believe that this information constitutes ***Brady*** discovery and I believe that at a minimum this information should be disclosed to every defense attorney who represents or has represented an individual in a case in which [the dog handler] will or has presented evidence regarding his dog Reilly's ability to detect scents." (**Id**. at pp. 980-981.) The letter also requested an investigation be made into all the cases in which Reilly has participated in scent lineups. (**Id**. at p. 981.)

The ***Aguilar*** court gave a number of reasons for why this evidence impeaching Reilly was in possession (i.e., knowledge) of the prosecution team "even if the trial attorney did not himself possess the exculpatory evidence[.]" (**Id**. at p. 982.) Among those reasons was that each individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf and that "[t]his includes evidence held by other prosecutors." (**Id**. at p. 983.) The other reason given was based on the fact that the Public Defender's letter was addressed specifically to the elected District Attorney and thus knowledge of the ***Brady*** evidence was properly "imputed both to [the head of the prosecutor's office] and, by extension, to prosecutors working in his office." (**Id**. at p. 982.)

The Ninth Circuit's holding in ***Milke* v. *Ryan*** (9th Cir. 2013) 711 F.3d 998 [discussed in this outline, section I-7-D at pp. 75-76] similarly suggests that all prosecutors in a single office are in constructive possession of information in the possession of any prosecutor in the office. (**Id**. at pp. 1016-1017; **see also *Odle* v. *Calderon*** (N.D.Cal.1999) 65 F.Supp.2d 1065, 1071 [in dicta, stating "knowledge will be imputed to the prosecutor where the impeaching evidence is known . . . to other prosecutors in the same office"].)

Moreover, there are cases from other jurisdictions that have directly held or stated that if one prosecutor in an office knows about discoverable information, ***all*** prosecutors in the same district attorney's office are deemed to be aware of it. (**See *State* v. *Williams*** (Md. 2006) 896 A.2d 973 [outlining rationale and cases upon which conclusion is based]; ***McCormick* v. *Parker*** (10th Cir. 2016) 821 F.3d 1240, 1247 [for ***Brady*** purposes—the "prosecution" includes "not only the individual prosecutor handling the case, but also ... the prosecutor's entire office"]; ***Tiscareno* v. *Anderson*** (10th Cir. 2011) 639 F.3d 1016, 1021 [same]; ***Smith* v. *Secretary of New Mexico Department of Corrections*** (10th Cir. 1995) 50 F.3d 801, 824 [same]; ***Diallo* v. *State*** (Md. 2010) 994 A.2d 820, 837; ***In re Sealed Case No. 99 3096 (Brady Obligations)*** (D.C. Cir. 1999) 185 F.3d 887, 896; ***Hall* v. *State*** (Tex. App. 2009) 283 S.W.3d 137, 170; **see also *Graves* v. *Smith*** (E.D.N.Y. 2011) 2011 WL 4356083, *8 [noting the Second Circuit has indicated "that a prosecutor may have constructive or actual knowledge of exculpatory evidence *known to other prosecutors working in the same office*"]; ***State* v. *Engel*** (N.J. Super.1991) 592 A.2d 572, 601 [citing many cases "supporting the proposition that the knowledge of one member of a prosecutor's office is to be imputed to another in the context of a ***Brady*** violation"]; ***Com.* v. *Wallace*** (Pa. 1983) 455 A.2d 1187, 1190 ["the prosecutor's office is an entity and the knowledge of one member of the office must be attributed to the office of the district attorney as an entity"].)

In addition, on at least one occasion, the California Supreme Court has used broad language in describing the prosecutor's obligation to disclose that arguably supports such an interpretation, although the *facts* in the case did not raise the issue of whether the prosecution team included all prosecutors in the office. (**See e.g.**, ***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1132 [stating the ***Brady*** "obligation is not limited to evidence the prosecutor's ***office*** itself actually knows or possesses . . ."].)

Finally, arguments can be made for adopting this principle on the ground that it avoids the problem of how to draw a line between those prosecutors who have had a participatory involvement in a case and those who have not. Such line drawing may not be so easy. For example, would a prosecutor who makes a brief appearance on behalf of a prosecutor colleague in order to continue a case thereby become part of the prosecution team in that case? Would a prosecutor who litigates a section 995 motion, but who is otherwise unfamiliar with other aspects of the case, be considered part of the prosecution team in that case? A simple rule that all prosecutors in the office are on the team eliminates the possibility that exculpatory information will slip through the cracks. As the court in ***State* v. *Williams*** (Md. 2006) 896 A.2d 973 put it: "As the seeker of truth [should] the State, as prosecutor, [be able] to insulate itself

from its constitutionally mandated duty by dividing itself into pieces, thus permitting one piece to claim ignorance of the knowledge of the other pieces[?]" (**Id**. at p. 990; **see also *Breceda* v. *Superior Court of Los Angeles County*** (2013) 215 Cal.App.4th 934, 955 [imputing information known to "office of the district attorney" to individual prosecutors handling grand jury for purposes of duty to disclose exculpatory evidence to the grand jury under Penal Code section 939.71 - discussed in this outline at section XI-2 at pp. 276-277].)

Case Law and Argument Supporting the Idea that *Only* Prosecutors Connected to the Charged Case in Some Fashion are Part of the Prosecution Team

On the other hand, there is a significant flaw in the reasoning of cases directly holding information known to one prosecutor is known to all prosecutors. These cases largely rely on the United States Supreme Court decision in ***Giglio* v. *United States*** (1972) 405 U.S. 150, 154, a case in which the High Court noted that "[t]he prosecutor's office is an entity and as such it is the spokesman for the Government[.]" (**See *State* v. *Williams*** (Md. 2006) 896 A.2d 973, 983; ***In re Sealed Case No. 99 3096 (Brady Obligations)*** (D.C. Cir. 1999) 185 F.3d 887, 896; ***Hall* v. *State*** (Tex.App. 2009) 283 S.W.3d 137, 171; ***Com.* v. *Wallace*** (Pa. 1983) 455 A.2d 1187, 1190.) But reliance on ***Giglio***, and the quoted language from ***Giglio***, for the broad proposition that exculpatory information known to *anyone* in the prosecuting agency is constructively known to *everyon*e in the prosecution agency is unwarranted.

In ***Giglio***, the question posed was whether exculpatory information known to a prosecutor ***who initially dealt with government witness*** should be attributed to the constructive knowledge of the prosecutor who later handled ***same*** case. (**Id**. at pp. 152-154.) It was in *that* factual context that the ***Giglio*** court held information known to one prosecutor is attributable to another prosecutor. (**See *United States* v. *Lee Vang Lor*** (10th Cir. 2013) 706 F.3d 1252, 1259-1260 [rejecting argument prosecutors have a duty to investigate testifying officers' actions in *unrelated* cases even though the officer is on the prosecution team for constructive possession purposes; and highlighting language in ***Giglio*** saying "prosecutors should establish procedures 'to insure communication of all relevant information ***on each case*** to every lawyer who deals with it'"].)

The much more persuasive argument is that, for ***Brady*** obligation purposes, the *only* prosecutors on the "prosecution team" are those who have had some involvement in the particular prosecution. And, in the recent California appellate case of ***IAR Systems Software, Inc.* v. *Superior Court*** (2017) 12 Cal.App.5th 503, the court specifically recognized that "the prosecution team does ***not include*** federal agents, ***prosecutors***, or parole officers who are not involved in the investigation." (**Id**. at p. 516; **see also *United States* v. *Morgan*** (S.D.N.Y. 2014) 302 F.R.D. 300, 304 ["It is clear, however, that "the prosecution team does not include . . . prosecutors . . . who are not involved in the investigation."]; ***People* v. *Simmons*** (N.Y. 1975) 325 N.E.2d 139, 143 [citing to ***Giglio*** for the proposition that "the office of the District Attorney is an entity and the individual knowledge of a case possessed ***by assistants assigned to its various stages*** must, in the final analysis, be ascribed to the

prosecutorial authority]; ***State* v. *Hall*** (Idaho 2018) 419 P.3d 1042, 1128 ["The duty of disclosure enunciated in ***Brady*** is an obligation of not just the individual prosecutor assigned to the case, but of all the government agents *having a significant role in* investigating and *prosecuting the offense*."], emphasis added; **see also**, this outline, section I-7-H at pp. 94-99 [discussing why all officers in the investigating agency are not on the prosecution team].) Prosecutors with no connection to the case should not be deemed to be on the prosecution team (though it might be reasonable to include prosecutors in the office who are not involved in the particular case but are nonetheless aware there is an on-going prosecution and that they are in possession of exculpatory information relating to that prosecution). Limiting the "prosecution team" to prosecutors who have had some involvement with the case makes sense for several reasons.

First, it's just plain crazy to attribute knowledge of one prosecutor to every prosecutor in the office. It assumes the prosecutor's office is like the Borg – a hive mind – in which every piece of knowledge is in the collective consciousness of the office. If a defense attorney joins a prosecutor's office, does the whole officer suddenly become legally imbued with the defense attorney's knowledge about all his past clients?

Second, it is consistent with the holding in ***People* v. *Jordan*** (2003) 108 Cal.App.4th 349 that a prosecutor is not deemed to be in possession of the "testimony of every witness called by the defense at every criminal trial in the county" (**id**. at p. 361) even though such information must *necessarily* be contained in the minds of the prosecutors in the office who handled those trials. (**See** this outline, section I-7-C-i at pp.73-74.)

Third, it is consistent with the rationale of those cases finding that when deciding whether a person is on the prosecution team *in general*, "the relevant inquiry is what the person ***did***, not who the person is." (***United States* v. *Stewart*** (2nd Cir. 2006) 433 F.3d 273, 298, emphasis added.) That is, "the propriety of imputing knowledge to the prosecution is determined by examining the specific circumstances of the person alleged to be an 'arm of the prosecutor'" and **not** by looking at "the status of the person with actual knowledge, such as a ***law enforcement officer***, prosecutor or other government official." (***United States* v. *Stewart*** (2nd Cir. 2006) 433 F.3d 273, 298, emphasis added; **accord *United States* v. *Meregildo*** (S.D.N.Y. 2013) 920 F.Supp.2d 434, 441 ["the prosecution team does not include federal agents, ***prosecutors***, or parole officers who are not involved in the investigation," emphasis added]; **see also *United States* v. *Robinson*** (4th Cir. 2010) 627 F.3d 941, 952 and ***United States* v. *Locascio*** (2nd Cir. 1993) 6 F.3d 924, 949 [information known to some *United States Attorneys* and FBI agents (in a different district) impeaching witness in defendant's case but not to United States Attorney and FBI agents involved in investigating case against defendant is not in possession of latter]; **but see *State* v. *Williams*** (Md. 2006) 896 A.2d 973, 983 [finding consideration of whether a person participated in the investigation in assessing whether that person's knowledge may be imputed to the prosecution team only "applies to actors outside the State's Attorney's Office," not to individuals who are part of "the prosecutor's office itself"].)

Fourth, drawing a distinction between those prosecutors who are involved in the investigation and those who are not is a logical extension of the "partial team" concept which draws a distinction between information held by the portion of an agency involved in the investigation of a crime and information held by the portion of agency that is concerned with non-investigative functions. (**See *County of Placer* v. *Superior Court (Stoner)*** (2005) 130 Cal.App.4th 807, 814; ***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, 1317-1318; **cf.**, ***People* v. *Jacinto*** (2010) 49 Cal.4th 263, 270 [for *Sixth Amendment* purposes, release of prisoner from the county jail to federal authorities who deported the prisoner could not be held against the prosecution where deputies responsible for release of prisoner were part of jail security and administration and not part of unit investigating case against defendant].)

Fifth, one rationale for imputing constructive knowledge of police or others assisting the prosecution to the prosecutor handling the case is to ensure that the duty of the prosecutor to disclose exculpatory evidence is not circumvented by allowing evidence to be suppressed by others *aware* of exculpatory evidence. (**See *Moore* v. *Illinois*** (1972) 408 U.S. 786, 794 ["The heart of the holding in ***Brady*** is the prosecution's suppression of evidence"]; ***In re Brown*** (1998) 17 Cal.4th 873, 880 [prosecutor's duty to search for and disclose known to others acting on the government's behalf imposed to prevent prosecution from avoiding duty to disclose evidence by "the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial"].) This rationale is not furthered by imputing knowledge to the trial prosecutor when the only person in actual possession of knowledge is unaware he or she is in possession of exculpatory evidence. (**Cf.**, ***California* v. *Trombetta*** (1984) 467 U.S. 479, 488-489 [no due process violation when evidence is destroyed unless exculpatory value was apparent before the evidence was destroyed]).

In sum, it is unfair and beyond impractical to attribute to a prosecutor handling a case the knowledge of another prosecutor in the office regarding exculpatory evidence when that other prosecutor has no connection to the case and has no knowledge the evidence he or she possesses is relevant to any pending case – unless the office has set up a mechanism for collecting the information that makes it reasonably accessible to all prosecutors in the office.

H. Are All Members of the Investigating Agency Part of the Prosecution Team for Purposes of Imputing Knowledge of *Brady* Material?

As with the question of whether every prosecutor in an office is on the prosecution team, it is not yet fully settled whether every officer in a law enforcement agency that conducted the investigation of a defendant is on the prosecution team for ***Brady*** purposes.

It is beyond dispute that individuals (i.e., police officers, lab technicians, etc.,) who participate in the actual investigation of the defendant are considered part of the prosecution team, and that information known to members of the prosecution team is deemed to be in the constructive possession of the

prosecution for ***Brady*** purposes, regardless of whether the prosecutor is personally aware of the exculpatory information. (**See *Youngblood* v. *West Virginia*** (2006) 547 U.S. 867, 870 [nondisclosure of note from prosecution witnesses impeaching testimony of witnesses at trial that was read by a state trooper ***who investigated the case***, but not shared with prosecutor, could constitute ***Brady*** error]; ***Kyles* v. *Whitley*** (1995) 514 U.S. 419, 438 [statement of an informant known to an officer ***investigating the case*** was in the constructive possession of the prosecution, even though information never communicated to the prosecuting attorney]; ***In re Brown*** (1998) 17 Cal.4th 873, 880 [failure to disclose crime laboratory's worksheet created by lab personnel ***working on defendant's case*** was ***Brady*** violation even though prosecutor unaware of lab report]; ***People* v. *Uribe*** (2008) 162 Cal.App.4th 1457, 1482 [failure to disclose video of sexual assault victim known to SART examiners ***who interviewed victim in defendant's case*** violated ***Brady***].)

Moreover, the duty to disclose material exculpatory information in the constructive possession of the prosecutor applies to impeachment evidence, as there exists no pat distinction between impeachment and exculpatory evidence under ***Brady***. (**See *United States* v. *Bagley*** (1985) 473 U.S. 667, 676.) Rather, "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [the ***Brady***] rule." (***Giglio* v. *United States*** (1972) 405 U.S. 150, 154, quoting ***Napue* v. *Illinois*** (1959) 360 U.S. 264, 269; ***United States* v. *Buchanan*** (10th Cir. 1989) 891 F.2d 1436, 1443.)

However, neither the California Supreme Court nor the United States Supreme Court has ever directly confronted the issue of whether a prosecutor will be deemed to be in possession of exculpatory information known to an officer who is employed in an investigatory capacity by the agency investigating the defendant, ***when the officer has no personal involvement in the investigation of the defendant and is <u>unaware</u> there is any ongoing prosecution of the defendant or that the information has any exculpatory value to that prosecution***.

The closest the California Supreme Court has come to speaking on the issue was in ***People* v. *Lucas*** (2014) 60 Cal.4th 153. In ***Lucas***, the court rejected an argument that the prosecution had suppressed a police report relating to an incident that would have impeached a prosecution witness because the information documented in the report was ultimately presented at trial. However, the court did note that "[i]t is true that the San Diego Police Department forms part of the 'prosecution team,' and therefore, the prosecution had constructive possession of the report." (**Id.** at p. 274.) This language was dicta insofar as it can be read as placing every police report of the San Diego police department in constructive possession of a prosecutor handling a case investigated by that department. (It is unknown, for example, whether the report could be deemed in the prosecution's possession because it was listed in the witness' rapsheet.)

In the recent case of ***IAR Systems Software, Inc.* v. *Superior Court*** (2017) 12 Cal.App.5th 503, the court appeared to recognize that agents must be involved in the investigation in some fashion in order to be on the prosecution team. (**Id**. at p. 516.) Albeit, in the Ninth Circuit case of ***Aguilar* v. *Woodford*** (9th Cir. 2013) 725 F.3d 970 [discussed in this outline, section I-7-G at p. 90], the court indicated that knowledge in the possession of *any* deputy in the investigating agency could properly be imputed to all other deputies in the agency. Specifically, the court held evidence relating to prior mistaken identifications by a scent dog (Reilly) whose identification was used to help establish the guilt of a defendant in a later case was properly imputed to be within the possession of the prosecutor in that later case. One of the reasons given for imputing possession was that it was likely the information was known to the dog handler who testified regarding the investigations in defendant's case. But the court then went on to say that "*even if [the handler] himself had not been aware of Reilly's misidentifications, it is enough that other members of the Sheriff's Department were aware of them*. (**Id**. at p. 983 [albeit the holding may be limited to circumstances where all members in the same specialized unit would be likely have knowledge of the impeaching information].)

Some California courts have used language that suggests that the entire investigating agency *is* on the prosecution team. (**See *People* v. *Jordan*** (2003) 108 Cal.App.4th 349, 358 ["prosecution team includes both investigative and prosecutorial ***agencies*** and personnel"]; ***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, 1315 [same]; ***People* v. *Kasim*** (1997) 56 Cal.App.4th 1360, 1380 ["prosecutorial duty to disclose encompasses . . . evidence possessed by investigative ***agencies*** to which the prosecutor has reasonable access"]; ***People* v. *Robinson*** (1995) 31 Cal.App.4th 494, 499 ["scope of a prosecutor's disclosure duty includes not just exculpatory evidence in his possession but that possessed by investigative ***agencies*** to which he has reasonable access"].) (Emphasis added to all.)

But notwithstanding the language used in these cases, none actually involved factual scenarios where the information suppressed was only known to a member of the investigating agency who had no connection to the investigation. In ***People* v. *Jordan*** (2003) 108 Cal.App.4th 349, the court held that the prosecution had ***no Brady*** duty to collect, store, or disseminate evidence that could potentially impeach an officer testifying at defendant's trial where the evidence consisted of claims made at other trials by defendants claiming the officer was lying. (**Id**. at pp. 361-362.) In ***People* v. *Kasim*** (1997) 56 Cal.App.4th 1360, the court held the prosecution violated due process by failing (i) to disclose information about benefits that had accrued to a witness where some of the benefits ***were known to the prosecutor handling the case*** and (ii) to disclose information about the witness's status as an informant where the information ***was known to a detective who "broke" the case*** by getting the witness to admit being an accomplice in the charges facing the defendant. (**Id**. at pp. 1366-1367, 1379-1381.) In ***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, the court held that when the Department of Corrections (DOC) investigates an in-prison crime, only that unit of the DOC that is involved in the investigation of the crime is part of the prosecution team, not the unit overseeing the

administrative and security responsibilities of housing prisoners, and a prosecutor does not have an obligation to search or disclose the records of those portions of a multi-function government agency which are not a part of the prosecution team. (**Id**. at pp. 1317-1318.) Thus, the actual holding of the court **supports** the principle that **not** all information in the possession of the investigating agency is in the possession of the prosecutor. In ***People* v. *Robinson*** (1995) 31 Cal.App.4th 494, the court held there was a discovery violation where the police investigator failed to timely disclose the identity of an eyewitnesses where the ***investigator had been present for, or had conducted the interview of, the witness***. (**Id**. at pp. 499-503.)

Moreover, there is also language from decisions of the United States Supreme Court and California Supreme Court suggesting the duty to disclose only extends to information in the possession of officers or others who have actually participated in the investigation, i.e., those who act as actual agents of the prosecution. (**See *Youngblood* v. *West Virginia*** (2006) 547 U.S. 867, 870 ["***Brady*** suppression occurs when the government fails to turn over even evidence that is 'known only to police ***investigator***s and not to the prosecutor"]; ***Kyles* v. *Whitley*** (1995) 514 U.S. 419, 437 ["individual prosecutor has a duty to learn of any favorable evidence known to the others ***acting on the government's behalf*** in the case, including the police"]; "]; ***People* v. *Whalen*** (2013) 56 Cal.4th 1, 64 ["Because [the officer] ***participated in the investigation*** of the [victim's] murder and was employed by an investigating agency, he was part of the prosecution team"]; ***In re Brown*** (1998) 17 Cal.4th 873, 881 ["***those*** assisting the government's case are no more than its agents"]) (Emphasis added in all cases.)

In addition, there are cases holding that when deciding whether a prosecution witness is on the prosecution team, "the relevant inquiry is ***what the person did***, not who the person is" and that "the propriety of imputing knowledge to the prosecution is determined by examining the specific circumstances of the person alleged to be an 'arm of the prosecutor.'" (***United States* v. *Stewart*** (2nd Cir. 2006) 433 F.3d 273, 298, emphasis added [finding forensic document analyst was not on prosecution team even though analyst's duties including analyzing document used in evidence, explaining the forensic ink tests that had been conducted, discussing possible testimony that the defense expert would give, assisting the prosecutors in developing cross-examination questions with respect to technical aspects of testing, taking part in a mock examination prior to trial, and testifying at trial regarding the tests and his resulting conclusions]; **accord *People* v. *Garrett*** (2014) 18 N.E.3d 722 [23 N.Y.3d 878, 887]; ***Avila* v. *Quarterman*** (5th Cir. 2009) 560 F.3d 299, 307-309 [pathologist who testified in prosecution case was not part of the prosecution team, such that his arguably uncommunicated opinion as to cause of victim's injuries (which contradicted 'the prosecution's theory of the case) could be imputed to the government for ***Brady*** purposes]; **see also *McCormick* v. *Parker*** (10th Cir. 2016) 821 F.3d 1240, 1247 [finding all prosecutors in office are on prosecution team but stating team includes "law enforcement ***personnel*** and other arms of the state ***involved in***

investigative aspects of a particular criminal venture.", emphasis added.]; ***Ex Parte Miles*** (Tex. Crim. App. 2012) 359 S.W.3d 647, 665 ["the State" includes, in addition to the prosecutor, other lawyers and employees in his office and members of law enforcement ***connected to the investigation and prosecution of the case***", emphasis added; Commonwealth v. Martin (Mass. 1998) 696 N.E.2d 904, 909 ["A prosecutor's obligations extend to information in possession of a person ***who has participated in the investigation or evaluation of the case and has reported to the prosecutor's office*** concerning the case." emphasis added.)

And finally, there are cases that have expressly or implicitly rejected the notion that all officers in a single agency are part of the prosecution team.

In ***People*** **v.** ***Shakur*** (1996) 648 N.Y.S.2d 200, the court stated: "A prosecutor is not constructively aware of police files unrelated to the case on trial unless there exists some reason to believe a file contains relevant information. Otherwise, a conscientious prosecutor would have to search every police department file, whether related to the case on trial or not, in order to be certain of fulfilling his ***Brady*** obligation. That is clearly not required." (**Id**. at p. 206.) This necessarily means not every member of the investigating agency is part of the prosecution team because the information in the files would necessarily be known to some member of the investigating agency.

In ***Sutton*** **v.** ***Carpenter*** (6th Cir. 2015) [unpublished] 617 Fed. Appx. 434 [2015 WL 3853039, it came to light that the pathologist who established the time of death at defendant's trial was being investigated by the same law enforcement agency that investigated the defendant. The defendant argued that information regarding the investigation known to the agents investigating the pathologist should be imputed to those working on the defendant's case or that an affirmative duty should be imposed on the prosecution "to learn all potential witness credibility defects known by members of a cooperating government agency." (**Id**. at p. *6.) The Sixth Circuit rejected the argument because defendant offered "no evidence that the ***same*** TBI agents or teams participated in both investigations" and "no court has extended the prosecution's ***Brady*** obligations so far." (**Ibid**; emphasis in original; **accord** ***Robinson*** **v.** ***Morrow*** (M.D. Tenn.) 2015 WL 5773422, at *23, fn. 7; **see also** ***United States*** **v.** ***Meregildo*** (S.D.N.Y. 2013) 920 F.Supp.2d 434, 442 ["under the totality of the circumstances, the more involved ***individuals*** are with the prosecutor, the more likely they are team members" and circumstances relevant to membership " include whether the ***individual*** actively investigates the case, acts under the direction of the prosecutor, or aids the prosecution in crafting trial strategy" although "no single factor is the touchstone for imputation" of membership on the prosecution team]; ***Virgin Islands*** **v.** ***Ward*** (V.I. 2011) 2011 WL 4543925, *11 ["[n]o duty exists for a prosecutor to learn of favorable evidence collected by police in all cases under investigation," and that a duty to disclose information obtained in connection with a different case is likely only to arise if both cases share investigative and prosecutorial personnel"]; ***United States*** **v.** ***Locascio*** (2nd Cir. 1993) 6 F.3d 924, 949 [information known to some United States Attorneys (in a different district) and FBI agents impeaching witness in defendant's case

but not to United States Attorney and FBI agents involved in investigating case against defendant not imputed to latter]; ***United States* v. *Morgan*** (S.D.N.Y. 2014) 302 F.R.D. 300, 304 ["It is clear, however, that 'the prosecution team does not include federal agents, prosecutors, or parole officers who are not involved in the investigation. And, even when agents are involved in the investigation, they are not always so integral to the prosecution team that imputation is proper."].)

When the High Court or a California court ultimately gets around to addressing the issue head-on, it is likely only information that is known to law enforcement officers who ***participated in the investigation*** the case against the defendant will be found to be within the prosecutor's possession. However, it would be imprudent to ignore contrary authority or assume the High Court will ultimately adopt the most persuasive argument. Thus, for now, it should be assumed that once one prosecutor or officer in an investigating agency has come across ***Brady*** information, the information will be deemed to be in the in the constructive possession of *any* prosecutor in the same prosecutor's office. Indeed, one of the reasons prosecutors' offices are instituting ***Brady*** Banks is so that everybody in the office who will be deemed to be in constructive knowledge of impeaching information about an officer has a way of *actually knowing* about such information.

I. Are All Experts Who Testify as Prosecution Witnesses Members of the Prosecution Team?

There *may* be a distinction between experts who had a role in the investigation and experts who are called to testify strictly as experts but played no role in the investigation of the case. Clearly, the former are members of the prosecution team. (**See e.g.**, ***People* v. *Uribe*** (2008) 162 Cal.App.4th 1457, 1476; ***In re Brown*** (1998) 17 Cal.4th 873, 879.) But it is more of an open question when the experts are hired solely to give testimony in court are on the prosecution team. (**See *United States* v. *Skelly*** (2d Cir. 2006) 442 F.3d 94, 100 [concluding prosecution's duty to disclose "does not extend to the knowledge of an ordinary expert witness who was not involved with the investigation of the case"]; ***United States* v. *Stewart*** (2d Cir. 2006) 433 F.3d 273, 298–299 [expert who was not involved with the investigation or presentation of the case to the grand jury, did not interview witnesses or gather facts, and, with a single exception, did not review documents or develop prosecutorial strategy and acted only in the capacity of an expert witness was not a member of the prosecution team]; **see also *McCormick* v. *Parker*** (10th Cir. 2016) 821 F.3d 1240, 1248 [finding sexual assault nurse part of prosecution team but noting it was not asked to decide "whether an expert who had no pre-charge investigatory role may be a member of the prosecution team for ***Brady*** purposes."].)

> **Editor's note**: Prosecutors should assume, for now, that an expert witness called solely to testify in court is on the prosecution team for purposes of providing discovery. But be ready to make the argument the expert is not on the team if previously unknown impeaching information turns up post-conviction.

8. When will evidence ***not*** be considered to be "in possession of the prosecution" for purposes of deciding whether a prosecutor has a due process obligation to disclose favorable, material evidence?

A. Third Parties

"[A] prosecutor does not have a duty to disclose exculpatory evidence or information to a defendant unless the prosecution team actually or constructively possesses that evidence or information" (***People* v. *Abatti*** (2003) 112 Cal.App.4th 39, 53; ***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, 1315.) Evidence within the possession of persons or agencies not on the prosecution team is referred to as being within the possession of "third parties" (**See e.g.**, ***People ex rel. Lockyer* v. *Superior Court*** (2004) 122 Cal.App.4th 1060, 1077; ***People* v. *Abatti*** (2003) 112 Cal.App.4th 39, 57; ***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, 1318.)

> **Editor's note**: Agencies or persons not on the prosecution team are *also* outside the scope of any discovery duties imposed by the California discovery statutes (Pen. Code, §§ 1054 et seq.). **See** this outline, section III-6 at p. 169.)

B. Other Police Agencies

"[I]nformation possessed by an agency that has no connection to the investigation or prosecution of the criminal charge against the defendant is not possessed by the prosecution team, and the prosecutor does not have a duty to search for or to disclose such material.' [Citation.]" (***Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, 903; ***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1133; ***In re Steele*** (2004) 32 Cal.4th 682, 697.)

It does not make a difference if the agency in actual possession of the ***Brady*** information is responsible for maintaining custody of the defendant if the agency did not participate in the investigation. (***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1133.)

Thus, if the defense asks the prosecution to provide reports from agencies that did not conduct the investigation into the crimes of the defendant, the defense may be told to seek those records directly from those non-investigating agencies. There is a practical downside, however, to taking this approach: if the defense subpoenas records from a non-investigating agency, the prosecution is not entitled to receive those records. (**See *Teal* v. *Superior Court*** (2004) 117 Cal.App.4th 488, 492.) Hence, if it appears the defense will be entitled to obtain the records sought by way of subpoena, it might be prudent for the prosecutor to obtain those records *for* the defense to ensure that the defense does not end up with records that the prosecution does not have.

C. Peace Officer Personnel *(Pitchess)* Files

In ***Pitchess* v. *Superior Court*** (1974) 11 Cal.3d 531, the California Supreme Court recognized that, upon a sufficient showing, criminal defendants can obtain discovery from the court of potentially exculpatory information located in otherwise confidential peace officer personnel records. (**Id**. at pp. 537-540; ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 705.) The holding in ***Pitchess*** was codified by the Legislature in Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043, 1045, and 1046. (**See *People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 710.)

Penal Code section 832.7(a) provides that peace officer personnel records, records maintained by any state or local agency pursuant to Penal Code section 832.5, and information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code – albeit there is an exception to the confidentiality provision when access is sought pursuant "to investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office."

Moreover, as of 2019, some of the records are now available for public inspection pursuant "to the California Public Records Act Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code)." (Pen. Code, § 832.7(b).)

In 2019, Penal Code section 832.7 was amended to eliminate the confidentiality of various types of certain types of information contained in an officer's personnel file. Specifically, "[n]otwithstanding subdivision (a), subdivision (f) of Section 6254 of the Government Code, or any other law, the following peace officer or custodial officer personnel records and records maintained by any state or local agency shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act . . . : ¶ (A) A record relating to the report, investigation, or findings of any of the following: (i) An incident involving the discharge of a firearm at a person by a peace officer or custodial officer. ¶ (ii) An incident in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury. ¶ (B)(i) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public. . . . ¶ (C) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence." (Pen. Code, § 832.7(b)(1)(A)-(C).)

Penal Code section 832.8 explains that, as used in section 832.7, "personnel records" means any file maintained by the employing agency under the officer's name and containing records relating to "marital status, family members, educational and employment history, home addresses, or similar information," medical history, election of employee benefits, complaints or discipline, and "[a]ny other information the disclosure of which would constitute an unwarranted invasion of personal privacy."

Evidence Code section 1043(a) provides, in relevant part, that "[i]n any case in which discovery … is sought of peace officer personnel records … or information from those records, the party seeking the discovery … shall file a written motion with the appropriate court … [and give] written notice to the governmental agency which has custody and control of the records…." (Evid. Code, § 1043(a).)

Evidence Code section 1043(b) provides that the party seeking discovery or disclosure must identify "the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace or custodial officer whose records are sought, the governmental agency which has custody and control of the records, and the time and place at which the motion for discovery or disclosure shall be heard." (Evid. Code, § 1043(b)(1).) The party must also provide a "description of the type of records or information sought" (subd. (b)(2)) and file "[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records" (subd. (b)(3)).

The conditional privilege created by section 1043 of the Evidence Code for peace officer personnel records protects **all** information in a peace officer's file **without regard** to whether a particular piece of information can also be found elsewhere. (***Hackett* v. *Superior Court*** (1993) 13 Cal.App.4th 96, 97.)

Albeit, the prerequisites for access to personnel records under section 1043 does not apply to request for records specified under Penal Code section 832.7(b) because that subdivision governs "notwithstanding any other law . . ." (**See** this outline, I-8-C at p. 101.)

i. Are Peace Officer Personnel Files Considered Third Party Records?

In ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, the California Supreme Court had the opportunity to address the question of whether ***Pitchess*** files are considered records within the possession of the prosecution team or should be treated as third party records for purposes of deciding whether the prosecution had an obligation to review such files for potential ***Brady*** information.

The case arose when the prosecution received a "***Brady*** tip" from the San Francisco Police Department that potential ***Brady*** information existed in an officer's personnel file – albeit no further information was provided by the department. Based on this tip, the People filed their own ***Brady/Pitchess*** motion to obtain the file. (**Id**. at pp. 706-708.)

The trial court refused to hear the prosecutor's motion on several grounds. First, notwithstanding the fact the affidavit in support of the motion was based on the police department specifically stating the files had potential ***Brady*** material, the trial court ruled there was an insufficient showing of ***Brady*** materiality to justify court review of the records. Second, the court concluded that the ***Pitchess*** procedures (Penal Code section 1043 et seq.) did not apply to motions seeking "review" of police officer personnel records under ***Brady***. Third, the court ruled Penal Code section 832.7(a) (which generally bars "disclosure" of personnel records absent compliance with the *Pitchess* procedures) was unconstitutional to the extent it barred the prosecution from obtaining access to officer personnel records in order to comply with ***Brady***. (**Id**. at p. 708.)

After both the prosecution and the city attorney challenged the trial court's ruling, the Court of Appeal held the prosecution had a "right to [and should] review personnel records of police officer witnesses for ***Brady*** material without complying with the ***Pitchess*** procedures, although the prosecution would have to comply with those procedures, and receive judicial approval, before it could turn over to the defense any ***Brady*** material it found. It concluded that Penal Code section 832.7, subdivision (a), does not bar such review for two reasons. First, it believed that prosecutorial review of the records without more would not constitute "'disclos[ure] in any criminal or civil proceeding"' of the records under that subdivision. Second, it believed the exception for investigations permit[ted] such review." (**Id**. at p. 713 [bracketed information added].)

When the case came before the California Supreme Court, a different conclusion was reached. Unfortunately, the California Supreme Court did not directly answer the question of whether officer personnel files were in constructive possession of the prosecution (thus triggering a duty of review). Instead, it resolved the case on a different ground – albeit one suggesting the files *were* third party records.

The ***Johnson*** court pointed out that a violation of due process (i.e., the ***Brady*** rule) can only occur "if evidence has been suppressed by the State, either willfully or inadvertently" and that "[e]vidence is not suppressed if the defendant has access to the evidence prior to trial by the exercise of reasonable diligence." (***Johnson*** at pp. 715-716.) Since "the prosecution and the defense have equal access to confidential personnel records of police officers who are witnesses in a criminal case[,]" there could be no ***Brady*** violation if information contained in the file was not disclosed so long as the prosecution provided what information they did have to the defense. (***Johnson*** at pp. 716, 722.)

The California Supreme Court rejected the suggestion that the exception in section 832.7 that allows prosecutorial access to the files for "investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by . . . a district attorney's office" allowed the prosecutor access to the file of a peace officer witness in order to locate potential ***Brady*** material. (***Johnson*** at pp. 713-714.) The ***Johnson*** court stated "[c]hecking for

Brady material is not an investigation for these purposes. A police officer does not become the target of an investigation merely by being a witness in a criminal case." (**Id**. at p. 714.)

The California Supreme Court also disagreed with the Court of Appeal's belief that prosecutorial review of the records without more would not constitute "disclosure" in any criminal or civil proceeding. (**Id**. at pp. 713-714.)*

> ***Editor's note**: The Court of Appeal had reasoned that since the District Attorney was head of the prosecution team that included the investigating police agency, the District Attorney's review of the files was not substantially different than a city attorney's review of personnel files, which the California Supreme Court in ***Michael* v. *Gates*** (1995) 38 Cal.App.4th 737 said was outside the definition of "disclosure" as that term was used under Section 832.7(a). The ***Johnson*** court held the analogy between the District Attorney's Office and City Attorney's Office failed because, unlike the City Attorney, the District Attorney does not *represent* the police agency. (***Johnson*** at p. 714.)

Accordingly, the California Supreme Court held that "the prosecution fulfills its ***Brady*** duty as regards the police department's tip if it informs the defense of what the police department informed it, namely, that the specified records might contain exculpatory information." (***Johnson*** at p. 705.)

The ***Johnson*** court was not confronted with the question of what a prosecutor was required to do when ***no*** Brady tip was provided, but, after explaining that a ***Brady*** tip "together with some explanation of how the officer's credibility might be relevant to the proceeding, would satisfy the showing necessary under the ***Pitchess*** procedures to trigger in camera review[,]" the ***Johnson*** court went on to note "defendants are always permitted to file their own ***Pitchess*** motion ***even without any indication from the police department (through the prosecution)*** that the records might contain ***Brady*** material and, indeed, even if, hypothetically, the prosecution had informed them that the police department had said the records do not contain ***Brady*** material." (***Johnson*** at p. 721, emphasis added.) The ***Johnson*** court stated: "For these reasons, we conclude that, under these circumstances, permitting defendants to seek ***Pitchess*** discovery ***fully protects*** their due process right under ***Brady*** . . . to obtain discovery of potentially exculpatory information located in confidential personnel records. The prosecution ***need not do anything in these circumstances beyond providing to the defense any information it has regarding what the records might contain***—in this case informing the defense of what the police department had informed it." (***Johnson*** at pp. 721-722, emphasis added.)

The above language strongly indicates the prosecution and the defense have equal access to favorable material information contained in officer personnel files ***regardless*** of whether a ***Brady*** tip is provided to the defense. This interpretation of ***Johnson*** comports with the ***Johnson*** court's favorable citation to ***People* v. *Gutierrez*** (2004) 112 Cal.App.4th 1463, a case specifically holding the prosecution has no constitutional obligation to search peace officer personnel files for favorable material

evidence. (***Johnson*** at pp. 713, 720.) Moreover, such an interpretation is consistent with the fact that, earlier in the opinion, the ***Johnson*** court stated that a defendant could meet the prerequisite showing under ***Pitchess*** even though the defendant does "not know what information is located in personnel records before he obtains the discovery" and a showing of "reasonable belief" the records contained exculpatory evidence could "be based on a rational inference" that members of the public "may" have filed complaints. (***Johnson*** at p. 721.)

***Editor's note**: This same reasoning should apply to information newly made equally available to the defense and prosecution pursuant to the CPRA under Penal Code section 832.7(b). (**See** this outline, section I-8-C at p. 101.)

ii. In Light of *People* v. *Superior Court (Johnson)* (2015) 61 Cal.4th 696, Can it be Assumed that *Pitchess* Files are *Not* in the Constructive Possession of the Prosecution?

It remains an open question whether the prosecution is in constructive possession of peace officer personnel records. However, the issue is moot in light of the holding in ***Johnson*** – *at least when the information in the files is unknown to the prosecutor*.

On the one hand, an argument can be made that information in peace officer personnel files *should* be treated as being in the constructive possession of the prosecution team. After all, an officer who is going to be called as a witness by the prosecution is clearly a member of the prosecution team and the prosecution is held to be in possession of favorable material evidence known to a member of the team regardless of whether that information is personally known to the prosecutor. (**See *People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 709 [citing to ***People* v. *Whalen*** (2013) 56 Cal.4th 1, 64 for the proposition that "because a criminalist 'participated in the investigation of the … murder and was employed by an investigating agency, he was part of the prosecution team, and the prosecutor therefore had a constitutional duty to disclose exculpatory, material evidence in [his] possession *regardless whether the prosecutor was personally aware of the existence of the evidence*'"], emphasis added.)

Moreover, no one can seriously question whether, for ***Brady*** purposes, the prosecution is in possession of information known to an investigating officer that *impeaches* a prosecution civilian witness even though the information is not revealed to the prosecution and is known only to the investigating officer. (**See *Youngblood* v. *West Virginia*** (2006) 547 U.S. 867, 870; ***Kyles* v. *Whitley*** (1995) 514 U.S. 419, 438.) Indeed, investigating officers who fail to reveal favorable material evidence to prosecutors may be sued for violating ***Brady***. (**See *Moldowan* v. *City of Warren*** (6th Cir. 2009) 578 F.3d 351, 381 [noting "virtually every federal circuit has concluded either that the police share in the state's obligations under ***Brady***, or that the Constitution imposes on the police obligations analogous to those recognized in ***Brady***"]; ***Carrillo* v. *County of Los Angeles*** (9th Cir. 2015) 798 F.3d 1210, 1222, fn. 14 ["the vast majority of circuits to have considered the question have adopted the view that police

officers were bound by ***Brady*** well before the Court decided ***Kyles*** [**v. *Whitley*** (1995) 514 U.S. 419]"].) And this rule holds true if the officers fail to disclose information impeaching a witness. (**See *Gantt* v. *City of Los Angeles*** (9th Cir. 2013) 717 F.3d 702, 709 ["***Brady***'s requirement to disclose material exculpatory and *impeachment* evidence to the defense applies equally to prosecutors *and police officers*"]; ***McMillian* v. *Johnson*** (11th Cir.1996) 88 F.3d 1554, 1569 ["Our case law clearly established that an accused's due process rights are violated when the police conceal exculpatory *or impeachment evidence*"] emphasis added.)

Thus, it would seem to follow that if the prosecution is deemed to be in possession of evidence impeaching a civilian witness that is known only to the investigating officer, how can the prosecution *not* be deemed to be in possession of evidence in an officer's personnel file known to an investigating officer that impeaches his or ***her own credibility*** or the credibility of a fellow investigator on the prosecution team?

And, in fact, there are cases from out of state holding that prosecutors *are* in possession of information in confidential peace officer personnel files for ***Brady*** purposes. (**See *Gantert* v. *City of Rochester*** (New Hampshire 2016) 135 A.3d 112, 116 [duty under the state Constitution and ***Brady*** to disclose exculpatory evidence "extends to information known only to law enforcement agencies, such as information located in police officers' confidential personnel files."]; ***State* v. *Laurie*** (New Hampshire 1995) 653 A.2d 549, 553-554 [prosecution's failure to disclose personnel files for police officer disclosing numerous instances of conduct reflecting negatively on officer's character and credibility was reversible error]*; ***Matter of Lui*** (Washington 2017) 397 P.3d 90, 114 [prosecution has an affirmative duty under to disclose Brady information in officer's personnel file - albeit finding there was insufficient showing file contained material evidence]; ***United States* v. *Lawson*** (7th Cir. 2016) 810 F.3d 1032, 1043-1044 [agreeing with concession that disciplinary record in detective's personnel file was suppressed within the meaning of ***Brady*** but finding it was not material]; ***United States* v. *Lee Vang Lor*** (10th Cir. 2013) 706 F.3d 1252, 1259-1260 [suggesting prosecution might be in constructive possession of misconduct potentially impeaching officer once IA investigation has begun]; ***Robinson* v. *State*** (Maryland 1999) 730 A.2d 181, 192-193 ["In this State, each major police department has an IAD division. Consequently, because that division is a part of the police, its records are in the possession of the police. And if the police is an arm of the prosecution, it follows that the records are also constructively in the possession of the prosecution; records in the possession of the police are not rendered not in possession simply because they are made confidential and are not, on that account, shared with, or readily available to, the prosecution"]; ***Snowden* v. *State*** (Del. 1996) 672 A.2d 1017, 1023 [noting decisions from other jurisdictions are "almost unanimous in holding that in response to a specific motion, or upon subpoena duces tecum, the prosecution is required to review [police officer] personnel files for ***Brady*** material"]; ***McCormick* v. *Parker*** (10th Cir. 2016) 821 F.3d 1240, 1242–43 [sexual assault nurse examiner is on prosecution team and thus "we impute her knowledge of her own lack of credentials to the prosecutor,

who was obligated to disclose this impeachment evidence to the defense"]; Pipes, California Criminal Discovery (4th Edition) §§ 10:29-10:29.4, pp. 996-1013 [laying out some of the arguments in support of the idea the prosecution is in possession of information in peace officer personnel files].)

> ***Editor's note**: Indeed, to address the ruling in ***State* v. *Laurie*** (New Hampshire 1995) 653 A.2d 549, 553-554, the Attorney General of New Hampshire crafted a mechanism for getting this information to the defense in a manner similar to the ***Brady*** tip mechanisms created by many prosecutor's officers in California (**see** this outline, section XX at pp. 383-385). Specifically, the New Hampshire Attorney General issued a memo to all county attorneys and law enforcement agencies aimed at developing a procedure to identity and deal with exculpatory "information contained in confidential police personnel files and internal investigations files." (***Gantert* v. *City of Rochester*** (New Hampshire 2016) 135 A.3d 112, 116.) "Because police personnel files are generally confidential by statute, see RSA 105:13–b (2013), the Attorney General recognized in the Memo that prosecutors must rely upon police departments to identify ***Laurie*** issues." (***Gantert*** at p. 116.) The memo advised that law enforcement agencies should notify the county attorney, in writing, "whenever a determination is made that an officer has engaged in conduct that constitutes ***Laurie*** material." (**Ibid**.) Based on this information, county attorneys were then "to compile a confidential, comprehensive list of officers within each county who are subject to possible *Laurie* disclosure—the so-called '*Laurie* List.'" (***Gantert*** at pp. 116-117.) As a result, law enforcement agencies "began developing *Laurie* Lists' to share information regarding officer conduct between police and prosecutors." (***Gantert*** at p. 116.)

There are even a couple of out-of-state cases indicating that the prosecution is in constructive possession of information impeaching a police officer witness *even* when the information has not yet resulted in an investigation, i.e., the information was not, at the time of trial, in the officer's personnel file. (**See *Campiti* v. *Matesanz*** (D. Mass 2002) 186 F.Supp.2d 29, 49; ***Arnold* v. *McNeil*** (M.D. Fla. 2009) 622 F.Supp.2d 1294, pp. 1298-1322.) Although the idea that impeachment in an officer's background *known only to the officer* is within the constructive knowledge of the prosecutor has been **rejected** in almost all cases to address the issue. (**See *Penate* v. *Kaczmarek* (D. Mass.)** 2019 WL 319586, at *8; ***United States* v. *Lee Vang Lor*** (10th Cir. 2013) 706 F.3d 1252, 1259-1260; ***People* v. *Rispers*** (N.Y.A.D 2017) 45 N.Y.S.3d 217, 218; ***People* v. *Garrett*** (N.Y. 2014) 18 N.E.3d 722, 731; ***People* v. *Kinney*** (N.Y.A.D. 1 Dept. 2013) 967 N.Y.S.2d 365, 366; ***People* v. *Seeber*** (N.Y.A.D. 3 Dept. 2012) 943 N.Y.S.2d 282, 284; ***United States* v. *Robinson*** (4th Cir. 2010) 627 F.3d 941, 951-952; ***People* v. *Ortega*** (N.Y.A.D. 1 Dept. 2007) 836 N.Y.S.2d 144, 145-146; ***People* v. *Roberson*** (N.Y.A.D. 1 Dept. 2000) 716 N.Y.S.2d 43, 44; [669 N.Y.S.2d 268, 271-72]; ***People* v. *Longtin*** (N.Y. A.D. 3 Dept. 1997) 666 N.Y.S.2d 357, 359; ***People* v. *Vasquez*** (1995) 214 A.D.2d 93, 95;; ***People* v. *Johnson*** (N.Y. A.D. 3 Dept. 1996) 641 N.Y.S.2d 148, 149; ***Commonwealth* v. *Waters*** (Mass. 1991) 571 N.E.2d 399; ***United States* v. *Rosner*** (2nd Cir.1975) 516 F.2d 269, 278-279 ***Bastidas* v. *City of Los Angeles*** (C.D. Cal. 2006) [unreported] 2006 WL 4749706, *5; **see also *Donahoo v. State*** (Ala.Cr.App. 1989) 552 So.2d 887, 895-896 [prosecution held not to be in constructive possession of fact deputy sheriff had prior conviction, albeit where several routine computer searches relating to witness failed to reveal conviction].) As pointed out in ***People* v. *Garrett*** (N.Y. 2014) 18 N.E.3d 722, "there is a distinction between the nondisclosure of police misconduct 'which has some bearing on the case against the defendant,' and the nondisclosure of such material which has 'no relationship to the case against the

defendant, except insofar as it would be used for impeachment purposes' [citation omitted]. In the latter circumstance, the offending officer is not acting as 'an arm of the prosecution' when he or she commits the misconduct, and the agency principles underlying the imputed knowledge rule are not implicated [citation omitted]." (**Id**. at p. 731.)

On the other hand, the California Supreme Court in ***Alford*** and numerous appellate courts in California have treated information in ***Pitchess*** files that is *unknown* to prosecutors as third-party records (i.e., records *outside* the possession of the prosecution team). (**See *Alford* v. *Superior Court*** (2003) 29 Cal.4th 1033, 1046 [holding absent compliance with the ***Pitchess*** procedures "peace officer personnel records retain their confidentiality vis-à-vis the prosecution; ***Becerrada* v. *Superior Court*** (2005) 131 Cal.App.4th 409, 415 [same, albeit also noting an officer remains free to voluntarily provide the prosecution with material contained in the officer's own personnel file]; ***People* v. *Gutierrez*** (2004) 112 Cal.App.4th 1463, 1475 [same, albeit also noting prosecutor cannot conduct its own ***Brady*** review absent compliance with sections 1043 and 1045]; **accord *Rezek* v. *Superior Court*** (2012) 206 Cal.App.4th 633, 642; ***People* v. *Abatti*** (2003) 112 Cal.App.4th 39, 56; ***Garden Grove Police Dept* v. *Superior Court*** (4th Dist. 2001) 89 Cal.App.4th 430, 431-432 & fns. 1 & 2, 434; ***People* v. *Superior Court (Gremminger)*** (1997) 58 Cal.App.4th 397, 404-405; ***People* v. *Gonzalez*** (unreported) 2006 WL 3259202, *4-*5 [holding trial court's order that prosecution has to check with IA unit for ***Brady*** information in officer personnel files erroneous because the IA unit of the investigating agency is not on the "prosecution team" – ***Pitchess*** motion is the only vehicle available to obtain the information].)

Consistent with these decisions, the California Supreme Court in ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696 affirmed that the ***Pitchess*** procedure is "in essence a special instance of ***third party*** discovery" (at p. 713, emphasis added) and cited to all of the aforementioned published decisions favorably – at least insofar as they stand for the proposition "that the prosecution does not have access to confidential personnel records absent compliance with the ***Pitchess*** procedures." (***Johnson*** at p. 713.) Moreover, some pretty good arguments can be made in favor of finding information in officer personnel files that is not known to the prosecution is not within the possession of the prosecution team. For example, it does not seem reasonable to believe that an officer's confession of bias toward a defendant during a psychotherapy session and kept in a psychiatrist's file would be held to be in possession of the prosecution team just because the officer is a witness in a case. Why should an event documenting bias that is kept in an officer's personnel files be treated any differently? Both files are protected by privileges. (**See *City of Hemet* v. *Superior Court*** (1995) 37 Cal.App.4th 1411, 1427 ["Section 832.7 does not create a limited privilege; it creates a general privilege and then carves out a limited exception"]; ***Fletcher* v. *Superior Court*** (2002) 100 Cal.App.4th 386, 403 [describing Pen. Code, § 832.7 as a "new privilege" created by the Legislature]; ***Hackett* v. *Superior Court*** (1993) 13 Cal.App.4th 96, 98-99 [repeatedly referring to officer personnel files as "privileged"].)

Certainly, in light of the ***Johnson*** court's recognition of the principle that prosecutors do not have reasonable access to peace officer personnel files (i.e., the files are only accessible through compliance with the ***Pitchess*** procedures), it ***could*** easily have found that information in peace officer personnel files is not in the constructive or actual possession of the prosecution team – at least if the information is not known to any prosecutor. (**See** this outline, section I-7-C at p. 71-74.) However, the court did not expressly so hold.

In sum, the ***Johnson*** court seemed to suggest (but did not ultimately hold) that ***Pitchess*** files are not in possession of the prosecution – at least when the information in the file is unknown to the prosecutor.

It ***remains to be seen*** whether the United States Supreme Court will ultimately agree with the suggestion in ***Johnson*** that ***Brady*** information contained in peace officer personnel files is not in the possession of the prosecution. (**See *Catzim* v. *Ollison*** [unreported] (C.D.Cal. 2009) 2009 WL 2821424, *8 ["the United States Supreme Court has no clearly established precedent that a police department or agency acts as a part of a prosecution team when the police compile and keep regular personnel files"].)

The amendments to Penal Code section 832.7 giving the public access to records relating to use of force and sustained findings relating to honesty or sexual assault will likely moot the issue as to whether prosecutors have a ***Brady*** obligation to provide these specified records since it is likely defense counsel will be deemed to have equal access to these records. (**See** this outline, section I-8-C at p. 101; **but see** Pen. Code, § 832.7(h) ["This section does not supersede or affect the criminal discovery process outlined in Chapter 10 (commencing with Section 1054) of Title 6 of Part 2 . . ."].)

iii. It is Truly Unresolved Whether *Brady* Information Contained in *Pitchess* Files is in the Constructive Possession of the Prosecution When That Information is *Known* to a Prosecutor or Other Prosecutors in the Same Office

The record before the California Supreme Court in ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696 indicated that the prosecution was unaware of the information in the peace officer personnel files. (***Johnson*** at p. 706 [noting the declaration filed by the prosecution stated that the records were in the "exclusive possession and control" of the police department and the district attorney did not have "actual" or "constructive" possession of the records].) This was not actually correct. As indicated in the *Court of Appeal* opinion at footnote 12, some of the information contained in personnel files had, in fact, been released to the prosecution in a prior case (albeit the actual records themselves had been returned to the police department).

Nonetheless, the assumption that the records were unknown to the prosecution eliminated the need for the California Supreme Court in ***Johnson*** to directly decide whether the prosecution would have a due process obligation to disclose favorable material information in peace officer files ***known*** to the actual

prosecutor handling the case (or to a different prosecutor in the same office) – notwithstanding the confidentiality provided to such files by Penal Code section 832.7.

The question of whether a prosecutor will be deemed to be in possession of information in a peace officer's ***Pitchess***-protected personnel file when the information is otherwise ***unknown*** to the prosecutor or the prosecutor's office is a ***different*** question than whether a prosecutor will be deemed to be in possession of that information where the prosecutor or the prosecutor's office is ***aware*** of the information in the file. No California court has ever confronted the issue of whether the prosecutor will be deemed to be in possession of ***Brady*** impeachment material in a ***Pitchess***-protected personnel file when the prosecutor, or someone in the prosecutor's office, knows about the existence of such material. (**Cf.**, ***People* v. *Shakur*** (1996) 648 N.Y.S.2d 200, 206 ["prosecutor is not constructively aware of police files unrelated to the case on trial *unless* there exists some reason to believe a file contains relevant information"], emphasis added.)

In ***City of Los Angeles* v. *Superior Court (Brandon)*** (2002) 29 Cal.4th 1, the California Supreme Court was confronted with the question of whether routine record destruction of complaints in officers' ***Pitchess*** files, pursuant to the five-year time limit set forth in Evidence Code section 1045(b)(1), was a violation of due process. The court held "section 1045(b)(1)'s five-year limitation on court ordered discovery of such complaints does not, on its face, violate due process." (**Id**. at p. 12.) However, the ***Brandon*** court went on to say: "In holding that routine record destruction after five years does not deny defendants due process, ***we do not suggest that a prosecutor who discovers facts underlying an old complaint of officer misconduct, records of which have been destroyed, has no Brady disclosure obligation***. At oral argument, the Attorney General, appearing as amicus curiae on behalf of the City, agreed that, regardless of whether records have been destroyed, the prosecutor still has a duty to seek and assess such information and to disclose it if it is constitutionally material." (**Id**. at p. 12, emphasis added; ***Abatti* v. *Superior Court*** (2003) 112 Cal.App.4th 39, 54; ***see also People* v. *Jordan*** (2003) 108 Cal.App.4th 349, 360 [characterizing ***Brandon*** as acknowledging the prosecutor's "duty to seek and assess (information relating to citizen complaints more than five years old) and to disclose it if it is constitutionally material"].)

In ***Alford* v. *Superior Court*** (2003) 29 Cal.4th 1033, the California Supreme Court treated police officer personnel files as "third party records" outside the possession of the prosecution team because the ***Pitchess*** statutes limited the availability of peace officer personnel files to prosecutors. (**Id**. at p. 1045.) The court noted that "the prosecution itself remains free to seek ***Pitchess*** discovery disclosure by complying with the procedure set forth in Evidence Code sections 1043 and 1045" but that "[a]bsent such compliance, . . . peace officer personnel records retain their confidentiality vis à vis the prosecution." (***Alford***, at p. 1046.) However, the ***Alford*** court did *not* address an argument raised by the defense that receipt of defense-initiated ***Pitchess*** discovery, notwithstanding the protective order of section 1045(e), would create an obligation under ***Brady*** "to provide the defense, in future cases where

the officer in question is a material witness, with whatever disclosed ***Pitchess*** information bears on the officer's credibility or is significantly exculpatory." (***Alford***, at p. 1046, fn. 6.) Moreover, the ***Alford*** plurality opinion strongly suggested that there *would be* an obligation to reveal the information: "To the extent a prosecution initiated ***Pitchess*** motion yields disclosure of such information, the prosecutor's obligations, as in any case, are governed by constitutional requirements in the first instance[.]" (***Alford***, at p. 1046, fn. 6; **accord *Smith* v. *Superior Court*** (2007) 152 Cal.App.4th 205, 212, fn. 7; **see also *People* v. *Jordan*** (2003) 108 Cal.App.4th 349, 362 [stating sustained citizen complaints of officer misconduct involving moral turpitude *should* be disclosed under ***Brady***].)

In ***Abatti* v. *Superior Court*** (2003) 112 Cal.App.4th 39, the court was dealing with whether a trial court should have granted a defense request to review an officer's personnel files pursuant to a hybrid ***Brady*/*Pitchess*** motion for, among other things, a 12-year old counseling memo. The ***Abatti*** court noted that "the prosecutor, as well as the defendant, must comply with the statutory ***Pitchess*** requirements for disclosure of information contained in confidential peace officer records" but stated that the case before it did "not involve the prosecutorial duty to disclose[.]" (**Id**. at pp. 56, 58.)

And in ***People* v. *Gutierrez*** (2003) 112 Cal.App.4th 1463, the court held that prosecutors do not have an obligation to actively search peace officer personnel files for ***Brady*** material because the prosecutor does not generally have a right to possess and does not have access to confidential peace officer files (i.e., there is no reasonable access to the files) and/or because the files are not deemed to be within the possession of the "prosecution team," (i.e., peace officer personnel files are "third party" records notwithstanding the fact the agency holding the records is the agency involved in the criminal investigation). (**Id**. at p. 1475.) However, ***Gutierrez*** also did *not* address what the prosecutor's obligation would be if the prosecution was aware the file contained ***Brady*** material.

At the very least, it is wrong to assume California authority establishing or indicating that a prosecutor has no obligation to disclose ***Brady*** information contained within an officer's personnel file when the prosecutor (or prosecutor's office) is ***unaware*** the file contains ***Brady*** information ***also*** governs the prosecutor's obligation when a prosecutor (or prosecutor's office) is ***aware*** of the existence of ***Brady*** information in a peace officer's personnel file.

In fact, some of the language the court in ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696 used in discussing the prosecution's obligations suggests that the prosecutor ***would*** be held to be in possession of information in the files known to the prosecution. (**See *Johnson*** at p. 15 ["When the police department ***informed*** the district attorney that the officers' personnel records might contain ***Brady*** material, the prosecution had a ***duty*** under ***Brady*** . . . to provide this information to the defense. No one disputes that."] and at p. 722 "["The prosecution need not do anything in these circumstances beyond providing to the defense ***any*** information it has regarding what the records might contain—in this case informing the defense of what the police department had informed it."], emphasis

added.) Since no duty to search for or provide information arises unless the information is actually or constructively possessed by the prosecution (**see *People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1133; ***In re Steele*** (2004) 32 Cal.4th 682, 697; **see also *United States v. Combs*** (10th Cir.2001) 267 F.3d 1167, 1173 [observing that ***Brady*** does not oblige the government to obtain evidence from third parties]), it stands to reason that the ***Johnson*** court assumed it is the providing of ***information*** that creates possession. It follows that once the prosecution has received information from a personnel file, the prosecution will be deemed to be in possession of the *information* in the future –regardless of whether the actual records are retained. (**See *People* v. *Anderson*** (2001) 25 Cal 4th 543, 577, fn. 11.)

This just makes sense. While the actual records themselves may not be in the possession of the prosecutor's office or may be subject to a protective order, the *exculpatory content* of those records remains in the actual possession of the prosecutor's office. From a standpoint of prosecutorial federal due process (***Brady***) disclosure obligations, there can be no distinction between *physical possession* of written materials containing favorable, material evidence and *knowledge* of the favorable material evidence. Knowledge of intangible information *is* possession of intangible information. For example, if a witness provides information exculpating a defendant in an oral statement to the prosecutor, the prosecutor's duty to disclose that statement to the defense is the same whether or not the statement is written down in a report. (**See *United States* v. *Rodriguez*** (2nd Cir. 2007) 496 F.3d 221, 222 ["When the Government is in possession of material information that impeaches its witness or exculpates the defendant, it does not avoid the obligation under ***Brady/ Giglio*** to disclose the information by not writing it down"]; **but see *People* v. *Thompson*** (2016) 1 Cal.5th 1043 [discussed in this outline, section VII-6-B at pp. 240-242, and assuming defense counsel's *description* of evidence did not transfer constructive possession of the evidence to the prosecution].)

The California Supreme Court in ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696 said nothing to suggest that the prosecution would be relieved of its obligation to disclose information *known* to the prosecution (whether that includes the prosecutor(s) handling the case or more broadly any prosecutor in the office) regardless of whether that information was subject to the ***Pitchess*** protections. However, since the information is privileged or subject to a protective order, the prosecution would still have to go in camera to obtain court permission to release it to the defense. (**See *Johnson*** at p. 716 [citing to ***United States* v. *Dupuy*** (9th Cir.1985) 760 F.2d 1492, 1501-1503 for the proposition that a prosecutor satisfies her duty to disclose confidential information by asking court to review information in camera] and at p. 717 [citing to ***Pennsylvania* v. *Ritchie*** (1987) 480 U.S. 39, 59-61 for the proposition that "when confidential records might contain exculpatory material, the trial court's in camera review of those records, followed by disclosure to the defense of any ***Brady*** material that review uncovers, is sufficient to protect the defendant's due process rights"].)

Some additional guidance *may* be provided by the California Supreme Court on this question when it decides the case of ***Association for Los Angeles Deputy Sheriffs* v. *Superior Court*** (S243855).

In that case the sheriff's department wanted to provide to the prosecutor's office a list of deputies who had sustained findings of misconduct bearing on credibility, i.e., a collective "***Brady***" tip. The deputy sheriff's union, however, claimed this violated the ***Pitchess*** statutes and a majority of the appellate court agreed. The majority held that while the sheriff's department could internally maintain a ***Brady*** list, it could not disclose the ***Brady*** list to the district attorney or other prosecutorial agency without complying with Pitchess procedures. (***Association for Los Angeles Deputy Sheriffs* v. *Superior Court*** (2017) 13 Cal.App.5th 413.)

The California Supreme Court took the ***ALADs*** case up to decide: "When a law enforcement agency creates an internal ***Brady*** list (see Gov. Code, § 3305.5), and a peace officer on that list is a potential witness in a pending criminal prosecution, may the agency disclose to the prosecution (a) the name and identifying number of the officer and (b) that the officer may have relevant exonerating or impeaching material in his or her confidential personnel file, or can such disclosure be made only by court order on a properly filed *Pitchess* motion?" (223 Cal.Rptr.3d 490.) On January 2, 2019, The California Supreme Court has subsequently requested briefing to address the following: "What bearing, if any, does SB 1421, signed into law on September 30, 2018, have on this court's examination of the question presented for review in the above-titled case?"

> **Editor's note**: For information regarding ***Brady/Pitchess*** motions filed by the prosecution, **see** this outline, section XIX at pp. 350-352.)

The amendments to Penal Code section 832.7 giving the public access to records relating to use of force and sustained findings relating to honesty or sexual assault may moot the issue as to whether prosecutors have a ***Brady*** obligation to provide these specified records – even if the prosecutor knows about them, since it is likely defense counsel will be deemed to have equal access to these records. (**See** this outline, section I-11 at pp. 138-147. Albeit, the same may not hold true when it comes to the statutory discovery obligations. (**See** this outline, section III-29 at p. 208.)

iv. Statements of Witnesses to the Pending Charges Contained in Peace Officer Personnel Files

Sometimes a parallel investigation of the officer's conduct is opened based on the same incident as a charged crime. In such circumstances, the statements of witnesses to the crime with which the defendant *is charged* are not barred from discovery by Penal Code section 1054, and are not immune from discovery (via a defense or prosecution ***Pitchess*** motion) simply because the statements were obtained as the result of an internal affairs investigation and placed in an officer's personnel file. (***Rezek* v. *Superior Court of Orange County*** (2012) 206 Cal.App.4th 633, 642-644.)

D. Court and Probation Records

Records possessed by a separate branch of the government are not possessed by the prosecutor. The judiciary is a separate branch of government and thus should be treated as a third party to the criminal action. Judicial records are possessed by the judicial branch of the government, and so the prosecutor should be under no obligation to provide discovery of such records. (**See *Shorts* v. *Superior Court*** (2018) 24 Cal.App.5th 709, 728; ***County of Placer* v. *Superior Court (Stoner)*** (2005) 130 Cal.App.4th 807, 814; ***United States* v. *Zavala*** (9th Cir. 1988) 839 F.2d 523, 528.)

Unless the probation officer conducted the investigation into the crime with which the defendant is charged, records of the probation department are records of the court. Records relating to the supervision of a defendant on probation are not deemed to be in the possession of the prosecution team. (**See *Shorts* v. *Superior Court*** (2018) 24 Cal.App.5th 709, 729; ***County of Placer* v. *Superior Court (Stoner)*** (2005) 130 Cal.App.4th 807, 814; **see also *United States* v. *Zavala*** (9th Cir. 1988) 839 F.2d 523, 528 [disclosure of witness statements in probation reports "is not compelled by ***Brady*** . . . if the reports are in the hands of court or probation office"]; ***McGuire* v. *Superior Court*** (1993) 12 Cal App 4th 1685, 1687["the probation file is a court record"]; Pen. Code, § 1203.10 ["[t]he record of the probation officer is a part of the records of the court"]; **but see *Amado* v. *Gonzalez*** (9th Cir. 2013) 734 F.3d 936, 949, 951 [suggesting prosecution not only had a duty to disclose conviction from the rap sheet of a prosecution witness but a duty to disclose the gang affiliation of the witness which was revealed *in the probation report* associated with the witness' conviction because, inter alia, the witness was convicted by the same prosecutor's office]; ***In re Pratt*** (1999) 69 Cal.App.4th 1294, 1318 [presuming prosecution had a copy of a probation report relating to a witness testifying for the prosecution "because it was the prosecuting agency in case" against the witness].)

Probation reports are generally confidential sixty days after judgment is pronounced, or probation granted. The inspection of such reports is controlled by Penal Code section 1203.05. (**But see** Cal. Const., art. I, § 28 (b)(11) [opening up probation reports to victims in some instances].)

i. Civil Suits

Is evidence of civil suits alleging officer misconduct that is contained in court records within the possession of the prosecution team – such that there is an affirmative duty to check to see if any such suits have been filed against an officer-witness?

One argument to be made is that evidence of a civil suit filed against an officer and what happened in the civil suit is within the "knowledge" of the officer and thus is within the constructive possession of the prosecution team. (**See** this outline, section I-8-C-ii at pp. 105-108 [discussing whether information in officer personnel files are within the officer's own knowledge for purposes of imputing information to the prosecution team].) However, the few courts that have addressed this issue generally do not find

there is a duty on the part of the prosecution to search for such civil suits.

For example, in ***People* v. *Garrett*** (2014) 23 N.Y.3d 878, the court drew "a distinction between the nondisclosure of police misconduct 'which has some bearing on the case against the defendant,' and the nondisclosure of such material which has 'no relationship to the case against the defendant, except insofar as it would be used for impeachment purposes'." (**Id**. at p. 889 citing to, inter alia, ***People* v. *Vasquez*** (N.Y. App. Div. 1995) 214 A.D.2d 93, 100.) "In the latter circumstance, the offending officer is not acting as 'an arm of the prosecution' when he or she commits the misconduct, and the agency principles underlying the imputed knowledge rule are not implicated." (**Ibid**; **see also *John* v. *People*** (V.I.) 2015 WL 5622212, at p.*6 [noting that a "number of courts have held that information pertaining to a civil trial falls outside the scope of the prosecution's ***Brady*** obligation" and finding that the "People did not participate in the civil case, nor were they a party to the civil case so knowledge of the civil case cannot be imputed to the People"].)

As pointed out in ***People* v. *Garrett*** (2014) 23 N.Y.3d 878:

> "[I]t is one thing to require prosecutors to inquire about whether police have turned up exculpatory or impeachment evidence during their investigation. It is quite another to require them, on pain of a possible retrial, to conduct disciplinary inquiries into the general conduct of every officer working the case" (***Robinson***, 627 F.3d at 952). While prosecutors should not be discouraged from asking their police witnesses about potential misconduct, if they feel such a conversation would be prudent, they are not required to make this inquiry to fulfill their ***Brady*** obligations. Similarly, the People have no affirmative duty to search the dockets of every case in every federal and state court in New York for complaints against their police witnesses. A contrary rule, taken to its logical extreme, would require prosecutors to search for cases in every jurisdiction where investigating officers had a previous or existing connection "just in case some impeaching evidence may show up" ***United States* v. *Lee Vang Lor***, 706 F.3d 1252, 1259–1260 [10th Cir.2013]; **see *Risha***, 445 F.3d at 304 ["(P)rosecutors are not required to undertake a 'fishing expedition' in other jurisdictions to discover impeachment evidence"]). This would impose an unacceptable burden upon prosecutors that is likely not outweighed by the potential benefit defendants would enjoy from the information ultimately disclosed on account of the People's efforts." (***Garrett*** at pp. 890-891.)

However, if the prosecution is specifically *aware* of the civil suit, then it will likely be deemed to be in the possession of the prosecution. (**See *People* v. *Hubbard*** (NY 2014) 45 Misc.3d 328, 334 [prosecution was in possession of fact a civil action had been filed against officer and an IA investigation was ongoing alleging officer misconduct during a prior interrogation where prosecutor had "actual knowledge" of prior suit].)

Editor's note: For a discussion of whether "civil suits" should be viewed as "favorable" evidence, see this outline, section I-3-K at p. 18.) For cases on whether public court records documenting civil suits can be viewed as accessible to the defense, **see** this outline, section I-11-A at pp. 140-141.

E. Juvenile Files

i. Juvenile Court Has Control of Records

Welfare and Institutions Code section 827 governs the release of juvenile information. "Generally, a juvenile court has broad and ***exclusive*** authority to determine whether and to what extent to grant access to confidential juvenile records pursuant to section 827." (***In re Elijah S***. (2005) 125 Cal.App.4th 1532, 1541, citing ***T.N.G.* v. *Superior Court*** (1971) 4 Cal.3d 767, 778; **accord *J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1337; ***People* v. *Superior Court*** (2003) 107 Cal.App.4th 488, 491; ***In re Keisha T.*** (1995) 38 Cal.App.4th 220, 225-226.) (Emphasis added.)

ii. What Are Juvenile Records?

Section 827(e) states: "For purposes of this section, a 'juvenile case file' means a petition filed in any juvenile court proceeding, reports of the probation officer, and all other documents filed in that case or made available to the probation officer in making his or her report, or to the judge, referee, or other hearing officer, and thereafter retained by the probation officer, judge, referee, or other hearing officer." However, California Rule of Court 5.552 (formerly 1423), the rule enacted to effect section 827, defines "juvenile case file" more broadly to include: "(1) All documents filed in a juvenile court case;(2) Reports to the court by probation officers, social workers of child welfare services programs, and court-appointed special advocates; (3) Documents made available to probation officers, social workers of child welfare services programs, and court-appointed special advocates in preparation of reports to the court; (4) Documents relating to a child concerning whom a petition has been filed in juvenile court, which are maintained in the office files of probation officers, social workers of child welfare services programs, and court-appointed special advocates; (5) Transcripts, records, or reports relating to matters prepared or released by the court, probation department, or child welfare services program; and (6) Documents, video or audio tapes, photographs, and exhibits admitted into evidence at juvenile court hearings."

iii. Police Records of Juveniles

The exclusive authority of the juvenile court extends not only to records of the court itself, but to police agency records regarding juveniles possessed by law enforcement agencies:
"Welfare and Institutions Code section 827 reposes in the juvenile court control of juvenile records and requires the permission of the court before any information about juveniles is disclosed to third parties by any law enforcement official. The police department of initial contact may clearly retain the information that it obtains from the youths' ***detention***, but it must receive the permission of the juvenile court pursuant to section 827 in order to release that information to any third party, including

state agencies. Police records in this regard become equivalents to court records and remain within the control of the juvenile court." (***T.N.G.* v. *Superior Court*** (1971) 4 Cal.3d 767, 780-781, emphasis added.) Those police reports remain within the control of the juvenile court even if no wardship petition was ever filed with respect to those records since "the juvenile court ha[s] jurisdiction either to release or to deny disclosure of such records, even where no dependency or wardship petition had ever been filed with respect to the subject minors." (***In re Elijah S***. (2005) 125 Cal.App.4th 1532, 1549, citing to ***T.N.G.* v. *Superior Court*** (1971) 4 Cal.3d 767, 772, 778- 782; **accord *Wescott* v.*County of Yuba*** (1980) 104 Cal.App.3d 103, 105-109 ["the strictures of section 827 require a [juvenile] court order before any [police] reports relating to … juveniles can be released to third parties," even if no juvenile petition was ever filed].) Moreover, the scope of section 827's confidentiality requirement includes "police reports pertaining to minors who were not involved in juvenile court proceedings but had merely been temporarily 'detained.'" (***Wescott* v. *County of Yuba*** (1980) 104 Cal.App.3d 103, 106 citing to ***T.N.G.* v. *Superior Court*** (1971) 4 Cal.3d 767.)

a. <u>Does the Juvenile Court Control Records of a Police Department Involving Mere Contact with a Juvenile if the Juvenile Was Not Detained or Taken into Custody?</u>

It is an open issue. In the unreported case of ***People* v. *Williams*** [unreported] 2016 WL 5373073 the prosecution introduced evidence of police contacts with the defendant when he was a juvenile. These contacts consisted of "street checks" during which defendant admitted his gang affiliation. One of these street checks was documented in a field identification card. An officer also discussed an offense report which documented a police contact during which the defendant was found in possession of rock cocaine. (**Id**. at p. *3.) "The prosecutor obtained these juvenile records directly from the police department for use in the instant trial without petitioning the juvenile court pursuant to Welfare and Institutions Code section 827 to release the records for such use." (**Id**. at p. *4.) The defendant argued "the prosecutor was required to obtain a juvenile court order permitting the dissemination of these records to the People's gang expert and at trial." (**Ibid**.) The ***Williams*** court declined to address the question, finding that even if the People were required to petition the juvenile court, there was no prejudice to the defendant. (**Ibid**.)

In a footnote, the ***Williams*** court did, however, state: "Welfare and Institutions Code section 827 has been interpreted to apply not only to records of juvenile court proceedings but also to records of a juvenile's police *contacts* maintained by law enforcement agencies." (**Id**. at p. *4, fn. 7, emphasis.) While none of the cases cited in the footnote for this proposition actually involved police records of mere contacts with a juvenile, one of the cases mentioned, ***People* v. *Espinoza*** (2002) 95 Cal.App.4th 1287 (which held the defense was entitled to have a foster parent testify to her own observations of the defendant without having to comply with section 827) seemed to accept that police contacts would be covered by section 827: "The mere fact that police records of juvenile detentions and *juvenile contacts* are considered juvenile court records for purposes of section 827 does not establish or even suggest that

the percipient observations of a foster mother are part of a 'juvenile case file or 'information related to' such a file within the meaning of section 827." (**Id**. at pp. 1315-1316.)

On the other hand, if section 827 is comprehensive enough to cover mere conversations an officer has with a juvenile (who is never detained or arrested), then any time police contact a juvenile for *any* reason (i.e., for purposes of getting their statement as a victim or a witness), the report arguably could not be disseminated without a juvenile court order. And the language of Welfare and Institutions Code section 827.9 also supports the idea that section 827 does not cover mere contact with a minor absent a detention. Section 827.9 went into effect in 2017 and is intended "to clarify the persons and entities entitled to receive a complete copy of a juvenile police record, to specify the persons or entities entitled to receive copies of juvenile police records with certain identifying information about other minors removed from the record, and to provide procedures for others to request a copy of a juvenile police record." (Pen. Code, § 827.9(a).) Section 827.9 is kind of a "test" program - in that it only applies in Los Angeles County – but it appears to distinguish mere communications with juveniles from detentions of juveniles.

Subdivision (a) of section 827.9 provides:" It is the intent of the Legislature to reaffirm its belief that records or information gathered by law enforcement agencies ***relating to the taking of a minor into custody, temporary custody, or detention (juvenile police records)*** should be confidential." (Emphasis added.) And subdivision (m) of section 827.9 provides: "For purposes of this section, a "juvenile police record" refers to records or information relating to ***the taking of a minor into custody, temporary custody, or detention***." (Emphasis added.) Moreover, section 827.9(a) expressly states: "This section does not govern the release of police records involving a minor who is the witness to or victim of a crime who is protected by other laws including, but not limited to, Section 841.5 of the Penal Code, Section 11167 et seq. of the Penal Code, and Section 6254 of the Government Code." (Welf. & Inst. Code, § 827.9(a).) No mention is made, or indication given, in section 827.9 that the records protected by section 827 extend to mere contacts with juveniles when those contacts do not result in custody, temporary custody, or detention of the juvenile.

Moreover, a prosecutor should be able to contact the witnesses to the crime (including police officers) described in the juvenile records and have them testify in court so long as the prosecutor does not disseminate to the witness any information contained in the juvenile records. (**Cf**., ***People* v. *Espinoza*** (2002) 95 Cal.App.4th 1287, 1315–1316.) But this, too, is not for certain.

iv. <u>Prosecutorial Access to Juvenile Records</u>

Welfare and Institutions Code section 827(a)(1) specifically states a juvenile case file may be **<u>inspected</u>** by "(B) The district attorney, a city attorney, or city prosecutor authorized to prosecute criminal or juvenile cases under state law." No court order is necessary. (**See *J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1337 and fn. 8.)

In 2002, the Attorney General's Office issued an opinion stating that in order to make copies of the records maintained in a juvenile case file, the prosecutor must first obtain a court order authorizing the copying of the documents. (Op.Atty.Gen. No. 02-103 (September 10, 2002); **see also *In re Gina S.*** (2005) 133 Cal.App.4th 1074, 1082.) However, at the time the AG opinion issued, the rule of court in existence (Rule 1423) only permitted the inspection, not the receipt or copying, of the records. The superseding rule of court (Rule 552(b)) was later amended (as of January 1, 2009) to expressly allow for the receipt and copying as well as inspection. (**See *Rosado* v. *Superior Court*** [unreported] 2010 WL 1679737 [interpreting § 827(a)(1) to permit copying and receipt of juvenile records by attorney for minor].)

The **current** version of Rule 5.552(b) (which underwent changes in 2018 and 2019), in pertinent part, states: "Juvenile case files may ***be obtained*** or inspected only in accordance with sections 827, 827.12, and 828." (Emphasis added.) It stands to reason that such records cannot be "obtained" without the records being copied; but there does not appear to be any cases answering the question of whether prosecutors can ***copy*** the records in light of this latest language.

There remains some question as to whether juvenile records in one jurisdiction may be inspected and obtained by district attorneys from a *different* jurisdiction without filing a section 827 request. Although on its face, section 827 does not limit disclosure to the prosecutor in the county where the juvenile exists. It simply states the files may be inspected and obtained by "(B) The district attorney, a city attorney, or city prosecutor authorized to prosecute criminal or juvenile cases under state law." (Welf. & Inst. Code, § 827(a)(1)(B).)

Editor's note: The local rules regarding prosecutorial access and disclosure may vary. (**See e.g.,** Santa Clara Local Juvenile Rule of Court, 1(K).)

The prosecution may also be entitled to access records under one of several other statutes permitting disclosure of some aspects of a juvenile's record if certain circumstances exist. (**See** Welf. & Inst. Code, § 828 [allowing for disclosure to "law enforcement agencies . . . or to any person or agency which has a legitimate need for the information for purposes of official disposition of a case" of records if not sealed pursuant to specified statutes]; Welf. & Inst. Code, § 827.5 [allowing disclosure of name of minor 14 years of age or older taken into custody for the commission of any serious felony "upon the request of interested persons, following the minor's arrest for that offense" if records not sealed pursuant to specified statutes]; Welf. & Inst. Code, § 827.6 [allowing disclosure by law enforcement agency of "the name, description, and the alleged offense of any minor alleged to have committed a violent offense . . . and against whom an arrest warrant is outstanding, if the release of this information would assist in the apprehension of the minor or the protection of public safety"]; Welf. & Inst. Code, § 827.7 [allowing sheriff to disseminate information that a minor has been found by a court to have committed a felony "to other law enforcement personnel upon request, provided that he or she reasonably believes that the

release of this information is generally relevant to the prevention or control of juvenile crime"]; Welf. & Inst. Code, § 676(c)&(d) [allowing the name of the minor (unless good cause is shown for nondisclosure), the petition, minutes of the proceeding, order of adjudication and disposition in a court file are open to the public where the petition is sustained for any offense listed in Welfare and Institutions Code section 676 (covering most serious and violent felonies)]; Welf. & Inst. Code, § 204.5 [allowing disclosure of the name of a minor 14 years or older found to be a ward if the petition was sustained for any violent or serious felony].)

Editor's note: For a discussion of prosecutorial access to juvenile records for discovery purposes that are not only subject to section 827 but have also been *sealed*, **see** this outline, section I-8-E-x at pp. 126-128.

v. Prosecutorial *Use* of Juvenile Records in Court

Welfare and Institutions Code section 827(a)(4) states: "A juvenile case file, any portion thereof, and information relating to the content of the juvenile case file, ***may not be disseminated*** by the receiving agencies to any persons or agencies, other than those persons or agencies authorized to receive documents pursuant to this section. Further, a juvenile case file, any portion thereof, and ***information relating to the content of the juvenile case file, may not be made as an attachment to any other documents without the prior approval of the presiding judge of the juvenile court***, unless it is used in connection with and in the course of a criminal investigation or a proceeding brought to declare a person a dependent child or ward of the juvenile court."

In light of this language, prosecutors should assume that to make use of juvenile records in court, they will need to file a section 827 petition. (**See *People* v. *Thurston*** (2016) 244 Cal.App.4th 644, 670 and fn. 8.) The court in ***Thurston*** provided guidance on how to do this:

"Rule 5.552 of the California Rules of Court sets forth the procedure to be followed when a court order is required. The petitioner must serve upon enumerated parties a request for disclosure (Judicial Court form JV-570), a notice of request for disclosure (form JV-571) and a blank copy of the form for objection to release (form JV–572), and if the petitioner shows "good cause," the court "may set a hearing." (Rule 5.552(d)(1), (e)(1), (e)(2).) If the court determines there may be information to which the petitioner is entitled, "the juvenile court judicial officer must conduct an in camera review of the juvenile case file and any objections and assume that all legal claims of privilege are asserted." (Rule 5.552(e)(3).) The court "must balance the interests of the child and other parties to the juvenile court proceedings, the interests of the petitioner, and the interests of the public" (rule 5.552(e)(4)) and, if it grants the petition, "the court must find that the need for discovery outweighs the policy considerations favoring confidentiality of juvenile case files." (Rule 5.552(e)(5).) To obtain disclosure, the petitioner must show by a preponderance of the evidence "that the records requested are necessary and have substantial relevance to the legitimate need of the petitioner." (Rule 5.552(e)(6).) Rule 5.552 specifies that "[t]he

confidentiality of juvenile case files is intended to protect the privacy rights of the child." (Rule 5.552(e)(5).)" (***Thurston*** at p. 672.)

In making the request, prosecutors should point out that the "cloak of confidentiality is . . . not absolute." (***City of Eureka* v. *Superior Court of Humboldt County*** (2016) 1 Cal.App.5th 755, 761; ***Lorenza P.* v. *Superior Court*** (1988) 197 Cal.App.3d 607, 610; **accord *R.S.* v. *Superior Court*** (2009) 172 Cal.App.4th 1049, 1054; ***In re R.G.*** (2000) 79 Cal.App.4th 1408, 1414.) And the need for confidentiality may give way when outweighed by other interests, such as the need for the jury to accurately assess the credibility of a defendant. (**See e.g.**, ***J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1338; ***People* v. *Lee*** (1994) 28 Cal.App.4th 1724, 1740.)

vi. Defense Access to Juvenile Records of Defendant

Under Welfare and Institutions Code section 827(a)(1)(C), the minor who was the subject of the proceeding generating the records can inspect his or her own records. Under section 827(a)(1)(E), an attorney for a minor who is a defendant in a criminal proceeding may inspect the minor's case files. No court order is necessary. (**See also** Rule of Court, Rule 5.552(b)(1)(F).)

vii. Defense Access to Juvenile Records of Co-Defendant (Redaction Issues)

If there is a police report documenting a crime involving an adult, does the report provided to the defense attorney for the adult have to be redacted to remove the identity of the juvenile? Similarly, if the police report documents a crime involving two juveniles, does the prosecution have to redact the report provided to the defense attorney for one juvenile to eliminate identification of the other juvenile for the other? The answer to both questions is very likely: yes.

In the published case of ***Westcott* v. *County of Yuba*** (1980) 104 Cal.App.3d 103, a mother of one juvenile sought the entire record of juvenile proceedings for use in a civil proceeding which she instituted against one or more of the other juveniles. The appellate court held that "that when minors are subjects of a police investigation and thereby become subjects of a police report, that report may not be released to one of the juveniles or an authorized representative without the consent of the others unless a court order is first obtained." (**Id**. at p. 105.)

In the unpublished case of ***People* v. *Superior Court (Chambers)*** (unreported) 2010 WL 1766248, an adult defendant was charged with multiple counts of vandalism and other offenses. Police reports relating to the incidents mentioned participation of three minors in the alleged events. The People provided the adult defendant with the police reports but redacted the names of the three juveniles. The reports showed that the minors spoke to police investigators about the alleged incidents. The defense knew the identities of the three minors, but because the names of the minors have been redacted from the reports, the defense could not discern from the redacted reports which minor made each such statement. The defense requested unredacted reports. The People refused to provide them on the

authority of Welfare and Institutions Code section 827, which the People contended required them to refrain from disclosing the names of the minors without a juvenile court order permitting such disclosure. The appellate court held the People were correct in refusing to provide unredacted reports and the adult defendant's remedy was to obtain juvenile court authorization for inspection of the unredacted police reports. (**Id**. at p. *3.)

Editor's note: A reasonable interpretation of our redaction responsibilities would probably require the redaction of information that would easily identify the juvenile: name, address, phone number, social security number, and license or identification card number. Redaction becomes much trickier when there is body warrant camera footage. If that footage would effectively identify a juvenile, it also may need to be redacted. No case has dealt with whether or how such footage could be redacted. Not every police department or district attorney's office necessarily has the means or resources to do so. And even those that do, it may be very time-consuming if there are many officers on the scene and the juveniles simultaneously appear with the adult defendant or the other juveniles in the same video footage. This may need a legislative fix to come up with a permanent workable solution. In the meantime, to save time and resources, prosecutors may want to hold onto the body warrant camera until attorneys are appointed for both juveniles or the adult and the other juvenile; and then ask each attorney if their client would agree to the entire BWC footage being released. If there is such consent, prosecutors should be able to avoid having to redact the footage (and release unredacted video footage) based on the language in ***Westcott* v. *County of Yuba*** (1980) 104 Cal.App.3d 103, stating a "report may not be released to one of the juveniles or an authorized representative *without the consent of the others* unless a court order is first obtained." (**Id**. at p. 105, emphasis added.) This may not be the perfect solution since (i) the attorney may not seek or obtain consent; (ii) the language in ***Wescott*** regarding "consent" was dicta and the court was interpreting an earlier version of the statute (albeit neither the earlier version or the current version makes specific reference to consent of the juvenile as a basis for release); and (iii) many cases have characterized control over juvenile records as "exclusive" (**see *People* v. *Thurston*** (2016) 244 Cal.App.4th 644, 672). But it may be the best temporary solution until we have more definitive case law. If consent is not forthcoming, then I think we have to redact the BWC to prevent disclosure unless the attorney for the adult co-D files a petition under section 827 (or we get an order from the court allowing us not to redact).

viii. Defense Access to Juvenile Records of Witnesses

There is no specific exception under section 827 allowing for inspection of the juvenile records of ***witnesses*** in a criminal case by the defendant or his attorney. Thus, in order to obtain those records, the defense must file a petition for disclosure under subdivision (a)(1)(P) of section 827, the general exception allowing for disclosure to "any other person who may be designated by court order of the judge of the juvenile court[.]" (Welf. & Inst. Code, § 827(a)(1)(P); Rule of Court 5.552(b)(3); ***J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1337.)

The petition is the sole means by which the defense may obtain juvenile records other than those of the defendant whom they are representing. These records cannot be obtained by a subpoena. (***Lorenza P.* v. *Superior Court*** (1988) 197 Cal.App.3d 607, 611; Rule of Court 5.552(b)[juvenile court records "may not be obtained or inspected by civil or criminal subpoena"].)

"To support a section 827 petition, the petitioner is required to make a good cause showing warranting the in camera review." (***J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1337, citing to Rule of

Court, Rule 5.552(c) [now Rule 5.552(b)] which provides; "(1) The specific records sought must be identified based on knowledge, information, and belief that such records exist and are relevant to the purpose for which they are being sought. [¶] (2) Petitioner must describe in detail the reasons the records are being sought and their relevancy to the proceeding or purpose for which petitioner wishes to inspect or obtain the records."].)

In ruling on the petition, "[t]he court follows the procedures set out in Evidence Code section 915, subdivision (b) and is guided in its decision by the balancing test of Evidence Code section 1040, subdivision (b)(2)." (***Lorenza P.* v. *Superior Court*** (1988) 197 Cal.App.3d 607, 611; **see also** Rule of Court 5.552(e)(4) [describing procedures for juvenile courts to follow when deciding whether to release juvenile records].)

"In determining whether to authorize inspection or release of juvenile case files, in whole or in part, the court must balance the interests of the child and other parties to the juvenile court proceedings, the interests of the petitioner, and the interests of the public." (Rule of Court 5.552(d)(4)) "If the court grants the petition, the court must find that the need for discovery outweighs the policy considerations favoring confidentiality of juvenile case files. The confidentiality of juvenile case files is intended to protect the privacy rights of the child. (Rule of Court 5.552(d)(5).) "The court may permit disclosure of juvenile case files only insofar as is necessary, and only if petitioner shows by a preponderance of the evidence that the records requested are necessary and have substantial relevance to the legitimate need of the petitioner." (Rule of Court 5.552(d)(6).) "If, after in-camera review and review of any objections, the court determines that all or a portion of the juvenile case file may be disclosed, the court must make appropriate orders, specifying the information to be disclosed and the procedure for providing access to it." (Rule of Court 5.552(d)(7).)

"[T]he court 'must take into account any restrictions on disclosure found in other statutes, the general principles in favor of confidentiality and the nature of any privileges asserted, and compare these factors to the justification offered by the applicant' in order to determine what information, if any, should be released to the petitioner." (***J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1337 citing to ***People* v. *Superior Court*** (2003) 107 Cal.App.4th 488, 492 and former Rule 5.552(e)(5).)

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.)

Editor's note: California Rule of Court 5.552 (formerly Rule 1423) is invalid, however, to the extent that it limits the discretion of the juvenile court to disclose juvenile court records, beyond that provided in statutes. (**See *In re Elijah S.*** (2005) 125 Cal.App.4th 1532, 1554.)

ix. Handling Defense Requests for Juvenile Records of Witnesses

The Penal Code sections enacted by Proposition 115 (i.e., Pen. Code, § 1054 et seq.) "apply only to discovery between the People and the defendant. They are simply inapplicable to discovery from third parties." (***People* v. *Superior Court (Broderick)*** 231 Cal.App.3d 584, 594; **accord *People* v. *Sanchez*** (1994) 24 Cal.App.4th 1012, 1026-1027.) Because all juvenile records, regardless of whether they are physically in the possession of law enforcement agencies such as the district attorney's office, are deemed to be within the exclusive control of a third party (i.e., the juvenile court), **they are not subject to the discovery provisions** of Penal Code section 1054 et seq. (**See also** Pen. Code, § 1054(e) [providing that discovery covered by other express statutory provisions remains effective post-Prop 115].) Indeed, even before the enactment of Proposition 115, discovery requests for juvenile records of prosecution witnesses were directed to the juvenile court. (**See e.g.**, ***Foster* v. *Superior Court*** (1980) 107 Cal.App.3d 218, 226.)

The prosecution **should not and cannot** provide such records to the defense absent a court order to do so. (**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 [citing favorably to the San Diego County Juvenile Court's written policies for inspection of juvenile files, which states "that if the district attorney has inspected a juvenile file and finds discoverable material, the district attorney should first obtain a court order before turning the material over to the defense"].) 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 [reversing declaratory order requiring police department to turn over portions of police reports relating to juvenile co-defendants of requesting minor in absence of an order from the juvenile court releasing the records].)

Brady* Obligation**: Despite the fact that juvenile records of witnesses are deemed to be in the possession of a third party (i.e., the juvenile court), it is likely that the prosecution will not be relieved of its ***Brady obligation to provide exonerating information in its physical possession to the defense - even if that information is encompassed in juvenile records. (**See *J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1335 ["Disclosure may be required even when the evidence is subject to a state privacy privilege, as is the case with confidential juvenile records"].) To comply with our ***Brady*** obligation without running afoul of the statutes governing the release of juvenile records, it is respectfully recommended that the prosecution inform defense counsel of the potential existence of ***Brady*** material relating to the juvenile files of prosecution witnesses and suggest that defense counsel file a petition in juvenile court for release of that material.

Certainly, a prosecutor could comply with his or her discovery obligations by filing a section 827 petition requesting permission to disclose the information to the defense attorney. (**See** Welf & Ins. Code, §

827(a)(1)(Q) [allowing for inspection of a juvenile court file by "[a]ny other person who may be designated by court order of the judge of the juvenile court upon filing a petition"]; ***J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1337 [favorably citing to a San Diego County Juvenile Court's written policy for inspection of juvenile files, which states "that if the district attorney has inspected a juvenile file and finds discoverable material, the district attorney should first obtain a court order before turning the material over to the defense"].)

However, from a practical standpoint, a prosecutor should be able to meet any discovery obligation by simply informing the defense that the confidentiality provisions of section 827 preclude the prosecutor from providing any information about the juvenile records of a prosecution witness and recommend the defense file their own section 827 petition. (**See *People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 718 [endorsing the approach used for handling discovery of juvenile records as explained in ***J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329 and applying it in the analogous context of assessing prosecutorial discovery obligations regarding information contained in the personnel files of peace officer witnesses].)

The representation by the prosecutor should provide to the defense a "reasonable basis" for believing the file contains ***Brady*** information and should suffice to avoid a ***Brady*** violation. (**See *People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1134 [if the material evidence "is available to a defendant through the exercise of due diligence, then … the defendant has all that is necessary to ensure a fair trial…."]; ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 718.) Moreover, it is unlikely that disclosing the fact that a prosecution witness even has a juvenile record will be viewed as breaching the confidentiality of the prosecution witness – considering the implicit approval of such a disclosure in both ***J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1334-1335 and ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 717-718.

Editor's note: Local court rules may (arguably in violation of the discovery statute) impose additional obligations on the prosecution when filing its own petition for disclosure of juvenile witness files *or* when the defense files a motion based on being informed by the prosecution of potentially discoverable information in a juvenile witness's file. (**See e.g.,** Santa Clara County Juvenile Court Rules 1(K)(1)(b)(iii) & (iv)[requiring the prosecutor to, inter alia, identify relevant documents and lodge two sets of copies of the relevant documents (one redacted of the irrelevant material) with the court even when defense is filing motion].)

There is, however, a potential downside to this approach. If the defense counsel does not bother to file a section 827 motion (and significant impeachment evidence in a juvenile file of a prosecution witness is not revealed at trial), the case may be reversed for ineffective assistance of counsel. (**See *In re Edward S.*** (2009) 173 Cal.App.4th 387, 407 ["a defense attorney who fails to investigate potentially exculpatory evidence, including evidence that might be used to impeach key prosecution witnesses, renders deficient representation"].) Moreover, putting the task of filing a section 827 motion in the hands of the defense counsel creates an opportunity for defense counsel to delay the trial under the guise of not yet having had time to obtain the impeachment evidence.

That being said, prosecutors can always *initially* suggest defense counsel file a section 827 motion and hold off filing their own motion allowing release of the information to the defense until it is clear defense counsel has failed to obtain the impeachment evidence.

x. Sealed (or Destroyed) Records

Aside from the general confidentiality provisions of section 827, juvenile records may also be sealed or destroyed. Sections governing the sealing of records of juveniles include: Welfare and Institutions Code sections 781, 781.5, 786, and 793 and Penal Code sections 851.7 and 1203.45. Sections governing the destruction of juvenile records include: Welfare and Institutions Code sections 826, 826.5 and 826.6.

Major problems can arise if the prosecution is aware that there exists favorable and material evidence in a juvenile file that has been sealed and the sealing statutes do not permit access to the sealed records. This awareness may stem from the fact the prosecutor handled the case of the juvenile prosecution witness before the records were sealed or because sealed juvenile records have not yet been wiped from criminal history databases. But regardless of how the prosecutor knows about the information, if the information constitutes favorable material evidence, the prosecution has a due process obligation to disclose it – which conflicts with the sealing statute.

The problem was illustrated in the case of ***S.V.* v. *Superior Court*** (2017) 13 Cal.App.5th 1174. In ***S.V.***, the court held neither a criminal defendant nor a prosecutor is entitled to disclosure of juvenile delinquency records, sealed pursuant to Welfare and Institutions Code section 786, of a witness in a criminal proceeding. The ***S.V.*** court observed that none of the exceptions for disclosure of records sealed pursuant to Welfare and Institutions Code section 781 or 786 allowed the court to unseal and disclose sealed juvenile delinquency records to permit defense counsel or the prosecution to meet their discovery obligations in a pending criminal proceeding. (**Id**. at pp. 1182-1184.) The ***S.V.*** court suggested that to protect a criminal defendant's constitutional right to confront and cross-examine a witness whose records had been sealed, the prosecution could potentially be prohibited from even calling that witness. (**Id**. at p. 1185.) The ruling in ***S.V.*** thus deprives defense counsel of information they could use to impeach and puts prosecutors in the untenable and unfair position of being unable to comply with their constitutional due process obligations without violating the existing statutory scheme. The legislature has recently made amendments to two of the sealing statutes (sections 781 and 786) to allow prosecutors to access, inspect, or utilize these sealed records to meet a statutory or constitutional obligation to disclose favorable or exculpatory evidence to a defendant in a criminal case. These newly created exceptions are slightly different from each other and were not crafted by persons overly familiar with how prosecutorial discovery obligations work. Nevertheless, at least they exist. The remaining sealing statutes do not have any comparable exceptions. CDAA is hoping to enact new legislation that remedies that problem as well as make some amendments to the existing exceptions in section 781 and 786 that would help reduce the excessive delays in obtaining access to these files. (See AB 1537.)

The currently existing exceptions to sections 781 and 786 are described below:

Welfare and Institutions Code section 781

Section 781(a)(1)(D)(iii) provides that "[a] record relating to an offense listed in subdivision (b) of Section 707 that was committed after attaining 14 years of age that has been sealed pursuant to this section may be accessed, inspected, or utilized by the prosecuting attorney in order to meet a statutory or constitutional obligation to disclose favorable or exculpatory evidence to a defendant in a criminal case in which the prosecuting attorney has reason to believe that access to the record is necessary to meet the disclosure obligation. A request to access information in the sealed record for this purpose shall be submitted by the prosecuting attorney to the juvenile court, and the juvenile court shall approve the request if it determines that access to the record is necessary to enable the prosecuting attorney's compliance with the disclosure obligation. If the juvenile court approves the prosecuting attorney's request, the court shall state on the record appropriate limits on the access, inspection, and utilization of the sealed record information in order to protect the confidentiality of the person whose sealed record is accessed pursuant to this clause." (Welf. & Inst. Code, § 781(a)(1)(D)(iii).)

Welfare and Institutions Code section 786

Section 786(g)(1)(I) provides: "A record that has been sealed pursuant to this section may be accessed, inspected, or utilized by the prosecuting attorney in order to meet a statutory or constitutional obligation to disclose favorable or exculpatory evidence to a defendant in a criminal case in which the prosecuting attorney has reason to believe that access to the record is necessary to meet the disclosure obligation. A request to access information in the sealed record for this purpose, including the prosecutor's rationale for believing that access to the information in the record is necessary to meet the disclosure obligation, shall be submitted by the prosecuting attorney to the juvenile court. The juvenile court shall notify the person having the sealed record, including the person's attorney of record, that the court is considering the prosecutor's request to access the record, and the court shall provide that person with the opportunity to respond, in writing or by appearance, to the request prior to making its determination. The juvenile court shall review the case file and records that have been referenced by the prosecutor as necessary to meet the disclosure obligation and any response submitted by the person having the sealed record. The court shall approve the prosecutor's request to the extent that the court has, upon review of the relevant records, determined that access to a specific sealed record or portion of a sealed record is necessary to enable the prosecuting attorney to comply with the disclosure obligation. If the juvenile court approves the prosecuting attorney's request, the court shall state on the record appropriate limits on the access, inspection, and utilization of the sealed record information in order to protect the confidentiality of the person whose sealed record is accessed pursuant to this subparagraph." (Welf. & Inst. Code, § 786(g)(1)(I).)

Editor's note: A few thoughts on the exceptions to sections 781 and 786:

The exception built into section 781 is simpler to use and does not have the "notice to the witness and witness' attorney" requirements of section 786.

Because neither sealing statute permits a defense attorney to obtain the records, a prosecutor cannot meet his or her ***Brady*** obligation by tipping off the defense to the existence of potential information in the records (as we can do when the records are simply confidential pursuant to Welfare and Institutions Code section 827 – **see** this outline, section I-8-E-ix at pp. 124-125) so that the defense can file a motion to unseal. The onus is completely on the prosecutor – who may not be privy to some of the defense arguments for why the information would be significant.

This puts prosecutors in an awkward position because in many cases a prosecutor is filing the motion out of an abundance of caution and may believe that the information should not be disclosed because the interests in confidentiality outweigh the interests in disclosure. Yet the exception requires the prosecutor to have "reason to believe that access to the record ***is*** necessary to meet the disclosure obligation. . ." Moreover, prosecutors may be forced to articulate a reason for disclosure in order to ensure the defense gets the information while still hoping the evidence is excluded.

Both statutes allow access "in order to meet a *statutory* or constitutional obligation to disclose favorable or exculpatory evidence to a defendant in a criminal case . . ." (Welf. & Inst. Code, §§ 781(a)(1)(D)(iii) and 786(g)(1)(I), emphasis added.) But unless the information is sufficiently favorable and material to constitute ***Brady*** information, there arguably will never be a statutory obligation to disclose since Penal Code section 1054.1 does not require prosecutors to disclose information that is "privileged pursuant to an express statutory provision" (**see** Pen. Code, § 1054.6) and sealed records are likely to be viewed as falling within this category.

a. What Should a Prosecutor Do if the Prosecutor is Aware of *Brady* Information Contained in a Juvenile File That Has Been Sealed Pursuant to a Statute with No Exception Allowing Prosecutorial Access to Meet a Discovery Obligation?

If a prosecutor is aware of information in the juvenile records of a prosecution witness but the records have been sealed pursuant to a statute without an exception allowing prosecutorial access to meet discovery obligations (**e.g.,** Welf. & Inst. Code, § 793), the prosecutor has a dilemma. The prosecutor cannot reveal the information to the defense but risks jeopardizing the conviction and/or state bar discipline if the information remains concealed. One possible solution is to file a challenge to the statute itself on grounds that it is unconstitutional insofar as it will deprive the defendant of due process. (**Cf.**, ***Lorenza P.* v. *Superior Court*** (1988) 197 Cal.App.3d 607, 611 [where "section 827 gives the district attorney the right to review records upon a declaration that they are relevant to a criminal investigation there must be a similar right for the parent and his attorney in the same criminal matter. To hold otherwise would raise constitutional problems of due process in that any prosecution material that relates to guilt, innocence or punishment must be made available to the defendant."].)

This challenge can be made by the prosecutor, it can be recommended to the defense that such a challenge be made, or the challenge can be jointly made. The information itself can be lodged under seal with the court in the criminal case.

xi. Information Concerning Juveniles Obtained Outside the Context of Juvenile Proceedings

Nothing in section 827 or the definition of juvenile records would preclude the prosecution from seeking to introduce evidence of juvenile misconduct that did not result in any police contact. (**Cf.**, ***People* v. *Espinoza*** (2002) 95 Cal.App.4th 1287, 1314-1318 [finding section 827 did not apply so as to exclude testimony of a prosecution witness' foster mother regarding credibility of juvenile witness in prosecution for multiple counts of lewd conduct on a child in which the victim's credibility was at issue since proffered testimony from foster mother was not considered part of a "juvenile case file" and did not contain information relating to the contents of a juvenile case file; rather the testimony was based on her own observations of victim].)

