

Discovery 101

San Mateo County DA's Office

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Sharron Lee

Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.

- USSC (Brady v. Maryland)

The prosecutor's interest "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 innocent suffer."

-USSC (Berger v. US)

With great power comes great
responsibility.

- Winston Churchill
- Franklin D. Roosevelt
- Spider-Man

Discovery Obligations

- Statutory obligation
 - PC 1054 et seq
- Constitutional obligation
 - Due Process = fairness
 - Brady rule
- Ethical obligation
- Completing interests
 - Governmental interest
 - Third party confidentiality or privacy rights

Statutory Discovery (PC 1054 et seq)

- Prop 115 passed by voters in 1990.
- To promote the ascertainment of truth in trials by requiring timely pretrial discovery. [PC 1054(a)]
- 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. [PC 1054(e)]
- This chapter shall be the only means by which a defendant may compel the disclosure or production of information from prosecuting attorneys ... [or the prosecution team]. [PC 1054.5(a)]

Statutory Discovery

PC 1054.1 Information to be disclosed by prosecution

- 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 part of the investigation of the charged offenses.
 - (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.

Statutory Discovery

PC 1054.1 Information to be disclosed by prosecution

- “... in the possession of the prosecuting attorney ...”
 - Encompasses information “reasonably accessible” to prosecution (i.e. RAP sheets)
- “... or if the prosecuting attorney knows it to be in the possession of the investigating