If the prosecution has become aware of juvenile misconduct that it acquired outside of the juvenile proceedings, the prosecution should be able to reveal such misconduct, but may not reveal events that are part of the sealed juvenile proceedings nor documents generated on account of those proceedings. (**Cf.**, ***Parmett* v. *Superior Court*** (1989) 212 Cal.App.3d 1261, 1270 [applying this rule to mother of juvenile testifying in juvenile dependency hearing].)

This rule should apply even when there was police contact but no custody or detention. (**See** this outline, section I-8-E-iii-a at pp. 117-118.) But case law dealing the issue does not exist.

F. Victim Witness Advocates

To what extent a victim-witness advocate will be deemed a member of the prosecution team is an open issue in California. There are no published cases in California resolving the question and no out-of-state case directly on point either. However, based on the general principles governing who is a member of the prosecution team, an unpublished California decision, and some out-of-state cases that involved victim witness advocates, it is fair to say that resolution of the issue will likely depend on the specific relationship between the prosecutor's office and the local victim-witness program.

In the unpublished case of ***People* v. *Martin*** 2004 WL 2110783, the court indicated that victim witness advocates are part of the prosecution team - at least where the victim-witness advocates are district attorney personnel who help to ensure that witnesses are available for trial and thus help enable the prosecutor to present his or her case. (**Id.** at p. *6 [albeit ultimately declining to address the issue].) Massachusetts cases interpreting state statutory obligations have held the prosecution has a duty to disclose exculpatory information and statements contained in the notes of victim-witness advocates conversations with the victims and witnesses concerning the investigation or prosecution of the case that did not otherwise fall within the work-product rules protection. (***Commonwealth* v. *Torres*** (Mass. 2018) 98 N.E.3d 155, 162; ***Commonwealth* v. *Bing Sail Liang*** (Mass. 2001) 747 N.E.2d 112, 113-119; **see also *State of New Mexico, ex rel. Brandenburg* v. *Blackmer*** (N.M. 2005) 110 P.3d 66,

71-72 [holding the district attorney's victim advocates are part of the prosecution team for purposes of the work-product rule and state procedural discovery rules such that the victim advocate's notes, statements, reports, etc., made by victim to advocate regarding events before, during, and after the alleged crime that related to the alleged crime, the victim's relationship with defendant, and any bias, prejudice, or anger against defendant had to be disclosed - but not mentioning whether victim advocates are part of "prosecution team" for ***Brady*** purposes]; **cf.**, ***People* v. *Uribe*** (2008) 162 Cal.App.4th 1457 [finding records of SART examination possessed by prosecution team].)

Community-Based Victim Advocate Organizations

If a community-based organization ("CBO") is effectively functioning in the same manner as a DA-controlled VWA program (i.e., by assisting the prosecution), it is reasonable to assume that the CBO VWA will be considered part of the prosecution team. (**Cf.**, ***People* v. *Uribe*** (2008) 162 Cal.App.4th 1457, 1477-1481 [physician's assistant who performed a (SART) sexual abuse examination was a member of the prosecution team where the examination was initiated by the police, the physician's assistant obtained a history from the investigating officer who had previously interviewed the victim and sent a report to the investigating officer after the examination, the purpose of the examination was to determine whether the allegation could be corroborated with physical findings, the physician's assistant collected and preserved physical evidence, and the legislation governing such examinations was enacted, inter alia, to "provide comprehensive, competent evidentiary examinations for use by law enforcement agencies"]; ***State* v. *Farris*** (W.Va. 2007) 656 S.E.2d 121, 125-126 [forensic examination of child sexual assault victims held within possession of prosecution team where child protective service worker at request of police scheduled examination of victim at child advocacy center and examiner was later called as witness].)

However, assisting the *victim* cope with the effects of a crime or with navigating the criminal justice system is not the same as assisting the *prosecution*.

Penal Code section 13835.2 authorizes state funding of public or private nonprofit agencies (i.e., CBOs) for the purpose of providing assistance to victims and witnesses. (Pen. Code, § 13835.2(a).) Penal Code section 13835.5 details the primary and optional services that such agencies may provide to victims and witnesses. (Pen. Code, § 13835.5(a).)

With one possible exception, engaging in the primary and optional services authorized by Penal Code section 13835.5, does not appear to be "assisting" the DA in the prosecution of the case. All these services appear directed to helping the *victim* cope with the impact of the crime and the criminal justice system. The one service authorized by section 13835.5 that, if performed, might place the CBO VWA on the prosecution team is providing witness protection. If, for example, the witness is refusing to testify unless she is relocated, and the prosecution utilizes the CBO to relocate the witness (**see *Hernandez* v. *City of Pomona*** (1996) 49 Cal.App.4th 1492, 1503 ["witness protection programs are optional tools of

law enforcement" and "[w]hether a witness is to receive law enforcement protection is a discretionary decision to be made by law enforcement and the prosecuting authority"]), the CBO VWA may become part of the prosecution team.

Penal Code section 13835.10 identifies the legislative purposes behind providing funding for victim services and the reasons for establishing training guidelines for victim service providers. *Nothing* in that statute indicates that the purpose behind the legislation is to help the prosecution to convict criminal defendants. (**Cf.**, ***People* v. *Uribe*** (2008) 162 Cal.App.4th 1457, 1477-1481 [finding physician's assistant who performed a (SART) sexual abuse examination was a member of the prosecution team because, among other things, the legislation governing such examinations was enacted, in part, to "provide comprehensive, competent evidentiary examinations for use by law enforcement agencies"].)

Penal Code section 13837 authorizes the California Emergency Management Agency (CalEMA) to provide funding for child sexual exploitation and child sexual abuse victim counseling centers and prevention programs, including programs for minor victims of human trafficking. (Pen. Code, § 13837(a).) Section 13837 also authorizes the provision of services to all victims of sexual assault and rape. (Pen. Code, § 13837(b)(2).) Although some prosecutors are involved in the administering of sexual assault/rape crisis center victim services programs (**see** Pen. Code, §§ 13836, 13836.1, and 13837(b)(2))) and section 13836 authorizes the development of training programs for prosecutors, the services provided by the *sexual assault services programs services* appear directed to helping the *victim* cope with the impact of the crime and the criminal justice system – not to assist the district attorney's office in prosecuting criminal defendants (**see** Pen. Code, § 13837(b)(2)&(3)).

Considering the purposes behind the statutes authorizing CBO programs directed to helping victims, whether a VWA who works for a CBO will be deemed to be part of the prosecution team should turn on what *actual* assistance is provided by the CBO-based VWA to the prosecution. Although there are no cases directly on point, it is reasonable to assume that information in the possession of CBO-based VWAs will be treated analogously to information known to medical personnel who treat a victim of a crime for medical injuries stemming from a criminal assault. In general, such information (unless made known to the prosecution) is not held to be in the possession of the prosecution team even if the victim is treated at a public hospital (**see *Bradford* v. *Cain*** unreported (E.D.La. 2008) 2008 WL 4266761, *12), However, it *can* be deemed to be in possession of the prosecution team if medical personnel conduct a SART examination at the behest of law enforcement. (**See *People* v. *Uribe*** (2008) 162 Cal.App.4th 1457, 1477-1481.)

Indirect assistance to the prosecution will probably not make a CBO-based VWA advocate a member of the prosecution team. For example, providing counseling to the victim may help the victim develop the emotional coping skills that will allow her to testify in court, which may benefit the prosecution. However, this is no different than a doctor who renders medical aid to a victim to allow her to survive

the assault. Clearly, the prosecution benefits if the victim is alive to testify. But the doctor is not acting at the behest of the prosecution and would not be deemed part of the prosecution team. (**See *Carey* v. *Yates*** (E.D.Cal. 2008) [unreported] 2008 WL 5396616, *6 [no ***Brady*** violation for failure to disclose sexual assault victim's medical examination because, inter alia, examination done at request of victim's father, not police].)

Are Victim Witness Advocate Conversations With Witnesses Privileged?

There is no California statutory privilege that generally protects conversations that occur between victim-witness advocates and victims. However, arguments might be made that some conversations between victim-witness advocates and victims may be privileged under the psychotherapist-patient privilege (Evid. Code, § 1010), the sexual assault counselor-victim privilege (Evid. Code, § 1035.8), the domestic violence counselor-victim privilege (Evid. Code, § 1037.5), or the human trafficking caseworker-victim privilege (Evid. Code, § 1038). However, each of these privileges has limitations and should only apply when the communication occurs while victim-witness advocate is acting in his or her capacity as a therapist, counselor, or caseworker and not simply as a victim-witness advocate. Moreover, even when privileged, the communications may have to be disclosed if, after a court holds an in camera hearing in which the court reviews the information, the court determines the need for disclosure outweighs the need to keep the information confidential. (**See *People* v. *Hammon*** (1997) 15 Cal.4th 1117, 1125-1128 [discussing procedures for review of information protected by psychotherapist-patient privilege]; Evid. Code, § 1035.4 [setting out procedures for review of information protected by sexual assault victim counselor-victim privilege]; Evid. Code, § 1037.2(c) [setting out procedures for review of information protected by domestic violence counselor-victim privilege]; Evid. Code § 1038.1(b)&(c) [setting out procedures for review of information protected by human trafficking case worker-victim privilege].)

Penal Code section 13750 governs when information provided by victim within a family justice center may be disclosed and provides, inter alia, that "[c]onsent by a victim for sharing information within a family justice center pursuant to this section shall not be construed as a universal waiver of any existing evidentiary privilege that makes confidential any communications or documents between the victim and any service provider, including, but not limited to, any lawyer, advocate, sexual assault or domestic violence counselor as defined in Section 1035.2 or 1037.1 of the Evidence Code, human trafficking caseworker as defined in Section 1038.2 of the Evidence Code, therapist, doctor, or nurse. Any oral or written communication or any document authorized by the victim to be shared for the purposes of enhancing safety and providing more effective and efficient services to the victim of domestic violence, sexual assault, elder or dependent adult abuse, or human trafficking shall not be disclosed to any third party, unless that third-party disclosure is authorized by the victim, or required by other state or federal law or by court order." (Pen. Code, § 13750(h)(5).)

Editor's note: For a more expansive discussion of issues relating to the disclosure obligations of victim-witness advocates and what privileges may or may not apply to protect, **see** the handout entitled "Victim Witness Advocates and DA Discovery Duties" available upon request.

G. Victims, Witnesses, and Their Attorneys

Materials and information possessed by a crime victim or witness are held by a third party and are not in the possession of the prosecution team. When the prosecution team is unaware of any information that a victim or witness is in actual possession of, and where the prosecution team neither possessed the evidence nor instructed the victim or witness to hold on to the evidence, the prosecution does not possess that evidence and has no discovery obligation toward it. (***People* v. *Sanchez*** (1998) 62 Cal.App. 4th 460, 474 ["The People had no duty to discover the existence of, or to seek or obtain, (the evidence) not provided to the police by the victims"]; ***United States* v. *Graham*** (6th Cir. 2007) 484 F.3d 413, 417-418 [evidence in possession of a cooperating prosecution witness is not in constructive possession of the government]; ***United States* v. *Josleyn*** (1st Cir. 2000) 206 F.3d 144, 154 ["While prosecutors may be held accountable for information known to police investigators, [citation] we are loath to extend the analogy from police investigators to cooperating private parties who have their own set of interests. Those private interests, as in this case, are often far from identical to—or even congruent with—the government's interests"]; ***United States* v. *Meregildo*** (S.D.N.Y 2013) 920 F.Supp.2d 434, 445 ["fact that a cooperating witnesses signs a plea agreement and testifies at trial does not transform him from a criminal into a member of the prosecution team"]; ***United States* v. *Munchak*** (M.D. Pa., 2014) 2014 WL 3557176, at *15 [collecting cases].)

In ***IAR Systems Software, Inc.* v. *Superior Court*** (2017) 12 Cal.App.5th 503, the court recognized that "there is no published decision in California or elsewhere holding that a private party that is also a crime victim qualifies as a member of the prosecution team for purposes of ***Brady***." (**Id**. at p. 517.) The court also recognized that treating victims as members of prosecution team might be inconsistent with some of the rights "the California Constitution affords crime victims . . ., including the right to refuse to cooperate with the prosecution and, of particular significance here, the right 'to reasonably confer with the prosecuting agency, upon request, regarding, the arrest of the defendant ... [and] the charges filed ....' (Cal. Const., art. I, § 28, subd. (b)(6).)" (**Ibid**.) Moreover, after noting that whether knowledge should be imputed to the prosecution is a question of agency, and that an agent's duty to disclose is thus linked to his power to bind the principal, the court observed, "the scope of the agency relationship between a cooperating witness and a prosecutor is narrower [than that between a prosecutor and law enforcement agent] and warrants imputation in fewer circumstances." (**Id**. at p. 518.) In view of these principles, the ***IAR*** court held attorneys for the victims were not members of the prosecution team in the case before it. (**Id**. at p. 518.) However, the IAR court **did not *affirmatively* adopt a bright line rule** that victims can *never* be members of the prosecution team as a matter of law. (**Ibid**.)

i. Law Firms Representing Victims

In ***IAR Systems* v. *Superior Court (Shehayed)*** (2017) 12 Cal.App.5th 503, the defendant, embezzled large sums of money from IAR, a company that employed him as a chief executive officer. IAR hired a law firm (Valla) to file a civil suit against the defendant. The law firm also reported the embezzlement to the police; and the local district attorney's office charged the defendant with criminal embezzlement. (**Id**. at p. 508.) The defendant sent a subpoena asking for documents relating to an email from the district attorney to Valla. Valla raised a work product and attorney-client privilege objection. Over the prosecution's objection, the trial court held an evidentiary hearing to determine whether Valla was part of the prosecution team and, as such, subject to the ***Brady*** disclosure requirement of producing any material and exculpatory evidence in its possession notwithstanding the attorney-client privilege. (**Id**. at pp. 508-509.) At the hearing, it was shown that Valla did "not conduct legal research or investigate the charged offenses solely at the request of the police or district attorney or take any action with respect to defendant other than in its role as attorneys for IAR." (**Id**. at p. 509.) Although Valla "turned over information to law enforcement that it had independently obtained in discovery in the civil action brought against defendant" and arranged and scheduled meetings between law enforcement and IAR, Valla was never asked by law enforcement or the district attorney's office to "gather evidence, interview witnesses or find specific witnesses on its behalf[.]" (**Ibid**.)

The prosecutor who testified at the hearing explained that the office did not have the resources to retain a financial auditor. Thus, while the district attorney's office could not direct IAR or the police departments to hire an independent financial auditor, it was communicated to IAR that if they decided to "go forward with an independent financial audit, the company need[ed] to hire someone who will be available to testify" in the prosecution case. (**Id**. at p. 510.) It was also established that IAR obtained an expert, who had been providing basic accounting and tax services to them for several years, to provide the necessary information and expertise to understand defendant's crimes. IAR paid for this expert to serve as a witness in both the civil action and the criminal case against the defendant. (**Id**. at p. 510.) Several instances of cooperation between Valla and the police or district attorney were disclosed at the hearing: (i) in response to a request by a legal associate at Valla for information on what offenses defendant would likely be facing (information which the associate indicated could potentially be used to elicit evidence at an upcoming deposition of the defendant bearing on the elements of the charged offenses) the police gave the associate two Penal Code citations, but did not suggest or request any particular deposition questions relating to these provisions; (ii) Valla, of its own accord, provided the district attorney with a copy of defendant's deposition transcript with portions underlined; (iii) the district attorney asked IAR to make available IAR employees at a meeting to discuss, among other things, some of the Civil Code sections relating to a potential defense (i.e., the "ratification defense") that could be raised by the defendant; (iv) the district attorney and a Valla associate in a separate call discussed the ratification defense; and (v) at the district attorney's request, an associate with Valla provided some case citations relating to the ratification defense. (**Id**. at p. 511.)

The trial court the issued an order finding Valla to be a part of the prosecution team and requiring Valla to comply with the ***Brady*** requirement. The trial court held that informal discovery requests could be sent directly to Valla & Associates. (**Id**. at p. 511.) IAR and Valla then sought a writ of mandate (joined by the district attorney) challenging the trial court's finding that Valla was part of the "prosecution team" and the trial court's order that Valla disclose ***Brady*** evidence in its possession. (**Id**. at pp. 511-512.)

The court of appeal granted the writ. It concluded that since the principle adopted in ***Brady* v. *Maryland*** (1963) 373 U.S. 83 was not a rule of discovery but stemmed from the due process obligation of the state to provide a defendant a fair trial, and since the "Supreme Court has unambiguously assigned the duty to disclose [under ***Brady***] solely and exclusively to the prosecution," the "trial court committed legal error by imposing any duty under ***Brady*** to disclose material, exculpatory evidence directly on Valla, as opposed to on the prosecution." (***IAR Systems Software, Inc.* v. *Superior Court*** (2017) 12 Cal.App.5th 503, 514, 515.) The appellate court was not swayed by any of the information relied upon by the trial court, i.e., "the sharing of legal citation and 'analysis between Valla and the police or district attorney, and the delegating by the district attorney to Valla of the task of hiring and paying for a forensic accountant to prepare a report and testify regarding the factual basis for the charges against defendant." (**Id**. at pp. 519.) The appellate court held Valla was not part of the prosecution team for purposes of ***Brady*** such that the *prosecution* can be required to search for and disclose ***Brady*** materials under Valla's possession or control. (***IAR Systems Software, Inc.* v. *Superior Court*** (2017) 12 Cal.App.5th 503, 514, 517, 519.) Lastly, the appellate court observed, "the scope of the prosecution's duty of disclosure under ***Brady*** remains sufficiently broad to protect defendant's fundamental right to a fair trial" without having to extend the scope of this duty in a manner that would unduly intrude "into the equally sacrosanct duty of a private attorney or law firm to zealously represent the interests of its client with undivided loyalty." (at pp. 521-522.)

> **Editor's note**: Although the appellate court denied the prosecution's original writ request to prevent an evidentiary hearing from even occurring (**id**. at p. 509), the ***IAR*** appellate court did not address whether the trial court erred as a threshold matter by ordering an evidentiary hearing to determine whether Valla was in fact acting as part of the prosecution team. (**Id**. at p. *4, fn. 5.)

The holding in ***IAR*** is consistent with Ninth Circuit law that information or materials possessed by (or in the files of) an attorney who has been retained or appointed to represent a victim or witness are not constructively possessed by the prosecution team. And that the prosecution is under no duty to search for or obtain evidence possessed solely by the third party's attorney. (**See *United States* v. *Plunk*** (9th Cir. 1998) 153 F.3d 1011, 1028.)

H. All Other Government, Quasi-governmental, and Private Entities (Absent Employment or Use of the Entity by the Prosecution Team)

"[T]he prosecution cannot reasonably be held responsible for evidence in the possession of all governmental agencies, including those not involved in the investigation or prosecution of the case."

(***People* v. *Uribe*** (2008) 162 Cal.App.4th 1457, 1475, citing to ***In re Steele*** (2004) 32 Cal.4th 682, 697.)

In general, governmental, quasi-governmental, or private entities are not considered to be part of the prosecution team unless the prosecution has enlisted the agencies assistance in the investigation and/or prosecution of the case. (**See e.g.**, ***United States* v. *Shryock*** (9th Cir.2003) 342 F.3d 948, 983–984 [federal prosecutors did not violate ***Brady*** by not disclosing records in possession of a state agency]; ***United States* v. *Lochmondy*** (1990) 890 F.2d 817, 823-824 [income tax returns of government witnesses not in prosecution team's possession]; ***United States v. Dunn*** (1988) 851 F.2d 1099, 1101 [report of state child protective services worker not in possession of prosecution team];]; ***Illinois* v. *C.J.*,** (Ill. 1995) 652 N.E.2d 315, 318 ["where [the Division of Child Family Services] acts at the behest of and in tandem with the State's Attorney, with the intent and purpose of assisting the prosecutorial effort, DCFS functions as an agent of the prosecution," and is therefore subject to ***Brady***'s disclosure requirement – albeit since "there was no evidence to support the conclusion that the DCFS investigator functioned, intentionally or otherwise, as an aid in the prosecution of the case," the prosecutor's ***Brady*** requirement did not extend to that particular DCFS agent]; ***People* v. *Webb*** (1993) 6 Cal 4th 494, 518 [medical and psychiatric records in possession of government clinic or hospital not in possession of prosecution team]; **cf.**, ***People* v. *Uribe*** (2008) 162 Cal.App.4th 1457, 1475-1481 [discussed in this outline at I-7-F-ii at p. 80].)

I. Caveat re: Third Party Material Provided to Prosecution Team

Due process ***does*** require the prosecution to disclose exculpatory evidence that is otherwise treated as third party evidence **once it comes into the possession of the prosecution team**. (**See *People* v. *Anderson*** (2001) 25 Cal 4th 543, 577, fn. 11.)

9. Is there a duty to inform the defense of *Brady* material known to the prosecutor to be in the possession of third parties?

It is true that "[t]he prosecution is under no obligation to turn over materials not under its control." (***United States* v. *Aichele*** (9th Cir. 1991) 941 F.2d 761, 764 citing to ***United States* v. *Gatto*** (9th Cir.1985) 763 F.2d 1040, 1049.) However, regardless of whether a prosecutor is actually or constructively in possession of ***Brady*** material, once the prosecutor becomes **aware** that a third party is in possession of such material, the duty to disclose *the existence* of the material (as opposed to disclosure of the actual material) is triggered. (**See *United States* v. *Lacey*** (8th Cir.2000) 219 F.3d 779, 783 [***Brady*** requires the government to disclose to a defendant only evidence that is in the government's possession *or that of which the government is aware*."], emphasis added; ***Ferreira* v. *United States*** (S.D.N.Y. 2004) 350 F.Supp.2d 550, 556, fn. 7; ***United States* v. *Bryan*** (9th Cir. 1989) 868 F.2d 1032, 1037 [prosecutor must disclose exculpatory information prosecutor has "knowledge of and access to"].)

Alternatively, once a prosecutor becomes aware of information that the prosecutor knows is ***Brady*** material, that information itself may be viewed as being in the direct possession of the prosecutor even though the physical evidence (i.e., a written account of the information) is housed with a third party. (**See *Smith* v. *Secretary of New Mexico Dept. of Corrections*** (10th Cir. 1995) 50 F.3d 801, 825, 828 [indicating prosecution actually or constructively possesses information learned orally but not memorialized in writing and finding that, because district attorney's office had actual knowledge that there was a separate investigation by authorities in a separate county, it was reasonable to impute knowledge possessed by the separate county to prosecution].)

10. Failure to disclose evidence is the same as "suppressing" evidence for purposes of the *Brady* rule

In order for a defendant to establish a due process (i.e., ***Brady***) violation on the ground the prosecution failed to disclose evidence, the defendant must establish the prosecution "suppressed" evidence. (**See *United States* v. *Bagley*** (1985) 473 U.S. 667, 675; ***Brady* v. *Maryland*** (1963) 373 U.S. 83, 87.)

Although the United States Supreme Court has stated that a ***Brady*** violation does not occur unless the evidence was "*suppressed* by the State, either willfully or inadvertently" (***Strickler* v. *Greene*** (1999) 527 U.S. 263, 281-282), the use of the term "suppressed" in "this context may be somewhat misleading in that it might incorrectly suggest affirmative misconduct by the prosecution." (***People* v. *Uribe*** (2008) 162 Cal.App.4th 1457, 1475, fn. 20.) "The prosecution need not affirmatively suppress evidence favorable to the defense in order for there to be 'suppression' under ***Brady***. A good faith failure to disclose, irrespective of the presence of a defense request for the materials, may constitute the 'suppression' necessary to establish a ***Brady*** violation." (***People* v. *Uribe*** (2008) 162 Cal.App.4th 1457, 1475, citing to ***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1132.)

11. If the defense is fully aware of the existence of *Brady* evidence and/or has an opportunity to obtain *Brady* material through the exercise of reasonable diligence, can there be a violation of the *Brady* rule?

Even if favorable material evidence is in the actual or constructive possession of the prosecution and the prosecution fails to provide the evidence, there is no violation of the due process clause (i.e., a ***Brady*** violation) if the evidence is known to the defense or readily available through the exercise of reasonable diligence. (***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 716-717; **see also *People* v. *Salazar*** (2005) 35 Cal.4th 1031, 1049 ["evidence is not suppressed unless the defendant was actually unaware of it and could not have discovered it '"by the exercise of reasonable diligence"'"].)

"[T]the high court has made clear that one element of a ***Brady*** violation is that 'evidence must have been suppressed by the State, either willfully or inadvertently.'" (***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 715.) "[T]he prosecutor had no constitutional duty to conduct defendant's investigation for him. Because ***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,' the ***Brady*** rule does not displace the adversary system as the primary means by which truth is uncovered." (***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 715 citing to ***United States* v. *Martinez–Mercado*** (5th Cir.1989) 888 F.2d 1484, 1488; **see also *People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1134; ***People* v. *Salazar*** (2005) 35 Cal.4th 1031, 1048-1049; ***Tate* v. *Wood*** (2d Cir. 1992) 963 F.2d 20, 25 [because the "rationale underlying ***Brady*** is . . . but to assure that the defendant will not be denied access to exculpatory evidence only known to the Government", ***Brady*** does not require disclosure if "the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence"].)

"Consequently, 'when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no ***Brady*** claim.'" (***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 715; ***People* v. *Morrison*** (2004) 34 Cal.4th 698, 715; **see also *People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1134, citing to ***People* v. *Salazar*** (2005) 35 Cal.4th 1031, 1048-1049 ["If the material evidence is in a defendant's possession or is available to a defendant through the exercise of due diligence, then ... the defendant has all that is necessary to ensure a fair trial...."]; ***Andrews* v. *Davis*** (9th Cir. 2015) 798 F.3d 759, 793-794 [citing to ***United States* v. *Dupuy*** (9th Cir.1985) 760 F.2d 1492, 1501 n. 5 for the proposition that the "government does not suppress evidence for purposes of ***Brady*** where 'the means of obtaining the exculpatory evidence [was] provided to the defense'"]; ***Cunningham* v. *Wong*** (9th Cir. 2013) 704 F.3d 1143, 1154 [no suppression of medical records where defense attorneys knew victim had been shot and treated]; ***Raley* v. *Ylst*** (9th Cir. 2006) 470 F.3d 792, 804 [suppression not shown where mitigating evidence in defendant's medical records not disclosed but defendant "knew that he had made frequent visits to medical personnel at the jail," and "knew that he was taking medication that

they prescribed for him" and that was sufficient to alert defense counsel to the probability the jail had created medical records]; ***United States* v. *Aichele*** (9th Cir.1991) 941 F.2d 761, 764 [where "defendant has enough information to be able to ascertain the supposed ***Brady*** material on his own, there is no suppression"]; ***Owens* v. *Guida*** (6th Cir. 2008) 549 F.3d 399, 415-416 [noting "rule makes sense because if the defendant could have presented similar evidence to prove the same point that the allegedly-suppressed information would have been introduced to prove, but did not, it is not reasonably probable that government disclosure would have led to a different result"]; ***United States* v. *Bracy*** (9th Cir.1995), 67 F.3d 1421, 1428–1429 [holding criminal history wasn't suppressed because the government "disclos[ed] ... all the information necessary for the defendants to discover the alleged ***Brady*** material"]; **but see *United States* v. *Bond*** (9th Cir. 2009) 552 F.3d 1092 1096 [if prosecution misleads defense by selective disclosure of some of discovery, indicating remainder was not exculpatory, suppression may still be found].)

Keep in mind, also, that "evidence that is presented ***at trial*** is ***not considered suppressed***, regardless of whether or not it had previously been disclosed during discovery." (***People* v. *Lucas*** (2014) 60 Cal.4th 153, 274; ***People* v. *Verdugo*** (2010) 50 Cal.4th 263, 281; ***People* v. *Morrison*** (2004) 34 Cal.4th 698, 715, emphasis added; **but see *People* v. *Mora and Rangel*** (2018) 5 Cal.5th 442, 467 [indicating ***Brady*** violation can occur if evidence otherwise meets elements of ***Brady*** violation and is provided so belatedly that defense cannot make use of the information].)

> **Editor's note**: There is no comparable "defense had equal access loophole" to the general duty to provide evidence such as defendant's own statements in the context of the discovery statute. (**See** this outline, section III-29 at p. 208.)

A. Does Suppression Occur if the Prosecution Does Not Specifically Identify Where Material Evidence is Located but the Evidence is Reasonably Available to the Defense by the Exercise of Due Diligence?

"Numerous federal decisions have made clear that if the prosecution provides the defense with, or if the defense otherwise has, sufficient information to obtain the evidence itself, there is no ***Brady*** violation." (***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 716 citing to ***Amado* v. *Gonzalez*** (9th Cir.2014) 758 F.3d 1119, 1137 ["defense counsel cannot ignore that which is given to him or of which he otherwise is aware"]; **see also *People* v. *Zaragoza*** (2016) 1 Cal.5th 21, 51 [alerting defense to the existence of a videotape and by making it available for him to view on restaurant recording device precluded claim evidence was suppressed].)

Many of the cases in which the defense showing of suppression has been held inadequate involve situations in which the prosecution has not provided the actual exculpatory evidence but has given the defense enough information to locate the evidence if the defense simply exercised due diligence. (**See *People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 715 [where the "prosecution informs the defense of what it knows regarding information in confidential personnel records, and the defense

can seek that information itself, no evidence has been suppressed"]; ***Andrews* v. *Davis*** (9th Cir. 2015) 798 F.3d 759, 793-794 [no suppression where prosecution failed to provide a "murder book," which contained material evidence including the third party culpability and fingerprint evidence because the state had provided counsel with a chronology of the police investigation referring to much of the allegedly suppressed murder book evidence]; ***United States* v. *Bond*** (9th Cir.2009) 552 F.3d 1092, 1097 [no ***Brady*** violation where the government provided the defendant "with the information needed to acquire all trial testimony, and provided him with the essential factual data to determine whether the witness' testimony might be helpful"]; ***United States* v. *Bracy*** (9th Cir.1995) 67 F.3d 1421, 1428–1429 [no ***Brady*** violation when the government "provided all the information necessary for the defendants to discover the alleged ***Brady*** material on their own, so the government was not guilty of suppressing any evidence favorable to [a defendant]"]; ***United States* v. *Aichele*** (9th Cir.1991) 941 F.2d 761, 764 [no suppression in *federal* case where prosecutor provided defense a copy of state rap sheet and information identified in the rapsheet and allegedly suppressed was located in *state* Department of Corrections file]; **but see *Tennison* v. *City and County of San Francisco*** (9th Cir. 2009) 570 F.3d 1078,1091 [finding fact defense knew about existence of witness and some of the information witness had provided was not sufficient to find evidence was *not* suppressed]; ***State* v. *Wayerski*** (Wisconsin 2019) --- N.W.2d ----2019 WL 4712762019, *9 ["Federal courts are currently divided as to whether a defendant's ability to acquire favorable, material evidence through 'reasonable diligence' or 'due diligence' forecloses a ***Brady*** claim. Although half of the federal courts of appeals have affirmed application of the 'reasonable diligence' or 'due diligence' limitation, the other half of federal courts of appeals have determined that the 'reasonable diligence' and 'due diligence' limitations are not doctrinally supported and undermine the purpose of ***Brady***."].)

There are also cases involving alleged suppression of favorable material evidence where the prosecution has not provided the defense with ***any*** specific information alerting the defense to the actual existence of information, but the information should have been uncovered by the defense through due diligence and it is as easily available to the defense as it is to the prosecution - such as when the evidence is easily located by a quick Internet search or is otherwise available in public records. (**See e.g.**, ***United States* v. *Morris*** (7th Cir.1996) 80 F.3d 1151, 1170 [and cases cited therein]; ***United States* v. *Wilson*** (4th Cir.1990) 901 F.2d 378, 381 [observing that "where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine"]; and cases cited below].)

At least in circumstances where the prosecution is deemed to be in constructive or actual possession of the information, whether suppression is deemed to have occurred will turn on how easy it was for the defense to obtain the information. And how easy it is for the defense to obtain the information will often, but not always, turn on whether the information was "publicly available." (**See e.g., *United States* v. *Stein*** (11th Cir. 2017) 846 F.3d 1135, 1146–1147 [pointing out that the allegedly suppressed

evidence was a publicly available document filed with a public agency (the SEC) and defendant admitted he found the document on the SEC website in support of finding there was no suppression but recognizing that "in some cases a publicly available document practically may be unobtainable with reasonable diligence"]; ***Snow* v. *Pfister*** (7th Cir. 2018) 880 F.3d 857, 867 [no ***Brady*** violation for failure to disclose witnesses received downward sentencing departure because "all court documents regarding the witnesses' sentences were publically (sic) available"].)

Here are some cases illustrating when the allegedly suppressed "information" will be viewed as accessible to the defense through due diligence where no information at all was provided by the government:

In ***United States* v. *Shields*** (7th Cir. 2015) 789 F.3d 733, the court held that the government did not violate ***Brady*** by failing to disclose a lawsuit filed approximately ten years prior against city and 26 police officers, including the officer involved in defendant's arrest, because the lawsuit, and its settlement, had been publicly available for approximately ten years, and defendant could have accessed the information through exercise of due diligence. (**Id**. at p. 747.)

In ***United States* v. *Catone*** (4th Cir. 2014) 769 F.3d 866, the defendant was charged with submitting a fraudulent federal worker's compensation claim because he willfully concealed work he had been doing. The defendant argued the prosecution violated the ***Brady*** obligation by failing to disclose that he had submitted to the government work claims documenting the work he was accused of concealing. The Fourth Circuit rejected defendant's argument for two reasons. First, since the defendant was the individual who completed the form, it was already known to him. Second, the form was "a *publicly available document and could have been uncovered by a diligent investigation*" and he "could have obtained a copy of his entire claims file by simply submitting a written request to the Department of Labor." (***Id***. at p. 872, emphasis added.)

In ***United States* v. *Coplen*** (8th Cir. 2009) 565 F.3d 1094, a case where a number of individuals were prosecuted for involvement in a drug ring, the court held the testimony of defense witnesses in one trial was readily available to defendants in the other trials as the testimony of the witnesses was a matter of public record. (**Id**. at p. 1097)

In ***United States* v. *Willis*** (8th Cir.2002) 277 F.3d 1026, a case involving a charge of federal tax evasion, the defendant made a request before trial for "any documents in the possession of the government concerning a program known as 'De–Taxing America.'" (***Id***. at p. 1034.) The defendant testified at trial that he had relied on materials from De–Taxing America in forming his belief that he was not obligated to pay taxes. The government responded that it possessed no such evidence." (**Ibid**.) After trial, the defendant "discovered that the founders of De–Taxing America had been investigated by the IRS and permanently enjoined from marketing the program." (**Ibid**.) On appeal, defendant alleged

a ***Brady*** violation based on the prosecution's failure to disclose this information about "De-Taxing America." The Circuit rejected the argument because the injunction was a matter of public record at time of trial and "was available by merely entering the phrase "De–Taxing America" into a search engine on a legal database such as Westlaw or Lexis[.]" (**Ibid**.)

In ***Liggins* v. *Burger*** (8th Cir. 2005) 422 F.3d 642, the court held the prosecution did not suppress evidence of a videotape in their possession that would have impeached the testimony of a witness who claimed he did not own a leather coat, where the videotape was of a funeral showing the witness wearing a leather coat, because the videotape was broadcast on television and seen by many people in the area and thus was equally accessible to the defense. (***Id***. at pp. 655.)

In ***United States* v. *Jones*** (8th Cir.1998) 160 F.3d 473, the court held potentially exculpatory information regarding a testifying witness derived from an open court plea and sentencing hearing of the witness was not suppressed because transcripts of those proceedings were readily available to the defense. (**Id**. at p. 479; **see also *United States* v. *Ladoucer*** (8th Cir.2009) 573 F.3d 628, 636 [no ***Brady*** violation based on prosecution failure to provide transcript of witness in state court open trial where defense aware of witness involvement in state court case]; ***United States* v. *Albanese*** (8th Cir. 1999) 195 F.3d 389, 393 [no violation of ***Brady*** where witness testified inconsistently in two public hearings put on by the prosecutor].)

And in ***United States* v. *Hansen*** (11th Cir. 2001) 262 F.3d 1217, the court held the government's failure to disclose court opinions, which "were all available through legal research," does not violate ***Brady***. (**Id**. at p. 1235.)

On the other hand, in ***Milke* v. *Ryan*** (9th Cir. 2013) 711 F.3d 998 [discussed in this outline at section I-7-D at pp. 75-76], the Ninth Circuit held there was suppression of information that courts had previously and repeatedly found an officer lied and violated a defendant's constitutional rights even though the information was contained in public court records because the Ninth Circuit believed it was still difficult for the defense to locate the information. (**Id**. at pp. 1017-1018 [albeit the claim of suppression was inextricably tied to the prosecution's opposition to disclosure of the officer's personnel file – which would have led to some of the information in the court files].)

And in ***United States* v. *Payne*** (2d Cir.1995) 63 F.3d 1200, the court held the defense did not have sufficient facts to allow discovery through their own due diligence where a witness in the witness' own criminal case submitted an affidavit contradicting her testimony in the defendant's case even though the defense knew of the witness' criminal case and could have found the affidavit in the public record. (**Id**. at pp. 1205, 1208-1209.)

B. Is Evidence Suppressed if Information is Disclosed to the Head of the Public Defender's Office - Even if the Information is Not Directly Provided to the Public Defender Handling the Defendant's Case?

Although no case has specifically addressed the issue – a reasonable argument can be made that disclosure of evidence to the head Public Defender gives the defense access to information through the exercise of reasonable diligence and thus the evidence cannot be considered suppressed - at least in cases where the information is not subject to a protective order, is revealed in a public court proceeding, and is conveyed to the head of the public defender's office. In fact, because the head of the public defender's office is the attorney of record for any case handled by the public defender's office, the information is not just in the constructive knowledge of the defendant, it is in the actual knowledge of the defendant's attorney of record. (***People* v. *Jones*** (2004) 33 Cal.4th 234, 237, fn. 1 ["In cases handled by the public defender's office, it is the officeholder who is the attorney of record."]; ***People* v. *Sapp*** (2003) 31 Cal.4th 240, 256 [same].)

Imputing knowledge of the exculpatory information known to the head public defender to a deputy in the public defender's office is based on simple agency. (**Cf.**, ***IAR Systems Software, Inc. v. Superior Court*** (2017) 12 Cal.App.5th 503, 518 [stating that "[a]t bottom, imputation involves a question of agency law" for purposes of deciding whether person is on the "prosecution team].) A "deputy under a public officer and the officer or person holding the office are, in contemplation of law and in an official sense, one and the same person." (***Sarter* v. *Siskiyou County*** (1919) 42 Cal.App. 530, 536; **cf.**, ***Aguilar* v. *Woodford*** (9th Cir. 2013) 725 F.3d 970, 982 ["The prosecutor in Aguilar's case was employed by District Attorney Cooley. Knowledge of the ***Brady*** evidence therefore is imputed both to Cooley and, by extension, to prosecutors working in his office."].) This rationale is equally applicable to public defenders and district attorneys and should govern the question of whether a defendant "has access to the evidence prior to trial by the exercise of reasonable diligence" as required to establish the element of suppression.

> **Editor's note**: Whether there is such a thing as a "defense team" that operates in a comparable manner to the "prosecution team" for discovery purposes has not been explored in the case law. Could failure to disclose reciprocal discovery possessed by a defense investigator but unknown to the attorney violate §1054.3?

C. Is Evidence (Such as Defendant's Own Statement) Suppressed if the Defendant (But Not) Defense Counsel Knows or Should Know About the Information?

As noted earlier, the California Supreme Court has repeatedly stated that "when information is fully available to a ***defendant*** at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no ***Brady*** claim.'" (***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 715.) But it is not entirely clear if any distinction can or should be drawn between the "defense" and the "defendant" when it comes to

determining if the suppression prong of ***Brady*** has been met. (**See *United States v. Tagupa*** (D. Hawaii 2015) 2015 WL 6757526, at *4 ["Courts, in discussing ***Brady*** obligations, often use the terms 'defendant,' 'defense counsel,' and 'the defense' interchangeably."].)

Most federal courts have held that the prosecution has no duty to disclose information known to the defendant *personally*. (**See e.g., *Boyd* v. *Commissioner, Alabama Dept. of Corrections*** (11th Cir. 2012) 697 F.3d 1320, 1335 [prosecution had no duty to disclose statement defendant himself made to police]; ***Raley* v. *Ylst*** (9th Cir. 2006) 470 F.3d 792, 804 [suppression not shown where mitigating evidence in defendant's medical records not disclosed but *defendant* "knew that he had made frequent visits to medical personnel at the jail," and "knew that he was taking medication that they prescribed for him" and that was sufficient to alert defense counsel to the probability the jail had created medical records]; ***United States* v. *Dawson*** (7th Cir. 2005) 425 F.3d 389, 393 [finding no ***Brady*** violation where "the government was aware of what was said in the [defendants'] conversations but not recorded, because the defendants, being parties to the conversation, were equally aware"]; ***Pondexter* v. *Quarterman*** (5th Cir. 2008) 537 F.3d 511, 526 [finding no ***Brady*** violation where the defendant asserted the government suppressed statements he made to cellmate since if the statements were made, defendant would fully aware having made them and of the cellmates ability to verify they had been made"]; ***United States* v. *Catone*** (4th Cir. 2014) 769 F.3d 866, 872 [prosecution had no duty to disclose form that defendant had submitted to state department of labor]; ***McHone* v. *Polk*** (4th Cir. 2004) 392 F.3d 691, 702 [where alleged ***Brady*** material consists of a third-party recounting a conversation with the defendant to investigators, "this evidence cannot form the basis of a Brady claim" because the defendant participated in the conversation]; ***Gov't of Virgin Islands* v. *Martinez*** (3d Cir. 1985) 780 F.2d 302, 308 [indicating defendant was responsible for informing his defense counsel of exculpatory evidence barring extenuating circumstances such as a language barrier or a mental defect that made the defendant incapable of doing so]; ***United States* v. *Barcelo*** (2d Cir. unpublished) 2015 WL 5945997, *2 [no ***Brady*** violation where the government did not disclose the substance of the testimony of an officer present during a traffic stop of defendant because the defendant knew the police officer was "present during the traffic stop and might have useful evidence."].)

On the other hand, the Ninth Circuit has declined to apply that rule to excuse the prosecution from providing defense counsel with defendant's own statements: "The availability of particular statements through the defendant himself does not negate the government's duty to disclose." (***United States* v. *Howell*** (9th Cir.2000) 231 F.3d 615, 625 [and noting that defendants "cannot always remember all of the relevant facts or realize the legal importance of certain occurrences"]; **see also *Tennison* v. *City and County of San Francisco*** (9th Cir. 2008) 570 F.3d 1078, [rejecting as "untenable a broad rule that any information possessed by a *defense witness* must be considered available to the defense for ***Brady*** purposes"]; ***Boss* v. *Pierce*** (7th Cir.2001) 263 F.3d 734, 740 [same].)

In ***People* v. *Schmidt*** (unpublished) 2016 WL 310280, the appellate court observed that while there are California Supreme Court decisions stating suppression does not occur if information is known to the *defendant*, it could not find "any California case actually holding that the prosecution did not have any duty to disclose asserted *Brady* material because the defendant already had possession of it, even though defense counsel did not." (**Id**. at pp. *8-*9 [albeit declining to address the issue].)

The court in ***United States* v. *Tagupa*** (unpublished) 2015 WL 6757526 does a pretty good job of reconciling the holding in ***United States* v. *Howell*** (9th Cir.2000) 231 F.3d 615 with the majority of cases (including cases from the Ninth Circuit) holding information known to the defendant himself is not suppressed. (**Id**. at pp. *4-*9.) It concluded the majority rule prevails unless, as in ***Howell***, the "government provides false or misleading information to the defense and fails to correct its error[.]" (**Id**. at p. *9.)

D. <u>The People Have No Duty to Point Out Where, in the Discovery Provided, the Exculpatory Information is Contained</u>

In cases with voluminous discovery, locating the exculpatory portions can sometimes be like trying to find a needle in a haystack. In such circumstances, the defense may expect the prosecution to lend them a hand by highlighting the exculpatory evidence. Certainly, prosecutors may choose to do so as a gesture of good will. However, there is no ***obligation*** to do so.

"As a general rule, the government is under no duty to direct a defendant to exculpatory evidence within a larger mass of disclosed evidence." (***United States* v. *Warshak*** (6th Cir. 2010) 631 F.3d 266, 297; ***United States* v. *Skilling*** (5th Cir.2009) 554 F.3d 529, 576 [vacated in part on other grounds 130 S.Ct. 2896]; **accord *United States* v. *Mulderig*** (5th Cir.1997) 120 F.3d 534, 541 ["there is no authority for the proposition that the government's ***Brady*** obligations require it to point the defense to specific documents with[in] a larger mass of material that it has already turned over"];***United States* v. *Mmahat*** (5th Cir. 1997) 106 F.3d 89, 94 [same].)

In ***Rhoades* v. *Henry*** (9th Cir. 2011) 638 F.3d 1027, the defendant claimed that prosecution had violated due process by failing to provide a recorded statement of a witness that contained potentially exculpatory material. The Ninth Circuit rejected the claim because its own review of the record revealed the statement *had* been provided. The allegedly missing statement was included in a videotape - it was just that the defense had not "found" it when perusing the tape. In rejecting the defendant's claim, the Ninth Circuit stated the defendant could "point to no authority requiring the prosecution to single out a particular segment of a videotape, and we decline to impose one." (**Id**. at p. 1039.)

The general rule holds true even where the discovery contains ***millions*** of pages. (**See *United States* v. *Warshak*** (6th Cir. 2010) 631 F.3d 266, 297 [rejecting argument the government shrugged off its obligations under ***Brady*** by simply handing over *millions* of pages of evidence and forcing the defense to

find any exculpatory information contained therein]; ***United States* v. *Skilling*** (5th Cir. 2009) 554 F.3d 529, 576 [rejecting argument that government's failure to direct the defendant to a single ***Brady*** document in the government's open file, which consisted of several *hundred million* pages of documents resulted in the effective concealment of a huge quantity of exculpatory evidence].)

However, some courts have identified circumstances in which the government's voluminous production *might* violate its ***Brady*** obligations. For example, in ***United States* v. *Skilling*** (5th Cir. 2009) 554 F.3d 529, the court suggested that (i) "evidence that the government 'padded' an open file with pointless or superfluous information to frustrate a defendant's review of the file might raise serious ***Brady*** issues"; (ii) "[c]reating a voluminous file that is unduly onerous to access might raise similar concerns"; and (iii) "the government may not hide ***Brady*** material of which it is actually aware in a huge open file in the hope that the defendant will never find it." (**Id**. at p. 577; **accord *United States* v. *Warshak*** (6th Cir. 2010) 631 F.3d 266, 297; ***United States* v. *AU Optronics Corp***. (N.D. Cal. 2011) [unreported] 2011 WL 6778520, *1; **see also *United States* v. *Hsia*** (D.D.C.1998) 24 F.Supp.2d 14, 29 ["The Government cannot meet its ***Brady*** obligations by providing [defendant] with access to 600,000 documents and then claiming that she should have been able to find the exculpatory information in the haystack"]; ***United States v. Salyer*** (E.D.Cal.) [unreported] 2010 WL 3036444, *7 [finding that government has heightened obligations when producing "voluminous" discovery to "a singular, individual defendant, who is detained in jail pending trial, and who is represented by a relatively small defense team"].)

More recently, in ***People* v. *Harrison*** (2017) 16 Cal. App. 5th 704, the appellate court found that a ***Brady*** violation occurred when an exculpatory videotape (contradicting an officer's testimony that the defendant had not invoked his right to silence) was not disclosed to the defense. The state argued that there was no violation because the police report mentioned that a DICV (which stood for "digital in—car video" was activated during the initial detention of the defendant. However, the court rejected this argument because a "cryptic reference to DICV in the police report did not relieve the prosecution of the duty to provide" the defendant a copy of the video recording, considering: (i) there was nothing in the report stating the *Mirandized* interrogation was recorded; (ii) the video was a new technology; (iii) the acronym was not explained in the report; and (iv) the acronym was new and the defendant's attorney stated that he did not know what acronym meant. (**Id**. at pp. 709-710.)

E. Open File or Other Potentially Misleading Discovery Policies

Although the United States Supreme Court has held "the prosecutor is ***not*** required to deliver his entire file to defense counsel" (***United States* v. *Bagley*** (1985) 473 U.S. 667, 675, emphasis added), some prosecutors take the approach that "My file is an open book, I meet my discovery obligations by simply allowing the defense complete access to my file."

This sounds nice but considering the fact that all sorts of confidential and privileged information (including work product, victims' addresses, information regarding informants, and criminal rapsheets)

may be contained within the file, allowing the defense free access to the prosecutor's file may violate any number of statutes and privileges. It may also, if rapsheets of witnesses are revealed, even be illegal. (**See** Pen. Code, § 11142 [disclosure of criminal history record to unauthorized person is a misdemeanor].) Moreover, it can backfire if, in fact, the file does not contain all the discovery.

In ***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, the court noted that "the prosecutor's ***Brady*** obligation may, under proper circumstances, be satisfied by an 'open file' policy, under which defense counsel are free to examine all materials regarding the case that are in the prosecutor's possession." (**Id**. at p. 1134, citing to ***Strickler* v. *Greene*** (1999) 527 U.S. 263, 283, fn. 23; **see also e.g.**, ***United States* v. *Morales-Rodriguez*** (1st Cir.2006) 467 F.3d 1, 15; ***United States* v. *Beers*** (10th Cir.1999) 189 F.3d 1297, 1304.) However, the ***Zambrano*** court cautioned that "if the prosecutor relies on such a policy to comply with ***Brady***, the defense may assume his files contain all the evidence he is obligated to share. (***Zambrano*** at p. 1134.) As pointed out in ***Smith* v. *Secretary of New Mexico Dept. of Corrections*** (10th Cir. 1995) 50 F.3d 801, "[i]t is not difficult to envision circumstances where the prosecution possesses, either actually or constructively, ***Brady*** information that for some reason is not in the 'file,' such as material in a police officer's file (but not in the prosecutor's file) or material learned orally and not memorialized in writing. No one could reasonably argue that under those circumstances, assuming the evidence was exculpatory, the prosecution's ***Brady*** obligations would be satisfied by its 'open file' policy." (**Id**. at p. 828.) Moreover, "[c]oncerns might also arise if the prosecutor used the policy to impose impracticable or unduly oppressive self-discovery burdens on the defense." (***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1134.)

Finally, an open file policy may prevent the prosecutor from arguing there was no ***Brady*** violation because the defendant could have obtained the evidence by using reasonable diligence. That is, defense counsel can argue he did not take actions a reasonably diligent attorney would otherwise take because he believed the prosecution's open file policy would eliminate the need for him to do so. (**See *Smith* v. *State*** (Md. Ct. Spec. App. 2017) 165 A.3d 561, 591 ["where the State uses open file discovery to satisfy its obligations, and defense counsel has no reason to believe that the State has not satisfied those obligations, due diligence does not require defense counsel to 'scavenge for hints of undisclosed ***Brady*** material."]; ***Beaman* v. *Souk*** (C.D. Ill. 2014) 7 F.Supp.3d 805, 824.)

> **Editor's note**: Prosecutors who choose to adopt an open file policy in a manner that does not disclose criminal histories of witnesses or breach other privileges, should inform the defense of that fact so defense counsel is not misled into believing the prosecutor possesses no information other than was disclosed to them in the file.

F. Disclosure by Way of Motion in Limine

If the prosecution makes a motion in limine to exclude identifiable and potentially exculpatory evidence (i.e., when the motion itself discloses the existence of the information), is this adequate to meet the due

process obligation to disclose exculpatory evidence. The answer likely depends on the how much information is disclosed as part of the motion in limine.

If *all* the exculpatory information is provided in the brief in support of the motion to exclude, this should constitute compliance with the duty of disclosure. However, if some, but not all, of the information is disclosed in the brief, it may be viewed as insufficient compliance.

For example, in ***Vaughn* v. *United States*** (D.C. 2014) 93 A.3d 1237, the court held that the prosecution did not fulfill it disclosure obligations when it provided a summary of a report on an officer witness where (i) "there was nothing about the motion in limine that put the defense on notice that the government was disclosing ***Brady*** information" and (ii) "[t]he government not only failed to give the defense (or the court) accurate or complete information [in the motion], it then stood by at trial and allowed the defense's ignorance and the court's erroneous understanding of the pertinent facts to persist[.]" (**Id**. at pp. 1257-1258, 1262.)

12. Who ultimately decides whether the evidence is *Brady* material?

A. Generally

The "Supreme Court has unambiguously assigned the duty to disclose [under ***Brady***] solely and exclusively to the prosecution . . ." (***IAR Systems Software, Inc.* v. *Superior Court*** (2017) 12 Cal.App.5th 503, 514, 515.) In a typical case, where a defendant makes only a general request for ***Brady*** material, "it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final." (***Pennsylvania* v. *Ritchie*** (1987) 480 U.S. 39, 59; **see also *In re Brown*** (1998) 17 Cal.4th 873, 878, 881 ["Responsibility for ***Brady*** compliance lies exclusively with the prosecution . . . the duty is nondelegable . . ."]; ***United States* v. *Prochilo*** (1st Cir. 2011) 629 F.3d 264, 268 ["at least where a defendant has made only a general request for ***Brady*** material, the government's decision about disclosure is ordinarily final-unless it emerges later that exculpatory evidence was not disclosed"].)

B. Judicial Intervention

However, if there is some basis to believe that material in the possession of the prosecutor might be exculpatory and it is not being turned over, the trial court may, if a sufficient preliminary showing is made, be entitled to conduct a review to determine the merits of defendant's claim. (**See *People* v. *Luttenberger*** (1990) 50 Cal.3d 1, 20 [defendant has no right to court examination of police files absent "some preliminary showing 'other than a mere desire for all information in the possession of the prosecution'"]; ***People* v. *Prince*** (2007) 40 Cal.4th 1179, 1232 ["motion for discovery must describe the information sought with some specificity and provide a plausible justification for disclosure"]; ***People* v. *Jenkins*** (2000) 22 Cal.4th 900, 953 [same]; ***United States* v. *Henthorn*** (9th Cir. 1991) 931 F.2d

29, 31; **see also *United States* v. *Brooks*** (D.C. Cir. 1992) 966 F.2d 1500, 1505 [where defense does not specifically identify the exculpatory evidence allegedly being withheld, it is the duty of the prosecutor rather than court to conduct review of files].)

> **Editor's note**: The issue of when judicial review is appropriate is discussed more fully in this outline, section IX-1 at pp. 265-270.)

13. When does *Brady* material have to be disclosed?

A. Generally

It is not entirely clear when Due Process (i.e., the ***Brady*** rule) requires disclosure. There is language in the cases indicating that "evidence that is presented ***at trial*** is ***not considered suppressed***, regardless of whether or not it had previously been disclosed during discovery." (***People* v. *Lucas*** (2014) 60 Cal.4th 153, 274; ***People* v. *Verdugo*** (2010) 50 Cal.4th 263, 281; ***People* v. *Morrison*** (2004) 34 Cal.4th 698, 715, emphasis added; **accord *People* v. *Mora and Rangel*** (2018) 5 Cal.5th 442, 467; **see also *United States* v. *Bencs*** (6th Cir.1994), 28 F.3d 555, 560-561 ["***Brady*** generally does not apply to delayed disclosure of exculpatory information, but only to a complete failure to disclose."].) Since suppression of the evidence is an element of a ***Brady*** violation, an argument can be made that so long as the evidence is disclosed before the end of trial – there can never be a violation of due process.

However, there is also language in the cases indicating that a violation of the ***Brady*** rule can occur if disclosure is made so belatedly that it is of no value to the defense and the delayed disclosure cannot be cured. (**See *People* v. *Mora and Rangel*** (2018) 5 Cal.5th 442, 467 [suggesting that "when considering whether delayed disclosure rather than 'total nondisclosure' constitutes a ***Brady*** violation, 'the applicable test is whether defense counsel was "prevented by the delay from using the disclosed material effectively in preparing and presenting the defendant's case."']; ***People* v. *Superior Court (Meraz)*** (2008) 163 Cal.App.4th 28, 51 ["Disclosure, to escape the ***Brady*** sanction, must be made at a time when the disclosure would be of value to the accused."]; ***United States* v. *Davenport*** (9th Cir.1985) 753 F.2d 1460, 1462 [same]; ***In re United States*** (2nd Cir. 2001) 267 F.3d 132, 142 [***Brady*** material must be provided "no later than the point at which a reasonable probability will exist that the outcome would have been different if an earlier disclosure had been made"]; ***Tennison* v. *City and County of San Francisco*** (9th Cir. 2009) 570 F.3d 1078, 1093 [***Brady*** violation may be cured "by belated disclosure of evidence, so long as the disclosure occurs 'at a time when disclosure would be of value to the accused'"].)

In ***People* v. *Mora and Rangel*** (2018) 5 Cal.5th 442, the California Supreme Court affirmed the principle that evidence is not suppressed if introduced at trial but then contrasted that principle with language from two cases. These two cases (***United States* v. *Devin*** (1st. Cir. 1990) 918 F.2d 280, 289

and ***United States* v. *Scarborough*** (10th Cir. 1997) 128 F.3d 1373, 1376) both assumed (but did not find) a ***Brady*** violation can still occur if the defense is provided the evidence so belatedly that is cannot use the material effectively in preparing and presenting the defendant's case. Thus, prosecutors should not assume that disclosure *at any time* during trial fulfills their constitutional obligation. Rather, the constitutional obligation to disclose likely *requires* disclosure in time for the defense to make effective use of the evidence at trial. (**See *People* v. *Lucas*** (2014) 60 Cal.4th 153, 273-275 [rejecting claim ***Brady*** duty violated where failure to disclose evidence impeaching prosecution witness did not occur until after witness testified at trial because delay in disclosure did not prejudice defense]; ***People* v. *Pinholster*** (1992) 1 Cal.4th 865, 941 [disclosure of three informant witnesses timely since defendant "had ample time to investigate [the witness's] statement before deciding to call him as a witness"]; ***People* v. *Wright*** (1985) 39 Cal.3d 576, 589-591 [no ***Brady*** violation where court permitted defense counsel to re-open case to present undisclosed material]; ***United States* v. *Houston*** (9th Cir. 2011) 648 F.3d 806, 813 ["no ***Brady*** violation so long as the exculpatory or impeaching evidence is disclosed at a time when it still has value" and finding, inter alia, notes disclosed during trial still had value]; ***United States* v. *Higgins*** (7th Cir.1996) 75 F.3d 332, 335 ["prosecutor must disclose information favorable to the defense, but disclosure need not precede trial . . . ***Brady*** thus is a disclosure rule, not a discovery rule. Disclosure even in mid-trial suffices if time remains for the defendant to make effective use of the exculpatory material"].)

The rule in California, however, is different when it comes to discovery that might impact the outcome of a *pre-trial* motion. In that context, it would have to be disclosed in time for the defense to make effective use of the information at the particular hearing. (**See e.g.**, ***Bridgeforth* v. *Superior Court*** (2013) 214 Cal.App.4th 1074, 1081 [prosecution has ***Brady***-based duty to disclose evidence that would be reasonably likely to have altered the magistrate's probable cause determination at preliminary hearing]; this outline, section I-5-B at pp. 59-60.)

B. Any duty to disclose *Brady* evidence before entry of guilty plea

i. Evidence Bearing on Impeachment and Affirmative Defenses

Although impeachment evidence may, in certain circumstances, be held to be ***Brady*** evidence (**see** this outline, section I-5-D, at p. 62), the United States Supreme Court has held that the federal Constitution does not require prosecutors to disclose material impeachment evidence or evidence bearing on an affirmative defense before entering a plea bargain with the defendant.

In ***United States* v. *Ruiz*** (2002) 536 U.S. 622, a defendant charged with possessing marijuana was offered a plea bargain whereby she would waive indictment, trial, and an appeal in exchange for a reduced sentence recommendation. The plea bargain acknowledged the Government's continuing duty to turn over information establishing the defendant's factual innocence but required that the defendant waive the right to receive impeachment information relating to any informants or other witnesses, as

well as to information supporting any affirmative defense that might be raised if the case went to trial. The defendant did not agree to the latter waiver and the prosecutors withdrew their bargaining offer but ultimately the defendant pled guilty in the absence of a plea agreement. At sentencing, the defendant asked the judge to grant her the same reduced sentence that the Government would have recommended had she accepted the plea bargain. The Government opposed her request, and the District Court denied it. The Ninth Circuit reversed the district court, holding that the Constitution requires prosecutors to make certain impeachment information available to a defendant before entering a plea agreement, that the Constitution prohibits defendants from waiving their right to the information, and that the plea agreement was unlawful because it insisted upon such a waiver. (**Id**. at pp. 625-626.)

The Supreme Court disagreed with the Ninth Circuit and held that the Constitution does not require the prosecutor to share ***all*** useful information with the defendant. (**Id.** at p. 629.) The High Court held the constitution does **not** require prosecutors to disclose material ***impeachment*** evidence or ***evidence bearing on an affirmative defense*** before entering a plea bargain with the defendant. (**Id**. at p. 633.)

The ***Ruiz*** court found that failure to provide material impeachment evidence or evidence bearing on an affirmative defense to a defendant before the entry of a plea bargain does not render a plea involuntary. (**Id**. at pp. 629-630.) The court noted, however, that any due process considerations regarding the possibility of innocent individual pleading guilty were minimized by the fact the challenged plea bargain specified the government would provide information establishing the factual innocence of the defendant and because there were other guilty plea safeguards required by the federal rules. (**Id**. at p. 631.)

Editor's note: Prosecutors need to be careful in relying too heavily on ***Ruiz*** – at least when the negotiated plea takes place within 30 days of trial. The statutory duty to provide information within 30 days of trial may exist regardless of ***Ruiz.*** (**See** this outline, section VII-4 at at pp. 235-238.)

ii. Material Favorable Evidence Bearing on Guilt or Innocence

The ***Ruiz*** court did not address whether a violation of ***Brady*** occurs when the prosecution suppresses material exculpatory evidence at the plea stage. (*Compare* ***Ruiz*** at p. 631 [indicating a distinction between impeachment information and evidence of actual innocence] with ***Ruiz*** at pp. 633-634 (Thomas, J., concurring) [asserting that "[t]he principle supporting ***Brady*** was avoidance of an unfair trial to the accused [and][t]hat concern is not implicated at the plea stage regardless"] (internal quotation marks and citation omitted)]; ***United States* v. *Moussaoui*** (4th Cir.2010) 591 F.3d 263, 286 ["To date, the Supreme Court has not addressed the question of whether the ***Brady*** [**v. *Maryland***] right to exculpatory information, in contrast to impeachment information, might be extended to the guilty plea context"].)

The California Supreme Court has so far declined to answer the question of "whether or to what extent the prosecution has a duty to disclose evidence favorable to a criminal defendant before the defendant

pleads guilty." (***In re Miranda*** (2008) 43 Cal.4th 541, 582 and fn. 6 [albeit noting courts in other jurisdictions are split on whether the failure to disclose material exculpatory evidence before entering into a plea entitles a defendant to withdraw his or her guilty plea].)

One post-***Ruiz*** published California appellate case to touch upon the issue is ***People* v. *Ramirez*** (2006) 141 Cal.App.4th 1501. In ***Ramirez***, the prosecution failed to turn over a supplemental police report containing a witness statement that another person committed the carjacking and that the defendant was innocent. The prosecution had ample time to furnish the report before the change of plea. The court held that the trial judge should have allowed the defendant to withdraw his guilty plea because "[the] supplemental report identified new defense witnesses, potentially reduced appellant's custody exposure, and provided possible defenses to several charges, thereby casting the case against him in an entirely different light." (**Id**. at p. 1508.) Moreover, the court found the defendant suffered prejudice by his ignorance because earlier discovery of the report would have affected his decision to enter a plea before the preliminary hearing. (**Ibid**.)

The ***Ramirez*** court did *not* decide whether there was a ***Brady*** violation, choosing to decide the case on the ground that the trial court simply abused its discretion in denying the motion to withdraw. (**Id**. at p. 1503, fn. 3.) The court did note, however, that even if there had been a ***Brady*** violation, dismissal would be unwarranted because any prejudice would be cured by allowing the defendant to withdraw his plea and proceed to preliminary hearing and trial. (**Ibid** [and noting dismissal is an appropriate sanction only where less drastic alternatives are available and the prosecution acts in bad faith].)

Several federal cases have indicated or held that the failure to disclose ***Brady*** evidence can render a guilty plea involuntary. (**See *Sanchez* v. *United States*** (9th Cir 1995) 50 F.3d 1448, 1453 [noting defendant can argue that his guilty plea was not voluntary and intelligent because it was made in the absence of withheld ***Brady*** material.]; ***Fisher* v. *Angelozzi*** (Or. Ct. App. 2017) 285 Or.App. 541, fn. 3 [noting "the Second, Sixth, Seventh, Eighth, and Tenth Circuits have all held that a ***Brady*** violation involving exculpatory evidence can justify allowing a defendant to withdraw a guilty plea."].) In ***McCann* v. *Mangialardi*** (7th Cir. 2003) 337 F.3d 782, the court did not have to decide the issue but stated "it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea." (**Id**. at p. 788; **see also *Ferrara* v. *United States*** (D. Mass 2005) 384 F.Supp.2d 384, 421.)

Editor's note: Because there is a colorable argument that failure to disclose evidence establishing factual innocence before a guilty plea is a ***Brady*** violation and since failure to do so will definitely provide grounds for withdrawal of the plea, it is **respectfully recommended that such material be provided before the plea**. At a minimum, it is recommended that prosecutors use the following test in deciding whether to disclose information before entry of the plea: whether disclosure "would have materially affected a defendant's decision to plead guilty rather than to proceed to trial[.]" (***People* v. *Martin*** (N.Y. App. Div. 1998) 240 A.D.2d 5, 9.)

C. Any Duty to Disclose *Brady* Evidence Before PX?

In light of the general rule that there is no violation of due process so long as ***Brady*** evidence is provided in time for the defense to make effective use of the evidence at trial (**see** this outline, section I-13-A at p. 149), one might think that the federal Constitution would not require the disclosure of ***Brady*** evidence before preliminary examination. (**See e.g., *Brown* v. *Chiappetta*** (D. Minn. 2011) 806 F.Supp.2d 1108, 1116 [***Brady*** does not apply to judicial probable cause determination].) However, two California appellate court decisions have held that due process demands the disclosure of information that could reasonably alter the magistrate's probable cause determination regarding any charge or allegation. (**See *People* v. *Gutierrez*** (2013) 214 Cal.App.4th 343; ***Bridgeforth* v. *Superior Court*** (2013) 214 Cal.App.4th 1074.)

Although these cases have referred to the obligation to disclose information before trial as a "***Brady***" obligation, it is more accurately characterized as a due process obligation. The semantical distinction is important because evidence that may be material at trial is not necessarily material at preliminary examination.

In ***People* v. *Gutierrez*** (2013) 214 Cal.App.4th 343, the court held the prosecution's ***Brady*** obligation extends to the preliminary hearing stage of criminal proceeding. (**Id**. at p. 349.) It also found that failure to provide ***Brady*** evidence at the preliminary examination constituted a deprivation of "substantial right." (**Id**. at p. 356.)

The ***Gutierrez*** court did not expressly state that the test for whether a failure to disclose evidence at the preliminary examination would violate due process was whether there was a reasonable probability of a different result (i.e., no holding order). The ***Gutierrez*** court did, however, rely on ***Merrill* v. *Superior Court*** (1994) 27 Cal.App.4th 1586, which held that whether the defendant was deprived of a substantial right turned on the impact of nondisclosure on the determination of probable cause. (**Id**. at p. 1596.)

The ***Gutierrez*** court did not decide whether defendants have a due process right to discovery before preliminary hearing under the ***California*** Constitution. (**Id**. at p. 355, fn. 5.) Nor did the ***Gutierrez*** court decide whether the prosecution was required to disclose evidence at the preliminary examination if the evidence was listed in Penal Code section 1054.1 as an item the prosecution had to disclose - but which was not otherwise material.

Editor's note: Some defense counsel cite to ***Gutierrez*** not only for the proposition that was actually decided (i.e., the applicability of ***Brady*** at preliminary examination), but *also* as standing for the proposition that the undisclosed evidence in the case (i.e., evidence undermining the credibility of the witnesses whose statements were Prop 115'd at the preliminary examination and which were derived from unrelated juvenile files and past cases that were never charged) was in the constructive possession of the prosecution and was material. However, ***Gutierrez*** does **not** stand for either proposition because the People appealed **only** on the ground that there was no right to ***Brady*** discovery before preliminary examination (i.e., whether the information itself was material and/or in the possession of the prosecution was not challenged on appeal). (**Id**. at p. 349, fn. 2.)

In ***Bridgeforth* v. *Superior Court*** (2013) 214 Cal.App.4th 1074, the court held that that a defendant has a due process right under ***both*** "the California Constitution and the United States Constitution to disclosure prior to the preliminary hearing of evidence that is both favorable and material, in that its disclosure creates a reasonable probability of a different outcome at the preliminary hearing." (**Id**. at p. 1081 [albeit finding no due process violation because the undisclosed information was not material].)

The ***Bridgeforth*** court adopted many of the same arguments accepted by the ***Gutierrez*** court and, like ***Gutierrez***, rejected the idea that "***Brady***" is only a trial right. (***Bridgeforth*** at pp. 1083-1087.) However, the ***Bridgeforth*** opinion (much more so than the ***Gutierrez*** opinion) clarified that it was **only** holding that the evidence that must be disclosed before preliminary examination is that which would be reasonably probable to change the magistrate's mind about whether to find probable cause - not evidence that would be reasonably probable to result in different verdict at trial. (***Bridgeforth*** at p. 1087.) The former standard is obviously much more difficult for the defense to meet since evidence that would prevent probable cause from arising must be significantly more damaging than evidence that would prevent a reasonable doubt from arising. (**See *People* v. *Sisala*** [unreported] 2018 WL 1358057, at *3 [failure to produce body warrant camera footage at preliminary hearing was not ***Brady*** violation because the standard at preliminary hearing "is a low bar" and there was no reasonable probability that the "footage would have altered the magistrate's probable cause determination"].)

Petitions for review in both ***Bridgeforth*** and ***Gutierrez*** were denied by the California Supreme Court and a petition for review of ***Gutierrez*** in the United States Supreme Court was similarly denied.
In an ***unreported*** appellate decision (that preceded ***Gutierrez*** and ***Bridgeforth***), the court held that the ***Brady*** information should be provided in time to allow defense counsel adequate preparation for the preliminary hearing. (**See *Black* v. *Superior Court*** (unreported) 2010 WL 2053338, *5.)

Editor's note: Prosecutorial discovery obligations under the California State Constitution are discussed in this outline, section II at p. 162.) Statutory discovery obligations under Penal Code section 1054 et seq. are discussed in this outline, section III at pp. 164-208.

D. Is There Any Duty to Disclose *Brady* Evidence After Trial?

In ***People* v. *Garcia*** (1993) 17 Cal.App.4th 1169, the court held that a CHP accident reconstruction expert's previous use of an erroneous methodology in speed calculations was ***Brady*** material. The court found that once the use of the wrongful methodology was discovered, the district attorney had a ***post***-trial ***Brady*** duty to inform the defendant of the expert's prior use of the wrong methodology although it was not clear that the expert had used the wrong methodology in defendant's case. (**Id.** at pp. 1180-1183; **see also *Tennison* v. *City and County of San Francisco*** (9th Cir. 2009) 570 F.3d 1078 1094 [indicating ***Brady*** duty applies to evidence discovered post-trial - at least where post-trial proceedings are on-going and listing cases in support of this principle].)

However, in ***Dist. Attorney's Office for the Third Judicial Dist.* v. *Osborne*** (2009) 557 U.S. 52, the Supreme Court **overruled** a Ninth Circuit case which had held the ***Brady*** rule applies post-conviction in habeas proceedings, section 1983 requests for testing of evidence, and to "freestanding claims of actual innocence." The High Court affirmed that ***Brady*** is a pre-conviction trial right and stated that "***Brady*** is the wrong framework" to apply in assessing a convicted defendant's right to access exculpatory evidence. (**Id.** at p. 69; **see also *Grayson* v. *King*** (11th Cir. 2006) 460 F.3d 1328, 1337 [it is the suppression of evidence before and during trial that carries ***Brady***'s constitutional implications, there is no ongoing due process obligation to inform the defense of after-acquired evidence that might cast doubt on a conviction]; ***Harvey* v. *Horan*** (4th Cir.2002) 278 F.3d 370, 375 [same]; **but see *People* v. *Davis*** (2014) 226 Cal.App.4th 1353, 1366 ["the People's obligations under ***Brady*** are ongoing, even postjudgment"].)

Keep in mind though that while there is no *constitutional* post-verdict discovery duty, "after a conviction the prosecutor ... is bound by the ethics of his office to inform the appropriate authority of ... information that casts doubt upon the correctness of the conviction," (***People* v. *Curl*** (2006) 140 Cal.App.4th 310, 318, citing to ***Imbler* v. *Pachtman*** (1976) 424 U.S. 409, 427, fn. 25; ***Grayson* v. *King*** (11th Cir. 2006) 460 F.3d 1328, 1337 ["the prosecution maintains an ongoing ethical obligation to inform the defense of" of after acquired evidence that might cast doubt on a conviction].) Moreover, even when there was no ***Brady*** violation at trial (e.g., because there was no suppression of any evidence in the possession of the prosecution team) a new trial may be granted "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." (**See** Pen. Code, § 1181 (8).)

> **Editor's note**: The prosecutor's post-trial ethical discovery obligations are discussed in greater depth in this outline, section XIV at pp. 296--305.

14. Does the obligation to provide *Brady* material apply in juvenile proceedings?

"The ***Brady*** disclosure requirement applies to juvenile delinquency proceedings as well as criminal proceedings." (**See *J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1334.)

15. What is the obligation of the police or entities assisting the prosecution to provide *Brady* material?

There are numerous cases holding the police have a ***Brady*** obligation to disclose exculpatory information *to the prosecutor* or, at least, that the police are subject to civil liability for failing to do so even if the violation is not technically a "***Brady***" violation. (**See *Mellen* v. *Winn*** (9th Cir. 2018) 900 F.3d 1085, 1096 [pet. for cert. docketed] [law in 1997-1998 clearly established "police officers investigating a criminal case were required to disclose material, impeachment evidence to the defense"]; ***Carrillo* v. *County of Los Angeles*** (9th Cir. 2015) 798 F.3d 1210, 1219 [finding as far back as 1984 "it was clearly established that police officers were bound to disclose material, exculpatory evidence"]; ***Bermudez* v. *City of New York*** (2d Cir. 2015) 790 F.3d 368, 376, fn. 4 ["Police officers can be held liable for ***Brady*** due process violations under § 1983 if they withhold exculpatory evidence from prosecutors"]; ***Beaman* v. *Freesmeyer*** (7th Cir. 2015) 776 F.3d 500, 509 ["the idea that police officers must turn over materially exculpatory evidence has been on the books since 1963"]; ***Owens* v. *Baltimore City State's Attorneys Office*** (4th Cir. 2014) 767 F.3d 379, 402 ["a police officer violates clearly established constitutional law when he suppresses material exculpatory evidence in bad faith"]; ***D'Ambrosio* v. *Marino*** (6th Cir. 2014) 747 F.3d 378, 389 ["the role that a police officer plays in carrying out the prosecution's ***Brady*** obligations is distinct from that of a prosecutor.... ***Brady*** obliges a police officer to disclose material exculpatory evidence only to the prosecutor rather than directly to the defense."]; ***Gantt* v. *City of Los Angeles*** (9th Cir. 2013) 717 F.3d 702, 709 ["We have held in no uncertain terms that ***Brady***'s requirement to disclose material exculpatory and impeachment evidence to the defense applies equally to prosecutors and police officers"]; ***Drumgold* v. *Callahan*** (1st Cir.2013) 707 F.3d 28, 38 ["law enforcement officers have a correlative duty to turn over to the prosecutor any material evidence that is favorable to a defendant"]; ***Smith* v. *Almada*** (9th Cir. 2011) 640 F.3d 931, 939 ["***Brady*** requires ***both*** prosecutors and police investigators to disclose exculpatory evidence to criminal defendants" emphasis added]; ***Elkins* v. *Summit County, Ohio*** (6th Cir. 2010) 615 F.3d 671, 676-677; ***Moldowan* v. *City of Warren*** (6th Cir. 2009) 578 F.3d 351, 381-383 [listing cases]; ***White* v. *McKinley*** (8th Cir. 2008) 519 F.3d 806, 814["***Brady***'s protections also extend to actions of other law enforcement officers such as investigating officers" but bad faith must be shown to support a civil suit]; ***Yarris* v. *County of Delaware*** (3rd. Cir. 2006) 465 F.3d 129, 141 ["the ***Brady*** duty to disclose exculpatory evidence to the defendant applies ***only*** to a prosecutor" albeit finding officers may be liable under § 1983 for failing to disclose exculpatory information to the prosecutor, emphasis added]; ***Gibson* v. *Superintendent of N.J. Dep't of Law & Public Safety-Div. of***

State Police (3d Cir.2005) 411 F.3d 427, 442-443 [same]; ***Newsome* v. *McCabe*** (7th Cir.2001) 260 F.3d 824, 825 ["It is possible for police no less than prosecutors to violate the due process clause by withholding exculpatory information"]; ***Brady* v. *Dill*** (1st Cir. 1999) 187 F.3d 104, 114 ["a police officer sometimes may be liable if he fails to apprise the prosecutor or a judicial officer of known exculpatory information"]; ***Walker* v. *City of New York*** (2d Cir. 1992) 974 F.2d 293, 299 [listing cases]; ***Mayes* v. *City of Hammond*** (N.D. Ind. 2006) 42 F.Supp.2d 587, 625 ["When a police officer prevents the prosecutor from complying with his duty to produce exculpatory or impeaching evidence, by failing to disclose such evidence to the prosecutor, then the officer violates his obligations under ***Brady***" and is subject to liability a violation of the Due Process clause]; **but see *Jean* v. *Collins*** (4th Cir. 2000) 221 F.3d 656, 660 (Wilkinson, C.J., concurring), ["to speak of the duty binding police officers as a ***Brady*** duty is simply incorrect. The Supreme Court has always defined the ***Brady*** duty as one that rests with the prosecution."].)

Even criminalists or other public employees (or their supervisors) who fail to disclose material exculpatory or impeaching information have a due process obligation to disclose the information. (**See *Brown* v. *Miller*** (5th Cir.2008) 519 F.3d 231, 238 [allowing § 1983 claim against state crime lab technician for suppressing exculpatory blood results]; ***Pierce* v. *Gilchrist*** (10th Cir. 2004) 359 F.3d 1279, 1298-1299 [police department forensic chemist was not entitled to qualified immunity on claim under § 1983 for constitutional tort of malicious prosecution based on her alleged withholding of exculpatory evidence and fabrication of inculpatory evidence]; ***Gregory* v. *City of Louisville*** (6th Cir. 2006) 444 F.3d 725, 744 [holding that an examiner in the state police crime laboratory who deliberately withheld exculpatory evidence violated a criminal defendants' constitutional rights]; ***Jones* v. *Han*** (D. Mass. 2014) 993 F.Supp.2d 57, 65 [supervisors who failed to disclose material exculpatory and impeaching information about one of their employees who testified in a defendant's case subject to civil liability for such failure to disclose]; ***Penate* v. *Kaczmarek*** (D. Mass) 2019 WL 319586, at *8 [summarizing cases]; ***Bibbins* v. *City of Baton Rouge*** (M.D.La. 2007) 489 F.Supp.2d 562, 573 [denying summary judgment on a ***Brady*** claim against a state-employed fingerprint analyst].)

There are some differences that can arise in assessing the respective discovery duties of prosecutors and law enforcement under due process. "The elements of a civil ***Brady/Giglio*** claim against a police officer are: (1) the officer suppressed evidence that was favorable to the accused from the prosecutor and the defense, (2) the suppression harmed the accused, and (3) the officer 'acted with deliberate indifference to or reckless disregard for an accused's rights or for the truth in withholding evidence from prosecutors.'" (***Mellen* v. *Winn*** (9th Cir. 2018) 900 F.3d 1085, 1096 [pet for rev. pending].) Circuit courts have split regarding whether a police officer's failure to disclose exculpatory evidence establishes a § 1983 claim in the absence of bad faith although the majority hold some form of bad faith is required. (*Compare* ***Helmig* v. *Fowler*** (8th Cir. 2016) 828 F.3d 755, 760 [a showing of bad faith is necessary] ***Owens* v. *Baltimore City State's Attorneys Office*** (4th Cir.2014) 767 F.3d 379, 402 ["To make

out a claim that the Officers violated his constitutional rights by suppressing exculpatory evidence, Owens must allege, and ultimately prove, that (1) the evidence at issue was favorable to him; (2) the Officers suppressed the evidence in bad faith; and (3) prejudice ensued."]; ***Porter* v. *White*** (11th Cir.2007) 483 F.3d 1294, 1308 ["hold[ing] that the no-fault standard of care ***Brady*** imposes on prosecutors in the criminal or habeas context has no place in a § 1983 damages action against a law enforcement official in which the plaintiff alleges a violation of due process"); ***Villasana* v. *Wilhoit*** (8th Cir.2004) 368 F.3d 976, 980 ["[T]he recovery of § 1983 damages requires proof that a law enforcement officer other than the prosecutor intended to deprive the defendant of a fair trial."] *with* ***Steidl* v. *Fermon*** (7th Cir. 2007) 494 F.3d 623, 631-632 [bad faith is not required] *with* ***Tennison* v. *City and County of San Francisco*** (9th Cir. 2009) 570 F.3d 1078, 1089-1090 [while proof of bad faith is not necessary, an officer's good faith in failing to disclose is not a defense if the officer acted with "deliberate indifference to or reckless disregard for an accused's rights or for the truth in withholding evidence from prosecutors" and merely placing exculpatory evidence into a homicide file without informing the prosecutor of the existence of the evidence is insufficient to meet the police obligation even if prosecutors have access to the file].) Differences in how the ***Brady*** duty may be interpreted in the context of prosecutorial obligations versus police obligations can also arise based on the fact police may not have as much knowledge about the significance of potential information as a prosecutor– "a police investigator (through no fault of his or her own) may not correctly appreciate the scope of the materials that must be turned over to the defense under ***Brady***. This is especially true as to impeachment evidence, "given the random way in which such information may, or may not, help a particular defendant." (***Mellen* v. *City of Los Angeles*** (C.D. Cal., Dec. 22, 2016) 2016 WL 7638207, at *18 [reversed and remanded by ***Mellen* v. *Winn*** (9th Cir. 2018) 900 F.3d 1085].)

16. Are there different standards for determining whether due process has been violated by government failure to disclose favorable material evidence than when determining whether due process has been violated by government failure to prevent the use of false evidence?

In a series of cases beginning with ***Mooney* v. *Holohan*** (1935) 294 U.S. 103, the United States Supreme Court began to develop the principle that it violates due process for the government to convict a defendant based on testimony that the government knows or should know is false. (**See *Mooney* v. *Holohan*** (1935) 294 U.S. 103, 110-112; ***Pyle* v. *State of Kansas*** (1942) 317 U.S. 213, 216; ***Napue* v. *Illinois*** (1959) 360 U.S. 264, 269.)

In many cases, the knowing use of false testimony by the government (i.e., the prosecution team) will be intertwined with suppression of favorable evidence because the government can't know that testimony is false unless it knows why it is false; and if government knows why it is false, it is likely the government knows something that the defense does not know about. (**See *Jackson* v. *Brown*** (9th Cir. 2008) 513 F.3d 1057, 1076, fn. 12 [every ***Napue*** claim has an implicit accompanying ***Brady*** claim: Whenever the

prosecution knowingly uses false testimony, it has a ***Brady*** obligation to disclose that witness's perjury to the defense."].)

Indeed, in the case of ***Mooney* v. *Holohan*** (1935) 294 U.S. 103 itself, the High Court had to address a claim by the defendant that he was being confined without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States because "the sole basis of his conviction was perjured testimony, which was knowingly used by the prosecuting authorities in order to obtain that conviction, ***and*** also that these authorities deliberately suppressed evidence which would have impeached and refuted the testimony thus given against him." (**Id.** at p. 110.)

Nevertheless, while either form of due process violation will deprive a defendant of a fair trial and both require a showing of "materiality," most courts treat the two forms of due process violations (suppression of favorable material evidence versus elicitation of material false testimony) as related but distinct violations subject to different tests. (**See *United States* v. *Butler*** (D.D.C. 2017) 278 F.Supp.3d 461, 480; ***State* v. *Lankford*** (Idaho 2017) 399 P.3d 804, 832.)

When the claim is that a prosecutor either knowingly presented false evidence or failed to correct the record to reflect the true facts when unsolicited false evidence is introduced at trial, it is considered a ***Napue*** claim. A ***Napue*** claim will be successful when "(1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) the false testimony was material." (***Reis-Campos* v. *Biter*** (9th Cir. 2016) 832 F.3d 968, 976; ***Jackson* v. *Brown*** (9th Cir. 2008) 513 F.3d 1057, 1071–1072; ***Hayes* v. *Brown*** (9th Cir. 2005) 399 F.3d 972, 984.) Under ***Napue***, the false testimony will be deemed material whenever there is "any ***reasonable likelihood*** that the false testimony ***could*** have affected the judgment of the jury." (***Reis-Campos* v. *Biter*** (9th Cir. 2016) 832 F.3d 968, 976; ***United States* v. *Butler*** (D.D.C. 2017) 278 F.Supp.3d 461, 480, fn. 10; ***State* v. *Lankford*** (2017) 162 Idaho 477, 506, emphasis added.)

> **Editor's note**: ***Napue*** error is also sometimes referred to as ***Giglio*** error. (**See *United States* v. *Stein*** (11th Cir. 2017) 846 F.3d 1135, 1147.)

In contrast, when the claim is that the prosecution suppressed evidence favorable to an accused in violation of due process under ***Brady***, evidence will be deemed "material" when there "is a ***reasonable probability*** that, had the evidence been disclosed, the result of the proceeding ***would*** have been different." (***United States* v. *Butler*** (D.D.C. 2017) 278 F.Supp.3d 461, 480, fn. 10 [citing to the most recent decision from the High Court - ***Turner* v. *United States*** (2017) 137 S.Ct. 1885, 1893]; ***State* v. *Lankford*** (Idaho 2017) 399 P.3d 804, 830; **see also *Bailey* v. *Rae*** (9th Cir. 2003) 339 F.3d 1107, 1116, fn. 6 ["Evidence is not 'material' unless it is 'prejudicial,' and not 'prejudicial' unless it is 'material.'"].)

Most courts have also viewed the test for materiality under ***Napue*** as a more lenient test than the test for materiality under ***Brady***, i.e., it is easier for a defendant to establish materiality under the former than it is under the latter. (**See e.g.**, ***Reis-Campos* v. *Biter*** (9th Cir. 2016) 832 F.3d 968, 976 ["The ***Napue*** materiality standard is less demanding than ***Brady***"]; ***Jackson* v. *Brown*** (9th Cir. 2008) 513 F.3d 1057, 1076 [same]; ***Hayes* v. *Brown*** (9th Cir. 2005) 399 F.3d 972, 985 [same]; ***Perkins* v. *Russo*** (1st Cir. 2009) 586 F.3d 115, 119 [a "prosecutor's knowing inducement of perjury is treated more harshly than a failure, which could be inadvertent, to disclose exculpatory evidence"]; ***United States* v. *Stein*** (11th Cir. 2017) 846 F.3d 1135, 1147 [noting "***Giglio*** error, a species of ***Brady*** error, occurs when the undisclosed evidence demonstrates that the prosecution's case included perjured testimony and that the prosecution knew, or should have known, of the perjury" and stating "***Giglio***'s materiality standard is more defense-friendly than ***Brady***'s."]; ***Guzman* v. *Sec'y, Dep't of Corr.***, (11th Cir. 2011)663 F.3d 1336, 1348 [similar]; ***Mastracchio* v. *Vose*** (1st Cir.2001) 274 F.3d 590, 601 [a "different, more defendant-friendly standard of materiality attaches when a prosecutor has knowingly used perjured testimony or, equivalently, has knowingly failed to disclose the information that would give the lie to perjurious testimony" than when *Brady* error is alleged]; ***State* v. *Jordan*** (Conn. 2014) 102 A.3d 1, 10 ["When, however, a prosecutor obtains a conviction with evidence that he or she knows or should know to be false, the materiality standard is significantly more favorable to the defendant" than the ***Brady*** materiality standard]; ***State* v. *Widmer*** (unreported) 2013 WL 142041, *7 ["A different and more defense-friendly materiality standard applies under ***Napue***" than under ***Brady***]; **see also *Conyers* v. *State*** (Md. 2002) 790 A.2d 15, 31 [finding standard for measuring materiality is "strictest" when the undisclosed evidence involves perjured testimony the prosecution knew, or should have known, about]; **cf.**, ***Morris* v. *Ylst*** (9th Cir. 2006) 447 F.3d 735, 745 [equating the test for whether ***Mooney-Napue*** was *harmful*, i.e., resulted in prejudice, to the test for materiality in a ***Brady*** claim."].)

Past decisions of the High Court have been a little lazy in keeping the two separate tests of materiality from leaching into one another. For example, in ***Giglio* v. *United States*** (1972) 405 U.S. 150, which involved a witness whose false statement about not being given any promises went uncorrected at trial because one prosecutor failed to pass on to the trial prosecutor that the witness had been promised he would not be prosecuted if he cooperated with the Government, the High Court mushed together language relating to "materiality" from both ***Brady*** and ***Napue***: "A finding of materiality of the evidence is required under ***Brady***, supra, at 87, 83 S.Ct., at 1196, 10 L.Ed.2d 215. A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . .' ***Napue***, supra, at 271, 79 S.Ct., at 1178." (***Giglio*** at p. 154.)

In ***United States* v. *Bagley*** (1985) 473 U.S. 667, a case in which the High Court clearly drew a distinction between the standard of materiality under ***Brady*** ("The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different") and the standard of materiality applicable to the prosecutor's knowing use

of perjured testimony ("a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury"), the High Court also stated "suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial" and "the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." (**Id**. at p. 678, 682, 684; **see also *Smith* v. *Cain*** (2012) 565 U.S. 73, 75-76 [reiterating standard that "evidence is 'material' within the meaning of ***Brady*** when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different" but also stating a "reasonable probability" means "only that the likelihood of a different result is great enough to 'undermine[ ] confidence in the outcome of the trial.']).

The case of ***Wearry* v. *Cain*** (2016) 136 S.Ct. 1002 did not help clear up the matter by stating (with alternate citations and sub-quotation marks omitted): "Evidence qualifies as material when there is any reasonable likelihood it could have affected the judgment of the jury. ***Giglio***, supra, at 154 (quoting ***Napue v. Illinois***, 360 U.S. 264, 271). To prevail on his ***Brady*** claim, Wearry need not show that he "more likely than not" would have been acquitted had the new evidence been admitted. ***Smith* v. *Cain***, 132 S.Ct. 627, 629–631. He must show only that the new evidence is sufficient to "undermine confidence" in the verdict." (***Wearry*** at p. 1006.)

Even though the court in ***Wearry*** was addressing a claim of a ***Brady*** violation, the definition provided in the first sentence of the quote imports language from ***Giglio* v. *United States*** (1972) 405 U.S. 150 at p. 154, which in turn was quoting from ***Napue* v. *Illinois*** (1959) 360 U.S. 264, 271. That language from ***Giglio*** and ***Napue*** reflected the standard for determining whether a new trial "is required if 'the *false testimony* could . . . in any reasonable likelihood have affected the judgment of the jury." (***Giglio*** at p. 154, emphasis added.) However, the latest case from the United States Supreme Court has **affirmed the traditional standard**: "[E]vidence is 'material' within the meaning of ***Brady*** when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." (***Turner* v. *United States*** (2017) 137 S.Ct. 1885, 1893.)

There ***are*** some good reasons for drawing a distinction in the standards used. For example, the easier standard for reversal for a ***Napue*** violation may be more appropriate to use if, as some courts have held, knowingly false or misleading testimony by a law enforcement officer cannot be imputed to the prosecution in the same way that knowledge of law enforcement officers is imputed to prosecutors for ***Brady*** purposes. (**See *Smith* v. *Sec'y of N.M. Dep't of Corr.,*** (10th Cir. 1995) 50 F.3d 801, 830–831; ***Koch* v. *Puckett*** (5th Cir. 1990) 907 F.2d 524, 531.)

Editor's note: As pointed in ***Reis-Campos* v. *Biter* (**9th Cir. 2016) 832 F.3d 968, the federal courts are split on whether knowingly false or misleading testimony by a law enforcement officer may be imputed to the prosecution" for purposes of determining whether there has been a ***Napue*** violation. (**Id**. at p. 977, fn. 8 [and noting the Ninth Circuit has not yet addressed the question].)

Moreover, as discussed by Justice Hoffstadt in his supplement to the Fifth Edition of California Criminal Discovery, "due process is violated under ***Napue*** even if the defendant also knows that the testimony is false [citing to ***United States* v. *Alli*** (9th Cir. 2003) 344 F.3d 1002, 1007 and ***Soto* v. *Ryan*** (9th Cir. 2014) 760 F.3d 947, 968], whereas ***Brady*** is not violated if the defendant knows of the undisclosed evidence." (**See** Hoffstadt, California Criminal Discovery (5th ed. [2018 Cumulative Supplement]) § 4.31 at p. 32, modifying p. 147.)

It is possible that the some of the difference in the language used can be attributed to the fact that sometimes the question of whether evidence is material is viewed as a distinct question from whether a case should be reversed. But, in any event, the distinction between the various formulations of the test, under either ***Napue*** or ***Brady*** have little practical consequences and courts are likely to pick and choose which language they want to use in accordance with whether they want to reverse the case or not. (**See *Strickler* v. *Greene*** (1999) 527 U.S. 263, 300 (concurring and dissenting opinion of Justice Souter) [noting that "while 'reasonable possibility' or 'reasonable likelihood,' . . . and 'reasonable probability' express distinct levels of confidence concerning the hypothetical effects of errors on decisionmakers' reasoning, the differences among the standards are slight."].)

Editor's note: For readers interested in learning more about difference (such as it may exist) in the standards used when determining ***Brady*** versus ***Napue*** error, see Justice Souter's concurring and dissenting opinion in ***Strickler* v. *Greene*** (1999) 527 U.S. 263, 297-301.

II. THE PROSECUTOR'S *STATE* DUE PROCESS DISCOVERY OBLIGATIONS

In relevant part, section 7 of article I of the California Constitution provides: "(a) A person may not be deprived of life, liberty, or property without due process of law . . ." (Cal. Const., art I, § 7.)

The due process clause of the state constitution can theoretically be interpreted differently than the due process clause of the federal constitution. (**See** Cal. Const., art. I, § 24 ["[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution"]; ***People* v. *Ramos*** (1984) 37 Cal.3d 136, 152 ["state courts in interpreting provisions of the state Constitution are not necessarily concluded by an interpretation placed on similar provisions in the federal Constitution"]; ***People* v. *Chavez*** (1980) 26 Cal.3d 334, 351-352 [same]; ***Raven* v. *Deukmejian*** (1990) 52 Cal.3d 336, 355 [rejecting, as unconstitutional, an amendment to article 1, section 24 contained in Proposition 115 that would have eliminated the ability of courts to construe the California Constitution to provide greater rights to criminal defendants than those afforded by the Constitution of the United States].)

However, whether the California state due process clause, *in fact*, imposes discovery obligations any broader than the federal due process clause has never been addressed by the California Supreme Court.

A few California appellate courts, however, have indicated that it may require discovery not required by the federal constitution.

In ***People* v. *Superior Court (Moucharab)*** (2000) 78 Cal.App.4th 403, the concurring opinion held that the California Constitution's guarantee of due process could not be vindicated without permitting defendants discovery of transcripts of the nontestimonial portions of grand jury proceedings. The opinion recognized that Penal Code section 1054(e) precludes discovery except where expressly required by statute or mandated by the United States Constitution, but concluded that section 1054(e), "as a mere statute, has no power to preclude discovery where it is required to vindicate rights guaranteed by the California Constitution." (**Id**. at p. 444.)

In ***Magallan* v. *Superior Court*** (2011) 192 Cal.App.4th 1444, the court held a trial court was not precluded from ordering discovery that related to a Penal Code section 1538.5 motion occurring before trial under one of two possible theories: (i) that section 1538.5, (f) was an 'express' statutory provision which entitled a defendant to the discovery necessary to support the suppression motion that it authorizes to be brought in conjunction with the preliminary examination *and* (ii) "a defendant's right to due process under the *California Constitution* takes precedence over Chapter 10 and entitles the defense to the discovery necessary to support a Penal Code section 1538.5, subdivision (f) motion." (**Id**. at p. 1462, emphasis added.)

In ***Bridgeforth* v. *Superior Court*** (2013) 214 Cal.App.4th 1074, the court held that "[a] defendant has a due process right *under the California Constitution* and the United States Constitution to disclosure prior to the preliminary hearing of evidence that is both favorable and material, in that its disclosure creates a reasonable probability of a different outcome at the preliminary hearing." (**Id**. at p. 1081 emphasis added [and noting the "right is independent of, and thus not impaired or affected by the criminal discovery statutes"].)

Editor's note: The notion of a broad state constitutional due process right providing for discovery orders under the theory discovery would be helpful to vindicate a defendant's implied statutory right seems inconsistent with spirit, if not the letter, of the California Supreme Court's decision in ***Verdin* v. *Superior Court*** (2008) 43 Cal.4th 1096, wherein the court frowned upon the creation of new rules untethered to any statute or constitutional mandate and stated, "Only when interpreting a statute or where a rule of discovery is "mandated by the Constitution of the United States" (§ 1054, subd. (e)) does this court have a role." (**Id**. at pp. 1107-1108.)

III. THE PROSECUTOR'S *STATUTORY* DISCOVERY OBLIGATIONS

1. In General

In 1990, the voters of the State of California passed the "Crime Victims Justice Reform Act" [Proposition 115]. This initiative enacted a set of laws governing discovery in criminal cases. These laws, sometimes referred to as the Criminal Discovery Statute (hereinafter "CDS") were codified in sections 1054-1054.7 of the Penal Code, i.e., Chapter 10 of Title 6 of Part II of the California Penal Code. (**See *Jones* v. *Superior Court*** (2004) 115 Cal.App.4th 48, 50.) However, the initiative also amended the California Constitution to provide for reciprocal discovery. (**See** Cal. Const. Article I, section 30(c).)

A. CDS is the Exclusive Means to *Compel* Discovery *Between the Parties*

Section 1054.5, subdivision (a) of Chapter 10 states:

"No ***order requiring*** discovery shall be made in criminal cases except as provided in this chapter. This chapter shall be the only means by which the defendant may ***compel*** the disclosure or production of information from prosecuting attorneys, law enforcement agencies which investigated or prepared the case against the defendant, or any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties." (Emphasis added; **see *In re Steele*** (2004) 32 Cal.4th 682, 696; ***People* v. *Superior Court (Dominguez)*** (2018) 28 Cal.App.5th 223, 233.)

Section 1054, subdivision (e) further provides that "no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States." (Pen. Code, § 1054(e).) The California Supreme Court has repeatedly held that, in criminal proceedings, "all court-ordered discovery is governed exclusively by-and is barred except as provided by-the discovery chapter newly enacted by Proposition 115." (***People* v. *Thompson*** (2016) 1 Cal.5th 1043, 1093; ***Verdin* v. *Superior Court*** (2008) 43 Cal.4th 1096, 1103; ***In re Littlefield*** (1993) 5 Cal.4th 122, 129; **accord *Rubio* v. *Superior Court*** (2016) 244 Cal.App.4th 459, 478.)

Courts are precluded from "broadening the scope of discovery beyond that provided in the chapter or other express statutory provisions, or as mandated by the federal Constitution." (***People* v. *Tillis*** (1998) 18 Cal.4th 284, 294; **see also *Verdin* v. *Superior Court*** (2008) 43 Cal.4th 1096, 1116; ***People* v. *Landers*** (2019) 31 Cal.App.5th 288 [2019 WL 181485, *8]; ***Jones* v. *Superior Court*** (2004) 115 Cal.App.4th 48, 56-57; ***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, 1312-1313; ***Hines* v. *Superior Court*** (1993) 20 Cal.App.4th 1818, 1823; ***Sandeffer* v. *Superior Court*** (1993) 18 Cal.App.4th 672, 679; ***People* v. *Hayes*** (1992) 3 Cal.App.4th 1238, 1244.)

However, it is well-established that "discovery in criminal cases is sometimes compelled by constitutional guarantees to ensure an accused receives a fair trial." (***People* v. *Thompson*** (2016) 1 Cal.5th 1043, 1095 [citing examples of cases where discovery was held compelled by the *federal* constitution].) And, in such cases, the California Supreme Court has "reaffirmed that a criminal defendant's right to discovery is based on the fundamental proposition that the accused is entitled to a fair trial and the opportunity to present an intelligent defense in light of all relevant and reasonably accessible information." (***People* v. *Thompson*** (2016) 1 Cal.5th 1043, 1095 citing to ***People v. Hobbs*** (1994) 7 Cal.4th 948, 965.)

"Thus, unless a requested item is authorized by other statutes or is constitutionally required, the parties to a criminal proceeding are entitled to obtain disclosure of only those items listed in sections 1054.1 and 1054.3." (***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, 1313; **but see *Bridgeforth* v. *Superior Court*** (2013) 214 Cal.App.4th 1074, 1081 [notwithstanding the language in the discovery statute enacted by Proposition 115, discovery can be required by the due process clause of the *state* constitution]; ***Magallan* v. *Superior Court*** (2011) 192 Cal.App.4th 1444, 1462 [same]; ***People* v. *Superior Court (Mouchaourab)*** (2000) 78 Cal.App.4th 403, conc. opn at p. 441 [same]; this outline, section II, at pp. 162-163.

Editor's note: The CDS does not preclude the parties from asking each other to *voluntary* provide discovery. The CDS only governs *compelled* discovery, i.e., court-ordered discovery. (**See *People* v. *Valdez*** (2012) 55 Cal.4th 82, 118 ["a criminal defendant may ask witnesses to give interviews"]; ***Carrea* v. *Cate*** (S.D. Cal., Feb. 17, 2012) 2012 WL 1900050, at *14 [finding it proper for trial court to suggest, but not require, that defense witnesses speak with the prosecution and for prosecution investigator to seek to obtain birthdates directly from defense witnesses where birthdates were not provided by the defense].)

2. What information is a prosecutor statutorily obligated to disclose?

Penal Code section 1054.1 states: "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."

3. Does the CDS govern discovery from third parties?

"As the Legislature recognized, and as reiterated in the case law, Penal Code sections 1054 through 1054.7 'do not regulate discovery concerning uninvolved third parties.'" (***Kling* v. *Superior Court of Ventura County*** (2010) 50 Cal.4th 1068, 1077.) The discovery procedures provided in the CDS "apply only to discovery between the People and the defendant. They are simply inapplicable to discovery from third parties." (***People* v. *Sanchez*** (1994) 24 Cal.App.4th 1012, 1027; ***People* v. *Superior Court (Broderick)*** (1991) 231 Cal. App.3d 584, 594; **accord *People* v. *Superior Court (Dominguez)*** (2018) 28 Cal.App.5th 223, 233 [CDS "'provisions do not regulate discovery from third parties,' which must be sought by way of subpoena duces tecum"]; ***Teal* v. *Superior Court*** (2004) 117 Cal.App.4th 488, 492 ["the statutory discovery scheme does not apply to information possessed by third parties or agencies that have no connection to the investigation or prosecution of the criminal charge"]; ***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, 1313 ["The requirements and procedural mechanisms of Chapter 10 apply only to the parties in a criminal case—that is, the prosecution and the defendant(s)"]; ***People* v. *Sanchez*** (1994) 24 Cal.App.4th 1012, 1026-1027.)

However, if information is listed in section 1054.1, it cannot be obtained by way of a defense subpoena if the information is within the possession of the prosecuting attorney or the law enforcement agency that investigated the case – at least if the information sought is possessed by the division of the agency that investigated the case. (**See** Pen. Code, § 1054.5(a)(1); ***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305.) In addition, the defense cannot subpoena information listed in section 1054.1 from any "persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties" – at least if the information sought is possessed by division of the investigating agency that assisted in the case. (**Ibid**.) A defendant must use the discovery procedures set forth in Chapter 10 to obtain discovery from such agencies. (**See** Pen. Code, § 1054.1; ***Teal* v. *Superior Court*** (2004) 117 Cal.App.4th 488, 491.)

4. What does it mean to "disclose" for purposes of Penal Code section 1054.1? (Does the duty to disclose require the prosecution to make copies of the discovery for the defense?)

Section 1054.1 provides that the prosecuting attorney "shall disclose" to the defendant certain materials and information listed in subdivisions (a) through (f) of that section.

In ***Schaffer* v. *Superior Court (People)*** (2010) 185 Cal.App.4th 1235, the court agreed with an opinion issued by the Attorney General that "[t]he People comply with section 1054.1 by affording the defendant an opportunity to examine, inspect, or copy the discoverable items. A non-indigent defendant may receive at his or her own expense copies of discovery made available by the People." (**Id**. at pp. 1237-1238, 1244; ***Rubio* v. *Superior Court*** (2016) 244 Cal.App.4th 459, 478.) The California Supreme Court later endorsed this interpretation of "disclosure." (**See *People* v. *Zaragoza*** (2016) 1

Cal.5th 21, 51 ["By alerting the defense to the existence of the videotape and making it available for viewing offsite, the prosecution complied with its obligations under section 1054.1, subdivision (e) to disclose exculpatory evidence in its possession."].)

The ***Schaffer*** court held "it does not offend the Constitution to require a non-indigent defendant to pay reasonable fees for duplicating discovery materials disclosed by the District Attorney pursuant to section 1054.1." (**Id**. at p. 1245; **accord *Rubio* v. *Superior Court*** (2016) 244 Cal.App.4th 459, 478-479.)

However, the ***Schaffer*** court also stated that "[i]n the event a defendant or his counsel chooses not to pay reasonable duplication fees, the District Attorney must make reasonable accommodations for the defense to view the discoverable items in a manner that will protect attorney-client privileges and work product." (**Id**. at p. 1245; **accord *Davis* v. *Superior Court*** (2016) 1 Cal.App.5th 881, 889; ***People* v. *Shrier*** (2010) 190 Cal.App.4th 400, 416.)

The ***Schaffer*** court observed there were many ways to achieve this accommodation and suggested, "[b]y way of example, the District Attorney could allow the defendant and his counsel to view the items in private or in a discrete location where their conversation would not be overheard by the District Attorney's staff but precautions could be made to protect against theft or destruction." (**Id**. at p. 1245; **accord *People* v. *Shrier*** (2010) 190 Cal.App.4th 400, 416.)

Editor's note: The rule adopted in ***Schaffer*** is likely a two-way street when it comes to non-indigent defendants represented by private counsel. That is, extrapolating from ***Schaffer***, a privately-retained defense attorney can probably require that the *prosecution* pay reasonable copying costs for duplicating discovery. If the prosecution does not wish to pay, the defense attorney will probably have to make reasonable accommodations for the prosecution to view the discoverable items.

The interpretation of what it means to disclose evidence for purposes of section 1054.1 in ***Schaffer*** was later utilized by the California Supreme Court in the case of ***People* v. *Zaragoza*** (2016) 1 Cal.5th 21, which cited to ***Schaffer*** for the proposition that "the current discovery statutes, like the earlier ones, provide that the prosecution's obligations can be satisfied 'by making the information available for inspection and copying'". (***Zaragoza*** at p. 51.)*

Editor's note: In ***Zaragoza***, police became aware of a surveillance videotape from a restaurant of limited exculpatory value. The prosecution provided the videotape to the defense. However, it could only be viewed by playing it on the restaurant's recording system. (**Id**. at p. 51.) The defense claimed that the prosecution violated its discovery obligations under section 1054.1, as well as its constitutional duty to disclose exculpatory evidence, by failing to provide the defense with a usable copy of the videotape. (**Id**. at pp. 50-51.) The ***Zaragoza*** court rejected the defense claim, noting that "[b]y alerting the defense to the existence of the videotape and making it available for viewing offsite, the prosecution complied with its obligations under section 1054.1, subdivision (e) to disclose exculpatory evidence in its possession." (**Id**. at p. 51 [albeit also stating that "[e]ven if the prosecution had a duty to supply a 'usable copy,' as defendant contends, its obligation would have been excused on the ground of impossibility"].)

The ***Schaffer*** court did not expressly address another aspect of the Attorney General's opinion, i.e., the conclusion that if the prosecution voluntarily furnishes copies to the defense, the defense cannot be required to pay for those copies since sections 1054 through 1054.8 do not impose an obligation on the defense to pay for copies of discoverable materials without prior consent. (**See** 85 Ops. Cal. Atty. Gen. 123, *4.)

A. Disclosure of Child Pornography: Penal Code Section 1054.10

Copies of child pornography are disclosable to the defense (**see *Westerfield* v. *Superior Court*** (2002) 99 Cal.App.4th 994, 998), but defense attorneys are limited in further disclosure. (Pen. Code, § 1054.10.) Section 1054.10, enacted partially in response to ***Westerfield***, provides:

(a) "Except as provided in subdivision (b), no attorney may disclose or permit to be disclosed to a defendant, members of the defendant's family, or anyone else copies of child pornography evidence, unless specifically permitted to do so by the court after a hearing and a showing of good cause.

(b) Notwithstanding subdivision (a), an attorney may disclose or permit to be disclosed copies of child pornography evidence to persons employed by the attorney or to persons appointed by the court to assist in the preparation of a defendant's case if that disclosure is required for that preparation. Persons provided this material by an attorney shall be informed by the attorney that further dissemination of the material, except as provided by this section, is prohibited."

Arguably, the People could ask for destruction of the evidence at the close of the case pursuant to Penal Code section 312, which states: "Upon the conviction of the accused, the court may, when the conviction becomes final, order any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the district attorney or any law enforcement agency, to be destroyed, and the court may cause to be destroyed any such material in its possession or under its control."

5. Do the People have any statutory duty to highlight the exculpatory portions of materials provided in discovery?

The question of whether a prosecutor has any federal constitutional (***Brady***) duty to highlight the exculpatory portions of materials given in discovery is covered in this outline, section I-11-D at p. 145. There is no reason to believe different rules will apply when it comes to whether a prosecutor has any *statutory* duty to do so.

6. What does it mean for "materials and information" to be in the "possession of the prosecuting attorney" under section 1054.1?

"It bears noting . . . that section 1054.1 requires the prosecuting attorney to disclose material and information **only** "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." (***People* v. *Ashraf*** (2007) 151 Cal.App.4th 1205, 1211, fn. 2, emphasis added.)

"[T]he statutory phrase 'in the possession' is not read literally so as to very narrowly cabin the materials that can be sought. (§ 1054.1.) Rather, it serves primarily to 'clarify and confirm that the prosecution has no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense.'" (***People* v. *Superior Court (Dominguez)*** (2018) 28 Cal.App.5th 223, 234 citing to ***In re Littlefield*** (1993) 5 Cal.4th 122, 135.)

A. <u>Any Difference Between "Possession" for Purposes of Section 1054.1 and "Possession" for Brady Purposes?</u>

It has been recognized that "the prosecution's disclosure obligations from our statutory scheme and from ***Brady*** are distinct." (***People* v. *Superior Court (Dominguez)*** (2018) 28 Cal.App.5th 223, 235.) However, it has also been recognized that "case law interpreting whose information is subject to disclosure by the prosecution under these respective authorities can overlap." (***Dominguez*** at p. 235 citing to ***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, 1311.) Moreover, in ***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, the California Supreme Court noted the language in section 1054.1 requiring provision of materials and information to the defense "refers only to evidence possessed by the prosecutor's office and "the investigating agencies[,]" and then stated, "[t]here is no reason to assume the quoted statutory phrase assigns the prosecutor a *broader* duty to discover and disclose evidence in the hands of other agencies than do ***Brady*** and its progeny." (***Zambrano*** at pp. 1133-1134, emphasis added; **accord *Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, 905 [same]; **see also *People* v. *Superior Court (Dominguez)*** (2018) 28 Cal.App.5th 223, 235 [citing to ***In re Steele*** (2004) 32 Cal.4th 682, 696 and ***Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, 904 for the proposition that "our Supreme Court has more than once interpreted the statutory discovery requirements with respect to this particular issue as 'consistent with' the prosecution's ***Brady*** obligations."]; **but see** this outline, section III-6 at p. 171.

> **<u>Editor's note</u>**: For a discussion of what it means for evidence to be within the possession of the prosecution team for constitutional purposes, see, sections I-7 and I-8 at pp. 68-137.)

It is likely, however, that "possession" for purposes of the discovery is ***narrower*** than possession for ***Brady*** purposes. There are three reasons for believing this.

First, if the term "possession" of the prosecuting attorney encompassed items in the known possession of the investigating agencies (as the term "possession" does for ***Brady*** purposes) it would be redundant to state that the prosecution must ***also*** disclose materials and information in the known possession of the investigating agency. (**See *Manufacturers Life Ins. Co.* v. *Superior Court*** (1995) 10 Cal.4th 257, 274 ["[w]ell-established canons of statutory construction preclude a construction which renders a part of a statute meaningless or inoperative"].

Second, under ***Brady***, prosecutors are deemed to be in possession of favorable material evidence that is "known only to police investigators and not to the prosecutor[.]" (***Youngblood* v. *West Virginia*** (2006) 547 U.S. 867, 869.) In contrast, section 1054.1 limits the disclosure obligation to materials and information that "the prosecuting attorney ***knows*** it to be in the possession of the investigating agencies[.]" (Pen. Code, § 1054.1, emphasis added; **see also *People* v. *Pereyra*** [unreported] 2012 WL 6184539, *9 [holding failure to timely provide recording in possession of investigating agency, but unknown to prosecutor, was not a violation of section 1054.1 because, inter alia, statute only applies to disclosure of information in the possession of investigation agencies known to the prosecutor].)

Third, in two relatively recent cases, the California Supreme Court has recognized that the prosecutor's *statutory* duty to disclose evidence would ***not*** apply to evidence in the possession of a member of the prosecution team that was not known to the prosecutor. Specifically, in ***People* v. *Whalen*** (2013) 56 Cal.4th 1, the court held that photos in the possession of a criminalist (but unknown to the prosecutor and belatedly disclosed to the defense) *were* in the possession of the prosecutor for ***Brady*** purposes because the criminalist was on the prosecution team – albeit finding no ***Brady*** violation for other reasons. However, the court then went on to separately address the question of whether failure to disclose was a violation of section 1054.1. The court held that there was no statutory violation because the defendant's statutory right to disclosure of relevant real evidence and exculpatory evidence extended ***only*** to evidence in the possession of the prosecuting attorney or ***known by*** the prosecuting attorney to be in the possession of the investigating agencies. (**Id**. at p. 65, fn. 27.) If possession of material for ***Brady*** purposes was co-extensive with possession for statutory purposes, it would not make sense for the court to hinge its finding of no statutory violation on the fact, inter alia, the prosecutor was unaware the evidence existed. In ***People* v. *Mora and Rangel*** (2018) 5 Cal.5th 442, the prosecution did not disclose multiple reports that were found in the trial notebook of the lead investigating detective until after the trial was well underway. Once the information was made known to prosecutor, the information was immediately disclosed the information. On appeal, the defendant claimed this failure to disclose violated section 1054.1. However, the while the California Supreme Court expressed concern "the prosecution was unaware of so much about the case that resided in the Compton Police Department's files, ***no statutory error arose***. Because "the material and information [became] known to, or [came] into the possession of, ***a party*** within 30 days of trial, [and] disclosure [was] made immediately," no violation of the discovery statutes occurred. (§ 1054.7.)" (**Id**. at p. 468, emphasis added.) The

information was clearly in the possession of the prosecution team for ***Brady*** purposes and was not disclosed by the prosecutor until after the trial started. If possession for purposes of section 1054.1 was the same as for ***Brady*** purposes, the court would have had to have found a violation of the discovery statute. The only reason the court could say disclose was made "immediately" was if the test for possession under section 1054.1 was limited to information in the investigating agency files that was *known* to the prosecutor. Later in the opinion, the court made the distinction between possession for constitutional purposes and possession for statutory purposes more explicit. The court did this by pointing out that it was *proper* for the trial court to modify the version of the instruction on delayed discovery to blame the police, not the prosecution, for delayed discovery because, while the prosecution is responsible for "discovering and disclosing ***material exculpatory*** evidence even if maintained by a different agency" (i.e., for ***Brady*** evidence), there was no indication that most of the undisclosed evidence fell into that category and to the extent one of the reports was exculpatory, that report was admitted over defense counsel's objection (i.e., it was not material). (**Id**. at p. 472, emphasis added.) In other words, because the evidence was not concealed by the prosecution for statutory purposes (i.e., it was concealed by the police) and because it was not possessed by prosecution for constitutional purposes (i.e., it was not material exculpatory evidence), the instruction focusing on police negligence was proper.

However, it is *possible* that the definition of possession for purposes of the discovery statute is broader than the definition of possession for ***Brady*** purposes in *one* regard. Under ***Brady***, the test for whether evidence is within the possession of the prosecution team considers, *as one factor*, whether the evidence is reasonably accessible to the prosecution team. But, outside of treating criminal rap sheets as being "possessed" based on the fact they are reasonably accessible to the prosecution and not to the defense, reasonable accessibility *alone* has not been viewed as tantamount to possession. (**See** this outline, section I-7-C at pp 171-173.) However, ***if*** the information is listed under section 1054.1 and the prosecutor merely has reasonable access to the information, it may be considered to be in the possession of the prosecution based on that fact alone. For example, in ***In re Littlefield*** (1993) 5 Cal.4th 122, the California Supreme Court stated that "California courts long have interpreted the prosecutorial obligation to disclose relevant materials in the possession of the prosecution to include information 'within the possession or control' of the prosecution" and then noted that it had previously "construed the scope of possession and control as encompassing information 'reasonably accessible' to the prosecution." (**Id**. at p. 135 [and noting, inter alia, that in ***People* v. *Coyer*** (1983) 142 Cal.App.3d 839, 843 "the court described information subject to disclosure by the prosecution as that 'readily available' to the prosecution and not accessible to the defense."].) The ***Littlefield*** court then concluded: "We find no basis for petitioner's assumption that, by designating discoverable information under section 1054.1 as that "in the possession" of the prosecution or its investigating agencies, Proposition 115 was intended to abrogate this prior rule precluding the prosecution from withholding information that is "reasonably accessible" to it, such as the address of a witness that readily could be obtained through a request of the witness." (**Ibid**; **see also *Roland* v. *Superior Court*** (2004) 124 Cal.App.4th 154, 166–167

[describing intent behind Proposition 115 as being "to promote the ascertainment of truth in trials by requiring timely pretrial discovery of all relevant and *reasonably accessible* information"] emphasis added.)*

> **Editor's note**: In ***Littlefield***, the court made its comments regarding prosecutorial obligations even though the actual case involved the issue of what the *defense* had to do. The defense claimed that it would be unconstitutional to require the defense to turn over material if the prosecution did not have a comparable duty. The defense argued because it did not know the address of a defense witness, it did not "possess" the address; and since the prosecution only had to turn over materials and information it "possessed," the defense could not be ordered to ask a defense witness for their address. The ***Littlefield*** court agreed that disparate duties would likely render section 1054 unconstitutional, but then held since the prosecution would have a similar duty to ask for the witness' address, so did the defense. (**Id**. at pp. 134-135.)

On the other hand, it may not be fair to treat ***Littlefield***'s definition of "possession" as encompassing materials and information that is "reasonably accessible" as meaning reasonable accessibility, by itself, is tantamount to possession under the statute. An overly literal interpretation of the language in section 1054.1 would have allowed the parties to circumvent the discovery rules (**see *People* v. *Hammond*** (1994) 22 Cal.App.4th 1611, 1623) and so ***Littlefield*** was looking for some analytical mechanism to hang its hat to prevent such an outcome. Indeed, other than in the case of ***People* v. *Little*** (1997) 59 Cal.App.4th 426, which held an informal request for standard reciprocal discovery is sufficient to create a prosecution duty to disclose the felony convictions of all material prosecution witnesses if the record of conviction is "reasonably accessible" to the prosecutor by the simple expedient of running a criminal history (**id**. at p. 438), courts have not taken an overly broad view of what it means for evidence to be "reasonably accessible."

And, in the unreported decision of ***People* v. *Hood*** 2016 WL 4547854, at *3, the court questioned whether ***Littlefield*** and ***Little*** even remain good law in light of our Supreme Court's subsequent interpretation of the plain language of the Criminal Discovery Act in ***People* v. *Whalen*** (2013) 56 Cal.4th 1, 65, fn. 27 [discussed in this outline, section III-6-A at p. 170] and ***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1131, 1133 [discussed in this outline, section III-6-A at p. 169].) The ***Hood*** court noted that even if the holdings of ***Littlefield*** and ***Little*** remain good law, their holdings were "quite narrow" and "[n]either case purported to alter the principle that 'the prosecution has no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense'. . ." (***Hood*** at p. *3.)

More recently, without mentioning ***Whalen***, the court in ***People* v. *Superior Court (Dominguez)*** (2018) 28 Cal.App.5th 223, stated that "the statutory phrase "'in the possession'" of the prosecution encompasses information "'reasonably accessible" to it.'" (**Id** at p. 239, citing to ***Littlefield*** and ***Little***.) However, even the ***Dominguez*** court recognized that just "because it might be easier for the prosecution than the defense to get the materials," this does not mean the materials are reasonably

accessible to the prosecution and reiterated the "the prosecution has no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense." (**Ibid**.)

7. Is there a conflict between the statutory requirement of disclosing the names and addresses of witnesses and *Marsy*'s Law?

Penal Code section 1054.1(a) requires the disclosure of the names and addresses of witnesses the prosecution intends to call at trial. This duty of disclosure has been interpreted by the California Supreme Court in ***In re Littlefield*** (1993) 5 Cal.4th 122 as requiring the prosecution to disclose the names and addresses of persons whom they intend to call as witnesses at trial, if such information is known or is reasonably accessible. (**Id**. at pp. 135-136.)

Moreover, in the *unreported* case of ***Holland* v. *Superior Court*** 2013 WL 3225812, this duty to disclose was interpreted as requiring the prosecution to provide the last known address of the witnesses if the current address was not available or known to the prosecution. (**Id**. at pp. *3-*4.)

A. Subdivision (b)(4): Prohibition on Disclosure of Victim Information

With the passage of Proposition 9 (Marsy's Law), effective November 5, 2008, subdivision (b)(4) of Article I, section 28 of the California Constitution now states a victim is entitled to "prevent the disclosure of confidential information or records to the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, 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 (b)(4).)

Certainly, the names and addresses of victims of crimes appears to fall under the definition of "confidential information or records . . . which could be used to locate or harass the victim or the victim's family[.]" (Cal. Const., art. I, § 28 (b)(4).) It is not clear how this state constitutional provision will impact the prosecution's statutory discovery obligations to provide the defense with the names and addresses of prosecution witnesses pursuant to Penal Code section 1054.1(a).

Such information is already subject to a general rule prohibiting defense counsel from disclosing the address or telephone number of victims or witnesses unless specifically permitted to do so by the court after a hearing and a showing of good cause. (Pen. Code, § 1054.2; **see also** Pen. Code, § 841.5.) A right guaranteed by Marsy's Law will trump a state statute. (**See *Kling* v. *Superior Court*** (2010) 50 Cal.4th 1068, 1078 [Penal Code section 1326(c)'s limitation on disclosure of defense-subpoenaed documents to prosecution except as required by Penal Code section 1054.3 has to give way when necessary to effectuate People's state due process rights under Marsy's Law].)

However, to the extent the right created by Marsy's law conflicts with the prosecutor's ***federal constitutional*** obligations, it will probably have to take a backseat. (**See *People* v. *Valdez*** (2012) 55 Cal.4th 82, 107 ["when nondisclosure of the identity of a crucial witness will preclude effective investigation and cross-examination of that witness, the confrontation clause does not permit the prosecution to rely upon the testimony of that witness at trial while refusing to disclose his or her identity"]; ***Alvarado* v. *Superior Court*** (2003) 23 Cal.4th 1121, 1151 [same]; ***People* v. *Hammon*** (1997) 15 Cal.4th 1117, 1123-1124 [noting that, pursuant to ***Davis* v. *Alaska*** (1974) 415 U.S. 308, "a criminal defendant's right to confront adverse witnesses sometimes requires the witness to answer questions that call for information protected by state-created evidentiary privileges"]; ***People* v. *Robinson*** (1995) 31 Cal.App.4th 494, 499 [quoting ***Eleazer* v. *Superior Court*** (1970) 1 Cal.3d 847, 851 for the proposition that "[w]hen exculpatory evidence involves an eyewitness to the crime, what must be disclosed is not just the witness' identity 'but all pertinent information which might assist the defense to locate him'"].)

A reasonable argument can be made that absent any affirmative evidence that disclosure of the victim's address would actually lead to harassment, the limitations in Penal Code section 1054.2 (which makes it a misdemeanor for an attorney to disclose to a defendant or anyone else the address or telephone number of a victim or witness whose name is disclosed to the attorney pursuant to section 1054.1, unless specifically permitted to do so by the court after a hearing and a showing of good cause) and Penal Code section 841.5 (which prevents law enforcement from disclosing to any arrested person, or to any person who may be a defendant in a criminal action, the address or telephone number of any person who is a victim or witness in the alleged offense) are adequate to prevent such harassment and thus Marsy's law is not necessarily in conflict with the statutory or federal constitutional obligations to provide the names and addresses of witnesses.

No published case has yet addressed this potential conflict. Prosecutors concerned about running afoul of Marsy's law by providing the discovery mandated by the CDS or the federal constitution should consider bringing the conflict between Marsy's law and statutory or constitutional discovery obligations to the attention of the trial judge so that the issue can be resolved in a published decision

B. Subdivision (b)(5): Victims Right to Refuse Interviews

Marsy's Law also enacted subdivision (b)(5) of Article I, section 28 of the California Constitution, which states victims have the right "[t]o refuse an interview, deposition, or discovery request by the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, and to set reasonable conditions on the conduct of any such interview to which the victim consents." (Cal. Const., art. I, § 28 (b)(5).)

Part of this provision is already the law. Victims and witnesses have an absolute right to refuse to be interviewed. (***People* v. *Valdez*** (2012) 55 Cal.4th 82, 118-119; ***Reid* v. *Superior Court*** (1997) 55 Cal.App.4th 1326, 1337, fn. 4; ***People* v. *Pitts*** (1990) 223 Cal.App.3d 606, 872-873; ***Walker* v. *Superior Court*** (1957) 155 Cal. App. 2d 134, 140.) Criminal discovery is provided by the prosecution, not directly from the victim. (Pen. Code, § 1054.1.) Even before the passage of Proposition 115, depositions were not available in criminal cases. (***People* v. *Municipal Court (Runyan)*** (1978) 20 Cal.3d 523, 530 ["the Legislature has acted to limit the taking of pretrial depositions to those situations specifically described in Penal Code sections 1335 through 1345" i.e., conditional examinations].) And a "defendant does not have a fundamental due process right to pretrial interviews or depositions of prosecution witnesses." (***People* v. *Panah*** (2005) 35 Cal.4th 395, 458 [albeit also noting a defendant "does have a right to the names and addresses of prosecution witnesses and a right to have an opportunity to interview those witnesses if they are willing to be interviewed"]; **accord *Reid v. Superior Court*** (1997) 55 Cal.App.4th 1326, 1332.)

Warning!! Prosecutors must exercise caution in advising victims or witnesses regarding whether they should submit to a defense interview. Such advice from the police or prosecution may violate the defendant's Sixth Amendment right to prepare for trial. (***People* v. *Hannon*** (1977) 19 Cal.3d 588, 601; ***Walker* v. *Superior Court*** (1957) 155 Cal. App. 2d 134, 140.) It is not improper for a prosecutor to "inform a witness of his or her right to choose whether to give a pre-trial interview, or of his or her right to determine who shall be present at the interview" but it is "improper for a prosecutor to instruct or advise a witness not to speak with defense counsel except when a prosecutor is present." (***State* v. *Hofstetter*** (Wash. Ct. App. 1994) 878 P.2d 474, 481 [discussing many cases adopting this principle]; **but see *People v. Valdez*** (2012) 55 Cal.4th 82, 118-119 [finding a court order that a prosecutor *could* be present when a witness interviewed was ***not*** "tantamount to advice not to speak to the defense, or at least to request the presence of the prosecutor or an investigator"].)

8. Does the CDS require disclosure of the phone numbers of witnesses?

Neither Penal Code section 1054.1(a) nor the reciprocal discovery provision governing what the defense must provide to the prosecution (Pen. Code, § 1054.3) state the telephone number of a witness who the party intends to call at trial must be provided. No published decision has addressed the issue of whether there is an obligation to disclose a witness' telephone number under either section.

Arguably, if a witness provided a telephone number during an interview with the police or prosecution, the number might have to be provided pursuant to Penal Code section 1054(f) which requires the People to provide relevant written or recorded statements or reports of statements of trial witnesses. If so, the defense would have a similar obligation to provide a telephone number pursuant to Penal Code section 1054.3 (which requires the defense to provide relevant written or recorded statements or reports of statements of trial witnesses).

An argument could presumably be crafted that failure to provide a telephone number violates due process. But unless the defense can show how failure to provide a witness' phone number deprived the defendant of favorable material evidence, there would be no federal due process obligation to disclose the number for the same reasons failure to disclose a witness' *address*, without more, does not violate due process (i.e., ***Brady***). (***People* v. *Williams*** (2013) 58 Cal.4th 197, 258-259.)

The passage of Marsy's Law (**see** this outline, section III-7-A, p. 173) should also weigh against provision of the telephone number of the witness when the witness is a victim.

Penal Code section 841.5(a) provides: "Except as otherwise required by Chapter 10 (commencing with Section 1054) of Title 7, or by the United States Constitution or the California Constitution, ***no law enforcement officer or employee of a law enforcement agency shall disclose*** to any arrested person, or to any person who may be a defendant in a criminal action, the address or ***telephone number of any person who is a victim or witness in the alleged offense***." (Pen. Code, § 841.5(a), emphasis added.) However, subdivision (b) of section 841.5 states: "Nothing in this section shall impair or interfere with the right of a defendant to obtain information necessary for the preparation of his or her defense through the discovery process." (Pen. Code, § 841.5(b).) And subdivision (c) states: "Nothing in this section shall impair or interfere with the right of an attorney to obtain the address or telephone number of any person who is a victim of, or a witness to, an alleged offense where a client of that attorney has been arrested for, or may be a defendant in, a criminal action related to the alleged offense. (Pen. Code, § 841.5(c).) Thus, section 841.5 does not resolve the question of whether the prosecution is required to turn over a victim or witness's telephone number as required by the federal constitution or section 1054.1.

9. Does the statutory obligation to disclose the addresses of witnesses extend to peace officers? Even if they are retired?

Peace Officer Addresses Protected

Peace officer personnel records, records maintained by any state or local agency pursuant to Penal Code section 832.5, and information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code. (Pen. Code, § 832.7(a).)

Section 832.8 of the Penal Code explains that, as used in section 832.7, "personnel records" means any file maintained by the employing agency under the officer's name and containing records relating to, inter alia, ". . . ***home addresses, or similar information***, . . ." and "[a]ny other information the disclosure of which would constitute an unwarranted invasion of personal privacy." (***Hackett* v. *Superior Court*** (1993) 13 Cal.App.4th 96, 98 [emphasis in the original].)

Subdivision (a) of section 1043 provides, as relevant, that "[i]n any case in which discovery ... is sought of peace officer personnel records ... or information from those records, the party seeking the discovery ... shall file a written motion with the appropriate court ... [and give] written notice to the governmental agency which has custody and control of the records...." (***Hackett* v. *Superior Court*** (1993) 13 Cal.App.4th 96, 99.)

The conditional privilege created by section 1043 of the Evidence Code for peace officer personnel records protects **all** information in a peace officer's file **without regard** to whether a particular piece of information can also be found elsewhere. (***Hackett* v. *Superior Court*** (1993) 13 Cal.App.4th 96, 97.)

Disclosure of a peace officer's address is also protected by Penal Code section 1328.5 which states: "Whenever any peace officer is a witness before any court or magistrate in any criminal action or proceeding in connection with a matter regarding an event or transaction which he has perceived or investigated in the course of his duties, where his testimony would become a matter of public record, and where he is required to state the place of his residence, he need not state the place of his residence, but in lieu thereof, he may state his business address." (Pen. Code, § 1328.5.)

In ***People* v. *Lewis*** (1982) 133 Cal.App.3d 317, the court specifically held that, pursuant to Penal Code section 1328.5, a defense attorney is not entitled to the home address of a peace officer. (**Id**. at p. 322.)

The reason for limiting disclosure is obvious: a peace officer's personal safety and the safety of his or her family is endangered by unrestricted disclosure. (***Hackett* v. *Superior Court*** (1993) 13 Cal.App.4th 96, 100; ***People* v. *Lewis*** (1982) 133 Cal.App.3d 317, 321.) This interest in non-disclosure of a peace officer's address is specifically recognized in both the case law (**ibid**) and by statute (**see** Pen. Code § 146e [making it a misdemeanor to publish, without authorization, the residence address or telephone number of a peace officer] and Veh. Code § 1808.4 [requiring the Department of Motor Vehicles to treat the home addresses of law enforcement officers as confidential information].)

The holding in ***Lewis*** remains good law, notwithstanding the enactment of the California Discovery Statute. Although it is true that section 1054.1(a) requires the People to provide the names and addresses of persons the prosecutor intends to call as witnesses at trial, and "all court-ordered discovery is governed exclusively by-and is barred except as provided by-the discovery chapter newly enacted by Proposition 115" (***In re Littlefield*** (1993) 5 Cal.4th 122, 129), section 1054 (e) provides that "no discovery shall occur in criminal cases except as provided by this chapter, ***other express statutory provisions***, or as mandated by the Constitution of the United States." (Pen. Code, § 1054(e), emphasis added.) Penal Code section 1328.5 is an express statutory provision and thus remains controlling as the question of whether a peace officer's address can be released.

Defense counsel may argue that ***Lewis*** does not control because the ***Lewis*** court did not discuss alternatives that would have provided the information to defense counsel, but not the defendant, such as

a protective order and because "***Lewis*** was decided prior to the enactment of ... Penal Code section 1054.2(a)(1) [in 1990, which] requires defense counsel to keep confidential addresses and telephone numbers of witnesses, and not provide that information to the defendant or any other person." (**See *Barnett* v. *Superior Court*** (2008) 79 Cal.Rptr.3d 199, 213 [reversed by the California Supreme Court in ***Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890].) Moreover, the defense may argue that section 1054 can be reconciled with section 1328.5.

One response to these arguments is that section 1328.5 remains good law, notwithstanding the enactment of the discovery statutes, and the only case to interpret that section, remains good law as well. Moreover, section 1328.5 is directly inconsistent with section 1054.1(a) and cannot be reconciled with it. Thus, the language in section 1054(e) recognizing that the discovery statute is not intended to override existing statutory provisions regarding discovery should prevail. (**Cf.**, ***People* v. *Jackson*** (2005) 129 Cal.App.4th 129, 169-170 [language in § 1054(e) does not require superseding of other statutes governing discovery, i.e., the wiretap statute, where statutes can be harmonized and intent of the discovery statutes can be carried out].)

Protection of the Home Address Should Extend to Retired Officers

The protections against release of peace officer personnel records under Evidence Code section 1043 applies to retired peace officers. "Because personnel records of a particular officer are presumably generated while the officer is employed by the police department, they are '[r]ecords of peace officers.' They do not cease being such after the officer's retirement [or leave from employment]." (***Abatti* v. *Superior Court*** (2003) 112 Cal.App.4th 39, 57, citing to ***Davis* v. *City of Sacramento*** (1994) 24 Cal.App.4th 393, 400 [holding protection of section 1043.7 against release of personnel records for officers not involved in the incident giving rise to particular litigation applied to protect the records of a retired peace officer who was testifying as an expert witness and nothing in statute suggests otherwise]; **see also *People* v. *Superior Court (Gremminger)*** (1997) 58 Cal.App.4th 397 [exemption in Penal Code section 832.7 allowing prosecutors access to peace officer records to conduct investigations applies, regardless of whether officer is retired, so long as conduct being investigated occurred while officer employed]; ***People* v. *Moreno*** (2011) 192 Cal.App.4th 692, 702-703 [similar].) Thus, at a minimum, section 1043 requires that the defense file a ***Pitchess*** motion to obtain the home address or telephone number of a retired peace officer that is included in the officer's personnel files.

However, it is an open question whether a retired officer's current address is protected by either section 1043 or 1328.5. Certainly, the reasons for protecting the address remain valid - especially when testifying concerning incidents that arose while the officer was employed as a peace officer. And if neither section provides a mechanism for keeping the address private, recourse may be had to Penal Code section 1054.7. (**See** this outline, section VII-6 at pp. 240-250.)

10. 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.) It is not sufficient that the attorney "reasonably anticipates" calling a witness to testify; the attorney must reasonably anticipate the attorney is "likely" to call the witness. (**See *People* v. *Landers*** (2019) 31 Cal.App.5th 288 [2019 WL 181485 at p. * 13 -discussing test in context of defense duty].)

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.)

The ***Tillis*** court pointed to its earlier decision in ***In re Littlefield*** (1993) 5 Cal.4th 122 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 ***Littlefield*** 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]; **see also *People* v. *Landers*** (2019) 31 Cal.App.5th 288 [2019 WL 181485, *15] ["It is an unexceptional proposition that a defendant with no recourse but to call a particular witness violates 1054.3 by delaying disclosure and unveiling the witness by surprise at trial (***Jackson***) or concealing the witness's whereabouts prior to trial (***Littlefield***)."].)

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*** (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]; ***People* v. *Mireles*** (2018) 21 Cal.App.5th 237, 248 [no violation of section 1054.1 where prosecutor did not initially believe rebuttal witness was necessary for its prosecution, but then, as the trial unfolded, changed her mind, interviewed him, and immediately thereafter provided the interview notes to the defense].)

As a practical matter, many trial courts are reluctant to question an 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; **see also *People* v. *Landers*** (2019) 31 Cal.App.5th 288 [2019 WL 181485 at p. *16 ["Even where it can be established that an examining attorney has valuable information that he may use at trial, speculation about how he might use it does not justify the conclusion that he reasonably anticipates the likelihood of calling any particular witness."].)

Moreover, sometimes delaying the decision whether or not to call a witness *is* legitimate. "A trial is not a scripted proceeding. … [D]uring 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." (***People* v. *Hammond*** (1994) 22 Cal.App.4th 1611, 1624; (***People* v. *Mireles*** (2018) 21 Cal.App.5th 237, 248 [quoting ***Hammond*** in support of finding *prosecutor* who only later decided to call rebuttal witness was not in violation of section 1054.1]; ***People* v. *Blanks*** [unreported] 2018 WL 2676896, at *9 [same].)

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.)

11. Does the obligation to disclose names and addresses of witnesses under section 1054.1(a) apply to rebuttal witnesses?

The name and address of a person whom the prosecuting attorney "intends to call" as a witness at trial must be disclosed to the defense, regardless of whether the prosecuting attorney intends to call that witness as part of the case-in-chief or as a rebuttal witness. (***Maldonado* v. *Superior Court*** (2012) 53 Cal.4th 1112, 1132, fn. 12; ***People* v. *Gonzalez*** (2006) 38 Cal.4th 932, 956; ***Izazaga* v. *Superior Court*** (1991) 54 Cal.3d 356, 375; ***People* v. *Mireles*** (2018) 21 Cal.App.5th 237, 248; ***People* v. *Jordan*** (2003) 108 Cal.App.4th 349, 357; ***People* v. *Hammond*** (1994) 22 Cal.App.4th 1611, 1621-1622.)

Generally, a prosecutor cannot be held to intend to call a rebuttal witness at trial unless first provided with the names of witnesses the defense intends to present at trial. Indeed, in the unreported case of ***People* v. *Morrison*** 2013 WL 453869, the court held the defense was not entitled to "advance notice" of rebuttal evidence (i.e., that the prosecutor would impeach defendant with evidence of his gun arrest) because the defense did not disclose it intended to call the defendant. (**Id**. at p. *5.) However, once the defense discloses its own witnesses pursuant to section 1054.1, "the obligation of the prosecution to disclose its rebuttal witnesses pursuant to section 1054.1 is triggered[.]" (***People* v. *Gonzalez*** (2006) 38 Cal.4th 932, 956.) "A prosecutor cannot 'sandbag' the defense by compelling disclosure of witnesses the defense intends to call, and then refusing to disclose witnesses it intends to call to rebut the defense witnesses." (***People* v. *Gonzalez*** (2006) 38 Cal.4th 932, 956.) However, where there is no evidence that prosecutor decided to call a rebuttal witness prior to interviewing the witness, no violation of the discovery statute will be found. (**See *People* v. *Mireles*** (2018) 21 Cal.App.5th 237, 248.)

The *due process* clause *also* requires that, once the defense discloses its own witnesses, the prosecution must disclose the witnesses it intends to call to rebut the testimony of the defense witnesses. (**See *Maldonado* v. *Superior Court (***2012) 53 Cal.4th 1112, 1132, fn. 12; ***People* v. *Tillis*** (1998) 18 Cal.4th 284, 287, 295 [albeit noting that not "all the details that will be used to refute" the defense witness must be provided].)

12. Does the prosecutor have a duty to disclose impeaching information about a witness where the prosecutor intends merely to ask about the impeaching information, but does not intend to call someone as a witness to prove the impeaching information?

The discovery statute is not violated by failure to disclose impeachment evidence where the prosecution does not reasonably anticipate using a rebuttal witness or real evidence to impeach, i.e., where the attorney simply plans to ask the witness about a prior event based on information available to the attorney. (**See *People* v. *Tillis*** (1998) 18 Cal.4th 284, 290-291.)

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. *Landers*** (2019) 31 Cal.App.5th 288 [2019 WL 181485, *8, fn. 10]; ***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]; **but see** this outline, section III-13 at p. 183 [explaining why it is risky not to disclose].)

Editor's note: Of course, this is a two-way street. The defense is not required to disclose impeaching information about a witness where the defense intends merely to ask about the impeaching information but does not intend to call someone as a witness to prove the impeaching information. (See this outline, section V-5 at p. 212.)

13. If a prosecutor interviews a witness who the *defense* intends to call, must the witness' statement be disclosed to the defense, and vice versa?

In general, 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 *Izazaga* v. *Superior Court*** (1991) 54 Cal.3d 356, 377, fn. 14; ***People* v. *Hunter*** (2017) 15 Cal.App.5th 163, 177 ["prosecutor is not entitled to statements impeaching prosecution witnesses because *there is no reciprocal duty for the prosecutor to turn over similar impeachment of defense witnesses*."]; ***Hubbard* v. *Superior Court*** (1997) 66 Cal.App.4th 1163, 1165-1170; **see also** this outline, section V-5 at p. 212 [discussing defense reciprocal discovery obligations in this regard].)

Of course, there is both a constitutional and a statutory obligation on prosecutors 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).)

Moreover, in certain circumstances, it is improper for a prosecutor to ask a witness about impeaching information without a good faith belief that the questions would be answered in the affirmative (**see *People* v. *Young*** (2005) 34 Cal.4th 1149, 1186) or without a good faith belief the prosecutor could produce a witness to provide a factual basis for the questioning of a witness should the questions be answered in the negative (**see *People* v. *Mooc*** (2002) 26 Cal.4th 1216, 1233-1234; ***People* v. *Perez*** (1962) 58 Cal.2d 229, 241.) Thus, *where it appears a defense witness will deny giving a statement impeaching his trial testimony*, a prosecutor who does not disclose the name of the officer or investigator who took the statement risks a defense argument that the prosecutor ***must have*** reasonably anticipated calling the officer or investigator since it would be misconduct for the prosecutor to have asked about the statement without being prepared to call the impeaching witness. (**See *People* v. *Bittaker*** (1989) 48 Cal.3d 1046, 1098 [finding inadequate showing of misconduct even though no rebuttal witness was called to support harmful allegation implied in prosecutor's question but noting a lack of intent to call the witness might be inferred from the fact the prosecutor did not introduce evidence to prove up the implication].)

14. Does the prosecution have any obligation to disclose impeaching information about a witness the prosecutor does not intend to call?

The defense will sometimes ask a judge to require the prosecution to turn over impeaching information (e.g., the criminal history) of a witness listed in the police report who is *not* going to be testifying as a witness. The prosecution's typical response will (and probably should) be that disclosure of such information is, subject to a few exceptions identified below, not required by either the constitution or the discovery statute.

The prosecutor should point out that it cannot be ***Brady*** material since the impeachment could not be admitted into evidence if the witness did not testify and thus it is not reasonably probable that the result of the proceeding would have been different had it been disclosed to the defense. (***People* v. *Williams*** (2013) 58 Cal.4th 197, 258 [summarily rejecting defendant's claim the prosecution violated ***Brady*** by failing to turn over information on a prior criminal incident committed by someone who did not testify, because absent "testimony to impeach, defendant's ***Brady*** claim is without merit"]; ***People* v. *Torrence*** (unreported) 2018 WL 1376741, at p.*21 [same]; ***People* v. *Cook*** (2006) 39 Cal.4th 566, 589 [no possible prejudice to defense where witness who would be impeached did not testify]; **accord *Mosley* v. *City of Chicago*** (7th Cir. 2010) 614 F.3d 391, 399 [prosecution had no ***Brady*** obligation to turn over impeachment evidence about an eyewitness because the prosecution did not call the witness at trial]; ***United States* v. *Haskell*** (8th Cir. 2006) 468 F.3d 1064, 1075 [failure to disclose evidence impeaching non-testifying witness "is not material because the government's case would have been the same even had the defense had access to the undisclosed information"]; ***United States* v. *Mullins*** (6th Cir. 1994) 22 F.3d 1365, 1372 [there is no authority supporting a rule "that the government must disclose promises of immunity made to individuals the government does not have testify at trial"]; **see also *United States* v. *Stinson*** (9th Cir. 2011) 647 F.3d 1196,1208-1209 [failure to provide identities of persons who debriefed inmates was not a ***Brady*** violation because the inmates did not testify at trial]; ***United States* v. *Ballesteros*** (S.D.Fla. 2012) [unpublished] 2012 WL 3639059, *3 ["Defendant cites no authority for the proposition that the Government must disclose impeachment evidence about a witness that the Government does not wish to call, and in fact does not call, simply because the Defendant would like to impeach that witness. Plainly, there can be no impeachment of a witness who does not testify at trial. Nor can there be a ***Brady*** or ***Giglio*** problem in such circumstances"].)

The prosecutor should also point out that it cannot be "exculpatory" evidence under section 1054.1(e) for similar reasons since, subject to the exceptions listed below, evidence impeaching a witness who does not testify is irrelevant. And even if the witness is called by the defense, evidence impeaching a defense witness cannot be exculpatory.

Notwithstanding this common-sense approach, a California appellate court stated that while, in the case before it, there was no ***Brady*** violation stemming from the failure of the prosecution to turn over

evidence impeaching an officer who did not testify, such a violation *could* occur. (***People* v. *Lewis*** (2015) 240 Cal.App.4th 257, 265 ["we do not hold that such a violation can never be established when a prosecutor withholds evidence of misconduct by an arresting officer who does not testify at trial"].) Moreover, while the ***Lewis*** court did not find the evidence material, it stated the failure to turn over the evidence was a violation of the discovery statute since the information qualified as "exculpatory evidence" under Penal Code section 1054.1(e). (**Id**. at p. 267.)

Here are some *legitimate* exceptions to that general principle that evidence impeaching a person (or casting the person in a bad light) is not discoverable unless the prosecution is calling the person to testify as a witness:

When the person's statement is coming in as a hearsay declaration

Evidence bearing on the *credibility* of a non-testifying witness *could* also potentially be favorable or material evidence when the witness does not testify but a ***hearsay statement of the witness is being introduced*** into evidence. This is because the defense can impeach the declarant of a hearsay statement with any evidence offered to attack the credibility of the declarant if the evidence *would have* been admissible had the declarant been a witness at the hearing. (**See** Evid. Code, § 1202.) There is a split among cases from other jurisdictions regarding whether ***Brady*** may require disclosure of impeachment materials concerning a hearsay declarant. (**Compare e.g., *United States* v. *Jackson*** (2nd Cir. 2003) 345 F.3d 59, 71 [yes] with ***Adams* v. *State*** (Md. 2005) 885 A.2d 833, 850 [no].)

When the evidence used to impeach is the person's statement and the statement contains exculpatory information.

Where a witness makes statements regarding a charged crime, those statements must be disclosed, even if the witness will not be called to testify, if they would provide the defense with a promising line of investigation. (***Leka* v. *Portuondo*** (2d Cir. 2001) 257 F.3d 89, 106; ***United States* v. *Jackson*** (2nd Cir. 2003) 345 F.3d 59, 71 & fn. 6.)

When the impeachment involves prior misconduct by the person and that misconduct is relevant on an issue other than credibility.

Misconduct by a non-testifying officer may also be exculpatory for some reason ***other than*** to impeach the officer's credibility. Evidence relating to the *character trait* of a witness may also be relevant in a case regardless of whether the witness testifies. (**See** Evid. Code, § 1103.) Such evidence may be discoverable if that evidence would support, for example, a defendant's claim that he or she acted in self-defense and the victim had a character trait for violence. Or, in a prosecution for resisting arrest or battery on an officer, evidence of the arresting officer's tendency to violence, "including evidence of specific instances of violent conduct, is relevant and admissible" (***People* v. *Castain*** (1981) 122 Cal.App.3d 138, 144) and would be so regardless of whether the arresting officer testified.

Editor's note: Prosecutors concerned that failure to disclose information impeaching a witness who the prosecution does not call to testify will be viewed as a violation of their constitutional or statutory obligations can send the following missive to defense counsel: "It is the office policy not to disclose information bearing solely on the credibility of persons who will not called as witnesses in the prosecution case. However, if you can articulate a theory under which information impeaching the credibility of a person not called as a witness by the prosecution would constitute exculpatory evidence, please let us know and we will re-evaluate our position on an individual basis."

15. How broad is the statutory obligation under section 1054.1(b) to disclose "statements of all defendants?"

As noted earlier, Penal Code section 1054.1(b) requires the prosecution to disclose "all statements of the defendant." There is not a lot of case law in this area. In ***People* v. *Jackson*** (2005) 129 Cal.App.4th 129, the court held that, at least when an investigation involves a wiretap, the People are obligated, pursuant to Penal Code section 1054.1(b), to provide ***all*** statements of the defendant, not just "relevant" statements, even though the section governing wiretaps (Pen. Code, § 629.70(b)) only requires disclosure of the defendant's statements "from which evidence against the defendant was derived[.]" (**Id.** at pp. 169-170; **see also *People* v. *Acevedo*** (2012) 209 Cal.App.4th 1040, 1052, 1057, fn. 12 [wiretap statute disclosure requirement of Penal Code § 629.70(b) "parallels the statutory mandate to disclose the statements of all defendants" of section 1054.1, but statement in ***Jackson*** that "the law requires disclosure of all statements made by a defendant, is dictum"].)

In the unreported decision of ***People* v. *Le*** (unpublished) 2006 WL 2949021, the court held it was reversible error to fail 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 where the letter was not disclosed until after the defendant testified. Relying on ***Jackson***, the ***Le*** court concluded the prosecution was obligated to provide the letter and tapes even though the tapes were not exculpatory. (**Id**. at p. *10.)

In the unreported decision of ***People* v. *Zarazu*** (unpublished) 2012 WL 1866934, the court held that statements of a defendant admitting his gang membership (long before he was charged with the offense for which he was on trial were "statements of a defendant" for purposes of section 1054.1(b) where a gang expert introduced that evidence in the charged case against defendant. (**Id**. at pp. *13-*14.)

Editor's note: For a discussion of whether a prosecutor must provide all post-arrest recorded jail calls of a defendant, **see** this outline, section XXV-3 at pp. 400-411.

16. Do felony convictions *not* involving moral turpitude have to be disclosed pursuant to section 1054.1(d) even if the conviction is inadmissible and/or the prosecution is unaware of the conviction?

Penal Code section 1054.1(d), on its face, does **not** limit the People's obligation to disclose felony convictions (of material witness whose credibility is likely to be critical to the outcome of the trial) to convictions of moral turpitude.

The duty exists regardless of whether the conviction is admissible in evidence. (***People* v. *Santos*** (1994) 30 Cal.App.4th 169, 177.) Moreover, it does not make a difference that the prosecution is unaware of the felony conviction if records of the conviction are "reasonably accessible" to the prosecution. (**See *People* v. *Little*** (1997) 59 Cal.App.4th 426, 432.)

The statute also does not expressly limit the information to felony convictions contained in accessible databases. However, section 1054.1(d), like all the other subdivisions of section 1054.1, is subject to the limitation that the item be in the possession of the prosecution and databases that are not reasonably accessible to the prosecution should not be deemed in the possession of the prosecution. (**See** this outline, section III-6 at pp. 169-172.)

Databases that are "reasonably accessible" to the prosecution include State Department of Justice criminal history records, i.e., CII or CLETS rapsheets (**see *People* v. *Little*** (1997) 59 Cal.App.4th 426, 433; local criminal history databases, i.e., CRIMS or CORPUS (**see *United States* v. *Perdomo*** (3rd Cir. 1991) 929 F.2d 967, 971); and federal FBI and NCIC records (**see *United States* v. *Auten*** (5th Cir. 1980) 632 F.2d 478, 481). Because prosecutors also have easy access to DMV records, it is probably safe to say that the prosecution will be deemed to be in possession of information contained therein as well. As to the question of whether prosecutors have possession of information in the CalGang database, **see** this outline, section I-7-F-iv at p. 82-83.

On the other hand, databases of criminal history from other states are not reasonably accessible to the prosecution and thus the prosecution should not be deemed to be in possession of information contained in out-of-state rapsheets but not contained in the FBI database. (**See *United States* v. *Young*** (7th Cir. 1994) 20 F.3d 758, 764.) Similarly, since prosecutors do not have access to criminal rapsheets from other counties (except to the extent they are contained in the Department of Justice records), it is unlikely the prosecution will be deemed to be in possession of out-of-county convictions reflected *only* in other counties local criminal data bases.

Editor's note: An interesting issue is whether section 1054.1(d) requires the prosecutor to alert the defense to any felony convictions in the criminal history of a *defense witness* whose credibility is likely to be critical to the outcome of the case. The language of section 1054.1(d), in contrast to the language of section 1054.1(a), does not limit the prosecutor's discovery obligation to persons the prosecution intends to call at trial.

Prosecutors should **not assume** that the obligation under Penal Code sections 1054.1(d) to disclose "[t]he existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial" or 1054.1(e) to disclose "[a]ny exculpatory evidence" is eliminated if the conviction of a prosecution witness has been dismissed pursuant to Penal Code sections 1203.4, 1203.41, or 1203.4a. (**See** this outline, section I-3-P-vii at pp. 38-41.)

17. How broad is the definition of "exculpatory evidence" under section 1054.1(e)?

Section 1054.1(e) requires the prosecution to disclose "[a]ny exculpatory evidence." (Pen. Code, § 1054.1(e).) The precise definition of the term "exculpatory evidence" is open to some debate. In ***Izazaga* v. *Superior Court*** (1991) 54 Cal.3d 357, the California Supreme Court observed that the constitutional duty to disclose is independent of, and to be differentiated from, the statutory duty of the prosecution to disclose information to the defense and rejected the notion that the duty to provide exculpatory evidence under section 1054.1(e) limited the ***Brady*** obligation in any way. (**Id**. at p. 378.)

Section 1054.1(e) "requires the prosecution to provide all exculpatory evidence, not just evidence that is material under ***Brady*** and its progeny." (***People* v. *Cordova*** (2015) 62 Cal.4th 104, 124 citing to ***Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, 901; **accord *People* v. *Superior Court (Dominguez)*** (2018) 28 Cal.App.5th 223, 241; ***People* v. *Elder*** (2017) 11 Cal.App.5th 123, 132; ***People* v. *Lewis*** (2015) 240 Cal.App.4th 257, 266-267; ***People* v. *Bowles*** (2011) 198 Cal.App.4th 318, 326.)

However, whether "exculpatory evidence" means all favorable evidence, *no matter how insignificant*, must be disclosed pursuant to section 1054.1(e) is a different question.

The term "exculpatory evidence" clearly does not extend to "neutral and unfavorable materials . . . even under the broadest reading of section 1054.1(e)." (***Kennedy* v. *Superior Court*** (2006) 145 Cal.App.4th 359, 371.) And speculation that evidence *might* be exculpatory is insufficient. (**See *People* v. *Superior Court (Dominguez)*** (2018) 28 Cal.App.5th 223, 241.)

In ***People* v. *Cordova*** (2015) 62 Cal.4th 104, the defense claimed failure to disclose evidence of mistakes a crime lab had made in previous cases violated the ***Brady*** rule and the People's statutory discovery provisions. (**Id**. at p. 123.) The California Supreme rejected the argument finding the information sought "could not have been ***significantly*** exculpatory and was certainly not material in the ***Brady*** sense." (**Id**. at p. 124, emphasis added.) Whether this should be read as indicating not every bit of "favorable" evidence will be deemed sufficiently exculpatory to constitute a statutory violation of section 1054.1(e) or as just a throwaway line to emphasize the evidence was not material remains to be seen. (**Cf.**, ***J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1335 [describing "exculpatory evidence" for ***Brady*** purposes as "evidence that tends to exonerate the defendant from guilt" but

drawing a distinction between "favorable" evidence and "exculpatory" evidence, i.e., by noting there is a due process duty to disclose "exculpatory and impeachment evidence that is favorable"].)

In ***People* v. *Bowles*** (2011) 198 Cal.App.4th 318, the evidence deemed "exculpatory" seemed more neutral than favorable. There, the court found evidence that a technician could not conclusively state the thumbprint on a pawn slip for stolen property belonged to the defendant in a case in which defendant was charged with receipt of stolen property was exculpatory evidence under section 1054.1(e)). It was held to be exculpatory evidence - even though it appeared the technician could not exclude the defendant as the person leaving the print either. (**Id**. at pp. 324-325.)

The evidence deemed "exculpatory" in ***People* v. *Lewis*** (2015) 240 Cal.App.4th 257 was similarly weak. In ***Lewis***, the undisclosed evidence was that an officer who chased and arrested the defendant for vehicle theft and evading the police was himself later investigated and placed on administrative leave for drug-related crimes he committed over a year after the arrest of the defendant. The People did not disclose the evidence because the officer was not going to be called as a witness at trial. The defense was that defendant (who was in a car) fled because the officer said that he would going to release his dog on the defendant for no apparent reason (the officer had reported he told the defendant during the chase if defendant attempted to escape he would end up getting bitten by the dog). The evidence was not relevant to impeach the officer's credibility (since he was not testifying) nor was any character trait of the officer that might be reflected by the crimes at issue. Nevertheless, the appellate court held it was "relevant not only to impeach [the officer's] testimony but also to support [the defendant's] story that he ran from a police officer who threatened him for illegitimate reasons." (**Id**. at pp. 260-261, 267.)

The recent case of ***People* v. *Elder*** (2017) 11 Cal.App.5th 123, however, reflects a saner version of what constitutes exculpatory evidence. In that case, the defendant was charged with gross vehicular manslaughter while intoxicated based on his having accelerated to over 70 mph while on a narrow two-lane road with a 25-mph speed limit, veering momentarily into the opposing lane, and colliding with an oncoming car. The defendant made a motion to compel discovery of California Highway Patrol records relating to other automobile collisions at the same location in the seven years preceding the collision in this case. (**Id**. at pp. 125-127.) The appellate court rejected the argument this information was "exculpatory" because even if there was a history of collisions at the location of the accident, "it would not dispel the gross negligence of driving three times the roadway's posted speed limit while entering a curve. To the contrary, a disproportionate number of collisions would tend to show the roadway was difficult to drive under typical conditions, making it even more dangerous to drive in the manner defendant did." (**Id**. at p. 132 [and dismissing the idea the information would aid a defense based on defendant's conduct not being deemed a legal cause of harm due to an intervening act since that intervening act must not be reasonably foreseeable].) The appellate court also rejected the argument that the evidence would help show it was common for persons at that location to make mistakes and therefore the victim probably made the same mistake. The court observed that it was just as "arguable

that mistakes made by other drivers in the same situation would make a similar mistake by the victim driver more foreseeable, which would weaken a causation defense." (**Id**. at p. 133; **see also *People* v. *Superior Court (Dominguez)*** (2018) 28 Cal.App.5th 223, 241 [where there was no evidence that a software program suffered a problem in the case before, speculation that the program might have problems did not render the software program exculpatory].)

A. Does the Term "Exculpatory" Under Section 1054.3 Include "Impeachment" Evidence?

It is an open question whether the term "exculpatory" would include "impeachment" evidence.

In ***People* v. *Santos*** (1994) 30 Cal.App.4th 169, the court found the duty to provide exculpatory evidence under section 1054(e) might be less encompassing than the due process duty to disclose evidence. Paradoxically, the ***Santos*** court held that misdemeanor convictions involving moral turpitude for use as impeachment do not constitute "exculpatory evidence" for purposes of section 1054.1, but such convictions could constitute ***Brady*** evidence that would have to be turned over to the defense pursuant to the federal due process clause (**Id**. at pp. 178-179 [and indicating due process would also require the disclosure of prior misdemeanor *misconduct* involving moral turpitude].)

In ***Kennedy* v. *Superior Court*** (2006) 145 Cal.App.4th 359, the court stated there was reason to think the electorate "did ***not*** intend section 1054.1(e) to require the disclosure of impeachment evidence." (**Id**. at p. 377, emphasis added.) In support of this proposition, the ***Kennedy*** court thought it was significant that subdivision (d) of section 1054.1 "requires the disclosure of a very specific type of impeachment evidence, namely, 'The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.' (§ 1054.1, subd. (d).) If the term 'exculpatory evidence' in subdivision (e) is read in its broad sense and thus deemed to encompass all impeachment evidence, then subdivision (d) of the statute would be rendered superfluous—something that is to be avoided in the interpretation of statutes." (**Id**. at 377; **see also *People* v. *Lewis*** (2015) 240 Cal.App.4th 257, 267 [citing to ***Kennedy*** for the proposition that "whether exculpatory evidence includes impeachment evidence may be unsettled"].) **Prosecutors, however, should assume that exculpatory evidence includes impeaching evidence** – especially since "impeachment evidence" can even be deemed ***Brady*** evidence. (**See** this outline, section I-5-D at p. 62.)

> **Editor's note**: Although the drafters of Proposition 115 may have been thinking that *any* felony conviction would bear on the credibility of a witness – this is not actually true. A felony conviction not involving moral turpitude (and which would not otherwise show the witness was currently on probation) would not be relevant to the credibility of the witness and thus could not be used for impeachment. (**See *People* v. *Maestas*** (2005) 132 Cal.App.4th 1552, 1556 ["If a felony conviction does not necessarily involve moral turpitude, it is inadmissible for impeachment as a matter of law"].) In other words, subdivision (d) theoretically requires disclosure of evidence for purposes *other than* impeachment. (**See *People* v. *Price*** (1991) 1 Cal.4th 324, 419-420 ["Although the prosecution has a duty to inform the defense of polygraph results that cast doubt on the credibility of a prosecution witness, the existence of this duty does not make the results admissible."].)

18. Does the prosecution have to obtain and provide to the defense police reports relating to prior arrests or convictions of prosecution witnesses?

A common request made by the defense to the prosecution is for copies of the police reports relating to incidents that might be used to impeach prosecution witnesses. Is informing the defense of the date of arrest and nature of the arrest or conviction sufficient to comply with a prosecutor's discovery obligations?

There are no published California cases addressing this question insofar as the prosecutor's *statutory* discovery obligation is concerned. And prosecutors can expect the defense to argue that the police reports themselves fall under one or more of the following categories of discovery the prosecution is required to disclose to the defense under section 1054.1: (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"; or (f) "Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial[.]" (Pen. Code, § 1054.1.)

Providing the defense with *sufficient information to obtain police reports* or other documents *should* meet the prosecutor's ***Brady*** obligation since there is no violation of ***Brady*** **if** the prosecution has furnished the defense sufficient information to obtain documents that the defense may reasonably obtain on their own. (**See *People* v. *Morrison*** (2004) 34 Cal.4th 698, 715 ["when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no ***Brady*** claim"]; **see also** this outline,section I-11 at pp. 138-147.) In ***People* v. *McNeely*** (unreported) 2004 WL 187873, the prosecutor provided defense counsel the arrest date, case number, and charge of an offense impeaching a prosecution witness but declined to provide the police reports underlying the conviction. On appeal, the defense argued the failure of the prosecution to do so was a ***Brady*** violation. The appellate court found no violation because the police reports were not deemed material and because it was questionable whether there was the requisite "suppression" necessary to make out a ***Brady*** violation as the reports appeared readily available to defense. (**Id.** at p. *6-*7; **but see *Amado* v. *Gonzalez*** (9th Cir. 2013) 734 F.3d 936, 949, 951 [suggesting prosecution not only had a duty to disclose conviction from the rap sheet of a prosecution witness but a duty to disclose the gang affiliation of the witness which was revealed *in the probation report* associated with the witness' conviction because, inter alia, the witness was convicted by the same prosecutor's office].)

An argument can be made that whether there is a duty on the part of the prosecution to provide the actual police reports relating to the impeachment of prosecution witnesses (as opposed to just the information available from the witness' rapsheet) is ultimately a question of whether the prosecution should be deemed to be *in possession of* such reports. If that is a fair characterization of the question, then the duty under the discovery statutes to disclose witness-impeaching police reports (at least where the prosecutor has not already obtained the police reports in question) is likely no greater than the duty under ***Brady*** to disclose

witness-impeaching police reports. (**See *People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1133-1134 [finding there is "no reason to assume" the language in section 1054.1 requiring provision of materials and information to the defense "assigns the prosecutor a broader duty to discover and disclose evidence in the hands of other agencies than do ***Brady*** and its progeny"]; **accord *Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, 905.)

The issue can be parsed a little more closely by folks who want to draw a distinction between witness-impeaching police reports found in the files of the agency that investigated the charged crime and witness-impeaching police reports found in the files of other agencies. This distinction only becomes important *if* the prosecutor is held to be in possession of all police reports in the possession of the investigating agency regardless of whether those reports relate directly to the charged offense. (**See** this outline, section I-7-H at pp. 94-99.) If so, then prosecutors may have to, at least, make witness-impeaching reports that fortuitously happen to be in the possession of the agency investigating the charged offense available for review (albeit not if those reports are in the possession of some other law enforcement agency).

Keep in mind that if the prosecution physically obtains the police reports impeaching a witness, it will not matter which agency originally provided those reports. Once the actual reports have fallen into the hands of the prosecutor trying the case, it is going to be difficult to argue that such reports are not in the possession of the prosecutor, and the duty under subdivision (e) to provide "exculpatory evidence" likely dictates that the prosecutor will have to disclose those reports regardless of which agency originally provided them.

If the witness-impeachment evidence consists of a felony *conviction* (or at least a felony conviction of a material witness whose testimony is likely to be critical to the outcome of the trial), section 1054.1(d) specifically states that it is "*the existence*" of the felony conviction that must be disclosed. Thus, the statute itself essentially establishes providing the information needed to locate the conviction should suffice – and consequently the reports underlying the conviction need not be disclosed.

On the other hand, if the witness-impeachment evidence consists of conduct that *did not* result in a felony conviction, a slightly different analysis must be undertaken. In that situation, the underlying impeachment misconduct would be discoverable under section 1054.1(e), not 1054.1(d). In that circumstance it might not fly to argue that providing just the police report number is sufficient because, unlike when it comes to ***Brady*** evidence, section 1054.1(e) requires the disclosure of exculpatory evidence regardless of whether it is also reasonably accessible to the defense. If the exculpatory evidence exists in the reports themselves, the reports might have to be provided – at least if they are in the possession of the prosecution team. A counter argument might be that if all the prosecution has to do – even when it comes to felony convictions of material witnesses - is let the defense know of the existence of the conviction, it would be unreasonable to impose a greater duty on the prosecution to produce less significant impeachment evidence (i.e., reports of arrests, etc.,). The counter argument to the counter argument is that the absence of subdivision (d)'s qualifying language ("the existence of") from all other subdivisions of section 1054.1 indicates that more than

just alerting the defense to the existence of the information is required. (Cf., *Committee of Seven Thousand* v. *Superior Court* (1988) 45 Cal.3d 491, 507 ["it is ordinarily the rule that where the Legislature uses a different word or phrase in one part of a statute than it does in other sections or in a similar statute concerning a related subject, it must be presumed the Legislature intended a different meaning"].)

Another argument that can be made by the defense is that the witness-impeaching police reports are covered by subdivision (f) of section 1054.1 - under the theory that if the reports contain statements of the witnesses then they contain "[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial[.]" However, even assuming the reference to "relevant written or recorded statements of witnesses" can be interpreted to apply to statements made by witnesses in connection with events *unrelated* to the charged offense (a very tenuous assumption), the rationale would not apply if the police reports do not actually contain statements of the prosecution witnesses who would potentially be impeached.

Editor's note: Setting aside the legal issues, prosecutors should probably think twice before declining to obtain and provide police reports for a practical reason. If the defense can obtain the reports on their own and the prosecutor does not bother to obtain the reports, the prosecution is then in the unenviable position of lacking information that is known to the defense.

If it turns out that simply providing the police report numbers will **not** provide the defense reasonable access to the police reports, there is a stronger argument for imposing an obligation on the prosecution to do obtain and disclose the reports. (**See** this outline, section I-11-A at p. 138.)

Editor's note: A separate issue arises if the prosecution has a file relating to the conviction or impeaching evidence of a prosecution witness that contains information over and above what is contained in the police reports. If the prosecution does not disclose the information, and the information is exculpatory, there is a risk a court will find the prosecution violated its constitutional or statutory duty to disclose that information.

19. What, if any, is the prosecutor's obligation to provide law enforcement "training manuals?"

It is not unusual for the defense to request copies of police training manuals. Sometimes this is done as a matter of course sans explanation. Less frequently, the defense will identify the reasons for the request. Prosecutors can expect to receive these requests most commonly in cases where the defendant is charged with resisting arrest or battery upon a peace officer and the defense is that the police used excessive force. The reason why the defense wants the manuals is to see if the officer's conduct comported with recommended procedures. (**Cf., *People* v. *Riffel*** (unreported) 2004 WL 187601.) Another situation in which police training manuals are requested is where there is a claim the police obtained an involuntary confession. The reason why the defense wants the manuals is to determine whether the manuals encourage (or discourage) conduct that the defense claims bears on the voluntariness of the statements.

These manuals would only be discoverable directly from the prosecution if they contained exculpatory (**see** Pen. Code, § 1054.1(e)) or ***Brady*** evidence since they do not fall under any other statutory category. Even assuming that the defense could make such a showing, an argument can be made that there still would not be an obligation on the part of the prosecution to disclose the manuals under the theory that training officers is a non-investigatory function of the police department and thus, the training manuals are properly viewed as outside the possession of prosecution team. (**See *People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, 1310, 1317-1318 [even though the Department of Corrections was the investigating agency in a prison assault, the prosecutor's duty to disclose information favorable to the defense did not extend to policy and procedure manuals for the administrative segregation unit relating to the Department's non-investigatory functions].)

That being said, as a practical matter, some thought should be given to whether the discovery request is best handled by a prosecutor rather than by the city attorney or county counsel before directing the defense to file their request with the police department. There is always the chance the police department will simply provide the manual in response to a subpoena and then the defense will be in possession of material that the prosecutor does not possess - always a bad scenario. Whereas if the prosecutor handles the discovery motion, the prosecutor will have a copy of any discovery ordered. Another reason for the prosecutor to handle the discovery request is that a prosecutor may be in a better position than a city or county attorney to (i) assess whether the manual should be disclosed (i.e., the People pay the penalty if the disclosure is improperly denied) and (ii) articulate the argument for non-disclosure if that is the position adopted.

Assuming a prosecutor decides to handle the discovery request directly, and further assuming the defense can make some showing the manuals contain exculpatory material, this does not mean the manuals should be disclosed. These manuals likely constitute "official information" as defined in Evidence Code section 1040. (**See** Evid. Code, § 1040 ["information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made"].) The closest case on point in this regard is the case of ***Suarez* v. *Office of Administrative Hearings (Bennett)*** (2004) 123 Cal.App.4th 1191.

In ***Suarez***, the state Department of Real Estate (the "DRE") was attempting to revoke the real estate license of a broker for engaging in fraud. Other charges of misconduct were also alleged based on an audit of Bennett's account records. Bennett asked for the DRE's "Audit Manual and Enforcement Deputy Manual." Bennett argued the manuals were relevant because "a good portion of the concerned accusation deals with an alleged violation of trust account record keeping and fund management. This alleged violation was purportedly discovered by [the DRE] during an audit under the guidelines provided by the Department of Real Estate. Thus the specific steps and procedures used by [the DRE] pursuant to the DRE Audit Manual will necessarily affect the outcome of his audit." After an in camera review of the manuals, the administrative judge ordered most of the manuals revealed. (**Id**. at p. 1192-1193.)

The DRE challenged that order by way of a writ in Superior Court claiming the manuals were protected under Evidence Code section 1040. The Superior Court also reviewed the manuals in camera and agreed with the DRE, finding that the manuals were privileged, confidential, and not subject to discovery, and that the disclosure order was an abuse of discretion. The Superior Court found that the manuals were "official information" and contained "confidential investigative training materials that describe investigative techniques and game plans for ferreting out violations of law. They include information to help investigators identify 'red flags' and techniques dealing with protection of the public from unscrupulous real estate businesses. If the information in the manuals, or even parts of the manuals, was disclosed to [Bennett] and/or the public in general, it would compromise the effectiveness of the investigations because licensees could devise methods to avoid detection of violations of the law. Disclosure of the manuals, or any part thereof, is against the public interest." (**Id**. at pp. 1193-1194.) The Superior Court also found that all of one manual was completely irrelevant, and most of the other manual was irrelevant, to the issues before the Administrative Law Judge. (**Id**. at p. 1194.)

The appellate court agreed with the Superior Court that the information constituted official information and, under balancing test of Evidence Code section 1040(b), should not have been ordered disclosed. (**Id**. at p. 1195.)

If a court agrees a police training manual is covered by the official information privilege, prosecutors should be prepared to go in camera to litigate whether all or any of it should be disclosed.

Manuals relating to *software* programs used by law enforcement may also be protected by the trade secret privilege of Evidence Code section 1060, which provides that "[i]f he or his agent or employee claims the [trade secret] privilege, the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice." (**See** Evid. Code, § 1060; ***People* v. *Superior Court (Dominguez)*** (2018) 28 Cal.App.5th 223, 241-243.)

In that case, prosecutors should make sure that the court knows the holder of the applicable privilege must be given an opportunity to object before any disclosure is made. (**See *People* v. *Superior Court (Dominguez)*** (2018) 28 Cal.App.5th 223, 242-243.)

20. Does the obligation under section 1054.1(f) to provide witness statements extend to the raw notes of an interview of the witness - even if the notes have been incorporated into a report?

In ***Thompson* v. *Superior Court*** (1997) 53 Cal.App.4th 480, the court held that raw written notes of defense witness interviews are discoverable by the prosecution as "statements" under section 1054.3 and that similar written notes of prosecution witness interviews (by police, investigators, or prosecutors) likewise would be discoverable by the defense under section 1054.1(f). The duty exists regardless of

whether the interviewer is an attorney and whether the notes are later incorporated into a formal written witness statement report – at least if the notes are in existence at the time the duty to disclose arises. (**Id**. at pp. 484-488.) However, the court *did* limit the duty to statements of witnesses the parties intend to call at trial and held the duty does not extend to the interviewer's impressions or opinions, i.e., work product. (**Id**. at p. 484.) In ***People* v. *Verdugo*** (2010) 50 Cal.4th 263, the California Supreme Court cited to ***Thompson*** in support of its finding that the prosecutor violated section 1054.1(d) by failing to turn over the raw notes of interviews the prosecutor had with witnesses – albeit finding the failure did not prejudice the defendant. (**Id**. at pp. 280-282.)

Editor's note: For the rules regarding raw notes of *experts*, see this outline, section III-22 at pp. 197-198.)

Editor's note: As to whether section 1054.1(f) (or due process) requires officers to retain raw notes that are incorporated into police reports, **see** Allison MacBeth's "Responding to Motions to Dismiss: Loss or Destruction of Evidence" outline.

21. Does the obligation under section 1054.1(f) to disclose witness statements extend to "oral statements" of witnesses - even if those statements are unrecorded?

In ***Roland* v. *Superior Court*** (2004) 124 Cal.App.4th 154, the court held that the criminal discovery statute requires defense counsel to disclose all relevant statements, including unrecorded oral witness statements relayed to defense counsel by a third party, such as an investigator, and also requires disclosure of unrecorded witness statements made directly to defense counsel. (**Id**. at p. 160.)

The ***Roland*** court made it clear that defense counsel is "not entitled to withhold any relevant witness statements from the prosecution by the simple expedient of not writing them down. 'Such gamesmanship is inconsistent with the quest for truth, which is the objective of modern discovery.'" (**Id**. at p. 157.)

Editor's note: It may be improper for counsel to ask an expert to refrain from writing a report in order to avoid discovery obligations. (**See *In re Serra*** (9th Cir. 1973) 484 F.2d 947 [proper to find attorney in contempt where, after court ordered counsel to provide reciprocal discovery of scientific or medical reports of experts that were going to be used in trial, the attorney instructed the doctor not to prepare medical report which doctor would have prepared in accordance with his usual practice].)

In ***People* v. *Lamb*** (2006) 136 Cal.App.4th 575, the court held defense counsel was required by the discovery statute to disclose what the expert had orally told the defense counsel regarding his interviews with the witnesses, his calculations, and his examination of the vehicle as well as his theories and opinions about the cause of the accident. (**Id**. at pp. 580-581.)

The ***Roland*** court made it clear that its ruling applied equally to the prosecution's obligation under Penal Code section 1054.1 to disclose to the defendant or his or her attorney "Relevant written or

recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at trial[.]" (**Id**. at p. 156 and fn. 1.) And in ***People* v. *Poletti*** (2015) 240 Cal.App.4th 1191, the court applied the rule to the prosecution: "The prosecutor represented to the trial court that there was no report of the victim's undisclosed statements. That is irrelevant to the question of whether a discovery violation occurred." (**Id**. at p. 1211, citing to ***Roland* v. *Superior Court*** (2004) 124 Cal.App.4th 154, 165.)

Editor's note: The California Supreme Court has twice declined to approve or disapprove of the rule in ***Roland***. (**See *People* v. *Thompson*** (2016) 1 Cal.5th 1043, 1102-1104, citing ***People* v. *Verdugo*** (2010) 50 Cal.4th 263, 283.) In ***Thompson***, the court assumed, without deciding, that a prosecutor had to turn over oral statements not reduced to writing; but held defendant's failure to request a continuance to address the belated disclosure precluded a claim of error on appeal and that any error was harmless. (**Id**. at p. 1104.)

22. Is the prosecution required to provide the raw notes or data of an expert?

Penal Code section 1054.1(f)) requires the prosecution to, inter alia, disclose: "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 1054.3(a) requires the defense to make similar disclosures of statements or reports of statements of witnesses - other than statements of the defendant.

In ***Sandeffer* v. *Superior Court*** (1993) 18 Cal.App.4th 672, the court noted that a trial court's order that the defense provide not only an expert's report but the expert's "notes" "in most circumstances would go beyond the specification of discoverable items set forth in the statute." (**Id**. at p. 679.) However, this dictum was clarified by the same appellate court shortly thereafter in the ***Hines*** decision, discussed immediately below.

In ***Hines* v. *Superior Court*** (1993) 20 Cal.App.4th 1818, a case involving defense discovery obligations, the court interpreted this language to "include the original documentation of the examinations, tests, etc." (**Id**. at p. 1822.) The court observed the "[o]riginal documentation, including handwritten notes if that be the case, would seem often to be the best evidence of the test, experiment or examination. An expert should not be permitted to insulate such evidence from discovery by refining, retyping or otherwise reducing the original documentation to some other form." (**Ibid**.) The prosecution was entitled to "factual determinations of the expert from observations made during an examination[.]" (**Id**. at p. 1823.)

However, the ***Hines*** court also stated that this did not mean there was a duty to disclose all the random "notes" which might be lodged in an expert's file nor the "production of 'preliminary drafts of reports, or of

an expert's notes to himself which reflect his own opinions or interim conclusions." (**Id**. at p. 1823.) The ***Hines*** court also exempted interview notes reflecting the defendant's statements - which it found were specifically exempted from discovery under section 1054.3, subdivision (a). (**Ibid**.) Although ***Hines*** involved defense disclosures, the holding would be equally binding on the prosecution.

Editor's note: The obligations of defense counsel to turn over raw data and notes of their experts who have examined the defendant is discussed in greater detail in this outline, section V-8 at pp. 215-219.)

A. Does the Duty to Provide an Expert's Notes Change Depending on Whether a Formal Report is Written?

The rules regarding disclosure of expert's notes change if the expert *never makes a report* and the notes and/or raw data is the only "report" made by the expert.

In ***People* v. *Lamb*** (2006) 136 Cal.App.4th 575, the court held defense counsel was required by the discovery statute to disclose what the expert had orally told the defense counsel regarding his interviews with the witnesses, his calculations, and his examination of the vehicle as well as his theories and opinions about the cause of the accident. (**Id**. at pp. 580-581.)

In ***People* v. *Hajek*** (2014) 58 Cal.4th 1144, an attorney for one co-defendant retained an expert for the penalty phase. The attorney represented that the expert had not prepared a report but neglected to mention that expert had prepared 20 pages of handwritten notes and administered psychological tests to the defendant. The California Supreme Court effectively held that where no formal report is produced, the notes themselves constitute a report for purposes of the statute, citing to ***People* v. *Lamb*** (2006) 136 Cal.App.4th 575, 580, and upholding the sanction of exclusion of the expert for failure to disclose the "report." (***Hajek*** at pp. 1232-1233.)

In the *unreported* decision of ***People* v. *Zarazu*** 2012 WL 1866934, the court held the prosecution should have turned over 15 photographs, a peer–review worksheet, and 26 pages of handwritten notes of a firearm examiner, as well as, 8 pages of notes of a fingerprint examiner pursuant to section 1054.1(f). (**Id**. at p. *15-*16.)

23. Is the prosecution required to disclose the reports or other evidence *relied upon* by an expert in forming his opinion?

Whenever it comes to reports relied upon by an expert, it is helpful to draw a distinction between information *pertaining to the specific case* which the expert reviewed and *general* information that an expert has reviewed in order to establish and develop his expertise. In ***People* v. *Sanchez*** (2016) 63 Cal.4th 665, the California Supreme Court pointed out that, unlike lay persons, "experts may relate information acquired through their training and experience, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc." (**Id**. at p. 675.)

Regardless of whether the expert is going to be called by the prosecution or the defense, materials used ***in developing an expertise*** are not witness statements, expert reports, or the results of examinations. (**Cf.**, ***Hines* v. *Superior Court*** (1993) 20 Cal.App.4th 1818, 1823 [noting even "the report of a nontestifying expert which is in some way utilized by a testifying expert is not a document, at least in ordinary circumstances, which the defendant will intend to offer in evidence" and thus "is not, therefore, literally embraced within the description of the statute."].) In the unreported decision of ***People* v. *Zarazu*** (unpublished) 2012 WL 1866934, a firearms expert provided detailed technical testimony regarding gunshot residue from which it could be inferred she had read studies or academic articles not provided to the defense. However, the court rejected the defendant's claim there was a discovery violation because "there is no basis in ***Brady*** or section 1054.1 to compel discovery of every single item an expert has read in his or her career[.]" (**Id.** at p. *17.)

In fact, even before Penal Code section 1054 was enacted and limited the discovery obligations of the prosecution, such material was not discoverable. For example, in ***People* v. *Roberts*** (1992) 2 Cal.4th 271, the court upheld the trial court's denial of a defense request to examine the materials relied upon by prosecution gang experts where the experts were called to testify regarding defendant's membership in a prison gang and the defense asked for materials on which the experts relied to interpret the prison gang's oaths and rules. (**Id.** at p. 299 [albeit the request was based on defendant's Sixth Amendment right of Confrontation and not due process or the discovery statute].)

On the other hand, when it comes to documents the expert has reviewed that are *specific* to the case in which the expert is testifying, the rules regarding whether the opposing party is entitled to the documents pre-trial *may* be different depending on whether it is the prosecution or the defense expert who relied on the materials.

In ***Hines* v. *Superior Court*** (1993) 20 Cal.App.4th 1818, the defendant argued section 1054.3 does not contemplate the production of reports of other experts which the testifying expert may have used or relied on in the preparation of his own report. The court of appeal agreed that "[t]he report of a nontestifying expert which is in some way utilized by a testifying expert" was not disclosable by the defense because it "is not a document, at least in ordinary circumstances, which the defendant will intend to offer in evidence" and thus as was "not literally embraced within the description of the statute." (**Id.** at p. 1823.) While recognizing that the provision of the discovery statute governing what the defense must provide the prosecution when it comes to "witness statements, expert reports and the results of examinations" is "virtually the same as" the provision of the discovery statute governing what the prosecution must provide the defense, the ***Hines*** court begged off deciding whether the defense would be entitled to reports relied upon by a prosecution expert.

This is the language from ***Hines***: "The defense in criminal trials benefits from all manner of procedural advantages. Being able to protect pretrial divulgence of certain information upon which a defense expert

intends to rely is one of them. While the new discovery provisions equalize to some extent prosecution and defense discovery, they clearly do not (as we explain post) achieve complete reciprocity. This is one area in which we believe the defense retains a procedural advantage." (**Id**. at pp. 1823-1824.)

It is not entirely clear what the ***Hines*** court was implying. It is reasonable to assume, at a minimum, that if the evidence the expert considered contains exculpatory information, the People would have an obligation to disclose it – whereas the defense would have no obligation to disclose inculpatory information the defense expert relied upon.

The ***Hines*** court may also have been referring to the fact that prosecutors will not ordinarily be able to claim the attorney-client privilege because a prosecutor has no physical client, whereas defense attorneys may legitimately and routinely claim the privilege. That privilege encompasses confidential communications where the lawyer has "a client reveal information to an expert consultant in order that the lawyer may adequately advise his client." (Law Revision Commission Comments to Evid. Code, § 952.) It also encompasses confidential communications from the client "made to third parties--such as the lawyer's secretary, a physician, or similar expert--for the purpose of transmitting such information to the lawyer . . ." (**Ibid**.) And "if the expert consultant is acting merely as a conduit for communications from the client to the attorney, . . . the communication would [also] be privileged . . ." (**Ibid**.)

Subject to caveat that the People have a due process obligation to disclose material information favorable to the defense, no distinction should be drawn between the prosecution and the defense when it comes to the work-product privilege. *Neither* the prosecution nor the defense would have an obligation to disclose information protected by the work-product privilege since the statutory discovery requirements do not require disclosure of privileged information. (Pen. Code, § 1054.6.)

A. <u>Evidence Code Section 721 and 771</u>

Keep in mind that, pursuant to Evidence Code section 721, the opposing party is entitled to ***cross-examine*** an expert regarding the contents of materials the expert "referred to, considered, or relied upon . . . in arriving at or forming his or her opinion[.]" (Evid. Code, § 721(b)(2).) "Generally, the bases and reliability of an expert's opinion are proper grounds for cross-examination and impeachment. 'The most important inquiry of an expert witness concerns the matter on which the witness's opinion is based and the reasons for the opinion.'" (***People* v. *Spence*** (2012) 212 Cal.App.4th 478, 503; **see also *Hines* v. *Superior Court*** (1993) 20 Cal.App.4th 1818, 1823 [noting reports used by expert may be discoverable as an aspect of cross-examination of the testifying expert].)

Moreover, pursuant to Evidence Code section 771, if an expert (or any witness for that matter) "either while testifying or ***prior thereto***, uses a writing to refresh his memory with respect to any matter about which he testifies, ***such writing must be produced*** at the hearing at the request of an adverse party

and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken." (Evid. Code, § 771(a), emphasis added.)

24. Does the prosecution have an obligation to provide reports made by an expert witness in unrelated cases?

Sometimes defendants will ask for reports made by experts in cases other than the case for which the defendant is on trial. And, if the expert witness is a police officer, the defendant may seek all police reports made by the officer-witness.

However, unless the prosecution knows there is exculpatory information contained in these other reports, there is no obligation to provide those others reports. The discovery statute only requires the disclosure of "***[r]elevant*** 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***[.]" (Pen. Code, § 1054(f), emphasis added.)

The discovery statute has never been interpreted to require the parties to provide all statements ever made by a witness. The statements must relate to and be relevant to the charged case. As the California Supreme Court has observed, the opposing party is not entitled to "examine all the written records generated during [the expert's] career in order to be able to cross-examine him concerning his professional experience." (***People* v. *Prince*** (2007) 40 Cal.4th 1179, 1232, citing to ***People* v. *Roberts*** (1992) 2 Cal.4th 271.) **but see** Evid. Code, §§ 721, 771 and this outline, section III-23 at pp. 198-200.)

25. Does section 1054.1(f)'s requirement to disclose witness statements require the disclosure of work product?

When taking statements from a witness, prosecutors sometimes jot down notes to themselves that ***do not recount*** the actual statement of the witness. Such notes will usually be considered work product. (**See e.g.,** ***People* v. *Adams*** (unreported) 2011 WL 3568512, *9.)

Penal Code section 1054.6 specifically states: "Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined in subdivision (a) of Section 2018.030 of the Code of Civil Procedure[.]" (**See *Roland* v. *Superior Court*** (2004) 124 Cal.App.4th 154, 159 [noting "[s]ection 1054.6 of the statutory scheme 'explicitly protects the work product privilege' by stating that a defendant is not required to disclose any materials or information that constitute attorney work product."].) "To the extent that a report of a witness interview reflects an attorney's mental processes, it is exempted from discovery by section 1054.6, and a party can seek a protective order to that effect (**see** Code Civ. Proc., §2031, subd. (e)) or an in camera review in which the privileged material can be excised." (**Id**. at p. 159, citing to ***Hobbs* v. *Municipal Court*** (1991) 233 Cal.App.3d 670, 692.)

However, there are limitations on what constitutes work product; what is discoverable is based ***on the content*** of the writing not just the fact that the attorney wrote it.

Work product is defined in the Code of Civil Procedure as: "(a) A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances. ¶ (b) The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." (Code of Civ. Proc. § 2018.030.)

However, for purposes of criminal discovery, Penal Code section 1054.6 "expressly limits the definition of 'work product' in criminal cases to 'core' work product, that is any writing reflecting 'an attorney's impressions conclusions, opinions, or legal research or theories.'" (***Izazaga* v. *Superior Court*** (1991) 54 Cal.3d 356, 382 fn. 19; **accord *People* v. *Zamudio*** (2008) 43 Cal.4th 327, 356 [and finding no violation of work product privilege occurred when the state's criminalist was permitted to testify that physical evidence had been released to a defense lab after testing].)

While work product may be found in interviews, "to the extent that witnesses' statements and reports of witness interviews reflect merely what the witness said they are not work product." (***Hobbs* v. *Municipal Court*** (1991) 233 Cal. App. 3d 670, 692; **accord *Roland* v. *Superior Court*** (2004) 124 Cal.App.4th 154, 169 ["statements or reports that merely reflect what an intended witness said during an interview are not work product"]. "It is well-settled that there is no attorney's work-product privilege for statements of witnesses since such statements constitute material of a nonderivative or noninterpretative nature." (***People* v. *Williams*** (1979) 93 Cal.App.3d 40, 63-64; ***People* v. *Alexander*** (1983) 140 Cal. App. 3d 647, 660 ["Statements given by witnesses to the prosecutor are discoverable 'since such statements constitute material of a nonderivative or noninterpretive nature"]; **see also *People* v. *Collie*** (1981) 30 Cal.3d 43, 60 [assuming that witness's statements paraphrased in investigator's report to defense counsel were not work product].)

The identity of experts consulted, but not used, by the prosecution is protected by the work product privilege. This protection includes the expert's opinions so long as any exculpatory facts upon which those opinions are based are disclosed to the defense. (***People* v. *McClinton*** (2018) 29 Cal.App.5th 738, 766.)

Editor's note: Prosecutors are not often engaged in "expert shopping" of the type routinely engaged in by defense counsel. If an expert who is merely consulted (but not called as a witness) provided an opinion favorable to the defense, it is likely that many prosecutors would feel uncomfortable keeping the ultimate opinion from the defense – even if all the underlying facts upon which the opinion is based are disclosed. For example, it appears unseemly for a prosecutor to consult with one traffic accident reconstruction expert who opines a defendant was not negligent, but then use a different reconstruction expert who comes to a different conclusion – without ever revealing to the defense the first expert's opinion. Nevertheless, this is consistent with the long-standing law: "The opinions of experts who have not been designated as trial witnesses are protected by the attorney work product rule. [Citation.] Their identity also remains privileged until they are designated as trial witnesses." (***Hernandez* v. *Superior Court*** (2003) 112 Cal.App.4th 285, 297.) And if, as ***McClinton*** states, due process only requires disclosure of the underlying facts, the prosecutor should be entitled to keep the ultimate opinion of the first expert undisclosed. Moreover, the rationale behind the work product privilege would be undermined if prosecutors were inhibited from, for example, soliciting informal opinions from uninvolved officers about whether a certain amount of methamphetamine would be enough for sale before deciding how to properly charge a defendant. That said, because there is no law that states the privilege **must** be asserted, because there does not appear to be any case other than ***McClinton*** that touches upon the issue in the context of prosecutorial discovery obligations, and because keeping the opinion concealed just doesn't feel right, it is respectfully recommended that a prosecutor disclose any formal opinion of an expert that is helpful to the defense.

In ***Coito* v. *Superior Court*** (2012) 54 Cal.4th 480, the court held that when the questions that the attorney has chosen to ask or not ask in a recorded witness interview provide a window into the attorney's theory of the case or the attorney's evaluation of what issues are most important, redaction of the attorney's questions may be appropriate. (**Id.** at pp. 495-496 [and overruling cases holding "a witness statement taken by an attorney does not, ***as a matter of law***, constitute work product," emphasis added.) If the party resisting discovery alleges a witness statement, or portion thereof, is absolutely protected because it "reflects an attorney's impressions, conclusions, opinions, or legal research or theories' (§ 2018.030, subd. (a)), that party must make a preliminary or foundational showing in support of its claim. The trial court should then make an in camera inspection to determine whether absolute work product protection applies to some or all of the material." (***Coito*** at pp. 499-500**; see also *People* v. *Valdez*** (2012) 55 Cal.4th 82, 119, fn. 22.)

26. Is the prosecution obligated to write down or record oral statements provided by witnesses?

The question of whether the prosecution (or defense) must record or write down the oral statements of the witness has not been addressed by any published decision. If a prosecutor ***has*** taken notes, providing an oral summary of the interview, in lieu of the notes, will **not** suffice. (***People* v. *Verdugo*** (2010) 50 Cal.4th 263, 281-282 [describing failure of prosecutor to provide notes of interview with witness as a violation of the discovery statute - albeit finding violation was not prejudicial considering the prosecutor told defense counsel the substance of the witness's statement and the trial court granted a continuance to defense counsel to prepare for cross-examination].)

If no notes have been taken, passing on a verbal summary of the information obtained should suffice. However, there is a risk that if only an oral statement is provided, the door is opened for the defense to claim (out of faulty memory or by design) the discovery was never provided. (**See e.g., *People* v. *Verdugo*** (2010) 50 Cal.4th 263, 281.)

Transcripts of Oral Statements

Does the prosecutor have any statutory discovery obligation to transcribe an oral statement of a witness?

In the unreported case of ***People* v. *Zarazu*** [unreported] 2012 WL 1866934, a case in which the prosecutor did not provide a transcript of a witness interview it planned to use in evidence until mid-trial (the transcriber had not finished it until late), the court stated that "the clear language of the statute does not require the prosecution to also create transcripts of recorded oral statements." (**Id**. at p. *18, emphasis added.) However, the court went on to indicate that once the transcript had been created, the prosecution had a duty to disclose it in a timely manner. (**Ibid**.)

27. Does the prosecutor have an obligation to disclose *everything* a witness says?

It is common for prosecutors to briefly speak with witnesses over the telephone in the months leading up to trial or to sit down with the witness just before the witness testifies. And *it is a common lament* of prosecutors that it is impossible to provide every single thing a witness has said leading up to trial. (**See *People v. Thompson*** (2016) 1 Cal.5th 1043, 1103 [quoting the prosecutor as saying "We can't [provide pretrial discovery for] each and every sentence that the witness is testifying to" but failing to address whether such an obligation existed].)

Is there an obligation to report to the defense *everything* the witness has told the prosecutor, regardless of whether the information is duplicative of earlier information provided to the defense and regardless of the information's significance?

The language of section 1054.1(f) requires disclosure of any "***[r]elevant*** written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial[.]" (Pen. Code, § 1054.1(f), emphasis added.) Communications with witnesses about scheduling and even much of what may be discussed during an oral witness' interview may not be relevant and would not fall under section 1054.1(f). Thus, the qualification that the statement be relevant provides some limitation on the scope of prosecutorial obligations.

Arguably, duplicative information is also not relevant – although duplicative information from an interview could potentially become relevant if the duplicative statement qualifies as a prior consistent statement. (**See** Evid. Code, §§ 1236, 791.) In ***People* v. *Verdugo*** (2010) 50 Cal.4th 263, the California Supreme Court found a violation of the discovery statute where the prosecution gave an oral

summary of a witness' statement to the defense but failed to initially disclose written notes the prosecutor had taken of the statement – even though the written notes were duplicative of the oral summary. (**Id**. at p. 281.) Though, if duplicative information is ultimately deemed discoverable, it is unlikely to ever be deemed prejudicial error. (**See *People* v. *Verdugo*** (2010) 50 Cal.4th 263, 281 [finding no prejudicial error in failing to provide notes of interview where, inter alia, the prosecutor provided a verbal summary of the substance of the information to the defense]; ***People* v. *Gray*** [unreported] 2006 WL 1000385, *2-3 [no prejudice to defendant from failure to disclose information in witness' statements duplicative of information in witness' statement that was disclosed].)

No published case has addressed whether every minute detail, including duplicative information of a witness' earlier statement, must be disclosed. Certainly, ***any new significant information should be provided***. And it does not make a difference that the statement is not favorable to the defense. (**See *People* v. *Poletti*** (2015) 240 Cal.App.4th 1191, 1210 [prosecutor had duty to disclose witness' statement that reflected the witness changed her mind as to when a rape occurred in a manner that was more consistent with the evidence];

Under pre-Proposition 115 case law, some distinction was arguably drawn between statements of witnesses given as part of an investigation and conversations a prosecutor might have with a witness as part of trial preparation – with the latter not necessarily being discoverable to the same extent as the former. (**See *People* v. *Alexander*** (1983) 140 Cal. App. 3d 647, 660-661; Whether such a distinction still exists post-Proposition 115 is an open question. (**See *People* v. *Washington*** (unpublished) 2014 WL 4161580, at *13 [any discovery violation stemming from failure of prosecutor to disclose allegedly last-minute trial prep interview with witness cured by court ordering disclosure of any notes and report of conversation to be made].) However, requiring the disclosure of every minute detail of an *unrecorded* witness's statement seems beyond impractical and it would be unreasonable for a court to impose such a requirement.

28. Does the prosecutor have a statutory obligation to obtain and/or disclose statements of police officer witnesses to a criminal case if the statements were made by officers during a parallel internal affairs investigation?

It is not unusual for there to be an on-going internal affairs investigation occurring simultaneously with the investigation of a criminal case. Sometimes the internal affairs (IA) investigation results in witnesses (including police officer witnesses) to the criminal case being interviewed by police department IA investigators. What is the prosecutor's responsibility to obtain and/or disclose the statements of such witnesses?

In ***Rezek* v. *Superior Court*** (2012) 206 Cal.App.4th 633, the court confronted the question of whether Penal Code section 1054 ***precluded*** the defense from filing a ***Pitchess*** motion to obtain statements of witnesses to a pending criminal case where there was a parallel IA investigation, and the statements were

elicited by police pursuant to that IA investigation. The court held that the defense is entitled to file a ***Pitchess*** motion to obtain the statements of witnesses to the crime with which the defendant is currently charged where such statements were obtained as the result of an internal affairs investigation and placed in an officer's personnel file. (***Rezak*** at pp. 637, 641, 643 [and noting that "[w]hen the defendant seeks the statements of witnesses to the charged incident, an officer's privacy interests are implicated less than when the information sought pertains to past incidents unconnected to the charged offense"].) The court also indicated that if the prosecution *wanted* to file a ***Pitchess*** motion, it could do so. (***Rezak***, at p. 642.) It is an entirely different question though whether a prosecutor ***should*** seek to obtain witness statements regarding the current offense that are located in an officer's personnel file. From a practical standpoint, it is probably not a good idea for the defense to be in sole possession of the witness statements given during the IA investigation when those statements differ from statements given in the pending criminal case, especially since the defense would have no obligation to provide those statements to the prosecution if the witnesses were called by the prosecution. (**See** 1054.3(a)(1) [defense has obligation to provide statements of witness, the ***defense*** intends to call as witnesses]; ***Hubbard* v. *Superior Court*** (1997) 66 Cal.App.4th 1163, 1165-1170 [party may withhold disclosure of statement taken from the opposing party's witness unless and until the party holding the statement reasonably anticipates calling a witness to introduce the statement].) Moreover, it is even possible that *physical* evidence was obtained during the IA investigation that is relevant to the pending criminal case.

Prosecutors should make sure that if information is obtained during the IA investigation that bears on the criminal case and/or if the defense files a ***Pitchess*** motion, there is some mechanism to alert the prosecution that they need to make their own ***Pitchess*** motion for the information or evidence. Finally, ***if the prosecution becomes aware of the content of a witness' statement*** that is ensconced in an officer's personnel file (e.g., by talking to one of the witnesses directly), the prosecution must turn over that information to the defense pursuant to section 1054.1(f), and under the due process obligation if the content constitutes ***Brady*** information.

Related issues can arise when there is an officer-involved shooting. For example, let's say officers are chasing a pair of bank robbers. The robbers open fire on the officer and the officers respond by shooting and killing one of the robbers. In such circumstances, there may be multiple overlapping investigations resulting in multiple statements being taken from a single witness: (i) a criminal investigation into the surviving defendant for commission of the robbery and possibly a provocative act murder –an investigation which also potentially might branch off into an investigation of the officer for a homicide; (ii) an investigation by the DA's office into whether the shooting was within the law; or (iii) an automatic departmental-generated administrative investigation to determine whether the officer acted in compliance with departmental policies - which might merge with an IA investigation if a civilian complaint is later lodged against the officer.

Witnesses to the event may be interviewed by both the officers investigating the robbery/provocative act murder and officers conducting the administrative and/or civilian-generated IA investigation into the police shooting. The officer involved in the shooting is going to be interviewed but that statement is very likely going to be subject to the protections laid out in ***Lybarger* v. *City of Los Angeles*** (1985) 40 Cal.3d 822, which held statements officers are compelled to give to their employing police agency are protected from being used against the officer in any subsequent criminal proceeding. Whether the defense is entitled to obtain ***Lybarger***'d statements where the officer *is a witness* (not a defendant) in a pending criminal case and was interviewed as part of an officer-involved shooting investigation has not been directly addressed in any California case. The issue of whether the defense was entitled to a ***Lybarger***'d statement in a criminal case where the officer giving the statement was a potential witness was raised, but not decided, in the unreported case of ***People* v. *Ortega*** [unreported] 2012 WL 1621564.

It appears that use of the statement would not be barred by Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.). Government Code section 3303(f), subject to certain exceptions, prevents the use of a ***Lybarger***'d statement in any subsequent "***civil*** proceeding" but does not address its use in ***criminal*** proceedings. In fact, even in a civil proceeding, such statements may be used to "impeach the testimony of that officer after an in camera review to determine whether the statements serve to impeach the testimony of the officer." (Gov. Code, § 3303(f)(3).)

However, while the ***Lybarger*** admonishment only informs the officer that his statement cannot be used *against him in a criminal proceeding* (**see *Williams* v. *City of Los Angeles*** (1988) 47 Cal.3d 195, 200), a lybarger'd statement is nonetheless considered a coerced and involuntary statement. (**See *Garrity* v. *State of N.J.*** (1967) 385 U.S. 493 [where officers being investigated were given choice either to incriminate themselves or to forfeit their jobs under New Jersey statute and chose to make confessions, confessions were not voluntary but were coerced, and Fourteenth Amendment prohibited their use in subsequent criminal prosecution of officers in state court]; ***People* v. *Canard*** (1967) 257 Cal.App.2d 444, 466 [officer could not be *impeached* with involuntary statement he gave to grand jury where he was told before he appeared before the grand jury, pursuant to subpoena, that if he refused to testify by invoking the Fifth Amendment, it meant dismissal from the force].) Thus, the statement will very likely be inadmissible for impeachment purposes *in any case* – even where the officer is just a witness. (**See *Mincey* v. *Arizona*** (1978) 437 U.S. 385, 398 [statements that are involuntary, of course, remain inadmissible for any purpose]; ***People* v. *Underwood*** (1964) 61 Cal.2d 113, 124 [involuntary statement could not be used to impeach the testimony of the person from whom the statement issued, be he the accused or a witness].)

But *statutory* disclosure obligations do not turn on admissibility of the evidence. And thus it appears that the bar against use of the statements to implicate the officer would not necessarily prevent

disclosure of the statements in a case where the officer is not the subject of a criminal investigation and would simply be testifying as a witness in a third party's case.

29. Is the *statutory* duty to disclose information met if the defense either possesses or can reasonably obtain the information on its own?

Failure to disclose evidence that is known and reasonably accessible to the defense is not a violation of federal due process, i.e., is not a ***Brady*** violation. (**See *People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1134, citing to ***People* v. *Salazar*** (2005) 35 Cal.4th 1031, 1048-1049; this outline, section I-11 at pp. 138-147.) However, it should not be assumed this principle applies when it comes to the People's ***statutory*** obligations. There is nothing in the language of section 1054.1 that renders the duty to disclose the statutorily-designated evidence a nullity if that evidence is known and reasonably accessible to the defense. Indeed, the case law indicates the contrary.

For example, in ***People* v. *Little*** (1997) 59 Cal.App.4th 426, the People contended they had no duty to disclose the felony conviction of a witness "because they did not know about the conviction ***and the defense counsel should have already known about Wright's conviction because he represented a codefendant in a previous trial***." (**Id**. at p. 430.) The ***Little*** court rejected this argument stating, "[u]nder ***In re Littlefield***, ***supra***, 5 Cal.4th 122, ***even if*** . . . the prosecution did not have actual knowledge of the witness's prior conviction, ***and the defense had alternative access to that information***, section 1054.1 creates a prosecution duty to inquire and disclose." (***Little*** at p. 430.)

And a recent State Bar opinion has come to a similar conclusion. In ***Matter of Nassar*** (Cal. Bar Ct., Sept. 18, 2018, No. 14-O-00027) 2018 WL 4490909, the prosecutor was facing discipline for, inter alia, failing to disclose an exculpatory letter the prosecutor had obtained by way of a mail cover. The prosecutor, relying on ***People* v. *Salazar*** (2005) 35 Cal.4th 1031, argued that since the letter was in the defense's possession, she did not have to disclose an exculpatory letter. The State Bar rejected this argument since "***Salazar*** dealt with the materiality of evidence under ***Brady*** and has no bearing on whether [the prosecutor] was obligated to make certain disclosures under the Penal Code." (***Matter of Nassar***, at *8.)

Of course, while failure to disclose exculpatory evidence to the defense where the information is known to the defense might be a statutory violation, it cannot conceivably be deemed prejudicial and thus should not result in exclusion of the evidence (**see** this outline, section I-11 at pp. 138-139) or reversal of a conviction (**see *People* v. *Verdugo*** (2010) 50 Cal.4th 263, 279–280 [violation of section 1054.1 is subject to the ***Watson*** harmless-error standard]).

IV. REDACTING POLICE REPORTS

1. Does the prosecution have any duty to redact police reports to exclude information about the witnesses under section 1054.2?

Aside from the as-yet-unresolved question of whether there is any duty under Marsy's law to redact identifying information about a victim (**see** this outline section III-7 at pp. 173-174), there does not appear to be any general obligation on the part of the prosecution to redact identifying information from police reports provided in discovery. Even Penal Code section 293.5, which allows a court to order that a victim of sexual assault be identified as "Jane Doe" or "John Doe" in criminal proceedings does not permit the prosecutor to avoid providing the name and address of the victim to the defense attorney as required by the discovery statutes. (Pen. Code, § 293.5(a) ["Except as provided in Chapter 10 (commencing with Section 1054) of Part 2 of Title 7 . . ."].)

In ***Holland* v. *Superior Court*** (unpublished) 2013 WL 3225812, the prosecution had redacted occupation, race, sex, date of birth, age, and telephone number of witnesses and did not provide the former addresses of witnesses where the current address was unknown. The ***Holland*** court held that the prosecution had a duty to disclose the former addresses and identifying information about the witnesses. (**Id**. at p. *5.)

Penal Code section 964 requires the district attorney and the courts in each county to establish a mutually agreeable procedure to protect confidential personal information regarding any witness or victim contained in a police report, arrest report, or investigative report that is ***submitted to a court*** by a prosecutor in support of an accusatory pleading or in support of a search or arrest warrant." (Pen. Code, § 964(a); ***Clark* v. *County of Tulare*** (E.D.Cal. 2010) 755 F.Supp.2d 1075, 1097.) However, this statute does not apply to police reports provided to defense counsel. In fact, subdivision (c)(1) of section 964 specifically provides that section 964 "may not be construed to impair or affect the provisions of Chapter 10 (commencing with Section 1054) of Title 6 of Part 2" and subdivision (c)(3) specifically provides that section 964 "shall not be construed to impair or affect a criminal defense counsel's access to unredacted reports otherwise authorized by law, or the submission of documents in support of a civil complaint."

The discovery statutes do not *preclude* a prosecutor from redacting police reports. And no case has held that police reports cannot be redacted when the redacted information is nonetheless provided to defense counsel. However, any redaction must not run afoul of the prosecutor's statutory or constitutional duty to disclose the name and addresses of its trial witnesses. (**See *Holland* v. *Superior Court*** [unreported] 2013 WL 3225812 [indicating prosecutors should not have redacted police reports to remove the occupation, race, sex, date of birth, age, and telephone number of witnesses where there was no explanation for the redactions or a good cause finding for doing so].) If redaction is necessary to

protect the witnesses, prosecutors should utilize Penal Code section 1054.7. (**See** this outline, section VII-6 at pp. 240-250.)

2. Does the defense or the court have any duty to redact police reports?

Penal Code Section 1054.2(a) places a duty ***upon defense counsel*** to redact information in police reports that they have received from the prosecution, subject to certain exceptions. (**See** Pen. Code, § 1054.2(a)(1) ["no attorney may disclose or permit to be disclosed to a defendant, members of the defendant's family, or anyone else, the address or telephone number of a victim or witness whose name is disclosed to the attorney pursuant to subdivision (a) of Section 1054.1, unless specifically permitted to do so by the court after a hearing and a showing of good cause"].) Failure of defense counsel to make the necessary redactions is a misdemeanor. (Pen. Code, § 1054.2(a)(3).)

Penal Code section 1054.2(b) places a duty ***on the court*** to protect the address and telephone number of victims or witnesses when the defendant is acting as his or her own attorney "by providing for contact only through a private investigator licensed by the Department of Consumer Affairs and appointed by the court or by imposing other reasonable restrictions, absent a showing of good cause as determined by the court." (Pen. Code, § 1054.2(b).)

V. RECIPROCAL DISCOVERY PROVISIONS OF § 1054.3

"The purpose of section 1054 et seq. is to promote ascertainment of truth by liberal discovery rules which allow parties to obtain information in order to prepare their cases and reduce the chance of surprise at trial. [Citation.] Reciprocal discovery is intended to protect the public interest in a full and truthful disclosure of critical facts, to promote the People's interest in preventing a last minute defense, and to reduce the risk of judgments based on incomplete testimony." (***People* v. *Jackson*** (1993) 15 Cal.App.4th 1197, 1201; ***People* v. *Landers*** (2019) 31 Cal.App.5th 288 [2019 WL 181485, at *7].)

On the other hand, the defense obligation to provide discovery "is a pure creature of statute, in the absence of which, there can be no discovery." (***Hubbard* v. *Superior Court*** (1997) 66 Cal.App.4th 1163, 1167.) In contrast to the government, which has an obligation to making "the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime," "[d]efense counsel has no comparable obligation to ascertain or present the truth." (***People* v. *Landers*** (2019) 31 Cal.App.5th 288 [2019 WL 181485, at *9 citing to ***United States* v. *Wade*** (1967) 388 U.S. 218, 256 (conc. & dis. opn. of White, J.)].) "For the defense, unless a claimed item of discovery falls within the express terms of section 1054.3, 'there is no statutory or constitutional duty on the part of the defendant to disclose anything to the prosecution.'" (***People* v. *Landers*** (2019) 31 Cal.App.5th 288 [2019 WL 181485, at p. *10]; ***Andrade* v. *Superior Court*** (1996) 46 Cal.App.4th 1609, 1613.)

"Obviously, this does not mean defense counsel is licensed to put forward false facts or tell 'half-truth[s]' (***U.S.* v. *Nobles*** (1975) 422 U.S. 225, 241 [alternate citations omitted]), but what it does mean is that the defense always has the option of standing mute and putting the state to its proof." (***People* v. *Landers*** (2019) 31 Cal.App.5th 288 [2019 WL 181485, at *9] citing to ***United States* v. *Wade*** (1967) 388 U.S. 218, 257].)

But, as a practical matter, section 1054.3 "does not create a symmetrical scheme of discovery" at least not in the sense of an exact match on both sides." (***People* v. *Landers*** (2019) 31 Cal.App.5th 288 [2019 WL 181485, at p. *10] citing to ***Hubbard* v. *Superior Court*** (1997) 66 Cal.App.4th 1163 at p. 1170.) Rather, the discovery statute "creates a nearly symmetrical scheme of discovery ..., with any imbalance favoring the defendant as required by reciprocity under the due process clause." (***People* v. *Landers*** (2019) 31 Cal.App.5th 288 [2019 WL 181485, at p. *10] citing to ***Izazaga* v. *Superior Court*** (1991) 54 Cal.3d 356, 377.)

1. Statutory Constitutional Basis for Reciprocal Discovery

In 1990, Proposition 115 added *both* constitutional and statutory language authorizing reciprocal discovery in criminal cases. "The new constitutional provision, article I, section 30, subdivision (c) of the California Constitution, declares that '[i]n order to provide for fair and speedy trials, discovery in criminal cases shall be reciprocal in nature, as prescribed by the Legislature or by the People through the initiative process.'" (***People* v. *Thompson*** (2016) 1 Cal.5th 1043, 1093; ***Verdin* v. *Superior Court*** (2008) 43 Cal.4th 1096, 1102.)

2. The statutory language of Penal Code section 1054.3(a)

Penal Code section 1054.3(a) provides: "The defendant and his or her attorney shall disclose to the prosecuting attorney:

(1) The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial.

(2) Any real evidence which the defendant intends to offer in evidence at the trial."

3. The reciprocal discovery provisions of section 1054.3 do not violate either the state or federal constitution or any privilege

The application of the reciprocal discovery provisions does not violate (i) a defendant's Fifth Amendment privilege against self-incrimination; (ii) the state constitutional privilege against self-incrimination; (iii) a defendant's right to due process of law under Fourteenth Amendment; (iv)

defendant's constitutional right to disclosure of all ***Brady*** material; (v) a defendant's right to effective assistance of counsel under Sixth Amendment; or (vi) the work product privilege. (***Izazaga* v. *Superior Court*** (1991) 54 Cal.3d 356, 365-383.)

4. Case law interpretation of defense obligations

Courts have interpreted language common to both section 1054.1 (defining the prosecutor's obligations) and section 1054.3 (defining the defense obligations) in an identical fashion. (**See *People* v. *Tillis*** (1998) 18 Cal.4th 284, 290, fn. 3; ***Verdin* v. *Superior Court*** (2008) 43 Cal.4th 1096, 1103; ***People* v. *Landers*** (2019) 31 Cal.App.5th 288 [2019 WL 181485, at *10, fn. 13]; ***Roland* v. *Superior Court*** (2004) 124 Cal.App.4th 154, 165.)

As to what "intends to call as witnesses" means, **see** this outline, section III-10 at pp. 179-181.

As to whether the defense must disclose oral statements of witnesses, **see** this outline, section III-21 at p. 196.

5. Defense obligations to disclose statements taken from prosecution witnesses

Prosecutors are often surprised to learn that if the defense takes a statement from a prosecution witness, the defense has no obligation to disclose "statements it obtains from prosecution witnesses it may use to refute the prosecution's case during cross-examination" (***Izazaga* v. *Superior Court*** (1991) 54 Cal.3d 356, 377, fn. 14) unless the defense reasonably anticipates calling the defense investigator who took the impeaching statement to the witness stand. This is, however, the state of the law. (**Ibid**; ***People* v. *Landers*** (2019) 31 Cal.App.5th 288 [2019 WL 181485, *11]; ***People* v. *Hunter*** (2017) 15 Cal.App.5th 163, 177 [citing to Pipes & Gagen, Jr., California Criminal Discovery, § 4:13, p. 607 ["If the defendant has gathered information from a prosecution witness that the defendant will use only on cross-examination of that witness, the defendant is not required to divulge [it] to the prosecution"]; ***Hubbard* v. *Superior Court*** (1997) 66 Cal.App.4th 1163, 1165-1170; this outline, section III-13 at p. 183 [describing prosecutorial duties (or lack thereof) when it comes to statements taken of defense witnesses].)

Thus, while prosecutors are often taken aback to suddenly see the defense cross-examine a prosecution witness about an earlier unknown statement and will insist upon being able to see the statement, this is almost always going to be a nonstarter. (**See also** Evid. Code, § 768(a) ["In examining a witness concerning a writing, it is not necessary to show, read, or disclose to him any part of the writing."].)

If, however, defense counsel shows the witness the writing, a prosecutor is entitled to inspect the writing before the witness may be questioned about it. (**See** Evid. Code, § 768(b) ["If a writing is shown to a witness, all parties to the action must be given an opportunity to inspect it before any question concerning it may be asked of the witness."].)

It is rare for the defense to ever acknowledge that they anticipate calling the defense investigator in advance of the prosecution witness's testimony so the statement will not be provided pursuant to section 1054.3. Usually, defense counsel will claim that they cannot decide whether the investigator will need to be called until the prosecution witness is done testifying on cross-examination (**see e.g., *People* v. *Landers*** (2019) 31 Cal.App.5th 288 [2019 WL 181485 at p. * 11].) And absent overwhelming evidence defense counsel is prevaricating, the court will generally deny the prosecutor's request. (**See e.g.**, ***Sandeffer* v. *Superior Court*** (1993) 18 Cal.App.4th 672, 678.)

Practice Tip: The best way to avoid being surprised by the fact a prosecution witness has given a hitherto unknown statement is to make sure that when interviewing prosecution witnesses, the witnesses are told to inform the prosecution of any statements regarding the case they have made (or might make in the future) to other persons. Albeit this is concededly less effective with hostile witnesses. The best way to obtain a copy of the statement at *trial* is to alert the prosecution witnesses in advance that if they have any doubt about what was said in a prior statement (whether made to the prosecution or the defense), they should request an opportunity to review the statement and refresh their recollection before answering. Once the witness reviews the statements, this will give the prosecutor the right to review the statement. (**See** Evid. Code, § 771; this outline, section III-23-A at p. 200.)

6. Defense obligations to disclose statements of witnesses for the *co-defendant* to the prosecution

Counsel for a defendant does not have an obligation to provide the prosecution with statements taken from a witness whom counsel reasonably believes the *co-defendant* intends to call as a witness. (**See *People* v. *Landers*** (2019) 31 Cal.App.5th 288 [2019 WL 181485 at pp. * 14-*20].) And, it does not matter whether the defendant is effectively using the co-defendant as a conduit to put on a witness the defendant would need to call if the co-defendant did not. (**Id**. at p. *19.)

In ***Landers***, the defendant was charged with, inter alia, being an aider and abettor to a murder perpetrated by his co-defendant Lamalie of a victim named Solis. Co-defendant Lamalie claimed that he killed in self-defense after Solis and a man named Fuentes (both members of a rival street gang) came to Lamalie's neighborhood looking to stir up trouble. Lemalie claimed he saw Fuentes put his hands in his waistband, appearing to grab a weapon, while yelling racially-charged taunts and beckoning nearby compatriots to back him up. Lemalie said he only shot the victim after the murder victim charged toward him while holding what appeared to be gun but turned out to be a knife. (**Id**. at p. *1.)

Defendant Landers claimed he was not present at the location of the murder and he didn't see or talk to co-defendant Lemalie before the street confrontation with Solis. Defendant Landers claimed that when the shooting occurred, he was in a different location, involved in a confrontation with a gun-wielding Fuentes. Defendant Landers claimed a video clip of him running near the scene (relied on the prosecution) simply showed he was fleeing from Fuentes and he only went to the location of the murder after hearing shots fired.

At that point, Lemalie handed him a shotgun, which he held for only few seconds before tossing it under a parked car. (**Id**. at p. *2.)

In preparation for trial, defense counsel Raju interviewed a witness (Fletcher) who identified several people depicted in the video. The witness's identification of who was who in the video was accurate but inconsistent with the prosecution's mistaken understanding of who was who. The witness also claimed to have seen Fuentes carrying a firearm. Defense counsel Raju informed co-defendant's attorney (Goldrosen) of witness Fletcher's existence knowing that co-counsel Goldrosen would want to call the witness because the witness helped support the co-defendant's self-defense argument. Defense counsel Raju even arranged for one of his "neighborhood connections" to facilitate an interview and defense counsel Raju was present when co-counsel Goldrosen's investigator met with witness Fletcher. A summary of this interview was provided by Goldrosen. But defense counsel Raju did not provide any report of his own investigator's interview with witness Fletcher– notwithstanding an order of the trial court to disclose statements of any witnesses.* (**Id**. at pp. *3-*4.)

Editor's note: The trial court made the order at the request of the prosecutor who sought the order because defense counsel Raju allegedly regularly failed to disclose evidence admitted at trial. (**Id**. at p. *3.)

In opening statement, the prosecutor used a clip from the video in her opening statement and described the video as showing defendant Landers chasing the murder victim toward co-defendant Lamalie so Lamalie could shoot him. In defense counsel Raju' opening statement, he discussed how the video presented in the prosecution's opening statement was incorrect, how the prosecution had misidentified witnesses in the video, and how the video showed the defendant Landers running away from *Fuentes*. Based on the level of detail in defense counsel Raju's remarks, the prosecutor claimed a discovery violation. (**Ibid**.) Defense counsel Raju argued, inter alia, "he had no duty to disclose what he knew about who was shown on the video, and for emphasis, he added in any event that the video was evidence belonging to the prosecution, not the defense." (**Id**. at p. *4.) At trial, defense counsel Raju elicited information supporting his interpretation of the video through cross-examination of the witness he had earlier interviewed but who had been called by counsel for the co-defendant. (**Id**. at p. *4, fn. 4, *10-*11.) Following trial, the People filed a motion seeking a contempt finding and imposition of monetary sanctions against Raju for 19 separate discovery violations, including that he allegedly failed to disclose the identity and statements of the witness. Ultimately, the trial court did not address 18 of the 19 alleged violations. Rather, the trial court simply found a violation of a court order, pursuant to Code of Civil Procedure section 177.5, based solely on defense counsel Raju's failure to identify Fletcher as a witness as required by section 1054.3. The trial court stated she believed defense counsel Raju "reasonably anticipate[d]" calling Fletcher as *his* witness, that Raju's intent to call Fletcher was formulated at the time of opening statements, and that "this omission was designed to gain a tactical advantage over the People and was done without good cause or substantial justification." (**Id**. at pp. *5-*6.) In support of these conclusions, the trial court found, inter alia, that defense counsel Raju "could not be certain that [co-counsel] Goldrosen would call Fletcher as a witness" and

defense counsel "Raju hoped to avoid his discovery obligation by first persuading [co-counsel] Goldrosen to call Fletcher as his witness and then relying on [co-counsel] Goldrosen's assertion that he was going to call her as his witness at trial." (**Id**. at pp. *5-*6.)

Defense counsel Raju appealed the sanction on grounds *he* never intended to call the witness at trial, and in fact did not call her. Rather, defense counsel contended his intent was not to put on any affirmative defense evidence but to rely on "a state-of-the evidence defense" and elicitit what he needed through cross-examination of various witnesses, including the witness called by counsel for the co-defendant. (**Id**. at p. *1.)

The appellate court disagreed. It held Fletcher was not, in reality, a witness reasonably anticipated to be called by defense counsel Raju and defense counsel Raju had no duty to disclose the statements taken by his investigator. Accordingly, it was not proper to hold defense counsel Raju in contempt for a violation of section 1054.3. (**Id**. at pp. *13-*14.)

Editor's note: The appellate court came to this conclusion notwithstanding the fact that some of the information elicited by defense counsel Raju during cross-examination of Fletcher was on certain background points he could not have known co-counsel Goldrosen would ask about (such as Landers's age, his reason for being in the neighborhood, and his relationships with people in the neighborhood); and notwithstanding the fact defense counsel Raju had to call Fletcher as his own witness when the trial court sustained an objection to his elicitation of evidence outside the scope of direct examination. (***Id***. at p. *13, fn. 21.) However, the appellate court did express concern that defense counsel Raju misrepresented the extent of the information he had acquired when asked by the trial court at an in camera hearing. (***Id***. at p. 20.)

7. Statements or reports of defense experts

Penal Code section 1054.3 requires defense disclosure of the names and addresses of any expert witness the defense intends to call at trial along with "any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial." (Pen. Code, § 1054.3(a).)

In ***Hines* v. *Superior Court*** (1993) 20 Cal.App.4th 1818, the court held this language includes "the original documentation of the examinations, tests, etc." (**Id**. at p. 1822.) And that "[o]riginal documentation" can include handwritten notes because "[a]n expert should not be permitted to insulate such evidence from discovery by refining, retyping or otherwise reducing the original documentation to some other form." (**Ibid**.) However, this does not mean the defense must disclose "all random 'notes' which might be lodged in an expert's file." (***Hines*** at p. 1823.) Nor does it mean the defense must produce "preliminary drafts of reports, or of an expert's notes to himself which reflect his own opinions or interim conclusions." (**Ibid**.) Rather, it means that the defense must produce "factual determinations of the expert from observations made during an examination" regardless of whether these factual determinations are contained in handwritten notes. (**Ibid**; **see also *Woods* v. *Superior Court*** (1994) 25 Cal.App.4th 178, 183 [describing ***Hines*** as holding section 1054.3 "did not provide for pretrial disclosure of random notes in

the expert's file, interview notes reflecting the defendant's statements, preliminary drafts of the expert report, the expert's notes to himself, interim conclusions or subsidiary reports on which the expert may rely" but does "require disclosure of the expert's notes of factual determinations made during an examination "].)

In ***People* v. *Lamb*** (2006) 136 Cal.App.4th 575, the court found the obligation under section 1054.3 to disclose "any reports or statements of experts made in connection with the case" required disclosure of an accident reconstruction expert's notes regarding interviews of witnesses, calculations he had done, and his inspection of vehicles involved in the accident. (**Id**. at p. 580.)

The defense does not have to provide the names or reports of experts with whom they have consulted but whom the defense does not plan on calling. The names of these experts are protected from disclosure by the both the attorney-client and work-product privilege until the expert is identified as witness. "Case authority has drawn a bright line at the point where it becomes reasonably certain that the expert will testify—holding that the attorney-client privilege and work product protection apply prior to the point, but not subsequent to it." (***DeLuca* v. *State Fish Co., Inc.*** (2013) 217 Cal.App.4th 671, 689 citing to ***People* v. *Milner*** (1988) 45 Cal.3d 227, 241; ***Williamson* v. *Superior Court*** (1978) 21 Cal.3d 829, 834-835; and ***Sanders v. Superior Court*** (1973) 34 Cal.App.3d 270, 278–279; **accord *Woods* v. *Superior Court*** (1994) 25 Cal.App.4th 178, 187.) Thus, "the trial court cannot require defense counsel to disclose the identity of, or produce reports and notes by, an expert the attorney has not yet determined to call as a witness." (***Woods* v. *Superior Court*** (1994) 25 Cal.App.4th 178, 183; ***Sandeffer* v. *Superior Court (***1993) 18 Cal.App.4th 672, 678.) Indeed, even "[t]he report of a nontestifying expert which is in some way utilized by a testifying expert" is not disclosable by the defense because it "is not a document, at least in ordinary circumstances, which the defendant will intend to offer in evidence" and thus as was "not literally embraced within the description of the statute." (***Hines* v. *Superior Court*** (1993) 20 Cal.App.4th 1818, 1823.)

Moreover, even if the expert is identified, two California appellate courts (***Andrade* v. *Superior Court*** (1996) 46 Cal.App.4th 1609, 1614 and ***Rodriguez* v. *Superior Court*** (1993) 14 Cal.App.4th 1260, 1267-1269) "have held that section 1054.6 absolves the defendant from disclosing, *prior to trial*, the otherwise discoverable written or recorded statement of an expert witness he or she intends to call (§ 1054.3, subd. (a)(1)) ***if*** the statement includes or discusses communications from the defendant to the expert that are protected by the statutory attorney-client privilege. (***Maldonado* v. *Superior Court*** (2012) 53 Cal.4th 1112, 1134, fn. 14, emphasis added.)

The cases of ***Andrade*** and ***Rodriguez*** may be incorrect. There are civil cases interpreting the privilege in a contrary fashion. As stated in ***DeLuca* v. *State Fish Co., Inc.*** (2013) 217 Cal.App.4th 671, "[o]nce a testifying expert ***is designated as a witness***, the attorney-client privilege no longer applies, "because the decision to use the expert as a witness manifests the client's consent to disclosure of the information." (**Id**. at p. 689l; ***Shadow Traffic Network* v. *Superior Court*** (1994) 24 Cal.App.4th 1067, 1079 [same].)

However, prosecutors should probably assume that until the expert witness actually testifies, the attorney-client privilege will protect pre-trial "communications from a client to his or her lawyer, or to a third person to whom the communication is necessary for "accomplishment of the purpose for which the lawyer is consulted." (***Maldonado* v. *Superior Court*** (2012) 53 Cal.4th 1112, 1134, fn. 14 [citing to Evid. Code, § 952 and noting that such statements are not otherwise protected from disclosure by the Fifth Amendment].)

On the other hand, once the expert witness is designated as a witness, the "*work-product*" privilege will be deemed waived. "[W]hen an expert witness ***is expected to testify***, the expert's report, which was subject to the conditional work product protection, becomes discoverable, as the mere fact that the expert is expected to testify generally establishes good cause for its disclosure." (***DeLuca* v. *State Fish Co., Inc.*** (2013) 217 Cal.App.4th 671, 689 citing to ***Williamson* v. *Superior Court*** (1978) 21 Cal.3d 829, 834-835, emphasis added.)

Editor's note:** A potential issue ***may arise when it comes to *pre-trial* discovery of a written report of an expert "which contains both: (1) information relevant to the opinion the expert will give as a testifying expert; and (2) the expert's advice on trial preparation matters, conveyed as a consulting expert." (***DeLuca* v. *State Fish Co., Inc.*** (2013) 217 Cal.App.4th 671, 690.) "[T]he mere fact the expert may have the dual status of a prospective witness and of adviser to the attorney, does not remove the product of his services rendered exclusively in an advisory capacity, as distinguished from the product of services which qualify him as an expert witness, from the work product limitation upon discovery." (***DeLuca* v. *State Fish Co., Inc.*** (2013) 217 Cal.App.4th 671, 690 citing to ***Scotsman Mfg. Co.* v. *Superior Court*** (1966) 242 Cal.App.2d 527, 531.) In other words, an expert's opinion regarding the subject matter about which the expert is a prospectively testifying is discoverable, but the expert's advice rendered to the attorney in an advisory capacity is not discoverable ***pre-trial*** if the report reflects the attorney's impressions, conclusions, opinions, legal research or theories. (**See *DeLuca v. State Fish Co., Inc.*** (2013) 217 Cal.App.4th 671, 690 and fn. 21.) "Therefore, when an expert's written report was prepared both as a consulting expert and a testifying expert, a trial court is often required to conduct an in camera review of the report, to separate out the information provided as a consultant from the information provided as a testifying expert." (***DeLuca v. State Fish Co., Inc.*** (2013) 217 Cal.App.4th 671, 690 [albeit noting its discussion of the dual capacity issue and how it may need to be resolved "relates only to the pretrial discovery of an expert's opinions and, specifically, the expert's report." (**Id**. at p. 691.)

In the unreported case of ***People* v. *Zeledon*** (unreported) 2010 WL 144052, the court stated "where, as here, the defense *contemplates calling an expert but has not yet decided whether to do so*, defense counsel can comply with the discovery statute without waiving any privileges by identifying the expert, disclosing reports prepared by the expert, but redacting any confidential material over which counsel wants to maintain a privilege until a final decision to call the expert is made." (***Id***. at p. *9, emphasis added by IPG.)

Certainly, "[o]nce the defendant calls an expert to the stand, the expert loses his status as a consulting agent of the attorney, and neither the attorney-client privilege nor the work-product doctrine applies to matters relied on or considered in the formation of his opinion." (***People* v. *Ledesma*** (2006) 39 Cal.4th 641, 695; ***People* v. *Milner*** (1988) 45 Cal.3d 227, 241; **accord *People* v. *Jones*** (2003) 29 Cal.4th 1229, 1263–1264 [rejecting defense claims that both those privileges, as well as the Fifth Amendment privilege, prevented trial court from ordering defense to produce unredacted statements of defendant to, and conclusions made by, a

defense expert prior to penalty phase of trial, once the defense definitively identified the expert; and calling defendant's reliance on ***Andrade*** and ***Rodriguez*** "misplaced" since both those cases "dealt with *pretrial* discovery orders"]; **see also** Evid. Code, § 721(a) [an expert witness "may be fully cross-examined as to ... (3) the matter upon which his opinion is based and the reasons for his opinions."].)*

Editor's note:** This cross-examination may include questioning the experts concerning any statements or declarations made to them by defendant which formed the foundation for their opinions. (**See *People* v. *Modesto (1963) 59 Cal.2d 722, 732; ***People* v. *Whitmore*** (1967) 251 Cal.App.2d 359, 366.)

8. Statements of defendant to experts

As noted above, section 1054.3(a)(1), requires the defense to disclose to the prosecution, "any reports or statements of experts made in connection with the case, . . . including the results of physical or mental examinations ... which the defendant intends to offer in evidence at the trial."

Appellate courts "have held that section 1054.6 absolves the defendant from disclosing, *prior to trial*, the otherwise discoverable written or recorded statement of an expert witness he or she intends to call (§ 1054.3, subd. (a)(1)) if the statement includes or discusses communications from the defendant to the expert that are protected by the statutory attorney-client privilege. (***Maldonado* v. *Superior Court*** (2012) 53 Cal.4th 1112, 1134, fn. 14 citing to ***Andrade* v. *Superior Court*** (1996) 46 Cal.App.4th 1609, 1614 and ***Rodriguez* v. *Superior Court*** (1993) 14 Cal.App.4th 1260, 1267-1269; **see also *Hines* v. *Superior Court*** (1993) 20 Cal.App.4th 1818, 1823 [section 1054.3 does not require "discovery of interview notes reflecting the defendant's statements which are excepted from discovery under section 1054.3, subdivision (a)"]; **but see *DeLuca* v. *State Fish Co., Inc.*** (2013) 217 Cal.App.4th 671, 689 ["Once a testifying expert is ***designated as a witness***, the attorney-client privilege no longer applies, "because the decision to use the expert as a witness manifests the client's consent to disclosure of the information."]; ***Shadow Traffic Network* v. *Superior Court*** (1994) 24 Cal.App.4th 1067, 1079 [same], emphasis added.)

However, the California Supreme Court has held that the protection provided against *pre-trial* disclosure of defendant's statements does not extend to "the raw results of standardized psychological and intelligence tests administered by a defense expert upon which the expert intends to rely." (***People* v. *Hajek*** (2014) 58 Cal.4th 1144, the California Supreme Court said "[t]his provision includes (**Id.** at p. 1233; **accord *People* v. *Woods*** (1994) 25 Cal.App.4th 178, 183-184 [the *raw results* on a standard psychological test given to defendant are discoverable *pre-trial* when (i) the expert relied on defendant's responses in reaching his conclusions; (ii) the expert referred to test responses in his report; and (iii) the report had been provided to the prosecution]; **see also *Maldonado* v. *Superior Court*** (2012) 53 Cal.4th 1112, 1132 [defense obligation to provide pretrial discovery of the results of mental examinations the defense intends to offer at trial does not violate the Fifth Amendment].)

In addition, "[b]y presenting, at trial, a mental-state defense to criminal charges or penalties, a defendant waives his or her Fifth Amendment privilege to the limited extent necessary to allow the prosecution a fair opportunity to rebut the defense evidence. Under such circumstances, the Constitution allows the prosecution to receive unredacted reports of the defendant's examinations by defense mental experts, including any statements by the defendant to the examiners and any conclusions they have drawn therefrom." (***Maldonado* v. *Superior Court*** (2012) 53 Cal.4th 1112, 1125; **see also *Kansas* v. *Cheever*** (2014) 134 S.Ct. 596, 601-602 [finding Fifth Amendment is not violated when a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit an offense and the prosecution rebuts with evidence from a court ordered psychological examination of the defendant]; ***People* v. *Gonzales*** (2011) 51 Cal.4th 894, 928 [a "defendant who makes an affirmative showing of his or her mental condition by way of expert testimony waives his or her Fifth and Sixth Amendment rights to object to examination by a prosecution expert"]; ***People* v. *Coleman*** (1989) 48 Cal.3d 112, 151-152.)

9. Penal Code section 1054.3(b): examination of defendants who place mental state in issue

Before the advent of Proposition 115, the California Supreme Court had repeatedly held that once a defendant placed his mental state in issue, trial courts were authorized to order a defendant to submit to mental examination by prosecution experts. (***People* v. *Clark*** (2011) 52 Cal.4th 856, 939.) However, in ***Verdin* v. *Superior Court*** (2008) 43 Cal.4th 1096, the California Supreme Court held that the language of Penal Code section 1054(e), which provides "no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States," prevented trial courts from authorizing defendants who placed their mental state in issue to submit to a mental examination because such examination was a form of discovery that was neither authorized in the criminal discovery statutes or any other express statutory provision nor mandated by the federal Constitution. (**Id**. at p. 1103-1116; ***People* v. *Clark*** (2011) 52 Cal.4th 856, 939, fn. 22.)

Nevertheless, the ***Verdin*** court left open the door for the Legislature to provide for such an examination by noting the Legislature remained free to create a rule of criminal procedure "within constitutional limits" to allow for it. (***Verdin***, at p. 1116, fn. 9.) The court did not opine on whether requiring the defendant to submit to such an examination (and/or comment upon failure to submit to such an examination) would violate the federal Constitution. (***Verdin,*** at pp. 1112, fn. 6, and 1116.)

"The Legislature promptly responded to ***Verdin*** by enacting section 1054.3, subdivision (b), which authorizes courts to order examination by a mental health expert retained by the prosecution whenever a defendant places his or her mental state at issue through expert testimony." (***People* v. *Gonzales*** (2011) 51 Cal.4th 894, 927, fn. 15.)

Penal Code section 1054.3(b) now "specifically provides statutory authority for the proposition that when the defendant 'places in issue his or her mental state at any phase of the criminal action,' the prosecution may seek and obtain a court order 'that the defendant ... submit to examination by a prosecution-retained mental health expert.'" (***Maldonado* v. *Superior Court*** (2012) 53 Cal.4th 1112, 1117; **accord *People* v. *Banks*** (2014) 59 Cal.4th 1113, 1193; ***Sharp* v. *Superior Court*** (2012) 54 Cal.4th 168, 172; ***People* v. *Clark*** (2011) 52 Cal.4th 856, 939, fn. 22.)

Thus, once a defendant gives notice of his intent to present a mental-state defense, the defendant is obliged to submit to an examination by prosecution-retained experts. (***Maldonado* v. *Superior Court*** (2012) 53 Cal.4th 1112, 1132.) If the defendant declines to submit to the examination and raises a mental defense at trial, "the court may impose sanctions, such as advising the jury that it may consider such noncooperation when weighing the opinions of the defense experts. (**Id**. at p. 1125.)

Editor's note: The mental state of a defendant may be placed "in issue" even if the defendant has not placed his mental state in issue *through a different expert than the expert who actually examined the defendant*: "The application of section 1054.3, subdivision (b) is not limited to defendants who have placed their mental state in issue through the proposed testimony of a mental health expert who examined or interviewed defendant." (***People* v. *Jones*** [unreported] 2012 WL 3642848, *7.)

Editor's note: Even before the amendment to section 1054.3 or the passage of Proposition 115, "trial courts had the power to order defendants to submit to a psychological examination by a *court-appointed* expert pursuant to Evidence Code section 730." (***People* v. *Banks*** (2014) 59 Cal.4th 1113, 1193.)

A. Statutory Language of Penal Code Section 1054.3(b)

Penal Code section 1054.3, as amended in 2009, permits the prosecution to request that a defendant, who places his mental state in issue through the testimony of a mental health expert, submit to an examination by a prosecution-retained mental health expert.

Specifically, section 1054.3(b) states:

"(b)(1) Unless otherwise specifically addressed by an existing provision of law, whenever a defendant in a criminal action or a minor in a juvenile proceeding brought pursuant to a petition alleging the juvenile to be within Section 602 of the Welfare and Institutions Code places in issue his or her mental state at any phase of the criminal action or juvenile proceeding through the proposed testimony of any mental health expert, upon timely request by the prosecution, the court may order that the defendant or juvenile submit to examination by a prosecution-retained mental health expert.

(A) The prosecution shall bear the cost of any such mental health expert's fees for examination and testimony at a criminal trial or juvenile court proceeding.

(B) The prosecuting attorney shall submit a list of tests proposed to be administered by the prosecution expert to the defendant in a criminal action or a minor in a juvenile proceeding. At the request of the defendant in a criminal action or a minor in a juvenile proceeding, a hearing shall be held to consider any objections raised to the proposed tests before any test is administered. Before ordering that the defendant submit to the examination, the trial court must make a threshold determination that the proposed tests bear some reasonable relation to the mental state placed in issue by the defendant in a criminal action or a minor in a juvenile proceeding. For the purposes of this subdivision, the term 'tests' shall include any and all assessment techniques such as a clinical interview or a mental status examination.

(2) The purpose of this subdivision is to respond to *Verdin v. Superior Court* 43 Cal.4th 1096, which held that only the Legislature may authorize a court to order the appointment of a prosecution mental health expert when a defendant has placed his or her mental state at issue in a criminal case or juvenile proceeding pursuant to Section 602 of the Welfare and Institutions Code. Other than authorizing the court to order testing by prosecution-retained mental health experts in response to *Verdin v. Superior Court*, *supra*, it is not the intent of the Legislature to disturb, in any way, the remaining body of case law governing the procedural or substantive law that controls the administration of these tests or the admission of the results of these tests into evidence."

B. The Constitutionality of Penal Code Section 1054.3(b)

Penal Code section 1054.3(b) is not unconstitutional. Once a defendant presents a mental-state defense to criminal charges or penalties at trial, the defendant is deemed to have waived his constitutional rights under both the Fifth and Sixth Amendment to the limited extent necessary to allow the prosecution a fair opportunity to rebut the defense evidence. (***Maldonado* v. *Superior Court*** (2012) 53 Cal.4th 1112, 1125, 1132.) This waiver "constitutionally permit[s the prosecution] to obtain its own examination of the accused, and to use the results, including the accused's statements to the prosecution examiners, as is required to negate the asserted defense. If the defendant refuses to cooperate with the prosecution examiners, the court may impose sanctions, such as advising the jury that it may consider such noncooperation when weighing the opinions of the defense experts." (***Maldonado* v. *Superior Court*** (2012) 53 Cal.4th 1112, 1125; **accord *People* v. *Clark*** (2011) 52 Cal.4th 856, 939-941 [a pre-1054.3(b) rejecting claim ***Verdin*** error implicated federal constitutional rights because the court was not aware of any case "holding that the Fifth Amendment or any other federal constitutional provision prohibits a court from ordering a defendant who has placed his or her mental state in issue to submit to a mental examination by a prosecution expert"]; ***People* v. *Gonzalez*** (2011) 51 Cal.4th 894, 939 [a pre-1054.3(b) finding ***Verdin*** error, but stating "[i]t is settled that a defendant who makes an affirmative showing of his or her mental condition by way of expert testimony waives his or her Fifth and Sixth Amendment rights to object to examination by a prosecution expert," citing to ***People* v. *Carpenter*** (1997) 15 Cal.4th 312, 412–413; ***People* v. *McPeters*** (1992) 2 Cal.4th 1148, 1190; and ***People* v. *Danis*** (1973) 31 Cal.App.3d 782, 786].)

Keep in mind that defendant the defendant retains the "unfettered choice" whether to actually present such a defense at trial. If a mental state defense is not later raised at trial, "except for appropriate rebuttal, the defendant's statements to the prosecution experts may not be used, either directly or as a lead to other evidence, to bolster the prosecution's case against the defendant." (***Maldonado* v. *Superior Court*** (2012) 53 Cal.4th 1112, 1125.)

"This bar extends at least to the prosecution's case-in-chief" and prevents impeachment of a defendant "with statements the defendant earlier made to mental health examiners appointed by the court to determine his or her competence to stand trial." (**Id**. at 1125, fn. 9.) However, it remains an open question "whether, if the accused chooses to testify at trial, his or her prior statements during a court-ordered examination *initiated by the defense's voluntary decision to present mental-state evidence* on the issue of guilt or penalty may be used to impeach that testimony." (**Ibid**; emphasis added.)

C. <u>What Limits, if Any, May Properly be Placed on Pre-Trial Prosecutorial Access to Court-ordered Examinations and Their Results?</u>

Penal Code section 1054.3(b) itself places limitations on court-ordered examination of defendants by prosecution experts: "The prosecuting attorney shall submit a list of tests proposed to be administered by the prosecution expert to the defendant in a criminal action or a minor in a juvenile proceeding. At the request of the defendant in a criminal action or a minor in a juvenile proceeding, a hearing shall be held to consider any objections raised to the proposed tests before any test is administered. Before ordering that the defendant submit to the examination, the trial court must make a threshold determination that the proposed tests bear some reasonable relation to the mental state placed in issue by the defendant in a criminal action or a minor in a juvenile proceeding." (Pen. Code, § 1054.3(b)(1)(B).)

To protect the defendant's *Sixth Amendment* right to counsel, counsel must be notified in advance of examination appointments and their purpose, and be given the opportunity to consult with the client before they occur. (***Maldonado* v. *Superior Court*** (2012) 53 Cal.4th 1112, 1142.) Moreover, to further protect the right to counsel, a trial court appears to have the ability to require that the examinations be monitored in real time by defense counsel so that counsel may interpose timely objections to disclosure of statements which the defendant may make. (**Id**. at p. 1142.) However, the ***Maldonado*** court did not suggest the presence of defense counsel in the examination room itself was required. (**See also *In re Joseph H.*** (2015) 237 Cal.App.4th 517, 536 ["case law supports the proposition that presence of counsel at the psychiatric examination is not constitutionally required as long as three conditions are met: (1) counsel is informed of the appointment of psychiatrists; (2) the court-appointed psychiatrists are not permitted to testify at the guilt trial unless the defendant places his mental condition into issue; and (3) where the defendant does place his mental condition into issue at the guilt trial, and the psychiatrist testifies, the court must give the jury a limiting instruction."]; ***People* v. *Jones*** [unreported] 2012 WL 3642848, *7 ["Neither section 1054.3 nor any other authority required that a recording be made of the clinical interview by the prosecution's expert or that defense counsel be allowed to attend that interview"].)

In ***Maldonado* v. *Superior Court*** (2012) 53 Cal.4th 1112, the lower appellate court had ordered that certain restrictions be placed on the prosecution's access to a pre-trial court-ordered examination of the defendant pursuant to section 1054.3 to purportedly protect defendant's *Fifth Amendment* rights. Among the restrictions were those: "(1) barring the prosecuting attorneys and their agents from observing the examinations in real time; (2) precluding all persons present at the examinations, including the examiners, from disclosing any statements made by [defendant] therein until expressly authorized by the court to do so; (3) allowing [defendant], "[w]ithin a specified amount of time after the conclusion of each examination (to be determined by the trial court)," to assert, by a sealed motion if he so desires, privilege objections to disclosure of statements he made during the examination; and (4) providing that the court, after inspecting the materials in camera, "shall determine if [defendant's] statements to the examiners, in whole or in part, remain subject to Fifth Amendment privilege [and shall] redact any statements it finds to be privileged[.]" (**Id**. at p. 1122.) The appellate court then found that if these steps were followed, the trial court could "release the balance of the examination materials to the prosecution, subject to any conditions or limitations necessary to preserve a valid assertion of privilege or prevent improper derivative use." (**Id**. at p.1122.)

However, the California Supreme Court **rejected** all these limitations: "[N]either the Fifth Amendment right against self-incrimination, nor prophylactic concerns about the protection of that right, justify precluding the prosecution from ***full pretrial*** access to the results of mental examinations by prosecution experts conducted, pursuant to section 1054.3(b)(1), for the purpose of obtaining evidence to rebut a mental-state defense the defendant has indicated he or she intends to present on the issue of guilt." (**Id**. at p. 1141, emphasis added.) The court suggested several methods of addressing the Fifth Amendment concerns raised by the court of appeal other than by restricting prosecution access to the section 1054.3(b) examination materials. (**Id**. at p. 1137-1138.)

First, the court stated the trial court is free to entertain a defense motion in limine to limit use of the examination materials at trial and "issue all appropriate protective orders against improper use, both direct and derivative, of evidence derived from the examinations." (**Id**. at p. 1138 [albeit also noting "if the defense desires such pretrial assurances against improper use, it must, of course, provide the court, and the prosecution, with the details of its anticipated mental-state defense sufficient to permit fully informed argument and resolution of the privilege issues" and "the court's pretrial privilege determinations necessarily would be preliminary, and must be subject to reconsideration if the circumstances at trial differ significantly from those anticipated at the time of the motion"].)

Second, the court stated the defense could assert its privilege arguments at the trial itself after the defendant has presented the mental-state evidence by raising specific objections to particular evidence from the section 1054.3(b)(1) examinations the prosecution seeks to introduce. (**Id**. at p. 1138 [and noting that "[a]t this stage, the court is in the best possible position to determine whether particular rebuttal evidence proffered by the prosecution exceeds the scope of the defendant's Fifth Amendment waiver"].)

The court observed that, when the defense raises the claim "that all or some portion of the prosecution's case was obtained by constitutionally improper means" during these alternative procedures, the defendant must first "go forward with specific evidence demonstrating taint," after which the government "has the ultimate burden of persuasion to show that its evidence is untainted." (**Id**. at p. 1138.)

The concurring opinion commented that it would be impossible to anticipate the extent to which a particular examination might color, however innocently or subtly, the way a prosecutor frames the case, selects witnesses, or presents the evidence. (**Id**. at p. 1143, conc. opn.) However, the majority opinion cautioned that, unlike when it comes to claims that immunized testimony was improperly used, "there is nothing presumptively improper about the prosecution's access to the results of its own experts' mental examinations of petitioner, conducted pursuant to court order" and "it is doubtful that mere pretrial disclosure to the prosecution of the unredacted examination results should force the prosecution to justify the independent basis for its entire case." (**Id**. at p. 1138, fn. 17.)

In a footnote, the ***Maldonado*** court left open the possibility that "specific, as-yet-unforeseen problems" might arise in the course of a section 1054.3(b) examination that could create constitutional or prophylactic reasons for allowing the imposition of "access restrictions" to avoid misuse of such examinations in a particular case. (**Id**. at p.1141, fn. 21; **see also** the concurring opinion, at pp. 1143-1144 [noting the "trial court retains broad discretion, consistent with our opinion today, to decide whether and to what extent protective measures may be warranted in a particular case to ensure that any use of the examination by the prosecution is limited to rebuttal of a mental health defense"].)

Following up on this footnote, the **concurring opinion** pointed to several facts as significant in finding the "general rule prohibiting the prosecution from making direct or derivative use of the examination except as necessary to rebut any mental health defense" was applicable in the instant case: (i) the prosecution already had access to police interviews in which defendant recounted his version of the crime; (ii) the defendant did not raise particular concerns about the nature of the tests or the practices of the expert that would suggest an ulterior motive by the prosecutor; and (iii) there was no specific indication that defendant would be unable to avoid making prejudicial or incriminating statements unrelated to his mental health defense. (**Id**. conc. opn. at p. 1143.) The concurring opinion postulated that prophylactic restrictive measures may be necessary in the following situations: (i) where "the defendant has refused to make any statements to law enforcement, and thus the proposed mental examination might appear to serve as a surrogate for police interrogation"; (ii) where "the practices of the expert or the nature of the tests might suggest that the examination is more akin to an investigatory device than a procedure to allow the prosecution fair opportunity to rebut an anticipated mental health defense"; (iii) where the defendant's attorney shows "that the defendant simply cannot stop talking and will infuse the examination with such prejudicial and inculpatory information that it is impossible to unring the bell." (**Ibid**.)

Editor's note: Considering that prosecutors may have to show that evidence they wish to use at trial did not derive from a section 1054.3(b) court-ordered mental examination, the trial attorney in the ***Maldonado*** case (San Mateo County DDA Al Giannini) cautions prosecutors about asking for a pre-trial examination by a prosecution-retained expert where, until the examination, the defendant did not reveal any information about his or her defense. An examination where the defendant reveals, for the first time, in advance of trial, what defense he will proffer might later lead a trial or appellate court to seriously scrutinize whether the mental examination informed the prosecutor's strategy or tactics. A prosecutor might find himself in the difficult position of having to prove the negative, i.e., having to demonstrate that absolutely nothing he or she did was in response to information that was revealed during the interviews with the defendant. Indeed, it might be wise in some cases to consider offering to defer the examinations until after the close of the prosecution case to avoid such a challenge, even though the prosecution might be entitled to do the examinations earlier.

D. Section 1054.3's Applicability in Capital Cases

In ***Sharp* v. *Superior Court*** (2012) 54 Cal.4th 168, the California Supreme Court made it clear that section 1054.3(b) was not intended to be limited to guilt phase defenses, but applies, broadly "whenever" the defendant has put his or her mental state at issue, including the penalty phase. (**Id**. at p. 175.)

However, prophylactic measures restricting prosecution access to court-ordered pretrial mental examinations guilt phase *may* need to be imposed when the examination would only be relevant in the penalty phase of a trial. In ***Maldonado* v. *Superior Court*** (2012) 53 Cal.4th 1112, the court did not directly address the issue, but did note that where a case may never proceed to a penalty phase, "it may not be unfair to delay the prosecution's discovery of potentially incriminating penalty evidence—evidence for which the prosecution has no legitimate need or use at the guilt phase—until the need for a penalty trial becomes clear." (**Id**. at p. 1140.)

E. Section 1054.3's Applicability in Insanity, Mental Retardation, and Competency Cases

By its terms, Penal Code section 1054.3(b) authorizes an order compelling examination by a prosecution-retained expert "whenever … at any phase of the criminal action" the defense has proposed its own expert testimony on mental state, *"[u]nless otherwise specifically addressed by an existing provision of law*." (***Sharp* v. *Superior Court*** (2012) 54 Cal.4th 168, 171, italics in opinion.)

NGI Cases

Penal Code section 1054.3(b)(1) authorizes a trial court to order a defendant to submit to an examination by a prosecution-retained mental health expert when a defendant has pleaded not guilty by reason of insanity (NGI) and proposes to call a mental health expert on the issue of sanity. (***Sharp* v. *Superior Court*** (2012) 54 Cal.4th 168, 171.) However, section 1054.3(b)(1) does not ***mandate*** appointment of a prosecution-retained expert. Rather, "[u]nder section 1054.3(b)(1), the court may grant the People's motion to compel a further examination by a prosecution-retained expert." (**Id**. at p. 176, emphasis in opinion.)

The ***Sharp*** court observed that, "[i]n deciding how to exercise its section 1054.3(b)(1) discretion, the trial court may consider the extent to which such an additional examination is needed, in light of any existing court appointments, to rebut the defense's proposed expert testimony." (**Ibid**.) "That appointments have already been made under section 1027 thus may influence, but does not preclude, the decision to order an examination under section 1054.3(b)(1)." (**Id**. at p. 176 [and noting, at p. 175, that defendant "may be correct that in general the People have less need for an examination by their own expert when the defendant has pleaded NGI, requiring the court to appoint its own expert examiners under section 1027, than where . . . the defense proposes to present a mental health defense to guilt through its own retained experts"].)

Mental Retardation Cases

In ***Centeno* v. *Superior Court*** (2004) 117 Cal.App.4th 30, a pre-1054.3(b) case, the court held, under Penal Code section 1376, a court could make orders reasonably necessary to ensure the production of evidence sufficient to determine whether the defendant is mentally retarded, including, but not limited to, the appointment of, and the examination of the defendant, by qualified experts. (**Id**. at p. 36.) Thus, section 1376 could authorize that the defendant submit to a prosecution expert. However, under the rationale of ***Sharp***, it appears such an examination would *not* be authorized pursuant to section 1054.3(b) because section 1376 is an existing statute that "otherwise specifically addresses" the subject matter of section 1054.3.

Competency Hearings

Whether the rationale of ***Sharp*** will permit a court to order a defendant who is claiming incompetency to submit to an examination by prosecution-retained experts is unclear because a competency hearing is not considered a criminal proceeding and is governed by the civil rules of discovery. (**See *Baqleh* v. *Superior Court*** (2002) 100 Cal.App.4th 478, 490-492.) Under Code of Civil Procedure section 2019.010, discovery may be obtained by physical or mental examination. And under Code of Civil Procedure section 2032.020 a mental examination may be obtained of a party to an action in which the mental condition of that party is in controversy in the action. Thus, Penal Code section 1369 likely is ***not governed*** by section 1054.3(b). However, section 1369 already empowers courts to compel a defendant to submit to a competency examination by a prosecution expert - albeit only if the defendant's statements during the examination are inadmissible for any purpose at trial and the examination comports with the civil rules of discovery. (***Baqleh*** at pp. 498–499 & fn. 5, 502-506.)

F. How "Timely" Does a "Timely Request by the Prosecution" Have to Be?

Subdivision (b)(1) of section 1054.3 allows for an evaluation by a prosecution retained mental health expert of a defendant or juvenile when the defendant or juvenile places his or her mental state in issue at any phase of the criminal action or juvenile proceeding "***upon timely request by the prosecution***[.]" (Pen. Code, § 1054.3(b)(1).)

In ***In re Joseph H.*** (2015) 237 Cal.App.4th 517, the court interpreted "the term 'timely,' found in section 1054.3, subdivision (c)[*sic*], in a common sense manner, to mean 'at the earliest time possible.'" (**Id**. at p. 537.) Applying this interpretation, the court held that a prosecution request for a juvenile to be evaluated by a prosecution retained expert was "timely" even though it was made in the middle of a contested jurisdictional hearing where: (i) the defense successfully objected at that time to the testimony of a court-appointed expert who had improperly been appointed to conduct both an insanity and competency evaluation; (ii) the prosecution had just received the report from the defense-retained expert on the juvenile's capacity shortly before the hearing; and needed have another doctor review that report; and (iii) the court determined that the prosecutor should have some time to get another doctor, in case it was necessary to impeach defense-expert's testimony. (**Id**. at pp. 536-537.)

10. Reciprocal discovery between co-defendants

Nothing in Penal Code section 1054.1 or 1054.3 discusses reciprocal discovery obligations between co-defendants. The California Supreme Court has clearly indicated that the discovery statute does not apply to discovery between co-defendants: "Nothing in the language of these two provisions requires one codefendant to provide discovery to another codefendant." (***People* v. *Thompson*** (2016) 1 Cal.5th 1043, 1094; **see also *People* v. *Hunter*** (2017) 15 Cal.App.5th 163, 167 ["the Penal Code does not provide for discovery among codefendants"]; ***People* v. *Landers*** (2019) 31 Cal.App.5th 288 [2019 WL 181485, *8, fn. 10].)

In ***Thompson***, the defendant sent letters to her co-defendant while both were incarcerated. The letters urged him not to trust his lawyers and to recant his story blaming defendant for the shooting in exchange for promised financial benefits. The letters suggested exactly what he should tell police. The co-defendant turned these letters over to his attorneys, and at their suggestion wrote defendant back, hoping she would continue the correspondence. Some of the letters were written by the defendant's cell mate, who had acceded to defendant's request to copy, in her own handwriting, letters that defendant had drafted. (**Id**. at p. 1063, 1084.) Before trial began, attorneys for the codefendant met with the prosecutor in an ex parte meeting with the judge and revealed the existence of the letters and informed the prosecutor they had located a witness (defendant's former cellmate) who could authenticate them. The attorneys for the co-defendant acknowledged they would have to reveal the letters but stated they did not want to "formally disclose the evidence to the prosecutor because that would trigger the latter's obligation under applicable discovery rules to disclose the evidence to defendant." (**Id**. at p. 1092.) The attorneys stated, as a strategic matter, they wished to wait until after defendant had presented her defense and "locked herself into a position." (**Ibid**.) They also explained that the former cellmate was afraid defendant would retaliate violently against her should she discover her cooperation with the prosecution. The prosecution agreed not to press for disclosure at that time. The trial court agreed that the co-defendant's attorneys would not have to disclose the cellmate's existence until after defendant testified and approved the agreement with the prosecution not to disclose the evidence until trial. The prosecution, in effect, declined to insist on its right to pretrial discovery. The agreement between the co-defendant and the prosecution went so far as to permit

the attorneys to submit the letters to a police department handwriting expert for analysis, with a court order directing the expert not to disclose the letters without the court's permission. (**Id**. at p. 1092.) It was not until mid-trial that the prosecution for the first time formally received copies of the letters from co-defendant's counsel and thereafter disclosed them to defendant's attorney, who protested the belated disclosure of the evidence. (**Id**. at pp. 1088, 1091.) The defendant moved for a continuance, renewed her motion for severance, and then moved for a mistrial, but all three motions were denied. (**Id**. at p. 1085.) The cellmate testified at trial in the defense portion of the co-defendant's case. The "defendant unsuccessfully renewed her motion for a mistrial due to the failure to provide discovery." (**Id**. at p. 1092.)

In the California Supreme Court, defendant claimed the delayed disclosure was a violation of the discovery statute as well as her state and federal constitutional rights to a fair trial, to due process, to present a defense, to confront the witnesses against her, and to a reliable death penalty verdict (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, § 15). (**Id**. at p. 1091.)

As to the claim of a statutory discovery violation, the California Supreme Court held "no provision in the statutory scheme governing criminal discovery explicitly or even impliedly requires one codefendant to disclose any evidence to another codefendant. (**Id**. at p. 1094.) Moreover, the court held nothing in the statutory schemed prohibited the prosecution, after being made aware of the evidence, from acquiescing in the proposal to delay disclosure. (**Ibid**.)

Editor's note: An argument could be made that once the prosecution learned of the existence of the letters, they were in constructive possession of a "statement" of the defendant, which they would be obligated to disclose under Penal Code section 1054.1(b), even though they did not formally receive the letters. However, the ***Thompson*** court seemed to assume that the proffered information did not impose any obligation on the prosecution to disclose the information to the defendant.

As to the constitutional claims, the ***Thompson*** court recognized that "discovery in criminal cases is sometimes compelled by constitutional guarantees to ensure an accused receives a fair trial." (**Id**. at p. 1095.) Nevertheless, the court held there was no denial of her Sixth Amendment right to confrontation or Fourteenth Amendment right to a fair trial and meaningful opportunity to present a defense since (i) "[d]efendant presumably knew the content of the letters (because she wrote them) and knew of [the cellmate's] participation as well, so she could not have been caught off guard to such an extent that we might conclude she was unable to prepare a meaningful defense and thereby denied her due process right to a fair trial" and (ii) she was "able to cross-examine [both the codefendant and the cellmate] about the letters, thereby satisfying her right to confrontation." (**Id**. at p. 1096 [and finding the "mere possibility she would have obtained discovery of the letters earlier had she been tried separately is insufficient to demonstrate a violation of her constitutional rights to a fair trial and to confront the witnesses against her"; and also finding a lack of prejudice from the belated failure to disclose].) Lastly, the California Supreme Court rejected a related claim that the ex parte in camera hearings between the co-defendant's attorneys and the prosecution violated the defendant's right to be present, right to effective assistance of counsel, due process, or section 1054.7. (**Id**. at pp. 1097-1101.)

Editor's note: This last claim is discussed in greater depth in this outline at section VII-6-B at p. 240)

In ***People* v. *Ervin*** (2000) 22 Cal.4th 48 the court rejected a defendant's claim that his counsel was incompetent in failing to obtain discovery of his codefendants' penalty phase witnesses, noting that "[a]s defendant acknowledges, no statutory basis exists for the discovery of codefendants' penalty phase witnesses." (**Id**. at p. 91 [citing to Pen. Code, §§ 1054–1054.7]; **see also *Spence* v. *Hickman*** (E.D. Cal. 2009) [unreported] 2009 WL 1260251, *31 [citing to ***Ervin*** for the proposition that no matter is "discoverable ***at all*** from a codefendant, under the reciprocal discovery scheme," emphasis added].)

In the case of ***People* v. *Hajek*** (2014) 58 Cal.4th 1144, counsel for one co-defendant (Hajek) complained about the failure of counsel for the other co-defendant (Vo) to provide discovery on an expert defendant Vo planned to call. The prosecution joined in the request for discovery. When counsel for defendant Vo refused to provide the information, the trial court precluded defendant Vo from calling his expert. The California Supreme Court upheld the trial court's sanction "because of its adverse effect on the ability of the prosecutor ***and the co-defendant*** to cross-examine the expert. (**Id**. at p. 1233, emphasis added.)

Editor's note: The language in ***Hajek*** referencing the impact of one co-defendant's discovery violation on the rights of the other co-defendant does not reflect any inconsistency with the rule laid out in ***Thompson*** or in ***Ervin***, but is simply a sotto voce answer to the question of whether a trial court may consider the potential prejudice to a codefendant in determining the appropriate sanction for a defendant's discovery violation. (**See *People* v. *Harris*** (unreported) 2009 WL 2854270, *7, fn. 2.)

In ***People* v. *Hunter*** (2017) 15 Cal.App.5th 163, two defendants were convicted of murder under the "provocative acts" doctrine for the slaying of their accomplice in a botched robbery at a jewelry store. A defense investigator for *another* co-defendant (who had pled guilty to lesser charges) interviewed the victim of the robbery. The attorney for that co-defendant (Clark) declined to provide any information to the co-defendants, claiming the work-product privilege. (**Id**. at pp. 167-168, 173.) The appellate court held that the discovery statute did not require Clark's attorney to provide a report of the witness because the discovery statute did not require discovery between co-defendants. (**Id**. at pp. 175-177.) The appellate court recognized that in some circumstances counsel for co-defendant could be ordered to provide discovery to the other co-defendant in order "to ensure the defendant's right to a fair trial." (**Id**. at p. 167.) However, the court held none of those circumstances applied in the case before it, and especially since the "defendants' chief claim of the value of the codefendant's interview—that it was conducted entirely in the shopkeeper victim's native language—turned out to be inaccurate, and . . . neither defendant suggested he could not secure an interview with the shopkeepers." (**Id**. at p. 167.)

11. Penal Code section 1054.3 applies to the penalty phase of capital cases

The reciprocal discovery provisions of Penal Code section 1054 et seq. require defense disclosure of penalty phase evidence. (***People* v. *Superior Court (Mitchell)*** (1993) 5 Cal.4th 1229, 1232–1233;

People* v. *Superior Court (Sturm) (1992) 9 Cal.App.4th 172, 181–182.) However, "trial courts possess discretion to defer penalty phase discovery by the prosecution until the guilt phase has concluded. On request, the court may permit such showing to be made in camera." (***People* v. *Superior Court (Mitchell)*** (1993) 5 Cal.4th 1229, 1239.)

12. Discovery obligations imposed on defense other than those imposed by section 1054.3

A defense attorney may not withhold physical evidence from the State. "Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. Applicable law may require a lawyer to turn evidence over to the police or other prosecuting authorities, depending on the circumstances. (Comment to California Rule of Professional Conduct Rule 3.4 [citing to ***People* v. *Lee*** (1970) 3 Cal.App.3d 514, 526 and ***People* v. *Meredith*** (1981) 29 Cal.3d 682]; **see also *People* v. *Sanchez*** (1994) 24 Cal.App.4th 1012, 1019 [trial court did not violate the reciprocal discovery provisions by furnishing to the prosecutor inculpatory writings of defendant that had been delivered to the trial court by defendant's lawyer, after the writings had been found by defendant's sisters and turned over to the lawyer];. ***People* v. *Superior Court (Fairbank)*** (1987) 192 Cal.App.3d 32, 39-40 [holding that where a defense attorney chooses to remove, possess, or alter physical evidence pertaining to the crime, the defense attorney must immediately inform the court and the court must then take appropriate action to ensure the prosecution has timely access to the evidence].)

VI. THE IMPACT OF THE DISCOVERY STATUTE ON COLLECTION OF "NONTESTIMONIAL EVIDENCE" (PENAL CODE § 1054.4)

1. Statutory language of Penal Code Section 1054.4

Penal Code section 1054.4 provides that the discovery statutes shall not be "construed as limiting any law enforcement or prosecuting agency from obtaining ***nontestimonial*** evidence to the extent permitted by law on the effective date of this section."

2. What is "nontestimonial" evidence under section 1054.4?

This section makes it clear that the discovery statute was "not directed at normal investigative efforts of law enforcement agencies." (***People* v. *Sanchez*** (1994) 24 Cal.App.4th 1012, 1027.)

Although "nontestimonial" is not defined in the criminal discovery statutes, the California Supreme Court has indicated that cases defining what type of evidence is protected by the Fifth Amendment "provide a useful framework for interpreting" what nontestimonial means in the context of section

1054.4. (***Verdin* v. *Superior Court*** (2008) 43 Cal.4th 1096, 1110; ***People* v. *Appellate Div. of Superior Court (World Wide Rush, LLC)*** (2011) 197 Cal.App.4th 985, 991; **see also *People* v. *Sanchez*** (1994) 24 Cal.App.4th 1012, 1027-1028.)

For the Fifth Amendment privilege to apply to evidence, four requirements must be met: "the information sought must be (i) 'incriminating'; (ii) 'personal to the defendant'; (iii) obtained by 'compulsion'; and (iv) 'testimonial or communicative in nature.'" (***Verdin* v. *Superior Court*** (2008) 43 Cal.4th 1096, 1110.)

Evidence That Is Nontestimonial Because It is Not Communicative in Nature

In light of the above framework, ***People* v. *Appellate Div. of Superior Court (World Wide Rush, LLC)*** (2011) 197 Cal.App.4th 985, recognized that "nontestimonial" evidence at the time of enactment of section 1054.4 included: (i) lineups; (ii) handwriting exemplars; (iii) blood samples; (iv) fingerprint exemplars; (v) voice identification tests; (vi) breath samples; urine samples; (vii) the modeling of clothing; and (viii) nonincriminatory testimony demonstrating mental impairment where the defendant was the subject of a commitment petition. (**Id**. at p. 992; **see also *Verdin* v. *Superior Court*** (2008) 43 Cal.4th 1096, 1111-1112 [noting Fifth Amendment privilege does not prevent suspect from being compelled to furnish a blood samples, provide handwriting or voice exemplars or wear particular clothing because these acts are not "communicative" in that the defendant is not being asked "to disclose the contents of his own mind']; ***Centeno* v. *Superior Court*** (2004) 117 Cal.App.4th 30, 41, fn. 5 ["Nontestimonial evidence includes blood samples, urine samples, saliva samples, fingerprints, handwriting exemplars, voice exemplars, writings, and physical lineups]; ***Hobbs* v. *Municipal Court*** (1991) 233 Cal.App.3d 670, 689 fn. 15 ["with respect to nontestimonial evidence, section 1054.4 merely restates existing law regarding compelled participation by the defendant in providing physical evidence such as blood or fingerprints as well as handwriting exemplars and participation in line-ups"].)

Evidence That is Nontestimonial Because It is Not Compelled

In ***People* v. *Appellate Div. of Superior Court (World Wide Rush, LLC)*** (2011) 197 Cal.App.4th 985, the court held that voluntarily created corporate records fall within the category of nontestimonial materials discoverable under section 1054.4 because evidence is not testimonial unless it is created under compulsion and because corporations like other organizations are not protected by the Fifth Amendment. (**Id**. at p. 991 [and noting at pp. 990 and 992, that voluntarily-created corporate records were treated as nontestimonial evidence and were not immune from discovery by the prosecution under the case law existing before Proposition 115 enacted the criminal discovery statutes].)

In ***People* v. *Sanchez*** (1994) 24 Cal.App.4th 1012, the court held that a criminal defendant's inculpatory writings that had been given to his defense counsel by a third party and subsequently provided to the court by defense counsel were "nontestimonial" evidence that was later properly

furnished to the prosecution because, inter alia, the defendant was not compelled to create the writings. (**Id**. at pp. 1027-1028.)

VII. WHEN MUST STATUTORILY-MANDATED DISCOVERY BE DISCLOSED?

1. Penal Code section 1054.7's statutory language

Penal Code section 1054.7 governs when discovery must be provided under the California discovery statute. In relevant part, that section states: "The disclosures required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred."

2. Does statutorily-mandated discovery have to be provided before a guilty plea?

The California discovery statutes do not state nor imply that any statutory discovery must be disclosed before a guilty plea. The question of whether the prosecution has a *federal due process* duty to disclose any evidence before a guilty plea is discussed in this outline, at section I-13-B at pp. 150-151.

3. Does statutorily-mandated discovery have to be provided before preliminary examination?

Most discovery is typically provided to the defense as a matter of course prior to the preliminary examination. There are many good reasons for generally providing discovery before preliminary examination, including avoiding battles over when discovery must be provided. Nevertheless, there are times when there are good reasons not to provide discovery before the preliminary hearing, i.e., when doing so would present a risk to witnesses, potentially impact privileges, compromise an investigation, etc. In those circumstances, prosecutors should be ready to include, as an argument against having to provide the information requested by the defense, that disclosure of statutorily-based discovery is barred by the discovery statute.

The question of whether the prosecution has a federal due process duty to disclose ***Brady*** evidence before preliminary examination is discussed in this outline, at section I-13-C, at pp. 153-155. Whether the prosecution has any ***statutory*** duty to provide the discovery outlined in Penal Code section 1054.1 before preliminary examination has not been directly decided by a published California decision. (**See *People* v. *Chavez*** [unreported] 2009 WL 641309 [leaving question open].)

Some court observers had hoped that the question would be addressed the California Supreme Court decision in ***Galindo* v. *Superior Court*** (2010) 50 Cal.4th 1, which dealt with the issue of whether a defendant was entitled to a ***Pitchess*** motion before preliminary examination. Unfortunately, the court answered the question before it without addressing the issue of whether there is any *statutory* duty to disclose information before the preliminary examination. The closest the court came to touching upon the question was to describe section 1054 as limiting pre-trial discovery "to aiding the trial process." (**Id**. at p. 10 [and finding while a ***Pitchess*** motion can be made before a px, there was no right to one].)

Hopes were raised again that the question would be addressed in the appellate court case of ***Magallan* v. *Superior Court*** (2011) 192 Cal.App.4th 1444. However, the ***Magallan*** court limited its holding to finding that a magistrate had the authority to order that discovery bearing on a motion to suppress (i.e., 911 dispatch tapes and records) be turned over before preliminary examination *where a Penal Code section 1538.5 motion to suppress has been scheduled to be heard in conjunction with the preliminary examination*. The court specifically stated it was not deciding the "broad issue of whether magistrates have an expansive power to order discovery of any kind in advance of the preliminary examination, but only the narrow issue of whether a magistrate has the power to order discovery in support of a suppression motion to be heard in conjunction with the preliminary examination." (**Id**. at p. 1460.)

Editor's note: Notwithstanding the above language, expect the defense to cite to language in the ***Magallan*** opinion that undermines one of the arguments often made in support of the proposition that the discovery statute generally prohibits discovery orders made in anticipation of the preliminary hearing. (**See *People* v. *Holland*** (unpublished) 2013 WL 3225812, *4.) In ***Magallan***, the People argued that the discovery statute is tied to trial discovery and cannot be applied before the preliminary examination since the timing requirements of Penal Code section 1054.7 (which require the prosecution to provide discovery to the defense "at least 30 days before trial") and thus section 1054.7 would be ineffectual at a stage in the proceeding "before the parties know whether there will even be a trial[.]" (**Id**. at p. 1460.) Despite the compelling nature of this argument, the ***Magallan*** court rejected this analysis. The court held section 1054.7 "does not preclude a defendant from making an earlier discovery motion under Penal Code section 1054.5, nor does it preclude such a motion from being granted more than 30 days in advance of trial." (**Id**. at p. 1460.) The ***Magallan*** court observed that "[i]f the Attorney General's interpretation were correct, the prosecutor's discovery obligations would suddenly take effect 30 days before trial, and the defense would be deprived of the opportunity to prepare for trial before that time. Such an interpretation would be completely at odds with the express statutory purposes of Chapter 10, which are to promote 'timely pretrial discovery,' avoid the necessity for postponements, and avoid 'undue delay of the proceedings.' Precluding the granting of discovery motions until 30 days before trial would work against the goal of 'timely pretrial discovery' and would inevitably result in postponements and delays in the proceedings." (**Id**. at p. 1460.) Ultimately, the court made its observations to support its point that "delaying the discovery of this information material to a suppression motion until just 30 days before trial would result in the delay of the suppression hearing, which would hamper the goals that Chapter 10 was intended to serve." (**Id**. at p. 1460.) Thus, the language is dicta, but it does have wider implications insofar as the broader issue of the propriety of pre-px discovery in general is concerned.

In ***People* v. *Gutierrez*** (2013) 214 Cal.App.4th 343, the court held ***due process*** required the disclosure of evidence at preliminary examination. The ***Gutierrez*** court stated the ***Brady*** obligation applied at the preliminary examination because, unlike some of the discovery obligations imposed on

prosecutors by section 1054.1, which reference "trial" (i.e.,"(a) The names and addresses of persons the prosecutor intends to call as witnesses *at trial*"; (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial"; and (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the *trial*,"), "[t]he duty to disclose exculpatory evidence under section 1054.1, subdivision (e) is not circumscribed by any reference to trial[]", and since ***Brady*** evidence is "exculpatory evidence" it must be provided before trial. (**Id**. at p. 355.) Following this logic, ***Gutierrez*** also implies that evidence that falls under the subdivisions of section 1054.1 ***referencing trial*** would ***not*** have be provided before preliminary examination.

On the other hand, some of the arguments proffered by the prosecution in support of their claim that ***Brady*** information is not required before the preliminary examination (but which were rejected in ***Gutierrez***) are arguments that are *also* often cited in support of the claim that there is no duty to provide ***statutorily*** described evidence before the preliminary examination. For example, the ***Gutierrez*** court rejected the argument that Penal Code section 866(b), which expressly limits the defendant's ability to use a preliminary examination as a discovery device, appears to indicate an intent on the part of the electorate to say that discovery is not a required part of pretrial proceedings prior to the time a case reaches the jurisdiction of the trial court. (**Id**. at pp. 352-353.) Similarly, the ***Gutierrez*** court rejected the idea that ***Jones* v. *Superior Court*** (2004) 115 Cal.App.4th 48 (a case finding the criminal discovery statutes did not impose any duty on the defense to disclose evidence to the prosecution before a *probation revocation* since, inter alia, a probation revocation *is not a trial*) stood for the proposition that statutory discovery is not required before the preliminary examination. The ***Gutierrez*** acknowledged language in ***Jones*** strongly indicating that the statutory discovery provisions only apply to trial or pre-trial discovery, but it held ***Jones*** inapplicable because it concerned the discovery obligations of the defense, not the prosecution, and because it involved a post-trial rather than pretrial hearing. (***Gutierrez*** at pp. 343-354 [discussed in this outline, section I-13-C at pp. 153-154].)

The appellate court in ***Bridgeforth* v. *Superior Court*** (2013) 214 Cal.App.4th 1074, also held that a defendant has a due process right under ***both*** "the California Constitution and the United States Constitution to disclosure prior to the preliminary hearing of evidence that is both favorable and material, in that its disclosure creates a reasonable probability of a different outcome at the preliminary hearing." (**Id**. at p. 1081.) The ***Bridgeforth*** court adopted many of the same arguments accepted by the ***Gutierrez*** court that might impact the issue of whether there is a pre-px right to statutory discovery. (***Bridgeforth*** at pp. 1083-1087.) However, like ***Gutierrez***, ***Bridgeforth*** drew a distinction between the duty of disclosure compelled by the state and federal constitutions and the discovery obligations imposed by the criminal discovery statutes. (**Id**. at p. 1084.) It did **not** hold a prosecutor must provide the discovery identified in section 1054.1 before preliminary examination. (**See** this outline, section I-13-C at p. 154.)

4. Does statutorily-mandated discovery have to be disclosed before trial?

A. Disclosure Generally Required at Least 30 Days Before Trial

As noted above, section 1054.7 requires that disclosure of the discovery items listed in sections 1054.1 and 1054.3 be made "at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred." (Pen. Code, § 1054.7(a).)

If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, the section 1054.7(a) requires that disclosure "be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred." (Pen. Code, § 1054.7(a).)

However, Penal Code section 1054.5(b) provides that "[b]efore a party may seek court enforcement of any of the disclosures required by this chapter, the party shall make an informal request of opposing counsel for the desired materials and information. If within 15 days the opposing counsel fails to provide the materials and information requested, the party may seek a court order." (**But see** this outline, section VII-4-E at p. 238 [discussing right of judge to order discovery outside of 30-day period].)

i. Must a Witness List Be Provided 30 Days Before Trial?

Penal Code section 1054.7 says nothing about witness lists. However, in ***People* v. *Lewis*** (2015) 240 Cal.App.4th 257, the court indicated that a witness list is what is must be disclosed. In ***Lewis***, the People decided not to call the primary officer-witness against the defendant because, after defendant's arrest but before the defendant went to trial, the officer was himself arrested and charged with various offenses. The defense alleged it was taken by surprise because the People did not reveal they would not be calling the officer until the first day of trial when the officer was not included on the People's witness list. (**Id**. at pp. 265-266.) The ***Lewis*** court faulted the prosecution for failing to satisfy its statutory discovery obligations under section 1054.1. The ***Lewis*** court stated: "To begin with, the parties and the record do not explain why the prosecution's final witness list was not provided to the defense until the first day of trial. (**See** §§ 1054.1, subd. (a), 1054.7 [disclosure of witness list must be made 30 days before trial absent prosecution's showing of good cause or "immediately" if "information becomes known" less than 30 days beforehand].)" (**Id**. at p. 265.) The court then stated that there was no justification for waiting until the last minute to convey the information the witness would not be called – indicating there is a duty to not only provide a witness list of who will be called but a duty to state who will not be called. (**Id**. at p. 266.)

Editor's note: In the unsuccessful request for depublication of ***Lewis***, the authors of the request (Retired Sacramento Co. ADA Albert Locher, Contra Costa Co. Chief ADA Doug MacMaster, and Santa Clara Co. DDA David Boyd) pointed out that the disclosure of the names and addresses of witnesses the People reasonably anticipate calling are typically provided by way of police reports well in advance of trial – not by witness lists. Moreover, the discovery statute does not require the prosecution to notify the defense which of the witnesses in the police reports will *not* be called. Indeed, such a requirement would effectively require an attorney to produce a writing revealing impressions, conclusions, opinions or theories about a case – protected work product. (Pen. Code § 1054.6; Code of Civ. Proc., § 2018.030(a).)

The true rule was accurately explained in the unpublished decision of ***People* v. *Newman*** [unreported] 2018 WL 774015, where Justice Hoffstadt noted that section 1054.1 "*effectively* requires the prosecutor to disclose his or her witness list." (**Id**. at p. *3, emphasis added.) But that where a prosecutor informs a defendant of the names of the witnesses ahead of time and references police reports containing the information, the prosecutor is not required by the discovery statute to create a separate document called a "witness list."

B. How Immediate is "Immediately?"

In ***People* v. *Verdugo*** (2010) 50 Cal.4th 263, the court held that turning over the notes of a police officer the same morning the prosecutor received the notes was sufficient to comply with the "immediately" requirement for evidence obtained after the 30-day clock began to run, but that turning over the notes of a conversation with another witness a week after the notes were taken was not immediate and constituted a violation of the discovery statutes. (**Id**. at pp. 281-282, 286-287.)

In ***People* v. *Thompson*** (2016) 1 Cal.5th 1043, the court upheld a trial court's refusal to impose any sanction where the prosecutor learned of a statement of a victim during trial but did not turn it over for 30 minutes to an hour. (**Id**. at p. 1104.)

Editor's note: In ***People* v. *Bailey*** (unpublished) 2016 WL 1633214, the court held disclosure was not immediate where the attorney knew she would call the witness the day before but waited until the next morning right before the witness testified to disclose she would be called. (**Id**. at p. *6.)

C. If a Prosecutor Discloses Discovery Immediately After Learning of Discovery, Will That Always Be Sufficient to Comply with the Mandate of Section 1054.7?

If a member of the prosecution team (**see** this outline, section I-7-A at p. 68-71) is in possession of discovery but does not bring the information to the attention of the prosecutor until after section 1054.7's 30 day pre-trial clock has started running, the fact the prosecutor thereafter immediately provides the discovery to the defense is ***inadequate*** to meet the requirements of Penal Code section 1054.7. (***People* v. *Superior Court (Meraz)*** (2008) 163 Cal.App.4th 28, 48, fn. 10 [police negligence in providing discovery to prosecutor is attributed to prosecutor]; **but see** this outline, section VIII-9 at p. 262.)

D. Is it a Violation of the Discovery Statutes if Discovery is Not Disclosed 30 Days Before Trial but the Trial is Continued?

No published criminal appellate case has addressed whether there is a violation of the discovery statute if the prosecutor fails to provide statutorily required discovery within 30 days of trial, but the trial date is then continued, and such discovery is provided before the *next* trial date. It is unlikely that any sanction would be imposed in that circumstance by the ***trial court*** unless the defendant could somehow show prejudice from the delay.

However, in the State Bar opinion of ***In re Field*** (Cal. Bar Ct. 2010) 2010 WL 489505, a prosecutor was suspended for, inter alia, having failed to disclose exculpatory evidence of a co-defendant's statement under just those circumstances. The trial in that case had originally been set in July and then again in August. The statement was not disclosed until two days before the August trial date, and only after it first came to the attention of defense counsel approximately a week before the August trial date. In the state bar disciplinary proceedings, the prosecutor argued that he did not violate the statute by failing to provide the discovery before the first trial date because he thought the 30-day discovery cutoff for the first trial was postponed in light of the fact the trial had been continued and that the trial date set by the court "was not real, and an attorney must use a 'predictive ability' based upon 'on-the-job training' to determine when a case is actually going to trial for the purpose of timely producing discovery." (**Id**. at p. *10.)

The appellate court reviewing the imposition of discipline rejected the prosecutor's argument. The court stated: "Absent express language in section 1054.7 dictating otherwise, we do not presume the Legislature intended to allow parties in criminal proceedings to disregard discovery deadlines associated with trial dates merely because they think they can successfully predict that a trial date will be continued." (**Ibid** [and also rejecting the prosecutor's argument as disingenuous because the superior court did not postpone the discovery cutoff date for either trial and did not grant a continuance for the first trial until the actual trial date in July].) The appellate court found the prosecutor's conduct violated section 1054.1(b) and (f). (**Id**. at p. *10 [and finding this was misconduct since a violation of section 1054.1 is a violation of Business and Professions Code section 6068(a) [requiring attorneys "to support the Constitution and laws of the United States and of this state"].)

In another state bar opinion (***In re Nassar*** (Cal. Bar Ct., Aug. 23, 2018) No. 14-O-00027) [2018 WL 4057437] [modified but not substantively changed at (Cal.Bar Ct., Sep. 18, 2018 [2018 WL 4490909]), the state bar rejected a similar argument made by the prosecutor for failure to disclose evidence. In ***Nassar***, a prosecutor asked that jail personnel intercept and copy all mail sent to and from codefendants in a child abuse case. Some of the mail intercepted was exculpatory. The male defendant's trial was initially set for June 20, 2012. On June 13, the trial date was moved to October 10. On that date, and on each of three successive scheduled trial dates (of January 16, 2013, March 20, April 17, and

June 17, 2013) the trial was continued. (**Id**. at p. *2, fn. 6.) Before each scheduled trial date, the defendant's attorney requested the statutory and constitutional discovery to which the defendant was entitled. None of the copies of the mail were turned over to the defense by the prosecutor originally assigned the case (Nassar). After Nassar was re-assigned, the new prosecutor disclosed all the copies of the mailed letters to the defense. Nassar was then subject to a state bar prosecution for a violating the statutory deadline to disclose the exculpatory letters. (**Ibid**.)

The state bar reviewing court **rejected** the argument that since DDA Nassar was out of the case before the final jury trial date, the parties never announced ready before the final trial, and no "actual trial date" with a discovery cut-off date was set, there was no violation of the discovery statute by failure to disclose within 30 days of the trial date. The reviewing court concluded DDA Nassar violated the discovery timelines by failing to turn over the statements from the mail cover 30 days before the *earlier*-scheduled trial dates. (**Id**. at p. *4.) The reviewing court even refused to credit DDA Nassar's claim that since the "actual trial date" was not set, she thought disclosure was unnecessary because the court did not think such belief was objectively reasonable based on "the clear wording of section 1054.7." (**Id**. at p. *8.)

Editor's note: Although not mentioned or discussed in either State Bar opinion, in the appellate case of ***Sandeffer* v. *Superior Court*** (1993) 18 Cal.App.4th 672, a case holding a court could order discovery before the 30-day deadline, the court observed: "The reality of practice is that criminal cases are continued repeatedly, not infrequently within 30 days of trial. Courts must have the flexibility to order production by a specific date in complex litigation such as this where discovery at the tail end of the case would defeat the act's purposes." (***Id***. at p. 678.) If the concern was that discovery could be delayed by continuances within 30 days of trial without a trial court having the ability to order the discovery in advance, does this not imply that if a case was continued, discovery *could* and would *ordinarily* be delayed until the trial date unless a court intervened?

E. Can a Court Order Statutorily-Mandated Discovery Outside of 30 Days Before Trial?

In ***Sandeffer* v. *Superior Court*** (1993) 18 Cal.App.4th 672, the court held that the 30-day requirement is a minimum requirement and a court may order statutory discovery even outside of the 30 days before trial. (**Id**. at p. 678 [and noting criminal cases are continued repeatedly, not infrequently within 30 days of trial" and thus "[c]ourts must have the flexibility to order production by a specific date in complex litigation such as this where discovery at the tail end of the case would defeat the act's purposes"]; **see also *Magallan* v. *Superior Court*** (2011) 192 Cal.App.4th 1444, 1460; ***People* v. *Gutierrez*** (2013) 214 Cal.App.4th 343, 351; ***Holland* v. *Superior Court*** (unpublished) 2013 WL 3225812, *4.)

5. Is there a violation of the discovery statute if the discovery is disclosed after trial has begun?

Sometimes evidence comes to light after a trial has begun. The defense routinely jumps up and down, claiming that this constitutes a discovery violation. It does not.

Penal Code section 1054.7 explicitly recognizes that discovery may not be available in advance of 30 days of trial and simply states that if "the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately." (Pen. Code, § 1054.7.)

Moreover, the prosecution cannot provide discovery that does not exist or has not been created until after the trial has begun. This does not constitute a statutory or constitutional violation.

In ***People* v. *Thompson*** (2016) 1 Cal.5th 1043, the California Supreme Court upheld a trial court's refusal to impose any sanction where the prosecutor learned of a statement of a victim *during* the evidentiary portion of the trial and did not turn it over for 30 minutes to an hour. (**Id**. at p. 1104.)

In ***People* v. *Whalen*** (2013) 56 Cal.4th 1, the court found no discovery violation where the witness testified on stand defendant had raped her but had not previously disclosed defendant had done so. (**Id**. at pp. 66–67.)

In ***People* v. *Verdugo*** (2010) 50 Cal.4th 263, a police officer witness took the opportunity during a break in his trial testimony to gather some additional evidence. The prosecutor was provided with the officer's notes regarding his mid-testimony observations before the officer re-took the stand. The prosecutor gave the notes to the defense the same morning he received them from the officer. The defense complained this violated section 1054 and that he was "taken by surprise and ... unable to effectively counter this new evidence[.]'" (**Id**. at p. 287.) The ***Verdugo*** court held the prosecutor had properly complied with the discovery statute and "the ***prosecution had no duty to obtain the evidence sooner than it did***." (**Id**. at p. 287.)

In ***People* v. *Mireles*** (2018) 21 Cal.App.5th 237, the court held there was no violation of section 1054.1 where a prosecutor called a rebuttal witness not on the prosecutor's witness list and there was evidence supporting prosecutor's claim she did not initially believe rebuttal witness was necessary for its prosecution, but then, as the trial unfolded, changed her mind, interviewed him, and immediately thereafter provided the interview notes to the defense. (**Id**. at p. 248.)

In ***People* v. *Walton*** (1996) 42 Cal.App.4th 1004, the court held that a trial court properly permitted a witness to testify at trial even though the prosecution had not disclosed the witness until after jury selection had begun where the prosecutor was not able to locate and speak to the witness before that time. (**Id**. at p. 1017; **see also *People* v. *DePriest*** (2007) 42 Cal.4th 1, 38-39 [no violation of discovery statute where People produced new shoeprint evidence after jury sworn and defense given opportunity to further investigate]; ***People* v. *Panah*** (2005) 35 Cal.4th 395, 459-460 [finding no violation where expert prepared report after trial began but most of information in report already known to defense through grand jury testimony of expert]; **cf., *People* v. *Landers*** (2019) 31 Cal.App.5th 288 [2019 WL 181485, *8 [timing regime of statutory discovery statute "in effect, creates a continuing duty of

disclosure beginning 30 days prior to trial and *running through trial to its conclusion*.", emphasis added]; ***People* v. *Smith*** (2003) 30 Cal.4th 581, 620 [noting it is not the law that evidence discovered after trial is inadmissible]; ***People* v. *Viray*** (2005) 134 Cal.App.4th 1186, 1197 [noting "[s]ome degree of investigation undoubtedly continues after the complaint is filed; indeed it may go on until the parties rest their cases at trial, and sometimes beyond"].)

Discovery After the Close of Evidence

On the other hand, if exculpatory information comes to light, **even after the close of evidence**, there is a continuing obligation to disclose it. (**See *People* v. *Jackson*** (1991) 235 Cal.App.3d 1670 [pre-Proposition 115 case finding prosecutor had duty to disclose evidence that came light while jury was deliberating].)

6. Can disclosure of discovery be deferred or even foreclosed?

A. Penal Code Section 1054.7

"The disclosures required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be ***denied, restricted, or deferred***. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be ***denied, restricted, or deferred***.

'Good cause' is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement. Upon the request of any party, the court may permit a showing of good cause for the denial or regulation of disclosures, or any portion of that showing, to be made in camera. A verbatim record shall be made of any such proceeding. If the court enters an order granting relief following a showing in camera, the entire record of the showing shall be sealed and preserved in the records of the court, and shall be made available to an appellate court in the event of an appeal or writ. In its discretion, the trial court may after trial and conviction, unseal any previously sealed matter." (Pen. Code, § 1054.7, emphasis added.)

B. Is the Defense Entitled to Either Notice of the In Camera Hearing or to Participate in the Hearing in Some Fashion?

In ***People* v. *Thompson*** (2016) 1 Cal.5th 1043, the California Supreme Court had to address the propriety of an ex parte hearing held between attorneys for a co-defendant and the prosecution pursuant to section 1054.7. Those ex parte hearings resulted in the trial court authorizing the delayed disclosure of the fact that defendant had written letters to the co-defendant that incriminated the defendant as well as information about the witness (defendant's cellmate) who had written the letters. The defendant claimed that her exclusion from the hearing was not authorized by section 1054.7 and deprived her of the effective assistance

of counsel. She also claimed it violated her (i) constitutional rights to counsel and to due process of law under the state and federal Constitutions (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15); (ii) her statutory right to be present at all critical stages of her criminal trial (Pen. Code, §§ 977, 1043); and (iii) the California Code of Judicial Ethics. (**Id**. at p. 1097.)

In finding that the ex parte hearing did not run afoul of section 1054.7, the court laid out the general principle that section 1054.7 "contains no express prohibition on ex parte hearings, and defendant acknowledges that 'the trial court may hold an ex parte hearing on a discovery matter' so long as 'the hearing … comport[s] with the general principles of due process.'" (***People* v. *Thompson*** (2016) 1 Cal.5th 1043, 1099 [and cf.'g ***People* v. *Bryant*** (2014) 60 Cal.4th 335, 466 for the principle that "[i]n general, a court 'has inherent discretion to conduct in camera hearings to determine objections to disclosure based on asserted privileges.'"].) The ***Thompson*** court then held that in the case before it there was no violation of section 1054.7 as the defendant had no due process right to pretrial discovery from a jointly tried codefendant. (**Id**. at pp. 1099-1100.) The ***Thompson*** court rejected the argument that its holding was undermined by the pre-Proposition 115 case of ***City of Alhambra* v. *Superior Court*** (1988) 205 Cal.App.3d 1118, which laid out a procedure requiring a defendant to give notice to the prosecution of a request for an in camera hearing and state the basis for request and required the trial court to make a finding that the in camera procedure was both necessary and justified by the need to protect a constitutional or statutory privilege or immunity before holding the in camera hearing. (***Thompson*** at p. 1100.) The ***Thompson*** court distinguished ***Alhambra*** on the ground it concerned the propriety of a defendant's request for discovery from the *prosecution*, whereas in ***Thompson***, the discovery matter was between the prosecution and the co-defendant. (**Ibid**.) Moreover, the ***Thompson*** court observed that the in camera hearing was necessary to protect the fair trial rights of the *co-defendant* and even ***City of Alhambra*** acknowledged that "ex parte hearings may be necessary to protect a defendant's rights[.]" (***Thompson*** at p. 1100.)

The ***Thompson*** court held defendant was not deprived of effective assistance of counsel at the ex parte hearing because defendant failed to show she had any "right to be represented by counsel at a hearing concerning [the co-defendant's] discovery obligations" and even if she did, no prejudice was apparent, "as she could not have been unaware of the contents of the letters under discussion." (**Id**. at p. 1101.)
The ***Thompson*** court did not directly rule on whether the ex parte hearing violated defendant's Sixth Amendment constitutional or Penal Code section 1043 statutory right to be present. Rather, it held that any error was harmless because defendant was aware of the letters and was given a sufficient opportunity to cross-examine her cellmate. Thus, the court found there was no need to rule on the substantive question. (**Id**. at pp. 1098-1099.)

Editor's note: In rejecting the claim the ex parte hearing violated defendant's right to be present, the Court *appeared* to be heading towards saying that ex parte hearings to protect confidential information will not violate the constitutional or statutory right to be present. (**See *Thompson*** at p. 1098 [noting in camera hearings are disfavored but "as a general rule, a trial court has discretion to conduct a proceeding in a defendant's absence "to protect an overriding interest that favors confidentiality."].) The ***Thompson*** court cited to a pair of cases (***People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1299 and ***People* v. *Valdez*** (2012) 55 Cal.4th 82, 125) both of which involved ex parte hearings where *neither* the defense counsel nor the defendant was present in support of this principle. The ***Thompson*** court then took an odd detour - indicating that the substantive issue was whether the general rule allowing a court to conduct in camera hearings in defendant's absence applies not only when defendant is absent from the hearing but when defense counsel is also absent – before ultimately declining to decide that issue. (**Id**. at p. 1098.)

The ***Thompson*** court also **rejected** defendant's argument that reversal was required because the judge held an ex parte hearing in violation of the judicial canon of ethics, canon 3B7, which provides: "A judge shall not initiate, permit, or consider ex parte communications, that is, communications to or from the judge outside the presence of the parties concerning a pending … proceeding … except [listing situations inapplicable here]" and that "[i]f a judge receives an unauthorized ex parte communication, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond." (***Thompson*** at p. 1100.) The ***Thompson*** court came to this conclusion based on the fact that the judicial canon did not apply in the instant case because the defendant was not a "person who [had] a legal interest in the proceeding" within the meaning of canon 3B(7)(d) and because even if there was a violation of the canon, "no case authority holds that a violation of a judicial ethical rule, per se, automatically requires reversal of the ensuing judgment." (**Ibid**.)

In ***People* v. *Valdez*** (2012) 55 Cal.4th 82, the trial court held numerous ex parte hearings under section 1054.7 in order to review the prosecution's request for various protective orders limiting disclosure of the witness' identities. In the California Supreme Court, the defense argued that by conducting ex parte hearings on the nondisclosure of witness identities without giving the defense notice or an opportunity to participate in the hearings, the trial court violated (1) defendant's "right to counsel, to confront witnesses against him, to due process, and to a reliable penalty determination, and (2) "his rights under the California Constitution and the California Penal Code." (**Id**. at p. 121.) The defendant claimed that even if it was necessary to keep him and his counsel from discovering the witnesses' identities, it was not necessary to deprive him of notice and to exclude him from the hearings, because the hearings could have been conducted in his presence and the witnesses could simply have been referred to by number instead of name. (**Id**. at p. 121.)

The ***Valdez*** court rejected the defendant's claim on grounds that defendant forfeited the issue by failing to object to a lack of notice and/or the right to participate in the camera hearings and that even if the issue had not been forfeited, any error was harmless. (**Id**. at pp. 122-128.) However, while acknowledging that ex parte proceedings are permissible if compelling reasons justify them, the court noted such proceedings are generally disfavored and stated: "defendant may be correct that, at a

minimum, the trial court could have addressed the prosecution's concern for the witnesses' safety by identifying the witnesses by number instead of by name—as they were identified in the redacted grand jury transcripts—and allowing defense counsel to attend." (**Id**. at p. 125.)

Two unpublished cases have both held that failure to provide notice of, and an opportunity to be heard, at a section 1054.7 hearing violates due process. (**See *Gutierrez* v. *Superior Court of Orange County*** [unreported] 2004 WL 792319, at *2 [finding it an abuse of discretion to hold 1054.7 hearing without giving defense notice and chance to be heard]; ***People* v. *Chiles*** [unreported] 2005 WL 648278 at pp. *5-*8.) [**NEWLY DISCOVERED AND NEWLY ADDED**]

> **Editor's note**: While it remains an open question whether a defendant is entitled to notice and an opportunity to participate in a hearing on whether to defer discovery pursuant to section 1054.7, in light of the two unpublished opinions, **it is strongly recommended that notice of the hearing be provided to the defense**. This advice is given with a heavy heart since notice of the hearing may be enough to tip off the defense to the reason for the hearing and defeat the very purpose of section 1054.7.

C. Is Hearsay Admissible at an In Camera Hearing Under Section 1054.7?

Although many of the cases describing section 1054.7 hearings make it obvious that hearsay was being admitted, in none of these cases was the issue raised whether hearsay is admissible at the hearing. However, in camera MDI hearings are similar to section 1054.7 in camera hearings and in ***People* v. *Estrada*** (2003) 105 Cal.App.4th 783, the court held a trial court retains considerable discretion in terms of what it will review at an in camera on whether to disclose the identity of the informant and that "hearsay evidence is admissible during the in camera hearing." (**Id**. at p. 796.)

There is a case that is sometimes cited for the contrary position but on careful review it does not actually hold hearsay is inadmissible at an in camera hearing. The case is ***People* v. *Lee*** (1985) 164 Cal.App.3d 830. In ***Lee***, an appellate court had remanded a case for the trial court to re-do an in camera hearing. At the second in camera hearing, the trial court considered a transcript of the earlier in camera hearing. When the case returned to the appellate court, the *defense* argued the first transcript could not be considered because it was hearsay. The appellate court, however, never addressed the hearsay claim, finding the first transcript could not be considered on a different basis. The ***Lee*** court noted that Evidence Code section 1042(d) provided in relevant part: "At the in camera hearing, the prosecution may offer evidence which would tend to disclose or which discloses the identity of the informant to aid the court in its determination whether there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial." (***Id***. at p. 841.) The ***Lee*** court believed "the ***unsworn*** testimony of the confidential informant from the first in camera hearing at the second in camera hearing" did not constitute "evidence" within the meaning of the Evidence Code. (**Ibid**., emphasis added.) And, in fact, the ***Lee*** court implicitly suggested some hearsay might be admissible at the in camera hearing by recognizing the confidential informant need not testify. (***Id***. at p. 839; **cf**., ***People* v. *Tolliver*** (1975) 53 Cal.App.3d 1036, 1044 [finding hearsay exclusionary rule is not a barrier to defendant's ability to

make the showing for disclosure and an "affidavit to support the search warrant that recites the informant's communication to the police officer is considered admissible evidence for this purpose."].)

Several unpublished decisions also strongly suggest it is reliance on *unsworn* testimony at an in camera hearing on a motion to disclose an informant that is prohibited and **not** reliance on hearsay. In ***People* v. *Diaz*** (unpublished) 2011 WL 5085032, the appellate court reviewed a trial court's in camera hearing for purposes of deciding whether the confidential informant should be disclosed. The appellate court conducted a de novo review of the in camera hearing, which it discussed *approvingly* because "[a]ll evidence introduced at the in camera hearing *was given under oath*, and no opinions, characterizations of witness statements, or assumptions or conclusions were uttered by any testifying officer—merely facts." (***Id***. at p. *11, emphasis added; **see also *People* v. *Clarke*** (uunpublished) 2009 WL 3337849, at p. *6 [also finding trial court properly conducted in camera hearing for identical reasons to ***Diaz*** despite defendant's claim, inter alia, that the in camera hearing should not include hearsay]; ***In re T.Tr.*** (unpublished) 2010 WL 4131960, at p. *6 [finding informant was not material because police inspector testified at hearing under oath that "this informant ***told*** me that ... the informant did not see the shooting. And was nowhere near the incident." emphasis added.)

Moreover, in other contexts (such as a motion to dismiss for untimely discovery or deprivation of a speedy trial right) courts have suggested the concern with in camera hearings stems not from reliance on hearsay but on unsworn and conclusory testimony - at least when such reliance can result in the ***dismissal*** of a case. (**See *People* v. *Sahagun*** (1979) 89 Cal.App.3d 1,24 ["... in the absence of a stipulation, certainly without opposing counsel even being present, *unsworn* statements, even when made by counsel, do not constitute competent proof of facts that will support an order terminating a felony prosecution."], emphasis added; ***People* v. *Alderrou*** (1987) 191 Cal.App.3d 1074, 1079–1080 [approving the portion of the ***Sahagun*** opinion which prohibits reliance upon unsworn declarations at in camera hearing]; ***People* v. *Caldwell*** (1991) 230 Cal.App.3d Supp. 1, 7 ["An order dismissing a misdemeanor prosecution also must be based on competent evidence, not unsworn or conclusory statements."].)

Lastly, it is also worthwhile noting that in deciding almost all discovery issues involving potential disclosure of confidential or privileged information, courts routinely consider hearsay at in camera hearings. For example, in deciding whether there is potentially discoverable information in an officer's personnel file, witnesses who testify at the in camera hearing must be sworn (**see *People* v. *White*** (2011) 191 Cal.App.4th 1333, 1341), but the courts are reviewing police reports containing multiple levels of hearsay. (**See e.g**., ***People* v. *Mooc*** (2001) 26 Cal.4th 1216, 1227.) If the court could not consider the information contained in those reports for their truth in describing the conduct of the officer, in camera ***Pitchess*** hearings would be all-day affairs. Similarly, when a court is asked to review police reports involving potential third-party culpability evidence in camera, it must consider what is stated in those reports as true to determine whether the crimes documented in those reports are similar enough in

modus operandi to the charged offense to justify disclosure. (**See e.g.**, ***People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 286.)

In sum, prosecutors should continue to assume that hearsay is admissible at a section 1054.7 hearing. That being said, and notwithstanding the fact that section 1054.7, unlike section 1042(d), does not require "evidence" be presented at the hearing, it is recommended that any witnesses at the hearing be sworn and be capable of explaining the factual basis behind the request for denying, restricting, or delaying discovery.

D. What Constitutes "Good Cause" Under Section 1054.7?

In ***People* v. *Thompson*** (2016) 1 Cal.5th 1043 [discussed in this outline in greater depth at section VII-6-B at pp. 240-242 and IV-10 at pp. 227-229], the court found the good cause requirement for delaying disclosure did not apply to discovery between co-defendants. However, it went on to hold that even if it did, there was good cause to delay the disclosure of the name and testimony of a witness (a former cellmate of the defendant) where the witness had expressed a fear of violent retaliation by the defendant should the defendant learn of her cooperation with the prosecution and there was nothing to suggest these safety concerns were fabricated or exaggerated. (**Id**. at p. 1094.)

In ***People* v. *Williams*** (2013) 58 Cal.4th 197, the court found "good cause" under section 1054.7 to completely deny a defendant (charged with killing two men and with sexually assaulting and trying to kill a witness) the current out-of-state address of a witness where (i) the witness had testified she had received death threats; (ii) a declaration from an inspector stated the girlfriend had been threatened and that disclosure of her address would jeopardize her safety and compromise the integrity of an ongoing investigation; and (iii) the witness' old address had not been withheld. (**Id**. at pp. 258-266.)

In ***People* v. *Valdez*** (2012) 55 Cal.4th 82, the court held there was good cause to justify a pretrial nondisclosure order based on evidence that a notorious prison gang (the Mexican Mafia) ordered at least one of the murders, posed an extreme danger to the People's witnesses, had an excellent intelligence network, and demanded documentation identifying an individual as a government witness before approving a contract to kill a witness. (**Id**. at p. 107.) The ***Valdez*** court provided a good compilation of the kinds of information that prosecutors seeking to restrict or defer discovery of the identity of witnesses in gang cases should consider presenting (if available) in support of its request, including that: (1) the investigation had shown that members of the defendants' gang had committed one or more of the murders at the Mexican Mafia's behest; (2) both the defendant's gang and the Mexican Mafia have a code against testifying and, to enforce that code, have been willing to kill or harm people who might cooperate with police; (3) both a defendant and one of the Mexican Mafia members who ordered the hit were at large; (4) members of defendants' gang had told the investigator they would kill anyone who testified in the case; (5) before acting against a witness, gang members look for validation, i.e., official paperwork, such as a police report or transcript, that documents a person's name and statement the

person made to authorities or in court; (6) if the identities of the witnesses' in question and their grand jury testimony were to become known, the witnesses' lives would be in danger because members of defendants' gang would try to prevent them from testifying; (7) one of the witnesses had come forward with information and said she was fearful for the safety of herself and her family; (8) during a search of the home of one of the uncharged suspects police had found a transcript of testimony that a protected witness had given during a preliminary hearing in an unrelated murder case against three other members of defendant's gang members and a letter from one of the defendants in that case referencing the fact that the witness was testifying against gang members; (9) police had information that witnesses in other cases against either defendants' gang or Mexican Mafia members had been killed, one about a week before he was to return to court and another shortly after being identified through court records; (10) almost everybody a detective had spoken with regarding defendant's case had indicated they were fearful for their own safety and for the safety of their families as a result of talking to police; (11) based on debriefing of several Mexican Mafia associates, authorities had stopped 40 contract murders ordered by the Mexican Mafia, many for people referred to as snitches or informants; (12) in a gang expert's opinion, if the Mexican Mafia had ordered one of the killings, any witness associated with the case was in imminent danger of being assassinated to prevent their testimony; and (13) redaction of a witness's name would enhance the witness' "ability to stay alive" even if the identity of the witness could be determined because it would hamper the Mexican Mafia in proving the witness testified. (**Id**. at pp. 126-127.)

In ***People* v. *Maciel*** (2013) 57 Cal.4th 482, the California Supreme Court dealt with another defendant who committed the crime described in ***People* v. *Valdez*** (2012) 55 Cal.4th 82. The defendant in ***Maciel*** raised the same claims regarding the nondisclosure orders that the defendant in ***Valdez*** did - and they were rejected for the same reasons. (**Id**. at pp. 507-509.)

In ***People* v. *Riggs*** (2008) 44 Cal.4th 248, the court suggested that if there is evidence that one party is harassing and threatening witnesses, this probably constitutes good cause for delaying disclosure of other witnesses who have yet to be harassed and threatened. (**Id**. at 309-310, fn. 29.)

In ***People* v. *Panah*** (2005) 35 Cal.4th 395, the court found "good cause" under section 1054.7 to completely deny a defendant charged with sexually assaulting and murdering a child the out-of-state address of a witness where (i) the witness had been relocated to protect her based on information that defendant had been involved in a plan to jeopardize her life; (ii) the information about the witness' reputation in her new community, in which she had lived for only a brief time, was of minimal relevance; (iii) the witness was defendant's girlfriend so the defense had some information about the witness in order to investigate her reputation in the community; and (iv) the prosecution made the witness available for an interview but the witness declined to be interviewed. (**Id**. at pp. 457-458.)

In ***Alvarado* v. *Superior Court*** (2000) 23 Cal.4th 1121, the California Supreme Court found "good cause" under section 1054.7 to deny the defense any information about the witnesses, even their identity, until the trial began where (i) the charged crime was an organized jailhouse murder of a snitch ordered by the Mexican Mafia prison gang; (ii) the Mexican Mafia was known for ordering the murders of other snitches and had an excellent intelligence-gathering network; (iii) before such a murder is ordered, the gang has an informal trial based in part on paperwork identifying the snitch; and (iv) one of the three prospective witnesses had been cut while in jail and warned not to testify. (**Id**. at pp. 1128-1129, 1149-1150 [albeit also finding disclosure of identity of witnesses at trial was required- **see** this outline, section VII-6-F at p. 248].)

In ***Montez* v. *Superior Court*** (1992) 5 Cal.App.4th 763, the court relied on the standard of "good cause" in section 1054.7 to approve the nondisclosure of eyewitnesses' addresses and phone numbers to defense where (i) the defendants with "gang associations" were charged with murder and robbery; (ii) the prosecution offered to make the witnesses available for interview; (iii) the prosecution provided written statements of the witnesses indicating they did not wish disclosure of their address or phone number; (iv) the eyewitnesses were incidental bystanders without any criminal history and no facts placed at issue their reputation for veracity in their own neighborhood; and (v) one of the eyewitnesses wrote that associates of the defendant had harassed him and members of his family. (**Id**. at pp. 765-772.)

In ***Martinez* v. *Frauenheim*** (E.D. Cal., 2015) 2015 WL 2235470, the court upheld the nondisclosure of a witness's current address where the witness was in a witness protection program due to threats against the witness by the defendant and the prosecution made the witness available for an interview but only with a representative of the district attorney's office present. (**Id**. at p. *24.) The court recognized that the United States Supreme Court in ***Smith* v. *Illinois*** (1968) 390 U.S. 129 had stated a "witness' name and address open countless avenues of in-court examination and out-of-court investigation" and that "[t]o forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." (**Id**. at p. *26.) Nevertheless, the court noted that ***Smith*** "does not establish a rigid rule of disclosure, but rather discusses disclosure against a background of factors weighing conversely, such as personal safety of the witness." (***Martinez*** at p. *26.) The court held those concerns justified the nondisclosure, especially given that the defendant was able to cross-examine the witness and had sufficient information to investigate her credibility without knowing her current address. (**Ibid**.)

E. <u>What Does Not Constitute "Good Cause" Under Section 1054.7?</u>

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.)

A desire to afford the victims protection from "embarrassment" does not constitute good cause for an order preventing the defense from contacting the victims. (***Reid* v. *Superior Court*** (1997) 55 Cal.App.4th 1326, 1335-1336; **see also *People* v. *Humphrey*** (unreported) 2004 WL 2896929, *7 [a simple desire on the part of a witness to avoid being contacted by the defense is not good cause to defer or restrict disclosure of a witness' address].)

F. Denial of *Identity* of Witnesses: Pre-Trial Versus Trial

The right to deny ***pre***-trial disclosure of discovery out of concerns for a witness' safety under section 1054.7 is constitutional. (***People* v. *Valdez*** (2012) 55 Cal.4th 82,106; ***Alvarado* v. *Superior Court*** (2000) 23 Cal.4th 1121, 1134-1135.) However, when nondisclosure of the identity of a ***crucial*** witness will preclude effective investigation and cross-examination of that witness, the confrontation clause does not permit the prosecution to rely upon the testimony of that witness ***at trial*** while refusing to disclose his or her identity. (***People* v. *Valdez*** (2012) 55 Cal.4th 82,107; ***Alvarado* v. *Superior Court*** (2000) 23 Cal.4th 1121, 1151.)

Depending on the circumstances, the prosecution may defer disclosure of the witnesses' identities until very shortly before the witnesses testify. For example, in ***People* v. *Valdez*** (2012) 55 Cal.4th 82, the court held it was proper to delay the disclosure of the identity of noncritical witnesses in a gang murder case until several hours before the witnesses testified and to delay disclosure of allegedly "critical" witnesses until two days before they testified. (**Id**. at p. 907.) In support of its ruling, the ***Valdez*** court cited to the United States Supreme Court decision in ***Weatherford* v. *Bursey*** (1977) 429 U.S. 545, a case which had upheld nondisclosure of the witness' identity until the day the witness testified – albeit where was no objection at trial to the witness's testimony, no request for a continuance, and no indication of substantial prejudice from this occurrence. (***Valdez*** at p. 110 citing to ***Weatherford*** at pp. 559-561; **see also *People* v. *Lopez*** (1963) 60 Cal.2d 223, 246–247 [protective order authorizing prosecution to withhold identities of witnesses until 24 hours before they testified did not deprive the defendant of a fair trial]; ***United States* v. *Edwards*** (7th Cir.1995) 47 F.3d 841, 842–843 [cited in ***Valdez*** for the proposition that the "Constitution does not require disclosure of protected witness's identity before the morning of his testimony"].)

In deciding whether deferral of the identity of the witness is unconstitutional, courts will look to whether other methods were provided to the defense to investigate those witnesses, including whether other potential sources of obtaining impeachment evidence exist. For example, in finding that deferral of witness' identities until shortly before the witness' testified was constitutional, the California Supreme Court in ***People* v. *Valdez*** (2012) 55 Cal.4th 82 noted: (i) almost a year before trial began, the trial court directed the prosecution to make the witnesses available for interview by defense counsel, authorized the prosecution to provide defense counsel with information about the witnesses' prior convictions, and authorized defense counsel to obtain police reports regarding the incident; (ii) more than six months before trial, the trial court ordered the prosecution to make the witnesses available for a recorded interview by defense counsel and to

give defense counsel a record of the witnesses' prior convictions; (iii) the defendant was repeatedly given the opportunity to seek amendment of the order if defendant determined that further disclosure was necessary; (iv) the trial court told defendant it would grant continuances during trial upon a showing that the delayed disclosure of the witnesses' identities had hampered counsel's ability to prepare for cross-examination. (**Id**. at pp. 110-111 [and noting, also, that five days before trial, defense counsel had received information regarding the witnesses' prior convictions, had interviewed "the vast majority of the witnesses," had made no attempt to demonstrate that further disclosure was necessary to his trial preparation, and had not asked for a continuance before beginning cross-examination"].)

Note: Ordering the prosecution to make the witnesses available to the defense for interview should not be confused with ordering the witness to speak ***with*** the defense. "A defendant does not have a fundamental due process right to pretrial interviews or depositions of prosecution witnesses[.]" (***People* v. *Williams*** (2013) 58 Cal.4th 197, 262; ***People* v. *Panah*** (2005) 35 Cal.4th 395, 458.) As noted in ***People* v. *Valdez*** (2012) 55 Cal.4th 82, witnesses may legally decline to speak with a defendant. Moreover, because witnesses may legally decline to be interviewed at all, it "follows that a witness, short of declining a request altogether, may instead place conditions on the interview, such as insisting on the prosecution's attendance." (**Id**. at pp. 118-119 [and rejecting, at pp. 120-121, the argument that authorizing the prosecution to attend and record the witness' interviews impermissibly required the defense to provide the prosecution with nonreciprocal discovery].)

G. Denial of Current Address of Witness

In ***People* v. *Williams*** (2013) 58 Cal.4th 197, the court upheld the nondisclosure of a witness's current address over arguments that nondisclosure violated ***Brady***, the statutory discovery statute, and defendant's Sixth Amendment Right of Confrontation based on: (i) the witness' own testimony regarding death threats and (ii) the declaration from the inspector stating the witness had been threatened and that disclosure of her address would jeopardize her safety and compromise the integrity of an ongoing investigation. (**Id**. at pp. 262-266; **see also *People* v. *Panah*** (2005) 35 Cal.4th 395, 458 [discussed in this outline, section VII-6-C at p. 244].)

In ***People* v. *Valdez*** (2012) 55 Cal.4th 82, the lower court ordered that the addresses of certain witnesses be "permanently" undisclosed. The ***Valdez*** court did not reverse on this basis because such information was "inconsequential to the defendant's right to a fair trial under the facts presented." (**Id**. at p. 117.) The ***Valdez*** court did not find, however, the order of permanent disclosure was proper. (**Id**. at pp. 117-118.)

In ***People* v. *Thompson*** (2016) 1 Cal.5th 1043, a witness who overheard defendant's plans to murder the victim left the jurisdiction after testifying at preliminary to live with her parents. The witness, who had turned her life around, was located out of state and had been brought back to California on a material witness warrant and then released to the custody of her parents. The trial court ordered the disclosure of the witness' address (subject to a protective order that the address not be revealed to

defendant) but not the address of her parents. The defense claimed that he wanted to investigate whether the witness's claim of newfound sobriety was true but the prosecution objected that intrusive inquiries by the defense might cause the witness to again flee the jurisdiction. The trial court suggested that a compromise be reached whereby the prosecution would make the witness and her parents available at his office for an interview. The defense agreed. (**Id**. at p. 1105.) Because defense counsel accepted the trial court's compromise, the California Supreme Court held it was not abuse its discretion for the trial court to have declined to order disclosure of the witness' parents' address. (**Id**. at p. 1106 [and rejecting defense arguments that the trial court's ruling violated her federal constitutional rights to confront and cross-examine, to the effective assistance of counsel, and to a reliable penalty determination as well].)

H. Deferred Disclosure by the *Defense* in General and Before the Penalty Phase

The defense as well as the prosecution may utilize section 1054.7 to defer disclosure of discovery. (***People* v. *Loker*** (2008) 44 Cal.4th 691, 733.)

"[W]hile the requirements of timely reciprocal pretrial discovery, as set forth in section 1054.3, apply to the penalty phase of a capital case, the trial court has discretion to delay prosecution discovery of defense penalty evidence until after conclusion of the guilt trial." (***Maldonado* v. *Superior Court*** (2012) 53 Cal.4th 1112, 1139, fn. 18, citing to ***People* v. *Superior Court (Mitchell)*** (1993) 5 Cal.4th 1229, 1239.)

I. Are the Provision of Section 1054.7 Allowing for Deferral, Restriction, or Denial of Discovery Constitutional?

The provisions of Penal Code section 1054.7 allowing for denial, restriction, or deferral of discovery are constitutional. (***People* v. *Williams*** (2013) 58 Cal.4th 197, 262 citing to ***Izazaga* v. *Superior Court*** (1991) 54 Cal.3d 356.) "The proper exercise of a trial court's discretion under section 1054.7 does not violate a criminal defendant's confrontation or due process rights." (***People* v. *Thompson*** (2016) 1 Cal.5th 1043, 1105 citing to ***Alvarado* v. *Superior Court*** (2000) 23 Cal.4th 1121, 1134-1135.)

VIII. SANCTIONS FOR DISCOVERY VIOLATIONS

A "trial court may, in the exercise of its discretion, consider a broad range of sanctions for violation of a discovery order." (***People* v. *Hajek*** (2014) 58 Cal.4th 1144, 1233 citing ***People* v. *Ayala*** (2000) 23 Cal.4th 225, 299.) However, there are limitations on what sanctions can be imposed (**see** this outline, sections VIII-3 and 4 at pp. 252-255) and "[a] formal sanctions order of any kind necessarily tarnishes an attorney's reputation, the most precious professional asset any member of the bar possesses." (***People* v. *Landers*** (2019) 31 Cal.App.5th 288 [2019 WL 181485, at p. * 1].) Accordingly, "it is the duty of the court imposing sanctions to do so only when truly warranted . . ." (**Ibid**.)

1. Statutory language of Penal Code section 1054.5(b)&(c)

Penal Code section 1054.5(b) states: "Before a party may seek court enforcement of any of the disclosures required by this chapter, the party shall make an informal request of opposing counsel for the desired materials and information. If within 15 days the opposing counsel fails to provide the materials and information requested, the party may seek a court order. Upon a showing that a party has not complied with Section 1054.1 or 1054.3 and upon a showing that the moving party complied with the informal discovery procedure provided in this subdivision, a court may make any order necessary to enforce the provisions of this chapter, ***including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order.*** Further, the ***court may advise the jury of any failure or refusal to disclose and of any untimely disclosure***." (Emphasis added.)

Penal Code section 1054(c) states: "***The court may prohibit the testimony of a witness pursuant to subdivision (b) only if all other sanctions have been exhausted***. The court shall not dismiss a charge pursuant to subdivision (b) unless required to do so by the Constitution of the United States."

2. Can there be a violation of the discovery statute even though there is no violation of the prosecutor's constitutional discovery obligations?

In ***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, the California Supreme Court recognized that the duty of disclosure under ***Brady*** is independent from the prosecution's duty under the state's reciprocal discovery statute, which enumerates several types of information that the prosecution must produce even without a request. (**Id**. at p. 1133; **see also *Cone* v. *Bell*** (2009) 556 U.S. 449, 470 fn. 15 [recognizing prosecutor may have statutory obligation to disclose favorable evidence that is broader than the due process obligation].) Thus, even if information is not favorable or material for purposes of ***Brady***, the failure to disclose it nevertheless may constitute a violation of the discovery statute. (**See e.g.**, ***People* v. *Lewis*** (2015) 240 Cal.App.4th 257, 265.)

Nevertheless, it is unlikely that failure to provide discovery of information that is required to be disclosed by the discovery statute, but not under the ***Brady*** duty, will be held to be reversible error. This is because such a violation is reviewed under the standard laid out in ***People* v. *Watson*** (1956) 46 Cal.2d 818, which requires reversal only if there is reasonable probability that the defendant would have obtained a more favorable outcome had the information been produced. (***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1135, fn. 13.) The ***Watson*** standard and the standard for determining whether information is ***Brady*** material are similar. Thus, the same reasons that prevent a defendant from establishing a ***Brady*** violation should prevent a defendant from showing any alleged statutory violations compel reversal. (**See e.g.**, ***People* v. *Kennedy*** [unreported] 2009 WL 791226, *12.)

3. Dismissal of a case is not appropriate unless dismissal required is by the federal constitution

A "trial court has broad discretion to fashion a remedy in the event of a discovery abuse to ensure that the defendant receives a fair trial." (***People* v. *Bowles*** (2011) 198 Cal.App.4th 318, 325.) However, dismissal of a case for a discovery violation is rarely a proper sanction.

Penal Code section 1054.5(c) specifically "forbids the use of dismissal as a discovery sanction unless the dismissal is ***required*** by the federal Constitution." (***People* v. *Ashraf*** (2007) 151 Cal.App.4th 1205, 1212 (emphasis in original); **accord *People* v. *Superior Court (Meraz)*** (2008) 163 Cal.App.4th 28, 49.) That subdivision has been said to "preserve[ ] judicial power to dismiss charges for a ***Brady*** violation." (***People* v. *Gutierrez*** (2013) 214 Cal.App.4th 343, 352.)

This prohibition on dismissal applies to prevent the dismissal of either the substantive charge or an attached allegation. (***People* v. *Superior Court (Meraz)*** (2008) 163 Cal.App.4th 28, 49-50.) Even where there is a violation of the federal Constitution, the sanction of dismissal should rarely be imposed. In ***People* v. *Ramirez*** (2006) 141 Cal.App.4th 1501, the court held that dismissal is an appropriate sanction for a ***Brady*** violation only where less drastic alternatives are not available *and* bad faith is involved. (**Id**. at p. 1503, fn. 1 see also ***United States v. Garrison*** (9th Cir. 2018) 888 F.3d 1057, 1065 [dismissal is a "drastic step" that is "disfavored" and remedies for ***Brady*** or ***Giglio*** violations "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests" but "where a defendant was prejudiced by the late disclosure and there was flagrant prosecutorial misconduct, dismissal with prejudice may be an appropriate remedy."]; **cf**., ***United States* v. *Chapman*** (9th Cir. 2008) 524 F.3d 1073, 1084-1087 [dismissal was proper sanction in case involving hundreds of thousands of pages of discovery, where prosecutor failed to turn over discovery relevant to impeachment of witnesses even after witnesses testified, failed to keep a log indicating disclosed and nondisclosed materials, and repeatedly represented to the court that he had fully complied with ***Brady*** and ***Giglio*** while knowing he could not verify these claims because no record of compliance even existed].)

In ***Mendibles* v. *Superior Court*** (1984) 162 Cal.App.3d 1191, the court held, "even in instances in which prosecutorial misconduct is willful and apparently motivated by bad faith, the extreme sanction of dismissal is rarely appropriate unless a defendant has established ***prejudice*** by the failure of the People to comply with the discovery - lesser sanctions must be utilized by the trial court, unless the effect of the prosecution's conduct is such that it deprives defendant of the right to a fair trial[.]" (**Id**. at p. 1198, emphasis added.)

Prejudice cannot be established by "generalized statements" of defense counsel that he "could not properly or effectively prepare for cross-examination of witnesses," that "his ability to impeach the witness[ ] was adversely impacted," and that "[t]imely disclosure of the information would have enabled

counsel to adjust his theory of the case to fit the facts." (***People* v. *Verdugo*** (2010) 50 Cal.4th 263, 281–282.) Nor can it be shown by a defendant's bare argument that the defense was "simply unable mid-trial to make the effective use of the untimely disclosed evidence" without examples of how the defense's choices "would have differed had the discovery been made available earlier, and the record reveals no obvious defense strategy foreclosed by the late disclosure." (***People* v. *Mora and Rangel*** (2018) 5 Cal.5th 442, 469.)

4. Exclusion of evidence is not an appropriate sanction unless *all* other options are exhausted

Under subdivision (c) of section 1054.5, the trial court "may prohibit the testimony of a witness pursuant to subdivision (b) only if all other sanctions have been exhausted." (***People* v. *Superior Court (Mitchell)*** (2010) 184 Cal.App.4th 451, 459.)

Although excluding the testimony of a witness is not unconstitutional, the "exclusion of evidence necessarily may affect the fact-finding process and therefore, '[t]he potential prejudice to the truth-determining function of the trial process must also weigh in the balance.'" (***People* v. *Gonzales*** (1994) 22 Cal.App.4th 1744, 1758 citing to ***Taylor* v. *Illinois*** (1988) 484 U.S. 400, 415.) Moreover, exclusion is "**not an appropriate remedy** absent a showing of significant prejudice and willful conduct motivated by a desire to obtain a tactical advantage at trial." (***People* v. *Jordan*** (2003) 108 Cal.App.4th 349, 358, emphasis added; ***People* v. *Gonzales*** (1994) 22 Cal.App.4th 1744, 1758; **see also *People* v. *Edwards*** (1993) 17 Cal.App.4th 1248, 1261-1266.)

For example, in ***People* v. *Superior Court (Mitchell)*** (2010) 184 Cal.App.4th 451, the trial court repeatedly ordered the prosecution to produce discovery; at one point ordering the People to turn over dog scent evidence and provide a date, time and place for the public defender to interview a prosecution witness. The prosecution did not set up the meeting with the witness nor did they provide the dog scent evidence requested to the satisfaction of the trial court. The trial court then sanctioned the prosecution by, inter alia, precluding any dog scent evidence, the testimony of the witness and the testimony of the witness' fiancé. (**Id**. at pp. 454-455.)

Editor's note: Although not stated in ***Mitchell***, discussions with the prosecutor who handled the case on appeal revealed the testimony of the fiancé was precluded so as not to allow the evidence that would have been provided by the witness in question from coming in through the testimony of his fiancé.

The People challenged the trial court by way of pre-trial writ. The appellate court found the trial court had exceeded its jurisdiction in contravention of Penal Code section 1054.5(c) by failing to consider or exhaust other sanctions before precluding the testimony of the witnesses. (**Id**. at p. 459.) Significantly, the ***Mitchell*** court also found that, notwithstanding the language of section 1054.5(c), which specifies exclusion of the testimony of a "*witness*" is improper absent exhaustion of other sanctions, the exclusion

of the *physical* evidence was also beyond the trial court's jurisdiction. (**Id**. at p. 459.) The court reasoned that "the undeniable impact of the trial court's order was to exclude the People from calling a dog scent expert" and thus if it were to uphold the exclusion, it would "exalt form over substance" and improperly allow the trial court to "indirectly do what it is barred from directly doing." (**Id**. at p. 459.)

In the event of a belated disclosure, other alternative sanctions **must** be explored. For example, the opposing party should be given an opportunity to interview the witness or be given additional time to prepare for the witness' testimony. (**See e.g.**, ***People* v. *Walton*** (1996) 42 Cal.App.4th 1004, 1017; **see also *People* v. *Verdugo*** (2010) 50 Cal.4th 263, 281-289 [repeatedly finding proper sanction for any failure to disclose statements in violation of statutory duty was giving counsel additional time to prepare for cross-examination or allowing defense to recall witness rather than excluding evidence or granting mistrial].)

As repeatedly pointed out by appellate courts in Maryland, which also has a discovery statute imposing deadlines for discovery: "The discovery law is not an obstacle course that will yield a defendant the windfall of exclusion every time the State fails to negotiate one of the hurdles. Its salutary purpose is to prevent a defendant from being surprised. Its intention is to give a defendant the necessary time to prepare a full and adequate defense. Although the purpose of discovery is to prevent a defendant from being surprised and to give a defendant sufficient time to prepare a defense, defense counsel frequently forego requesting the limited remedy that would serve those purposes because those purposes are not really what the defense hopes to achieve." (***Thomas* v. *State*** (Md. 2007) 919 A.2d 49, 60; ***Jones* v. *State*** (Md. 2000) 753 A.2d 587, 598-599.)

On the other hand, while the sanction of exclusion may only be used as a last resort, this does not mean it may never be used. For example, in ***People* v. *Hajek*** (2014) 58 Cal.4th 1144, one of the co-defendants (Vo) retained a mental health expert for the penalty phase of a special circumstances case. Both the prosecutor and the other co-defendant (Hajek) complained that Vo's counsel had failed to disclose his intention to call the expert. The trial court initially declined to impose a sanction. However, counsel for defendant Hajek later asked for any reports of defendant Vo's expert. Defense counsel for Vo offered to give contact information on the expert but misrepresented that no reports had been made by the expert. When it came to light that the expert had provided 20 pages of handwritten notes and had administered some psychological tests to defendant Vo, both the prosecutor and defense counsel for defendant Hajeck requested the notes and results of the test. The prosecutor joined in the request. Counsel for defendant Vo refused to turn over the material on the ground that his expert would not be relying on the test results in his testimony. The trial court then made a finding counsel for defendant Vo did not act in good faith and precluded the expert's testimony. (**Id**. at pp. 1232-1233.) The California Supreme Court held that defense was required by section 1054.3 to turn over the statements of experts made in connection with the case, including the "results of standardized psychological and intelligence tests administered by a defense expert upon which the expert intends to rely," and further held the notes

and psychological tests represented a report of the defense expert. (**Id**. at p. 1233.) The court then found that that the failure to provide these notes and test results was a willful violation of its discovery order and justified the preclusion of the expert's testimony as a sanction because of its adverse effect on the ability of the prosecutor and the co-defendant to cross-examine the expert. (**Id**. at p. 1233.)

In ***People* v. *Jackson*** (1993) 15 Cal.App.4th 1197, the defense belatedly disclosed the identity of a witness who had given an alleged declaration against interest to a defense investigator. The defense attorney did not inform the prosecution the defense investigator would be a witness until moments before the defense investigator was called to testify. The violation appeared willful since the declaration was exculpatory and thus it was unlikely that the defense would have only decided to call the defense investigator who took the statement at the last-minute despite having known of the statement for three months. A continuance would have been inadequate because the whereabouts of the witness who gave the declaration against interest were unknown and the prosecution would have been unduly prejudiced by the admission of the declaration without an opportunity for cross-examination. Under these circumstances, the court held the sanction of exclusion was appropriate. (**Id**. at pp. 1200-1203; **see also *People* v. *Gana*** (2015) 236 Cal.App.4th 598, 612 [noting exclusion is remedy for discovery violation in upholding exclusion of witness testimony by trial judge- albeit finding that even if exclusion wasn't justified for the discovery violation, witness was properly excluded on relevance grounds]; ***People* v. *Hennig*** [unreported] 2015 WL 6470504, *13-*14 [precluding expert from giving opinion beyond what documents *were* disclosed in advance of trial where trial court twice ordered counsel to provide names of experts but defense did not until right before trial, there was evidence defense anticipated calling expert based on defendant's statement at scene, the expert provided a letter to defense counsel 4 years before trial (which was not provided until shortly before trial) and there was no time for the prosecutor to obtain a counter expert]; ***People* v. *Reed*** [unreported] 2010 WL 1493148, *10-*11 [upholding exclusion of some character witnesses who were members of defendant's family (from a list of twenty witnesses) where defense counsel had case for 18 months, disclosure of the witnesses was not made until evidentiary portion of trial, and the defense had told the prosecutor on four separate occasions he had no witnesses except one doctor].)

5. Is there a sanction of *first* resort?

A continuance should be the sanction of first resort when the defense or prosecution genuinely needs time to respond to the belatedly-disclosed evidence. Indeed, a defense failure to request a continuance in response to belatedly-disclosed evidence will prevent the defense from raising a claim the defense did not have time to properly respond to the new evidence. (***People* v. *Thompson*** (2016) 1 Cal.5th 1043, 1103, 1104; **see also *People* v. *Valdez*** (2012) 55 Cal.4th 82, 110-111 [affirming trial court's order delaying and limiting disclosure of the identities of certain prosecution witnesses, in part, because the defendant declined to accept the court's offer of a continuance].)

Courts often suggest the most appropriate sanction for failure to provide discovery is to allow opposing counsel a continuance to prepare to meet the hitherto undisclosed evidence. (**See e.g.**, ***People* v. *Verdugo*** (2010) 50 Cal.4th 263, 281-282; ***People* v. *Jenkins*** (2000) 22 Cal.4th 900, 950; ***People* v. *Castaneda*** (unpublished) 2016 WL 1162203, *5; ***People* v. *Vernon*** (unpublished) 2014 WL 1783861, *5.)

In ***People* v. *Mora and Rangel*** (2018) 5 Cal.5th 442, several different multi-page reports, including one containing statements of over a dozen witnesses (along with two diagrams and a transcript of an interview with a crucial witness, and a fingerprint report) were belatedly disclosed after the trial was well underway. The defense characterized these reports as containing "very critical" information that contained witnesses' observations inconsistent with the testimony already given and asserted "the scope and subjects of the already-conducted cross-examination would have differed." (**Id**. at pp. 463-464.) Although the defense requested a dismissal, the trial court gave the defense 5-days to investigate and prepare and gave CALJIC 2.28 modified to inform the jury about the content and recent discovery of the fingerprint report and clarifying for the jurors that no party had been aware of the report prior to its discovery." (**Id**. at p. 466.) The California Supreme Court found the undisclosed evidence was not suppressed (i.e., the disclosure was not prejudicial) and the remedies imposed were adequate because the defense failed to present any evidence as a result of those investigations nor sought to "recross-examine any of the witnesses that had provided prior testimony, and neither indicated anything more than the five-day recess was needed to cure the late disclosure." (**Id**. at p. 468.)

Indeed, using a continuance as a remedy of first resort was true even before Prop 115 enacted the discovery statute. In ***In re Jessie L.*** (1982) 131 Cal.App.3d 202, the court specifically stated: "Where there has been a failure of discovery the normal remedy is not dismissal or suppression of evidence, but a continuance to enable the defense to meet the new evidence. [Citations.]" (**Id**. at p. 210, citing to ***People* v. *Reyes*** (1974) 12 Cal.3d 486, 501-502, and ***People* v. *McGowan*** (1980) 105 Cal.App.3d 997, 1002]; ***People* v. *Jones*** (unpublished) 2016 WL 6818870, *11 [a post-Prop 115 case quoting from ***Jessie L.*** on this point]; **see also *People* v. *Pinholster*** (1992) 1 Cal.4th 865, 941 [on appeal, "[i]t is defendant's burden to show that the failure to timely comply with any discovery order is prejudicial, and that a continuance would not have cured the harm."].)

A continuance is not only the normal remedy in California for a belated disclosure by the prosecution, but in many other jurisdictions as well. In fact, the failure of the defense to seek such a remedy, or to take advantage of it if offered by the trial court, has often been cited by courts as justifying the rejection of motions for an exclusionary sanction. (**See *People* v. *Bobo*** (Ill.App.Ct.2007) 874 N.E.2d 297, 308; ***State* v. *Royal*** (Mo.1981) 610 S.W.2d 946, 953; ***State* v. *Hale*** (Ohio 2008) 892 N.E.2d 864, 892; ***Thomas* v. *State*** (Md.Ct.App.2007) 919 A.2d 49, 58.) As astutely pointed out by the appellate court in ***Thomas* v. *State*** (Md.Ct.App.2007) 919 A.2d 49, defendants, when confronted with a failure by the prosecution to meet a discovery deadline "'frequently forego requesting the limited remedy [of a

continuance] that would serve th[e] purposes [of the discovery statutes] because those purposes are not really what the defense hopes to achieve. The defense, opportunistically, would rather exploit the State's error and gamble for a greater windfall.'" (**Id**. at p. 60.)

6. Can a trial court consider the effect of the discovery violation on a codefendant in deciding what sanction to impose?

In the unpublished case of ***People* v. *Harris*** (unreported) 2009 WL 2854270, the court noted it was open issue whether a trial court could consider the potential prejudice to a codefendant in determining the appropriate sanction for a defendant's discovery violation. (**Id**. at p. *7, fn. 2.) In ***People* v. *Hajek*** (2014) 58 Cal.4th 1144, the California Supreme Court upheld the trial court's imposing the sanction of precluding a defense expert for one co-defendant from testifying "because of its adverse effect on the ability of the prosecutor ***and the co-defendant*** to cross-examine the expert. (**Id**. at p. 1233, emphasis added.) Arguably, the ruling in ***Hajek*** was a sub silentio answer to the question left open in ***Harris***.

7. When should an instruction telling the jury about the discovery violation be given?

One of the sanctions available to a court for a discovery violation is to give an instruction to the jury regarding the failure to disclose or delay in disclosing mandatory discovery. (**See** Pen. Code, § 1054.5(b ["the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure"].) If the defense fails to timely provide discovery, should a prosecutor ask for such an instruction to be given?

Over a decade ago, a number of appellate cases severely criticized the use of the then-existing CALJIC instruction on failure of the defense to provide timely discovery. (***People* v. *Lawson*** (2005) 131 Cal.App.4th 1242, 1248; ***People* v. *Saucedo*** (2004) 121 Cal.App.4th 937, 942-943; ***People* v. *Cabral*** (2004) 121 Cal.App.4th 748, 753; ***People* v. *Bell*** (2004) 118 Cal.App.4th 249, 255; **see also *People* v. *Thomas*** (2011) 51 Cal.4th 449, 481-484.) These cases held that the instruction could only be used if (i) the failure to disclose was done by the defendant personally (or was authorized by the defendant or at his or her direction); (ii) the evidence established this connection, and (iii) there was a showing that the prosecution was prejudiced in some fashion by reason of the failure to disclose.

In ***People* v. *Thomas*** (2011) 51 Cal.4th 449, the California Supreme Court joined these appellate courts in condemning the 1996 version of CALJIC 2.28 on grounds the instruction misleadingly suggested the defendant bore responsibility for his attorney's failure to provide discovery and because it offered no guidance on how failure to provide discovery could legitimately affect the jury's deliberations. (**Id**. at pp. 483-484.) However, the ***Thomas*** court also observed that "CALJIC No. 2.28 has since been modified to address the concerns expressed in ***People* v. *Bell***, ***supra***, 118 Cal.App.4th 249, 12 Cal.Rptr.3d 808 and its progeny. (CALJIC 2.28 (Fall 2010 ed.)." (***People* v. *Thomas*** (2011) 51 Cal.4th 449, 481 [and indicating that comparable CALCRIM instruction, No. 306, also now addresses the

concerns]; **see also *People* v. *Lawson*** (2005) 131 Cal.App.4th 1242, 1248 [indicating the new CALCRIM instruction does not suffer from the flaws of the 1996 version of CALJIC 2.28].)

The current CALJIC instruction (2.28) now states: "The prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial so as to promote the ascertainment of the truth, save court time and avoid any surprise which may arise during the course of the trial. [Concealment of evidence] [and] [or] [[D][d]elay in the disclosure of evidence] may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the non-complying party's evidence. ¶ Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately. In this case, the [People] [Defendant[s]] [concealed] [and] [or] [failed to timely disclose] the following evidence: ¶ Although the [People's] [Defendant's] [concealment] [and] [or] [failure to timely disclose evidence] was without lawful justification, the Court has, under the law, permitted the production of this evidence during the trial. ¶ [If you find that the [concealment] [and] [or] [delayed disclosure] was by the defendant [] personally, or was authorized by, or done at the direction and control of the defendant, and relates to a fact of importance, rather than something trivial, and does not relate to subject matter already established by other credible evidence, you may consider the [concealment] [and] [or] [delayed disclosure] as evidence tending to show the [defendant's consciousness of guilt] [defendant's consciousness of the lack of believability of the evidence presented in violation of the duty to make disclosure] []. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.] ¶ [A defendant's failure to timely disclose the evidence [he] [she] intends to produce at trial may not be considered against any other defendant[s] [unless you find that the other defendant[s] authorized the failure to timely disclose].] ¶ [If you find that the [concealment] [and] [or] [delayed disclosure] was by the prosecution, and relates to a fact of importance rather than something trivial, and does not relate to subject matter already established by other credible evidence, you may consider that [concealment] [and] [or] [delayed disclosure] in determining the [[believability] [or] [weight] to be given to that particular evidence[.]] [[, or] [].]]"

The current CALCRIM instruction (306) now states: "Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial. ¶ An attorney for the (People/defense) failed to disclose: <describe evidence that was not disclosed> [within the legal time period]. ¶ In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure. [However, the fact that the defendant's attorney failed to disclose evidence [within the legal time period] is not evidence that the defendant committed a crime.] ¶<Consider for multiple defendant cases> [You must not consider the fact that an attorney for defendant <insert defendant's name> failed to disclose evidence when you decide the charges against defendant[s] <insert names of other defendant[s]>.]

In the case of ***People* v. *Riggs*** (2008) 44 Cal.4th 248, the California Supreme Court approved of the giving of an instruction on the failure of the defendant to provide timely discovery. The instruction stated: "California Penal Code Section 1054.7 requires that each side in a criminal action provide names and addresses of witnesses that it expects to call at trial at least 30 days prior to the trial unless good cause is shown for this not to be done. [&] There has been evidence presented to you from which you may find that there was a failure by the defense to provide timely notice to the prosecution of the names and addresses of witnesses Ina Ross and Minny Jean Hill. [&] You may consider such failure, if any, in determining the weight to be given to the testimony of such witnesses. The weight to be given such failure is entirely a matter for the jury's determination." The ***Riggs*** court approved of the instruction albeit in part because it did not suffer from the problem of attributing a violation of defense counsel to the defendant since the defendant was representing himself. (**Id**. at pp. 307-311.)

The ***Riggs*** court did not opine on the overall validity of the new CALJIC and CALCRIM instructions; but it did seem to approve of the heart of the new CALCRIM instruction, i.e., the portion that states: "In evaluating the weight and significance of [the untimely disclosed] evidence, you may consider the effect, if any, of that late disclosure[.]" (**Id**. at p. 307.) The court noted this language limits the inferences the jury can draw by expressly directing the jury that it could consider a discovery violation in assessing the weight of the alibi testimony. (**Ibid**.) The court also **rejected** the notion that the instruction could only be given when there was an actual effect on the People's ability to respond to the untimely evidence. The court pointed out if the defendant waited until the last minute to disclose evidence, this would permit an inference that the defendant did not have much confidence in the ability of its own evidence to withstand full adversarial testing and thus the discovery violation might properly be viewed as "evidence of the defendant's consciousness of the lack of credibility of the evidence that has been presented on his or her behalf." (**Id**. at p. 308.) This inference, the court observed, could be drawn regardless of the effect on the People's ability to respond to the evidence. (**Ibid**.) However, the court stated this inference would not properly be drawn if the judge determined there was no attempt to gain a tactical advantage behind the failure to timely disclose. (**Id**. at p. 309.)

In ***People* v. *Mora and Rangel*** (2018) 5 Cal.5th 442, a case involving belated discovery of reports found in an investigator's file which the prosecutor was unaware existed but which were turned over by the prosecutor as soon as they came to light, the trial court gave a modified version of CALJIC No. 2.28 that explained the rules of discovery and noted that the police department failed to timely disclose reports containing witness statements and a fingerprint testing report. (**Id**. at p. 470.) The instruction "specifically left out" language regarding intent from the standard instruction because the trial court did not believe any showing of intent in failing to disclose had been made and the failure was due to negligence. (**Id**. at pp. 470-471.) On appeal, the defendants claimed (i) the instruction was incomplete because it identified the police department as the party responsible for the discovery delays, not the prosecution generally; (ii) the instruction should have clarified that the prosecution "concealed" the

evidence; and (iii) "CALJIC No. 2.28 fails to adequately guide a jury's understanding of how tardy discovery should impact deliberation" – in particular it does not "articulate how the delayed discovery affected the defense's presentation of their case by curtailing their ability to subpoena witnesses and requiring they proceed hastily and without adequate preparation during the course of the trial." (**Id**. at pp. 471, 472.)

The California Supreme Court held it was proper to give the instruction. The court recognized CALJIC 2.28 had been the subject of criticisms by appellate courts (albeit finding many of those critiques inapposite because they related to discovery delays by the defendant). However, they **rejected** the argument that the instruction did not provide adequate guidance, finding the language of the instruction (which told the jurors "Delay in the disclosure of evidence may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the non-complying party's evidence" and to consider whether the undisclosed evidence "pertains to a fact of importance, something trivial or subject matters already established by other credible evidence") constituted "a ***proper*** statement of the applicable law, from which the parties could argue inferences that might (or might not) be drawn from the evidence presented at trial." (**Id**. at p. 472, emphasis added [and noting that "[t]o the extent the instruction permitted the jury to speculate and presume the discovery delay was sufficient—alone—to cast doubt on [defendants'] guilt, the ambiguity favored them.].)

The ***Mora and Rangel*** court also rejected the argument that the trial judge erred by instructing the jury that the police department, not the prosecution generally, was to blame for the delayed discovery. The court recognized that, for ***Brady*** purposes, "the prosecution is charged with discovering and disclosing ***material exculpatory evidence*** even if maintained by a different agency." (**Id**. at p. 472, emphasis added.) But the court concluded there was no indication that most of the undisclosed evidence fell into that category and to the extent one of the reports was exculpatory, that report was admitted over defense counsel's objection (i.e., it was not material). (**Id**. at p. 472.)

In other words, because the evidence was not concealed by the prosecution for statutory purposes (i.e., it was concealed by the police) and because it was not possessed by prosecution for constitutional purposes (i.e., it was not material exculpatory evidence), trial court "did not abuse its discretion by providing the modified CALJIC No. 2.28 instruction, which modification included a precise identification of the agency responsible for the delay." (**Id**. at p. 473.) Moreover, the court held "[e]ven if the evidence was in fact material and exculpatory, and the prosecution was therefore required to discover and disclose it, nothing in the instruction constituted an excuse of the prosecutor's failure to disclose. Rather, the instruction informed the jury of the prosecution agency responsible for the delay in disclosure and invited the jury to accord the necessary weight to that delay." (**Id**. at p. 472 [and finding, as well, that to the "extent any error arose from identifying the police department and not the prosecution more broadly as the agency responsible for the delays, the error was harmless"].)

Notwithstanding the holding in ***Mora and Rangel*** explaining how CALJIC 2.28 addressed one of the primary earlier criticisms, the implication in ***Riggs*** and ***Lawson*** that the current CALCRIM instruction is valid, and the more definitive dicta in ***Thomas*** that both the current CALJIC and CALCRIM instructions no longer suffer from the deficiencies identified in the earlier appellate decisions, the current bench note to the CALCRIM instruction (No. 306) states: "While the court has discretion to give an instruction on untimely disclosure of evidence (Pen. Code, § 1054.5(b)), the court should not give this instruction unless there is evidence of a prejudicial violation of the discovery statute. [Citing to cases interpreting an *earlier* version of CALJIC 2.28].) The court should consider whether giving this instruction could jeopardize the defendant's right to a fair trial if the jury were to attribute a defense attorney's malfeasance to the defendant."

The bench notes to the comparable instruction in CALJIC 2.28, also citing to cases interpreting an earlier version of CALJIC 2.28, states these cases have "held that simply giving this instruction because there was delayed disclosure by the defense is error and may be prejudicial error. These cases hold that the predicate for this instruction is that the failure must have been by the defendant personally, or was authorized by the defendant, or at his or her direction, and the evidence must establish this connection, and in addition, there must be some showing that the prosecution was prejudiced in some fashion by reason of the failure. It may then be possible to advise the jury what inferences may be drawn from such failure."

Editor's note: There is nothing wrong with notion that the instruction should not be given unless there is evidence of a prejudicial violation of the discovery statute. Sanctions are generally not necessary if there is no prejudice to the parties. But the additional cautionary language about how giving the instruction "could jeopardize the defendant's right to a fair trial if the jury were to attribute a defense attorney's malfeasance to the defendant" is premised on criticisms of a ***now-defunct*** instruction and is somewhat anachronistic. It is misleading to the extent it suggests the current versions of CALCRIM 306 and CALJIC 2.28 should not be given. As noted in the unreported decision in ***People* v. *Bailey*** (unpublished) 2016 WL 1633214, the current instruction only attributes the violation to defense counsel, rather than defendant; and also "explicitly [tells] the jury the violation was not evidence defendant committed a crime." (**Id**. at p. *6.) Not surprisingly, the ***Bailey*** court could "see no basis to conclude the instruction was improper or that the jury was misled." (**Ibid**.)

The CALCRIM Bench Notes also recommend that "if the court determines that the defendant is ***personally*** responsible for discovery abuse, see CALCRIM No. 371, Consciousness of Guilt: Suppression and Fabrication of Evidence." (Emphasis added.)

8. Can the trial court sanction an attorney for contempt and impose a monetary fine for a discovery violation?

Code of Civil Procedure section 177.5 provides in relevant part, "A judicial officer shall have the power to impose reasonable money sanctions, not to exceed fifteen hundred dollars ($1,500), notwithstanding any other provision of law, payable to the court, for any violation of a lawful court order by a person, done without good cause or substantial justification." (Code of Civ. Proc., § 177.5.)

Code of Civil Procedure section 177.5 "is fully applicable to both criminal and civil matters." (***People* v. *Landers*** (2019) 31 Cal.App.5th 288 [2019 WL 181485, *6]; ***People* v. *Tabb*** (1991) 228 Cal.App.3d 1300, 1310.)

"The evident purpose of . . . section 177.5 is to punish and deter violations of lawful court orders ([citation omitted], and to compensate the judicial system for the cost of unnecessary hearings (citation omitted])." (***People* v. *Landers*** (2019) 31 Cal.App.5th 288 [2019 WL 181485, *6].)

In ***People* v. *Landers*** (2019) 31 Cal.App.5th 288 [2019 WL 181485], the appellate court appeared to accept that imposing a fine pursuant to section 177.5 would be a permissible type of sanction for violating the discovery statutes but ultimately found it was not an appropriate sanction in the case before it. (**Id**. at pp. *6-*7; **see** this outline, section V-6 at pp. 213-215.)

9. Can the jury ever be instructed that the *police* failed to provide timely discovery?

In the unreported decision of ***People* v. *Pereyra*** [unreported] 2012 WL 6184539, the police failed to provide the prosecution with a tape recording an arresting officer had surreptitiously made. The prosecution turned it over to the defense as soon as the prosecution learned of its existence. The defense argued that CALCRIM No. 306 should be given. However, the appellate court held defendant was not entitled to the instruction because "[***n*]*othing in the discovery statutes*** gives the court discretion to advise the jury that an ***investigating agency***, such as the police department, failed to timely turn over evidence to a party." (**Id**. at p. *9 [and noting as well that there was no violation of section 1054.1 because it only applies to disclosure of information in the possession of investigation agencies known to the prosecutor].)

However, in the case of ***People* v. *Mora and Rangel*** (2018) 5 Cal.5th 442 [discussed in this outline in depth at section VIII-7, pp. 259-260], the California Supreme Court rejected the argument a trial judge erred by instructing the jury that the police department, not the prosecution generally, was to blame for the delayed discovery. (**Id**. at p. 472.) However, in that case, the failure to disclose was held to be properly put on the police because the information that was not disclosed was not constitutionally required discovery and was not known to the prosecutor to be in the possession of the investigating agency. (**Id**. at p. 472.) Had the information been ***Brady*** evidence (so that it would be deemed constructively in the possession of the prosecution) or had the prosecution known about the evidence, it would likely have been improper to have placed the blame on the police. (**See** this outline, section VII-4-C, at p. 236 [discovery violation occurs even if belated disclosure is due to negligence on part of investigating agency].)

10. Can sanctions be imposed if the party seeking sanctions is himself in violation of the discovery statute?

The fact a party seeking sanctions may himself or herself be violation of the discovery statute does not prevent the sanctions from being imposed against the opposing party. "The intent of section 1054.5, subdivision (b) is for a moving party to utilize informal procedures before resorting to court enforcement and not to punish the moving party who itself has not complied with each discovery provision." (***People* v. *Jackson*** (1993) 15 Cal.App.4th 1197, 1202.) Nevertheless, prosecutors who themselves are in violation of the discovery statute should think twice before asking for sanctions to be imposed for a defense violation of the statute.

11. Can sanctions be imposed after the trial is concluded?

"[T]he sanctions provided for by section 1054.5 are available only prior to the close of testimony and for so long as the trial court has jurisdiction of a criminal case." (***People* v. *Bohannon*** (2000) 82 Cal.App.4th 798, 805.) "Once the trier of fact has rendered a verdict it is no longer possible to remedy a discovery violation by the sanctions outlined in section 1054.5; rather, the issue turns from remediation to an examination of whether the discovery violation prevented the defendant from obtaining a fair trial." (***People* v. *Poletti*** (2015) 240 Cal.App.4th 1191, 1212 citing to ***People* v. *Bowles*** (2011) 198 Cal.App.4th 318, 327.)

In ***People* v. *Bowles*** (2011) 198 Cal.App.4th 318, a discovery violation came to light after the jury had rendered a verdict on guilt. Although defense counsel made a motion for dismissal based on the violation before the judge finished hearing a trial on the prior convictions, the trial court did not hear the discovery motion until *after* the trial on the prior convictions was completed. As a sanction for the discovery violation, the trial court granted a new trial on the count that was allegedly impacted by the discovery violation. In addition, the trial court sanctioned the prosecution by precluding the prosecution from using the belatedly disclosed evidence in their case-in-chief in any new trial. (**Id**. at p. 324-325, 328.) The appellate court, however, reversed, holding "a trial court's power to grant sanctions under Penal Code section 1054.5, subdivision (b) . . . based on the prosecution's failure to disclose exculpatory evidence is limited to a circumstance where the verdict has not yet been rendered on the charged crimes and while the trial court has jurisdiction over the criminal case." (**Id**. at p. 320.)

However, in ***People* v. *Landers*** (2019) 31 Cal.App.5th 288 [2019 WL 181485], the court drew a distinction between a trial court's ability to impose the remedies list in section 1054.5 which are "necessary to enforce the provisions of" the discovery statute) and "imposition of monetary sanctions for violation of a court order, civil or criminal" pursuant to Penal Code section 177.5. (**Id**. at p. *9.)

The ***Landers*** court noted that all the remedies listed in section 1054.5(b) "are directed to rectifying a discovery default prior to or during trial" while "[s]anctions under Code of Civil Procedure section 177.5

may be used as a deterrent and imposed for punitive purposes, not simply for prospective enforcement." (**Ibid**.) Thus, while finding the sanctions themselves to be improper for other reasons, the appellate court held a trial court was authorized to conduct a contempt hearing and impose monetary sanctions for a defense attorney's alleged discovery violations that simultaneously constituted contempt of court – even though the hearing and sanctions were imposed after the verdict. (**Ibid**.)

12. Can a violation of the discovery statute result in a reversal of a case?

Only if a statutory violation can be shown to have been prejudicial, can it result in the reversal of a case. (***People* v. *Poletti*** (2015) 240 Cal.App.4th 1191, 1210.) Statutory discovery violations that do not rise to the level of a due process violation will not result in reversal.

"No reason appears why any violation of the California reciprocal-discovery statute, considered as such, is not subject on appeal to the harmless-error standard set forth in ***People v. Watson*** (1956) 46 Cal.2d 818, 836 [299 P.2d 243], and thus is a basis for reversal only where it is reasonably probable, by state-law standards, that the omission affected the trial result." (***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1135, fn. 13; **accord *People* v. *Verdugo*** (2010) 50 Cal.4th 263, 279–280; ***People* v. *Poletti*** (2015) 240 Cal.App.4th 1191, 1210-1211.)

13. Penal Code 1424.5 Sanction of Recusal and/or Reporting of Prosecutor to State Bar

As of last year, courts have the authority to hold a hearing on whether a prosecutor "deliberately and intentionally withheld relevant or material exculpatory evidence or information in violation of law[.]" (Pen. Code, § 1424.5(a)(1).) If the court finds the law was violated, the court must "inform the State Bar of California of that violation if the prosecuting attorney acted in bad faith and the impact of the withholding contributed to a guilty verdict, guilty or nolo contendere plea, or, if identified before conclusion of trial, seriously limited the ability of a defendant to present a defense." (**Ibid**.) In addition, if the court finds the violation occurred in bad faith, the court may disqualify the prosecutor from handling the case – and even disqualify the entire office "if there is sufficient evidence that other employees of the prosecuting attorney's office knowingly and in bad faith participated in or sanctioned the intentional withholding of the relevant or material exculpatory evidence or information and that withholding is part of a pattern and practice of violations." (Pen. Code, § 1424.5(b)(2).)

> **Editor's note**: The full text and additional discussion of section 1424.5 is included in this outline, at section XIV-5 at p. 305. **See also** Penal Code section 141(c), which imposes criminal penalties for intentional suppression of material exculpatory evidence, discussed in this outline, section XV at p. 307.

IX. JUDICIAL DISCOVERY ORDERS OUTSIDE THE SCOPE OF THE DISCOVERY STATUTE

1. Can a judge order the prosecution to disclose discovery not mandated by the California discovery statute?

It is not uncommon for the judiciary to order the prosecution to provide discovery that the prosecution is under no constitutional or statutory duty to provide ("Counselor, I don't care if the Bridgewater police department did not investigate this case, I'm tired of the delays and it's easy for you to make a call and get a copy of the police report"). Of course, sometimes it's easier just to go along to get along. However, sometimes it is not. So, here's some ammunition to support the proposition courts do not have the inherent authority to compel the disclosure of information from prosecuting attorneys unless such order is authorized by the California discovery statutes.

Penal Code section 1054.5(a) provides "No order requiring discovery shall be made in criminal cases except as provided in this chapter. This chapter shall be the only means by which the defendant may compel the disclosure or production of information from prosecuting attorneys, law enforcement agencies which investigated or prepared the case against the defendant, or any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties."

Penal Code section 1054(e) states the one of the purposes behind the CDS discovery is "[t]o provide that no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States."

In ***People* v. *Tillis*** (1998) 18 Cal.4th 284, the California Supreme Court held section 1054(e) precluded it "from broadening the scope of discovery beyond that provided in the chapter or other express statutory provisions, or as mandated by the federal Constitution." (**Id**. at p. 294.) The court acknowledged that "if none of those authorities requires disclosure of a particular item of evidence, we are not at liberty to create a rule imposing such a duty." (**Id**. at p. 294.) And in ***In re Littlefield*** (1993) 5 Cal.4th 122, the California Supreme Court observed that "criminal proceedings, under the reciprocal discovery provisions of section 1054 et seq., all court-ordered discovery is governed exclusively by-and is barred except as provided by-the discovery chapter newly enacted by Proposition 115 (§§ 1054, subd. (e), 1054.5, subd. (a).)" (**Id**. at p. 129; ***People* v. *Jackson*** (2005) 129 Cal.App.4th 129, 169, fn. 31 [although criminal discovery used to be "largely governed by judicially created rules" Proposition 115 "changed all that by enacting 'a comprehensive and very nearly exclusive system of discovery in criminal trials'"]; ***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, 1312-1313 ["The procedural mechanisms of the discovery statutory scheme (§ 1054 et seq.) are exclusive--that is, the parties to a criminal proceeding may not employ discovery procedures other than those authorized by Chapter 10."].)

Certainly, if the California Supreme Court cannot require the disclosure of discovery not mandated by the discovery statute, another statute, or by the federal Constitution, a trial judge cannot do so. (**See *Verdin* v. *Superior Court*** (2008) 43 Cal.4th 1096, 1116 [courts no longer have authority to create forms of discovery not authorized by statute or mandated by the federal Constitution].)

> **Editor's note**: Although in some ways the difference is a matter of semantics, do not confuse a trial court's ability to make orders under a very *broad* interpretation of section 1054 et seq. with making orders inconsistent with section 1054. (**See** this outline, section VII-4-E at p. 238 [discussing authority of court to order disclosure of evidence in advance of thirty days at trial].)

It is probably a different story when it comes to a trial court's ability to order discovery compelled by the state constitution. Section 1054(e) makes no mention of the state constitution. However, courts have held or indicated a defendant's right to due process under the *California* Constitution may, notwithstanding sections 1054(e) and 1054.5, entitle defense to discovery not mentioned in section 1054.1. (**See** this outline section II, at p. 162.) Nevertheless, it is rare for courts to attempt to justify an order under the due process clause of the California Constitution.

It is also a different story when it comes to discovery obligations stemming from the federal Constitution. It is true that the ***prosecution*** is responsible for determining whether evidence is sufficiently relevant to be disclosed (**see *Pennsylvania* v. *Ritchie*** (1987) 480 U.S. 39, 459 ["[i]n the typical case where a defendant makes only a general request for exculpatory material under ***Brady***. . .it is the State that decides which information must be disclosed"]; ***In re Brown*** (1998) 17 Cal.4th 873, 878 ["[r]esponsibility for ***Brady*** compliance lies exclusively with the prosecution"]). Moreover, "at least where a defendant has made only a general request for ***Brady*** material, the government's decision about disclosure is ordinarily final-unless it emerges later that exculpatory evidence was not disclosed." (***United States* v. *Prochilo*** (1st Cir. 2011) 629 F.3d 264, 268 [citing to ***Pennsylvania* v. *Ritchie*** (1987) 480 U.S. 39, 59.) In addition, a trial court "is under no general independent duty to review government files for potential ***Brady*** material." (***United States* v. *Bland*** (7th Cir. 2008) 517 F.3d 930, 935; ***United States* v. *Mitchell*** (7th Cir.1999) 178 F.3d 904, 907.)

However, a judge retains the authority to order disclosure of *constitutionally*-based discovery when the information sought is described with some specificity and the defense provides a plausible justification for disclosure. (**See *People* v. *Luttenberger*** (1990) 50 Cal.3d 1, 20 [defendant has no right to court examination of police files absent "some preliminary showing 'other than a mere desire for all information in the possession of the prosecution'" plus "[t]he request must be 'with adequate specificity to preclude the possibility that defendant is engaging in a "fishing expedition"'"]; ***People* v. *Prince*** (2007) 40 Cal.4th 1179, 1232 ["motion for discovery must describe the information sought with some specificity and provide a plausible justification for disclosure"]; ***People* v. *Jenkins*** (2000) 22 Cal.4th 900, 953 [same]; ***People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 285-286; **see also *United States* v. *Blanco*** (9th Cir. 2004) 392 F.3d 382, 392-395 [remanding case to district court to "order full

disclosure by the government of any and all potential ***Brady*** … material" related to a particular trial witness where the defendant showed that the government had suppressed ***Brady*** material concerning that witness.]; ***United States* v. *Brooks*** (D.C. Cir. 1992) 966 F.2d 1500, 1504-1505 [judge may require prosecutor to review files where the defense made explicit request for apparently easily examined material and there existed nontrivial prospect that review might yield material exculpatory information].)

Thus, some showing **must** be made. And mere speculation that a report or file might contain something useful for impeachment purposes is insufficient to demonstrate it constitutes ***Brady*** material triggering court involvement. (**See *People* v. *Ashraf*** (2007) 151 Cal.App.4th 1205, 1214; ***United States* v. *Michaels*** (9th Cir. 1986) 796 F.2d 1112, 1116 [upholding district court's refusal to compel production of certain interview notes under ***Brady*** where the defendant "offer[ed] no reason for believing that the notes contain[ed] significant material that [was] not contained in the typed [interview] summaries"]; ***United States* v. *Mincoff*** (9th Cir. 2009) 574 F.3d 1186, 1200 ["'mere speculation about materials in the government's files did not require the district court to make those materials available, or mandate an in camera inspection."]; ***United States* v. *Bland*** (7th Cir. 2008) 517 F.3d 930, 935 ["mere speculation that a government file might contain ***Brady*** material is not sufficient"]; ***United States* v. *Caro Muniz*** (1st Cir. 2005) 406 F.3d 22, 29 [noting ***Brady*** does not permit in camera fishing expeditions through the government's files without a defendant first providing the court with some indication that the materials to which defendant is seeking access contain material and potentially exculpatory evidence]; ***United States* v. *Quinn*** (11th Cir. 1997) 123 F.3d 1415, 1422 ["Mere speculation that a government file may contain ***Brady*** material is not sufficient to require a remand for in camera inspection, much less reversal for a new trial"]; ***United States* v. *Driscoll*** (6th Cir. 1992) 970 F.2d 1472, 1482 [same]; ***United States* v. *Andrus*** (7th Cir.1985) 775 F.2d 825, 843 [same]; ***United States* v. *Navarro*** (7th Cir. 1984) 737 F.2d 625, 631 [same]; **but see *United States* v. *Henthorn*** (9th Cir. 1991) 931 F.2d 29, 31 [finding when it comes to personnel files of federal agents (which are not protected by the equivalent of a ***Pitchess*** scheme), the defense need not make an initial showing of materiality];

Ordinarily, even if the defense has managed to persuade a judge to order the prosecution to "check" for the requested discovery, a prosecutor's statement that he or she has provided all the required discovery (or that it does not exist) ends the discussion.

It is not that unusual for defense counsel (or the judge) to ask a prosecutor: "How can I tell whether you have provided the discovery sought unless the court or defense can review the files that might contain the discovery?

When this question is posed, a good case to cite to the court is the recent Ninth Circuit case of ***United States* v. *Lucas*** (9th Cir. 2016) 841 F.3d 796. In ***Lucas***, the defense counsel sought information that he "hoped would demonstrate that federal and state authorities had colluded in prosecuting [the

defendant] in violation of the Double Jeopardy Clause of the Fifth Amendment." (**Id**. at p. 800.) The district court ruled that defendant had not made a sufficient "preliminary showing of inter-sovereign collusion under [the federal rule of discovery]" nor had the defendant shown a "substantial basis for claiming materiality exists 'to justify his discovery requests under ***Brady***.'" (**Id**. at p. 802.) The district court "also found that [the defendant] was not entitled to an in camera review of the government's files. The district court ***relied upon the government's representation*** that no ***Brady*** material regarding inter-sovereign collusion existed and the government's promise that such evidence would be produced if it were discovered." (**Ibid**, emphasis added.)

On appeal, the defendant claimed the government's "conclusory representation" that it did not possess evidence of inter-sovereign collusion "did not discharge the government's obligations under ***Brady*** because the government must either produce information responsive to his discovery requests or submit whatever it possesses to the district court for an in camera review to confirm that no such evidence exists." (***Lucas*** at p. 807.)

The Ninth Circuit rejected defendant's argument. "It is the government, not the defendant or the trial court, that decides prospectively what information, if any, is material and must be disclosed under ***Brady***. While we have encouraged the government to submit close questions regarding materiality to the court for in camera review, the government is not required to do so." (**Ibid**., citing to ***Milke* v. *Ryan*** (9th Cir. 2013) 711 F.3d 998, 1016.) Citing to ***Pennsylvania* v. *Ritchie*** (1987) 480 U.S. 39 at p. 60, the Ninth Circuit stated: "Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final." (***Lucas*** at p. 808.) "To challenge the government's representation that it lacks ***Brady*** information, [the defendant] must either make a showing of materiality under [federal] Rule 16 or otherwise demonstrate that the government improperly withheld favorable evidence." (**Ibid**.)

The defendant argued that this requirement was vitiated because he made a "specific request for information" and "***Brady***'s materiality standard is more lenient in this circumstance than it is when the defense makes no request or only a general request." (**Id**. at p. 808.) The ***Lucas*** court rejected this argument. The Ninth Circuit recognized that in ***United States* v. *Agurs*** (1976) 427 U.S. 97 at p. 106, the court "suggested that the standard [of materiality] might be more lenient [where the defense makes a specific request and the prosecutor fails to disclose responsive evidence] than ... [where] the defense makes no request or only a general request[.]" (***Lucas*** at p. 808.) However, the ***Lucas*** court noted that in ***United States* v. *Bagley*** (1985) 473 U.S. 667, at pp. 681-682), the High Court modified ***Agurs*** and "set forth a single test for materiality that applies regardless whether there was a specific request, a general request, or no request for ***Brady*** material." (***Lucas*** at p. 809.) The ***Lucas*** court also rejected defendant's "attempts to redefine the government's obligations under ***Brady*** by citing dicta [in ***United States* v. *Olsen*** (9th Cir. 2013) 704 F.3d 1172] discussing the difficulty that prosecutors face before trial in determining what information will be material after trial." (***Lucas*** at p. 809.) The ***Lucas*** court held that "[w]hile ***Olsen***

encouraged prosecutors to err on the side of disclosure, it did not alter the fundamental construct of ***Brady***, which makes the prosecutor the initial arbiter of materiality and disclosure." (***Lucas*** at p. 809.) Accordingly, the ***Lucas*** court held "unless [the defendant] can make a showing of materiality or demonstrate that the government has withheld favorable evidence, he ***must rely on*** 'the prosecutor's decision [regarding] disclosure.'" (***Lucas*** at p. 809, emphasis added; **see also *United States* v. *Hernandez***(6th Cir.1994) 31 F.3d 354, 361 [absent some indication of misconduct by the government, the district court is not required to conduct an in camera review *to verify government's assertions* as to materiality under ***Brady***, emphasis added]; ***United States* v. *Gomez*** (S.D.N.Y. 2016) 199 F.Supp.3d 728, 751 ["The Government has acknowledged its obligation and has indicated that it "will turn over any ***Brady*** materials it uncovers immediately upon discovery." . . . No more is required."]; **but see *Milke* v. *Ryan*** (9th Cir. 2013) 711 F.3d 998, 1011 [citing to ***United States* v. *Kiszewski*** (2d Cir.1989) 877 F.2d 210, 216 as standing for the proposition that courts should not rely on the government's representations regarding ***Brady*** materiality of potential impeachment evidence where credibility is the central issue in the case – at least where a prosecutor revealed that an agent's file contained complaints that he was 'on the take'].)

As pointed out in ***J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, "[i]f a defendant seeks recourse to the courts to challenge the prosecutor's ***Brady*** disclosure decision, the defendant must show that the prosecutor's "'omission is of sufficient significance to result in the denial of the defendant's right to a fair trial.'"" (***J.E.*** at p. 1336.)

Editor's note: Prosecutors frustrated with the unwillingness of a court or counsel to accept prosecutorial representations can ask the court to review the files of defense counsel to verify their own representations regarding what witnesses they plan to call and cite to ***United States* v. *Acosta*** (D. Nev. 2005) 357 F.Supp.2d 1228 for the proposition: "The prosecutor's responsibility to make judgment calls about what information constitutes ***Brady*** and ***Giglio*** material may cause defense counsel some angst. However, the prosecutor's duty to determine whether information in its possession requires pretrial disclosure is no different than the duty imposed on counsel for litigants in both civil and criminal litigation to exercise their professional judgment in making discovery disclosures required by the rules of civil and criminal procedure." (**Id**. at p. 1244.) It's all rhetoric, and obviously, prosecutors want to avoid this kind of pissing match but both court and counsel need to understand that reliance on the representations of both prosecutors and defense counsel is inherent in our system.

Editor's note: Sometimes prosecutors will submit evidence to a judge for an ex parte opinion as to whether it constitutes ***Brady*** evidence. Be aware that just because a judge determines the evidence is not ***Brady*** evidence, this does not mean that a reviewing court is precluded from coming to a contrary conclusion and finding the prosecutor violated due process for failure to disclose the evidence. (**See e.g.**, ***People* v. *Flowers*** (unreported) 2008 WL 2348293, p. *11.) Judicial approval of nondisclosure, however, will probably help fend off any state bar prosecution for failure to disclose.

2. Can the prosecution challenge a discovery order issued by a judge?

A. Penal Code section 1512 (formerly 1511)

Penal Code section 1512 provides: "In addition to petitions for a writ of mandate, prohibition, or review which the people are authorized to file pursuant to any other statute or pursuant to any court decision, the people may also seek review of an order granting a defendant's motion for severance or discovery by a petition for a writ of mandate or prohibition."

Whether section 1512 could be used as a vehicle to challenge an order imposing sanctions for a discovery violation, as opposed to an order granting discovery, is an open issue. (**See *People* v. *Superior Court (Meraz)*** (2008) 163 Cal.App.4th 28, 45 [albeit finding writ properly taken under Penal Code section 1238(a)(8), which permits the People to appeal from "[a]n order ... dismissing or otherwise terminating ... any portion of the action including such an order ... entered before the defendant has been placed in jeopardy...."].)

B. Writ of Prohibition or Mandate

"[P]retrial discovery orders in criminal cases may, in certain instances, be reviewed by prohibition or mandate." (***People* v. *Mena*** (2012) 54 Cal.4th 146, 153, citing to ***People* v. *Municipal Court (Ahnemann)*** (1974) 12 Cal.3d 658, 661.)

In ***People* v. *Superior Court (Mitchell)*** (2010) 184 Cal.App.4th 451, the court held that an act that exceeds a grant of statutory power qualifies for writ review upon a petition by the prosecution, and a pre-trial writ may be taken where a trial court exceeds its subject matter jurisdiction by ordering the exclusion of witness testimony as a discovery sanction against the prosecution without exhausting other sanctions first under Penal Code section 1054.5(c). (**Id**. at pp. 456-461.)

"In addition, writ review is appropriate when the petitioner 'seeks relief from a discovery order which may undermine a privilege, because appellate remedies are not adequate once the privileged information has been disclosed.'" (***People* v. *Superior Court (Mouchaourab)*** (2000) 78 Cal.App.4th 403, 413 citing to ***Kleitman* v. *Superior Court*** (1999) 74 Cal.App.4th 324, 330 and ***Raytheon* v. *Superior Court*** (1989) 208 Cal.App.3d 683, 685.)

X. WHAT OTHER STATUTES GOVERN DISCOVERY IN CRIMINAL CASES ASIDE FROM THE CALIFORNIA DISCOVERY STATUTE?

1. Express statutory provisions

As noted earlier, Penal Code section 1054(e) provides that "no discovery shall occur in criminal cases except as provided by this chapter, ***other express statutory*** provisions, or as mandated by the

Constitution of the United States. (Pen. Code, § 1054(e), emphasis added.) So, what are some of these "express statutory provisions?"

Evidence Code section 1040

In ***People* v. *Jackson*** (2003) 110 Cal.App.4th 280, the court held that Evidence Code section 1040's conditional privilege for official information was an express statutory provision that survived the passage of Proposition 115. (**Id**. at p. 290.) The privilege created by section 1040 would also be outside the scope of the discovery statute pursuant to Penal Code section 1054.6 (**see** this outline, section X-2 at p. 272.)

Penal Code Section 1538.5

In ***Magallan* v. *Superior Court*** (2011) 192 Cal.App.4th 1444, the court rejected a prosecution argument that a court was precluded from ordering discovery that related to a Penal Code section 1538.5 motion occurring before trial. The court rested its decision two possible rationales, including the rationale that "Penal Code section 1538.5, subdivision (f) is an 'express' statutory provision which entitles a defendant to the discovery necessary to support the suppression motion that it authorizes to be brought in conjunction with the preliminary examination." (**Id**. at p. 1462 [albeit also finding the order could be justified as necessary to enforce the defendant's right to due process under the California Constitution].)

Penal Code Sections 995, 939.71, and 939.6

In ***People* v. *Superior Court (Mouchaourab)*** (2000) 78 Cal.App.4th 403, the majority opinion held that a criminal defendant was entitled to discovery of a transcript of "nontestimonial" portions of a grand jury proceeding to assist in pursuit of a Penal Code section 995 motion to dismiss the indictment. The majority reasoned that, notwithstanding the exclusivity of the discovery statute, Penal Code section 995, in conjunction with other statutes governing grand jury proceedings, provided the requisite 'express statutory provisions,' within the meaning of section 1054(e), authorizing discovery of nontestimonial grand jury transcripts. (**Id**. at pp. 428-429.)

Editor's note: There are serious problems with the expansive definition given to the term "express statutory provision" by ***Magallan*** and ***Mouchaourab***. Section 1054(e) is referring only to statutes that explicitly provide for discovery. The modifier "express" was included to prevent courts from doing exactly what the ***Magallan*** and ***Mouchaourab*** courts did - take a statute that, on its face, says nothing about discovery and treat it as a statute implicitly providing for discovery. Under this expansive view, one could look at any number of statutes that provide some statutory right to the defendant and call it an express statutory provision that removes a discovery order from the scope of the discovery statute. It is not difficult to imagine defendants saying, "I'm entitled to information about an accomplice that does not fall under the section 1054.1 categories and since my right not to be convicted based solely on accomplice testimony under Penal Code section 1111 cannot be vindicated without receiving the requested discovery, section 1111 is an express statutory provision providing for discovery." In sum, the modifier "express" in the term "express statutory provision" must refer to the fact the statute expressly provides for discovery. If it simply modifies the term "statutory provision" it would be meaningless since there is no such thing as a "non-express" statutory provision. (**See *Manufacturers Life Ins. Co.* v. *Superior Court*** (1995) 10 Cal.4th 257, 274 ["[w]ell-established canons of statutory construction preclude a construction which renders a part of a statute meaningless or inoperative"].)

2. Privileges (Penal Code section 1054.6)

Penal Code section 1054.6, in pertinent part, provides "Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined in subdivision (a) of Section 2018.030 of the Code of Civil Procedure, or ***which are privileged pursuant to an express statutory provision***, or are privileged as provided by the Constitution of the United States." (Pen. Code, § 1054.6, emphasis added; **see also *People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 290 ["Evidence Code section 1040's conditional privilege for official information thus survived the passage of Proposition 115"].)

Thus, case law interpreting when allegedly privileged information can or cannot be provided to the opposing party will govern disclosure of such information to the extent there is a conflict between the privilege and the discovery statute. (**See e.g., *Andrade* v. *Superior Court*** (1996) 46 Cal.App.4th 1609, 1613-1614 [defense need not disclose information protected by the attorney-client privilege]; ***Rodriguez* v. *Superior Court*** (1993) 14 Cal.App.4th 1260, 1268-1269 [same].)

***Pitchess* Privileges**

For a discussion of the ***Pitchess*** statutes, see this outline, sections I-8-C at pp. 102-113 and XIX at pp.350-382.

3. Can the CDS be circumvented by utilizing the California Public Records Act?

The California Public Records Act (currently codified as California Government Code §§ 6250 through 6276.48) was a law passed in 1968 requiring inspection or disclosure of governmental records *to the public* upon request, unless exempted by law.

It is an open question whether defense attorneys can use the California Public Records Act (hereinafter, "CPRA") to obtain discovery in a criminal case from either the investigating law enforcement agency or the prosecutor's office. Justice Hoffstadt, current author of California Criminal Discovery (5th Edition) does a fairly extensive review of the issue and properly concludes that if the records sought are records not considered within the possession of the prosecution team, it is likely the CPRA can be used. However, whether the defense can obtain information through a CPRA request directly from members of the prosecution team seems to undermine aspects of the CDS. (Hoffstadt, at § 14.01 at pp. 411-412.) And, until there is a ruling from an appellate court to the contrary, defense attorneys requesting discovery from the prosecution by way of a CPRA request should be told it is not the proper vehicle for discovery purposes.

A. Use of the CPRA to Obtain Peace Officer Personnel Records: Penal Code Section 832.7 (as of January 1, 2019).

As of January 1, 2019, Penal Code section 832.7, which renders peace officer personnel files confidential was modified to require that certain records shall be made accessible pursuant to the CPRA. (**See** this outline, section I-8-C at p. 100.)

Specifically, subdivision (b)(1) of section 832.7 provides: Notwithstanding subdivision (a), subdivision (f) of Section 6254 of the Government Code, or any other law, the following peace officer or custodial officer personnel records and records maintained by any state or local agency ***shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act*** (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code): . . . [records relating to discharge of a firearm by officers, use of force by an officer resulting in death or great bodily injury, sustained findings of sexual assault by an officer on a member of the public, and sustained findings of dishonesty]." (Emphasis added.)

Because peace officer personnel files are currently treated as third party records – even when the officer is a member of the prosecution team (**see** this outline, section I-8-C-i at pp. 102-104) it is likely **both** defense counsel and the prosecution will be able to utilize the CPRA to obtain these records.

4. Can the defense circumvent the CDS by requesting records on potential witnesses pursuant to Penal Code section 11105 as amended in 2019?

California Penal Code section 11105 governs when the Attorney General of California has an obligation to furnish state summary criminal history information (i.e., California Department of Justice rapsheets). The statute lists categories of individuals who must be provided the criminal history. Among the persons to whom the information must be provided if needed in the course of their duties were: "A public defender or attorney of record when representing a person in a criminal case . . ." (Pen. Code, § 11105(b)(9).)

As reflected in the following paragraph, the language of subdivision (b)(9) was changed by AB 2133 this year (additions in italics, omissions stricken through), so that it now reads:

(9) A public defender or attorney of record when representing a person in a criminal case ***or a juvenile delinquency proceeding, including all appeals and postconviction motions,*** or a parole, mandatory supervision pursuant to paragraph (5) of subdivision (h) of Section 1170, or postrelease community supervision revocation or revocation extension proceeding, ~~or if otherwise authorized access by statutory or decisional law~~ ***if the information is requested in the course of representation***.

This is language from the analysis of the bill explaining the reason behind it:

> "While public defenders or the attorney of record are listed as people who can get criminal history information however, there is limiting language at the end of the subdivision pertaining to public defenders and defense attorneys which requires some additional authorization in 'statutory or decisional law.' (Penal Code, § 11105 (b)(9).) None of the other 25 subdivisions that grant access to a variety of state, local, and private entities contain this ambiguous limiting language. This bill would clarify that Penal Code Section 11105, subdivision (b)(9), on its own, provides public defenders and criminal defense attorneys with the right to receive information from the DOJ database.
>
> In most criminal cases, there is good reason for public defenders and criminal defense attorneys to be provided with information contained in the DOJ database. For example, evidence that a testifying witness has been convicted of a felony is generally admissible to attack the credibility of that witness (Evidence Code § 788), and misconduct bearing on a witness's propensity for honesty or veracity are likewise admissible, even where it falls short of felony conduct. (Evidence Code § 786; *People v. Wheeler* (1992) 4 Cal. 4th 284, 296.) Furthermore, the United States Supreme Court has made it clear that criminal defense attorneys are entitled to information that may cast doubt on the credibility of a prosecution witness. (See *Giglio v. United States* (1972) 405 U.S. 150).
>
> Although this information is legally required to be disclosed to the defense, often times defense attorneys receive this information late in the criminal proceedings, resulting in insufficient time to effectively investigate, review, and prepare for the cross-examination of witnesses. Specifically, the author has cited a recent, high-stakes trial in which a criminal defense attorney received evidence of more than 60 arrests and convictions for prosecution witnesses, all of which needed to be investigated in the course of a couple of days prior to trial. Apparently, the limiting language of Penal Code Section 11105 subdivision (b)(9) was at least partially to blame for the late disclosure because the prosecuting attorney was either unwilling, or believed he was unable to turn over the information until days before the trial was scheduled to begin. According to the sponsor of the bill, there are numerous prosecutors who feel that they either should not or cannot turn over criminal history database information. This bill makes it clear that public defenders and criminal defense attorneys can receive information to which they are legally entitled, and help prevent the possibility that they may be unable to adequately represent their clients."
>
> (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2133 (2017–2018 Reg. Sess.) as amended March 22, 2018 in Assembly, pp. 5-6, italics added.)

Editor's note: In an earlier version the proponents of the bill stated: "It is important to note that many prosecutors who believe they are not permitted to share the 'rap sheets' of witnesses, will instead provide an internally produced memo summarizing only portions of the report. However, too often this memo is delayed or provided right before trial with no opportunity for the defense attorney to conduct thorough investigation. Therefore, AB 2133 will also accelerate the timeliness of obtaining this information." (Assem. Com. on Public Safety Bill Analysis of AB 2133 (2017–2018 Reg. Sess.) as introduced Feb. 12, 2018, p. 5.)

Although there is language in the bill that would support an interpretation it was meant to allow defense counsel to gain access to the criminal history of persons other than the person they were representing, the Department of Justice has informed us they are interpreting the bill to only allow access to a defendant's own criminal history. This interpretation may be challenged and if the challenge is successful, there is a different reason why it should not be put into effect. Criminal history rapsheets of victims and witnesses contain identifiers and other biographical data. Much of this information (beyond name and address) is likely protected by Marsy's law. (**See** this outline, section II-7-A at pp. 173-174.) Moreover, records of arrests and convictions are protected by the California state constitutional right of privacy (**see** this outline, section XVII-3-C at p.332) and if those arrests and convictions are not relevant, there is no competing interest permitting disclosure. Thus, to the extent the bill would allow release of such information, it is unconstitutional. Hopefully, the Department of Justice will, if necessary, assert the rights of the witnesses and avoid disclosure of irrelevant information on their behalf – even if the amendments are not interpreted as applying solely to the rapsheet of the person being represented. The Department of Justice can do this because a government agency has standing "to assert a citizen's right to privacy in the agency's records." (***Rider* v. *Superior Court*** (1988) 199 Cal.App.3d 278, 282 citing to ***Craig* v. *Municipal Court*** (1979) 100 Cal.App.3d 69, 76-77 and ***Sinacore* v. *Superior Court*** (1978) 81 Cal.App.3d 223, 225 & fn. 2; **see also *Denari v. Superior Court*** (1989) 215 Cal.App.3d 1488, 1498–1499 [county agency allowed, albeit unsuccessfully, to seek "protection from the discovery request for the names, addresses and telephone numbers of arrestees based upon those arrestees' right to privacy"].)

A. How Will the Change in Language to Section 11105 Impact the Local Prosecutor's Obligations Regarding Criminal History Information about Trial Witnesses?

If the new language is interpreted as being limited to disclosure of a defendant's own rapsheet, this should not change current practice. Prosecutors routinely provide defense attorney's the criminal rapsheet of their own client upon request.

Expect defense counsel to claim that they are entitled to the actual rapsheets of any witnesses from local prosecutors. While defense counsel is entitled to the information in the rapsheets that falls under our ***Brady*** or statutory obligation to provide, defense counsel is not entitled to any other information in the rapsheet for several reasons. First, by its own terms, section 11105 does not compel dissemination by *local prosecutors* of state criminal histories. Second, section 11105 has no application to local criminal history

databases, which are governed by Penal Code sections 11330-11335 and do not require dissemination of the information sought. Third, for the same reasons that dissemination of irrelevant information in the state criminal histories would run afoul of Marsy's Law and the California state constitutional right of privacy, so would dissemination by local prosecutors. Fourth, if supporters of the bill are taken at their word, the whole point of the bill was to loop around local prosecutors.

The silver lining to the amendment is if it is interpreted as giving defense counsel access to the state criminal history databases of witnesses, then it will be next to impossible for defense counsel to show a *Brady* violation if somehow the prosecution fails to provide the information. (**See** this outline, section I-11-A &B at pp. 138-143 [explaining how a ***Brady*** violation cannot occur if the undisclosed information is available to the defense through due diligence].)

XI. WHAT RULES GOVERN DISCOVERY IN PROCEEDINGS *OTHER THAN* CRIMINAL JURY TRIALS?

Generally, "[c]riminal discovery provisions are limited to criminal cases." (***Michael P.* v. *Superior Court*** (2001) 92 Cal.App.4th 1036, 1042 [citing to Pen. Code, § 1054(e)].)

1. Competency hearings (Penal Code section 1369)

Even though a competency hearing arises in the context of a criminal trial, the rules governing discovery in competency hearings are those applicable to civil proceedings. (***Baqleh* v. *Superior Court*** (2002) 100 Cal.App.4th 478, 490-491.)

2. Grand jury proceedings

There is no duty imposed on the prosecutor to disclose exculpatory evidence to the grand jury by the United States Constitution. (***United States* v. *Williams*** (1992) 504 U.S. 36, 53; ***Berardi* v. *Superior Court*** (2007) 149 Cal.App.4th 476, 493; ***People* v. *Thorbourn*** (2004) 121 Cal.App.4th 1083, 1089.)

However, Penal Code section 939.7 provides that although the grand jury is not required to hear evidence in favor of the defendant, if it has reason to believe there is evidence that will "explain away the charge" it should order production of the evidence." (***Berardi* v. *Superior Court*** (2007) 149 Cal.App.4th 476, 490.)

In ***Johnson* v. *Superior Court*** (1975) 15 Cal.3d 248, the California Supreme Court construed section 939.7 to place an *implied* obligation on the prosecutor to disclose any known exculpatory evidence to the grand jury. (**Id**. at pp. 254-255.)

The ***Johnson*** ruling was later codified by the Legislature in Penal Code section 939.71. That section now states:

"(a) If the prosecutor is aware of exculpatory evidence, the prosecutor shall inform the grand jury of its nature and existence. Once the prosecutor has informed the grand jury of exculpatory evidence pursuant to this section, the prosecutor shall inform the grand jury of its duties under Section 939.7. If a failure to comply with the provisions of this section results in substantial prejudice, it shall be grounds for dismissal of the portion of the indictment related to that evidence.

(b) It is the intent of the Legislature by enacting this section to codify the holding in ***Johnson* v. *Superior Court***, 15 Cal. 3d 248, and to affirm the duties of the grand jury pursuant to Section 939.7." (Pen. Code, § 939.71.)

To establish "substantial prejudice" from the failure to disclose exculpatory evidence, the defense must show "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (***Berardi* v. *Superior Court*** (2007) 149 Cal.App.4th 476, 493.)

In making this determination, "the court must evaluate the record as a whole, taking into consideration all relevant factors. These factors include the strength and nature of both the undisclosed exculpatory evidence and the probable cause evidence that was presented. Regarding the disclosure errors, pertinent inquiries include the extent of the impact on the grand jurys independence and the extent to which the material could 'explain away the charge.' If the record shows that sufficient evidence of probable cause remains even after considering the undisclosed evidence, this does not end the analysis. The court must still determine if there is ""such an equal balance of reasonable probabilities as to leave the court in serious doubt""" as to whether a properly informed jury would have declined to find probable cause to indict had it known of the omitted evidence. ([Citation omitted.] If so, the defendant has established the requisite substantial prejudice and is entitled to dismissal of the indictment." (***Berardi* v. *Superior Court*** (2007) 149 Cal.App.4th 476, 495.)

The reference to "the extent of the impact on the grand jury's independence" means the court must consider "the extent to which the prosecution's disclosure deficiency interfered with the grand jury's independent investigatory function." (***Breceda* v. *Superior Court of Los Angeles County*** (2013) 215 Cal.App.4th 934, 956; ***Berardi* v. *Superior Court*** (2007) 149 Cal.App.4th 476, 495.)

For purposes of section 939.71, the duty to disclose exculpatory information exists regardless of whether the individual prosecutors handling the case before the grand jury are aware of the information, because it is "*[t]he office of the district attorney*" that "had the duty to present exculpatory evidence to the grand jury and breached that duty." (**Id**. at p. 953, emphasis added.)

Thus, in ***Breceda* v. *Superior Court of Los Angeles County*** (2013) 215 Cal.App.4th 934, where the supervising attorney of division responsible for the prosecution of the defendants and an investigator for that division knew of the exculpatory evidence, the duty to disclose the exculpatory information under section 939.71 was violated even though the prosecutors who handled the grand jury case were personally unaware of it. (**Id**. at pp. 942, 955.)

Editor's note: Although the holding in ***Breceda*** may be an omen of how a court will rule on whether all prosecutors in an office are on the prosecution team (**see** this outline, I-7-G at pp. 89-94) its ruling is tied to the specific nature of section 939.71. (**See *Breceda*** at p. 955 ["Narrowing the effect of section 939.71 to the individuals who handle the case before the grand jury is contrary to the purpose of the statute as set forth by the Supreme Court"].) Moreover, while the court used fairly broad language in explaining why the duty to disclose existed even if the prosecutors presenting the case to the jury were unaware of the information ("It is the duty of the office of the district attorney to gather all the information made available throughout the office and present that information to the grand jury", emphasis added), the information was, in fact, known to persons in the office who were actually involved in the investigation itself and would know of its exculpatory nature (the supervising attorney and the investigator in the unit of the office handling the prosecution). (**Id**. at p. 942, 955.)

In ***People* v. *Superior Court (Mouchaourab)*** (2000) 78 Cal.App.4th 403, the majority opinion held that a defendant was entitled to discovery of a transcript of "nontestimonial" portions of a grand jury proceeding to assist in pursuit of a Penal Code section 995 motion to dismiss the indictment because section 995, in conjunction with Penal Code sections 939.71, and 939.6 were express statutory provisions allowing for such "discovery." (**Id**. at pp. 428-429; **see also** this outline, section X-1 at p. 270.)

3. Habeas proceedings

"The nature and scope of discovery in habeas corpus proceedings has generally been resolved on a case-by-case basis." (***In re Scott*** (2003) 29 Cal.4th 783, 813.)

"Proposition 115's discovery provisions all deal with the underlying trial. For this reason, . . . they do not apply to habeas corpus matters (although they may provide guidance in crafting discovery orders on habeas corpus)." (***People* v. *Pearson*** (2010) 48 Cal.4th 564, 573; ***Rubio* v. *Superior Court*** (2016) 244 Cal.App.4th 459, 479; **accord *In re Scott*** (2003) 29 Cal.4th 783, 813–814.)

"[T]he electorate that passed Proposition 115, in providing for pretrial discovery in a criminal case, [did not] intend[] either to provide for or to prohibit discovery in a separate habeas corpus matter. Section 1054.9 addresses an area that is related to Proposition 115's discovery provisions but, crucially, it is also a *distinct* area." (***People* v. *Pearson*** (2010) 48 Cal.4th 564, 572-573.)

"Proposition 115's discovery provisions are a bad fit for habeas corpus. The issue on habeas corpus is not defendant's guilt or innocence or the appropriate punishment but whether the defendant ... can establish some basis for overturning the underlying judgment." (***People* v. *Pearson*** (2010) 48 Cal.4th 564, 573; ***Rubio* v. *Superior Court*** (2016) 244 Cal.App.4th 459, 479.)

On the other hand, "[i]f, as Proposition 115 provided, discovery is reciprocal at the criminal trial itself—where the defendant is presumed innocent and has no burden of proof—it certainly should be so on habeas corpus, where guilt has been established and the petitioner bears the burden of proof." (***In re Scott*** (2003) 29 Cal.4th 783, 814.)

Thus, in ***Scott***, the court held "Penal Code section 1054.3 was a logical place for the referee to look to fashion a fair discovery rule. It requires the defendant to provide the names, addresses, and statements of witnesses, expert reports, and real evidence the defendant intends to offer. This requirement is not onerous and could greatly facilitate the reference hearing." (**Id**. at p. 814 [and favorably noting as well that the referee had excluded "petitioner's statements to current counsel and current experts whom petitioner did not intend to call as witnesses"].)

4. Juvenile proceedings

In general, "[d]iscovery in juvenile matters rests within the control of the juvenile court and the exercise of its discretion will be reversed on appeal only on a showing of a clear abuse. [Citations.] The juvenile court rules encourage the informal exchange of information between the parties and create an affirmative duty to disclose favorable evidence, subject only to a showing of privilege or other good cause. [Citation.]" (***Michael P.* v. *Superior Court*** (2001) 92 Cal.App.4th 1036, 1042 citing to ***In re Tabatha G.*** (1996) 45 Cal.App.4th 1159, 1166.)

A. Applicability of Constitutional Due Process Discovery Obligations

The constitutional disclosure obligations, which are delineated in ***Brady*** and its progeny apply in juvenile proceedings. (**See *J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1334.)

B. Applicability of the California Discovery Statute (Pen. Code § 1054 et seq.)

Although the statutory discovery procedures of the CDS are expressly applicable only to criminal proceedings, the juvenile court has the discretion to apply them in juvenile delinquency proceedings as well. (***J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1334; ***Clinton K. v. Superior Court*** (1995) 37 Cal.App.4th 1244, 1248.)

In the absence of an express order for *reciprocal* discovery by the juvenile court, the provisions of Penal Code 1054 do **not** apply to juvenile proceedings. (***In re Thomas F.*** (2003) 113 Cal.App.4th 1249, 1254 [and cases cited therein].)

C. Applicability of Rules of Court (Rule 5.546)

Discovery in juvenile delinquency proceedings is guided by the California Rules of Court, rule 5.546. (***J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1334, fn. 5.)

Rule 5.546 was, prior to renumbering of the Rules of Court in 2007, Rule 1420.

i. Language of Rule 5.546

Rule 5.546 states the following:

"(a) General purpose

This rule must be liberally construed in favor of informal disclosures, subject to the right of a party to show privilege or other good cause not to disclose specific material or information.

(b) Duty to disclose police reports

After filing the petition, petitioner must promptly deliver to or make accessible for inspection and copying by the child and the parent or guardian, or their counsel, copies of the police, arrest, and crime reports relating to the pending matter. Privileged information may be omitted if notice of the omission is given simultaneously.

(c) Affirmative duty to disclose

Petitioner must disclose any evidence or information within petitioner's possession or control favorable to the child, parent, or guardian.

(d) Material and information to be disclosed on request

Except as provided in (g) and (h), petitioner must, after timely request, disclose to the child and parent or guardian, or their counsel, the following material and information within the petitioner's possession or control:

(1) Probation reports prepared in connection with the pending matter relating to the child, parent, or guardian;

(2) Records of statements, admissions, or conversations by the child, parent, or guardian;

(3) Records of statements, admissions, or conversations by any alleged coparticipant;

(4) Names and addresses of witnesses interviewed by an investigating authority in connection with the pending matter;

(5) Records of statements or conversations of witnesses or other persons interviewed by an investigating authority in connection with the pending matter;

(6) Reports or statements of experts made regarding the pending matter, including results of physical or mental examinations and results of scientific tests, experiments, or comparisons;

(7) Photographs or physical evidence relating to the pending matter; and

(8) Records of prior felony convictions of the witnesses each party intends to call.

(e) Disclosure in section 300 proceedings

Except as provided in (g) and (h), the parent or guardian must, after timely request, disclose to petitioner relevant material and information within the parent's or guardian's possession or control. If counsel represents the parent or guardian, a disclosure request must be made through counsel.

(f) Motion for prehearing discovery

If a party refuses to disclose information or permit inspection of materials, the requesting party or counsel may move the court for an order requiring timely disclosure of the information or materials. The motion must specifically and clearly designate the items sought, state the relevancy of the items, and state that a timely request has been made for the items and that the other party has refused to provide them. Each court may by local rule establish the manner and time within which a motion under this subdivision must be made.

(g) Limits on duty to disclose--protective orders

On a showing of privilege or other good cause, the court may make orders restricting disclosures. All material and information to which a party is entitled must be disclosed in time to permit counsel to make beneficial use of them.
(h) Limits on duty to disclose--excision

When some parts of the materials are discoverable under (d) and (e) and other parts are not discoverable, the nondiscoverable material may be excised and need not be disclosed if the requesting party or counsel has been notified that the privileged material has been excised. Material ordered excised must be sealed and preserved in the records of the court for review on appeal.

(i) Conditions of discovery

An order of the court granting discovery under this rule may specify the time, place, and manner of making the discovery and inspection and may prescribe terms and conditions. Discovery must be completed in a timely manner to avoid the delay or continuance of a scheduled hearing.

(j) Failure to comply; sanctions

If at any time during the course of the proceedings the court learns that a person has failed to comply with this rule or with an order issued under this rule, the court may order the person to permit the discovery or inspection of materials not previously disclosed, grant a continuance, prohibit a party from introducing in evidence the material not disclosed, dismiss the proceedings, or enter any other order the court deems just under the circumstances.

(k) Continuing duty to disclose

If subsequent to compliance with these rules or with court orders a party discovers additional material or information subject to disclosure, the party must promptly notify the child and parent or guardian, or their counsel, of the existence of the additional matter."

ii. Sanction of Dismissal Under Subdivision (j) of Rule 5.546

In ***In re Jesus J.*** (1995) 32 Cal.App.4th 1057, the appellate court held that subdivision (j) of former rule 1420 (adopted without substantive change as current subdivision (j) of Rule 5.546) did not allow a juvenile court to dismiss a petition solely because of discovery abuses without considering the interests of justice and the welfare of the minor as mandated by Welfare and Institutions Code section 782. (**Id.** at p. 1060.)

Applying the standard in section 782, the ***In re Jesus J.*** court held a juvenile judge's order dismissing a juvenile case was error where the judge had dismissed the case solely to punish the police for failing to provide the prosecution with police reports and did not adequately take into account the interests of justice or the minor's welfare in dismissing the proceedings. (**Id.** at p. 1060.) The court noted that "[t]here is authority for the use of the dismissal power as a punishment imposed on the prosecution.

However, that sanction is not appropriate, and lesser sanctions must be utilized by the trial court, unless the effect of the prosecution's conduct is such that it deprives the defendant of the right to a fair trial." (**Id**. at p. 1060 [and noting, at p. 1061, that since the minor was not in custody nor suffered any discernible prejudice from the People's unintentional discovery blunders, the juvenile was not denied a fair trial].)

5. Mentally disordered offender proceedings (Penal Code section 2972)

The MDO statute specifically provides that "the rules of criminal discovery, as well as, civil discovery, shall be applicable." (Pen. Code § 2972(a).) Thus, discovery in an MDO proceeding is governed by both the criminal discovery statute and civil discovery statutes. The ***Brady*** rule is part of criminal discovery.

6. NGI commitment proceedings (Penal Code section 1026.5)

"Under the statutory scheme for commitment of persons found not guilty of a felony because of legal insanity, a person may not be kept in actual custody longer than the maximum state prison term to which he could have been sentenced for the underlying offense." (***People* v. *Haynie*** (2004) 116 Cal.App.4th 1224, 1226, citing to Pen. Code, § 1026.5(a).) "At the end of that period, however, the district attorney may petition to extend the commitment for two years if the person presents a substantial danger of physical harm to others because of a mental disease, defect, or disorder. (***People* v. *Haynie*** (2004) 116 Cal.App.4th 1224, 1226 citing to § 1026.5(b)(1).)

Pursuant to Penal Code section 1026.5(b)(3), "[t]he rules of discovery in criminal cases apply." (***People* v. *Haynie*** (2004) 116 Cal.App.4th 1224, 1226.)

Thus, both due process and the statutory discovery obligations of section 1054 should apply. It is not exactly clear though how some of these obligations would be imported. For example, the question at an extension hearing has nothing to do with guilt. Thus, whether the evidence is "exculpatory" cannot have the same meaning in the context of an extension hearing as it does in a criminal trial. Presumably, the prosecutor would have a duty to disclose evidence that favorable and material in the context of determining whether the defendant should be subject to continued commitment. (**See** this outline, section I-5-B at p. 59.)

7. Preliminary examinations

Whether the discovery statutes apply to discovery before preliminary examinations is an open question. (**See** this outline, section VII-3 at pp. 232-234.) However, due process requires the disclosure of exculpatory information that could defeat the holding order. (**See** this outline, section I-13-c at p. 153.)

8. Pre-trial motions (motions to suppress evidence or statements, suggestive identification motions, speedy trial motions, etc.)

There are a variety of issues raised when it comes to the question of whether ***Brady*** applies to pre-trial motions.

First, are the due process principles adopted in ***Brady*** limited to the trial context?

Second, if the due process principles adopted in ***Brady*** are limited to the trial context, should the failure to disclose evidence that would have resulted in the granting of a motion to suppress evidence which, in turn, would have changed the outcome at trial, be treated as application of the principles of ***Brady*** in the pre-trial context or the trial context?

Third, if the due process principles adopted in ***Brady*** are not limited to the trial context, is the failure to disclose evidence at a pre-trial hearing only a violation of those principles if nondisclosure would be reasonably probable to have changed the outcome of the trial, or can there be a violation if it would have only affected the outcome of the pre-trial hearing?

Fourth, if the due process principles adopted in ***Brady*** may potentially apply in the pre-trial context, does the fact the undisclosed information simply impeaches a witness automatically preclude a finding of a due process violation (in light of the rule that impeachment evidence need not be disclosed before a guilty plea), or can the failure to disclose impeachment evidence allow for a finding of a due process violation at a pre-trial hearing if the impeachment is "material" to the outcome of the pre-trial hearing?

Motions to Suppress

The majority of courts finding that due process requires disclosure of evidence at a motion to suppress find the evidence must be the kind of evidence that would be reasonably probable to change the outcome of the motion to suppress – albeit while citing to ***Brady***. (**See e.g.**, ***United States* v. *Gamez-Orduno*** (9th Cir. 2000) 235 F.3d 453, 461 ["The suppression of material evidence helpful to the accused, whether at trial or on a motion to suppress, violates due process if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different" – albeit finding evidence not material under this standard]; ***United States* v. *Barton*** (9th Cir. 1993) 995 F.2d 931, 935 ["To protect the right of privacy, we hold that the *due process principles* announced in ***Brady*** and its progeny must be applied to a suppression hearing involving a challenge to the truthfulness of allegations in an affidavit for a search warrant" – albeit actually applying the due process principles used in ***Trombetta*** and ***Youngblood*** and denying suppression, emphasis added]; ***United States* v. *Fernandez*** (9th Cir.2000) 231 F.3d 1240, 1248. fn. 5 [agreeing with ***Gamez-Orduno*** and ***Barton*** but finding ***Brady*** did not apply to failure to disclose evidence bearing on United States Attorney's decision to go death]; ***Smith* v. *Black*** (5th Cir.1990) 904 F.2d 950, 965–666 (vacated on

other grounds) ["objections may be made under ***Brady*** to the state's failure to disclose material evidence prior to a suppression hearing," but "the appropriate assessment for ***Brady*** purposes" is whether the nondisclosure "affected the outcome of the suppression hearing" and thus failure to disclose evidence additionally impeaching an officer did not require suppression]; ***Biles* v. *United States*** (D.C. 2014) 101 A.3d 1012, 1020, 1023-1024 ["suppression of material information can violate due process under ***Brady*** if it affects the success of a defendant's pretrial suppression motion" and finding reasonable probability motion would have been granted, which in turn, would have reasonable probability of changing outcome at trial].)

In ***Biles* v. *United States*** (D.C. 2014) 101 A.3d 1012, the court observed that there are several decisions in which courts "have simply noted that, for plain error purposes, the applicability of ***Brady*** to Fourth Amendment suppression hearings was not "obvious." (***Biles*** at p. 1020, fn. 6 citing to ***United States* v. *Nelson*** (2d Cir.2006) 193 Fed.Appx. 47, 50 [remanding on other grounds and declining to answer "[w]hether ***Brady*** and its progeny require disclosures in advance of pre-trial hearings"—"an open question in this circuit"]; ***United States* v. *Stott*** (7th Cir.2001) 245 F.3d 890, 902 [stating that "we cannot say that the law is clear on the question of whether ***Brady*** should apply to suppression hearings"]; ***United States* v. *Bowie*** (D.C.Cir.1999) 198 F.3d 905, 912 [stating that "it is hardly clear that the ***Brady*** line of Supreme Court cases applies to suppression hearings"].)

The ***Biles*** court recognized that in ***United States* v. *Bowie*** (D.C.Cir.1999) 198 F.3d 905, the ***Bowie*** court had "reasoned in dicta that suppression hearings "do not determine a defendant's guilt or punishment," and thus presumably would be beyond the scope of ***Brady***." (***Biles*** at p. 1020 citing to ***Bowie*** at p. 912.) However, the ***Biles*** court did not find the dicta persuasive.

Several courts have questioned whether cases finding ***Brady*** applies in the motion to suppress context are still valid if they issued before the High Court decision in ***United States* v. *Ruiz*** (2002) 536 U.S. 622, 623, which held that the prosecution does not have a duty to disclose impeachment evidence or evidence bearing on an affirmative defense before a guilty plea (**see** this outline, section I-13-B at p. 150) – at least if the undisclosed evidence is just impeachment evidence. (**See *United States* v. *Harmon*** (D.N.M. 2012) 871 F.Supp.2d 1125, 1169 ["It would not be consistent with the holding in ***United States* v. *Ruiz*** to extend the obligation to disclose impeachment evidence to suppression hearings when the prosecution would have no obligation to make the disclosure at a later stage in many criminal proceedings—before the defendant enters a guilty plea"]; ***United States* v. *Hykes*** (D.N.M 2016) 2016 WL 1730125, at *7–11 [discussing ***Ruiz*** and finding "***Brady*** does not require the United States to disclose impeachment evidence before suppression hearings."]; ***United States* v. *Welton*** (C.D. Cal.) 2009 WL 2390848, at *8 [questioning validity of ***Gamez-Orduno*** and other Ninth Circuit cases post-***Ruiz***, but noting they "nonetheless remain the law of the circuit and are instructive here"].)

Other Pre-trial Motions

The same questions that arise in deciding whether to apply ***Brady*** or due process principles requiring disclosure at motions to suppress evidence will arise in deciding whether to apply ***Brady*** or due process principles requiring disclosure at other pre-trial motions. (**See e.g., *Nuckols* v. *Gibson*** (10th Cir.2000) 233 F.3d 1261, 1266–1267 [finding a ***Brady*** violation where the prosecution withheld evidence that would have impeached deputy's credibility, deputy's credibility bore on whether statement of defendant was admissible, and statement was critical to outcome of trial – albeit treating evidence as whether evidence would have changed outcome of *trial*]; ***Thompson* v. *Bouchard*** (E.D. Mich) 2001 WL 1218592, at *9 [assuming ***Brady*** principles would apply to question of whether statement should be suppressed but finding no Brady violation since loss of statement would not have affected outcome at trial]; ***Martinez* v. *United States*** (6th Cir. 2015) 793 F.3d 533, 555 (vacated on reh'g en banc on different issue) [finding "scope of the government's ***Brady*** obligations extends to evidence material to an affirmative defense or the ability of a defendant to assert his constitutional rights" such as whether defendant would prevail on speedy trial defense to extradition under a treaty]; ***Gaither* v. *United States*** (D.C.2000) 759 A.2d 655 [remanding case for findings on whether the government had withheld ***Brady*** information pertaining to suggestive identification procedures].)

In any event, it is clear that a trial court can order discovery related to a Penal Code section 1538.5 motion occurring before trial under one of two possible theories: (i) that section 1538.5, (f) was an 'express' statutory provision which entitled a defendant to the discovery necessary to support the suppression motion that it authorizes to be brought in conjunction with the preliminary examination *and* (ii) "a defendant's right to due process under the *California Constitution* takes precedence over Chapter 10 and entitles the defense to the discovery necessary to support a Penal Code section 1538.5, subdivision (f) motion." (***Magallan* v. *Superior Court*** (2011) 192 Cal.App.4th 1444, 1462.) This suggests that even if federal due process does not require disclosure of exculpatory evidence relevant to the outcome of the motion to suppress, the California Constitution does. (**See also *Biles* v. *United States*** (D.C. 2014) 101 A.3d 1012, 1020 ["a rule prohibiting the government from suppressing favorable information material to a Fourth Amendment suppression hearing would impose little if any additional burden on prosecutors and police beyond the obligations that court rules and professional standards already impose"].)

Bottom line: The safer course is to assume that disclosure will be required if the information is in the possession of the prosecution team and would help the defense prevail at the pre-trial hearing. Save the arguments for why ***Brady*** does not apply for post-hearing challenges.

9. Probation, Parole, PRCS and Mandatory Supervision Revocation Hearings

In ***Jones* v. *Superior Court*** (2004) 115 Cal.App.4th 48, the court concluded that the CDS was inapplicable to probation violation hearings primarily on the ground that such hearings are not trials. (**Id**. at p. 59; **see also *People* v. *Gutierrez*** (2013) 214 Cal.App.4th 343, 354.) However, due process still requires the prosecution provide the defense with "disclosure of the evidence against him" at a probation revocation hearing. (**See *Black* v. *Romano*** (1985) 471 U.S. 606, 612.)

It is an open question whether probationers are entitled to ***Brady*** disclosure in connection with probation revocation hearing. (**See** Pipes & Gagen, Cal. Criminal Discovery (4th Ed.) § 1:95, pp. 308-309 [opining rule does not apply].) In the unpublished case of ***People* v. *Cortez*** 2015 WL 2060121, the court noted that a probation revocation proceeding is a post-conviction proceeding and that "the United States Supreme Court has made clear ***Brady*** does not apply to compel disclosure in postconviction proceedings. (at p. *3 citing to ***District Attorney's Office* v. *Osborne*** (2009) 557 U.S. 52, 68–70; **see also *State* v. *Hill*** (South Carolina 2006), 630 S.E.2d 274, 277-280 [***Brady*** does not apply to probation revocation hearings].)

"Instead, when courts analyze the fairness of postconviction proceedings, they consider whether the procedures employed offend traditional principles of fundamental fairness." (***People* v. *Cortez*** (unpublished) 2015 WL 2060121, *3 citing to ***Osborne*** at p. 70.)

However, at both parole and revocation proceedings defendants are entitled, under due process, to disclosure of the evidence against them. (**See *Morrissey* v. *Brewer*** (1972) 408 U.S. 471, 489 [parole]; ***Gagnon* v. *Scarpelli*** (1973) 411 U.S. 778, 786 [probation]; ***People* v. *Vickers*** (1972) 8 Cal.3d 451, 458 [probation]; ***People* v. *Rodriguez*** (1990) 51 Cal.3d 437, 441.)

The disclosure requirements should be no different for a hearing on revocation of mandatory supervision or PRCS as the legislative findings accompanying a 2012 amendment to the Realignment Legislation state that "[i]t is the intent of the Legislature ... to provide for a uniform supervision revocation process for petitions to revoke probation, mandatory supervision, postrelease community supervision, and parole." (Stats.2012, ch. 43 (S.B.1023), § 2, subd. (a).) The findings also state the amendments are intended to "simultaneously incorporate the procedural due process protections held to apply to probation revocation procedures under ***Morrissey* v. *Brewer*** (1972) 408 U.S. 471 [***Morrissey***], and ***People* v. *Vickers*** (1972) 8 Cal.3d 451, and their progeny." (**Id**. § 2, subd. (b).)

Moreover, prosecutors still may have an ethical obligation to disclose exculpatory evidence at the revocation hearing. (**Cf., *Imbler* v. *Pachtman*** (1976) 424 U.S. 409, 427, fn. 25 [prosecutor is "bound by the ethics of his office to inform the appropriate authority of after acquired or other information that casts doubt upon the correctness of the conviction"].)

In any event, even assuming that due process requires the disclosure of favorable material evidence at a revocation hearing, the definition of materiality would be tied to the nature of the hearing. A revocation proceeding, whether it be a probation, parole, PRCS, or mandatory supervision revocation hearing, is governed by Penal Code section 1203.2. (**See** Pen. Code, § 1203.2.) And "section 1203.2(a) is properly read as permitting proof by preponderance of the evidence." (***People* v. *Rodriguez*** (1990) 51 Cal.3d 437, 442.) Thus, a revocation finding could not be reversed unless the undisclosed evidence would have been reasonably probable to prevent a finding *by a preponderance of the evidence that defendant violated his or her probation*. (**See** this outline at section I-5-B at p. 59.)

10. Sexually violent predator proceedings (Welfare and Institutions Code section 6600 et seq.)

"Discovery procedures in SVPA proceedings are governed by the Code of Civil Procedure." (***People* v. *McClinton*** (2018) 29 Cal.App.5th 738, 750 (review filed (Jan. 7, 2019) [citing to ***People* v. *Superior Court (Cheek)*** (2001) 94 Cal.App.4th 980, 989.) "[R]ather than the statutes governing discovery in criminal cases, discovery in a civil commitment proceeding under the SVPA is governed by the Civil Discovery Act." (***People* v. *Dixon*** (2007) 148 Cal.App.4th 414, 442.)

However, one California appellate court has held that the ***Brady*** rule applies in SVPA proceedings under the rationale that "civil commitment proceedings fundamentally involve a deprivation of liberty comparable to criminal proceedings." (***People* v. *McClinton*** (2018) 29 Cal.App.5th 738, 766; **see also *United States* v. *Edwards*** (E.D.N.C. 2011) 777 F.Supp.2d 985, 990 [***Brady*** rule applies to federal civil commitments of sexually dangerous persons]; ***United States* v. *Ebel*** (E.D.N.C.2012) 856 F.Supp.2d 764, 766 [adopting ***Edwards*** analysis of ***Brady***]; ***United States* v. *Mahoney*** (D. Mass. 2015) 105 F.Supp.3d 140, 143["***Brady*** does not apply in civil cases except in rare situations, such as when a person's liberty is at stake."]; ***Brodie* v. *Dep't of Health and Human Servs***., (D.D.C.2013) 951 F.Supp.2d 108, 118 [same].)

XII. POST-CONVICTION STATUTORY DISCOVERY IN DEATH OR LWOP CASES (PENAL CODE SECTION 1054.9)

Penal Code section 1054.9, enacted in 2002, permitted a defendant sentenced to death or life imprisonment without the possibility of parole (LWOP) who is proceeding on a postconviction habeas corpus petition to seek discovery of "materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at [the] time of trial." (***People* v. *Superior Court (Morales)*** (2017) 2 Cal.5th 523, 527.) As of January 1, 2019, section 1054.9 now also applies to any case in which a defendant is convicted of a serious or violent felony resulting in a sentence of 15 years or more. (A.B. 1987 (2017-2018 Legislative Session.)

Penal Code section 1054.9 discovery is "part of the prosecution of the habeas corpus matter, not part of the underlying criminal case." (***People* v. *Superior Court (Morales)*** (2017) 2 Cal.5th 523, 531.) However, the motion must be filed in the trial court unless the defendant's execution is imminent. (**Ibid**.)

Aside from section 1054.9, the CDS does not impose any post-conviction discovery obligations. However, even "after a conviction the prosecutor ... is bound by the ethics of his office to inform the appropriate authority of ... information that casts doubt upon the correctness of the conviction." (***People* v. *Curl*** (2006) 140 Cal.App.4th 310, 318, citing to ***Imbler* v. *Pachtman*** (1976) 424 U.S. 409, 427, fn. 25.)

1. Statutory language of Penal Code section 1054.9

Penal Code section 1054.9 (as of January 1, 2019) provides:

(a) In a case involving a conviction of a serious felony or a violent felony resulting in a sentence of 15 years or more, upon the prosecution of a postconviction writ of habeas corpus or a motion to vacate a judgment, or in preparation to file that writ or motion, and on a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful, the court shall, except as provided in subdivision (b) or (d), order that the defendant be provided reasonable access to any of the materials described in subdivision (c).

(b) Notwithstanding subdivision (a), in a case in which a sentence other than death or life in prison without the possibility of parole has been imposed, if a court has entered a previous order granting discovery pursuant to this section, a subsequent order granting discovery pursuant to subdivision (a) may be made in the court's discretion. A request for discovery subject to this subdivision shall include a statement by the person requesting discovery as to whether he or she has previously been granted an order for discovery pursuant to this section.

(c) For purposes of this section, "discovery materials" means materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial.

(d) In response to a writ or motion satisfying the conditions in subdivision (a), the court may order that the defendant be provided access to physical evidence for the purpose of examination, including, but not limited to, any physical evidence relating to the investigation, arrest, and prosecution of the defendant only upon a showing that there is good cause to believe that access to physical evidence is reasonably necessary to the defendant's effort to obtain relief. The procedures for obtaining access to physical evidence for purposes of postconviction DNA testing are provided in Section 1405, and this section does not provide an alternative means of access to physical evidence for those purposes.

(e) The actual costs of examination or copying pursuant to this section shall be borne or reimbursed by the defendant.

(f) This section does not require the retention of any discovery materials not otherwise required by law or court order.

(g) In criminal matters involving a conviction for a serious or a violent felony resulting in a sentence of 15 years or more, trial counsel shall retain a copy of a former client's files for the term of his or her imprisonment. An electronic copy is sufficient only if every item in the file is digitally copied and preserved.

(h) As used in this section, a "serious felony" is a conviction of a felony enumerated in subdivision (c) of Section 1192.7.

(i) As used in this section, a "violent felony" is a conviction of a felony enumerated in subdivision (c) of Section 667.5.

(j) The changes made to this section by the act that added this subdivision are intended to only apply prospectively."

2. Is Penal Code section 1054.9 inconsistent with the discovery statute?

Penal Code section 1054.9 was enacted by the legislature after the passage of Proposition 115. In ***People* v. *Pearson*** (2010) 48 Cal.4th 564, the California Supreme Court rejected an argument that section 1054.9 was an improper amendment to the discovery statute. The ***Pearson*** court came to its conclusion under the theory that Proposition 115 only governed pretrial discovery and did not prohibit post-conviction discovery of the kind that section 1054.9 provided. (**Id**. at p. 567.)

3. Is there any time limit on filing a section 1054.9 motion?

There is no time limit on the filing of a section 1054.9 motion for postconviction discovery other than that it occur after sentencing and in the prosecution of a postconviction writ of habeas corpus. (***People* v. *Superior Court (Morales)*** (2017) 2 Cal.5th 523, 531; ***Catlin* v. *Superior Court*** (2011) 51 Cal.4th 300, 302-303 [albeit noting, at page 308, that an inmate sentenced to death cannot use a last-minute section 1054.9 motion as a procedural ploy to delay execution].)

4. What materials is a defendant entitled to receive under section 1054.9?

"The plain language [of section 1054.9] does not limit the discovery materials to materials the defense once actually possessed to the exclusion of materials the defense did not possess but to which it would have been entitled at time of trial." (***In re Steele*** (2004) 32 Cal.4th 682, 694.)

Under section 1054.9, on a proper showing of a good faith effort to obtain the materials from trial counsel, the trial court may "order discovery of specific materials currently in the possession of the prosecution or law enforcement authorities involved in the investigation or prosecution of the case that the defendant can show either

(1) the prosecution did provide at time of trial but have since become lost to the defendant;

(2) the prosecution should have provided at time of trial because they came within the scope of a discovery order the trial court actually issued at that time, a statutory duty to provide discovery, or the constitutional duty to disclose exculpatory evidence;

(3) the prosecution should have provided at time of trial because the defense specifically requested them at that time and was entitled to receive them; or

(4) the prosecution had no obligation to provide at time of trial absent a specific defense request, but to which the defendant would have been entitled at time of trial had the defendant specifically requested them." (***People* v. *Superior Court (Morales)*** (2017) 2 Cal.5th 523, 529; ***In re Steele*** (2004) 32 Cal.4th 682, 697.)

5. Are there limits on the discovery that must be provided to the defense?

Section 1054.9 provides "only limited discovery. It does not allow "free-floating" discovery asking for virtually anything the prosecution possesses." (***In re Steele*** (2004) 32 Cal.4th 682, 695.)

Section 1054.9 "includes only materials 'in the possession of the prosecution and law enforcement authorities," which we take to mean in their possession currently. The statute imposes no preservation duties that do not otherwise exist. It also does not impose a duty to search for or obtain materials not currently possessed." (***In re Steele*** (2004) 32 Cal.4th 682, 695.)

Moreover, section 1054.9 "covers only materials to which 'defendant would have been entitled at time of trial' but does not *currently* possess." (***In re Steele*** (2004) 32 Cal.4th 682, 695, emphasis added.)

"[S]ection 1054.9 does not require that the People compile or extract information from their records in order to respond to a postconviction discovery request, a process that can prove onerous." (***Rubio* v. *Superior Court*** (2016) 244 Cal.App.4th 459, 485.)

6. Does the defendant have to make any showing the evidence requested exists?

"[S]ection 1054.9 requires defendants who seek discovery beyond file reconstruction to show a reasonable basis to believe that other specific materials actually exist." (***Barnett* v. *Superior Court***

(2010) 50 Cal.4th 890, 899 [disapproving ***People v. Superior Court (Maury)*** (2006) 145 Cal.App.4th 473 and ***Curl* v. *Superior Court*** (2006) 140 Cal.App.4th 310].)

However, a "reasonable basis to believe that the prosecution had possessed the materials in the past would also provide a reasonable basis to believe the prosecution still possesses the materials. Petitioner need not make some additional showing that the prosecution still possesses the materials, a showing that would be impossible to make." (***Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, 901.)

7. Does the defendant have to show the evidence requested is material?

"In most instances, an inmate requesting postconviction discovery under section 1054.9 need only demonstrate a reasonable belief that the items he or she requests actually exist; he or she need not also prove the items' materiality before being able to receive the discovery." (***Davis* v. *Superior Court*** (2016) 1 Cal.App.5th 881, 886.) The defendant "need not establish materiality before he even sees the evidence." (***Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, 901.)

"However, an inmate seeking access to ***physical evidence*** must show "that there is good cause to believe that access to physical evidence is reasonably necessary to the defendant's effort to obtain relief." (***Davis* v. *Superior Court*** (2016) 1 Cal.App.5th 881, 886 citing to § 1054.9(c)) [now subd. (d)].) "Similarly, an inmate must use the procedures described by section 1405, not section 1054.9, to obtain postconviction DNA testing." (**Ibid**.)

8. Does the prosecution have a duty to disclose evidence in the possession of any law enforcement agency that assisted in the prosecution of the defendant?

The discovery obligation ... does not extend to all law enforcement authorities everywhere in the world but ... only to law enforcement authorities who were involved in the investigation or prosecution of the case." (***People* v. *Superior Court (Morales)*** (2017) 2 Cal.5th 523, 529; ***In re Steele*** (2004) 32 Cal.4th 682, 697.)

In ***Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, the California Supreme Court discussed when an agency will be on the "prosecution team" for purposes of assessing the prosecutorial duty to provide discovery under section 1054.9. The court held that out of state law enforcement agencies and officers who assisted California prosecutors in finding and interviewing witnesses who later testified to prior violent crimes committed by the defendant in the penalty phase of trial were not members of the prosecution team for purposes of section 1054.9 and thus, materials (interview notes) which those agencies possessed (and which the California prosecutors did *not* possess) could not be deemed to be in the possession of California prosecution team within the meaning of Penal Code section 1054.9. (**Id**. at pp. 903-906.)

In ***Shorts* v. *Superior Court*** (2018) 24 Cal.App.5th 709, the court held a defendant is also "entitled to an order preserving materials pertaining to prior crimes and alleged prior criminal conduct that were the subject of evidence introduced by the prosecutor at the guilt and penalty phases of his capital trial, including offenses identified in the People's notice of evidence in aggravation, not only materials related to the specific crimes charged in the case." (**Id**. at p. 715.) This includes materials in the possession of those law enforcement agencies who investigated those other crimes and incidents. (**Id**. at p. 725.) It includes "CDCR records 'pertaining to incidents offered to impeach him at the guilt phase or in aggravation at the penalty phase,' not just records relating to his incarceration during the trial." (**Id**. at p. 726.) And it does not matter whether the CDCR records were *actually* reviewed by the prosecutor prior to trial. "To the extent the CDCR has records relating to any of the incidents about which [a defendant] was cross-examined during the guilt phase of his trial or that were introduced as evidence of aggravating circumstances in the penalty phase, the prosecutor had access to that information, whether such access was utilized or not; the material would have been discoverable at trial . . . and is properly preserved under . . . section 1054.9." (**Ibid**.) Finally, it would include the records of coroner-medical examiner's offices that investigated the murders that were introduced as other crimes evidence. (***Id***. at p. 727.)

However, the ***Shorts*** court held a defendant would not be entitled a preservation order for "documents, records, exhibits and reporter transcripts and notes" in the possession of the *court* that tried the capital case or the *courts* that tried the prior criminal cases that were placed at issue during the guilt and penalty phases of the defendant's capital trial. (**Id**. at p. 727; **see also *People* v. *Superior Court (Morales)*** (2017) 2 Cal.5th 523 [Section 1054.9 "does not extend to judicial or other non-law-enforcement agencies"].) Nor was the defendant entitled to a preservation order for probation department records, "whether as a juvenile or an adult, including records of his custody in juvenile facilities in connection with prior offenses" because "probation department records" are court records." (**Id**. at pp. 728-729.)

9. Does section 1054.9 only kick in once a habeas petition or other writ is filed?

Section 1054.9 authorizes discovery before the formal filing of a writ. The California Supreme Court has interpreted the word "'prosecution' flexibly to include cases in which the movant is preparing the petition as well as cases in which the movant has already filed it." (***In re Steele*** (2004) 32 Cal.4th 682, 691.) "Reasonably construed, the statute permits discovery as an aid in preparing the petition, which means discovery may come before the petition is filed. (**Ibid**.)

10. Can a defendant obtain an order preserving the evidence described in section 1054.9 before filing a habeas petition?

In ***People* v. *Superior Court (Morales)*** (2017) 2 Cal.5th 523, a defendant who had not yet been appointed counsel for his habeas corpus petition moved for an order in a trial court requesting multiple

public agencies and departments to preserve certain categories of evidence falling within and outside the scope of Penal Code section 1054.9 be preserved. (**Id**. at p. 527.) "[T]he motion sought an accounting, also not within the explicit scope of Penal Code section 1054.9, by the agencies named in the motion as to whether any of the materials sought "are in the possession of any other governmental unit, entity, official, employee, or former employee and/or whether any of such material has been destroyed." (**Id**. at p. 528.) The trial court granted the order over the prosecution's objection that the trial court did not have authority to grant any aspect of the request, contending it sought unauthorized postconviction discovery outside the court's jurisdiction to grant. (**Id**. at p. 528.)

The California Supreme Court in ***Morales*** held the trial court has inherent power under the Code of Civil Procedure section 187 to order preservation of evidence that would potentially be subject to such discovery. (**Id**. at p. 534.) However, the court held that the motion and related preservation order were improper to the extent they called for the preservation of materials beyond the scope of section 1054.9, which does not "extend to judicial or other non-law-enforcement agencies, such as jury commissioners or indigent defense programs." Moreover, the court held the trial court did not have authority to mandate that any agency within the scope of section 1054.9 provide an accounting as to whether the requested materials are in the possession of some other governmental unit, entity, official, or current or former employee, or whether any of the requested material has been destroyed." (**Id**. at pp. 534-535.)

11. What costs can the prosecution recoup for the examination and copying of materials covered by section 1054.9?

Section 1054.9(d) states: "The actual costs of examination or copying pursuant to this section shall be borne or reimbursed by the defendant." (Pen. Code, § 1054.9(d).)

In ***Rubio* v. *Superior Court*** (2016) 244 Cal.App.4th 459, the court held "that where the production of paper or electronic discovery is at issue, a defendant seeking postconviction discovery pursuant to section 1054.9 need not reimburse the agency providing the discovery for costs related to examination and preparation of documents for production. However, 'actual costs' does include the labor cost of the employee who actually copies items or transfers them to electronic media, a proportional share of equipment costs, and the cost of the copies, such as the ink, paper, or compact disc." (**Id**. at pp. 465–466.)

The ***Rubio*** court held "[w]ages and benefits paid to the employee who performs the service of copying are properly considered an actual cost of copying for purposes of section 1054.9, subdivision (d)." (**Id**. at p. 486.) On the other hand, it determined costs related to "services and supplies" (if unrelated to the actual copying) and countywide "departmental and divisional indirect costs" included in the auditor-controller's calculation were "too attenuated to qualify as actual costs of copying." (**Id**. at pp. 486-487.)

The term "examination" in subdivision (d) refers to the defendant's ***own*** examination of ***physical evidence***, not the People's examination of discovery materials in preparation for production. (**Id**. at p. 472, emphasis added.) Thus, the People are not entitled to recovery of costs for their own "examination of documents in preparation for providing copies of paper or electronic discovery." (**Id**. at p. 473.)

Finally, the ***Rubio*** court noted "that costs charged to a defendant pursuant to section 1054.9, subdivision (d), must be reasonable" but held that [w]hether particular charges are reasonable will depend on the facts of each case, and is a matter best decided by the trial court in the first instance." (**Id**. at p. 487 [and leaving open the question of whether the hourly rate charged was excessive].)

12. Can the prosecution insist on providing copies for a fee instead of allowing the defendant to examine the documents?

In ***Rubio* v. *Superior Court*** (2016) 244 Cal.App.4th 459, the court left open the "question of whether the People can insist on providing copies, for a fee, of discovery materials, as opposed to allowing a defendant to examine them[.]" (**Id**. at p. 487, fn. 13.)

13. Can a motion for postconviction discovery be denied solely due to a defendant's inability to pay in advance for copies of the discovery?

In ***Davis* v. *Superior Court*** (2016) 1 Cal.App.5th 881, the court held a defendant may not be completely prohibited "from receiving postconviction discovery without first paying for copies of what he receives." (**Id**. at p. 889.) This is because "section 1054.9 does not require an inmate seeking postconviction discovery to pay in advance for copies of discovery. Instead, it requires such an inmate to either bear or '***reimburse[]***' those costs. (**Id**. at p. 889, citing to § 1054.9(d), emphasis added.)

The ***Davis*** court did not specify "exactly how to address the payment of costs by [the defendant] as there are many ways in which an inmate may receive postconviction discovery without paying the copying costs in advance." (**Id**. at p. 889.) It declined to give an "exhaustive list of ways in which the parties might be able to ensure that [the defendant] receives the discovery to which he is entitled." (**Ibid**.) However, it suggested two potential methods: (i) the parties could "agree that [the defendant] can pay costs over time using his prison wages or other funds to which he has access" and (ii) the parties could agree to "make discovery available to [defendant's] counsel to view without taking or paying for any copies". (**Ibid**.)

In ***McGinnis* v. *Superior Court*** (2017) 7 Cal.App.5th 1240, the court agreed with ***Davis*** that a defendant's motion for postconviction discovery may not be denied solely due to a defendant's inability to pay in advance for copies of the discovery materials. (**Id**. at p. 1242.) Rather, when the defendant "demonstrates entitlement to postconviction discovery but asserts he is unable to pay copying costs, the court must determine if defendant is indigent as claimed and, if so, fashion a reimbursement plan or other means to permit the discovery to proceed." (**Ibid**.)

The ***McGinnis*** court approved of the parties' agreement that the defendant receive the postconviction discovery he requested and reimburse copying costs over time from his prison wages; and held the trial court "may, given the parties' stipulation, issue an order garnishing a portion of [defendant's] prison funds and remitting the payment to the district attorney." (**Id**. at p. 1246.) The ***McGinnis*** court, however, rejected the suggestion that the superior court pay the copying costs, add those costs to court fees, and then recover the costs under Government Code section 68635 (which allows garnishment of prison wages to collect court fees) because it did not believe postconviction discovery costs were "court filing fees and costs" encompassed by the garnishment statute and because "the superior courts have not been appropriated funds to advance these copying costs." (**Ibid**.)

14. Can a motion under section 1054.9 be summarily denied without a hearing on defendant's inability to pay?

In ***McGinnis* v. *Superior Court*** (2017) 7 Cal.App.5th 1240, the court ruled that a motion under section 1054.9 may not be summarily denied due to a defendant's inability to pay without a hearing." (**Id**. at p. 1247.) The court stated that where a defendant "demonstrates entitlement to postconviction discovery but asserts he is unable to pay copy costs, the court should determine if defendant is indigent as claimed and, if so, order reimbursement." (**Ibid**.) When a defendant makes the necessary showing of indigency, but "the district attorney submits evidence to the contrary or there is reason to question the defendant's showing, a hearing will be required to determine the issue." (**Ibid**.) However, the court observed that such "a hearing should rarely be necessary" as, "[i]n most cases the [trial] court will be able to make this determination based on the documentation submitted in support of the application." (**Id**. at p. 1247.)

XIII. IF EVIDENCE IS "DISCOVERABLE," DOES THAT MEAN IT IS ALWAYS ADMISSIBLE?

Just because evidence is discoverable does not mean it is admissible. (**See *Moore* v. *Marr*** (10th Cir. 2001) 254 F.3d 1235, 1244, fn. 12.) Evidence Code section 352 gives a court authority to exclude even relevant evidence. It is common for prosecutors to turn over material in discovery but argue against its admissibility. (**See e.g**., ***People* v. *Lightsey*** (2012) 54 Cal.4th 668, 714; ***People* v. *Robinson*** (2005) 37 Cal. 4th 592, 626; **see also** this outline, section I-3-D at p. 8 [discussing duty to disclose inadmissible evidence].)

XIV. DOES THE PROSECUTOR HAVE ANY ETHICAL DISCOVERY OBLIGATIONS (BEYOND HIS OR HER CONSTITUTIONAL OR STATUTORY DUTIES)?

Although one of a prosecutor's "unique ethical obligations is the duty to produce ***Brady*** evidence to the defense" (***Connick* v. *Thompson*** (2011) 563 U.S. 51, 62), a prosecutor has certain ethical obligations when it comes to discovery that exist ***in addition to*** any constitutional (i.e., ***Brady***) or statutory discovery obligations. (**See e.g.**, ***Cone* v. *Bell*** (2009) 556 U.S. 449, 470, fn. 15 ["[a]lthough the Due Process Clause of the Fourteenth Amendment, as interpreted by ***Brady***, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations" and citing to ABA model rule 3.8(d)]; ***Imbler* v. *Pachtman*** (1976) 424 U.S. 409, 427, fn. 25 [prosecutor is "bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction"]; ***People* v. *Gonzalez*** (1990) 51 Cal.3d 1179, 1261 [same]; ***In re Field*** [unreported] 5 Cal. State Bar Ct. Rptr. 171 [2010 WL 489505], *10 [finding ethical violation based on, in part, the prosecutor's failure to timely comply with discovery obligations of section 1054.1 regardless of whether the belated failure violated the constitutional duty to disclose evidence under ***Brady***].)

A willful violation of a rule of professional conduct can be the basis for discipline by the State Bar. (California Rule of Professional Conduct, Rule 1.0(b)(1).) This includes rules governing a prosecutor's discovery obligations. (**See *Matter of Nassar*** (Cal. Bar Ct., Sept. 18, 2018, No. 14-O-00027) 2018 WL 4490909 [disciplining prosecutor for violating Business and Professions Code sections 6068(a) and 6106 and rule of professional conduct 5-220 (now rule 3.4)].) "A willful violation of the rule does not require the lawyer intend to violate the law." (Comment to CRPC, Rule 1.0, subd. [3].)

Business and Professional Code section 6068, subdivision (a) states it is a duty of an attorney "to support the Constitution and laws of the United States and of this state" and this requires prosecutors to comply with their ***Brady*** (i.e., "support the Constitution") and ***statutory*** (i.e., "support the . . . laws . . . of this state) discovery obligations. A violation of this section can be the basis for discipline. (**See *Matter of Nassar*** (Cal. Bar Ct., Sept. 18, 2018, No. 14-O-00027) 2018 WL 4490909, *4-*5 [finding prosecutor's failure to comply with discovery obligations of section 1054.1 was violation of section 6068]; ***In re Field*** (Cal. Bar Ct., Feb. 12, 2010) 5 Cal. State Bar Ct. Rptr. 171 [2010 WL 489505] [same].)*

> **Editor's note:** Both the cases of ***Nassar*** and ***Field*** are discussed in greater length in this outline, section VII-4-D at pp. 237-238.)

Business and Profession Code section 6106 states: "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an

attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension. If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to disbarment or suspension from practice therefor." (Bus. & Prof. Code, § 6106.) A violation of the discovery statutes can be found to be an act involving moral turpitude. (**See e.g.**, ***Matter of Nassar*** (Cal. Bar Ct., Sept. 18, 2018, No. 14-O-00027) 2018 WL 4490909, at *5 [finding "grossly negligent" failure to produce discoverable evidence to the defense and for purposes of securing "a strategic trial advantage" was act of moral turpitude].)

1. California Rule of Professional Conduct 3.4(b): Fairness to Opposing Party and Counsel

California Rule of Professional Conduct, rule 3.4(b) [formerly rule 5-220] provides a "lawyer shall not counsel or assist another person to . . . suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce. . .". This rule may be violated by a constitutional *or* statutory discovery violation. (**See e.g.,** ***Matter of Nassar*** (Cal. Bar Ct., Sept. 18, 2018, No. 14-O-00027) 2018 WL 4490909, *6 [failure to disclose exculpatory evidence within 30 days of trial]; ***Matter of Alexander*** (Cal. Bar Ct., Apr. 30, 2014, 11-O-12821) 2014 WL 1778656, at *7 [failure to disclose exculpatory evidence before preliminary examination].)

Paragraph 2 of the Comment to rule 3.4 provides: "A violation of a civil or criminal discovery rule or statute does not *by itself* establish a violation of this rule. See rule 3.8 for special disclosure responsibilities of a prosecutor." (Emphasis added.)

2. California Rule of Professional Conduct 3.8(d): Special Responsibilities of a Prosecutor

As of November 2017, a new rule governing the responsibilities of a prosecutor went into effect: Rule 5-110 [re-designated Rule 3.8 as of November 2018].) In pertinent part, the new rule provides:

"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, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; . . .

In the Comment section to the Rule 3.8, there are several provisions clarifying the scope of the discovery obligations imposed by the rule.

"[3] The disclosure obligations in paragraph (d) 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. For example, these obligations include, at a minimum, the duty to disclose impeachment evidence or

information that a prosecutor knows or reasonably should know casts significant doubt on the accuracy or admissibility of witness testimony on which the prosecution intends to rely. Paragraph (D) does not require disclosure of information protected from disclosure by federal or California laws and rules, as interpreted by case 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 paragraph (D) 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." (Comment, California State Bar Rule, Rule 3.8(d), emphasis added.)

Before the California Supreme Court approved of this version of the rule, the California State Bar had submitted an earlier version that raised many concerns among prosecutors that the Bar was imposing new discovery obligations on prosecutors untethered to either statutory or case law. Among other fears was that language in the earlier version regarding *when* disclosure had to be made would be inconsistent with section 1054 as well as with case law governing disclosure of ***Brady*** evidence. For example, in a Formal Ethics Opinion (Opinion 09-454), the ABA put its own spin on how a version of Rule 3.8(d) – a version that closely paralleled the language of the earlier proposed version by the California State Bar - should be interpreted. Among the most significant aspects of the Opinion's interpretation of the rule: (i) the rule imposed obligations "***separate from*** disclosure obligations imposed under the Constitution, statutes, procedural rules, court rules, or court orders"; (ii) the rule dispensed with any "***de minimis*** exception to the prosecutor's disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant's guilt, or that the favorable evidence is highly unreliable"; (iii) the rule pushed up the time for disclosure of information by interpreting the term "timely disclosure" to mean as "soon as reasonably practical" and said that meant the prosecutor was required to "disclose evidence and information covered by Rule 3.8(d) ***prior to a guilty plea proceeding, which may occur concurrently with the defendant's arraignment***;" (iv) the rule required disclosure before entry of a guilty plea even the guilty plea occurred at arraignment and even if the defendant consented to non-disclosure in exchange for leniency - a duty completely inconsistent with the High Court opinion in ***United States* v. *Ruiz*** (2002) 536 U.S. 622 (**see** this outline, section I-14-B-I at pp. 150-151). (Emphasis added.)

Fortunately, the California Supreme Court (which has a reasonable understanding of the prosecutorial perspective and practical realities of practice) rejected the initial proposal submitted by the State Bar Committee on Professional Responsibility and Conduct (which was largely devoid of prosecutorial

perspective and largely ignored what little prosecutorial input was sought). The California Supreme Court insisted on the inclusion of the following language in the Comment to Rule 3.8: ***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 paragraph (D) 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***." (Comment to Rule 3.8, paragraph (3).)

This paragraph should alleviate concerns that the State Bar was displacing the courts and the legislature as arbiters of prosecutorial discovery obligations and imposing unknowable and unreasonable timing requirements and discovery obligations.

Editor's note: The ABA Model Rules of Professional Conduct "do not establish ethical standards in California, as they have not been adopted in California and have no legal force of their own." (***State Compensation Ins. Fund* v. *WPS, Inc.*** (1999) 70 Cal.App.4th 644, 655-656 citing to ***General Dynamics Corp. v. Superior Court*** (1994) 7 Cal.4th 1164, 1190, fn. 6 and ***Cho* v. *Superior Court*** (1995) 39 Cal.App.4th 113, 121, fn. 2.) **However**, paragraph (b)(2) of California Rule of Professional Conduct 1.0 states: "The prohibition of certain conduct in these rules is not exclusive. Lawyers are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) and opinions of California courts." And paragraph 4 of the Comment to California Rule of Professional Conduct 1.0 provides: "In addition to the authorities identified in paragraph (b)(2), opinions of ethics committees in California, although not binding, should be consulted for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered." (**See also *State Compensation Ins. Fund* v. *WPS, Inc.*** at p. 656.) "Thus, the ABA Model Rules of Professional Conduct may be considered as a collateral source, particularly in areas where there is no direct authority in California and there is no conflict with the public policy of California." (**Ibid**.)

3. California Rule of Professional Conduct 3.8(f) & (g): Special Responsibilities of a Prosecutor (Post-Verdict Obligations)

Although there is no *constitutional* post-verdict discovery duty*, existing case law in California imposes a duty to take action if evidence casting doubt on a conviction comes to light after the verdict. "[A]fter a conviction the prosecutor … is bound by the ethics of his office to inform the appropriate authority of … information that casts doubt upon the correctness of the conviction," (***People* v. *Curl*** (2006) 140 Cal.App.4th 310, 318, citing to ***Imbler* v. *Pachtman*** (1976) 424 U.S. 409, 427, fn. 25; ***Grayson* v. *King*** (11th Cir. 2006) 460 F.3d 1328, 1337 ["the prosecution maintains an ongoing ethical obligation to inform the defense of" of after-acquired evidence that might cast doubt on a conviction].)

Editor's note: In ***People* v. *Garcia*** (1993) 17 Cal.App.4th 1169, the appellate court seemed to conglomerate the ethical duty and the due process duty to disclose favorable material evidence after trial, noting that in ***Thomas* v. *Goldsmith*** (9th Cir. 1992) 979 F.2d 746, the Ninth Circuit had stated the ***Brady*** obligation continued in post-conviction habeas proceeding. (***Garcia*** at p. 1179 and fn. 5.) ***Garcia*** is no longer good law on this point, nor is ***Thomas*.** In ***District Attorney's Office for Third Judicial Dist. v. Osborne*** (2009) 557 U.S. 52, the High Court criticized the Ninth Circuit for relying on the ***Goldsmith*** case and specifically held ***Brady*** does not extend to the postconviction context. (***Osborne*** at pp. 68-69.) However, no California case has yet to specifically overrule ***Garcia*** in this regard.

Subdivisions (f) and (g) of the newly adopted California State Bar Rule of Professional Conduct 3.8 [Special Responsibilities of a Prosecutor, effective November 2018] also provide:

"(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,
(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) 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."

In the "Discussion" portion of the proposed Rule 3.8, the Commission states:

"[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 4.2.)

[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 this rule."

Business and Professions Code section 6131 makes it a misdemeanor (and requires disbarment) if an attorney either "directly or indirectly advises in relation to, or aids, or promotes the *defense* of any action or proceeding in any court the prosecution of which is carried on, aided or promoted by any person as district attorney or other public prosecutor with whom such person is directly or indirectly connected as a partner" or "having himself prosecuted or in any manner aided or promoted any action or proceeding in any court as district attorney or other public prosecutor, afterwards, directly or indirectly, advises in relation to or takes any part in the defense thereof, as attorney or otherwise, or who takes or receives any valuable consideration from or on behalf of any defendant in any such action upon any understanding or agreement whatever having relation to the defense thereof." (Bus. & Prof. Code, § 6131(a)&(b), emphasis added.)

However, whether the requirements of subdivisions (f) and (g) conflict with section 6131 is a question that has not been raised.

4. California Rule of Professional Conduct 5.1: Responsibilities of Managerial and Supervisory Lawyers

There is duty on the part of prosecutor's offices to make efforts to ensure that all the attorneys in the office comply with the state bar rules, which would include the rule imposing special discovery obligations on prosecutors (rule 3.8). Moreover, managerial or supervisorial attorneys may be subject to discipline for knowingly ratifying discovery violations committed by their subordinates or failing to take reasonable remedial action at a time when the conduct is known, and the consequences can be avoided or mitigated. This rule has potential ramifications for supervisory prosecutors when it comes to training on discovery.

Rule 5.1 provides:

(a) A lawyer who individually or together with other lawyers possesses managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm comply with these rules and the State Bar Act.

(b) A lawyer having direct supervisory authority over another lawyer, whether or not a member or employee of the same law firm, shall make reasonable* efforts to ensure that the other lawyer complies with these rules and the State Bar Act.

(c) A lawyer shall be responsible for another lawyer's violation of these rules and the State Bar Act if:

(1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or

(2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, whether or not a member or employee of the same law firm, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The Comment to Rule 5.1, in relevant part, provides:

[1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable* efforts to establish internal policies and procedures designed, for example, to . . . ensure that inexperienced lawyers are properly supervised.

[2] Whether particular measures or efforts satisfy the requirements of paragraph (a) might depend upon the law firm's structure and the nature of its practice, including the size of the law firm, whether it has more than one office location . . .

[3] A partner, shareholder or other lawyer in a law firm who has intermediate managerial responsibilities satisfies paragraph (a) if the law firm has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. For example, the managing lawyer of an office of a multi-office law firm* would not necessarily be required to promulgate firm-wide policies intended to reasonably assure that the law firm's lawyers comply with the rules or State Bar Act. However, a lawyer remains responsible to take corrective steps if the lawyer knows or reasonably should know that the delegated body or person is not providing or implementing measures as required by this rule.

[4] Paragraph (a) also requires managerial lawyers to make reasonable* efforts to assure that other lawyers in an agency or department comply with these rules and the State Bar Act. This rule contemplates, for example, the creation and implementation of reasonable* guidelines relating to the assignment of cases and the distribution of workload among lawyers in a public sector legal agency or other legal department. (See, e.g., State Bar of California, Guidelines on Indigent Defense Services Delivery Systems (2006).)

Paragraph (b) -- Duties of Supervisory Lawyers

[5] Whether a lawyer has direct supervisory authority over another lawyer in particular circumstances is a question of fact.

Paragraph (c)--Responsibility for Another's Lawyer's Violation

[6] The appropriateness of remedial action under paragraph (c)(2) would depend on the nature and seriousness of the misconduct and the nature and immediacy of its harm. A managerial or supervisory lawyer must intervene to prevent avoidable consequences of misconduct if the lawyer knows that the misconduct occurred.

[7] A supervisory lawyer violates paragraph (b) by failing to make the efforts required under that paragraph, even if the lawyer does not violate paragraph (c) by knowingly directing or ratifying the conduct, or where feasible, failing to take reasonable remedial action.

[8] Paragraphs (a), (b), and (c) create independent bases for discipline. This rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm. Apart from paragraph (c) of this rule and rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate, or subordinate lawyer. The question of whether a lawyer can be liable civilly or criminally for another lawyer's conduct is beyond the scope of these rules."

Rule 5.1 is new to California. It is based *ABA Model Rule of Professional Conduct 5.1*. Some guidance as to how it will play out when these rules are applied to prosecutor's offices can be gleaned from a Formal Ethics Opinion (Opinion 09-454) of the ABA, where the ABA discussed the discovery obligations of supervisors and other prosecutors who are not personally responsible for a criminal prosecution in light of the *ABA rule*.

The Opinion stated: "Any supervisory lawyer in the prosecutor's office and those lawyers with managerial responsibility are obligated to ensure that subordinate lawyers comply with all their legal and ethical obligations. Thus, supervisor who directly oversee trial prosecutors must make reasonable efforts to ensure that those under their direct supervision meet their ethical obligations of disclosure, and are subject to discipline for ordering, ratifying, or knowingly failing to correct discovery violations. To promote compliance with Rule 3.8(d) in particular, supervisory lawyers must ensure that subordinate prosecutors are adequately trained regarding this obligation. Internal office procedures must facilitate such compliance." (Opinion 09-454)

California rule 5.1 is not identical to ABA rule 5.1 and ABA rules and opinions are not binding in California. (**See** editor's note, this outline, section XIV-2 at p. 299.) But such rules may be considered in deciding how comparable rules should be applied in California and there is no reason to think that California rule 5.1 will be interpreted significantly differently than ABA rule 5.1 was in the ABA Opinion.

Editor's note: For purposes of reference, ABA Rule of Professional Conduct 5.1 provides:

(a) "A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

5. California Rule of Professional Conduct 5.2: Responsibilities of a Subordinate Lawyer

Another new California Rule of Professional Conduct is Rule 5.2. (Adopted, eff. Nov. 1, 2018.) The rule relates to the responsibilities of subordinate lawyers.

California Rule of Professional Conduct 5.2 states:

"(a) A lawyer shall comply with these rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.

(b) A subordinate lawyer does not violate these rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable* resolution of an arguable question of professional duty."

***Editor's note**: California State Rule of Professional Conduct, Rule 1.0.1 (h) states: "'Reasonable' or 'reasonably' when used in relation to conduct by a lawyer means the conduct of a reasonably prudent and competent lawyer."

The **Comment to Rule 5.2** states:

"When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to the lawyers' responsibilities under these rules or the State Bar Act and the question can reasonably* be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably* can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable* alternatives to select, and the subordinate may be guided accordingly. If the subordinate lawyer believes that the supervisor's proposed resolution of the question of professional duty would result in a violation of these rules or the State Bar

Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer."

Rule 5.2, like rule 5.1, has a counterpart in the ABA Rules of Professional Conduct. The ABA version of the rule is also entitled Rule 5.2 and provides as follows:

"(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person. ¶ (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."

Prosecutors should expect the State Bar to look for guidance interpreting the newly adopted Rule 5.2 to opinions interpreting the comparable ABA rule.

6. Sanction of Recusal and Report to State Bar for Intentional Prosecutorial Misconduct: Penal Code Section 1424.5

Penal Code section 1424.5 is a relatively new section, enacted in 2016 by AB 1328 and slightly amended in 2017 by SB 1474. It allows courts to report prosecutors who deliberately and intentionally withhold relevant, material exculpatory evidence to the State Bar and allows for disqualification of either the prosecutor or the prosecutor's office in certain circumstances for such conduct.

Specifically, section 1424.5 provides:

"(a)(1) Upon receiving information that a prosecuting attorney may have deliberately and intentionally withheld relevant, material exculpatory evidence or information in violation of law, a court may make a finding, supported by clear and convincing evidence, that a violation occurred. If the court finds such a violation, the court shall inform the State Bar of California of that violation if the prosecuting attorney acted in bad faith and the impact of the withholding contributed to a guilty verdict, guilty or nolo contendere plea, or, if identified before conclusion of trial, seriously limited the ability of a defendant to present a defense.

(2) A court may hold a hearing to consider whether a violation occurred pursuant to paragraph (1).

(b)(1) If a court finds, pursuant to subdivision (a), that a violation occurred in bad faith, the court may disqualify an individual prosecuting attorney from a case.

(2) Upon a determination by a court to disqualify an individual prosecuting attorney pursuant to paragraph (1), the defendant or his or her counsel may file and serve a notice of a motion pursuant to Section 1424 to disqualify the prosecuting attorney's office if there is sufficient evidence that other employees of the prosecuting attorney's office knowingly and in bad faith participated in or sanctioned

the intentional withholding of the relevant, material exculpatory evidence or information and that withholding is part of a pattern and practice of violations.

(c) This section does not limit the authority or discretion of, or any requirement placed upon, the court or other individuals to make reports to the State Bar of California regarding the same conduct, or otherwise limit other available legal authority, requirements, remedies, or actions."

Duty of Court to Report Violation of Section 1424.5: Business and Professions Code Section 6086.7

The same bill (AB 1328) that enacted section 1424.5 in 2016 also amended Business and Professions Code section 6086.7, which outlines when a court is required to report attorney misconduct to the State Bar. The bill did not, however, amend other subdivisions of section 6086.7, which *continue* to require a court to notify the State Bar when a case is reversed on appeal for prosecutorial misconduct but specifically exempt courts from having to report the imposition of discovery sanctions in general.

Business and Professions Code section 6086.7 outlines when a court is required to notify the State Bar of imposition of attorney misconduct. As it now reads, subdivision (a) requires the court to "notify the State Bar of any of the following:

(1) ***A final order of contempt*** imposed against an attorney that may involve grounds warranting discipline under this chapter. The court entering the final order shall transmit to the State Bar a copy of the relevant minutes, final order, and transcript, if one exists.

(2) ***Whenever a modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct***, incompetent representation, or willful misrepresentation of an attorney.

(3) The imposition of any judicial sanctions against an attorney***, except sanctions for failure to make discovery*** or monetary sanctions of less than one thousand dollars ($1,000).

(4) The imposition of any civil penalty upon an attorney pursuant to Section 8620 of the Family Code.

(5) A violation described in paragraph (1) of subdivision (a) of Section 1424.5 of the Penal Code by a prosecuting attorney, if the court finds that the prosecuting attorney acted in bad faith and the impact of the violation contributed to a guilty verdict, guilty or nolo contendere plea, or, if identified before conclusion of trial, seriously limited the ability of a defendant to present a defense.

(b) In the event of a notification made under subdivision (a) the court shall also notify the attorney involved that the matter has been referred to the State Bar.

(c) The State Bar shall investigate any matter reported under this section as to the appropriateness of initiating disciplinary action against the attorney." (Emphasis added.)

The Business and Professions code section relating to the duty of attorneys to self-report (section 6068) to the State Bar is consistent with paragraph (3) of section 6086.7(a). There is also no duty to self-report the impositions of sanctions for failure to make discovery. (**See** Bus. & Prof. Code, § 6068(o)(3) [requiring attorneys to "report to the agency charged with attorney discipline, in writing, within 30 days of the time the attorney has knowledge of any of the following: . . . (3) The imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000).].)

Thus, there appears to be no duty to self-report imposition of a discovery sanction unless it constitutes a violation of Penal Code section 1424.5 or a discovery violation unless it results in the reversal of a case on appeal.

XV. THE CRIME OF WITHHOLDING RELEVANT EXCULPATORY EVIDENCE: PENAL CODE SECTION 141(c)

Penal Code section 141(c), which went into effect January 1, 2017, provides: "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." (Pen. Code, § 141(c).)

Because a violation of Penal Code section 141(c) requires a prosecutor to act in bad faith and with the specific intent to conceal or destroy evidence, it is doubtful that any honest prosecutor will ever engage in such conduct or be criminally charged with engaging in such conduct. Mere defense allegations of discovery violations should not trigger concerns. Moreover, false accusations of prosecutors engaging in criminal behavior (e.g., "suborning perjury") are nothing new and come with the territory. However, CDAA convened a working group that produced a document with suggestions on how discovery practices can be designed to help insulate prosecutors from false accusations of criminal discovery violations and how prosecutors can respond to such false accusations: "COUNCIL FOR CRIMINAL JUSTICE INTEGRITY: An Overview of Penal Code Section 141(c) and Suggested Office Protocols for Ensuring That Discovery Duties Are Maintained and Properly Documented by Prosecutors." It is included in the Discovery Seminar materials.

XVI. OBTAINING POTENTIALLY PROTECTED OR PRIVILEGED RECORDS FROM THIRD PARTIES: SELECTED TOPICS

1. Obtaining records from third parties in general (subpoenas)

Penal Code section 1326 is the general mechanism for obtaining third party records in a criminal case, while Penal Code section 1327 describes what form a subpoena issued pursuant to section 1326 must take. (**See *Alford* v. *Superior Court*** (2003) 29 Cal.4th 1033, 1045 ["Penal Code sections 1326 and 1327 . . . empower either party in a criminal case to serve a subpoena duces tecum requiring the person or entity in possession of the materials sought to produce the information in court for the party's inspection."].)

Evidence Code sections 1560 and 1561 provide the mechanism for subpoenaing records without having to simultaneously subpoena the custodian of the records.

A. Penal Code Sections 1326 and 1327 & Evidence Code Sections 1560 and 1561

Penal Code section 1326 provides:

(a) The process by which the attendance of a witness before a court or magistrate is required is a subpoena. It may be signed and issued by any of the following:

(1) A magistrate before whom a complaint is laid or his or her clerk, the district attorney or his or her investigator, or the public defender or his or her investigator, for witnesses in the state.

(2) The district attorney, his or her investigator, or, upon request of the grand jury, any judge of the superior court, for witnesses in the state, in support of an indictment or information, to appear before the court in which it is to be tried.

(3) The district attorney or his or her investigator, the public defender or his or her investigator, or the clerk of the court in which a criminal action is to be tried. The clerk shall, at any time, upon application of the defendant, and without charge, issue as many blank subpoenas, subscribed by him or her, for witnesses in the state, as the defendant may require.

(4) The attorney of record for the defendant.

(b) A subpoena issued in a criminal action that commands the custodian of records or other qualified witness of a business to produce books, papers, documents, or records ***shall direct that those items be delivered by the custodian or qualified witness in the manner specified in subdivision (b) of Section 1560 of the Evidence Code***. Subdivision (e) of Section 1560 of the Evidence Code shall not apply to criminal cases.

(c) In a criminal action, no party, or attorney or representative of a party, may issue a subpoena commanding the custodian of records or other qualified witness of a business to provide books, papers, documents, or records, or copies thereof, relating to a person or entity other than the subpoenaed person or entity in any manner other than that specified in subdivision (b) of Section 1560 of the Evidence Code. When a defendant has issued a subpoena to a person or entity that is not a party for the production of books, papers, documents, or records, or copies thereof, 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.

(d) This section shall not be construed to prohibit obtaining books, papers, documents, or records with the consent of the person to whom the books, papers, documents, or records relate." (Pen. Code, § 1326.)

Penal Code section 1327 provides:

A subpoena authorized by Section 1326 shall be substantially in the following form:

The people of the State of California to A.B.:

You are commanded to appear before C.D., a judge of the _____ Court of _____ County, at (naming the place), on (stating the day and hour), as a witness in a criminal action prosecuted by the people of the State of California against E.F.

Given under my hand this _____ day of _____, A.D. 19_____. G.H., Judge of the _____ Court (or "J.K., District Attorney," or "J.K., District Attorney Investigator," or "D.E., Public Defender," or "D.E., Public Defender Investigator," or "F.G., Defense Counsel," or "By order of the court, L.M., Clerk," or as the case may be).

If books, papers, or documents are required, a direction to the following effect must be contained in the subpoena: "And you are required, also, to bring with you the following" (describing intelligibly the books, papers, or documents required)." (Pen. Code, § 1327.)

Evidence Code section 1560 provides:

(a) As used in this article:

(1) "Business" includes every kind of business described in Section 1270.

(2) "Record" includes every kind of record maintained by a business.

(b) Except as provided in Section 1564, when a subpoena duces tecum is served upon the custodian of records or other qualified witness of a business in an action in which the business is neither a party nor the place where any cause of action is alleged to have arisen, and the subpoena requires the production of all or any part of the records of the business, it is sufficient compliance therewith if the custodian or other qualified witness delivers by mail or otherwise a true, legible, and durable copy of all of the records

described in the subpoena to the clerk of the court or to another person described in subdivision (d) of Section 2026.010 of the Code of Civil Procedure, together with the affidavit described in Section 1561, within one of the following time periods:

(1) In any criminal action, five days after the receipt of the subpoena.

(2) In any civil action, within 15 days after the receipt of the subpoena.

(3) Within the time agreed upon by the party who served the subpoena and the custodian or other qualified witness.

(c) The copy of the records shall be separately enclosed in an inner envelope or wrapper, sealed, with the title and number of the action, name of witness, and date of subpoena clearly inscribed thereon; the sealed envelope or wrapper shall then be enclosed in an outer envelope or wrapper, sealed, and directed as follows:

(1) If the subpoena directs attendance in court, to the clerk of the court.

(2) If the subpoena directs attendance at a deposition, to the officer before whom the deposition is to be taken, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business.

(3) In other cases, to the officer, body, or tribunal conducting the hearing, at a like address.

(d) Unless the parties to the proceeding otherwise agree, or unless the sealed envelope or wrapper is returned to a witness who is to appear personally, the copy of the records shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, upon the direction of the judge, officer, body, or tribunal conducting the proceeding, in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records that are original documents and that are not introduced in evidence or required as part of the record shall be returned to the person or entity from whom received. Records that are copies may be destroyed.

(e) As an alternative to the procedures described in subdivisions (b), (c), and (d), the subpoenaing party in a civil action may direct the witness to make the records available for inspection or copying by the party's attorney, the attorney's representative, or deposition officer as described in Section 2020.420 of the Code of Civil Procedure, at the witness' business address under reasonable conditions during normal business hours. Normal business hours, as used in this subdivision, means those hours that the business of the witness is normally open for business to the public. When provided with at least five business days' advance notice by the party's attorney, attorney's representative, or deposition officer, the witness shall designate a time period of not less than six continuous hours on a date certain for copying of records subject to the subpoena by the party's attorney, attorney's representative, or deposition officer. It shall be the responsibility of the attorney's representative to deliver any copy of the records as directed in

the subpoena. Disobedience to the deposition subpoena issued pursuant to this subdivision is punishable as provided in Section 2020.240 of the Code of Civil Procedure.

(f) If a search warrant for business records is served upon the custodian of records or other qualified witness of a business in compliance with Section 1524 of the Penal Code regarding a criminal investigation in which the business is neither a party nor the place where any crime is alleged to have occurred, and the search warrant provides that the warrant will be deemed executed if the business causes the delivery of records described in the warrant to the law enforcement agency ordered to execute the warrant, it is sufficient compliance therewith if the custodian or other qualified witness delivers by mail or otherwise a true, legible, and durable copy of all of the records described in the search warrant to the law enforcement agency ordered to execute the search warrant, together with the affidavit described in Section 1561, within five days after the receipt of the search warrant or within such other time as is set forth in the warrant. This subdivision does not abridge or limit the scope of search warrant procedures set forth in Chapter 3 (commencing with Section 1523) of Title 12 of Part 2 of the Penal Code or invalidate otherwise duly executed search warrants." (Evid. Code, § 1560.)

Evidence Code section 1561

(a) The records shall be accompanied by the affidavit of the custodian or other qualified witness, stating in substance each of the following:

(1) The affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records.

(2) The copy is a true copy of all the records described in the subpoena duces tecum or search warrant, or pursuant to subdivision (e) of Section 1560, the records were delivered to the attorney, the attorney's representative, or deposition officer for copying at the custodian's or witness' place of business, as the case may be.

(3) The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event.

(4) The identity of the records.

(5) A description of the mode of preparation of the records.

(b) If the business has none of the records described, or only part thereof, the custodian or other qualified witness shall so state in the affidavit, and deliver the affidavit and those records that are available in one of the manners provided in Section 1560.

(c) If the records described in the subpoena were delivered to the attorney or his or her representative or deposition officer for copying at the custodian's or witness' place of business, in addition to the affidavit required by subdivision (a), the records shall be accompanied by an affidavit by the attorney or his or her

representative or deposition officer stating that the copy is a true copy of all the records delivered to the attorney or his or her representative or deposition officer for copying." (Evid. Code, § 1561.) Evidence Code section 1270 defines "a business" as including "every kind of business, governmental activity, profession, occupation, calling, or operation of institutions, whether carried on for profit or not." (Evid. Code, § 1270.)

B. Can a Defense Attorney Subpoena Non-Business Records from a Private Individual and Can an Individual or Prosecutor Do Anything About It?

It is not unusual for the defense to attempt to subpoena records from civilian witnesses. Is this proper when the records are not business records?

A quick glance at Penal Code section 1326 and Evidence Code section 1560 seems to suggest that a subpoena duces tecum can only be used to subpoena *business* records. (See Pen. Code, § 1326(b) [A subpoena issued in a criminal action that commands the custodian of records or other qualified witness *of a business* to produce books, papers, documents, or records shall direct that those items be delivered . . . specified in subdivision (b) of Section 1560 of the Evidence Code"]; Evid. Code, § 1560(b) ["Except as provided in Section 1564, when a subpoena duces tecum is served upon the custodian of records or other qualified witness *of a business* in an action in which the business . . ."].)

However, a closer reading of the language in section 1326 reveals that it does not technically prohibit the use of a subpoena duces tecum for *non*-business records. It simply sets out *how* a subpoena for business records must proceed *if* the subpoena commands the custodian of records or other qualified witness of a business to produce records. (Pen. Code, § 1326(b)&(c).)

Moreover, in the unpublished case of ***Murray* v. *Superior Court*** [unreported] 2013 WL 452894, the court directly addressed the question and held the authority to issue a subpoena under section 1326 was not limited to subpoenas for businesses. (**Id**. at p. *4.) The ***Murray*** court based its decision on language from the case of ***People* v. *Hammon*** (1997) 15 Cal.4th 1117. (***Murray*** at p. *4.) In ***Hammon***, the California Supreme Court stated: "That the defense may issue subpoenas duces tecum to private persons is implicit in statutory law (Pen. Code, §§ 1326, 1327) and has been clearly recognized by the courts for at least two decades." (***Hammon*** at p. 1128, citing to ***Millaud* v. *Superior Court*** (1986) 182 Cal.App.3d 471, 475–476 and ***Pacific Lighting Leasing Co*. v. *Superior Court*** (1976) 60 Cal.App.3d 552, 559–566.) The ***Murray*** court then pointed out, as further example of such use, that in the case of ***Rubio* v. *Superior Court*** (1988) 202 Cal.App.3d 1343, the court "granted a criminal defendant's petition for writ of mandate compelling the trial court to uphold a subpoena duces tecum issued to the parents of the alleged victim." (***Murray*** at p. *4.) Indeed, in the appellate court, the People conceded such authority existed. (**Ibid**.)

Interestingly, none of the cases relied upon by ***Murray*** specifically addressed the question of whether a subpoena duces tecum could be used to obtain records that fell outside the broad definition of business

records as that term is used in Evidence Code sections 1260 and 1560. ***Hammon*** involved a subpoena for business records from three psychologist and child protective services. (**Id**. at p. 1120.) ***Millaud*** involved a subpoena for records of private investigating service hired by a supermarket. (**Id**. at p. 473.) And ***Pacific Lighting Leasing Co.*** involved a subpoena for "personal property lease files of petitioner, its corporate articles, by-laws and minutes of meetings, all licenses and license applications by petitioner to engage in the business of leasing, and the regularly prepared year-end financial statements." (**Id**. at p. 554.) ***Rubio*** did involve a subpoena for a non-business record (a videotape of persons engaging in sex acts) but the only objection raised was based on a claim of privilege, not on a claim that section 1326 did not permit the use of subpoenas for business records. (**Id**. at pp. 1346-1351.) Thus, the question arguably remains open – since the unpublished decision is not precedent. That said, the argument against allowing use of a subpoena to obtain non-business records from private individuals on grounds it is not authorized by section 1326 is not an especially strong one.

Instead, when a defense attorney seeks to subpoena to court non-business records of a private individual, a more compelling argument in opposition to release of the records can be made based on the Victim's Bill of Rights of 2008, commonly known as Marsy's Law (Cal. Const., art. I, § 28). Marsy's Law provides, a crime victim has, inter alia, the right to (i) "prevent the disclosure of confidential information or records to the defendant, the defendant's attorney, . . . 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" and (ii) "refuse an interview, deposition, or discovery request by the defendant, the defendant's attorney, . . .". (Cal. Const., art. I, § 28(b)(4)&(5).) And these rights can be enforced in court by the "victim, the retained attorney of a victim, a lawful representative of the victim, or the ***prosecuting attorney*** upon request of the victim, . . .". (Cal. Const., art. I, § 28 (c)(1); **see also *Kling* v. *Superior Court*** (2010) 50 Cal.4th 1068, 1080 [extensively discussed in this outline at section XVII-2 at pp. 325-327]; this outline, section III-7 at pp. 173-174.)

The appellate court in ***Murray* v. *Superior Court*** [unreported] 2013 WL 452894 ***did not address the question*** of whether the subpoenas violated the rights provided by Marsy's law because Marsy's Law was not relied upon by the trial court and was an issue that had not been addressed by either party. (***Murray*** at p. *2 and fn. 3.) And, significantly, in ***People* v. *Hammon*** (1997) 15 Cal.4th 1117, right after the California Supreme Court acknowledged that a general right of the defense to issue subpoena duces tecum to private persons, it stated, "this more general right ***provides no basis for overriding a statutory and constitutional privilege***." (**Id**. at p. 1128, emphasis added; **see also *Rubio v. Superior Court*** (1988) 202 Cal.App.3d 1343, 1350 [holding trial court must balance defendant's right to due process against the "***constitutional rights of privacy***" and "statutory privilege not to disclose confidential marital communications" of the victim's parents in deciding whether to quash defendant's subpoena for a videotape belonging to the victim's parents], emphasis added.)

2. Obtaining DMV Records

[This portion of the outline was most excellently authored by Santa Clara County DDA Jordan Kahler.]

Federal Statutory Protections for DMV Records – Generally Inapplicable in Criminal Cases

The Driver's Privacy Protection Act of 1994 ("DPPA"), 18 U.S.C. §§ 2721-2725, forbids the disclosure of "personal information" by state motor vehicle departments to the public. It does not protect information on "vehicular accidents, driving violations, and the driver's status." (*Id.* at § 2725(3).) The statute permits both prosecutors and defense attorneys to obtain any information it otherwise protects for "investigation in anticipation of litigation" in state criminal proceedings. (18 U.S.C. § 2721(b)(4).) Therefore, it does not bar discovery in criminal cases.

However, there are special federal statutory protections for substance abuse records which may be held by the DMV. To obtain substance abuse records from programs licensed by the DMV, the prosecution or defense must apply with Public Health Service Act, 42 U.S.C. § 201 *et seq*. (9 C.C.R. § 9866(c) [requiring compliance with 42 C.F.R. §§ 2.1-2.67]; ***People* v. *Barrett*** (2003) 109 Cal.App.4th 437, 450.)

State Statutory Protections for DMV Records – Generally No Bar to Criminal Discovery

California Vehicle Code section 1808(a) provides that the DMV keeps (1) applications for driver's licenses, (2) abstracts of convictions and (3) abstracts of accident reports required to be sent to Sacramento. Generally, these are open to the public and can be freely disclosed. (**Id.**)

These provisions permit the DMV to disclose abstracts of accidents and convictions up to 10 years old for DUIs, up to 7 years old for violations involving two or more points, and up to three years old for all other cases. (Veh. Code, §§ 1808(b)(1)-(3).)

Likewise, suspensions and revocations of the driving privilege will not be generally disclosed where the suspension or revocation is more than 3 years old, or after the privilege is reinstated if the suspension or revocation was due to vandalism, truancy, or failure to pay child support, or if the suspension or revocation has been judicially set aside or stayed. (*Id.* at §§ 1808(c) and (d).)

While the federal Driver's Privacy Protection Act, discussed above, limits disclosures to the general public, it does not bar discovery in criminal cases. (See 18 U.S.C. § 2721(b)(4).)

A person's residential address **is available at any time to a prosecutor or to law enforcement**, but cannot be released by to the general public, (CVC § 1808.21(a).)

While abstracts of accidents are not available to public in cases where one individual is found to be at fault, "law enforcement" and "courts of competent jurisdiction" can obtain "all abstracts of accident reports," which should include these records. (CVC § 1808(a).)

As outlined above, the DMV is statutorily authorized to release a great deal of information to the public, generally, or to law enforcement or prosecutors specifically. If there is additional DMV-held information sought by a prosecutor and not specifically subject to release, it should be obtainable under the provisions of the Information Practices Act of 1977. (Civ. Code § 1798 *et seq*.) This code provides for the release of personal information held by state agencies by consent of the person whose records are requested (**Id**. at § 1798.24(b)), with a subpoena, where the *agency* must give notice to the person whose records are sought before complying (*Id*. at § 1798.24(k)), or with a search warrant. (**Id**. at 1798.24(l).)

3. Medical records

[This portion of the outline was most graciously authored by Santa Clara County DDA Jordan Kahler.]

A. California State Constitutional Right of Privacy in Medical Records

Patients have a state constitutional right to privacy that protects information contained in their medical records. (***Cross* v. *Superior Court*** (2017) 11 Cal.App.5th 305, 325; ***Pettus* v. *Cole*** (1996) 49 Cal.App.4th 402.)

A subpoena for medical records can be invalid to the extent it infringes on the state constitutional privacy right. In ***Cross* v. *Superior Court*** (2017) 11 Cal.App.5th 305, the court held that for an administrative subpoena for patient medical records to overcome the patient's state constitutional privacy rights, the requesting party must demonstrate "a compelling interest" in the records and show that the information demanded is "relevant and material."* The medical records in ***Cross*** were needed to investigate whether a physician was overprescribing habit-forming stimulant drugs, which gave the court "ample reason" to conclude the State had a compelling interest in the records. (**Id**. at pp. 326-27.) Overbroad requests for medical records violate a patient's constitutional right to privacy. (**Id**. at p. 329-30.) Addressing the breadth of medical records which may be requested, the ***Cross*** court rejected a strict narrow tailoring requirement, holding that such a standard would be "inconsistent with the investigatory stage that precedes a formal accusation, where the information available to the Department may be sparse and the ability to craft highly targeted demands for information is often limited." (**Id**. at p. 329.) However, the ***Cross*** court stated, the request must be for "relevant and material" records, must almost always be confined to a limited, defined time period, and must itemize, at least by category, the materials to be produced. The court expressly disapproved "catch-all" requests for "the complete medical record," a clause that "includes, but is not limited to" certain items, and a request for "all other data, information or records." (**Id**. at p. 329-330.)

Editor's note**: Not all state constitutional privacy rights must be overcome by a "compelling interest." Whether ***Cross remains good law in this regard depends on whether the interest in privacy of medical records involves an obvious invasion of an interest fundamental to personal autonomy. (***Williams* v. *Superior Court*** (2017) 3 Cal.5th 531, 556; **see** this outline, XVII-3-C at p. 333.)

B. HIPAA (Health Insurance Portability and Accountability Act)

The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") creates a set of federal statutory protections for patients' medical records. (42 U.S Code § 1320d *et seq*.) These regulations generally forbid the unauthorized disclosure of medical information by "covered entities," which include a "health plan…health care clearinghouse…or health care provider…" (45 C.F.R. § 160.103.) A HIPAA violation can be civilly or criminally punished, and the maximum criminal penalty for a HIPAA violation is a $250,000 fine and 10 years in federal prison. (42 U.S. Code § 1320d–6.) These potential penalties will tend to make health care providers and other "covered entities" extremely cautious when releasing patient medical information, including in criminal investigations.

i. What Types of Records are Protected by HIPAA?

HIPAA applies to "protected health information," which is "health information" that is "individually identifiable" and "transmitted" or "maintained" in "any…medium." (45 C.F.R. § 160.103.)

"Health information" is "any information" "created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse" that relates to "the past, present, or future physical or mental health of an individual," the "provision of health care to an individual," or "the past, present, or future payment for the provision of health care to an individual." (*Id.*)

Health information is "individually identifiable" if it explicitly identifies the individual or can be used to identify the individual. (*Id.*) There are narrow exceptions, rarely applicable in criminal prosecutions, where HIPAA does not apply even to individually identifiable health information for certain federally funded schools, regarding certain students, some employees of "covered entities," and for people who have been dead more than 50 years. (20 U.S. Code § 1232 *et seq*.; 45 C.F.R. § 160.103.)

These categories are very broad, so HIPPA will generally apply to protect medical records under the most common circumstances where prosecutors wish to obtain them (e.g., records of an emergency room visit following a vehicle collision or violent altercation).

ii. What are the Exceptions that Will Allow Law Enforcement or the Prosecution to Obtain the Types of Records Protected by HIPAA?

HIPAA has multiple, clearly defined avenues for medical providers to lawfully release medical records that may be needed by prosecutors and law enforcement. Medical records may be released:

1. By consent. It is not a HIPAA violation to release medical records where the patient expressly consents in writing or fails to object when given the opportunity to oppose disclosure. (45 C.F.R. §§ 164.508, 164.510; and see 45 C.F.R. § 164.512.) A mere failure to object, however, is not sufficient to show consent under the California Confidentiality of Medical Information Act (CMIA), which requires

express written consent in a specified form, see this outline, section XVI-3-C at pp. 320-321 (**See** Civ. Code §§ 56.10(b)(7), 56.11.) So, if a prosecutor relies on consent as the justification to produce medical records, a failure by the patient to object after notice of the intended disclosure will be sufficient for HIPAA but not for CMIA.

2. By court order. There is no HIPAA violation to release medical records "[i]n response to an order of a court or administrative tribunal, provided the covered entity discloses only the protected health information expressly authorized by such order." (45 C.F.R. § 164.512(e)(1)(i).) The statute does not state any requirements about the form or substance of the court order. (**See id**.) A court order will also satisfy the CMIA, which has the same exception. (**See** Civ. Code § 56.10(b)(1); ***Snibbe* v. *Superior Court*** (2014) 224 Cal.App.4th 184, 197–198.) Potentially, a subpoena that is *signed by a judge* could qualify.

3. By subpoena meeting special requirements. There is no HIPAA violation to release medical records in response to a subpoena, but one of two sets of conditions must apply for the subpoena to authorize the disclosure. (45 C.F.R. § 164.512(e)(1)(ii).)

Subpoena with Notice

One way to authorize the release of medical records in response to subpoena is to show that the person whose records are the subject of the request has notice, which requires a "written statement and accompanying documentation" proving:

(a) "The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);"
and
(b) "The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal;"
and
(c) "The time for the individual to raise objections to the court or administrative tribunal has elapsed;"
and
(d) Either no objections were filed, or "[a]ll objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution." (45 C.F.R. § 164.512(e)(1)(iii).)

How can those requirements be satisfied?

In California, a subpoena duces tecum accompanied by a "notice to consumer" form together with a court determination that the records are proper to release should satisfy HIPAA. Notice that complies

with Code of Civil Procedure sections 1985.3(b), (c) and (e) will satisfy requirements (a) and (b), above, by putting the patient on notice and explaining when and how an objection can be made. (**See** Judicial Council of California form SUBP-025, providing for notice to the consumer.) After a court hearing in which the court has determined that the records are suitable for release, requirements (c) and (d), above, will necessarily be satisfied as well. (**See *People* v. *Blair*** (1979) 25 Cal.3d 640, 651 [holding that release of records in response to subpoena duces tecum is subject to court determination that the requesting party is entitled to receive them].)

In practice, the record-holder (e.g., a hospital) will never know whether any objection has been made to the release of the records until the time of the SDT-return hearing. So, in theory, mailing in the medical records to the court before the hearing could be a HIPAA violation, unless another exception applies. To fully comply with HIPAA, a medical record holder should send a representative to the SDT-return hearing to determine whether the patient has failed to object or whether any objections have been overruled by the court before the record-holder releases the medical records. Failing to respond at all is punishable by contempt. (CCP § 1209(a)(10).)

For the prosecutor's perspective, it should make little difference whether the record-holder adheres to this strict requirement by sending a representative to the hearing or instead sends the records directly to the court in advance of the hearing. Either way, the court can order the immediate production of the records if the court determines they are suitable for release.

Subpoena with a Protective Order

In the alternative, seeking or securing a protective order can authorize the release of medical records in response to a subpoena. To meet the requirements for this exception, the requesting party must "provide satisfactory assurance" that the subpoenaing party has made "reasonable efforts…to secure a qualified protective order." (45 C.F.R. § 164.512(e)(1)(ii)(B).) That showing can be satisfied with a written statement and accompanying documentation showing that the party subpoenaing the records has requested a protective order from the court. (45 C.F.R. § 164.512(e)(1)(iv).) A "qualified protective order" meets the following requirements:

(a) It "[p]rohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested;" and

(b) it "[r]equires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding." (45 C.F.R. § 164.512(e)(1)(v).)

Since both of the HIPAA subpoena requirements described above are more exacting than CMIA's, which require only "a subpoena," a subpoena duces tecum that meets HIPAA standards will automatically meet CMIA standards. (**See** Civ. Code § 56.10(b)(3).)

4. By search warrant. (45 C.F.R. § 164.512(f)(1)(ii)(A).) This also satisfies CMIA. (**See** Cal. Civil Code § 56.10(b)(6).)

5. By grand jury subpoena. (45 C.F.R. § 164.512(f)(1)(ii)(B).) CMIA does not have an explicit exception for grand jury subpoenas; its general subpoena exception applies to parties to a proceeding before a court or administrative agency. (**See** Civ. Code § 56.10(b)(3).)

6. To identify or locate a suspect, fugitive, material witness, or missing person. (45 C.F.R. § 164.512(f)(2).) The following information may be released for this purpose: name, address, date and place of birth, social security number, ABO blood type and RH factor, type of prior injuries, date and time of treatment for injury, date and time of death (if applicable), and a description of any "distinguishing physical characteristics," which includes height, weight, gender, race, hair and eye color, and the presence of any facial hair, scars, or tattoos. (**Id**.) There is no equivalent exception under CMIA except for mandated reporting requirements (below), so a release of medical information under this exception in California could possibly trigger state statutory penalties for the entity that released the information. (**See** Civ. Code § 56.10 *et seq*.)

7. To a law enforcement official about a crime victim, to determine whether a violation of law by someone other than the crime victim has occurred. (45 C.F.R. 164.512(f)(3).) This exception requires either the crime victim's consent, or that the following five requirements be satisfied:

(a) Consent is not possible due to "incapacity or other emergency circumstance;"

(b) A law enforcement official represents that information "is needed to determine whether a violation of law by a person other than the victim has occurred;"

(c) The official represents the information will not be used against the victim;

(d) The official represents "immediate law enforcement activity that depends on the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure;" and

(e) "Disclosure is in the best interest of the individual as determined by the covered entity, in the exercise of processional judgment." (45 C.F.R. § 164.512(f)(3).)

There is no equivalent exception under CMIA except for mandated reporting requirements (see this outline, section XVI-3-C at pp. 320-321), so a release of medical information under this exception in California could possibly trigger state statutory penalties for the entity that released the information. (See Civ. Code § 56.10 *et seq*.)

8. To law enforcement, when a "covered entity" has evidence a crime was committed. (45 C.F.R. § 164.512(f)(5).) This exception applies when a crime occurred on the entity's premises or when the entity provided emergency health care and disclosure "appears necessary" to alert law enforcement to the commission and nature of a crime, the location or victims of a crime, or the identity, description and

location of the perpetrator of a crime. (45 C.F.R. § 164.512(f)(6).) There is no equivalent exception under CMIA except for mandated reporting requirements (see this outline, section XVI-3-C at pp. 320-321), so a release of medical information under this exception in California could possibly trigger state statutory penalties for the entity that released the information. (**See** Civ. Code § 56.10 et seq.)

9. To a government entity, including a social service or protective services agency, in cases of abuse, neglect, or domestic violence where required by law. (45 C.F.R. § 164.512(c)(1).) This disclosure requires that the entity "reasonably believes" the patient is a victim of abuse, neglect or domestic violence" and requires either patient consent, that disclosure is "required by law" or that disclosure is "expressly authorized by statute or regulation," where the entity believes "the disclosure is necessary to prevent serious harm to the individual and other potential victims." (*Id.*)

California's mandatory reporting requirements apply to compel the disclosure of certain kinds of suspect abuse and neglect. (Pen. Code §§ 11166-67.) These mandatory statutory reporting requirements prevail over CMIA's protections for medical privacy. (*People ex rel. Eichenberger v. Stockton Pregnancy Control Medical Clinic, Inc.* (1988) 203 Cal.App.3d 225, 238.) Therefore, medical disclosures in compliance with state mandatory reporting requirements are authorized by both HIPAA and CMIA.

C. California Confidentiality of Medical Information Act

The Confidentiality of Medical Information Act ("CMIA") creates a set of state statutory protections for patients' medical records. (Civ. Code § 56 *et seq*.) These regulations generally forbid the unauthorized disclosure of medical information by "health care providers," including a "health care service plan or contractor." (Civ. Code § 56.10(a).) A CMIA violation can be civilly punished with fines up to $250,000 or criminally punished as a misdemeanor. (Civ. Code §§ 56.35, 56.36(b), (c).) While the criminal penalties are less severe than under HIPAA, California health care providers have a significant incentive to comply with CMIA, including in criminal investigations.

i. What Types of Records are Protected by CMIA?

CMIA protects "medical information," which is "any individually identifiable information…regarding a patient's medical history, mental or physical condition, or treatment." (Civ. Code, § 56.05 (j).) A "patient" is any natural person, whether or not still living, who received health care services from a provider of health care and to whom medical information pertains. (Civ. Code, § 56.05 (k).)

These categories are very broad and generally overlap with HIPAA protections. (**See** this outline, section XVI-3-A-i at p. 316.) Under most circumstances where a prosecutor wishes to obtain medical records, (e.g., records of an emergency room visit following a vehicle collision or violent altercation) some exception to CMIA will need to apply before the health care provider can release the records.

ii. What are the Exceptions that Will Allow Law Enforcement or the Prosecution to Obtain the Types of Records Protected by CMIA?

Like HIPAA, CMIA has multiple, clearly defined avenues for medical providers to lawfully release medical records that may be needed by prosecutors and law enforcement. Medical records may be released:

1. By express, written authorization. Unlike HIPAA's equivalent consent exception, this authorization requirement is "detailed and demanding." (*Pettus* v. *Cole* (1996) 49 Cal.App.4th 402, 426.) Authorization is only valid if it:

(a) Is handwritten by the patient or typed in at least 14-point type;
(b) Is either the only waiver on the page, or clearly separate from any other language on the same page;
(c) Specifically states the types of medical information that may be disclosed, the name or function of the health care provider who will be empowered by the authorization to release that information, the name or function of the persons or entities who will be empowered by the authorization to receive that information, the uses to which the medical information may be put by those receiving the information, and an expiration date after which the authorization lapses;
(d) Advises the patient that he or she has a right to receive a copy of the authorization;
(e) Is signed and dated by the patient, the patient's legal representative if the patient is a minor or incompetent, the patient's spouse or the person "financially responsible for the patient" or the patient's "personal representative" or beneficiary, if the patient is deceased; and
(f) The signature serves no other purpose than to execute the authorization. (Civ. Code § 56.11.)

Meeting these exacting requirements will also satisfy HIPPA, which simply requires "express written consent" or the absence of an objection, given an opportunity to object. (45 C.F.R. §§ 164.508, 164.510; and see 45 C.F.R. § 164.512.)

2. By court order. (See Civ. Code § 56.10(b)(1).) A court order will also satisfy HIPAA, "provided the covered entity discloses only the protected health information expressly authorized by such order." (45 C.F.R. § 164.512(e)(1)(i).) Neither statute gives any requirements about the form or substance of the court order. (See Civ. Code § 56.10(b)(1), 45 C.F.R. § 164.512(e)(1)(i).) Potentially, a subpoena *signed by a judge* could qualify as a court order

3. By subpoena. Medical information may lawfully be released under CMIA when obtained by subpoena by parties to a proceeding before a court or administrative agency. (**See** Cal. Civil Code § 56.10(b)(3).) Since HIPAA's subpoena requirements require an additional showing of notice given or a protective order obtained, as described above, a subpoena that meets HIPAA's standards will automatically satisfy CMIA standards. (See 45 C.F.R. § 164.512(e)(1)(ii) *et seq*.)

4. By search warrant. (Cal. Civil Code § 56.10(b)(6).) This also satisfies HIPAA. (See 45 C.F.R. § 164.512(f)(1)(ii)(A).)

5. By discretion of a "general acute care hospital" to disclose "general medical information," upon an inquiry about a specific patient, absent written objection. (Civ. Code § 56.16.) Unless the patient submits a specific written request not to disclose the information, a general acute care hospital may release "the general nature" of an injury or other condition, and can disclose the general description of the reason for treatment, the general condition of the patient, and the identity of the patient, including name, address, age and sex of the patient. (**Id**.)

This authorization is much broader than any disclosure authorized by HIPAA, so disclosure of medical information under this exception would likely be a HIPAA violation for the hospital, absent another applicable exception.

6. To a patient's caretaker. (Civ. Code §§ 56.1007 (a)-(d).) The release of medical information must be "directly relevant to that caretaker's involvement with the patient's care." This caretaker can be any family member, relative, domestic partner, close personal friend, or anyone identified by the patient. (Id.) Disclosure requires express or implied consent, unless the patient is unavailable or incapacitated. Under those circumstances, a health care provider can release the information to the caretaker if it determines this release of information is in the patient's best interest. (Id.) Similarly, HIPAA provides for the designation of a "personal representative" who is authorized by the patient to receive medical disclosures. (45 C.F.R. § 164.502(g).)

While neither of these provisions will authorize disclosures directly to law enforcement under most circumstances, once information passes to caretakers, any disclosure by caretakers to law enforcement would no longer be limited by HIPAA or CMIA.

7. In response to a coroner's inquest. (Civ. Code § 56.10(b)(8).) There is no violation to disclose the protected health information to a coroner in response to a "an investigation by the coroner's office." (**Id**.) Such disclosures are limited to information about the deceased patient who is the subject of the coroner's investigation or a patient is a prospective donor. (**Id**.)

D. Drug and Alcohol Treatment Records

Drug and alcohol treatment records are subject to special state and federal statutory protections. These protections are coextensive with HIPAA and CMIA, such that a person requesting records must satisfy *both* the general requirements for obtaining medical records *and also* the specific requirements for obtaining drug and alcohol treatment records.

i. Protections Created by Federal Statute

The Public health Service Act, 42 U.S.C. § 201 *et seq*. protects records held by federally assisted drug and alcohol treatment programs from disclosure. Disclosure is subject to the requirements of 42 Code of Federal Regulations parts 2.1 through 2.67(1) ["Part 2"].

a. What Drug and Alcohol Treatment Records are Federally Protected?

"Federally assisted" drug and alcohol treatment programs are protected. (42 C.F.R. § 2.12(e).) The law protects "records of identity, diagnosis, or prognosis or treatment of any patient," where records are "maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation or research." This includes prior as well as current patients. (42 U.S.C. § 290dd-2(d).)

b. What Does a Prosecutor Need to Do to Obtain Drug and Alcohol Treatment Records from Federally Assisted Programs?

There are two ways to a federally assisted drug and alcohol treatment program can lawfully release its records. The simplest is with the written consent of the patient (42 U.S.C. § 290dd-2(b)(1). The alternative is by court order meeting several specific requirements. (42 U.S.C. §§ 290dd-2(b)(2)(C), 290dd-2(c).)

- Issuing the court order requires a showing of "good cause," which is includes "the need to avert a substantial risk of death or serious bodily harm." 290dd-2(b)(2)(C).

- The court must weigh public interest and need for disclosure against the potential injury to the patient, the physician-patient relationship, and to the treatment services. (*Id.*)

When information is sought by the prosecution about a patient to criminally investigate or prosecute a patient, the following requirements must be satisfied:

- The person whose records are sought is entitled to notice, an opportunity to be heard, and an opportunity to be represented by independent counsel. (42 C.F.R. § 2.65(b).)

- The prosecutor must persuade the court that the crime being investigated or prosecuted is "extremely serious," such as one that causes or directly threatens loss of life or serious bodily injury. (*Id.* § 2.65(d).) This includes homicide, rape, kidnapping, armed robbery assault with a deadly weapon, and child abuse and neglect. (**Id**.)

- There is a reasonable likelihood that records will disclose information "of substantial value" to the investigation. (**Id**.)

- Other methods of obtaining the information are unavailable or ineffective. (**Id**.)

- The court must find public interest and need for disclosure outweigh the injury to the patient, the physician-patient relationship, and to the treatment services. (**Id.**)

The court may examine records *in camera* to make its determination. (*Id.* § 2.65(c).) Any disclosure must be narrowly tailored with respect to what information is disclosed and who may possess it, and any disclosure must "[i]nclude such other measures as are necessary to limit disclosure and use to the fulfillment of only that public interest and need found by the court." (*Id.* § 2.65(e).)

ii. Protections created by California Statutes

California Health and Safety Code section 11845.5(a), (e) applies to protect "records of the identity, diagnosis, prognosis, or treatment of any patient" or former patient that are "maintained in connection with the performance of any alcohol or other drug abuse treatment or prevention" program not licensed by the DMV.

These protections apply to residential programs, drop-in centers, crisis lines, free clinics, detoxification centers, narcotics treatment programs and chemical dependency programs, alcohol and other drug prevention programs, and other nonspecific drug programs that provide counseling, therapy, referral, advice, care, treatment, or rehabilitation as a service to those persons suffering from alcohol and other drug addiction, or alcohol and other drug abuse related programs that are either physiological or psychological in nature. (Health & Saf. Code §§ 11842.5 (a)-(i).)

There are only two means by which these records can lawfully be released. The first is with the written authorization of the patient. (*Id.* § 11845.5(b). The second is with a search warrant. (Health & Safety Code § 11845.5(c)(5), (d). There is no statutory authorization to release the records in response to a subpoena.

XVII. WHAT IS THE PROSECUTOR'S ROLE WHEN IT COMES TO DEFENSE SUBPOENAS FOR RECORDS FROM THIRD PARTIES?

In California, at least as to nonprivileged information, a "defendant generally is entitled to discovery of information that will assist in his defense or be useful for impeachment or cross-examination of adverse witnesses." (***People* v. *Jenkins*** (2000) 22 Cal.4th 900, 953.)

1. The statutes relevant to subpoenas for records from third parties

Penal Code section 1326 is the general mechanism for obtaining third party records in a criminal case, while Penal Code section 1327 describes what form a subpoena issued pursuant to section 1326 must take. (**See *Alford* v. *Superior Court*** (2003) 29 Cal.4th 1033, 1045 ["Penal Code sections 1326 and 1327 . . . empower either party in a criminal case to serve a subpoena duces tecum requiring the person

or entity in possession of the materials sought to produce the information in court for the party's inspection."].) Evidence Code sections 1560 and 1561 provide the mechanism for subpoenaing records without having to simultaneously subpoena the custodian of the records. For a more expansive discussion and the full language of sections 1326, 1327, 1560, and 1561, **see** this outline, XVI-1 at pp. 308-313.)

In 2004, the legislature added language to Penal Code section 1326 stating: "When a defendant has issued a subpoena to a person or entity that is not a party for the production of books, papers, documents, or records, or copies thereof, 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), emphasis added)

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).) (**See** this outline, section V-1 to 4 at pp. 211-121.)

2. To what extent does the prosecution get to know about defense subpoenas for third party records and participate in the hearing on whether those records are disclosed to the defense?

In ***Kling* v. *Superior Court*** (2010) 50 Cal.4th 1068, the California Supreme Court addressed whether Penal Code section 1326(c) prohibited the prosecution from (i) participating in a hearing on whether third party records should be released to the defense and (ii) discovering the identity of the subpoenaed party and the nature of the documents sought under the third party subpoena, including the identity of the person to whom the documents pertained. (**Id**. at p. 1071.)

The defendant in ***Kling*** subpoenaed records from a number of third parties and asked the trial court not to disclose information concerning the subpoenas to the prosecution, contending that such information would reveal defense strategies and work product. (***Kling*** at p. 1072.) Over prosecution objection, the trial court ordered that all documents received by the court pursuant to a defense subpoena were "to be logged in the docket, noting the date received and the party supplying the documents." The trial court, however, denied the defense request to have no documentation in the file identifying the receipt of subpoenaed documents and the agency or person from whom they were received, concluding that such information was not privileged. (***Kling***, at pp. 1072-1073.) On various dates, subpoenaed records were delivered to the clerk of the trial court and examined by the court in camera in the presence of defense counsel. The trial court released the records to the defense and ordered transcripts of these in camera hearings sealed. The People received no notice as to some of these hearings. (***Kling*** at p. 1073.)

The People then asked the trial court to examine the transcripts of all previously closed hearings and unseal any portions of the transcripts that did not reveal defense theories of relevance or other privileged information. In response, the trial court issued an order unsealing some of the transcripts (noting they

contained "nothing but cursory discussions of subpoenaed records, nothing about defense strategy") and announced its intent to review additional transcripts, but stayed its order unsealing the transcripts to permit the defense to seek writ relief, which the defense did. (***Kling*** at p. 1073.)

The Court of Appeal held that the People were entitled to notice of, and to be present at, the hearing once the responsive documents have been produced, but were not permitted to learn the identity of the subpoenaed party or the nature of the documents requested. The Court of Appeal further held that, unless the prosecutor has been requested by a crime victim to enforce his or her rights under Proposition 9, the Victims' Bill of Rights Act of 2008: Marsy's Law (Cal. Const., art. I, § 28), the prosecutor was not authorized to argue or otherwise participate at the in camera hearing, except to answer any questions the trial court may have, and, furthermore, that the entire hearing may be held ex parte." (***Kling*** at pp. 1071-1072.) The California Supreme Court **came to a different conclusion**.

The California Supreme Court began by noting that a defendant is not entitled to third party records until a court holds a hearing to determine whether the requesting party is entitled to receive them. (***Kling*** at p. 1071.)

The court recognized that while section 1326 generally applies equally to the prosecution and the defense, subdivision (c) allows the court to conduct some of that hearing in camera when the defendant is the requesting party and that the "defense is not required, on pain of revealing its possible defense strategies and work product, to provide the prosecution with notice of its theories of relevancy of the materials sought, but instead may make an offer of proof at an in camera hearing." (***Kling*** at pp. 1071, 1075.)

Nevertheless, the court held "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, emphasis added.)

Moreover, even assuming a defense sealing of a filing is appropriate, the court stated the People have a right to notice of the hearing and to be present. (***Kling*** at p.1075.)

Thus, the court found the trial court initially erred in failing to give the People notice of the in camera hearings regarding the receipt of materials from third parties or to consider what information could be shared with the prosecution.

In addition, the court held prosecutorial participation in third party subpoena hearings "is not prohibited" inasmuch that "open proceedings involving the participation of both parties are the general rule in both criminal and civil cases[,]" and the prosecutor may participate in and argue at the hearing, if the trial court so desires. (***Kling*** at pp. 1072, 1075.)

Editor's note: The court declined to state whether a trial court is *required* to allow argument from the People concerning third party discovery issues. (***Kling*** at p. 1078, fn. 2.)

The ***Kling*** court held the lower appellate court **erred** in categorically denying the People the right to discover the identity of the subpoenaed party and the nature of the documents sought under the third party subpoena (including the identity of the person to whom the documents pertain), inasmuch as the People's due process right to a meaningful opportunity to be heard may typically require at least that much information. (***Kling*** at p. 1072 [albeit declining, at pp. 1079-1080, to say whether the trial court's subsequent act in ordering disclosure of some of the transcripts of the hearings was improper and remanding the case to the Court of Appeal for it to consider "whether the trial court, under the legal standards set forth herein, properly unsealed the specified portions of the transcripts"].)

Significantly, the ***Kling*** court said, "disclosure of the identity of the subpoenaed party and the nature of the records sought may, in many circumstances, effectuate the People's right to due process under the California Constitution." (***Kling*** at p. 1078, citing to Cal. Const., art. I, § 29.) Moreover, "[p]rotracted ex parte proceedings may result in delays, thereby interfering with the People's right to a speedy trial." (***Kling*** at p. 1078, citing to Cal. Const., art. I, § 29; Pen.Code, § 1050.)

The court observed "[d]iscovery proceedings involving third parties can have significant consequences for a criminal prosecution, consequences that may prejudice the People's ability even to proceed to trial. For example, a third party's refusal to produce documents requested by the defense can potentially result in sanctions being applied against the People." (***Kling*** at p. 1078 [citing to ***Dell M.* v. *Superior Court*** (1977) 70 Cal.App.3d 782, 788 [suppressing evidence of altercation between arresting officer and defendant because of the police department's refusal to turn over records].)

The ***Kling*** court **rejected** the idea that disclosure of basic information concerning the third party subpoena would inhibit the defense investigation, calling such concerns "overstated." (***Kling*** at p. 1077.) The court recognized that the defense might have to face the "difficult decision whether to subpoena the records and run the risk of bringing possibly adverse information to the attention of the prosecutor or to forgo seeking information that could be beneficial to his defense." (***Kling*** at p. 1077.) Nevertheless, the court said that "[h]owever difficult that decision may be, we do not see it as impairing the policies behind [a defendant's] right to counsel." (***Kling*** at p. 1077)

The ***Kling*** court stated "[t]he constitutional rights of the defendant can usually be protected by redacting those materials that disclose privileged information or attorney work product, by conducting portions of the in camera hearing ex parte, and by withholding disclosure to the prosecution of the records produced under the subpoena until the defense has determined that it intends to offer them in evidence at trial." (***Kling*** at p. 1072.)

Thus, the court concluded "[a] trial court's role when presented with materials produced under a defense subpoena duces tecum to a third party, then, is to balance the People's right to due process and a meaningful opportunity to effectively challenge the discovery request against the defendant's constitutional rights and the need to protect defense counsel's work product." (***Kling*** at p. 1079.)

In engaging in this balancing test, a trial court "is not 'bound by defendant's naked claim of confidentiality'" but "should, in light of all the facts and circumstances, make such orders as are appropriate to ensure that the maximum amount of information, consistent with protection of the defendant's constitutional rights, is made available to the party opposing the motion for discovery." (***Kling*** at p. 1079.)

The court recognized that a trial judge "may order an in camera review of the records produced under the subpoena duces tecum (Pen.Code, § 1326, subd. (c)) and, as the People concede, may conduct some or all of the hearing concerning the defendant's entitlement to those records ex parte in order to safeguard privileged information or attorney work product." (***Kling*** at p. 1079.) However, the court cautioned that "use of these extraordinary procedures, though, should be limited to that which is necessary to safeguard the rights of the defendant or of a third party, inasmuch as ex parte proceedings are ***generally disfavored*** because of their inherent deficiencies." (***Kling*** at p. 1079 [and explaining why ex parte proceedings are disfavored].)

The ***Kling*** court declined to go into "expansive proclamations regarding implementation of Marsy's Law" or how Marsy's law impacts and/or overrides the statutory language of section 1326(c) insofar as there is a conflict between the former and the latter. (**Id**. at p. 1080.)

Nonetheless, the court pointed out that its "interpretation of the criminal discovery statutes with respect to third party subpoenas duces tecum appears to be consistent with Proposition 9, the 'Victims' Bill of Rights Act of 2008: Marsy's Law,' which-subsequent to the proceedings in the trial court here-amended the California Constitution to guarantee crime victims a number of rights, including the right '[t]o prevent the disclosure of confidential information or records to the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, 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).)" (***Kling*** at p. 1080.) The court stated, "Marsy's Law evidently contemplates that the victim and the prosecuting attorney would be aware that the defense had subpoenaed confidential records regarding the victim from third parties. As the People have observed, "[n]either the prosecution nor the victim can attempt to address the disclosure of records if they do not know what records are being sought." (***Kling*** at p. 1080.)

3. May a prosecutor file a motion to quash a defense subpoena for records from third parties?

It is not unusual for the defense to subpoena documents from third parties even though the documents may infringe upon a person's state constitutional right to privacy (**see** Cal. Const. art. I, sec. I), may be protected by a privilege (e.g., the psychotherapist privilege, see Evid. Code, § 1014), or are otherwise confidential (e.g., electronic communication information, see § 18 U.S.C. § 2701 et seq.). The person or business whose privacy interest is being infringed or who has a right to prevent disclosure of the information will often never learn that the documents have been subpoenaed.

Up until the decision in ***Kling* v. *Superior Court*** (2010) 50 Cal.4th 1068, it had been unclear whether prosecutors could file a motion to quash defense requests for third party records. This had been a serious issue when the records subpoenaed implicated privileges or privacy interests. However, in ***Kling***, the court observed that the "People, even if not the target of the discovery, also ***generally have the right to file a motion to quash*** "so that evidentiary privileges are not sacrificed just because the subpoena recipient lacks sufficient self-interest to object" . . . or is otherwise unable to do so." (**Id**. at p. 1078, emphasis added.) The ***Kling*** court went on to say "[e]ven where the People do not seek to quash the subpoena, the court may desire briefing and argument from the People about the scope of the third party discovery." (**Id**. at p. 1078.)

The rationale given in ***Kling*** for allowing prosecutors to file motions to quash, i.e., to ensure evidentiary privileges are protected when the subpoena recipient lacks the self-interest to object, should also apply when it comes to protecting privacy interests of persons whose records are kept by the subpoena recipient. Thus, when there is no attorney to represent the interests of the third party whose records have been subpoenaed by the defense, particularly when it comes to records that might be covered by a privilege or a privacy right, the prosecution should be prepared to make a motion to quash and/or offer "amicus-like" assistance to a judge as to what the court should take into account when determining whether to release third party records implicating third party privileges or privacy rights.

At a minimum, a prosecutor can point out to the court receiving the records that, to the extent that disclosure of subpoenaed records impacts a third party's statutory privilege or privacy interests, **the court is authorized to act on its own** to protect the interest of the third party who has complied with a subpoena and delivered the records into the possession of the court. Prosecutors should also be aware of the general contours of the state constitutional right to privacy and the various privileges that might apply to the records (**see** Evidence Code sections 915-1070) and be prepared to bring that information to the attention of a court when the defense has subpoenaed information implicating a privilege or the privacy right.

Below are a few principles to consider in filing a motion to quash a defense subpoena for third party records or a bench memo offering guidance for a court:

A. Just Because Records Are Subpoenaed Doesn't Mean Defendant Gets Them

The issuance of a subpoena duces tecum does not entitle "the person on whose behalf it is issued to obtain access to the records described therein until a judicial determination has been made that the person is legally entitled to receive them." (***Kling* v. *Superior Court*** (2010) 50 Cal.4th 1068, 1074; ***People* v. *Blair*** (1979) 25 Cal.3d 640, 651.)

"[I]f the third party 'objects to disclosure of the information sought, the party seeking the information must make a plausible justification or a good cause showing of the need therefor.'" (***Kling* v. *Superior Court*** (2010) 50 Cal.4th 1068, 1074; ***Alford* v. *Superior Court*** (2003) 29 Cal.4th 1033, 1045.)

B. Privileged or Otherwise Confidential Information

When it comes to defense requests for third party information protected by privileges or the right of privacy, the integrity of the privilege or right is breached at the moment of disclosure to defense counsel (**cf**., ***Hill* v. *National Collegiate Athletic Assn.*** (1994) 7 Cal.4th 1, 27, fn. 7 [state constitutional right to privacy may be invaded by a less-than-public dissemination of information, particularly when professional or fiduciary relationships premised on confidentiality are at issue]) and that breach cannot be remedied at a latter hearing on the admissibility of the information, i.e., at a hearing where the People can participate.

It is well established that a court, upon its own initiative, may protect the absentee holder of a privilege that has not been waived. (***Rudnick* v. *Superior Court*** (1974) 11 Cal.3d 924, 932-933; **see also *People* v. *Pack*** (1988) 201 Cal.App.3d 679, 685 [trial court is statutorily required to assert the psychotherapist-patient privilege, on its own motion, on behalf of the third party].) Indeed, the 2004 legislation that amended Penal Code section 1326 to allow for in camera hearings on whether subpoenaed records may be disclosed to the defense but not the prosecution was designed to, inter alia, "re-establish and strengthen judicial control over the release of ***privileged and confidential*** records to prosecutors and criminal defendants in criminal cases." (***Kling* v. *Superior Court*** (2010) 50 Cal.4th 1068, 1076, emphasis added.)

A court can decide on its own not to provide the defense ***any*** pre-trial discovery of privileged or protected records. (**See *People* v. *Hammon*** (1997) 15 Cal.4th 1117, 1128 [disapproving the timing of the in camera review procedure set forth by ***People* v. *Reber*** (1986) 177 Cal.App. 3d 523].) ***Hammon*** dealt specifically with records protected by the psychotherapist-patient privilege, but the actual rule announced was broad ("we decline to extend the defendant's Sixth Amendment rights of confrontation and cross-examination to authorize *pretrial disclosure of privileged information*." (**Id**. at p. 1128, emphasis added.) And the rule has been applied in other contexts. (**See e.g**., ***People* v. *Petronella*** (2013) 218 Cal.App.4th 945, 960 [finding defendant did not have right to pre-trial review of e-mails claimed to be covered by the attorney-client privilege].)

The holding in ***Hammon*** means more than simply that a trial court is not required to conduct a pre-trial, in camera review of privileged records. It means that trial courts should *normally* not open, review, and disclose subpoenaed privileged records prior to trial. (**See *People* v. *Gurule*** (2002) 28 Cal.4th 557, 592-593.) The ***Hammon*** court recognized there are inherent dangers in permitting pretrial disclosure at a stage when the court does not have sufficient information to conduct an inquiry and pointed out that under certain circumstances the review and disclosure would be a serious and unnecessary invasion of the statutory privilege. (***Hammon***, at p. 1127.)

Once a case is sent out to trial, it is a different story. Courts may be required to examine the records. In that circumstance, the trial court may be called upon to balance the defendant's right to confrontation, against the third party's privilege or privacy interests at the time of the trial. (**Ibid**.) This balancing test applies notwithstanding the discovery statutes and is applicable to records other than those covered by the psychotherapist-patient privilege. (**See *People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 291 [records protected by the official information privilege]; ***People* v. *Superior Court (Dominguez)*** (2018) 28 Cal.App.5th 223, 242-243 [records protected by the trade secrets privilege].)

Editor's note: The limitations placed on pre-trial disclosure by ***Hammon*** remain valid. However, there is a reasonable possibility those limitations may be eliminated or modified in the future. In the case of ***Facebook, Inc.* v. *Superior Court*** (2018) 4 Cal.5th 1245, the California Supreme Court initially granted review to resolve the following issues: "(1) Did the Court of Appeal properly conclude that defendants are not entitled to pretrial access to records in the possession of Facebook, Instagram, and Twitter under the federal Stored Communications Act (18 U.S.C. § 2701, et seq.) and ***People* v. *Hammon*** (1997) 15 Cal.4th 117? (2) Does an order barring pretrial access to the requested records violate defendants' right to compulsory process and confrontation under the Sixth Amendment or their due process right to a fair trial? (3) Should this court limit or overrule ***People* v. *Hammon*** (1997) 15 Cal.4th 117?" However, the California Supreme Court in ***Facebook*** ultimately addressed questions of law that did not require them to decide the issue of whether ***Hammon*** should be modified or overruled and remanded the case to the trial court for further proceedings consistent with its opinion. (***Facebook*** at pp. 1276, 1291.) On remand, it is possible the issue of the continuing validity of ***Hammon*** may arise anew. (**Id**. at p. 1276.)

C. Information Protected by the State Constitutional Right of Privacy

The state constitutional right of privacy is enshrined in article 1, section 1 of the state Constitution. That section states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and ***privacy***." (Emphasis added.)

California cases "establish that, in many contexts, the scope and application of the state constitutional right of privacy is broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts." (***American Academy of Pediatrics* v. *Lungren*** (1997) 16 Cal.4th 307, 336.) Since discovery requests by parties to an action involve judicial orders compelling disclosure, they are treated as state action. (**See *Planned Parenthood Golden Gate* v. *Superior Court*** (2000) 83 Cal.App.4th 347, 357.) But even if the defense request for the information is not viewed as state action, the court would still have an obligation to protect the privacy interest of the person whose records have been subpoenaed since the state constitutional right of privacy applies to private, as well as to state, action. (**See *Hill* v. *National Collegiate Athletic Assn*.** (1994) 7 Cal.4th 1, 15-20.) Indeed, the 2004 legislation that amended Penal Code section 1326 to allowed for in camera hearings on whether subpoenaed records may be disclosed to the defense was "designed to better protect the ***privacy rights*** of third-party citizens and litigants alike when subpoenas are issued and served in criminal cases." (***Kling* v. *Superior Court*** (2010) 50 Cal.4th 1068, 1076, emphasis added.)

Information is considered "private" under the state constitutional right of privacy "when well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity." (***International Federation of Professional and Technical Engineers, Local 21, AFL-CIO* v. *Superior Court*** (2007) 42 Cal.4th 319, 330; ***Hill* v. *National Collegiate Athletic Assn.*** (1994) 7 Cal.4th 1, 30.) Among other information protected by the state constitutional right to privacy: arrest records or information about arrests (**see *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO* v. *Superior Court*** (2007) 42 Cal.4th 319, 340; ***People* v. *Jenkins*** (2000) 22 Cal.4th 900, 957; ***Denari* v. *Superior Court*** (1989) 215 Cal.App.3d 1488, 1498 [citing to numerous cases]; ***Reyes* v. *Municipal Court*** (1981) 117 Cal.App.3d 771, 775; ***Craig* v. *Municipal Court*** (1979) 100 Cal.App.3d 69, 72); home contact information (***Williams* v. *Superior Court*** (2017) 3 Cal.5th 531, 554); records of personal financial affairs (**see *City of Carmel-by-the-Sea* v. *Young*** (1970) 2 Cal.3d 259, 268); a patient's medical records and psychiatric history (**see *Manela* v. *Superior* Court** (2009) 177 Cal.App.4th 1139, 1150; ***Pettus* v. *Cole*** (1996) 49 Cal.App.4th 402, 440); personnel files (**see *In re Clergy Cases I*** (2010) 188 Cal.App.4th 1224, 1235); school records by virtue of Education Code section 49076 (**see *BRV, Inc.* v. *Superior Court*** (2006) 143 Cal.App.4th 742, 751-754); and information concerning a person's sexual conduct (**see *Roman Catholic Bishop* v. *Superior Court*** (1996) 42 Cal.App.4th 1556, 1567; ***Barrenda L.* v. *Superior Court*** (1998) 65 Cal.App.4th 794, 800).
A court reviewing records pertaining to the victim of a crime that would disclose "confidential information or records to the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, 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" **must** take into account the victim's state constitutional ***right*** not to have that information disclosed. (**See** Cal. Const., art. I, § 28 (b)(4) [enacted by Marsy's Law]; **see also *Kling* v. *Superior Court*** (2010) 50 Cal.4th 1068, 1080.) If the records contain information such as witness' social security number or other identifying information that, if made public, would make the witness vulnerable to identity theft, this should also be taken into account.

The privacy interest of a third party in the records subpoenaed by the defense is not absolute. (**See *Hill* v. *National Collegiate Athletic Assn.*** (1994) 7 Cal.4th 1, 37.) But before information subpoenaed by the defense can be disclosed to the defense, the judge must determine (i) if there is a protected privacy interest; (ii) whether there is a reasonable expectation of privacy in the circumstances; (iii) how serious is the invasion of privacy, and (iv) whether the invasion is outweighed by legitimate and competing interests. (***Hill* v. *National Collegiate Athletic Assn.*** (1994) 7 Cal.4th 1, 39-40.) "The key element in this process is the weighing and balancing of the justification for the conduct in question against the intrusion on privacy resulting from the conduct whenever a genuine, nontrivial invasion of privacy is shown." (***Alfaro* v. *Terhune*** (2002) 98 Cal.App.4th 492, 509.) "[N]ot 'every assertion of a privacy interest under article I, section 1 must be overcome by a 'compelling interest.'" (***Williams* v.**

Superior Court (2017) 3 Cal.5th 531, 556.) But a "compelling interest" is still required to justify "an obvious invasion of an interest fundamental to personal autonomy." (**Ibid**; **see also *American Academy of Pediatrics* v. *Lungren*** (1997) 16 Cal.4th 307, 341 ["When a statute significantly intrudes upon a fundamental, autonomy privacy interest" there must be "a showing that the intrusion upon such a basic and fundamental right is necessary to further a "compelling"—i.e., an extremely important and vital—state interest."].) What interests are "fundamental to personal autonomy" was not fully explored in ***Williams***. (**Id**. at p. 556.)

D. Defense Interest in Disclosure

In conducting the balancing test, judges should be made aware that simply wanting the information subpoenaed is not a sufficient interest to compel its disclosure. The defense "is not entitled to inspect material as a matter of right without regard to the adverse effects of disclosure[.]" (***Bullen* v. *Superior Court*** (1988) 204 Cal.App.3d 22, 26.)

The defense must have a "plausible justification (citation omitted) or a good cause showing of need (citations omitted) for inspection of third party records." (***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, 1320; **accord *Reyes* v. *Municipal Court*** (1981) 117 Cal.App.3d 771, 775; ***Craig* v. *Municipal Court*** (1979) 100 Cal.App.3d 69, 72; **see also *People* v. *Serrata*** (1976) 62 Cal.App.3d 9, 15 [defendant must make showing "documents which he seeks to inspect will assist him in preparing his defense"].) Although the defendant need not demonstrate that the evidence he seeks would be admissible at trial (***Craig* v. *Municipal Court*** (1979) 100 Cal.App.3d 69, 72), the defendant must demonstrate that the materials sought are relevant (**see *Alford* v. *Superior Court*** (2003) 29 Cal.4th 1033, 1045; ***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, 1320) and show that the requested information will facilitate ascertainment of the facts and a fair trial (***Craig* v. *Municipal Court*** (1979) 100 Cal.App.3d 69, 72).

The burden is much greater "when a discovery request seeks information implicating the constitutional right of privacy . . .". In that circumstance, "to order discovery simply upon a showing that the Code of Civil Procedure section 2017.010 test for relevance has been met is an abuse of discretion." (***Williams* v. *Superior Court*** (2017) 3 Cal.5th 531, 556.) The defendant has the "heavy burden" of establishing more than "merely . . . a rational relationship to some colorable state interest[.]" (***Boler* v. *Superior Court*** (1987) 201 Cal.App.3d 467, 473.) "'Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation' on the right of privacy." (**Ibid.**)

Finally, if the third party has not yet provided the records, discovery can be denied where the burdens placed on the third party in complying with the discovery "substantially outweigh the demonstrated need for discovery." (***People* v. *Jenkins*** (2000) 22 Cal.4th 900, 957; **accord *People* v. *Kaurish*** (1990) 52 Cal.3d 648, 686.)

4. Is the defense entitled to an in camera hearing on whether subpoenaed records should be released and, if so, can the affidavit in support of the request for the in camera hearing be sealed?

As noted above, a court must decide whether to release the records sought by the parties. When a defendant has issued a "subpoena to a person or entity that is not a party for the production of books, papers, documents, or records, or copies thereof, the court may order an in camera hearing to determine whether or not the defense is entitled to receive the documents." (Pen. Code, § 1326(c); **see also *Alford* v. *Superior Court*** (2003) 29 Cal.4th 1033,1045–1046 ["the defense is not required, on pain of revealing its possible defense strategies and work product, to provide the prosecution with notice of its theories of relevancy of the materials sought, but instead may make an offer of proof at an in camera hearing"].)

In support of their request for an in camera hearing, the defense will often file an affidavit. Can this affidavit (which may potentially include information impacting a defendant's Fifth Amendment or other privilege) be filed under seal? The answer is "yes, but only in limited circumstances."

"[S]ealing 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* v. *Superior Court*** (2010) 50 Cal.4th 1068, 1075; ***Garcia* v. *Superior Court*** (2007) 42 Cal.4th 63, 73.) Moreover, before allowing the affidavit in support of the request for an in camera hearing, an in camera hearing *on the question of whether the affidavit may be sealed* should be held. (***Garcia* v. *Superior Court*** (2007) 42 Cal.4th 63, 73.)

As pointed out in ***City of Alhambra* v. *Superior Court*** (1988) 205 Cal.App.3d 1118:

"The defendant who seeks to use in camera procedures in connection with a motion for discovery should first give a proper and timely notice and claim his fifth amendment or other privilege, and should support that claim by affidavit or declaration, stating his reasons, all of which can be considered by the court in camera. The trial court should then make a clear finding, on the record, that it has received and considered such papers and that it finds or does not find that the in camera procedure is both necessary and justified by the need to protect a constitutional or statutory privilege or immunity. ¶ The court's decision should be based upon an evaluation of all of the facts in light of the need to answer two critical questions. Will disclosure to the prosecutor 'conceivably' lighten the People's burden or will it serve as a 'link in a chain of evidence tending to establish guilt'? Is the information which the defendant seeks to protect subject to some constitutional or statutory privilege or immunity? If the answer to either question is yes then disclosure should not be made. On the other hand, if the claim of confidentiality cannot be sustained as to some or all of the material submitted by the defendant then such material should be made available to the prosecutor (and, where appropriate, interested third parties) so that all

parties will have the fullest opportunity possible to participate in those proceedings which will determine what, if any, discovery should be ordered." (**Id**. at p. 1131.)

In ***Garcia* v. *Superior Court*** (2007) 42 Cal.4th 63, the California Supreme Court discussed ***City of Alhambra*** with approval in the context of addressing the issue of whether a sealed affidavit may be filed in support of a ***Pitchess*** motion. The ***Garcia*** court reiterated that "a ruling on a request to file under seal involves balancing an accused's interest in protecting privileged information against opposing counsel's right to effectively challenge the discovery motion. In ruling on a request to file under seal, a trial court must carefully weigh these competing concerns." (***Garcia*** at p. 72.)

Moreover, the ***Garcia*** court largely approved the procedures the ***Alhambra*** court recommended be followed by the trial court and added a few of its own, including (i) requiring the defense to provide "proper and timely notice" of the privilege claim; (ii) requiring the defense to provide the court with the affidavit the defense seeks to file under seal, along with a proposed redacted version; requiring the defense to serve the proposed redacted version should be served on opposing counsel; (iii) requiring an in camera hearing on the *request* to file under seal; (iv) requiring that counsel explain how the information proposed for redaction would risk disclosure of privileged material if revealed, and demonstrate why that information is required to support the motion; (v) requiring that opposing counsel be given an opportunity to propound questions for the trial court to ask in camera; and (vi) requiring that filing under seal be the only feasible way of protecting the revelation of privileged information. (***Garcia***, at p. 73.)

However, the ***Garcia*** court went on to point out that in doing the balancing test, the court in ***City of Alhambra*** placed undue emphasis on a defendant's "state constitutional privilege against self-incrimination as it relates to reciprocal discovery." (***Garcia*** at p. 76.) The ***Garcia*** court held, in light of the enactment of Proposition 115 and its implementation of reciprocal discovery, a court deciding whether to hold an in camera hearing may no longer weigh the need for confidentiality as heavily as the court did in ***City of Alhambra***, i.e., the fact that the affidavit "*conceivably* might lighten the load the People must shoulder in proving their case" is no longer a basis for preventing the People from learning of the alleged need of the defense for the discovery sought. (***Garcia***, at pp. 75-76.)

It is important to keep in mind, as repeatedly stated by the California Supreme Court, that a trial court "'is not 'bound by defendant's naked claim of confidentiality'" but should, in light of all the facts and circumstances, make such orders as are appropriate to ensure that the maximum amount of information, consistent with protection of the defendant's constitutional rights, is made available to the party opposing the motion for discovery." (***Kling* v. *Superior Court*** (2010) 50 Cal.4th 1068, 1079; ***Garcia* v. *Superior Court*** (2007) 42 Cal.4th 63, 72; **see also *City of Alhambra* v. *Superior Court*** (1988) 205 Cal.App.3d 1118, 1130; **cf., *People* v. *Sahagun*** (1979) 89 Cal.App.3d 1, 26 [noting, in context of defense motion to dismiss for a speedy trial violation, that trial court compounded its

original error in granting an in camera hearing "when, notwithstanding its realization during the hearing that there was no legitimate need for preserving the confidentiality of the information imparted to it, the court nevertheless proceeded to make its decision, based expressly on the 'offers of proof' received in camera, without disclosing their content to the People and affording the People an opportunity to challenge the truth and accuracy of the statements made, present rebuttal evidence, and engage in meaningful argument."].)

Editor's note: These procedures **do not apply** when the defense is seeking information from the prosecution team, i.e., the prosecutor's office or investigating agency. (**See** Pen. Code, § section 1326(c) ["When a defendant has issued a subpoena to a person or entity ***that is not a party*** . . ."]; Pen. Code, § 1054(e) ["no discovery shall occur in criminal cases except as provided by this chapter . . ."]; Pen. Code, § 1054.1 ["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 . . ."].)

XVIII. DEFENSE FISHING EXPEDITIONS FOR POTENTIAL EVIDENCE OF THIRD PARTY GUILT

Occasionally, defendants seeking evidence of third-party guilt will make discovery requests for police reports or other information in the hope that there may be other crimes (solved or unsolved) with similarities to the charged crime. The idea being that if such incidents exist, they might reflect the "true" perpetrator of the charged crimes and help exonerate the defendant. (**See e.g.**, ***People* v. *Jenkins*** (2000) 22 Cal.4th 900, 957; ***People* v. *Kaurish*** (1990) 52 Cal. 3d 648, 686-687; ***People* v. *Littleton*** (1992) 7 Cal.App.4th 906, 909-910; ***City of Alhambra* v. *Superior Court*** (1988) 205 Cal.App.3d 1118, 1135.)

Sometimes the prosecutor may wish to obtain the records. This ensures that the defense is not in possession of records that are unknown to the prosecutor and helps prevent the prosecutor from being surprised at trial. Moreover, if there is a plausible basis for believing the records may contain truly exculpatory evidence, this provides another basis for prosecutors to seriously consider obtaining the records themselves.

Other times, the better approach may be simply to explain that the prosecutor has no constitutional, statutory, or ethical duty to comply with the request – in particular when the defense is not forthright in explaining their reasons for seeking the records, the reasons for desiring the records are based on speculation, or the request appears to be a mere fishing expedition that will potentially suck up prosecutorial time and resources.

Assuming a prosecutor has determined the request falls into the latter category, two questions are raised. First, does the prosecution have to obtain the records? Second, should the records be disclosed to the defense?

1. What is the Prosecutor's Obligation to Go Searching for Evidence of Third Party Guilt Requested by the Defense?

The People have an obligation to respond to a request to search for records of third party culpability evidence only when **all** of the following three factors are present:

● The records are deemed to be in the possession of the prosecution team.

● The defense specifies the records sought and makes a showing of plausible justification for their disclosure in light of the rule that evidence of third-party culpability is only relevant if it is capable of raising a reasonable doubt of defendant's guilt by showing a direct or circumstantial link between a third party and the charged offense.

● The defense makes a showing that their interest in having the prosecution search for records is sufficiently great that it justifies requiring the search *notwithstanding* (i) the burden placed on the government in obtaining those records and (ii) the fact that the records may be privileged or protected by the state constitutional right of privacy.

A. The People Have No Duty to Search for Records of Alleged Third Party Culpability Not Deemed to Be in Possession of the Prosecution Team

i. Records in the Possession of Non-Investigating Agencies

"The prosecution '"has no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense." [Citation.]" (***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1163, citing to ***People* v. *Panah*** (2005) 35 Cal.4th 395, 460.) If the defense requests information not known to the prosecution team or not in the constructive possession of the prosecution team, the prosecution has no statutory or constitutional obligation to search for such information. (**See *People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1133-1134 [noting there was no reason to assume the ***statutory*** definition of "possession" for purposes of section 1054.1 assigned the prosecutor "a broader duty to discover and disclose evidence in the hands of other agencies than do ***Brady*** and its progeny"]; **accord *Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, 905 [same].) "[I]nformation possessed by an agency that has no connection to the investigation or prosecution of the criminal charge against the defendant is not possessed by the prosecution team, and the prosecutor does not have a duty to search for or to disclose such material.' [Citation.]" (***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1133; ***In re Steele*** (2004) 32 Cal.4th 682, 697; ***Abatti* v. *Superior Court*** (2003) 112 Cal.App.4th 39, 46; **accord *Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, 902; ***People* v. *Ervine*** (2009) 47 Cal.4th 745, 768.)

Thus, if the defense asks the prosecutor for police reports of crimes committed on a particular date or particular neighborhood from a police agency that was **not involved** in the investigation of the case against the defendant, the defense must use "traditional third party discovery tools, such as a subpoena duces tecum" to attempt to obtain the records. (***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th

1305, 1318; **see also *Kling* v. *Superior Court of Ventura County*** (2010) 50 Cal.4th 1068, 1074 ["Documents and records in the possession of nonparty witnesses and government agencies other than the agents or employees of the prosecutor are obtainable by subpoena duces tecum"].) **See** generally, this outline, section XVI, at pp. 308-312.

Moreover, because there is no constitutional or statutory obligation to search for alleged records of unknown third party culpability evidence housed with non-investigating agencies, a court has **no authority** to order the prosecution to conduct the search. As pointed out in ***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, while courts could require a prosecutor to obtain records in the possession of an uncooperative non-investigative agency before *passage* of Proposition 115 (the initiative that enacted the current discovery statute, Penal Code section 1054 et seq.), that is no longer the case. (**Id**. at pp. 1319-1320.) This is due to the language of the current discovery statute.

ii. Records in the Possession of the Investigating Agencies

Certainly, if the reports of third party culpability are known to the officers involved in the investigation of the pending case, or directly relate to the charged investigation, the reports would be held to be in possession of the prosecution team. However, reports containing alleged third party culpability evidence may not be deemed to be in the possession of the prosecution – *even if those reports are housed within the investigating agency*. (**See** this outline, sections I-7-A at pp. 68-71 and I-7-H at pp. 94-99.)

In ***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305 the court held that when the Department of Corrections (DOC) investigates an in-prison crime, only that unit of the DOC that is involved in the investigation of the crime is part of the prosecution team, not the unit overseeing the administrative and security responsibilities of housing prisoners, and a prosecutor does not have an obligation to search or disclose the records of those portions of a multi-function government agency which are not a part of the prosecution team. (**Id**. at pp. 1317-1318; **accord *County of Placer* v. *Superior Court (Stoner)*** (2005) 130 Cal.App.4th 807, 814; **see also *In re Steele*** (2004) 32 Cal.4th 682, 701 [citing ***Barrett*** with approval]; ***Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, 902 [same]; **cf**., ***People* v. *Jacinto*** (2010) 49 Cal.4th 263, 270 [for *Sixth Amendment* purposes, release of prisoner from the county jail to federal authorities who deported the prisoner could not be held against the prosecution where deputies responsible for release of prisoner were part of jail security and administration *and not part of unit investigating case against defendant*].) Whether the rationale discussed in ***Barrett*** for drawing a distinction between possession of reports prepared by the investigative unit and reports prepared by the administrative unit of a multi-function agency can be extrapolated to draw a distinction between possession of reports prepared by the investigators of a charged case and unrelated reports involving unknown perpetrators or other perpetrators – in a law enforcement agency that serves primarily one function – has not been directly addressed by any court.

One thing to keep in mind (which would weigh heavily in favor of finding unrelated reports allegedly containing third party culpability evidence housed in the investigating agency are **not** "possessed" by the prosecution team for discovery purposes) is that such evidence may be difficult, if not practically impossible, to locate. This factor is important because whether information is ***readily accessible*** to the prosecution is an aspect of whether the information can properly be deemed to be in the possession of the prosecution team. (**See** this outline, section I-7-C & D at pp. 71-75.)

If the prosecution team is deemed only to possess reports relating to the charged case and not every report housed within the prosecution agency, then the prosecution would have no greater duty to obtain those records than if the records were housed in a non-investigating agency. However, assuming the People *are* in possession of all records of the investigating agency, this still does not mean the People must seek out those records. It just means the People cannot refuse to search for such records *on the ground the People are not in possession of the records*. As explained immediately below, there remain several other reasons why the People may properly refuse to conduct the search.

B. Before the Defense is Entitled to an In Camera Review of Alleged Third Party Culpability Evidence and/or Before the Prosecution May Be Ordered to Search for Such Evidence, the Defense Must Describe the Information Sought With Specificity and Must Make, At Least, a Showing of Plausible Justification for Disclosure

In general, before the prosecution can be required to seek out discovery in their possession, the defense must make a showing of "good cause" or a "plausible justification" of the need for release of the information. For example, in ***People* v. *Jenkins*** (2000) 22 Cal.4th 900, the defendant was charged with having murdered a police officer. The defense sought discovery of various documents, including all reports relating to cases that the victim had investigated or relating to arrests he had made in the year before he was murdered, to develop potential evidence of third party culpability. (**Id**. at pp. 953-957.) After noting a defendant generally is entitled to discovery of information that will assist in his defense, the court stated "[a] motion for discovery must describe the information sought with *some specificity and provide a plausible justification* for disclosure." (**Id**. at p. 953, emphasis added; **accord *People* v. *Kaurish*** (1990) 52 Cal.3d 648,686 [finding trial court has discretion to protect against the disclosure of third party culpability information when, inter alia, there is an "'absence of a showing which specifies the material sought and furnishes a 'plausible justification' for inspection"]; **see also *People* v. *Prince*** (2007) 40 Cal.4th 1179, 1232 [stating same standard in context of defense request for FBI database relied upon by prosecution expert]; ***People* v. *Luttenberger*** (1990) 50 Cal.3d 1, 20 [defendant has no right to court examination of police files absent "some preliminary showing 'other than a mere desire for all information in the possession of the prosecution'" plus "[t]he request must be 'with adequate specificity to preclude the possibility that defendant is engaging in a "fishing expedition"'"]; ***People* v. *Navarro*** (2006) 138 Cal.App.4th 146, 166 [when seeking an in camera review of police records concerning a confidential informant as part of a *Franks* challenge to a search warrant, "the defendant must make a preliminary showing that describes the information sought with

some particularity and that is supported by a plausible justification" and noting the "defendant must offer some evidence casting reasonable doubt regarding either the existence of the informant or the truthfulness of the affiant's statements]; ***People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 285-286 [noting that, among the discovery principles codified in 1990 by the passage of Proposition 115 was the principle that a court may decline a defendant's request for discovery when, inter alia, there is an "absence of a showing which specifies the material sought and furnishes a 'plausible justification' for inspection"]; ***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, 1320, fn. 7 ["A subpoena duces tecum that makes a blanket demand . . . and amounts to nothing more than a fishing expedition is subject to being quashed."]; ***Alhambra* v. *Superior Court*** (1988) 205 Cal.App.3d 1118, 1136 [characterizing "plausible justification" as being sufficient if it demonstrates a "reasonable likelihood" that the requested reports might lead to circumstantial evidence that a third person was implicated in one or more of the crimes with which the defendant was charged"].)

Moreover, when it comes to a request that the prosecution search through agency files for third party culpability evidence, or for the court to release subpoenaed documents purportedly showing third party culpability, the standard of "plausible justification" or "good cause" showing of a need for the records must take into account the standard for admissibility of third party culpability evidence, i.e., the defense must make a showing of "plausible justification" that the evidence directly or circumstantially links a third party to the charged crime and is capable of raising a reasonable doubt of defendant's guilt. (**See *People* v. *Gutierrez*** (2009) 45 Cal.4th 789, 824; ***People* v. *Robinson*** (2005) 37 Cal.4th 592, 625; **see also *People* v. *Montes*** (2014) 58 Cal.4th 809, 829 [questioning whether, post-Prop 115, defense request for discovery to support discriminatory prosecution was authorized, but assuming it is, identifying the standard of "plausible justification" for discovery relating to a discriminatory prosecution claim as requiring "a defendant to 'show by direct or circumstantial evidence that prosecutorial discretion was exercised with intentional and invidious discrimination in his case"]; ***Kennedy* v. *Superior Court*** (2006) 145 Cal.App.4th 359, 371 [finding, for purposes of Penal Code section 1054.9, a defendant is not *entitled to* evidence of third party guilt at trial unless defendant is not only able to describe the information sought with some specificity and provide a plausible justification for disclosure of the alleged third party guilt evidence, but is also able to "—at the very least—explain ***how*** the requested materials would be relevant to show someone else was responsible for the crime].)

Mere speculation that the records requested contain evidence of third party culpability evidence is insufficient to make the showing necessary to force the prosecution to go searching through agency records. (**See *People* v. *Jenkins*** (2000) 22 Cal.4th 900, 957 [denying defendant's request for reports potentially leading to third party culpability because, inter alia, "defendant's showing of need for those records was based upon speculation and constituted the proverbial fishing expedition"].)

This is consistent with the general rule that courts have no obligation to do in camera reviews of records for alleged ***Brady*** material based on mere speculation that a report or file might contain something useful.

(**See** this outline, IX-1 at pp. 265-270; ***United States* v. *Bland*** (7th Cir. 2008) 517 F.3d 930, 935 [a trial court "is under no general independent duty to review government files for potential ***Brady*** material"]; ***United States* v. *Caro Muniz*** (1st Cir. 2005) 406 F.3d 22, 29 [noting ***Brady*** does not permit in camera fishing expeditions through the government's files without a defendant first providing the court with some indication the materials sought contain material and potentially exculpatory evidence].)

Penal Code section 1054.1(e) requires the prosecution to disclose "[a]ny exculpatory evidence" but Penal Code Section 1054.5 only authorizes court enforcement of a prosecutor's statutory discovery obligations, "[u]pon a showing that a party has not complied with Section 1054.1[.]" (Pen. Code, § 1054.5.) The necessary showing the party must make before court enforcement of a discovery obligation can occur is that there is plausible justification or good cause for believing the evidence exists and is exculpatory. (**See *People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 285-286 [noting that, among the discovery principles codified in 1990 by the passage of Proposition 115 was the principle that a court may decline a defendant's request for discovery when, inter alia, there is an "absence of a showing which specifies the material sought and furnishes a 'plausible justification' for inspection"].)

C. Before the Prosecution May Be Ordered to Search for Records of Alleged Third Party Culpability Evidence and/or Before a Court May Grant a Request for Subpoenaed Records of Such Evidence the Defense Must Show Their Interest in Having the Prosecution or Law Enforcement Agency Search for Records is Sufficiently Great that it Justifies Requiring the Search Notwithstanding the Burden Placed on the Government in Obtaining the Records and Notwithstanding the Fact that the Records May be Privileged or Protected by the State Constitutional Right of Privacy

Assuming the defense can specify what records they are seeking and that they can provide a plausible justification that those documents are capable of raising a reasonable doubt of defendant's guilt, this does not mean the prosecution must begin its search for the records.

Even if the defense can provide a plausible justification for certain records, some defense requests for discovery of evidence of potential third party guilt may be denied on grounds that complying with the request is simply too burdensome for the government or potentially impacts third party interests in privacy. As pointed out in ***People* v. *Jenkins*** (2000) 22 Cal.4th 900, it is proper to deny a request to search for discovery of third party culpability where "the burdens placed on government and on third parties substantially outweigh the demonstrated need for discovery." (**Id**. at p. 957; **see also *People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 285-286 [noting this principle was "codified in 1990 by the passage of Proposition 115, the Crime Victims Justice Reform Act, which enacted Penal Code section 1054 et seq"].)

In ***Jenkins***, the defendant sought a year's-worth of police reports prepared by a murdered officer on the theory that a person investigated or arrested by the officer may have borne a grudge against the officer and thus been responsible for the murder of the officer. The defense pointed out that some eyewitnesses to the shooting of the officer had described the assailant as White or Hispanic, whereas defendant was African–

American. The defense contended that evidence of a White or Hispanic suspect in one of the officer's cases who bore a grudge against the officer — if such a person existed — would add weight to his defense. The prosecution successfully resisted having to provide the discovery on the grounds that defendant had made an inadequate showing and that the request would impose an inordinate burden on the police department to sift through its records to determine what arrests or investigations the officer had been involved in during the year preceding his death (although the prosecution agreed to go through their files and dig up any information relating to reports of serious threats of great bodily injury or death to the officer. (**Id**. at p. 956.) In upholding the denial of discovery, the ***Jenkins*** court not only took into account the practical burden placed on the government in collecting the report, but also considered that the records sought constituted records subject to the official information privilege, noting "[t]here is a significant interest in preserving the confidentiality of an individual citizen's arrest records[.]" (**Id**. at p. 957.)

In ***People* v. *Kaurish*** (1990) 52 Cal.3d 648, the defendant attempted to subpoena "police reports pertaining to child molestation killings in the Hollywood area" for the six months preceding and following the murder. The trial court granted a motion to quash the subpoena. The California Supreme Court upheld the granting of the motion to quash because there was a limited showing of relevance, and because "defendant's request was broad and somewhat burdensome, both with regard to expenditure of police resources to review files and to the privacy interests of third parties." (**Id**. at pp. 686-687; **see also *United States* v. *Brooks*** (D.C. Cir. 1992) 966 F.2d 1500, 1504 [noting as "the burden of the proposed examination rises, clearly the likelihood of a pay-off must also rise before the government can be put to the effort"].)

In contrast to ***Jenkins*** and ***Kaurish***, the appellate court in ***Alhambra* v. *Superior Court*** (1988) 205 Cal.App.3d 1118, held that a trial court did ***not*** abuse its discretion in finding a defendant in a multiple murder case was entitled to receive 12 specific homicide investigation and police reports from the district attorney's office where the specific reports sought were described with sufficient specificity. (**Id**. at p. 1135.) However, in ***Alhambra*** the court found that locating or producing the reports would place *no significant burden* on any governmental entity and *there was no showing that release of the requested information would violate any protected governmental interests or any third-party confidentiality or privacy rights*. (**Id**. at p. 1135-1136 [and noting that, "[u]nder such circumstances, it was not necessary that the showing of plausible justification be as strong as might be required under other circumstances"].) Moreover, as pointed out in ***People* v. *Littleton*** (1992) 7 Cal.App.4th 906, the appellate court in ***Alhambra*** did not find the reports *had* to be produced. Rather, the ***Alhambra*** court "simply found no abuse of discretion in granting discovery. Such a conclusion does not mean a court would abuse its discretion in denying discovery under similar facts." (***Littleton*** at p. 911, fn. 7.)

Yet, even assuming a defendant has made a sufficient showing justifying in camera review of the documents sought or the records subpoenaed, this still does not mean the defense is entitled to receive the records. As explained immediately below, a court may properly refuse to disclose the requested or subpoenaed documents after reviewing them in camera.

D. When is a Defendant *Entitled* to Discovery of Documents Allegedly Containing Third Party Culpability Evidence?

Once the defense has made a showing justifying the need for the prosecution to gather the documents containing the alleged third party culpability evidence or a sufficient showing to overcome a motion to quash a subpoena for documents of alleged third party culpability, the requested documents **should not automatically be disclosed to the defense**. This is because once the trial court reviews the requested documents, the documents may not turn out to contain relevant information; or if they do, the information may not be so relevant that the defendant's interest in disclosure outweighs the interest of the government or a third party in nondisclosure. (**See *People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 289 [requiring the trial court to review reports of alleged third party culpability, but upholding nondisclosure thereafter].)

In *general*, when determining whether privileged or private information should be disclosed in order to vindicate a competing need such as defendant's state or federal constitutional right to discovery, it is proper (and likely mandatory) that a court hold an in camera review of the materials. (**See *Pennsylvania* v. *Ritchie*** (1987) 480 U.S. 39, 61 [requiring in camera review to determine whether defendant's interest in disclosure outweighed state's need to protect the confidentiality of those involved in child-abuse investigations]; ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 717 ["when confidential records might contain exculpatory material, the trial court's in camera review of those records, followed by disclosure to the defense of any ***Brady*** material that review uncovers, is sufficient to protect the defendant's due process rights"]; ***People* v. *Webb*** (1993) 6 Cal.4th 494, 518 [when allegedly material evidence is subject to a state privacy right, and "the state seeks to protect such privileged items from disclosure, the court ***must*** examine them in camera to determine whether they are 'material to guilt or innocence", emphasis added]; ***Rubio* v. *Superior Court*** (1988) 202 Cal.App.3d 1343, 1349-1351 [requiring in camera review of videotape of sexual relations between a married couple to determine whether criminal defendant's right to due process outweighs couple's constitutional rights of privacy and their statutory privilege not to disclose confidential marital communications].) This rule applies when the discovery sought, either directly from the prosecution or from third parties, constitutes alleged third party culpability evidence. (**See *People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 286-287; ***People* v. *Littleton*** (1992) 7 Cal.App.4th 906, 910-911.)

i. Factors in the Balancing Test

In deciding whether to disclose police reports relating to alleged third party culpability evidence, the trial court must take into account: "(1) whether the material requested is adequately described, (2) whether the requested material is reasonably available to the governmental entity from which it is sought (and not readily available to the defendant from other sources), (3) whether production of the records containing the requested information would violate (i) third party confidentiality or privacy rights or (ii) any protected governmental interest, (4) whether the defendant has acted in a timely manner, (5) whether the time required to produce the requested information will necessitate an unreasonable delay of defendant's trial, (6)

whether the production of the records containing the requested information would place an unreasonable burden on the governmental entity involved and (7) whether the defendant has shown a sufficient plausible justification for the information sought." (***Alhambra* v. *Superior Court*** (1988) 205 Cal.App.3d 1118, 1134.)

a. Privacy Rights of Victims, Witnesses and Suspects

Third party confidentiality interests include the interest of the victims, the witnesses, and the suspects who are named in the report in maintaining their privacy.

Victims' Privacy Rights

"[V]ictims have a constitutional right of privacy. (***People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 287, citing to Cal. Const., art. I, § 1.) This fact weighs "heavily against a criminal defendant's right to potentially exculpatory material." (***People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 287.) Moreover, with the passage of Marsy's law, this interest in victim's privacy has been substantially enhanced. (**See** Cal. Const., art. I, § 28(b)(4) [giving victims the right to "prevent the disclosure of confidential information or records to the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, 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"].)

Marsy's Law requires that victims have a right to "reasonable notice of all public proceedings, . . . upon request, at which the defendant and the prosecutor are entitled to be present . . . and to be present at all such proceedings" (Cal. Const., art. I, § 28 (b)(7)) as well as the right to "be heard, upon request, at . . . any proceeding, in which a right of the victim is at issue." (Cal. Const., art. I, § 28 (b)(8).) However, it is an open question whether Marsy's law requires notification to the victims of crimes before release of police reports identifying the victim when the reports are being released in cases where the victim was not the victim of the charged offense, i.e., in cases where the police reports are being released as evidence of third-party culpability. The language of section 28(b)(4) suggests the answer is no; but the intent behind Marsy's law suggests the answer might be yes.

Keep in mind, the strength of the victim's privacy interest in reports relating to third party culpability may vary depending on the nature of the crime alleged in the requested reports. (**See *People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 289-290 [noting the victim of a "home invasion slash sexual assault" had "a strong interest in maintaining her anonymity"].)

Witnesses' Privacy Rights

Witnesses also have a state constitutional right of privacy that must be taken into account in deciding whether to disclose police reports of alleged third party culpability. (**See *People* v. *Littleton*** (1992) 7 Cal.App.4th 906, 911.)

Suspects/Defendants' Privacy Rights

Suspects named in the police reports also have an interest in privacy that must be considered when deciding whether to disclose police reports of third party culpability. (***People* v. *Jenkins*** (2000) 22 Cal.4th 900, 957.) This is because arrest records are protected by the state constitutional right to privacy. (**See *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO* v. *Superior Court*** (2007) 42 Cal.4th 319, 340; ***People* v. *Jenkins*** (2000) 22 Cal.4th 900, 957; ***Reyes* v. *Municipal Court*** (1981) 117 Cal.App.3d 771, 775; ***Craig* v. *Municipal Court*** (1979) 100 Cal.App.3d 69, 72.) "The courts have repeatedly recognized that release of arrest records or dissemination of information about arrests implicated the right to privacy of the arrestees." (***Denari* v. *Superior Court*** (1989) 215 Cal.App.3d 1488, 1498 [citing to numerous cases].)

b. Governmental Interest in Protecting Official Information

The governmental interest weighing against disclosure includes the governmental interests in maintaining the confidentiality of criminal investigations – all of which are protected by the official information privilege of Evidence Code section 1040. (***People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 290.)

The trial court must take into account whether the report would disclose an ongoing investigation. "Ongoing investigations fall under the privilege for official information." (***People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 287 citing to Evid. Code, § 1040.) And if the report might disclose an ongoing investigation, this factor weighs "heavily against a criminal defendant's right to potentially exculpatory material." (***People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 287.)

"It is true that as time passes and an investigation lapses or is abandoned, the need for confidentiality in police files wanes." (***People* v. *Jackson*** (2003) 110 Cal.App.4th 280,290, citing to ***County of Orange* v. *Superior Court*** (2000) 79 Cal.App.4th 759, 768–769.) "However, the general confidentiality of police investigations accrues significant public benefit. Informants and witnesses are more likely to cooperate with law enforcement if they trust that their participation will not be made public." (***People* v. *Jackson*** (2003) 110 Cal.App.4th 280,290, citing to ***County of Orange* v. *Superior Court*** (2000) 79 Cal.App.4th 759, 764–765.) Thus, any decline in the need for confidentiality "never renders law enforcement investigative files automatically discoverable and is but one factor to consider when weighing a defendant's right to otherwise privileged information under Evidence Code section 1040." (***People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 290.)

Even when the reports relate to a case that *has gone to court*, this does not mean that all third party or governmental interests in confidentiality have been extinguished. It is undisputed that "the government's interest in maintaining confidentiality in a case of ongoing investigation is far greater than in a case where a suspect has been charged and the matter has entered the public view through the court system." (***People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 288.) But a charged crime may have resulted in a plea at arraignment without any disclosure of information regarding the names of witness in open court. The fact

that some information has been disclosed in court does not vitiate the interest in information that has not been disclosed.

For example, in ***People* v. *Jackson*** (2003) 110 Cal.App.4th 280, the defense argued that it was entitled to disclosure of a report relating to a burglary committed by an unidentified third party that revealed a similar modus operandi to the burglaries defendant was alleged to have committed. The ***Jackson*** court found that the victim had a strong interest in maintaining her privacy *even though* the defense had already been made aware of certain fact surrounding the uncharged burglary and the defendant had been asked about this other burglary when he was interrogated about the charged burglaries. "Neither the official information privilege, or the victim's privacy interests were waived by the publication of the address and date of the crime. The prosecution's voluntary disclosure that the victim failed to identify [the defendant] in a lineup and the police interrogation of [the defendant] likewise failed to disclose sufficient facts to render the entire file discoverable." (**Id**. at pp. 289-290.)

Moreover, the need to weigh the government's claim of privilege against the defendant's constitutional right to present a defense has <u>not</u> been altered by the passage of Proposition 115 as this balancing test is "inherent in the criminal discovery statutes." (***People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 291 [citing to Pen. Code, § 1054.7 which permits the denial of even exculpatory evidence altogether for 'good cause' which includes "possible compromise of other investigations by law enforcement"].)

c. <u>Governmental Interest in Avoiding Unduly Burdensome Requests</u>

The governmental interest in conserving and prioritizing resources can weigh heavily against requiring the agency to collect police reports in the first place. (**See** this outline, XVIII-1-C at pp. 341-342.) However, once the reports have been collected, the damage has already been done so this interest is not as compelling when deciding to whether to release records that have been brought before a trial court for in camera review. Courts may, however, want to take into consideration that release of the records may be followed by more onerous requests by defense counsel seeking additional discovery.

ii. <u>Cases Applying the Balancing Test to Documents Reviewed In Camera</u>

***<u>People</u>* <u>v. *Jackson*</u>** <u>(2003) 110 Cal.App.4th 280</u>

In ***Jackson***, the defendant was charged with three separate residential burglaries in which he sexually assaulted his victims. The defense requested discovery of police files relating to uncharged similar burglaries, prowlings, and/or sexual assaults that occurred at or near the same time as the spree of charged burglaries. (This request, stemmed in part, from the fact that during the police interrogation of the defendant, investigators asked the defendant about a pair of *other* burglaries, which defendant denied committing.) The People opposed the request as to reports relating to investigations where a suspect had not yet been identified. The trial court denied the defense request for those reports without first conducting any in camera review. On appeal, the Attorney General's Office conceded it was error to deny the request without conducting an in camera review. The appellate court reversed, directing the trial court "to conduct

the necessary in camera hearing followed by an open adversarial hearing pursuant to Evidence Code sections 915, subdivision (b), and 1040." (**Id**. at p. 284.) The appellate court directed the trial court to deny defendant's discovery request and reinstate the judgment if it found the information contained no material, exculpatory evidence. (**Ibid**.) The trial court then reviewed several reports in camera that related to similar incidents that occurred at addresses on Dunlap Street, Bloomquist Street, and Candy Lane. The trial court denied discovery as to all such reports. (**Id**. at pp. 284-285.)

When the case returned to the appellate court, it first upheld this denial of release as to the Candy Lane and Bloomquist incidents. The court observed that the Candy Lane incident involved an attempted forcible entry into the house while the crimes charged against the defendant all involved entry through unlocked or broken doors. Thus, there was insufficient evidence that the Candy Lane incident was similar to the charged offense(s). Moreover, the court noted that neither the Candy Lane victim nor the Bloomquist Street victim could identify the perpetrator and that since the defendant could not be excluded as a possible perpetrator of the crime, the files would not lead to exculpatory evidence. (**Id**. at p. 286.)

As to the Dunlap Street incident, the appellate court noted there were a lot of similarities between the crimes charged and the crime committed by the defendant, including the time and location of the attack, mode of entry, nature of the touching, flight of the suspect, and initial description. Indeed, the trial court found it was so similar that it was likely committed by the defendant and thus would not be exculpatory, but *inculpatory*, evidence. The appellate court upheld nondisclosure, however, on a different ground: that the evidence was not material when weighed against the interest in non-disclosure. (**Id**. at p. 287.)

In coming to their conclusions, the ***Jackson*** appellate court relied on the fact that (i) the police reports sought related to ongoing investigations that fell under the privilege for official information (Evid. Code, § 1040) and (ii) disclosure of the reports would violate the constitutional right of privacy (Cal. Const., art. I, § 1) of the victims identified in those reports. Both of these factors, the ***Jackson*** court found to "weigh heavily against a criminal defendant's right to potentially exculpatory material." (**Id**. at p. 287.)

The ***Jackson*** court recognized that, at the time of the remand hearing, the Dunlap Street incident was not the subject of an ongoing investigation and seemed to accept the defense argument that release of the report relating to that incident might not compromise the investigation in the same way it would if the investigation were active. Nevertheless, ***Jackson*** court found there remained an interest in nondisclosure even when an investigation lapses or is abandoned because "the *general* confidentiality of police investigations accrues significant public benefit." (***People* v. *Jackson*** (2003) 110 Cal.App.4th 280,290, emphasis added.)

The ***Jackson*** court did not find the interest in disclosure compelling in comparison to that interest. The court held neither the fact the requested reports related to crimes that were similar to the charged offenses nor the fact the victims of those crimes had failed to identify the defendant as the perpetrator, provided the "direct or circumstantial evidence linking the third person to the actual perpetration of the crime" required for admissibility under ***People* v. *Hall*** [(1986)] 41 Cal.3d 826[.]" (***Jackson*** at p. 288.)

The ***Jackson*** court **rejected** the argument that since the defense might have uncovered evidence that excluded defendant as the perpetrator by following up on the police investigation described in the sought-after reports, the defense was entitled to their disclosure notwithstanding the countervailing interests. (**Id**. at p. 287.) The court also **rejected** a related argument that the defense was entitled to the reports because the defense "might" have done a better job than the police in investigating the crime and consequently uncovered ***Brady*** evidence. (**Id**. at p. 289 [and noting there is a "heavy burden in establishing the materiality of investigation files in similar but uncharged crimes "which can only be met by a showing that "had the files been disclosed, it was reasonably probable that the defense investigation would have turned up admissible exculpatory evidence"].)

The ***Jackson*** court distinguished the case of ***City of Alhambra* v. *Superior Court*** (1988) 205 Cal.App.3d 1118 [discussed in this outline, section XVIII-1-D-ii at p. 349], a case finding the defense was entitled to disclosure of 12 specifically identified reports of police homicide investigations, on two grounds. First, the ***Jackson*** court pointed out that the reports in ***City of Alhambra*** related to *charged* cases whereas the reports in ***Jackson*** involving ongoing investigations. This was significant because "the government's interest in maintaining confidentiality in a case of ongoing investigation is far greater than in a case where a suspect has been charged and the matter has entered the public view through the court system." (***Jackson*** at p. 288.) Second, the ***Jackson*** court observed that the appellate court in ***City of Alhambra*** never considered the issue of "whether a defendant's entitlement to potentially exculpatory material outweighs the official information privilege and a victim's privacy rights[.]" (***Jackson*** at p. 288.)

People* v. *Littleton (1992) 7 Cal.App.4th 906

In ***Littleton***, the defendant was charged with burglary and rape. Before trial began, the defense requested discovery of 12 police reports involving other similar burglary-rape cases in which no arrests had been made or charges brought. The defendant was a possible suspect in those other crimes and had appeared in a lineup before a number of the victims but was identified by only one victim. The defense argued that because the defendant had been a suspect in the other crimes and was not charged, the reports could produce evidence that a third party was responsible for the crime in the case at bar. (**Id**. at pp. 909–910.) The trial court denied the requested discovery, finding the other crimes "unrelated by evidence or even argument" and that the privacy interests of the victims and citizen witnesses outweighed the defendant's request considering the court found no benefit to defendant would be obtained from the information. (**Id**. at p. 910.)

The appellate court upheld the denial of the request for discovery, noting that since "no one had been arrested or charged with those other crimes in this case, the information in the reports would have been of no value to the defendant unless he was able to solve the other crimes and identify the perpetrator." (**Id**. at p. 911.) The court pointed out that "the only connection between the present case and the other crimes was that the police had identified defendant as a possible suspect in the other cases but had not charged him because the victims in those cases could not identify the defendant as the perpetrator." (**Id**. at p. 911.) The court found this connection insufficient "and the possible benefit to defendant too tenuous and speculative

to outweigh" the government's "legitimate need for confidentiality of ongoing police investigations" and privacy interests that would be breached if the victims and witnesses identified in those other reports were disclosed. (**Id**. at p. 911.) The ***Littleton*** court distinguished the case of ***City of Alhambra* v. *Superior Court*** (1988) 205 Cal.App.3d 1118 [discussed in this outline, section XVIII-1-D-ii at p. 349], in the same way that the court in ***People* v. *Jackson*** (2003) 110 Cal.App.4th 280 [discussed in in this outline, section XVIII-1-D-ii at pp. 347-348] did. (***Littleton*** at pp. 910-911 [and noting ***City of Alhambra*** did not find disclosure was mandated- only that it was not an abuse of discretion to order].)

City of Alhambra v. Superior Court (1988) 205 Cal.App.3d 1118

In ***City of Alhambra***, the defendant was charged with two counts of murder and one count of attempted murder. During the time period of the alleged crimes, defendant was employed as a newspaper delivery person and the crimes all occurred in or about the geographical area of defendant's paper route during the early morning hours. The defense requested twelve reports, all of which involved crimes which bore some similarities to the crimes with which the defendant was charged, i.e., the victims were lone females, the attacks were associated with stabbing, bludgeoning, and sex, and all took place in a relevant time period in the same geographic area. According to the defense attorney, the information was requested to determine the type of murder involved, the description of the victim, the location, the time, and other sufficient indicia to allow a comparison to be made between the facts of defendant's case and of the different cases. Each report was specifically identified by number. (**Id**. at pp. 1124, 1136.)

The appellate court characterized the showing made by the defendant as "[a] minimal demonstration of plausible justification" that "[w]hile not particularly strong, . . . was sufficient to demonstrate a 'reasonable likelihood' that the requested reports might lead to circumstantial evidence that a third person was implicated in one or more of the crimes with which the defendant was charged." (**Id**. at p. 1136.) On the other hand, the appellate court noted the request for the reports would not delay the trial, the reports would place no significant burden on any governmental entity as the prosecution would not have been required to copy one page of the ordered documents, and there was no showing that release of the requested information would violate any protected governmental interests or any third-party confidentiality or privacy rights. (**Id**. at p. 1135.) In light of these observations, the appellate court held that a trial court did not abuse its discretion in finding the defendant was entitled to receive the police reports from the district attorney's office. (**Id**. at p. 1135.)

2. The Standard of Review for Denial of Discovery of Alleged Third Party Guilt on Appeal

The standard for review of a court's denial of a defense discovery request for evidence of third party guilt on appeal is the same standard of appellate review when it comes to a court's denial of a discovery request in general: whether the trial court abused its discretion, and if so, whether the denial resulted in prejudice to the defendant. (**See *People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 286, 291; ***People* v. *Superior Court (Baez)*** (2000) 79 Cal.App.4th 1177, 1185.)

XIX. PROSECUTORIAL *BRADY/PITCHESS* MOTIONS FOR INFORMATION CONTAINED IN PEACE OFFICER PERSONNEL FILES?

1. What is a *Brady/Pitchess* motion?

A ***Pitchess*** motion is a motion seeking disclosure of citizen complaints and other information from the personnel files of a peace or custodial officer.

The motion is called a ***Pitchess*** motion because that is the name of the California Supreme Court case that held a criminal defendant's fundamental right to a fair trial entitled him or her to discover relevant information in a peace officer's personnel record relating to citizen complaints, and which described the balancing test and procedures to be used when such information privilege is sought. (**See *Pitchess* v. *Superior Court*** (1974) 11 Cal.3d 531, 537-540.)

"In 1978, the California Legislature codified the privileges and procedures surrounding what had come to be known as '***Pitchess*** motions' ... through the enactment of Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045." (***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 710; ***Chambers* v. *Superior Court*** (2007) 42 Cal.4th 673, 679; **see also** Pen. Code, §§ 832.5 [governing citizen complaints against personnel in departments of agencies that employ peace officers]; 832.7 [stating peace or custodial officer personnel records maintained pursuant to section 832.5, and information obtained from those records are confidential and shall not be disclosed unless pursuant to Evidence Code Sections 1043 and 1046]; and Gov. Code § 3300 et seq. [the Public Safety Officers Procedural Bill of Rights Act].) However, motions for disclosure of peace officer personnel files continue to be referred to as ***Pitchess*** motions. (***Zanone* v. *City of Whittier*** (2008) 162 Cal.App.4th 174, 186, fn. 13.)

The ***Pitchess*** scheme takes precedence over more general civil and criminal discovery provisions. (***Davis* v. *City of Sacramento*** (1994) Cal.App.4th 393, 400; ***Albritton* v. *Superior Court*** (1990) 225 Cal.App.3d 961, 963 (reciprocal discovery provisions enacted by Proposition 115 do not "abrogate or repeal the express statutory discovery authorized by Evidence Code sections 1043-1045" [citing Pen. Code, § 1054, subd. (e)]).

The statutory scheme seeks to achieve a balance between "two directly conflicting interests: the peace officer's just claim to confidentiality, and the criminal defendant's equally compelling interest in all information pertaining to the defense." (***City of San Jose* v. *Superior Court*** (1993) 5 Cal.4th 47, 53.)

A ***Brady/Pitchess*** motion is a hybrid motion requesting the disclosure of information contained in an officer's personnel file that might constitute favorable, material evidence. (**See e.g., *People* v.**

Superior Court (Johnson) (2015) 61 Cal.4th 696, 706; ***Abatti* v. *Superior Court*** (2003) 112 Cal.App.4th 39, 42.) The motion utilizes the ***Pitchess*** procedures but requests "***Brady***" information that would not necessarily be disclosed be disclosed pursuant to a ***Pitchess*** motion if the information is more than five years old. (**See *City of Los Angeles* v. *Superior Court (Brandon)*** (2002) 29 Cal.4th 1, 12, 14-15 [finding "no fundamental principle of justice that is offended by" section 1045(b)'s "prohibition against disclosing citizen complaints of officer misconduct that were filed 'more than five years' before the proceeding in which disclosure is sought" but that if the trial court comes across a complaint constituting favorable material evidence older than 5 years it may need to disclose that complaint notwithstanding the 5 year prohibition]; ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 716 [noting that in "some ways the ***Pitchess*** statutory scheme is potentially narrower than ***Brady***'s requirement" but stating more definitively that "all information that the trial court finds to be exculpatory and material under ***Brady*** must be disclosed, notwithstanding Evidence Code section 1045's limitations"].)

2. Who can bring a *Brady*/*Pitchess* motion?

Although ***Pitchess*** motions are most often brought by defendants in criminal cases (and the case of ***Pitchess*** itself involved such a discovery request), ***Pitchess*** and ***Brady/Pitchess*** motion may be brought by prosecutors, civil litigants, or juvenile offenders. (**See *People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 716 [prosecutors]; ***Alford* v. *Superior Court*** (2003) 29 Cal.4th 1033, 1046 [prosecutors]; ***People* v. *Gutierrez*** (2004) 112 Cal.App.4th 1463, 1475 [prosecutors]; ***Rosales* v. *City of Los Angeles*** (2000) 82 Cal.App.4th 419, 427 [civil litigants]; ***City of San Jose* v. *Superior Court*** (1993) 5 Cal.4th 47, 53-54 [juvenile offenders].)

3. Who responds to a *Brady*/*Pitchess* motion?

Service of a ***Brady/Pitchess*** motion must be made on the "governmental agency which has custody and control of the records." (Evid. Code, § 1043(a).) Service on the designated custodian of records should be sufficient but time can be saved by providing a courtesy copy to the attorneys who will be representing the agency at the hearing, i.e., the city attorneys for local police agencies, county counsel for sheriffs or probation, and the Attorney General for CHP or other state agencies.

Sometimes, however, the only person to show up with the records will be a representative of the police agency's administration or personnel/internal affairs division rather than counsel.

4. When should a *Brady*/*Pitchess* motion be filed?

The ***Pitchess*** statutes do not place specific time limitations on ***when***, during the course of a criminal proceeding, a ***Pitchess*** motion may be brought. (**See *Hall* v. *Superior Court*** (2005) 133 Cal.App.4th 908, 917 [and finding a local court policy requiring all felony matters motions be filed and heard 30 days in advance of trial was invalid as applied to ***Pitchess*** motions for officer's personnel files,

since statute governing ***Pitchess*** motions did not have such 30-day requirement].) Nor do the ***Pitchess*** statutes identify particular types of criminal proceedings to which the right to ***Pitchess*** discovery is limited. ***Pitchess*** motions may even be filed after conviction in a criminal case. (**See e.g.**, ***People* v. *Nguyen*** (2007) 151 Cal.App.4th 1473; ***Hurd* v. *Superior Court*** (2006) 144 Cal.App.4th 1100.)

In ***Galindo* v. *Superior Court*** (2010) 50 Cal.4th 1, a case involving a defense request to file a ***Pitchess*** motion before the preliminary examination, the California Supreme Court held that while "no statute prohibits a criminal defendant from filing a ***Pitchess*** motion before a preliminary hearing is held, neither does any statute expressly grant a right to obtain ***Pitchess*** discovery for use at the preliminary hearing." (**Id**. at p. 5.) Accordingly, the court held that while a defendant could file a ***Pitchess*** motion before a preliminary hearing, the desire to do so "will not necessarily or invariably constitute good cause for postponing the preliminary hearing over the prosecution's objection" considering the purpose of the hearing and that "[b]oth the defendant and the people have the right to a preliminary examination at the earliest possible time" (**Id**. at p. 5.)

5. Is there any notice requirement when filing a *Pitchess* motion?

A. Generally

The moving party must file written notice with court, and serve the custodian of records, at least 16 court days in advance of hearing (plus 2 calendar days if service is by FAX or overnight delivery service, or plus 5 calendar days, if service is by mail). (Evid. Code, § 1043(a); Code Civ. Proc., § 1005(b).)

"The fact that an opposing party has actual knowledge of a pending court proceeding will not excuse the moving party from the requirement of giving the written notice required by statute." (***City of Tulare* v. *Superior Court*** (2008) 169 Cal.App.4th 373, 384.) However, the moving party can file an order requesting the shortening of the notice period. (**Ibid**.)

Section 1043 requires written notice of a motion to produce records on the agency who holds the records and mandates that the agency must notify the individual whose records are sought; without such notice, no hearing may be held. (***Abatti* v. *Superior Court*** (2003) 112 Cal.App.4th 39, 56; Evid. Code, § 1043(a)&(c).) Normally, service on the agency holding the records will be sufficient. However, a court should not assume the officer has been notified, especially if the officer is no longer working for the agency holding the records. (**See *Abatti* v. *Superior Court*** (2003) 112 Cal.App.4th 39, 56.)

B. Is Counsel for Defendant in the Criminal Case Entitled to Notice or to Participate in a Prosecutorial *Brady/Pitchess* Motion Asking the Court to Review Peace Officer Personnel Records?

It is important to keep in mind that the opposing party in a ***Brady/Pitchess*** motion is **not** the criminal defendant but the agency holding the records.

In ***Alford* v. *Superior Court*** (2003) 29 Cal.4th 1033, the California Supreme Court held that prosecutors are not entitled to participate in a defendant's ***Pitchess*** motion, but they are entitled to notice, to be present and to participate if the trial court so desires. (**Id**. at pp. 1044-1046; **accord *People* v. *Superior Court (Humberto S.)*** (2008) 43 Cal.4th 737, 750.) And in ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, the court reiterated that the prosecution "must follow the same procedures that apply to criminal defendants, i.e., make a ***Pitchess*** motion, in order to seek information in [officer personnel] records." (**Id**. at p. 705.)

In ***People* v. *Davis*** (2014) 226 Cal.App.4th 1353, the court recognized that while the analysis in ***Alford* v. *Superior Court*** (2003) 29 Cal.4th 1033 pertained to the *People*'s due process right to participate in a *defense* ***Pitchess*** motion, "many of the same principles apply when the roles are reversed." (***Davis*** at pp 1373-1374.) However, the ***Davis*** court then went on to point out that "[t]he statutory procedure for conducting a ***Pitchess*** motion does not require service of notice on the defendant when the People bring that motion" and that even "assuming that general due process principles entitle the defendant to notice of what could be considered a third party discovery proceeding, we have found no law entitling the defendant to participate in the People's ***Pitchess*** motion." (**Id**. at p. 1374.) The ***Davis*** court observed that "the People's agency relationship with investigative personnel implicates ***Brady*** obligations that the defendant does not have" (**id**. at p. 1374, fn. 6) and stated ***Brady*** "does not confer on the criminal defendant a due process right to participate in the People's ***Pitchess*** motion to discover material evidence from a police officer's confidential personnel files, particularly when that motion is made post-judgment." (**Id**. at p. 1374.) The ***Davis*** court noted the lack of "any other authority which construes ***Brady*** as conferring on a defendant a constitutional right to participate in a third party proceeding initiated by the People in order to comply with its obligations under ***Brady***." (**Id**. at p. 1374.)

Editor's note: In ***Davis***, twelve years after defendant was convicted, the prosecution filed a motion for discovery of potentially relevant records from the personnel file of a police officer who testified at the defendant's trial. The superior court conducted an in-camera review of the file and then issued an order finding that the officer's records were not material to the defendant case either as evidence bearing on his guilt or sentence or as impeachment evidence. (**Id**. at p. 1358.) "Although not a party to the 2012 postjudgment discovery motion, the defendant filed a notice of appeal seeking independent appellate review of the officer's records to determine whether they contain material that should have been produced to the People pursuant to ***Brady***[.]" (**Id**. at p. 1359.) The appellate court rejected defendant's request because the superior court's decision was not an appealable order since the order did not affect the defendant's substantial rights, the defendant did not file his own motion for discovery of police officer personnel files or otherwise intervene in the post-judgment proceeding, and a convicted defendant does not have a statutory right to a post-judgment discovery order based on ***Brady*** alone, independent of Penal Code section 1054.9. (**Id**. at pp. 1364-1374.) The ***Davis*** court indicated that if the superior court *had* located "***Brady***" information in the officer's file, the People might have a due process duty to disclose the information to the defense. (**Id**. at pp. 1374-1375.)

C. Does the notice requirement apply to "follow-up" motions requesting supplemental information?

The notice requirement not only applies to an initial ***Pitchess*** motion but to any subsequent motion requesting more information than initially disclosed. (***City of Tulare* v. *Superior Court*** (2008) 169 Cal.App.4th 373, 383.) **See** this outline, section XIX-12-A at p. 369 [discussing secondary requests for ***Pitchess*** information].)

6. What is the threshold showing that must be made before a court will conduct an in camera examination of personnel files pursuant to a *Brady*/*Pitchess* motion?

Evidence Code section 1043(b)(3) requires that the party seeking discovery or disclosure of ***Pitchess*** information file a written motion supported by affidavits showing "good cause for the discovery," first by demonstrating the materiality of the information to the pending litigation, and second by "stating upon reasonable belief" that the police agency has the records or information at issue. (***Warrick* v. *Superior Court*** (2005) 35 Cal.4th 1011, 1019; **accord *People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 710.) If this showing is made, the court reviews the records in camera to determine what records, if any, must be disclosed. (**Id**. at p. 1019.) The "two-part showing of good cause is a '**relatively low threshold for discovery**.'" (***Warrick* v. *Superior Court*** (2005) 35 Cal.4th 1011, 1019, emphasis added.)

"The critical limitation for purposes of the initial threshold determination is materiality, which, in this context, means the evidence sought is admissible or may lead to discovery of admissible evidence." (***Riske* v. *Superior Court*** (2016) 6 Cal.App.5th 647, 658 citing to ***Richardson* v. *Superior Court*** (2008) 43 Cal.4th 1040, 1048–1049 ["the materiality standard [of Evidence Code section 1043] is met if evidence of prior complaints is admissible or may lead to admissible evidence"].) This showing of "materiality" is a lesser showing than required under the Supreme Court's constitutional materiality standard articulated in ***Brady* v. *Maryland*** (1963) 373 U.S. 83. (***People v. Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 712; ***Riske* v. *Superior Court*** (2016) 6 Cal.App.5th 647, 658.)

A. Materiality Relates to the *Pending* Litigation

A ***Pitchess*** motion will not be granted unless there is showing that the information requested is material to the "subject matter involved in the ***pending*** litigation." Thus, a request for information in anticipation of a pending new trial motion must show the information requested is material to the ***new trial*** motion, not that it might have been material at the trial. (***People* v. *Nguyen*** (2007) 151 Cal.App.4th 1473, 1478; **see also *Hurd* v. *Superior Court*** (2006) 144 Cal.App.4th 1100, 1105 [Pen. Code, § 1054.9 authorizes a pre-habeas corpus motion for discovery of peace officer personnel records pursuant to ***Pitchess*** and Evid. Code, § 1043, but a criminal defendant who makes such a motion without having made one during the original prosecution must show that the records are material to the

habeas corpus claims he or she proposes, and that those proposed claims are cognizable on habeas corpus]; ***Giovanni B.* v. *Superior Court*** (2007) 152 Cal.App.4th 312, 321 [denying request to hold in camera hearing because evidence sought insufficient to affect outcome of *motion to suppress*].)

B. Is there a Difference in the "Good Cause" Showing that Must be Met Depending on Whether the Party Requesting the Information is the Prosecution or the Defense?

In ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, the California Supreme Court described more specifically what a *defendant* would have to show to obtain in camera review of peace officer personnel files:

"The defense only needs to demonstrate '"a logical link between the defense proposed and the pending charge" and describe with some specificity "how the discovery being sought would support such a defense or how it would impeach the officer's version of events."'" (**Id**. at p. 720.) "[T]he defense proposed may, 'depending on the circumstances of the case, . . . consist of a denial of the facts asserted in the police report[.]'" (**Id**. at p. 720 citing to ***Warrick* v. *Superior Court*** (2005) 35 Cal.4th 1011, 1024-1025; **see also *Garcia* v. *Superior Court*** (2007) 42 Cal.4th 63, 70 [specificity requirement is imposed to "preclude the possibility of a defendant's simply casting about for any helpful information"].)

"This specificity requirement excludes requests for officer information that are irrelevant to the pending charges." (***Johnson*** at pp. 720-721.) "But if the defendant shows that the request is relevant to the pending charges, and explains how, the materiality requirement will be met." (***Johnson*** at p. 721.)

"[T]o satisfy the 'reasonable belief' requirement, [the defendant] need not know what information is located in personnel records before he obtains the discovery." (***Johnson*** at p. 721.) "A reasonable belief that the agency has the type of information sought does not necessarily mean personal knowledge but may be based on a rational inference." (***Johnson*** at p. 721)

Thus, it is sufficient for defense counsel's declaration to state a belief that members of the public "may" have filed complaints bearing on the officer's credibility or character trait in issue. It is not necessary the affidavit prove the existence of the particular records. (**See *Johnson*** at p. 721.)

Editor's note: The preceding sentence is based on language from ***City of Santa Cruz* v. *Municipal Court*** (1989) 49 Cal.3d 74 outlining the standard for triggering in camera review based on a belief that members of the public "may" have filed complaints of use of "***excessive force*** by the officers in question[.]" (**Id**. at p. 79.) It is clear, however, that the ***Johnson*** court was relying on the language for the principle that defendants do not have to know whether members of the public actually did file complaints *in general* to meet the standard for review. (***Johnson*** at p. 721; **see also *Johnson*** at p. 718 ["The ***Pitchess*** procedures should be reserved for cases in which officer ***credibility*** is, or might be, actually at issue rather than essentially mandated in all cases."] emphasis added.)

Some of the requirements the defense will have to meet should apply equally to the prosecution. For example, both parties would have to meet Evidence Code section 1043(b) requirement of an affidavit "showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records" (Evid. Code, § 1043(b)(3)). Moreover, at least some of the case law gloss on what a defendant must show to establish good cause should apply equally to ***Brady/Pitchess*** motions filed by the prosecution; namely: (i) that the showing cannot be met when the information is "irrelevant to the pending charges"; (ii) that the requirement of a "reasonable belief that the agency has the type of information sought does not necessarily mean personal knowledge but may be based on a rational inference"; and (iii) that it is sufficient to state a belief that members of the public "may" have filed complaints bearing on the officer's credibility or character trait in issue - it is not necessary the affidavit prove the existence of the particular records. (**See *Johnson*** at pp. 720-721.) Also, the rule that assertions in the affidavits "may be on information and belief and need not be based on personal knowledge" (**see *Garcia* v. *Superior Court*** (2007) 42 Cal.4th 63, 70; ***People* v. *Mooc*** (2001) 26 Cal.4th 1216, 1226) should apply equally to the prosecution.

On the other hand, the People have *different* obligations than the defense which demand a different approach in assessing the standard of good cause for disclosure. (**See *People* v. *Davis*** (2014) 226 Cal.App.4th 1353, 1373 [noting these differences in finding the defense was not entitled to notice or participation in People's post-conviction ***Brady/Pitchess*** motion].) For example, it may be untenable to require the prosecution to demonstrate "a logical link between the defense proposed and the pending charge" (e.g., the officers are lying) in order to obtain records of officers bearing on their credibility since the prosecution may not even be aware of the anticipated defense. (**See *People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 719 [recognizing that while the prosecution may "often be able to anticipate what information the defense might want, and it might be able to present the defense position reasonably well to the court in a ***Pitchess*** motion, the defense will ***know*** what it wants, and will often be able to explain to a court what it is seeking and why better than could the prosecution"]; ***Serrano* v. *Superior Court*** (2017) 16 Cal.App.5th 759, 774 ["It would be nonsensical to require the prosecution to allege that an officer, who is part of the prosecution team and an intended witness, engaged in specific acts of misconduct."].)

On the third hand (foot?), when it comes to situations where ***Brady*** tips have been provided by the police department, the showing should be generally the same. As pointed out in ***Serrano* v. *Superior Court*** (2017) 16 Cal.App.5th 759, not all the requirements that normally must be shown for a defense counsel to meet the initial burden to obtain an in camera hearing apply when the prosecution has provided defense counsel a "***Brady*** tip." In ***Serrano***, the defense counsel filed a ***Pitchess*** motion based on the ***Brady*** tip and alleged that the officer was the sole witness to many of the events leading to the defendant's arrest. (**Id**. at p. 774.) The Sheriff's Department opposing the request argued the

defendant had not established "good cause" for disclosure because the defendant failed "to allege how the deputy's credibility is material if the defense does not allege that the deputy lied in any manner." (**Ibid**.) However, the ***Serrano*** court rejected the argument that every ***Pitchess*** motion must allege officer misconduct. The ***Serrano*** court pointed out that the premise underlying the holding in ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696 (i.e., that a ***Brady*** tip to the defense satisfies the prosecution's due process obligation because personnel files are confidential even vis-à -vis the prosecution, and therefore "prosecutors, as well as defendants, must comply with the ***Pitchess*** procedures if they seek information from confidential personnel records") was that both the prosecution and defense have equal access to the personnel files. The ***Serrano*** court reasoned: "It would be nonsensical to require the prosecution to allege that an officer, who is part of the prosecution team and an intended witness, engaged in specific acts of misconduct. And requiring a defendant—but not the prosecution—to allege misconduct would defeat ***Johnson***'s premise that defendants and prosecutors have 'equal access' to potential ***Brady*** material in an officer's personnel file." (**Id**. at p. 774.) Thus, regardless of whether a defendant alleges the officer engaged in misconduct, when the defense has received a "***Brady*** tip" from the prosecution that an officer's personnel file contains potential ***Brady*** material, that is sufficient, together with counsel's declaration explaining that the officer is the prosecution's sole witness to many of the events leading to the defendant's arrest to establish the claim that the "file contains potential impeachment evidence that may be material to his defense. Nothing more is required to trigger the trial court's in camera review." (**Id**. at p. 778.) The standards should be no different when it comes to a prosecution request based on a ***Brady*** tip from the police department.

Editor's note: A sample copy of a ***Brady/Pitchess*** motion based on a ***Brady*** tip (authored by Ventura County Special Assistant District Attorney Michael Schwartz is in the posted materials for the CDAA Discovery Seminar Handout.

C. What Type of Good Cause Showing Will be Sufficient to Obtain the Release of the Files in Response to Prosecution *Brady-Pitchess* Motion When No "*Brady* Tip" has Been Provided to the Prosecution?

The decision in ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696 should have put an end to any concern that a police department's provision of a "***Brady*** tip" to the district attorney's office itself violates the ***Pitchess*** statutes. The ***Johnson*** court stated the San Francisco Police Department "has ***laudably*** established procedures to streamline the ***Pitchess/Brady*** process" and saw fit to attach the policy protocol as an appendix to their opinion. (**Id**. at p. 721.) If disclosure of the ***Brady*** tip was considered to be a violation of the ***Pitchess*** statutes, it is highly doubtful the policy of doing so would be commended by the California Supreme Court. The Attorney General has also opined: "To facilitate compliance with ***Brady* v. *Maryland***, the California Highway Patrol may lawfully release to the district attorney's office the names of officers against whom findings of dishonesty, moral turpitude, or bias have been sustained, and the dates of the earliest such conduct." (**See** 98 Ops.Cal.Atty.Gen. 54, (2015).) Doing so does not violate Penal Code section 832.7. (**Id**. at p. *2.)

However, the case of ***Association for Los Angeles Deputy Sheriffs* v. *Superior Court*** [***ALADS***] (2017) 13 Cal.App.5th 413 put that procedure in doubt. In that case the sheriff's department wanted to provide to the prosecutor's office a list of deputies who had sustained findings of misconduct bearing on credibility, i.e., a collective "***Brady***" tip. The deputy sheriff's union, however, claimed this violated the ***Pitchess*** statutes and a majority of the appellate court agreed. The majority held that while the sheriff's department could internally maintain a ***Brady*** list, it could not disclose the ***Brady*** list to the district attorney or other prosecutorial agency without complying with Pitchess procedures. (***Association for Los Angeles Deputy Sheriffs* v. *Superior Court*** (2017) 13 Cal.App.5th 413.)

The California Supreme Court took the ***ALADs*** case up to decide: "When a law enforcement agency creates an internal ***Brady*** list (see Gov. Code, § 3305.5), and a peace officer on that list is a potential witness in a pending criminal prosecution, may the agency disclose to the prosecution (a) the name and identifying number of the officer and (b) that the officer may have relevant exonerating or impeaching material in his or her confidential personnel file, or can such disclosure be made only by court order on a properly filed *Pitchess* motion?" (S243855) 223 Cal.Rptr.3d 490.) On January 2, 2019, The California Supreme Court has subsequently requested briefing to address the following: "What bearing, if any, does SB 1421, signed into law on September 30, 2018, have on this court's examination of the question presented for review in the above-titled case?"

Moreover, the ***Johnson*** court did not address whether a police department was *required* to provide ***Brady*** tips. Thus, the ***Johnson*** court had no call to discuss what the showing of good cause would be for release of information to the People in the *absence of* a ***Brady*** tip – albeit the court did recognize that "[t]he prosecution also has a statutory right to bring a ***Pitchess*** motion and might want to do so sometimes for its own reasons" (***Johnson*** at p. 719.)

So, when should a prosecutor do to make the showing of good cause when no ***Brady*** tip has been provided?

The prosecution could, presumably, in support of its good cause showing, assert any or all the following reasons in establishing good cause for review:

(1) It is necessary to avoid the possibility that the defense will end up in possession of information (never disclosed to the prosecution) that could be used to sandbag a prosecution peace officer witness. (**See *People* v. *Tillis*** (1998) 18 Cal.4th 284, 290-291 [no statutory duty to disclose impeachment evidence where attorney simply plans to ask witness about a prior event based on information available to the attorney].)

(2) It is necessary to help ensure the prosecution has all the information it needs in deciding whether to rely on the officer's testimony. For example, in cases where the evidence of defendant's guilt relies heavily on the credibility of an officer the information might be useful in helping to

determine whether to proceed with the prosecution, enter into plea negotiations, or dismiss the case, or eschew reliance on the officer's testimony. This is especially true when the prosecution is aware that the defendant will be challenging the truthfulness of an officer's report. (**See *People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 719 ["the prosecution will often be able to anticipate what information the defense might want, and it might be able to present the defense position reasonably well to the court in a ***Pitchess*** motion"].)

(3) It is necessary to help ensure that the information in the file is presented to the defense so that there can be no later claim that defense counsel provided ineffective assistance of counsel by failing to file a ***Brady/Pitchess*** motion. (**See e.g.**, ***In re Avena*** (1996) 12 Cal.4th 694, 730 [rejecting argument defense attorney's failure to file a ***Pitchess*** motion constituted ineffective assistance of counsel, but only ***because*** the defense had failed to show there was any information in the officer's file that would have changed the verdict].)

7. Can the declaration in support of a Prosecution *Brady-Pitchess* motion be filed under seal?

In ***Garcia* v. *Superior Court*** (2007) 42 Cal.4th 63, the California Supreme Court held portions of a declaration in support of ***Pitchess*** motion may be sealed to protect a privilege such as the attorney-client or work-product privilege and, if sealed, the opposing party may only be given a redacted version of the declaration. (**Id**. at p. 68.)

It does not appear that evidence of a "mere ***Brady*** tip" would necessarily need to be placed in a sealed declaration – although an argument can be made that even a tip is information covered by the official information privilege. Moreover, if the information provided by the police department is more expansive it likely will fall under the official information privilege and thus a sealed affidavit describing the information protected by the official information will need to be filed in order to maintain the privilege.

A. <u>What Procedures Must be Followed When the Party is Seeking to File a Declaration or Affidavit Under Seal in a *Brady/Pitchess* motion?</u>

The party requesting the declaration be sealed must give "'proper and timely notice' that one of those privileges is being claimed and provide the court with the affidavit the defense seeks to file under seal, along with a proposed redacted version." (***Garcia* v. *Superior Court*** (2007) 42 Cal.4th 63, 73.) "The proposed redacted version should be served on opposing counsel." (**Id.** at p. 73.)*

> **<u>Editor's note</u>**: Remember- opposing counsel in a ***Brady/Pitchess*** motion is the attorney representing the entity that has the personnel file, e.g., the city or county attorney, or attorney general.

"The trial court must then conduct an in camera hearing ***on the request to file under seal***." (***Garcia*** at p. 73, emphasis added.)

Before the in camera hearing on the request to file is heard, "[o]pposing counsel should have an opportunity to propound questions for the trial court to ask in camera." (***Garcia*** at p. 73.)

"At that hearing, counsel should explain how the information proposed for redaction would risk disclosure of privileged material if revealed, and demonstrate why that information is required to support the motion." (***Garcia***, at p. 73.)

"If the court concludes that parts of the affidavit do pose a risk of revealing privileged information, and that filing under seal is the only feasible way to protect that required information, the court may allow the affidavit to be so filed." (***Garcia***, at p. 73.)

i. <u>Is Sealing Only Available to Protect the Attorney-Client or Work Product Privilege?</u>

In ***Garcia* v. *Superior Court*** (2007) 42 Cal.4th 63, the California Supreme Court indicated a court has the inherent power to allow documents to be filed under seal to protect against revelation of privileged information *in general*. (**Id**. at pp. 71-72.)

ii. <u>Can the Sealed Affidavit Filed in Support of a *Brady-Pitchess* Motion be Revealed to a City Attorney?</u>

Sometimes the information provided by the police department to the district attorney under the official information privilege is the sole basis for the good cause showing in the sealed affidavit. In such circumstances, the custodian of records and counsel for the agency are already aware of the information and are not opposing release per se and need to know what is contained in the affidavit in order to determine whether to oppose it. To avoid the situation where counsel for the agency is forced to file opposition documents, can the information in the sealed affidavit be provided to counsel?

There should not be a problem with both filing the sealed affidavit to protect the information from public distribution and informing counsel of that same information. Counsel for the department is still considered part of the agency (**see *Michael* v. *Gates*** (1995) 38 Cal.App.4th 737, 743) and all the prosecution is doing is disclosing the same information the department has already provided to the prosecution. (**See *Michael P.* v. *Superior Court*** (2001) 92 Cal.App.4th 1036, 1048 [official information privilege is not a "single agency" privilege, when a public official divulges privileged information to other agencies or officials with an official interest in the information, such disclosure does not constitute a waiver].)

It is a different story when the information in the sealed affidavit was not initially provided to the prosecution by way of a ***Brady*** tip. In that circumstance, the general rule that the supporting ***Pitchess*** affidavit filed under seal may not be released to the city attorney. (**See *Garcia* v. *Superior Court*** (2007) 42 Cal.4th 63, 77 [and overruling ***City of Los Angeles* v. *Superior Court (Davenport)*** (2002) 96 Cal.App.4th 255].)

8. Is there any requirement that the *Brady*/*Pitchess* motion include police reports relating to the criminal case?

There is no general obligation to attach police reports relating to the charged criminal case when filing a ***Pitchess*** motion. However, Evidence Code section 1046 states that when the party seeking disclosure is alleging excessive force "by a peace officer or custodial officer in connection with the arrest of that party, or for conduct alleged to have occurred within a jail facility, the motion shall include a copy of the police report setting forth the circumstances under which the party was stopped and arrested, or a copy of the crime report setting forth the circumstances under which the conduct is alleged to have occurred within a jail facility." (Evid. Code, § 1046.)

9. What happens if the threshold showing is met?

If the written notice provides a sufficient showing of materiality and good cause for disclosure, the trial court must then review the pertinent documents in chambers in conformity with Evidence Code section 915. (Evid. Code §§ 1043, 1045; ***Warrick* v. *Superior Court*** (2005) 35 Cal.4th 1011, 1019; ***City of Los Angeles* v. *Superior Court (Brandon)*** (2002) 29 Cal.4th 1, 19.)

A. Who is Present at the In Camera Hearing?

The in camera hearing is held with only the custodian of records and the agency's counsel present. (Evid. Code §§ 1043, 1045; ***People* v. *Mooc*** (2001) 26 Cal.4th 1216, 1226.) However, the officer to whom the records pertain is entitled to be present (if he or she so chooses) at the in chambers hearing, as are such other persons the officer is willing to have present under Evidence Code section 915. (**See *City of Los Angeles* v. *Superior Court (Brandon)*** (2002) 29 Cal.4th 1, 9 [section 1045 requires "in chambers" hearing be done "in conformity with section 915"]; ***Becerrada* v. *Superior Court*** (2005) 131 Cal.App.4th 409, 415.)

B. Is a Transcript Made of the In Camera Hearing?

A court reporter must be present at the in camera hearing so a transcript can be made, but the transcript of the in camera hearing must be sealed. (**See *People* v. *Prince*** (2007) 40 Cal.4th 1179, 1284.)

C. What Types of Records are Considered "Personnel Records" for Purposes of the Pitchess Statutes?

Penal Code section 832.8 states: "As used in Section 832.7, 'personnel records' means any file maintained under that individual's name by his or her employing agency and containing records relating to any of the following: [¶] (a) Personal data, including marital status, family members, educational and employment history, home addresses, or similar information. [¶] (b) Medical history. [¶] (c) Election of employee benefits. [¶] (d) Employee advancement, appraisal, or discipline. [¶] (e) Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties.

[¶] (f) Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy." (**See *Commission on Peace Officer Standards & Training* v. *Superior Court*** (2007) 42 Cal.4th 278, 289–290 [only information falling into one of Penal Code section 832.8' s specifically listed categories is a "personnel record" for ***Pitchess*** purposes]; ***Zanone* v. *City of Whittier*** (2008) 162 Cal.App.4th 174, 188 [same].)

Penal Code section 832.5(c) states: "Complaints by members of the public that are determined by the peace or custodial officer's employing agency to be frivolous, as defined in Section 128.5 of the Code of Civil Procedure, or unfounded or exonerated, or any portion of a complaint that is determined to be frivolous, unfounded, or exonerated, shall not be maintained in that officer's general personnel file. However, these complaints shall be retained in other, ***separate files that shall be deemed personnel records for purposes of*** the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) and ***Section 1043 of the Evidence Code***." (Emphasis added.)

i. Does the Complaint (or Investigation of the Complaint) Have to Both Concern an Event Involving an Officer and Pertain to the Performance of His or Her Duties?

In ***Zanone* v. *City of Whittier*** (2008) 162 Cal.App.4th 174, the court held that "to be a personnel record the complaint or investigation of a complaint must both concern an event that involved the officer as a participant or witness and pertain to the officer's performance of his or her duties." (**Id.** at p. 189, emphasis in original.) Thus, a memorandum from a police chief reporting the details and conclusions of an investigation into claims of racial discrimination made by an officer (which included a statement there was a perception in the Department of a lack of advantageous or career-enhanced futures for women) that was in that officer's personnel file was not a "personnel record" subject to protection under the ***Pitchess*** rules. (**Id.** at p. 187.)

The fact that the complaint concerns an officer's off-duty conduct, however, should not prevent the complaint from being deemed part of the personnel record. (**Cf.**, ***Fagan* v. *Superior Court*** (2003) 111 Cal.App.4th 607, 615 [***Pitchess*** protections apply to personnel records even though information in personnel file relates to off-duty conduct since officers remain police and under a duty to protect the public even while off-duty].)

ii. If there are Other Kinds of Information, Not Specifically Identified in the Statute, Located in an Officer's Personnel File, is that Information Subject to the Pitchess Protections?

In ***Commission On Peace Officer Standards And Training* v. *Superior Court*** (2007) 42 Cal.4th 278, "the California Supreme Court held only information falling into one of Penal Code section 832.8's specifically listed categories is a 'personnel record' subject to the ***Pitchess*** procedure; other information that may be physically located in the personnel file is not a 'personnel record' for ***Pitchess*** purposes[.]" (***Zanone* v. *City of Whittier*** (2008) 162 Cal.App.4th 174, 188.)

iii. Are Records Pertaining to "Police Review Commission Hearings" Subject to the *Pitchess* Procedures?

Police review commission hearings on alleged peace officer misconduct are considered confidential under Penal Code section 832.7 and records from such hearings are subject to the ***Pitchess*** procedures. In ***Berkeley Police Ass'n* v. *City of Berkeley*** (2008) 167 Cal.App.4th 385, the city of Berkeley had established a Police Review Commission (PRC) that investigated citizen complaints against Berkeley police officers and held public evidentiary hearings on the complaints. The PRC procedures generated a fair number of documents and evidence, including statements from the complaining witnesses and the police. The Berkeley Police Association challenged the PRC investigative and public hearing procedures on the ground, inter alia, that they violated the confidentiality of police officer personnel records under section 832.7. The court of appeal agreed, finding that "that the records and findings of the PRC are protected from disclosure under section 832.7, subdivision (a), both as "records maintained by any state or local agency pursuant to Section 832.5" and as "personnel records." (**Id**. at pp. 388-389, 404-405.)

iv. Is Body Camera or Dashboard Arrest Video Footage a "Personnel Record?"

In ***City of Eureka* v. *Superior Court of Humboldt County*** (2016) 1 Cal.App.5th 755, the court held a video of an arrest captured by a patrol car's dashboard camera is not confidential "personnel record" under Penal Code sections 832.7 or 832.8.1 even though it was later used in an internal affairs investigation. (**Id**. at p. 758 [and noting at p. 763 the arrest video was not "generated in connection" with the officer's appraisal or discipline but was is simply a visual record of the minor's arrest"].)

D. Who is Responsible for Bringing the Records to the In Camera Hearing?

A representative from the police agency appears as the custodian of records with all "potentially relevant" documents. (***People* v. *Mooc*** (2001) 26 Cal.4th 1216, 1229.) The custodian should be placed under oath before discussing his or her file review and efforts to locate responsive documents contained therein. (***People* v. *Mooc*** (2001) 26 Cal.4th 1216, 1229-1230, fn. 4.)

E. Can the Custodian of Records "Winnow Out" the Personnel Records Before Bringing the Records to the In Camera Hearing?

"When a trial court concludes a defendant's ***Pitchess*** motion shows good cause for discovery of relevant evidence contained in a law enforcement officer's personnel files, the custodian of the records is obligated to bring to the trial court all 'potentially relevant' documents to permit the trial court to examine them for itself. [Citation.] A law enforcement officer's personnel record will commonly contain many documents that would, in the normal case, be irrelevant to a ***Pitchess*** motion.... Documents clearly irrelevant to a defendant's ***Pitchess*** request need not be presented to the trial court for in camera review. But if the custodian has any doubt whether a particular document is relevant, he or she should present it to the trial court. Such practice is consistent with the premise of Evidence Code sections 1043 and 1045 that the locus of decisionmaking is to be the trial court, not the prosecution or the custodian of records. (***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 722.)

However, "[t]he custodian should be prepared to state in chambers and for the record what other documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the defendant's ***Pitchess*** motion." (***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 722.)

If some of the documents reviewed are not brought, the custodian of records should bring a summary of those documents. (**See *People* v. *Wycoff*** (2008) 164 Cal.App.4th 410, 415.)

Ultimately, "[i]t is for the court to make not only the final evaluation but to make a record that can be reviewed on appeal." (***People* v. *Wycoff*** (2008) 164 Cal.App.4th 410, 415; ***People* v. *Guevara*** (2007) 148 Cal.App.4th 62, 69.)

F. Can the Custodian of Records Decline to Bring Records Pertaining to Complaints Made Against the Officer that are More than 5-Years Old? And, if so, May the Complaints Be Released?

Section 1045(b)(1) states: "In determining relevance, the court ***shall examine*** the information in chambers in conformity with Section 915, and shall exclude from disclosure: (1) Information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought." (Emphasis added.) This suggests the entire personnel file should be brought to the in camera hearing, including documents regarding complaints beyond the five-year limitation, but that such complaints may not be released.

In ***City of Los Angeles* v. *Superior Court (Brandon)*** (2002) 29 Cal.4th 1, a case in which the court concluded a trial court could potentially (albeit should not have in the case before it) order the release of complaints older than five years made against peace officers if those complaints were material under ***Brady***, the court stated: "We do not suggest that trial courts must routinely review information that is contained in peace officer personnel files and is more than five years old to ascertain whether *Brady*, *supra*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 requires its disclosure." (**Id**. at p. 15, fn. 3.)

The above rule may hold true when the motion is a simple ***Pitchess*** motion. *However*, when the motion being brought is a ***Brady/Pitchess*** motion, and the file contains evidence of complaints that are more than five years old, those complaints should be brought for review and disclosed if relevant. (**See *People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 720 [stating "because the ""***Pitchess*** process' operates in parallel with ***Brady*** and does not prohibit the disclosure of ***Brady*** information,"' all information that the trial court finds to be exculpatory and material under ***Brady*** must be disclosed, notwithstanding Evidence Code section 1045's limitations"]; **accord *Abatti v. Superior Court*** (2003) 112 Cal.App.4th 39 [12-year-old counseling memos in officer's personnel file must be reviewed by trial judge for purposes of deciding whether it constituted disclosable ***Brady*** material].)

10. Under what circumstances should information not be released?

Evidence Code section 1045(b) provides:

"In determining relevance, the court shall examine the information in chambers in conformity with Section 915, and shall exclude from disclosure:

(1) Information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought.

(2) In any criminal proceeding the conclusions of any officer investigating a complaint filed pursuant to Section 832.5 of the Penal Code.

(3) Facts sought to be disclosed that are so remote as to make disclosure of little or no practical benefit."

Subject to statutory exceptions and limitations, the trial court should disclose "such information [that] is relevant to the subject matter involved in the pending litigation." (***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 711 [citing to Evid. Code, § 1045(a)]; **see also *Warrick* v. *Superior Court*** (2005) 35 Cal.4th 1011, 1019 [court "discloses only that information falling within the statutorily defined standards of relevance"].)

> **Editor's note**: Evidence Code section 1045(c) provides: "In determining relevance where the issue in litigation. concerns the policies or pattern of conduct of the employing agency, the court shall consider whether the information sought may be obtained from other records maintained by the employing agency in the regular course of agency business which would not necessitate the disclosure of individual personnel records." Subdivision (c) will usually not be implicated in a prosecution ***Brady-Pitchess*** motion.

A. Evidence Code Section 1045(b)(1): Complaints More than 5-Years Old

Whether, pursuant to a ***Brady-Pitchess*** motion, complaints more than five years old should be disclosed is discussed in this outline, section XVIII-9-F at p. 364. A court, however, could potentially exclude from disclosure complaints more than five years old on grounds the evidence is too remote. (**See *City of Los Angeles* v. *Superior Court (Brandon)*** (2002) 29 Cal.4th 1, 13-16 [noting the five-year cut-off period of subdivision (b)(1) and five-year retention period of Penal Code section 832.5 "may well reflect legislative recognition that after five years a citizen's complaint of officer misconduct has lost considerable relevance" and declining to find 10-year old information located in officer's personnel file was favorable material evidence that had to be disclosed]; Evid. Code, § 1045(b)(3)[in criminal proceedings, courts must exclude from disclosure "facts so remote as to make disclosure of little or no practical benefit"].)

B. Evidence Code Section 1045(b)(2): Conclusions

As noted above, in a "criminal proceeding," the court must exclude from disclosure "the conclusions of the investigating officer[.]" (Evid. Code § 1045(b)(2).)

For the reasons similar to those discussed in this outline, section I-3-J-i,ii at pp. 12-13, the conclusions of the investigating officer should not constitute favorable, let alone material, evidence and thus there *should* be no conflict between this limitation and due process. However, this issue is not settled, and no court has specifically addressed whether due process demands for this information would trump the statutory limitation.

This rule only applies when the records are sought in a criminal proceeding. (***Haggerty* v. *Superior Court*** (2004) 117 Cal.App.4th 1079, 1088.) In ***Haggerty* v. *Superior Court*** (2004) 117 Cal.App.4th 1079, a case involving a civil suit filed against an officer, the court found that the conclusions of an investigating officer should not be disclosed because there was "nothing contained in the officer's subjective impressions of the facts found during the investigation that would be" admissible evidence or lead to such evidence. (**Id**. at p. 1088.) However, the ***Haggerty*** court indicated that such conclusions *could* potentially be disclosed if a proper showing of relevance had been made. (**Ibid**.)

C. Evidence Code Section 1045(b)(3): Remoteness

As noted above, Evidence Code section 1045(b)(3) requires court to exclude from disclosure fact "that are so remote as to make disclosure of little or no practical benefit." On its face, this aspect of section 1045 should not conflict with any due process right to disclosure since facts of little or no practical benefit could not be material evidence under ***Brady***.

D. Evidence Code Section 1047: Officers Not Present at Arrest

Evidence Code section 1047 states: "Records of peace officers or custodial officers, as defined in Section 831.5 of the Penal Code, including supervisorial officers, who either were not present during the arrest or had no contact with the party seeking disclosure from the time of the arrest until the time of booking, or who were not present at the time the conduct is alleged to have occurred within a jail facility, shall not be subject to disclosure."

Sections 1046 and 1047 were specifically enacted to overturn the portion of the decision in ***People* v. *Memro*** (1985) 38 Cal.3d 658, 685-687 stating that a defendant would be entitled to discovery of the records of a non-interrogating officer if the defendant could show a link between that officer and the interrogating officers such as training or other substantial contacts, which would be relevant to the defendant's theory that the coercive techniques alleged were part of a pattern of conduct by the department. (***Riske* v. *Superior Court*** (2016) 6 Cal.App.5th 647, 660.)

Section 1047 "constitutes a specific exemption from the general discovery provisions of sections 1043 and 1045 . . . and applies if the request for discovery involves an issue concerning an arrest or a postarrest/prebooking incident or their functional equivalent." (***Alt* v. *Superior Court*** (1999) 74 Cal.App.4th 950, 952.)

However, if the request for discovery "does not involve an issue concerning arrest or any conduct from the time of [a defendant's] arrest to booking or their functional equivalent," then "the general discovery provisions of sections 1043 and 1045 apply." (***Alt* v. *Superior Court*** (1999) 74 Cal.App.4th 950, 959; **accord *Riverside County Sheriff's Dept.* v. *Stiglitz*** (2014) 60 Cal.4th 624, 641.)

"[A contrary] interpretation of section 1047 would mean that police personnel information could be discovered only if there had been an arrest or contact between arrest and booking, and in no other situation. This reading runs counter to ***Memro***'s observation that sections 1043 and 1045 do not limit discovery of police personnel records to cases involving altercations between police officers and arrestees." (***Riverside County Sheriff's Dept.* v. *Stiglitz*** (2014) 60 Cal.4th 624, 641.)

The ***Pitchess*** statutes do "***not*** restrict discovery to personnel records of peace officers who participated in or witnessed the wrongdoing at issue in the litigation." (***Riske* v. *Superior Court*** (2016) 6 Cal.App.5th 647, 658, emphasis added.) Thus, where a defendant, who was a police officer being prosecuted for insurance fraud, sought discovery of the records of another officer who the defendant claimed informed the district attorney that defendant had filed a false insurance report, disclosure of the records sought was not precluded by section 1047. (***Alt* v. *Superior Court*** (1999) 74 Cal.App.4th 950, 959.)

"[M]ateriality will typically be found when the officer was involved, and not found when the officer was not involved in the alleged wrongdoing. But that is not invariably the case, as the Supreme Court has made clear." (***Riske* v. *Superior Court*** (2016) 6 Cal.App.5th 647, 659 [citing cases illustrating the principle].)

It is possible (albeit not likely) that in circumstances where there is an issue concerning an "arrest or a postarrest/prebooking incident or their functional equivalent" that information in the personnel records of an officer not involved or present in the arrest may nonetheless constitute favorable material evidence. Thus, due process might require disclosure when there is a prosecution ***Brady-Pitchess*** motion- notwithstanding the limitation of section 1047.

E. Can Information that Would be Inadmissible at Trial be Considered "Relevant Evidence" Subject to Release?

"Relevant information under section 1045 is not limited to facts that may be admissible at trial, but may include facts that could lead to the discovery of admissible evidence." (***Haggerty* v. *Superior Court*** (2004) 117 Cal.App.4th 1079, 1087 [and cases cited therein].) However, whether information would be admissible at trial or lead to admissible evidence may be considered in determining *whether the evidence is relevant*. (**See *Haggerty* v. *Superior Court*** (2004) 117 Cal.App.4th 1079, 1088 [finding aspects of Internal Affairs report properly disclosed but declining to release officer's subjective impressions of the facts found during the investigation because there was "nothing contained in the impressions that would be admissible at trial or lead to the discovery of admissible evidence"].)

Due Process may also require release of inadmissible evidence in an officer's personnel file. (**See** this outline, section I-3-D at p. 8.)

F. Can Pending or Incomplete Investigations of Complaints be Disclosed?

In ***City of Los Angeles* v. *Superior Court*** (2002) 29 Cal.4th 1, the court stated "the ***Pitchess*** scheme does not delay discovery of citizen complaints until an investigation is completed or even until the officer has filed his response. Rather, when the proper showing is made, citizen complaints are discoverable even if the investigation of those complaints is still incomplete." (**Id**. at p. 13.)

Editor's note: As to whether pending investigations can constitute favorable material evidence that must be disclosed pursuant to the ***Brady*** rule, **see** this outline, section I-2-D at p. 5.)

G. Competing Interest in Nondisclosure

A court may find that even information determined to be relevant should not be disclosed when "the need to maintain its secrecy is greater than the need for disclosure in the interests of justice." (***Haggerty* v. *Superior Court*** (2004) 117 Cal.App.4th 1079, 1092, citing to ***People* v. *Memro*** (1985) 38 Cal.3d 658, 689.)

11. How "much" information should be released?

Although not specifically required by statute, after a court finds good cause for disclosure, the court typically discloses only the "name, address and phone number of any prior complainants and witnesses and the dates of the incidents in question[.]" (***Chambers* v. *Superior Court*** (2007) 42 Cal.4th 673, 679; **accord *Warrick* v. *Superior Court*** (2005) 35 Cal.4th 1011, 1019; ***Alford* v. *Superior Court*** (2003) 29 Cal.4th 1033, 1039; **see also *City of Santa Cruz* v. *Municipal Court*** (1989) 49 Cal.3d 74, 84 [and noting courts generally refuse to disclose verbatim reports].) This practice "imposes a further safeguard to protect officer privacy where the relevance of the information sought is minimal and the officer's privacy concerns are substantial. (***Warrick* v. *Superior Court*** (2005) 35 Cal.4th 1011, 1019; **see also *Haggerty* v. *Superior Court*** (2004) 117 Cal.App.4th 1079, 1090-1092 [recognizing that in criminal cases, albeit not in civil cases, before a report could be disclosed, the person seeking disclosure had to show the witness identifying information would be insufficient to allow the person to conduct his own discovery].)

However, "[t]he practice of disclosing only the name of the complainant and contact information must yield to the requirement of providing sufficient information to prepare for a fair trial." (***Alvarez* v. *Superior Court*** (2004) 117 Cal.App.4th 1107, 1112.) And when it comes to prosecutor ***Brady/Pitchess*** requests, enough information must be released to allow the prosecution to determine whether it has discovery obligations owed to the defense; the simple release of the names of witnesses is often insufficient.

Prosecutors should seek the disclosure of whatever information is necessary to allow a quick determination of any ***Brady*** obligation. In practice, trial courts have been more willing to release police reports, letters of chiefs laying out the reasons for discipline, or portions of IA reports when it comes to prosecution ***Brady-Pitchess*** motions. (**See e.g.**, ***People* v. *Superior Court*** (2014) 176 Cal.Rptr.3d 340 (rev'd sub nom. ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696), 355, fn. 12 [noting that there was 505 pages of potential ***Brady*** material that could be released].)

12. If insufficient information is released to allow the prosecutor to determine whether the information falls under the *Brady* rule, what should the prosecutor do? (Follow up *Brady/Pitchess* motions)

If the witness names, addresses, etc. are inadequate to allow the prosecutor to assess his or her discovery obligations, the prosecutor can make a motion seeking the release of additional information. If a showing of inadequacy is made, the court can order disclosure of additional material such as citizen complaints and witness statements. (**See *Rezek* v. *Superior Court*** (2012) 206 Cal.App.4th 633, 638; ***City of Tulare* v. *Superior Court*** (2008) 169 Cal.App.4th 373, 382**; *Alvarez* v. *Superior Court*** (2004) 117 Cal.App.4th 1107, 1112-1113; ***Kelvin L.* v. *Superior Court*** (1976) 62 Cal.App.3d 823, 828-829; ***People* v. *Matos*** (1979) 92 Cal.App.3d 862; **see also *Chambers* v. *Superior Court*** (2007) 42 Cal.4th 673*,* 679, fn. 7; ***Pitchess* v. *Superior Court*** (1974) 11 Cal.3d 531, 537.)

For example, in ***Pitchess* v. *Superior Court*** (1974) 11 Cal.3d 531 itself, the court found good cause for a request for a law enforcement agency's records of complainants' *statements* – albeit only because the parties seeking discovery, who already knew the names of other complainants, showed they either were unavailable for interviews or could not remember the details of the events about which they had complained. (**Id**. at p. 537; ***City of Azusa* v. *Superior Court*** (1987) 191 Cal.App.3d 693, 696-697.)

However, release of additional information (especially when it comes to prosecution ***Brady-Pitchess*** motions) should not be limited to circumstances in which the complainants named in the released discovery cannot be located or cannot remember the events. Rather, the test should be whether the party requesting the files has shown that absent the supplemental information, the matter cannot effectively be investigated. (**See *Alvarez* v. *Superior Court*** (2004) 117 Cal.App.4th 1107, 1113-1114; **but see *People* v. *Ghebretensae*** (2013) 222 Cal.App.4th 741, 757 ["when that information proves insufficient*, either because a witness does not remember the earlier events or the witness cannot be located*, a supplemental ***Pitchess*** motion may be filed and the statements of the witnesses may be disclosed to the defendant], emphasis added.)

A. <u>Does the "Follow-Up" Motion Have to Meet the Same Notice Requirements as the Initial *Brady-Pitchess* Motion?</u>

A follow-up motion requesting more information than initially disclosed must follow the same notice requirements as the initial motion. (***City of Tulare* v. *Superior Court*** (2008) 169 Cal.App.4th 373, 383.)

B. Can the Agency with the Records Challenge Any Claims Made in the Follow-Up Motion as to Why the Initial Disclosure Was Insufficient?

In ***City of Tulare* v. *Superior Court*** (2008) 169 Cal.App.4th 373, an attorney for a minor facing a pending juvenile proceeding argued that the entity representing the officer (i.e., the City) should not be able to challenge the "due diligence declaration" filed by the attorney in support of a request for information beyond the names, addresses, etc., of the complaining witnesses that had been initially provided pursuant to a ***Pitchess*** motion. The appellate court, however, disagreed, pointing out the City was entitled to challenge the vague claims made by the minor regarding the inability to locate the witnesses. (**Id**. at pp. 384-385.)

13. Where must the records be kept that have been reviewed by the court?

Confidential law enforcement personnel files that are reviewed in camera by the court under ***Pitchess*** may be retained by the court (if not voluminous) and kept in a confidential file. (***People* v. *Townsel*** (2016) 63 Cal.4th 25, 68.) Alternatively, the custodian of those records may keep them, provided that the court makes an adequate record of what was reviewed. (***People* v. *Galland*** (2008) 45 Cal.4th 354, 367; ***People* v. *Mooc*** (2001) 26 Cal.4th 1216, 1228-1230.)

An adequate record can be made if the court reviewing them "prepare[s] a list of the documents it considered, or simply state[s] for the record what documents it examined." (***People* v. *Townsel*** (2016) 63 Cal.4th 25, 69; ***People* v. *Myles*** (2012) 53 Cal.4th 1181, 1209.)

14. If information is disclosed to the prosecution pursuant to a *Brady-Pitchess* motion, is it subject to a protective order prohibiting its use in any proceeding other than the proceeding for which it was initially obtained?

Mandatory Protective Order: Evidence Code section 1043(e) states: "The court shall, in any case or proceeding permitting the disclosure or discovery of any peace or custodial officer records requested pursuant to Section 1043, order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law." This order is required. (***Chambers* v. *Superior Court*** (2007) 42 Cal.4th 673, 679-680.)

Optional Protective Order: Evidence Code section 1043(d) states: "Upon motion seasonably made by the governmental agency which has custody or control of the records to be examined or by the officer whose records are sought, and upon good cause showing the necessity thereof, the court may make any order which justice requires to protect the officer or agency from unnecessary annoyance, embarrassment or oppression." This order is discretionary. (***Chambers* v. *Superior Court*** (2007) 42 Cal.4th 673, 680, fn. 8.)

15. Can information released to the prosecution in one proceeding be disclosed in a different proceeding if the information initially released constitutes favorable material impeaching an officer in a future case?

At least when it comes to simple ***Pitchess*** motions, the California Supreme Court has repeatedly held that if peace officer personnel records are ordered disclosed, they may not, pursuant to section 1043(e), be used for any purpose other than the court proceeding in which disclosure is ordered. (**See** ***Commission On Peace Officer Standards And Training* v. *Superior Court*** (2007) 42 Cal.4th 278, 289; ***Alford* v. *Superior Court*** (2003) 29 Cal.4th 1033, 1045-1046.)

However, this statutory requirement likely will take a backseat to the prosecutor's due process obligations. When favorable material information is released to the prosecution pursuant to a ***Brady-Pitchess*** motion, the prosecutor (and arguably the entire office) will likely be held to be in possession of that information in the event the same office testifies in a future case. (**See** this outline, section I-7-G at pp.89-94; I-8-C-iii at pp. 109-112.) Thus, the ability to be able to retain that information and quickly access that information is critical for prosecutors. Indeed, this is one of the primary reasons that many offices have established "***Brady*** Banks." Having to file a new ***Brady-Pitchess*** motion each time the officer testifies will be incredibly onerous and, especially in no-time waiver cases, prevent timely disclosure of favorable information in our possession in violation of our constitutional and ethical duties.

Accordingly, it is recommended that prosecutors who obtain information from a ***Brady-Pitchess*** motion should attempt to modify any protective order to allow the prosecution to retain the information and disclose it as necessary to fulfill their constitutional obligations – subject to the prior protective order being lifted. In practice, this means that the prosecutor should be able to go in camera with a court in a future case, present the information to the court, obtain a lifting of the protective order for purposes of disclosure in that future case, and receive another protective order.

Here is such a sample protective order:

Certain information has been released to the Santa Clara County District Attorney's Office regarding _____. Such information is confidential. Disclosure of such information is generally governed by the "Pitchess" procedures (see Pen. Code, § 832.7; Evid. Code, §§ 1043-1046) and is potentially protected by other applicable privileges (see e.g., Evid. Code, § 1040) or the California state right of privacy (see California Constitution, Art. I, sec.1). Accordingly, pursuant to Penal Code section 1045(e) and subject to further court order, the District Attorney's Office is hereby ordered not to further use or disclose the information released to them pursuant to the *Brady/Pitchess* motion filed in docket _____ other than as stated below.

As necessary to comply with their constitutional discovery obligations, *the District Attorney's office may maintain the information*, or release the information to the attorney for the defendant in the case of People v._____, docket_____.

If such information is released to the attorney(s) for the defendant(s) in the case of People v._____, docket_____, the attorney(s) are ordered not to use or disclose the information for any purpose other than as it may be relevant for use in the case of People v. _____, docket_____ unless this protective order is subsequently lifted.

It is further ordered that if the information is maintained by the District Attorney's Office in order to meet future due process discovery obligations, the District Attorney's Office must obtain a lifting of the protective order from a Superior Court Judge and provide notification to the custodian of records before any further disclosure is made.

The case law has yet to catch up with the issue created by the release of ***Pitchess***-protected information to prosecutors with due process discovery obligations in future cases. Expect some county counsel, city attorneys, or attorney generals (i.e., the representative of state law enforcement agencies) to argue that prosecutors must file a new ***Brady-Pitchess*** motion in every case. They will point to Penal Code section 832.7(a) which in pertinent part states: "Peace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code." Moreover, they will cite to cases holding the ***Pitchess*** procedure is the sole means by which citizen complaints kept in peace officer personnel files may be obtained. (***Abatti* v. *Superior Court*** (2003) 112 Cal.App.4th 39, 58; ***People* v. *Jordan*** (2003) 108 Cal.App.4th 349, 360; ***Garden Grove Police Department* v. *Superior Court*** (2001) 89 Cal.App.4th 430, 432; ***California Highway Patrol* v. *Superior Court*** (2000) 84 Cal.App.4th 1010, 1024; ***New York Times Co.* v. *Superior Court*** (1997) 52 Cal.App.4th 97, 101; ***City of Hemet v. Superior Court*** (1995) 37 Cal.App.4th 1411, 1423.) Finally, they will argue that "a] properly noticed motion does not restrict disclosure of the information; it merely allows a sufficient time for the law enforcement agency and its officers to challenge and scrutinize the adequacy of the motion in question" and thus maintains "the balance between a fair trial and the officer's interest in privacy[.]" (***City of Tulare* v. *Superior Court*** (2008) 169 Cal.App.4th 373, 383.)

However, none of these cases have addressed situations in which disclosure is necessary to meet constitutionally-imposed discovery obligations stemming from the prosecution team being in knowing possession of favorable material evidence impeaching an officer. (**See** this outline, section I-8-C-iii at pp. 109-112.) Moreover, the requirement of the protective order that notice be provided to the employing agency before the information is released to defense counsel addresses the concern that the right to refuse to disclose the information would be nullified absent notice (**see *City and County of San Francisco v. Superior Court*** (1993) 21 Cal.App.4th 1031, 1035).

16. If the party who obtained *Pitchess* information develops "derivative information" through interviews of the witnesses or other persons whose names were provided, can the "derivative information" be used in another proceeding?

The general language of Evidence Code section 1045(e) relating to the protective order does not, on its face, apply to the disclosure of information derived from that information by way of follow-up interviews or investigation. However, as pointed out in ***Chambers* v. *Superior Court*** (2007) 42 Cal.4th 673, "derivative information could reveal that a complaint had been made against a particular officer and the name of the complainant. As a result, it could relate back to information that *was* disclosed and [that would] fall under the protective order." (**Id**. at p. 681 [bracketed language added].) Thus, at least when it comes to information released pursuant to a simple ***Pitchess*** motion, derivative information cannot generally be used in a proceeding other than the proceeding for which the information was released.

If the ***defense*** obtains ***Pitchess*** information and then develops derivative information they may use the derivative information in a later unrelated case, but only if the defense makes a ***Pitchess*** motion in the subsequent case and receives the name of the same complainant to which the derivative information pertains. (**Id**. at pp. 677, 681-682.)

In a concurring opinion in ***Chambers* v. *Superior Court*** (2007) 42 Cal.4th 673, Justice Baxter cautioned that he did not "interpret the majority's opinion, or its judgment, to imply that counsel may employ information learned as a direct result of the first ***Pitchess*** disclosure to *support a later request* for ***Pitchess*** disclosure in a different case. (***Chambers*** at p. 683, emphasis in original.)

Whether the bar on use of derivative information (absent compliance with the ***Pitchess*** procedures) will apply equally to prosecutors when the information derived would constitute favorable material evidence in a future case has not yet been addressed by the courts. However, for the same reasons that prosecutors should/need to be able to disclose information subject to a protective order in one case if the officer is a witness in a future case (i.e., if that information constitutes favorable material evidence in the future case **see** this outline, section XIX-15 at p. 371), prosecutors should/need to be able to disclose derivative information in that circumstance.

A. Is *Pitchess*-Protected Information Disclosed in Court Still Subject to a Protective Order?

It is more common than not that information impeaching an officer that has come from a personnel file will never be admitted in open court – either because the defense has not been able to subpoena the necessary witnesses or because the trial court excludes the information pursuant to Evidence Code section 352. However, let's say an officer, in open court, acknowledges engaging in conduct of moral turpitude that was contained and derived from the officer's personnel file. Can it truly be said that ***what is testified to in open court*** is subject to the protective order?

"The right to a public trial is deeply rooted in the history and jurisprudence of our nation. The origins of the right trace back to the Magna Carta and the Bible. As a result of our history, we distrust secret inquisitions and Star Chamber proceedings. Accordingly, in criminal cases, both the United States and the California Constitutions guarantee the right to a public trial. (***People* v. *Esquibel*** (2008) 166 Cal.App.4th 539, 551 citing to U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15.)

No case has yet to discuss whether ***Pitchess***-protected information attested to in a public trial may be used in subsequent cases, but common sense dictates that since a court cannot place post-trial restrictions on the use of court testimony witnessed by spectators or jurors or read about in the media, or as part of the record in an appellate court, the information contained in the testimony could not possibly be subject to the court's protective order.

17. If another agency (other than the peace officer's employing agency) comes into possession of peace officer personnel records, would the *Pitchess* procedures still govern disclosure of the records?

If an agency other than a peace officer's employing agency obtains confidential records under section 832.7, the records should still remain confidential. In ***Commission On Peace Officer Standards And Training* v. *Superior Court*** (2007) 42 Cal.4th 278 ["*POST*"], a news reporter made a public records request for information concerning peace officer names, employing agencies, and dates of employment kept by the Commission on Peace Officer Standards and Training, an agency created within the California Department of Justice that is charged with establishing standards of physical, mental, and moral fitness for peace officers and provides education and training for peace officers. The *POST* court stated that while "the Commission is not the 'employing agency' of the peace officers whose information it maintains, its records nonetheless would be confidential under section 832.7 if they were 'obtained from' personnel records maintained by the employing agency." (**Id**. at p. 289.)

18. Do the *Pitchess* procedures protect an officer from being asked on the stand about his or her personnel records?

The privilege and its exceptions apply to both pretrial discovery and to live testimony. Thus, unless a party complies with the ***Pitchess*** scheme, the party may not ask the officer on the stand about information that remains protected by the ***Pitchess*** scheme. (***Fletcher* v. *Superior Court*** (2002) 100 Cal.App.4th 386, 403; ***Hackett* v. *Superior Court*** (1993) 13 Cal.App.4th 96, 98; ***City of San Diego* v. *Superior Court*** (1981) 136 Cal.App.3d 236, 239.)

19. If a prosecutor obtains records subject to the *Pitchess* protections without first filing a *Pitchess* motion (i.e., pursuant to the "investigation exception" of section 832.7 or consent from the officer), is the prosecutor still precluded from using it in court?

If the prosecution obtains peace officer personnel records directly under the "investigatory" exception (Pen. Code, § 837(a)) to the general rule requiring use of the *Pitchess* procedures, the prosecution must still comply with the *Pitchess* procedures before dissemination of that material. (**See *Fagan* v. *Superior Court*** (2003) 111 Cal.App.4th 607, 618-619 [the "district attorney properly gained access to petitioners' confidential peace officer personnel files under section 832.7, subdivision (a); however, the information obtained from those files remains confidential absent judicial review pursuant to Evidence Code section 1043, et seq."]; **see also *City of Burbank* v. *Superior Court*** (unpublished) 2011 WL 1950015, at * [holding that, under the ***Pitchess*** scheme and ***Hackett* v. *Superior Court*** (1993) 13 Cal.App.4th 96, "even if conditionally privileged information can be gleaned from another source, it nonetheless remains conditionally privileged and can only be obtained by and disclosed after compliance with Evidence Code section 1043 et seq. If information is conditionally privileged, it follows that a party cannot reveal it absent filing the appropriate discovery motion and after an in-camera hearing. A party therefore cannot disclose the conditionally privileged information, even in the very discovery motion that seeks to obtain it."].)

However, in ***Zanone* v. *City of Whittier*** (2008) 162 Cal.App.4th 174, the court stated it is an unresolved "question whether a party that legitimately obtains personnel records subject to such protection without first filing a ***Pitchess*** motion (for example, by receiving copies from the involved officer) is nonetheless precluded from offering that information into evidence or using it in cross-examination: that is, whether the ***Pitchess*** procedures affect not only discovery of personnel information but also its admissibility." (**Id**. at p. 187, fn. 14.)

20. Do the *Pitchess* procedures protect the records of retired officers?

The ***Pitchess*** procedures apply even when the records sought pertain to an officer who has retired or has transferred to another department. "Because personnel records of a particular officer are presumably generated while the officer is employed by the police department, they are '[r]ecords of peace officers.' They do not cease being such after the officer's retirement." (***Abatti* v. *Superior Court*** (2003) 112 Cal.App.4th 39, 57; ***Davis* v. *City of Sacramento*** (1994) 24 Cal.App.4th 393, 400; **see also *People* v. *Superior Court (Gremminger)*** (1997) 58 Cal.App.4th 397 [prosecution must comply with Evidence Code section 1043 to obtain discovery of a *former* police officer's personnel file when prosecuting that person for a crime committed post-retirement].)

21. Do the *Pitchess* procedures govern disclosure of personnel records of federal agents?

The ***Pitchess*** procedures do not extend to the personnel records of federal agents and there is no federal statutory equivalent of the ***Pitchess*** procedures when it comes to such records. There is, however, federal case law laying out certain procedures that should be followed when the defense in a federal case seeks such personnel records - albeit there is a split among federal courts as to the showing necessary to obtain court review of those records. (**See *United States* v. *Cadet*** (9th Cir. 1984) 727 F.2d 1453, 1468 and compare ***United States* v. *Henthorn*** (9th Cir. 1991) 931 F.2d 29, 30-31 with ***United States* v. *Quinn*** (11th Cir. 1997) 123 F.3d 1415, 1422.)

22. How can the personnel records of federal agents be obtained?

A. Getting Federal Records is Tough

It is not that unusual for a state district attorney's office to be prosecuting a defendant based on the testimony of federal agents such as members of the Drug Enforcement Administration (DEA), the Federal Bureau of Investigation (FBI), or other agencies under the Department of Justice umbrella. Defense counsel will sometimes attempt to obtain the personnel records of these agents by sending a subpoena to the employing federal agency requesting those records. In other situations, the prosecution (in an attempt to comply with its *Brady* obligations) may seek relevant personnel files of federal agents. Sometimes, as well, a court will order the prosecutor to get those files.

In either event, it is often difficult to obtain the records (**see e.g.**, ***People* v. *Salcido*** (2008) 44 Cal.4th 93, 145) and there are a lot of hoops to jump through to obtain any records of federal agencies, let alone personnel files, especially if the federal agency is not inclined to provide those records.

For example, in the case of ***F.B.I.* v. *Superior Court of Cal.*** (N.D. Cal. 2007) 507 F.Supp.2d 1082, a defendant charged with use of fraudulent checks and possessing false/stolen personal identification in a state criminal prosecution claimed he engaged in this felonious activity as part of his duties as a confidential informant for the FBI. To support that defense, his defense attorney issued a subpoena ordering an FBI agent to appear in court to offer testimony bearing on that defense. (**Id**. at p. 1085.) In response to this subpoena, an assistant United States Attorney (AUSA) wrote a letter to the attorney stating that the agent would not appear in court given that the Department of Justice (DOJ) had not authorized her do so, the defendant had not established the relevance of the agent's testimony, and the subpoena had been improperly served. The DOJ never authorized the agent or the AUSA to appear to testify or produce any documents in the state court action. (**Id**. at p. 1086.)

Several months later, the state deputy district attorney prosecuting the criminal case sent a subpoena to the AUSA directing the FBI agent to appear in Marin County Superior Court. The Marin County Superior Court also issued an order requiring the agent, or another FBI representative, appear to provide

testimony and requiring both the AUSA and the agent provide FBI documents relevant to the defense raised by the defendant. (**Id**. at p. 1086.)

The AUSA responded by sending a letter to the Marin County Superior Court stating the neither she nor the agent would appear in court or provide the requested documents, although she said the FBI would be willing to sign a stipulation declaring that they have no responsive documents. The AUSA stated that the matter would be removed to federal court if the state court did not vacate its order. After the AUSA received no response to her letter, she and the agent successfully had the state court order and the two subpoenas issued to the FBI agent removed to federal district court pursuant to 28 U.S.C. §§ 1441 and 1442(a). In federal district court, the AUSA and the FBI agent made a motion to quash the state court subpoenas and vacate the state court order on the grounds that (i) the doctrine of sovereign immunity precludes a state court from enforcing orders and subpoenas against federal employees and (ii) the DOJ regulations set forth in 28 U.S.C. §§ 16.21 et seq. validly prohibit DOJ employees from disclosing the information sought absent explicit authorization by the proper Department official. (**Id**. at p. 1086.)

The defendant then filed a motion in state court to dismiss the charges against him on the grounds that the denial of his discovery request constituted a violation of his due process and fair trial rights as established by *Brady* and provisions of California Evidence Code section 1042(d). (**Id**. at p. 1086.)

In federal court, the state prosecutor (carrying the ball on behalf of the defendant) argued that neither the doctrine of sovereign immunity nor the DOJ regulations can serve as the basis for precluding the enforcement of the subpoenas and a court order in light of the Constitutional right to Due Process and a fair trial guaranteed to defendants in criminal proceedings established by *Brady* v. *Maryland* (1963) 373 U.S. 83. The People were also concerned that, without the requested information, the state court would grant the defendant's motion to dismiss the charges against him pursuant to California Evidence Code § 1042(d), which provides that dismissal is appropriate upon non-disclosure of the identity of a confidential informant if "the court concludes that there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial." (**Id**. at p. 1087.) The prosecution suggested that the federal court conduct an in camera hearing and determine what information, if any, should be released after balancing the defendant's right to disclosure against the interest in maintaining the confidential nature of the information. (**Id**. at p. 1087.)

The federal district court ultimately held (i) the case was properly removed to federal court under a broad construction of 28 U.S.C. § 1442(a) allowing for removal when the state is attempting to subject federal officers to the state's process for conduct the officers engaged in during the scope of their duties; (ii) the DOJ's regulations governing the disclosure of information in a legal proceeding are valid in light of 5 U.S.C. § 301 and ***United States ex rel. Touhy* v. *Ragen*** (1951) 340 U.S. 462, and the state court lacked the authority to compel the agent and the AUSA to submit to the state subpoenas and order; (iii) when a case is removed from state court to federal court under section 1442, the federal court's jurisdiction to decide the issue is limited to the jurisdiction the state court would have to decide the issue

and the "state court lacked jurisdiction to enforce the subpoenas or order against [the AUSA and the FBI agent] in light of both the DOJ regulations governing the disclosure of information and the doctrine of sovereign immunity"; and (iv) the subpoenas had to be quashed since they were issued without jurisdiction to enforce them. (**Id**. at pp. 1089-1094.)

B. What Should Prosecutors be Prepared to Do to Obtain the Personnel Records of Federal Agents?

Prosecutors seeking to obtain personnel records of federal agents should be prepared to do the following:

1. Make telephone contact with a supervisor in the federal agency or the legal department of the federal agency from whom the records are sought.

2. Make contact with the Chief of the Civil Division in the United States Attorney's Office that will be working jointly with the federal agency holding the relevant records. Even before writing a letter or sending a subpoena requesting the records, it may be prudent to find out which person in the United States Attorney's Office (USAO) handles "***Touhy***" requests and enlist that person's knowledge (if not his or her complete cooperation) in navigating the federal waters.

3. Because the USAO needs a summary of the information sought and its relevance to the proceeding (**see** 28 C.F.R. §16.22(d)), a letter should be written to the agency as well as to the local United States Attorney's Office summarizing the scope of the records sought and the relevancy of the records.

4. Expect significant delays and obstacles to obtaining the records if the agency is reluctant to release the information. Here's why:

   (a) When a demand is made for materials contained in the files of the Department of Justice (e.g., personnel files of an FBI or DEA agent) the federal regulations bar disclosure of those materials "without prior approval of the proper Department official in accordance with [28 C.F.R. §§ 16.24 and 16.25]." (28 C.F.R. §16.22(a).)

   (b) The federal employee receiving the request is required to notify the USAO of the request. (28 C.F.R. §16.22(b).)

   (c) The USAO will "request a summary of the information sought and its relevance to the proceeding." (28 C.F.R. §16.22(d).)

   (d) The USAO will check with the agency holding the records to determine whether they object to the release of the records. If the agency has no objection, the chances are better that the USAO

will authorize release of the records. (**See** United States Attorney's Manual, hereinafter "USAM", § 4-6.332(E); 28 C.F.R. §16.24(c) [subject to certain conditions, it is DOJ policy that the AUSA shall "authorize testimony by a present or former employee of the Department or the production of material from Department files without further authorization from Department officials whenever possible"].) If the agency is objecting, the USAO can be expected to (but is not required to) join in objecting to the release of the records. (See 28 C.F.R. §16.24(a)-(g).)

(e) The USAO, in conjunction with officials or attorneys for the agency holding the records, will (when it comes to agent's personnel files) consider the following factors in assessing whether release of the records is appropriate:

(i) "[w]hether such disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose" (28 C.F.R. §16.26(a)(1).)

> **Editor's note**: For purposes of California state court criminal proceedings, this language asks, among other questions, whether disclosure would be appropriate under California's ***Pitchess*** procedures.

(ii) "[w]hether disclosure is appropriate under the relevant substantive law concerning privilege (28 C.F.R. §16.26(a)(1))

> **Editor's note**: Among the potential privileges that may apply: "the military or state secrets privilege, which is absolute if validly claimed, and the deliberative process, informant's, law enforcement evidentiary, and required reports privileges, which are qualified." (USAM, § 4-6.332(E))

(iii) whether "[d]isclosure would violate a specific regulation (28 C.F.R. §16.26(b)(2))

(iv) whether "[d]isclosure would reveal classified information, unless appropriately declassified by the originating agency" (28 C.F.R. §16.26(b)(3))

(v) whether "[d]isclosure would reveal a confidential source or informant, unless the investigative agency and the source or informant have no objection (28 C.F.R. §16.26(b)(4))

(vi) whether "[d]isclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired (28 C.F.R. §16.26(b)(4))

(f) If the records requested do *not* "involve information that was collected, assembled, or prepared in connection with litigation or an investigation supervised by a division of [DOJ]" such as the DEA or FBI, the agency holding the records "shall decide whether disclosure is appropriate, except that, when especially significant issues are raised, the [USAO] may refer the matter to the *Deputy* or *Associate* Attorney General for final determination. (28 C.F.R. § 16.24(d)(2); 28 C.F.R. § 16.25.) If the agency holding the records does not want them released and the USAO decides not to refer the matter to the Deputy or Associate Attorney General, the

USAO will "take all appropriate steps to limit the scope or obtain the withdrawal of a demand" for the records. (28 C.F.R. § 16.24(d)(2).) Once these steps have been taken, the AUSA must refer the matter to the Deputy or Associate Attorney General for a final decision as to whether the records should be released. (28 C.F.R. § 16.24(d)(2); 28 C.F.R. § 16.25(c).)

(g) If the records sought were "collected, assembled, or prepared in connection with litigation or an investigation supervised by a division of the [DOJ]" (i.e., one of several litigation divisions of the DOJ) then the Assistant Attorney General in charge of that division conducting that investigation may require approval from that division before the records are disclosed. Moreover, if the records fall into this category, the USAO may "through negotiation and, if necessary, appropriate motions, seek" to further limit what information is released. (28 C.F.R. §16.24(c).)

Editor's note: Presumably, many of the records of citizen complaints against an agent or internal affairs-type investigations would fall into this category of records.

(h) If the records have been "collected, assembled, or prepared in connection with litigation or an investigation supervised by a division of the [DOJ]" and the USAO and the department holding the records "disagree with respect to the appropriateness of demanded testimony or of a particular disclosure, or if they agree that such testimony or such a disclosure should not be made[,]" then the Assistant Attorney General in charge of the division responsible for the litigation or investigation must be notified. (28 C.F.R. §16.24(d).) This Assistant Attorney General then may (i) authorize disclosure if certain conditions are met; (ii) authorize the USAO to try and limit, through negotiations or motions, the records to be released; or (iii) refer the matter to the "*Deputy* Attorney General" for a final determination if the Assistant Attorney General does not want the records disclosed. (28 C.F.R. § 16.24(d)(1)(i)-(iii); 28 C.F.R. § 16.25.)

(i) If a court is requiring a response to the demand for the records before the USOA has decided whether to release the records, an attorney will "appear and furnish the court or other authority with a copy of the regulations contained in [28 C.F.R § 16.24 et seq.] and inform the court or other authority that the demand has been or is being, as the case may be, referred for the prompt consideration of the appropriate Department official and . . . respectfully request the court or authority to stay the demand pending receipt of the requested instructions." (28 C.F.R. § 16.27)

(j) If "the court or other authority declines to stay the effect of the demand in response to a request [for the records] . . . pending receipt of instructions, or if the court or other authority rules that the demand must be complied with irrespective of instructions rendered in accordance with [the federal regulations discussed above] not to produce the material or disclose the information sought, the employee or former employee upon whom the demand has been made shall, if so directed by the responsible Department official, respectfully decline to comply with the demand." (28 C.F.R. § 16.28 [and citing to ***United States ex rel. Touhy* v. *Ragen*** (1951)

340 U.S. 462, a case in which the Supreme Court held that an employee may not be held in contempt for failing to produce the demanded information where appropriate authorization had not been given; USAM, § 1-6.500].)

5. **Special rules re: prosecution requests for DEA records**: "The Drug Enforcement Administration receives unique treatment with respect to authorizing testimony under 28 C.F.R. 0.103(a), a section of the regulations unaffected by the 1980 amendment to 28 C.F.R. 16.21 et seq. Under Section 0.103(a), the Administrator of DEA may authorize the testimony of DEA officials in response to subpoenas issued by the prosecution in federal, state, or local criminal cases involving controlled substances. 28 C.F.R. 0.103(a)(3). In addition, the Administrator may release information obtained by DEA and DEA investigative reports to federal, state, and local prosecutors and to state licensing boards engaged in the institution and prosecution of cases before courts and licensing boards related to controlled substances. 28 C.F.R. 0.103(a)(2). Note that this section only authorizes release to the government side of the covered cases. Any other production of information or testimony by DEA officials is covered by 28 C.F.R. 16.21 et seq." USAM, § 1-6.600].)

6. If your request for disclosure of the records is declined, then "[t]he appropriate means for challenging [a department's] decision under ***Touhy*** is an action under the Administrative Procedure Act [5 U.S.C. §§ 701 et seq.] in federal court." (***F.B.I.* v. *Superior Court of Cal.*** (N.D. Cal. 2007) 507 F.Supp.2d 1082, 1095.) There is nothing a state court can do.

7. The Administrative Procedure Act permits a state prosecutor (or defense attorney) who has suffered a "legal wrong because agency action" to bring an action in federal district court seeking judicial review of the agency action. (5 U.S.C. § 702.)

8. If the federal court finds the denial of your request was erroneous, they are empowered to order the release of the information from the agency. (5 U.S.C. § 706.)

Editor's note: Special thanks to Marin County DDA Jack Ryder, the prosecutor who handled the case of ***F.B.I.* v. *Superior Court of Cal.*** (N.D. Cal. 2007) 507 F.Supp.2d 1082, and AUSA Yoshinori Himel for their help in explaining the hurdles posed when personnel files of federal agents are sought.

23. Can a state court order the prosecutor to obtain the personnel files of federal agents?

A state trial court does not have the authority to order the prosecution to provide files within the control of federal agencies.

In ***Saulter* v. *Municipal Court*** (1977) 75 Cal.App.3d 231, a defendant sought records from the federal Bureau of Alcohol, Tobacco and Firearms (ATF) for relevant personnel records or records showing any

citizen's complaint or any other types of complaints lodged against agents of the Bureau for acts of excessive force and violence in the execution of search warrants, or in making arrests. The ATF refused to comply with the defendant's subpoena. The state trial court denied defendant's request that the prosecution be ordered to obtain the records from the federal agency. However, the Court of Appeal reversed, finding the magistrate should have required the prosecutor to first request the records, and if that failed, to subpoena them. (**Id**. at pp. 242-243, 245.)

The holding in ***Saulter*** is no longer good law if the records sought are personnel records or the federal agency holding the records was not the investigating agency in the state case. As pointed out ***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, it is doubtful ***Saulter*** continues "to be viable in light of the criminal discovery statutory scheme put in place by Proposition 115" since the current discovery statutes "authorizes discovery only when the material sought is actually possessed by the prosecution or when the prosecution has the right to exercise control over the material." (***Barrett***, at p. 1319.) State prosecutors definitely do not have the right to exercise control over records kept by federal agencies. (**See *F.B.I.* v. *Superior Court of Cal***. (N.D. Cal. 2007) 507 F.Supp.2d 1082; **cf., *United States* v. *Dominguez-Villa*** (9th Cir. 1992) 954 F.2d 562 [federal district court exceeded its authority by requiring federal prosecutors to produce personnel files of state law enforcement witnesses because such material not under the control of federal prosecutors].)

24. Can an officer bring a civil suit for wrongful dissemination of personnel records?

A wrongful dissemination of peace officer personnel records does not give rise to a private cause of action for damages. (***Fagan* v. *Superior Court*** (2003) 111 Cal.App.4th 607, 614; ***Rosales v. City of Los Angeles*** (2000) 82 Cal.App.4th 419, 427-428; ***City of Hemet* v. *Superior Court*** (1995) 37 Cal.App.4th 1411, 1430; 532; ***Bradshaw* v. *City of Los Angeles*** (1990) 221 Cal.App.3d 908, 918-919.) Thus, "an officer whose records are wrongfully disclosed may not state causes of action for invasion of privacy, negligence, negligence per se, violation of a federal right to privacy or infliction of emotional distress." (***Fagan* v. *Superior Court*** (2003) 111 Cal.App.4th 607, 614; **accord *Rosales* v. *City of Los Angeles*** (2000) 82 Cal.App.4th 419, 429-432.)

25. What is the standard of review when challenging a court's determination to release (or not release) personnel records?

"The trial court's decision to grant or deny a discovery motion under Evidence Code sections 1043 and 1045 is ordinarily reviewed for abuse of discretion." (***Riske* v. *Superior Court*** (2016) 6 Cal.App.5th 647, 657 citing to ***Alford* v. *Superior Court*** (2003) 29 Cal.4th 1033, 1039.)

However, when the decision is based on an interpretation of the statutes governing such discovery, our review is de novo. (***Riske* v. *Superior Court*** (2016) 6 Cal.App.5th 647, 657 citing to ***City of Eureka***

v. *Superior Court of Humboldt County* (2016) 1 Cal.App.5th 755, 763 and ***Pasadena Police Officers Assn. v. Superior Court*** (2015) 240 Cal.App.4th 268, 284.)

XX. THE PROS AND CONS OF *BRADY* TIP SYSTEMS

Considering that the California Supreme Court in ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696 did not state that "***Brady*** tip" systems are required (**see** this outline, section XIX-6-C at p. 358), is there any reason a police department should agree with the prosecution to set up a system for alerting the prosecution to the potential existence of favorable material evidence in an officer's personnel file, i.e., set up a ***Brady*** tip system?

There are reasons both for and against setting up a ***Brady*** tip system by which the department alerts the District Attorney's Office to the existence of potential favorable material evidence in a peace officer's personnel file. (See 98 Ops.Cal.Atty.Gen. 54, *7 (2015) [noting a number of police departments employ such policies].) The decision in ***Johnson*** provides some ammunition for both sides on the issue. On the one hand, as noted above, the ***Johnson*** court did not indicate a ***Brady*** tip system was necessary to meet a prosecutor's due process obligations – at least where the information is unknown to the prosecution. On the other hand, ***Johnson*** takes away one of the strongest arguments for not setting up such a system – that disclosure of the ***Brady*** tip might itself violate the ***Pitchess*** statutes. (**See** this outline, section XIX-6-C at p. 357.)

Here are some of the arguments for why a ***Brady*** tip system is a good idea post-***Johnson***:

First, the United States Supreme Court may disagree with the California Supreme Court's view that the existence of the ***Pitchess*** procedures relieves the prosecution of any obligation on the part of the prosecution to check for hitherto unknown favorable material evidence in peace officer personnel files. (**See** this outline, section I-8-C-iii at p. 109.) Setting up a system that triggers a prosecutor's ***Brady/Pitchess*** motion based on a ***Brady*** tip allows prosecutors to comply with their constitutional discovery obligations even assuming the High Court ultimately rules that the ***Pitchess*** scheme does not place personnel files outside the constructive possession of the trial and does not afford the defense equal access to unknown favorable material information in the personnel file.

Second, even if the High Court ultimately concludes there is no ***Brady*** obligation to review peace officer personnel files because they are not within the constructive possession of the prosecution (i.e., under the theory the information is not reasonably accessible to the prosecution and is equally available to the defense and the prosecution alike), a case may still be reversed on grounds of ineffective assistance of counsel if the attorney fails to file a ***Brady-Pitchess*** motion and there exists information in the personnel file that constitutes Brady material. Consider how common it is for the defendant to claim that an attorney rendered ineffective assistance on grounds the attorney failed to file a ***Pitchess*** motion.

In ***In re Avena*** (1996) 12 Cal.4th 694, the California Supreme Court rejected an argument that a defense attorney's failure to file a ***Pitchess*** motion constituted ineffective assistance of counsel, but only because the defense had failed to show there was any information in the officer's file that would have changed the verdict (i.e., the failure to file the motion was not prejudicial. (**Id**. at p. 730.) Similarly, in ***People* v. *Nguyen*** (2007) 151 Cal.App.4th 1473, the court denied a defendant's motion seeking P***itchess*** information to help support an ineffective assistance claim against trial counsel for failure to file a ***Pitchess*** motion. (**Id**. at p. 1477.)

In numerous other unpublished cases, similar claims were made and rejected, in part or in whole, on the same grounds. (**See e.g.,** ***People* v. *Fuller*** 2016 WL 1223503, at *2 ***People* v. *Batres*** 2016 WL 6302410, at *4; ***People* v. *Molina*** 2014 WL 6632945, *9; ***People* v. *Turner*** 2014 WL 2967916, *9; ***People* v. *Venegas*** 2013 WL 6451795, *5; ***People* v. *Jones*** 2011 WL 592286, *4; ***People* v. *Cardenas*** 2011 WL 1991665, *14-*15; ***People* v. *Dunn*** 2010 WL 4160708, *9; ***People* v. *Allen*** 2010 WL 1914113, *5; ***People v. Rodriguez*** 2009 WL 3925582, *9; ***People* v. *Smith*** 2009 WL 2769178, *1-*2; ***People* v. *Madayag*** 2007 WL 1229428, *7; ***People v. Rocha*** 2006 WL 1381851, *2; ***People* v. *Bell*** 2001 WL 1469070, *4; **see also** ***People* v. *Diakite*** 2014 WL 6679100, *14; ***People* v. *Darrough*** 2013 WL 4044764, *1.) None of the cases suggested that, if a ***Pitchess*** motion could have been made and had there been a showing that ***Brady*** information existed in the ***Pitchess*** file, the claim of ineffective assistance would be unsuccessful. **(Cf**., ***People* v. *Lugo*** 2003 WL 21437636, *2 [where defense would not be dependent on showing officers lied, failure to file ***Pitchess*** motion not ineffective assistance].) On the other hand, at least one unpublished case granted a petition for a writ of habeas corpus on grounds that failure to file a ***Pitchess*** motion constituted ineffective assistance of counsel where the officers' credibility was crucial to the case, one of the officers had admitted he had recently been untruthful in his reporting of circumstances that had occurred in an unrelated criminal case and the other had made a typographical error creating a false impression in a probable cause declaration, the judge had encouraged the defense to file such a motion, and the attorney mistakenly believed he did not have to file a motion to obtain the information about the officers. (**See *People* v. *Heredia*** 2009 WL 1133058, *1, *8-*11 [albeit remanding case for defense to file ***Pitchess*** motion to see if, in fact, there was any prejudice from the failure to file the motion].) A ***Brady*** tip system allows prosecutors to alert the defense and help avoid any claim of ineffective assistance.

Third, setting up a ***Brady*** tip system helps avoid the problem of failure to produce known information in an officer's personnel file. As discussed above in this outline, section I-7-G at p. 89; I-8-C-iii at pp. 109-112, the prosecution cannot assume that the holding in ***Johnson*** will insulate it from committing a ***Brady*** violation if information in an officer's personnel file is known to the prosecution team (or at least known to the prosecutor's office). If information known to one prosecutor in an office is eventually held to be known to every prosecutor in an office – how will it be possible for the prosecution to comply with its due process obligation to disclose favorable material evidence, let alone its statutory obligation (**see**

Pen. Code, § 1054.1(e)) or ethical obligation (**see *Cone* v. *Bell*** (2009) 556 U.S. 449, 470, fn. 15) to do so – when the information in the personnel file has previously been released to a prosecutor in the office? A ***Brady*** tip system helps ensure that information provided in a past case to one prosecutor will be provided in a subsequent case to a different prosecutor.

Fourth, a ***Brady*** tip system can help insulate a police department against civil suit. As noted in this outline, section I-15-156-158, investigating officers who fail to reveal favorable material evidence to prosecutors may be sued for violating due process. Although the existence of the ***Pitchess*** statutes can potentially defuse a claim that failure to disclose favorable material evidence in an officer's personnel file violated the defendant's rights because the information is accessible to the defense through due diligence (**see** this outline, section I-11 at pp. 138-147), it is unknown whether the ***Pitchess*** statutes will ultimately be viewed by the High Court as having the "saving grace" quality of providing equal access to the defense attributed to them by the ***Johnson*** court or whether their existence will defeat a federal suit against a department (or officer) for failure to disclose such information to the prosecution. (**See *Tennison v. City and County of San Francisco*** (9th Cir. 2009) 570 F.3d 1078, 1090-1091 [placing the notes of exculpatory witness' statements in the police file did not fulfill investigating officer's duty to disclose exculpatory information to the prosecutor].)

Fifth, a ***Brady*** tip system can avoid potential concerns about violation of the prosecutor's statutory discovery obligations. Even assuming the ***Johnson*** court is correct that the prosecution has no ***Brady*** obligation to check officer personnel files because the defense has equal access to the files, a prosecutor has statutory obligations to disclose exculpatory evidence that exist regardless of whether the evidence is equally accessible to the prosecution. (**See** this outline, at section III-29 at p. 208) Even if the prosecutor is deemed to be in possession of non-***Brady*** exculpatory evidence in a personnel file (**see** this outline, section I-8-C-iii at pp. 109-112), this will not make a difference in most cases since information in the officer's personnel file is protected by a privilege and Penal Code section 1054.6 provides that "[n]either the defendant nor the prosecuting attorney is required to disclose any materials or information . . . which are privileged pursuant to an express statutory provision[.]" (Pen. Code, § 1054.6.) Thus, in general, the prosecution has no *statutory* duty to disclose information in a personnel file that might be disclosable under the ***Pitchess*** standards but not under the ***Brady*** standards.

Nevertheless, there is a problem that might arise if no ***Brady*** tip system is in place and the officer has information in his criminal history record that must be disclosed. Most prosecutor's offices do not run officer rapsheets. Information contained in an officer's rapsheets that is exculpatory (i.e., pending cases, probationary status, arrests for crimes of moral turpitude) is often contained in an officer's personnel file. Information in an officer's rapsheet is probably not subject (even if it is simultaneously contained in an officer's personnel file) to the ***Pitchess*** protections. (**See** this outline, section I-7-E-v at pp. 84-85.) Assuming prosecutors will be held to be in possession of information in an officer's rapsheet, unless a ***Brady*** tip system is in place, prosecutors will likely either need to run officer rapsheets or file ***Pitchess***

motions on all officers in order to avoid violating the discovery statute obligation to provide exculpatory evidence.

Sixth, a ***Brady*** tip system can help ensure the prosecutor is made aware of exculpatory information an officer's personnel file without the prosecutor having to file a ***Brady-Pitchess*** motion in every case. If there is information in an officer's personnel file that significantly bears on an officer's credibility, prosecutors should want to know about such information. Such information is important to have before placing too much reliance on the officer's testimony. Moreover, a prosecutor does not want to be caught off-guard when the defense attempts to impeach an officer with information the defense received pursuant to their ***Brady-Pitchess*** motion. A ***Brady*** tip system allows prosecutors to avoid reliance on officers with credibility problems and surprise at trial without having to file ***Brady-Pitchess*** motions in every case

Seventh, a ***Brady*** tip system can help provide a basis for developing a protocol that avoids the problem identified in ***Johnson*** at p. 719 of duplicative and excessive filing of ***Pitchess*** motions by both the defense and prosecution.

Eighth, unless a ***Brady*** tip system is set up, it may be awkward or difficult to make the necessary good cause showing for release of ***Brady-Pitchess*** information in officer personnel files pursuant to a prosecutorial ***Brady-Pitchess*** motion.

Ninth, unless a ***Brady*** tip system is set up (or prosecutors file ***Pitchess*** motions in every case), there may be disclosure of information in officer personnel files to defense attorneys that need not occur since the defense may file ***Pitchess*** motions on officers who would not otherwise be called by the prosecution.

Tenth, failure to set up some sort of ***Brady*** Bank can expose a prosecutor's office to civil liability. (**See *Milke* v. *City of Phoenix*** (D. Ariz.) 2016 WL 5346364, at *5 [allowing suit against county based on failure to maintain "an administrative system or internal policies and procedures for the deputy county attorneys handling criminal cases to access exculpatory and impeachment information"].)

XXI. THE ROLE OF THE PROSECUTOR IN DEFENSE *PITCHESS* MOTIONS

The prosecution is entitled to notice and has the right to appear at a defense ***Pitchess*** motion, but no absolute right to participate. (***Alford* v. *Superior Court*** (2003) 29 Cal.4th 1033, 1044-1045; **accord *Garcia* v. *Superior Court*** (2007) 42 Cal.4th 63, 73.) The prosecutor is not, however, entitled to the affidavits and/or any other information filed in support of the ***Pitchess*** motion. (***Garcia* v. *Superior Court*** (2007) 42 Cal.4th 63, 73; ***Alford* v. *Superior Court*** (2003) 29 Cal.4th 1033, 1045, fn. 5.)

Participation by, and input from, the prosecutor in a ***Pitchess*** motion may be permitted in the

discretion of the court hearing the motion. (***People* v. *Superior Court (Humberto S.)*** (2008) 43 Cal.4th 737, 748; ***Alford* v. *Superior Court*** (2003) 29 Cal.4th 1033, 1044-1045.)
Peace officer personnel records are treated, for discovery purposes, as "third party records" and the rules regarding a prosecutor's participation in a ***Pitchess*** motion track the rules regarding a prosecutor's participation in a hearing on a defense subpoena duces tecum for third party records (i.e., a victim's medical and psychotherapy records). (***People* v. *Superior Court (Humberto S.)*** (2008) 43 Cal.4th 737, 748-750.)

"[B]ecause of reciprocal discovery rights, the prosecution will receive relevant disclosure from the defense at the time that information contained in the ***Pitchess*** material results in the decision to call a witness." (***Becerrada* v. *Superior Court*** (2005) 131 Cal.App.4th 409, 414, citing to ***Alford* v. *Superior Court*** (2003) 29 Cal.4th 1033, 1045.)

XXII. STANDARD OF REVIEW FOR SELECTED ALLEGED DISCOVERY VIOLATIONS

1. Claims of failure to provide discovery required by due process (*Brady*)

In ***People* v. *Salazar*** (2005) 35 Cal.4th 1031, the court recognized that it had "not previously addressed the standard of review applicable to ***Brady*** claims. (**Id**. at p. 1042.) The ***Salazar*** court then stated: "Conclusions of law or of mixed questions of law and fact, such as the elements of a ***Brady*** claim [citation omitted], are subject to independent review." (***Salazar*** at p. 1042.)

However, in order for a claimed violation of due process based on failure to provide discovery to be deemed prejudicial error, the defense must establish on review the undisclosed evidence was material. (**See *People* v. *Superior Court (Meraz)*** (2008) 163 Cal.App.4th 28, 52.) For the evidence to be deemed material, it is not enough to show the suppressed evidence was admissible, or that its absence made conviction more likely or that it "might have changed the outcome of the trial[.]" (**Ibid**; ***In re Sodersten*** (2007) 146 Cal.App.4th 1165, 1226–1227.) Rather, the defense must establish that there is "a reasonable probability that, had [it] been disclosed to the defense, the result … would have been different." (**Ibid**.) "The requisite 'reasonable probability' is a probability sufficient to "undermine [] confidence in the outcome on the part of the reviewing court. [Citations.] It is a probability assessed by considering the evidence in question under the totality of the relevant circumstances and not in isolation or in the abstract. [Citation.] Further, it is a probability that is, as it were, 'objective,' based on an 'assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision,' and not dependent on the 'idiosyncrasies of the particular decisionmaker,' including the 'possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like.'" (**Ibid**.)

A. Can a New Trial Motion be Based on a Claimed *Brady* Violation?

A new trial motion may separately allege a constitutional due process violation based on a purported Brady error. (***People* v. *Hoyos*** (2007) 41 Cal.4th 872, 916-919; ***People* v. *Harrison*** (2017) 16 Cal.App.5th 704, 709–711; ***People* v. *Uribe*** (2008) 162 Cal.App.4th 1457, 1482.)

2. Claims that a *Brady* obligation is being improperly imposed

When the question is *whether* the ***Brady*** rule applies in a particular situation, it is a legal matter that is reviewed de novo. (***IAR Systems* v. *Superior Court (Shehayed)*** (2017) 12 Cal.App.5th 503, 513 citing to ***People* v. *Uribe*** (2008) 162 Cal.App.4th 1457, 1473.) However, "the trial court's factual findings are, as usual, reviewed for substantial evidence." (***IAR Systems* v. *Superior Court (Shehayed)*** (2017) 12 Cal.App.5th 503, 513 citing to ***People* v. *Superior Court (Hartway)*** (1977) 19 Cal.3d 338, 350 fn. 6.)

3. Claims of failure to provide discovery required by statute (Pen. Code § 1054.1)

In general, reviewing courts "'review a trial court's ruling on matters regarding discovery under an abuse of discretion standard.'" (***People* v. *Thompson*** (2016) 1 Cal.5th 1043, 1105, quoting ***People* v. *Ayala*** (2000) 23 Cal.4th 225, 299; **accord *People* v. *Curl*** (2009) 46 Cal.4th 339, 357.) "[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered." (***IAR Systems* v. *Superior Court (Shehayed)*** (2017) 12 Cal.App.5th 503, 513 citing to ***People* v. *Giminez*** (1975) 14 Cal.3d 68, 72.)

However, challenges based on claims that the discovery statute itself has been misinterpreted are reviewed de novo. (***Rubio* v. *Superior Court*** (2016) 244 Cal.App.4th 459, 471.)

If error is found in failing to provide statutorily-required discovery as required by section 1054.1, it is subject to the harmless-error standard set forth in ***People* v. *Watson*** (1956) 46 Cal.2d 818, 836. (***People* v. *Verdugo*** (2010) 50 Cal.4th 263, 280; ***People* v. *Zambrano*** (2007) 41 Cal.4th 108, 1135, fn. 13.) That is, there is a "basis for reversal only where it is reasonably probable, by state-law standards, that the omission affected the trial result." (***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1135 [and disapproving any contrary implication in ***People* v. *Bohannon*** (2000) 82 Cal.App.4th 798, 805–807, which appeared to apply a ***Brady*** materiality standard to violations of the reciprocal-discovery statute]; **accord *People* v. *Mora and Rangel*** (2018) 5 Cal.5th 442, 467.)

4. Claims the court improperly allowed the prosecution to delay, defer, or deny disclosure of discovery under section 1054.7

A ruling on whether to defer, restrict, or deny disclosure of evidence under section 1054.7 is subject to

the abuse of discretion standard. (**See *People* v. *Thompson*** (2016) 1 Cal.5th 1043, 1105.)

5. Claims the court improperly imposed a sanction under section 1054.5

A claim that the trial court improperly excluded evidence as a sanction for a discovery violation is subject to the abuse of discretion standard. (***People* v. *Jackson*** (1993) 15 Cal.App.4th 1197, 1203.)

However, if the sanction was to preclude a defense witness from testifying and the sanction was found to have been an abuse of discretion, it can be deemed a violation of the Compulsory Process Clause. In that circumstance, the error is of constitutional magnitude and is subject to the standard of review adopted in ***Chapman* v. *California*** (1967) 386 U.S. 18: whether the error was "harmless beyond a reasonable doubt." (***People* v. *Gonzales*** (1994) 22 Cal.App.4th 1744, 1759.)

6. Claims the court improperly denied a request for release of peace officer personnel records

"The trial court's decision to grant or deny a discovery motion under Evidence Code sections 1043 and 1045 is ordinarily reviewed for abuse of discretion." (***Riske* v. *Superior Court*** (2016) 6 Cal.App.5th 647, 657 citing to ***Alford* v. *Superior Court*** (2003) 29 Cal.4th 1033, 1039.)

However, when the decision is based on *an interpretation of* the statutes governing such discovery, review is de novo. (***Riske* v. *Superior Court*** (2016) 6 Cal.App.5th 647, 657 citing to ***City of Eureka* v. *Superior Court of Humboldt County*** (2016) 1 Cal.App.5th 755, 763 and ***Pasadena Police Officers Assn.* v. *Superior Court*** (2015) 240 Cal.App.4th 268, 284.)

XXIII. CIVIL LIABILITY OF PROSECUTORS AND INSPECTORS FOR *BRADY* VIOLATIONS

1. Prosecutors Have Absolute Immunity for Most Discovery Violations

A prosecutor is entitled to absolute immunity from liability under section 1983 for violating an individual's federal constitutional rights when he engages in activities "intimately associated with the judicial phase of the criminal process." (***Broam* v. *Bogan*** (9th Cir.2003) 320 F.3d 1023, 1028.) "This protection encompasses 'all of their activities that can fairly be characterized as closely associated with the conduct of litigation or potential litigation.…." (***Barbera* v. *Smith*** (2d Cir. 1987) 836 F.2d 96, 99; **see also *Fields* v. *Wharrie*** (7th Cir. 2012) 672 F.3d 505, 510 ["A prosecutor is absolutely immune from suit for all actions and decisions undertaken in furtherance of his prosecutorial duties."].)

Whether an action is viewed being taken in furtherance of prosecutorial duties depends upon its function. (**See *Van de Kamp* v. *Goldstein*** (2009) 555 U.S. 335, 342–343.)

A prosecutor is entitled to only qualified immunity, however, if he "is performing investigatory or administrative functions, or is essentially functioning as a police officer or detective." (***Broam* v. *Bogan*** (9th Cir.2003) 320 F.3d 1023, 1028.) "A prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity." (***Buckley* v. *Fitzsimmons*** (1993) 509 U.S. 259, 273.)

Editor's note: The fact that a prosecutor does not have immunity when engaging in administrative functions is one of the reasons, a district attorney's office may, "when it acts with deliberate indifference to the rights of persons with whom the [untrained employees] come into contact" be subject to civil suit under § 1983. (**See *Connick* v. *Thompson*** (2011) 563 U.S. 51, 61; ***Milke* v. *City of Phoenix*** (D. Ariz.) 2016 WL 5346364, at *5 [allowing suit against county based on failure to maintain "an administrative system or internal policies and procedures for the deputy county attorneys handling criminal cases to access exculpatory and impeachment information"].)

Qualified immunity from civil liability is provided to government officials "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (***Broam* v. *Bogan*** (9th Cir. 2003) 320 F.3d 1023, 1031.)

Generally, absolute immunity is the norm for post-charging functions and qualified immunity is the norm for pre-charging functions. (**See *Barbera* v. *Smith*** (2d Cir. 1987) 836 F.2d 96, 100.) But there is not a bright line and some pre-charging functions (e.g., the organization, evaluation, and marshalling of evidence into a form that will enable the prosecutor to try a case or to seek a warrant, indictment, or order) may be entitled to absolute immunity while others, such as "the supervision of and interaction with law enforcement agencies in acquiring evidence which might be used in a prosecution" are only entitled to qualified immunity. (***Barbera* v. *Smith*** (2d Cir. 1987) 836 F.2d 96, 100.) Conversely, "even after the initiation of criminal proceedings, a prosecutor may receive only qualified immunity when acting in a capacity that is exclusively investigatory or administrative." (***Broam* v. *Bogan*** (9th Cir. 2003) 320 F.3d 1023, 1031.)

"A prosecutor's decision not to preserve or turn over exculpatory material before trial, during trial, or after conviction is a violation of due process under ***Brady* v. *Maryland***[.]" (***Broam* v. *Bogan*** (9th Cir. 2003) 320 F.3d 1023, 1030.) "It is, nonetheless, an exercise of the prosecutorial function and entitles the prosecutor to absolute immunity from a civil suit for damages." (**Id**. at p. 1030 citing to ***Imbler* v. *Pachtman*** (1975) 424 U.S. 409,431–432 fn. 34 [explaining that the "deliberate withholding of exculpatory information" is included within the "legitimate exercise of prosecutorial discretion"]; **accord *Porter* v. *White*** (11th Cir. 2007) 483 F.3d 1294, 1305 ["Injury flowing from a procedural due process violation (i.e., incarceration following a constitutionally unfair trial) that results from a prosecutor's failure to comply with the ***Brady*** rule cannot be redressed by a civil damages action against the prosecutor under § 1983 because the prosecutor is absolutely immune from such liability."]; ***Long* v.**

Satz (11th Cir.1999) 181 F.3d 1275, 1279 [quoting and affirming opinion of the district court to confirm the principle that, because "'[t]he task of evaluating the credibility of the alleged exculpatory information, and of determining its bearing on the trial and the prosecutor's decision whether to confess error and agree to have the verdict set aside, no doubt requires the exercise of prosecutorial discretion,'" a prosecutor is protected by absolute immunity for the failure to turn over exculpatory evidence that was discovered shortly after the defendant was sentenced]; ***Carter* v. *Burch*** (4th Cir.1994) 34 F.3d 257, 263 [holding that a prosecutor's decision whether or not to give defense counsel evidence alleged to be materially exculpatory which was either discovered "after [the § 1983 plaintiff's] arrest, but before his conviction," or while the prosecutor was "still functioning as an advocate for the State" in "post-trial motions and preparations for appeal," is "clearly part of the presentation of the State's case," and therefore a prosecutor is absolutely immune from liability for failure to turn over evidence]; ***Ybarra* v. *Reno Thunderbird Mobile Home Village*** (9th Cir.1984) 723 F.2d 675, 679 [holding that a district attorney's duty to preserve exculpatory evidence "would arise from his role as an officer of the court charged to do justice. An act or an omission concerning such a duty cannot be construed as only administrative or investigative; it too is necessarily related to [the prosecutor's] preparation to prosecute."]; ***Fullman* v. *Graddick*** (11th Cir.1984) 739 F.2d 553, 559 [holding that "[t]he district court properly dismissed plaintiff's claims that [the prosecutor] conspired to withhold evidence and to create and proffer perjured testimony"]; ***Prince* v. *Wallace*** (5th Cir.1978) 568 F.2d 1176, 1178–1179 [extending absolute immunity to a prosecutor's actions in "initiating and pursuing a criminal prosecution and in presenting the state's case ... even where the prosecutor knowingly used perjured testimony, deliberately withheld exculpatory information, or failed to make full disclosure of all facts"]; ***Hilliard* v. *Williams*** (6th Cir.1976) 540 F.2d 220, 221 [holding that notwithstanding acts and omissions of state prosecutor in withholding certain information and in failing to prevent or correct deceptive and misleading testimony " 'deprived [the state defendant] of her constitutional right to a fair trial,' " prosecutor was absolutely immune].)

There may, however, be circumstances where a prosecutor is not entitled to immunity for the failure to disclose evidence after conviction. In ***Houston* v. *Partee*** (7th Cir. 1992) 978 F.2d 362, the court held trial prosecutors were only entitled to qualified immunity where, while defendant's conviction was pending on an appeal and being handled by persons other than the trial prosecutors, the trial prosecutors conducted an investigation that acquired but withheld exculpatory evidence. (**Id.** at p. 367.)

2. Employees of the Prosecutor's Office, Such as Inspectors or Investigators, Generally Have the Same Immunity as Prosecutors

Absolute immunity from civil rights liability extends to those performing functions closely associated with judicial process, including not just officials performing discretionary acts of judicial nature but individual employees who assist such officials and who act under their direction in performing functions closely tied to judicial process. (**See *Hill* v. *City of New York*** (2d Cir. 1995) 45 F.3d 653,

660[extending absolute immunity to non-attorney employees of district attorney's office under functional approach]; ***Davis* v. *Grusemeyer*** (3d Cir.1993) 996 F.2d 617, 631 [extending absolute immunity to employee working for attorney "when the employee's function is closely allied to the judicial process"]; ***Gobel* v. *Maricopa County*** (9th Cir.1989) 867 F.2d 1201, 1203, fn. 5 ["[i]nvestigators, employed by a prosecutor and performing investigative work in connection with a criminal prosecution, are entitled to the same degree of immunity as prosecutors].)

The immunity from liability rules regarding when prosecutors or employees of prosecutor's offices can be sued under state law differ from the rules governing federal civil suits, but generally those statutes also provide the same immunity to non-prosecutors that is provided to prosecutors under those statutes when those non-prosecutors act in a prosecutorial capacity. (**See *County of Los Angeles* v. *Superior Court*** (2009) 181 Cal.App.4th 218, 229-230.)

XXIV. THE LOSS OR DESTRUCTION OF EVIDENCE

NOTE: This portion of the outline provides a very summary version of the rules regarding loss or destruction of evidence. For a more expansive outline, please see the Allison Macbeth's "RESPONDING TO MOTIONS TO DISMISS: LOSS OR DESTRUCTION OF EVIDENCE & DEPORTATION OF WITNESSES" handout or the 2017-IPG#30(*TROMBETTA-YOUNGBLOOD* MOTIONS).

1. What are the rules regarding loss or destruction of evidence?

Under the current law, there remains a due process duty to preserve evidence. (**See *People* v. *Roybal*** (1998) 19 Cal.4th 481, 510.) This duty, however, is limited to evidence which is material, i.e., "evidence that might be expected to play a significant role in the suspect's defense."" (***People* v. *Beeler*** (1995) 9 Cal.4th 953, citing to ***California* v. *Trombetta*** (1984) 467 U.S. 479, 488.) In order for evidence to be expected to play a significant role in the suspect's defense, it "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (***California* v. *Trombetta*** (1984) 467 U.S. 479, 488-489; ***People* v. *Carter*** (2005) 36 Cal.4th 1215, 1246.) Moreover, if the missing evidence is simply "potentially useful" evidence, it must be shown the officers acted in "bad faith" in destroying or losing it. (***People* v. *Beeler*** (1995) 98 Cal.4th 953, citing to ***Arizona* v. *Youngblood*** (1988) 488 U.S. 51, 58.)

2. What are the rules regarding the duty to collect evidence?

A. No General Duty to Collect Evidence

In ***People* v. *Frye*** (1998) 18 Cal.4th 894, the California Supreme Court stated: "It is not entirely clear that the failure to obtain evidence falls within 'what might loosely be called the area of constitutionally guaranteed access to evidence.'" (**Id**. at p. 943.) The court then went on to say: "Although this court has

suggested that there might be cases in which the failure to collect or obtain evidence would justify sanctions against the prosecution at trial, we have continued to recognize that, ***as a general matter, due process does not require the police to collect particular items of evidence***." (**Ibid**; **accord *People* v. *Littlefield*** (1993) 5 Cal.4th 122, 134 ["the prosecution has no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense"]; ***People* v. *Farmer*** (1989) 47 Cal.3d 888, 911 [police cannot be expected to "gather up everything which might eventually prove useful to the defense"]; ***People* v. *Hogan*** (1982) 31 Cal.3d 815, 851 [duty to preserve material evidence already obtained does not include duty to obtain evidence or to conduct certain tests on it]; ***In re Koehne*** (1960) 54 Cal.2d 757, 759 ["the 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"].) Lower appellate courts have been more definitive in finding no duty to collect. (**See *People* v. *Wimberly*** (1992) 5 Cal.App.4th 773, 791 ["police have no obligation to collect evidence for the defense; their duty is to preserve existing material evidence"]; ***People* v. *Kelley*** (1984) 158 Cal.App.3d 1085, 1101-1102 [same]; ***People* v. *Kane*** (1985) 165 Cal.App.3d 480, 485 ["prosecution is not required to engage in foresight and gather up everything which might eventually prove useful to the defense"]; ***People* v. *McNeill*** (1980) 112 Cal.App.3d 330, 338 [no duty to gather and collect everything which, with fortuitous foresight, might prove useful to the defense]; ***People* v. *Watson*** (1977) 75 Cal.App.3d 384, 400 [same].)

B. Duty to Collect Less Than Duty to Preserve

Even assuming a duty to collect evidence, the "duty to obtain exculpatory evidence is not as strong as its duty to preserve evidence already obtained." (***People* v. *Daniels*** (1991) 52 Cal.3d 815, 855; **accord *People* v. *Webb*** (1993) 6 Cal.4th 494, 519, fn. 18; ***People* v. *Hogan*** (1982) 31 Cal.3d 815, 851.) Thus, if failure to preserve the evidence would not violate due process, failure to collect it in the first place would not violate due process either. (**See *Miller* v. *Vasquez*** (9th Cir. 198) 868 F.3d 1116, 1121 ["since, in the absence of bad faith, the police's failure to preserve evidence that is only potentially exculpatory does not violate due process, then a fortiori neither does the good faith failure to collect such evidence violate due process"]; **see also *People* v. *Daniels*** (1991) 52 Cal.3d 815, 855 [assuming, arguendo, due process duty to collect evidence, no violation in instant case because no showing evidence had exculpatory value per ***Trombetta***]; **see also *People* v. *Cooper*** (1991) 53 Cal.3d 771, 810-811 [applying ***Trombetta-Youngblood*** test to failure to collect evidence].)

XXV. OTHER SELECTED DISCOVERY-RELATED ISSUES

1. Should prosecutor's offices set up "informant banks?"

The cases indicating that prosecutors will be held to be in constructive possession of knowledge that a prosecution witness is currently, or has previously been, an informant (**see** this outline, section I-3-O-vi, at pp. 27-30) raises the question of whether prosecutor's offices have an obligation to set up "informant

banks" in a manner similar to the ***Brady*** banks created for police officers. This is a difficult issue, from both a legal, practical, and risk standpoint.

In ***Van de Kamp* v. *Goldstein*** (2009) 555 U.S. 335, the United States Supreme Court held that a prosecutor's office has "absolute immunity" from civil liability for failure to establish an information system containing potential impeachment material about informants. (**Id**. at p. 339.) Goldstein had been convicted of murder based in critical part upon the false testimony of a jailhouse informant who had previously received reduced sentences for providing prosecutors with favorable testimony in other cases and whose favorable treatment was known to at least some prosecutors in the Los Angeles County District Attorney's. The prosecution in the murder case never disclosed this potential impeachment information. (**Id**. at p. 339.) In a federal habeas proceeding, Goldstein convinced the district court to reverse his conviction on this ground. The Court of Appeals affirmed that reversal and the State decided that, rather than retry Goldstein (who had already served 24 years of his sentence), it would release him. Goldstein then sued the former Los Angeles County district attorney and chief deputy district attorney in federal court. Relying on ***Giglio* v. *United States*** (1972) 405 U.S. 150, Goldstein claimed that the prosecution's failure to communicate to his attorney the facts about the informant's earlier testimony-related rewards violated the prosecution's constitutional duty to "insure communication of all relevant information on each case [including agreements made with informants] to every lawyer who deals with it." (***Goldstein*** at p. 340.) Goldstein also alleged that this failure resulted from the failure of the office's chief supervisory attorneys to adequately train and supervise the prosecutors who worked for them and from the supervisory attorney's failure to establish an information system about informants. (**Ibid**.) The High Court unanimously rejected a claim that prosecutors could be sued for failure to set up the information system. One of the reasons they did so was to avoid the problem of forcing courts to "review the office's legal judgments, not simply about *whether* to have an information system but also about *what kind* of system is appropriate, and whether an appropriate system would have included ***Giglio***-related information *about one particular kind of trial informant*." (***Goldstein*** at pp. 348-349, emphasis in original.)

However, the Ninth Circuit thereafter wrote an opinion that allowed Goldstein to file a subsequent suit (on similar grounds to the earlier suit thrown out by the High Court) against the Los Angeles County District Attorney for failure to, inter alia, set up an informant bank. (**See *Goldstein* v. *City of Long Beach*** (9th Cir. 2013) 715 F.3d 750.) The Ninth Circuit allowed the suit to proceed, in essence, under the dubious notion that the High Court only decided whether a prosecutor's office has immunity for failure to set up an informant bank when acting in the capacity of a representative of the state and not when the prosecutor is representing the county - and then proceeded to find the Los Angeles County District Attorney represented the county when it established policy and training related to the use of jailhouse informants. (**Id**. at p. 762.) A petition for cert to the United States Supreme Court was denied.

Thus, presently there seems to be some potential liability for failing to set up at least a jailhouse informant bank if failure to do so results in an innocent person being convicted. Moreover, unless an informant bank is created, how will a prosecutor ever be able to know that a prosecution witness has previously acted as an informant?

Presumably, a police department could set up its own informant bank (as was imperfectly done in ***State* v. *Williams*** (Md. 2006) 896 A.2d 973); but unless the department requires officers to check that bank before bringing over a case for charging or an officer happens to know the witness has been an informant, the prosecutor will still be left in the dark.

A prosecutor's office could set up a policy of having its prosecutors ask every prosecution witness whether they are or ever have been an informant. But aside from this being an unwieldy and uncomfortable position for the prosecutor and the witness, it may often elicit a false answer. Civilian informants may believe it is totally justified and lawful for them to keep their informant status a secret. Or even absent such a belief, they may not wish to disclose information that puts their life at risk. Thus, a policy of asking every witness about prior informant status not only is unlikely to capture the information, but it sets up the potential for even more discovery issues if the witness lies or equivocates about their informant status.

Moreover, and this **point cannot be overstated**, the need to maintain the privacy of the person's status as an informant is overwhelmingly important. It far exceeds the need to maintain the confidentiality of police officer personnel records. The informant's **life is truly at risk** if their status as an informant is disclosed. If every officer and every prosecutor in an office will have access to the informant bank, the chance a person in the bank will be inadvertently revealed as an informant goes up exponentially. In 2010, for example, a Colorado sheriff's online database mistakenly revealed the identities of confidential drug informants and listed phone numbers, addresses and Social Security numbers of suspects, victims and others interviewed during criminal investigations. The breach potentially affected some 200,000 people. (**See** http://www.foxnews.com/us/2010/12/10/colorado-database-leak-puts-informants-jeopardy.html.)

In addition, it is questionable whether the United States Supreme Court will find that a prosecutor is actually in possession of the fact that a witness has acted as an informant in an unrelated case. Certainly, a good argument can be made that the fact a prosecution witness has received benefits in a previous unrelated case for providing information is not a fact that is reasonably accessible to the prosecution – reasonable accessibility being one criteria for determining whether the prosecution may properly be deemed to be in constructive possession of the information. (**See** this outline, section I-7-C at pp. 71-75.) Once a bank is set up giving prosecutors easy access to the information, this argument will be impossible to make.

Finally, trying to keep track of every benefit ever provided to persons who acted as informants involves a massive and time-consuming effort that may not be warranted just to avoid the very small risk that an important prosecution witness might testify without his or her informant status being disclosed.

So, what is the solution?

Perhaps a distinction can be drawn between persons who have received benefits for providing information to the police on one or two previous occasions and professional jailhouse snitches. A professional jailhouse snitch expects to testify in court about the information he or she has provided – he takes a knowing risk. It is a completely different story when the informant agrees to provide information in a case with the understanding his cooperation will never be revealed to the either the person he informs upon or anyone else - only to find that his cooperation must be disclosed if he later turns up as a robbery victim in an unrelated case.

Indeed, even the 2008 California Commission on the Fair Administration of Justice Report and Recommendations Regarding Informant Testimony, which recommended "[t]he maintenance of a central file preserving all records relating to contacts with in-custody informants, whether they are used as witnesses or not[,]" (**id**. at p. 4) drew a distinction between jailhouse informants and other informants. The Commission expressed "grave concerns that "informant testimony" not be defined so broadly that it encompasses citizen informants, or those responding to offers of rewards. The Commission stated its recommendations, including the recommendation a jailhouse informant bank be established, should not "reach the use of informants used to supply probable cause for arrests or searches, but who never testify at trial. Not every witness who testifies to hearing a statement made by the defendant should be included, simply because they may have some expectation of benefit from their testimony." (**Id**. at p. 7 [albeit recommending that "whenever feasible, an express agreement in writing should describe the range of recommended rewards or benefits that might be afforded in exchange for truthful testimony by an arrested or charged informant, whether the informant is in custody or not"].)

In Los Angeles County, there is an informant bank that keeps track of ***jailhouse*** informants who have offered to be, or who have been used as witnesses. All records of jailhouse informants are preserved, including notes, memoranda, computer printouts, records of promises made, payments made, or rewards given, as well as records of the last known location of the informant and records relating to cell assignments. (**See** Los Angeles County District Attorney's Office, Legal Policies Manual, Chapter 19, Jailhouse Informants, pp. 187-190 (April, 2005) [Available at www.ccfaj.org/rr-use-expert.html].)

The LADA bank does not appear to keep track of every person who has ever received a benefit from law enforcement – only jailhouse informants.

According to the 2008 California Commission on the Fair Administration of Justice Report and Recommendations Regarding Informant Testimony, at p. 4, the Santa Clara County and Orange County

District Attorneys are the only offices whose policy requires the maintenance of a central file of all informant information.

Bottom line: It seems reasonable (assuming jailhouse informants are going to be used as prosecution witnesses) for prosecutor's offices to set up a system to keep track of professional jailhouse informants – so that if such informants are going to testify in court, their prior history can be disclosed. However, it seems much less reasonable to go beyond that and collect information on *all* informants for future use.

2. When are a prosecutor's discovery obligations when it comes to "proffers" or immunized statements by cooperating co-defendants?

It is not unusual for one defendant in a multiple defendant case to decide to turn state's evidence, i.e., plead to a lesser charge in exchange for testifying against his co-defendant(s). To that end, the attorney for one defendant may contact the prosecutor with a "proffer" as to what his defendant would say if he were called to testify and/or offer to have the defendant give a statement. If the statement is given before a negotiated disposition is reached, the statement will often be immunized (i.e., the prosecutor will agree not to use the statement in any way). (**See e.g., *State* v. *McGee*** (Neb. 2011) 803 N.W.2d 497, 505 [non-disclosed proffer given as part of plea negotiations expressly provided that "[n]o statements made or other information provided by you during the 'off-the-record' proffer or discussion will be used against you in any prosecution."].) Naturally, the attorney and the defendant will want to keep this information confidential in the event no deal can be negotiated. And even if a deal is negotiated, the defendant may want to delay disclosure of his intentions as long as possible to shorten the window of time that he is physically at risk while he remains in custody. What are the prosecutor's discovery obligations in these circumstances?

Statements

If an actual statement is given by the turncoat defendant and it contains evidence that is exculpatory of one or more of the co-defendants, there would be constitutional duty to disclose it – albeit the fact it would be inadmissible hearsay might prevent it from being held to be material. (**See *People* v. *Ennis*** (NY. 2008) 900 N.E.2d 915, 922–923 [exculpatory proffer made by co-defendant should have been disclosed but was not ***Brady*** violation because there was no avenue to admit it in defendant's trial]; ***State* v. *McGee*** (Neb. 2011) 803 N.W.2d 497, 503-505 [not necessary to dismiss case for failure to provide proffer containing ***Brady*** information *because* first trial resulted in mistrial and proffer provided before retrial and proffer inadmissible as declaration against interest since part of agreement was that proffer could not be used against proffering co-defendant and thus was not against his penal interest]; ***United States* v. *Zuazo*** (8th Cir. 2001) 243 F.3d 428, 431 [no ***Brady*** violation for failure to disclose proffer statements *because* information known to the defendant]; ***United States* v. *Beckford*** (E.D. Va. 1997) 962 F.Supp. 780, 803 [federal discovery statute (the Jencks Act) does not require production of witness proffers unless it is a signed, written proffer statement, the government agent's notes contain a "substantially verbatim recital" of the witness' statement which the witness has read and

affirmed, ***or*** if the statement constitutes "favorable evidence to an accused" under ***Brady***].) However, even if the statement did not contain any evidence exculpating the other defendants, an argument can be made it would be potentially discoverable pursuant to a prosecutor's statutory discovery obligations. If the turncoat defendant is going to be testifying, it is a statement of a witness that would have to be disclosed pursuant to Penal Code section 1054.1(f), which requires disclosure of all statements of witnesses. Even if the turncoat defendant remained a defendant, there could be a duty to disclose the statement pursuant to Penal Code section 1054.1(b), which requires disclosure of the statements of *all* defendants.

On the other hand, the statement should qualify as privileged information under Evidence Code section 1040 which provides public entities (e.g., the district attorney's office) a privilege to refuse to disclose official information if, inter alia, "[d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." (Evid. Code, § 1040(b)(2).) Evidence Code section 1040 defines "official information" as "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." (Evid. Code, § 1040(a).) A statement given in confidence by a defendant in the hopes of securing a plea constitutes "official information." The statutory discovery obligations do not require disclosure of official information if the need for confidentiality of the information is ultimately found by a judge to outweigh the necessity for disclosure. (**See** Pen. Code, § 1054.6 [prosecuting attorney is not required to disclose materials or information which is privileged "pursuant to an express statutory provision"]; ***People* v. *Jackson*** (2003) 110 Cal.App.4th 280, 290 [section 1040's conditional privilege for official information is an "express statutory provision"].)

When the privilege is being asserted, courts have "delineated the procedures required for a proper determination of the applicability of the section 1040(b)(2) conditional privilege" and "[t]hese include an in camera review pursuant to Evidence Code section 915, subdivision (b), attended by the party claiming the privilege[.]" (***Michael P.* v. *Superior Court*** (2001) 92 Cal.App.4th 1036, 1048, emphasis added [listing cases]; **see also** Law Revision Commission Comments to Evidence Code section 915 [noting that "[i]n at least some cases, it will be necessary for the judge to examine the information claimed to be privileged [under section 1040] in order to balance [the necessity for preserving the confidentiality of the information against the necessity for disclosure in the interest of justice] . . . intelligently" and that "[e]ven in these cases, Section 915 undertakes to give adequate protection to the person claiming the privilege by providing that the information be disclosed in confidence to the judge and requiring that it be kept in confidence if it is found to be privileged," emphasis added]; **but see** ***Torres* v. *Superior Court*** (2000) 80 Cal.App.4th 867, 873 ["the district attorney is not entitled to an in camera hearing just for the asking . . . [b]ut . . . the court has the authority to hold an in camera hearing on a proper showing that the hearing is necessary to determine the claim of privilege"].)

In addition, as discussed in this outline, section VII-6, at pp. 240-250, when there is "good cause" for believing that the turncoat defendant (cum witness) will be placed at risk as a result of disclosure, Penal Code section 1054.7 will allow delaying or even foreclosing disclosure of the statement – albeit if the defendant is going to testify it is unlikely the disclosure of the statement would be completely foreclosed. Section 1054.7 permits this showing to be made in camera.

This does **not** mean the prosecutor may unilaterally decide not to disclose. Rather, a prosecutor should utilize the in camera procedure authorized under Evidence Code section 915 and/or Penal Code section 1054.7 as a means for obtaining a judicial determination that the statement need not be disclosed or its disclosure deferred.

If the turncoat defendant is going to testify, the likelihood of disclosure is much greater if the statement contains exculpatory information, and still greater if it contains favorable material evidence, because the due process rights of the defendant will trump the privilege. However, if the statements are only inculpatory and the risk of danger is real, it is likely the court will at least allow deferral of disclosure. Notwithstanding these mechanisms and potential protections from disclosure, the attorney for the turncoat defendant (and the defendant) should always be made aware of the potential prosecutorial discovery obligations. Some offices will inform the turncoat defendant that the information provided will be treated as confidential and protected by the official information privilege but that it still might need to be disclosed because of the prosecutor's constitutional or statutory discovery obligations or because it provides information about threats to person(s) law enforcement has a duty to warn (as defined by ***Tarasoff* v. *Regents of the University of California*** (1976) 17 Cal. 3d 425.

Proffers

If the proffer is just a statement by the turncoat defendant's attorney as to what he anticipates his client will say, an argument can be made that it is not a "statement" for purposes of the discovery statute, nor is it "evidence" for purposes of a prosecutor's constitutional obligations - the latter proposition being more dubious than the former.

In ***People* v. *Thompson*** (2016) 1 Cal.5th 1043, an attorney for one of two co-defendants met with the prosecutor and judge at an ex parte in camera hearing. The defense attorney told the court and prosecutor that he had letters written by the defendant to the co-defendant which implicated the defendant. The letters had been copied by the co-defendant's cellmate. The co-defendant's attorney asked to delay disclosure of the letters and the fact that the letters would be authenticated by the cellmate for trial strategy reasons and because of potential threats to the cellmate from the defendant. (**Id**. at pp. 1091-1093.) The prosecution agreed not to receive the actual letters (which apparently would have triggered a duty to disclose if they had been received) until later in the trial and the trial court approved of the delay. The California Supreme Court upheld this procedure, even though an argument could be made that once the prosecution learned of the *existence* of the letters from co-defendant's

attorney, the prosecution was in constructive possession of a "statement" of the defendant, regardless of whether the actual letters were provided to the prosecution. However, the ***Thompson*** court seemed to assume that the proffered information did not impose any obligation on the prosecution to disclose the information to the defendant, albeit without making any mention of section 1054.1(b). (**Id.** at pp. 1094-1097.) The information provided in camera appears to have been a form of proffer (albeit not one in exchange for a deal) and may provide some guidance on the question of whether the proffer should be viewed as a statement of the witness for discovery purposes.

> **Editor's note**: The ***Thompson*** case is discussed in greater depth in this outline, section V-10 at pp. 227-228; VII-6-B at pp. 240-242.)

If the proffer is treated as a statement of a witness (assuming the prosecutor plans to call the turncoat defendant as a witness) or as a statement of a defendant (assuming the turncoat defendant is not going to testify), then the same general guidelines regarding prosecutorial discovery disclosure of statements should apply. However, the interest in ensuring frank discussions and negotiations between defense counsel and the prosecution should be given consideration by the court conducting the in camera hearing on whether information in the proffer needs to be disclosed. (**Cf.**, ***United States* v. *Weaver*** (E.D.N.Y. 2014) 992 F.Supp.2d 152, 156-157 [declining to order disclosure of draft agreements or the negotiations with counsel for cooperating witnesses that led to these agreements where the final plea agreements and proffer agreements (which memorialized any benefits or favorable treatment) were provided to the defense and the government agreed to produce evidence from the draft agreements or negotiations if they proved to be inconsistent with the witness' trial testimony – because "requiring production of the substance of such communications with counsel, and/or draft agreements, could have a chilling effect on plea negotiations"]; ***United States* v. *Acosta*** (D. Nev. 2005) 357 F.Supp.2d 1228, 1244 [agreeing prosecutors did not have duty to produce materials related to initial discussions between the prosecutor and cooperators' counsel; the actual proffer of the cooperator, the statements of counsel, and the initial discussions between the prosecutor and case agent regarding opinions as to the completeness and truthfulness of the proffer "unless the information is material"].)

5. What is the prosecution's discovery obligation when it comes to post arrest "jail calls?"

Many, if not most, custodial institutions now have telephone-monitoring systems that record the telephone calls of inmates. The advent of this technology has been both a boon and a bane for prosecutors. It has been a boon because these conversations often can provide evidence of the defendant's guilt or can be used to impeach the testimony of defense witnesses. It is a bane because listening to the recordings can be extremely time-consuming. (**See *People* v. *Rangel*** 2002 WL 31009418 [unpublished decision where prosecutor represented there was 160-200 hours of surreptitiously recorded jail tapes].)

The existence of these recordings also raises a number of discovery issues, including: (i) are undelivered recordings in the possession of the prosecution team? (ii) do copies of the recordings have to be turned over to the defense once they come into the possession of the prosecution even if the recordings not relevant to the case? (iii) do the recordings have to be turned over to the defense immediately - even if they have not yet been listened to by the prosecution? (iv) do the recordings have to be turned over if they are only going to be used to impeach a defense witness? (v) will failure to turn over the recordings before trial prevent their use at trial? And (vi) are recording systems that give prosecutors complete and easy access to the recordings creating possession for discovery purposes?

Unfortunately, there is not a lot of published (or even unpublished) case law specific to the questions posed. However, there are certain cases which may provide some guidance.

A. Are Undelivered Recordings in the Possession of the Prosecution Team?

Until the recordings are delivered to the prosecution (or at least in the absence of a request for recordings to be made), it should be argued that the recordings are not in the possession of the prosecution team.

Under ***Brady***, the prosecution has a duty to disclose evidence possessed by the "prosecution team" which includes both "investigative and prosecutorial personnel." (***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1133; ***People* v. *Brown*** (1998) 17 Cal.4th 873, 879.) The prosecution team includes "others acting on the government's behalf." (***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1133; ***Kyles* v. *Whitley*** (1995) 514 U.S. 419, 437.)

However, "the prosecution cannot reasonably be held responsible for evidence in the possession of all government agencies, including those not involved in the investigation or prosecution of the case.... '[I]nformation possessed by an agency that has no connection to the investigation or prosecution of the criminal charge against the defendant is not possessed by the prosecution team, and the prosecutor does not have a duty to search for or to disclose such material.' [Citation.]" (***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1133; ***In re Steele*** (2004) 32 Cal.4th 682, 697.)

Under the discovery statutes, the only evidence that must be disclosed is evidence "in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agency." (Pen. Code, § 1054.1.) In ***People* v. *Zambrano*,** the court held "[t]here is no reason to assume the quoted statutory phrase assigns the prosecutor a broader duty to discover and disclose evidence in the hands of other agencies than do ***Brady*** and its progeny." (**Id**. at pp. 1133-1134; **accord *Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, 905.)

Just because an agency is charged with keeping custody of the defendant does not mean it is part of the prosecution team for purposes of imputing possession to the prosecution. (***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1133-1134.) Indeed, even if the agency housing the defendant is the agency doing the investigation, the agency will not be deemed part of the prosecution team for purposes of disclosing evidence

relating only to the agency's "housing" function. (**See *People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305 [even though the Department of Corrections was investigating agency in prison assault, the prosecutor's duty to disclose information did not extend to information the Department possessed relating to its non-investigatory functions].)

Thus, even if the housing agency (e.g., a county sheriff's department) was the investigating agency, evidence derived from its non-investigatory functions will not generally be deemed to be in possession of the prosecution team. Custodial institutions such as the county sheriff's department record **all** telephone conversations of inmates for the purpose of preserving the security and orderly management of the facility, and to protect the public. Since the tape recording of inmates is not normally done at the behest of the prosecution, or for an investigatory purpose, the recordings are properly deemed to be in the possession of a third party rather than the prosecution team. Moreover, even if the recordings were somehow deemed to be in the physical possession of the prosecution team, disclosure would still not necessarily be required. This is because there are voluminous numbers of recordings kept and nobody has any idea what is on them until somebody sits down to listen to them. Even records within the physical possession of the prosecution team may not be deemed to be in possession of the prosecution team for discovery purposes when knowledge of the contents of the records is not "reasonably accessible" to the prosecution. (**See** this outline III-7-C-i at pp. 73-75.)

When the recordings *are* physically turned over to an inspector or prosecutor with the district attorney's office; it is more difficult to argue the tapes are not in possession of the prosecution team for discovery purposes. (**See *People* v. *Jordan*** (2003) 108 Cal.App.4th 349, 358 ["prosecution must disclose evidence that is actually or constructively in its possession or accessible to it"].)

But what if the recordings of the phone conversations have not yet been turned over the prosecution although they are being held at the request of the prosecution?

Normally, jail recordings are preserved for a period of time unless there is a specific request by the prosecution to hold recordings of the calls made by the inmate. The prosecution can ask for these recordings to be preserved in order to determine whether they contain any useful information for purposes of the prosecution. The question then arises whether the recordings, which would otherwise be destroyed but are retained at the request of the prosecution, are transformed into evidence in the possession of the prosecution team.

A similar question can arise if the recordings are of conversations between the defendant and an actual visitor to the jail, conversations which are not usually recorded and often will only be recorded or preserved at the request of the prosecution. No published California decision has directly addressed the issue. In the unpublished decision of *People v. Hatch* 2004 WL 99355 the court held a prosecutor did not have a duty to turn over a jail call recording until the time when the recording came into his physical possession in part because there was no evidence that the prosecutor had requested the calls be recorded, and contrasted the situation with other published cases (i.e., ***People* v. *Kelley*** (2002) 103 Cal.App.4th 853, 856 and ***People***

v. *Loyd* (2002) 27 Cal.4th 997, 1000) where the prosecutor made a formal request before trial that the defendant's calls be recorded.

Expect the defense to argue that once the prosecution has requested recordings be made of the visitor-inmate conversations or that recordings of inmate phone calls be preserved for a period beyond the time period when they would normally be destroyed, such request converts the sheriff's department into a member of the prosecution team under the theory that making or maintaining the tapes is done on the prosecution's behalf. (**See *People* v. *Jordan*** (2003) 108 Cal.App.4th 349, 358 ["[t]he important determination is whether the person or agency has been 'acting on the government's behalf' . . . or 'assisting the government's case'"]; **see also *In re Brown*** (1998) 17 Cal.4th 873, 879 [prosecutor has constructive possession of exculpatory worksheet in sheriff's crime lab file].) Whether the simple request to preserve recordings that might or might not contain any usable evidence constructively transforms the recordings into evidence possessed by the prosecution team is somewhat dubious. However, if there is a specific request to record conversations that would not otherwise be recorded, it is difficult to argue that the evidence is not within the possession of the prosecution team.

B. Do Copies of the Recordings Have to be Turned Over to the Defense Once They Come into the Possession of the Prosecution - Even If the Recordings Are Not Relevant to the Case?

Assuming that the recordings are deemed to be in the possession of the prosecution team once they have been physically delivered to the prosecution, there remains the question of whether there is a constitutional or statutory obligation to turn them over to the defense.

If the tapes of defendant's conversation or a witness' conversation do not contain any exculpatory material, then there is no ***constitutional*** duty to disclose the tapes. (**See *In re Sassounian*** (1995) 9 Cal.4th 535, 543, fn. 5 [duty of disclose applies only to evidence that is "both favorable to the accused and 'material either to guilt or to punishment'"].) Disclosure would also **not** be required pursuant to Penal Code section 1054.1(e), which requires disclosure of "exculpatory evidence."

Conversely, if the recordings contain favorable material evidence (i.e., ***Brady*** material), there *would* be a duty to turn over the recording. (**See *People* v. *Jackson*** (2005) 129 Cal.App.4th 129, 170, fn. 135.) Moreover, if the evidence is favorable but not material, the recordings might have to be turned over as "exculpatory evidence" pursuant to Penal Code section 1054.1(e). (**See *Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, 901; ***People* v. *Bowles*** (2011) 198 Cal.App.4th 318, 326.)

The likelihood that the recordings will contain some exculpatory evidence is pretty high. While defendants often let their guard down and make statements incriminating themselves, it is equally, if not more common, for the defendants to proclaim their innocence. Whether a direct or indirect statement by the defendant consistent with the defendant's story will always constitute "favorable, material evidence" under ***Brady*** or exculpatory evidence under Penal Code section 1054.1(e), it certainly is the safer course to assume that such

evidence ***will*** be deemed to fall into the category of discoverable evidence. Moreover, if the call involves a prosecution witness and relates to the cases, the People may have to turn over the statement pursuant to Penal Code section 1054.1(f) which requires the disclosure of "relevant written or recorded statements of witnesses."

However, even if the statements of the recorded jail conversations between the defendant and a caller are not exculpatory or are completely irrelevant to the case at hand, there still may be an obligation to disclose the statements pursuant to Penal Code section 1054.1(b), which requires the prosecution disclose "statements of all defendants." The question of whether **all** statements of the defendant (relevant or not) that fall into the possession of the prosecution must be turned over has never been directly addressed. The holding in the case of ***People* v. *Jackson*** (2005) 129 Cal.App.4th 129, a case involving a similar issue, however, *suggests* such an obligation would exist.

In ***Jackson***, a defendant was charged with murder and attempted murder based, in part, on evidence from a wiretap. The prosecution disclosed to the defense fourteen of the defendant's conversations intercepted by the wiretap but did not disclose additional intercepted conversations. The defendant claimed that section 1054.1(b) required the prosecution turn over all the statements. The prosecution argued the defendant was only entitled to "relevant" statements. Noting that other subdivisions of section 1054.1 specifically incorporate the term "relevant" (e.g., section 1054.1, subdivisions (c) ["relevant real evidence"] and (f) ["relevant written or recorded statements of witnesses . . ."]), the appellate court held the absence of such a limitation in subdivision (b) meant no such limitation applied when it came to statements of defendants. (**Id**. at pp. 168-169.)

The ***Jackson*** court concluded that, notwithstanding the fact that the wiretap statute itself (Penal Code section 629.70(b)) only required disclosure of those statements of the defendant "from which evidence against the defendant was derived," "***all*** statements by the defendant captured on a wiretap must be disclosed to the defense whether they are inculpatory, exculpatory or neither." (**Id**. at p. 170, emphasis added by author; **but see *People* v. *Acevedo*** (2012) 209 Cal.App.4th 1040, 1052, 1057, fn. 12 [wiretap statute disclosure requirement of Penal Code § 629.70(b) "parallels the statutory mandate to disclose the statements of all defendants" of section 1054.1, but statement in ***Jackson*** that "the law requires disclosure of all statements made by a defendant, is dictum"].)

Editor's note: It is possible that a court directly confronting the issue of jail calls may draw a distinction between statements made during the time period when the crime is taking place (such as those made in ***Jackson***) and statements made after the crime (such as jail calls). It certainly seems like overkill to require ***any*** statement made by a defendant on any topic under the sun that is within the possession of the prosecution team be provided to the defense, but in light of the language in ***Jackson***, it might take some doing to convince a judge otherwise. Also, keep in mind, that the holding in ***Jackson*** would not require the disclosure of the statements of an inmate who is just a witness, not a defendant, in the case being prosecuted.

Editor's note: There is language in ***Jackson*** indicating that the purpose behind the California Discovery Statute of ascertaining the truth somehow requires that all statements of the defendant should be turned over since "some statements cannot easily be categorized as inculpatory or exculpatory but may provide defense counsel with information which might lead to the discovery of evidence important to the defense." (**Id**. at p. 171.) Moreover, the court suggests that all statements of the defendant should be turned over because "it cannot be left up to the government to decide for the defense what is relevant and what is not." (**Ibid**.) Both these statements are dicta and should be limited to the context in which they arose. The general rule is that inculpatory or neutral evidence does **not** have to be turned over to the defense (**see *People* v. *Burgener*** (2003) 29 Cal.4th 833, 875) and the prosecution **is** responsible for determining whether evidence is sufficiently relevant to be disclosed (**see** this outline, section III-12 at p. 148.)

C. Do the Recordings Have to be Turned Over to the Defense Immediately –Even if the Prosecution Has Not Yet Listened to Them?

One of the most frustrating situations for a prosecutor listening to jail calls arises when the prosecutor obtains the first of an ongoing set of recordings and realizes that a defendant does not care or has forgotten that his phone calls might be recorded. It is frustrating because the prosecutor knows that the discovery statute requires the immediate disclosure of evidence obtained within 30 days of trial; but also knows that once she turns over the first set of tape recordings to the defense, defense counsel will alert the defendant to the dangers of revealing too much information on the phone and the possibility of any future conversations containing incriminating statements will be severely diminished. Even more frustrating is when the first set of recorded jail calls reveals the defendant is soliciting or engaging in criminal activity. The prosecutor's frustration can probably only be relieved in the second situation.

As to the prosecution's statutory obligation to disclose the recordings, Penal Code section 1054.7 states disclosure must be made "at least 30 days prior to the trial or immediately if the tapes becomes known to, or comes into the possession of, the prosecution within 30 days of trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred" albeit "good cause" is "limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations" by law enforcement. (Pen. Code, § 1054.7.)

Upon the request of any party, the court may permit a showing of good cause for the denial or regulation of disclosures, or any portion of that showing, to be made in camera. (**See** Pen. Code, § 1054.7; **see also *Alvarado* v. *Superior Court*** (2000) 23 Cal.4th 1121, 1134-1135 [right to defer disclosure under section 1054.7 is constitutional].)

As to the prosecution's constitutional obligation to disclose the recordings, there *should* be no violation of the defendant's due process rights if the evidence is provided in time for its effective use at trial. (**See *In re United States*** (2nd Cir. 2001) 267 F.3d 132, 142 [the prosecutor must disclose *Brady* material "no later than the point at which a reasonable probability will exist that the outcome would have been different if an earlier disclosure had been made"]; ***People* v. *Morrison*** (2004) 34 Cal.4th 698, 714 [there is no ***Brady*** violation if evidence is presented at trial regardless of whether it was previously disclosed during discovery];

United States* v. *Gonzales (8th Cir. 1996) 90 F.3d 1363, 1368 ["[w]here the prosecution delays disclosure of evidence, but the evidence is nonetheless disclosed during trial, ***Brady*** is not violated"].) However, in light of ***People* v. *Gutierrez*** (2013) 214 Cal.App.4th 343, 356 and ***Bridgeforth* v. *Superior Court*** (2013) 214 Cal.App.4th 1074, if the recordings contain favorable material information, they may need to be disclosed before preliminary examination.

Subject to the above caveat, if the prosecutor comes into possession of the recordings more than 30 days before trial, disclosure can be deferred until 30 days before trial without the need to ask the court for a finding of good cause. If the recordings come into the possession of the prosecutor within 30 days of trial, and they include conversations of the defendant regarding the pending case, it is likely the recordings will have to be turned over immediately as they will definitely constitute statements of the defendant (and, depending on the circumstances may also qualify as exculpatory evidence or statements of a witness) unless turning over the recordings will impact the safety or a witness, result in the loss or destruction of evidence, or compromise other investigations. (Pen. Code, § 1054.7.)

Future incriminating statements or potential witnesses

An argument can probably be made that listening to the phone calls is part of a continuing investigation in the pending case and that revealing that fact will discourage the defendant from continuing to make incriminating statements or identifying potential witnesses during the phone calls, i.e., disclosure will result in the loss of evidence. There is no case addressing the validity of this argument and it is somewhat of a stretch. After all, most jails post signs informing the inmates their calls may be monitored and if this has not discouraged the defendant from engaging in candid conversation, it may be hard to convince a judge that revealing to the defendant the calls ***are*** being monitored and recorded will put a stop to any incriminating conversations. Moreover, it is fairly speculative that additional incriminating statements or potential witnesses will be turned up.

It is questionable whether an argument can be made that revealing the recordings will "compromise" the *pending* case because section 1054.7 seems to limit good cause to preventing the compromise of "other" investigations.

Threat or possible danger to the safety of a victim or witness

A stronger argument can be made for deferring disclosure of the recordings if the defendant is providing information about the whereabouts of the victim or witnesses during the conversations or is asking the people to whom he or she is speaking to make contact with the victim or witnesses. The theory would be that it is important for the prosecution to be able to alert the witness of possible danger from third parties. (**Cf.**, ***People* v. *Riggs*** (2008) 44 Cal.4th 248, 309-310, fn. 29 [evidence that one party is harassing and threatening witnesses probably constitutes good cause for delaying disclosure of other witnesses who have yet to be contacted by the party doing the harassing and threatening].) If there is any evidence in the calls that the defendant is more directly asking others to harm or dissuade the victims, deferral could be justified

not only on the ground of possible threat or danger to the witness but as potentially compromising other investigations. However, in the unpublished case ***People* v. *Humphrey*** 2004 WL 2896929 the court held that a simple desire on the part of a witness to avoid being contacted by the defense is not good cause to defer or restrict disclosure of a witness' address. (**Id**. at p. *7.)

Possible compromise of other investigations

A still stronger argument can be made for deferring disclosure of the recordings if the defendant is engaging in criminal activity which the prosecution is actually planning to investigate. It is not unusual for a telephone call to reveal the defendant is attempting to dissuade a potential witness from testifying, (Penal Code section 136.1), asking a potential witness to falsify his or her testimony (Penal Code section 127), or soliciting another to commit some other crime (Penal Code section 653f). Indeed, even if the call only reveals that a defendant is attempting to deceptively convince a potential alibi witness that the defendant was with the witness on a particular date, a defendant is subject to an investigation for violating Penal Code section 133, which makes it a misdemeanor to practice any fraud or deceit or to knowingly make a false statement or representation to any witness with the intent to affect the testimony of the witness.

If an investigation is opened up into the offense, it is very likely that deferring disclosure of the jail recordings will be approved. However, if no investigation is opened, asserting a need for delaying or restricting disclosure under the guise that an investigation might be forthcoming may be viewed as a disingenuous attempt to delay disclosure. Unfortunately, there is not a lot of case law on this question.

Is the fact that the prosecution has not yet listened to the calls grounds for delaying disclosure of the recordings?

To a certain extent, the question of whether the prosecution has to turn over recordings the prosecution has received, but not listened to, depends on how the appellate courts eventually interpret the scope of Penal Code section 1054.1(b). If the rule is that *any* recorded conversation of the defendant in jail constitutes a "statement of the defendant" for purposes of Penal Code section 1054.1(b), then it would seem to follow that once the prosecution comes into possession of a recording within 30 days of trial, section 1054.7 would require its immediate disclosure even if the prosecutor has not listened to it, i.e., the obligation to disclose applies regardless of what is on the call so what is the difference if the prosecution has not yet listened to the call. If the rule is that only recorded conversations of the defendant that relate to the case must be disclosed, then it may be okay to delay disclosure of the calls until it can be determined which of them (or which portions of the calls) are discoverable as either statements relating to the case or exculpatory information. A similar analysis would apply if the calls were from an inmate who is only a witness in the pending case and not a defendant. (**Cf**., ***People* v. *Walton*** (1996) 42 Cal.App.4th 1004, 1017 [even if prosecution knows the name of a witness, until the prosecutor actually locates the witness and learns what the witness will say, the prosecutor cannot be said to "intend to call" the witness].) In the case of ***People* v. *Corbett*** (unreported) 2011 WL 18733, the fact that the prosecutor did not disclose a jail recording of a defendant's conversation because she allegedly could not locate it among numerous jail recordings was the basis for a defense motion

for a new trial, albeit an unsuccessful one because the jail recording was not exculpatory. (**Id**. at pp. *26 - *30.)

D. Do the Recordings Have to be Turned Over if They Are Only Going to Be Used to Impeach a Witness?

Assuming that the recordings do not qualify as a statement of a defendant, whether the prosecution has to turn over a recording that can be used to impeach a defense witness depends on (i) whether the defense has stated they intend to call the witness and (ii) whether the prosecutor reasonably anticipates introducing the recording itself.

Penal Code section 1054.1 (a) requires that the prosecution provide to the defense "[t]he names and addresses of persons the prosecutor intends to call as witnesses at trial." The name and address of a person whom the prosecuting attorney "intends to call" as a witness at trial must be disclosed to the defense, regardless of whether the prosecuting attorney intends to call that witness as part of the case-in-chief or as a rebuttal witness. (***People* v. *Gonzalez*** (2006) 38 Cal.4th 932, 956; ***Izazaga* v. *Superior Court*** (1991) 54 Cal.3d 356, 375; ***People* v. *Hammond*** (1994) 22 Cal.App.4th 1611, 1621-1622.)

Generally, a prosecutor cannot be held to intend to call a *rebuttal* witness at trial unless first provided with the names of witnesses the defense intends to present at trial. Moreover, even if the prosecutor knows the name of a witness, until the prosecutor actually knows what the witness is going to say, the prosecutor cannot be said to "intend to call" the witness. (**See *People* v. *Walton*** (1996) 42 Cal.App.4th 1004, 1017.) However, once the defense discloses its own witnesses pursuant to section 1054.1, "the obligation of the prosecution to disclose its rebuttal witnesses pursuant to section 1054.1 is triggered[.]" (***People* v. *Gonzalez*** (2006) 38 Cal.4th 932, 956.) "A prosecutor cannot 'sandbag' the defense by compelling disclosure of witnesses the defense intends to call, and then refusing to disclose witnesses it intends to call to rebut the defense witnesses." (***People* v. *Gonzalez*** (2006) 38 Cal.4th 932, 956.)

In the *unpublished* decision of *People* v. *Le* 2006 WL 2949021, a case where 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, the court of appeal held the untimely disclosure had such an adverse impact on the defense, that reversal was required!

The due process clause also requires that, once the defense discloses its own witnesses, the prosecution must disclose witnesses it intends to call to rebut the testimony of the defense witnesses. (***People* v. *Tillis*** (1998) 18 Cal.4th 284, 287, 295 [albeit not "all the details that will be used to refute" the defense witness].)

If, based on the statements of a defense witness provided by the defense, the prosecutor reasonably anticipates that he or she will be impeaching the witness by introducing the recording itself, then disclosure of the statement might be required by Penal Code section 1054.1(c) which mandates disclosure of all relevant

real evidence seized or obtained as a part of the investigation of the offenses charged. If the prosecutor reasonably anticipates calling a witness to establish the recording is the voice of witness being impeached, Penal Code section 1054.1(a) requires the disclosure of the name and address of that witness.

If the prosecutor only intends to ask a witness about the recorded statements, but does not reasonably anticipate actually introducing the recordings or calling a witness to establish the foundation for the admission of the calls, then (assuming the recording contains no exculpatory information) there is no obligation to reveal it. (**See *People* v. *Tillis*** (1998) 18 Cal.4th 284, 290-291 [no violation of discovery statute where prosecution asked defense expert about prior incident involving expert's use of cocaine based on transcript of expert's testimony from prior trial where it was mere speculation the prosecution intended to call a witness to prove the prior incident, as opposed to merely asking about the prior incident or proving it without a witness]; **but see** this outline, III-13 at p. 183 [discussing downside to this nondisclosure].)

E. Will Failure to Turn Over the Recordings Before Trial Prevent Their Use at Trial?

The fact that jail recordings are not turned over until after the trial has started does not, per se, mean there has been a discovery violation. Courts recognize that the collection of evidence does not necessarily stop the moment trial begins and that the prosecution cannot provide discovery that does not exist or has not been created until after the trial has begun. (**See *People* v. *Verdugo*** (2010) 50 Cal.4th 263, 286-287; ***People* v. *DePriest*** (2007) 42 Cal.4th 1, 38-39; ***People* v. *Panah*** (2005) 35 Cal.4th 395, 459-460.) No published case has directly addressed the question of whether failure to provide jail calls of the defendant in a timely fashion will preclude use of the calls.

In the **unpublished** case of ***People* v. *Hatch*** 2004 WL 99355, the court seemed to take it for granted that, at least where the prosecutor did not request that the defendant's phone calls be recorded, there was no violation of the discovery rules just because the prosecutor *obtained* the tape after the trial started and did not attempt to use the tape until cross-examination of the defendant. The court did note, however, that the prosecutor notified the defense of the tape recordings the same day he received the recordings. (**Id**. at p. *7-*8.) On appeal, the defendant argued that there was a violation of the discovery rules because the prosecutor had deliberately remaining ignorant of discoverable evidence, relying on the case of ***In re Littlefield*** (1993) 5 Cal.4th 122 which had indicated that "courts in general have discouraged the practice of deliberately failing to learn or acquire information that, under applicable statutes or case law, must be disclosed pretrial, concluding that such gamesmanship is inconsistent with the quest for truth, which is the objective of modern discovery." (***Hatch*** at p. *8, citing to ***Littlefield*** at p. 133.) The appellate court rejected this argument since there was no showing the prosecutor had deliberately remained ignorant of the telephone recording. The court refused to infer deliberateness from the fact the prosecutor secured the tape recording on the day he disclosed the recording to the defense. (**Id**. at p. *8.) The ***Hatch*** court also rejected the argument that the allegedly untimely disclosure resulted in a denial of due process since the defense failed to show the untimely disclosure of material evidence undermined the reliability of the proceedings. (**Id**. at p. *9 [and noting no

showing *could* be made as the trial court had precluded the prosecutor from using the telephone calls for any purpose until the defense attorneys had several days to review that evidence and to make their objections].)

F. Some Practical Considerations Re: Jail Calls

In light of the recent case law and ***lack of*** case law, when it comes to voluminous jailhouse recordings, a prosecutor may have to make some difficult decisions as to whether it is worthwhile requesting defendant's calls be recorded, ordering the recordings, and delaying disclosure of the recordings. In making these decisions, the prosecutor should take into account the following:

Be careful what you ask for:

Requesting that the jail preserve recordings of the defendant's phone calls will likely constructively transfer those calls from the possession of the third party (i.e., the jail) to possession of the prosecution team. The same goes for when a prosecutor asks that the jail make recordings of defendant's face-to-face conversations with visitors. If a court finds those recordings are in the possession of the prosecutor, the obligation to turn them over ***may*** kick in regardless of whether such recordings are actually provided to the prosecutor, and if there is ***Brady*** material in the recordings, failure to disclose may cause a reversal. This possibility suggests requests should not necessarily be made in every case.

However, whether requesting that the recordings be made will be seen by a court as rendering them in the possession of the prosecutor is far from certain. Moreover, for several reasons, it is unlikely (but not certain) that failure to inform the defense of the existence of the recordings (when they are requested but never obtained) will rise to the level of a ***Brady*** violation. First, a ***Brady*** violation does not occur if the defense is aware of the allegedly suppressed material and could obtain it through due diligence. (**See *People* v. *Salazar*** (2005) 35 Cal.4th 1031, 1048-1049; ***People* v. *Morrison*** (2004) 34 Cal.4th 698, 715.) Certainly, the defendant is aware of the content of his own conversation and, at least, knows the conversation may be recorded and most defense counsel should be aware that all calls are recorded and available for a period of time. (**See *People* v. *Garey*** [unpublished] 2005 WL 2211948 [finding no prejudice for failure to disclose tape recording of defendants' conversation with witness until cross-examination of witness because, inter alia, defendant admitted he knew his calls were being monitored while in jail]; **but see *United States* v. *Howell*** (9th Cir.2000) 231 F.3d 615, 625 [availability of particular statements through the defendant himself does not negate the government's duty to disclose].) Second, it is unlikely that the conversations will contain favorable, material evidence that could change the result of trial. A defendant's own self-serving statements regarding his innocence is rarely the stuff which, if introduced, would change the result of the trial. (**Cf.**, ***People* v. *Kaurish*** (1990) 52 Cal.3d 648, 704-705 [defendant's self-serving confession to police is inadmissible hearsay].)

In ideal circumstances, the recordings should be listened to before turning them over to the defense:

If the recordings are ordered and delivered, it is obviously a bad idea to turn copies of the recordings over to the defense without having listened to them first. This is so for many reasons, including that there may be

witnesses revealed who the prosecutor will want to try and contact before the defense does and there may be information in the calls allowing for delayed disclosure. Moreover, a short delay of a day or so in disclosing the recordings may still qualify as "immediate" disclosure. (**See** *People* v. *Flores* [unreported] 2002 WL 104251 [court characterized prosecutor's disclosure of defendant's recorded jail conversation after trial as being disclosed "as soon as he learned of it" even though actual disclosure was not made until a day and a half after the prosecutor received it].)

Make a deal with the defense:

Given the time constraints facing a prosecutor with an impending trial, it may be impossible for the prosecutor and/or the prosecutor's inspector to listen to the recordings expeditiously. The defense attorney is facing similar time constraints and probably not eager to have to listen to (and/or pay for copies of) the recordings. Thus, it may be worthwhile to contact defense counsel, inform defense counsel of the existence of the recordings, and let defense counsel know you will provide copies of any relevant recordings after you have listened to them.

Potential risk of sanction, albeit probably not exclusion, for failure to disclose recordings upon receipt:

If recordings of defendant's statements come into possession of the prosecution team (and assuming a court will require immediate disclosure of such tapes under Penal Code section 1054.1(b)), failure to immediately disclose them creates a risk of being sanctioned for failure to comply with section 1054.7 and/or Business and Professions Code section 6068. (See e.g., In ***Matter of Nassar*** (Cal. Bar Ct., Sept. 18, 2018, No. 14-O-00027) 2018 WL 4490909.) Albeit that sanction will not likely include exclusion of the recordings unless there is ***Brady*** material in the recordings and the defense is not able make use of the recordings at trial.)

Expect a delay in trial if the recordings are not disclosed immediately

A trial court may choose not to permit use of the calls for impeachment until after the defense has had a chance to listen to them. (**See e.g.**, *People* v. *Hatch* [unpublished] 2004 WL 99355, *6-*7.)

Do not object to brief continuance if tapes are belatedly disclosed

If tapes are disclosed after the trial begins, it behooves the prosecution to agree to give the defense a continuance to review those recordings (at least when they involve conversations of the defendant).

G. Are Prosecutors in Constructive Possession of Calls that Are Kept on Systems to Which Prosecutor Has Complete and Immediate Access

There are no cases that discuss whether a prosecutor or prosecutor's office will be deemed to be in possession of recorded jail calls if the sheriff's department gives the prosecutor full access to the calls. The calls themselves will very likely qualify under one or more categories of evidence that the prosecution is required to provide. So, there is a risk that if providing unfettered access to the calls creates constructive possession, a prosecutor may be found in violation of his or her discovery

obligations. As explained in this outline, section III-7-C&D at pp. 71-75, the fact that evidence is reasonably accessible to the prosecution can result in possession being imputed to the prosecution.

There is no question that if a prosecutor listens to the calls, possession will be imputed. However, if a prosecutor does not listen to any calls, the risk is reduced because for possession to be imputed in that circumstance, a court would have to find that every prosecutor is in possession of every jail call ever made by an inmate in the local jail. That's a leap. But it is not so much greater of a leap than the currently existing law effectively placing the criminal history of every inmate in California in possession of the prosecution. (**See** this outline, section III-7-F-iii at p. 81.)

4. What is a prosecutor's obligation to disclose the death or unavailability of a witness before a guilty plea?

Note: A discussion of what information must be provided before a guilty plea *in general* is included in this outline, section I-13-B at pp. 150-152 [constitutional] and VII-2 at p. 232 [statutory].

A. Is There a Duty To Disclose the Death of a Witness Before Plea?

There is no California case addressing the question of the prosecutor's duty to disclose the death of a witness before accepting a guilty plea. And there are very few cases dealing with the issue in other states.

In the unreported case of ***Com.* v. *Friedenberger*** (Pa. Super. Ct) 2014 WL 10920398, the prosecutor did not disclose the death of three critical witnesses that occurred between the defendant's original trial and his subsequent plea of guilty. (**Id**. at p. *2.) The defendant sought to withdraw his plea when he learned of the witnesses' deaths, claiming the plea could not "be considered knowing, intelligent and voluntary because he was not informed of the fact that the Commonwealth could not even prosecute him. . .". (**Id**. at p. *2.) The Commonwealth responded that while three witnesses had died, prosecution was not impossible, just more difficult. (**Ibid**.) After observing that "no case or rule exists in Pennsylvania mandating a prosecutor to disclose to the defense that witnesses are no longer available" and that the defendant has supplied any case law from other jurisdictions, the majority of the court declined to find, "[b]ased on the sparse and undeveloped argument advanced herein" that the defendant entered an unknowing, unintelligent, and involuntary plea. (**Id**. at p. *4.)

The majority received "excoriation" from the dissent for not adequately discussing or examining ***Brady***. But the majority pointed out it did not do so since nowhere in the defendant's brief did he cite ***Brady*** or suggest "the death of a witness constitutes exculpatory evidence or that ***Brady***-type considerations should control." (**Ibid**.)

The majority also pointed out the while defendant raised a claimed violation of the ethical rule that requires a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense" (Pa.R.P.C. 3.8(d), it

was not raised on appeal. (**Id**. at p. *4, *17.) Moreover, it stated "[t]he fact that witnesses have died is not evidence that [the defendant] did or did not commit the crime in question. (**Id**. at p. *6.) The majority rejected the claim that the prosecutor willfully misrepresented any facts by certifying that it was ready to try the case. (**Id**. at p. *4.)

The majority did, however, note that "[c]ritically, unlike [in ***People* v. *Jones*** (N.Y. 1978) 375 N.E.2d 41], this matter involved numerous additional witnesses." (**Id**. at p. *6.) The dissenting opinion would have found that the death of the witness was "favorable" information that the prosecution was required to disclose in much the same way that the prosecution would be required to disclose a subsequent test showing a substance thought to be a narcotic was not. (**Id**. at p. *12, fn. 6.) The dissent also would have found the plea was not valid because it was based on a "material omission" which was tantamount to a misrepresentation and because there was a violation of the ethical rule. (**Id**. at p. *15.)

In the case of ***People* v. *Jones*** (N.Y. 1978) 375 N.E.2d 41, a prosecutor accepted a guilty plea without disclosing to the defendant that the primary eyewitness against him had died several days earlier. The defendant sought to withdraw his plea on this basis, claiming the witness' death should have been revealed because it was exculpatory evidence under ***Brady***. The court of appeal disagreed: "[t]he circumstance that the testimony of the complaining witness was no longer available to the prosecution was not evidence at all." (**Id**. at p. 43; **accord *People* v. *Martin*** (N.Y. App. Div. 1998) 240 A.D.2d 5, 9.) Moreover, the court held the prosecution did not have an ***ethical*** duty "to disclose information in its possession which, as here, is highly material to the practical, tactical considerations which attend a determination to plead guilty, but not to the legal issue of guilt itself." (**Id**. at p. 43 [and rejecting the idea that the prosecution committed any misrepresentation by announcing ready for trial]; ***People* v. *Roldan*** (N.Y. 1984) 476 N.Y.S.2d 447, 449.)

In the case of ***Matter of Wayne M.*** (1983) 467 N.Y.S.2d 798, a case where the prosecution was unable to go forward on the trial because the main witness (a tourist) had permanently left the state for Sweden, the court held the failure to disclose the unavailability of the witness before the plea was a flagrant violation of the state Code of Professional Responsibility rule DR7-103 (B) (which states "A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment"). (**Id**. at p. 347.) If failure to disclose the permanent unavailability of a witness is an ethical violation, it seems to necessarily follow that failure to disclose the death of a material witness would also be an ethical violation. However, even the ***Wayne M.*** court seemed to accept that failure to disclose the unavailability of the witness was not a violation of the ***Brady*** duty to disclose. (**Id.** at p. 800, fn. 1.)

Up until recently California did not have a comparable rule of professional responsibility to the New York rule in the ***Matter of Wayne M.*** (1983) 467 N.Y.S.2d 798. However, California now does: rule

3.8(d), which requires prosecutors to "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, mitigate the offense, or mitigate the sentence . . ." (**See** this outline, section XIV-2 at pp. 297.)

California Rule of Professional Conduct 3.8(a) states a prosecutor shall not "institute ***or continue to*** prosecute a charge that the prosecutor knows is not supported by probable cause . . ." (Emphasis added.) However, whether the demise of our witness means the charges are no longer supported by probable cause is an open question.

At the very least, it is an ethical violation for prosecutors to make an affirmative misrepresentation to court or counsel. (**See *People* v. *Rice*** (N.Y. 1987) 505 N.E.2d 618, 619 [holding it ethically impermissible for prosecutor to induce the court and defense counsel to believe a key witness was still alive, when, in fact, the prosecutor knew that the witness was dead].) Thus, if a defense attorney asks whether a witness is available, a prosecutor cannot represent that the witness is available when he or she knows the witness is deceased or cannot possibly testify. Moreover, from a practical standpoint, once the defense bar learns a prosecutor has neglected to mention a crucial witness is deceased before a plea, a prosecutor will always be asked about it in the future. At a minimum, failure to disclose the death of a critical witness just looks bad and can result in the loss of a prosecutor's reputation as trustworthy.

B. Is There a Duty to Disclose a Witness is Unavailable Before a Guilty Plea?

In ***People* v. *Roldan*** (N.Y. 1984) 476 N.Y.S.2d 447, the court stated: "If it is the law of the state, as set forth in *People v. Jones, supra*, that a district attorney is not obliged to reveal that a principal witness has died before a plea of guilty is taken, it must follow that even if the assistant district attorney knew that the complainant-witness would not cooperate in the prosecution of the case, he had no duty to reveal that information to the defendant before his plea of guilty." (**Id**. at p. 449.) However, if the prosecution knows the witness will absolutely be unavailable, there may be an ethical duty to disclose this fact. (**See *Matter of Wayne M.*** (1983) 467 N.Y.S.2d 798 [finding violation of the New York State code of professional responsibility to fail to reveal, before the entry of a guilty plea, fact prosecution is unable to go forward on the trial because the main witness has permanently left the United States]; California State Bar Rule of Professional Conduct 3.8 [a rule similar to that considered in ***Wayne M.***].)

It is a different story when the prosecution thinks there might be difficulties in bringing a witness to court, but there is a reasonable possibility that such witness will be available (i.e., the unavailability of the witness is not certain). There is no published case holding there is either a ***Brady*** or ethical duty to disclose the fact a witness ***might*** not be available.

In the **unpublished** case of ***People* v. *West*** 2003 WL 22753633, a witness who had been captured attempting to cash a stolen and forged check at a check cashing store told police that the defendant had

stolen and forged the check and brought her to the store to cash it. The day before the defendant entered his guilty plea, the witness (who was charged with burglary and forgery) failed to appear in court and a bench warrant issued for her arrest. The witness was a fugitive when defendant entered his plea. (**Id**. at p. *1.) When the defendant learned of this face, he sought to withdraw his plea, arguing the prosecution should have disclosed during the plea negotiations that its key witness was a fugitive. The court of appeal denied the claim, stating:

> "The fact that a prosecution witness fails to show up for a required court appearance does not necessarily mean the witness will be unavailable at the time of a defendant's trial. The witness could be found by the authorities or voluntarily reappear at any point in time, in which case knowledge of the failure to appear is no longer useful to the defendant. The prosecution has no duty to disclose its potential case to the defendant. (**See *People* v. *Burgener*** (2003) 29 Cal.4th 833, 875.) Similarly, the prosecution's duty to disclose exculpatory evidence does not extend to disclosure of difficulties that may arise in the securing of witnesses to present its case." (*West*, at p. *3.)

General Discovery Checklist

1. All police reports filed by the investigating agency relating to investigation of the crime with which defendant is charged.

2. All reports relating to pending case filed by agencies employed to assist the investigating agency or prosecution team in performing their duties.

3. Statements of witnesses (oral, recorded, or written) along with the addresses and telephone numbers of the witnesses.

4. Statements of defendants (oral, recorded, or written).

5. Reports relating to the collection and/or testing of any evidence obtained during the course of the investigation (e.g., fingerprints, analysis of alcohol or drugs, DNA tests, tool markings, ballistics, etc).

6. Reports relating to mental examinations intended to be introduced at trial.

7. Miscellaneous reports which might hold exonerating or inculpatory information, including tow sheets, booking sheets, prisoner property receipts.

8. Recordings from officers' body cameras/recording devices/vehicle recordings devices.

9. Real evidence (i.e., photographs, surveillance videotapes, etc.,) that will be introduced at trial.

10. Impeachment material on witnesses: felony convictions of material witnesses, moral turpitude crimes/conduct of any witness, pending cases, probationary or parole status, prior false reports, inconsistent or inaccurate statements, evidence contradicting witness' statements, evidence of bias toward defendant, misconduct bearing on issues in case, promises made, informant status, benefits conferred (including help with U or T-visas; and reports relating to impeachment of witnesses – if obtained. Check local raps, CII, FBI rap sheets, get police reports if possible.

11. Defendant's prior felony convictions, misdemeanor convictions or arrests to be used for impeachment or introduced in the case for another reason. Check local raps, CII, DMV, FBI rap sheets, get police reports if possible.

12. Witnesses identified as being on the *Brady* list.

13. Any other exculpatory evidence.

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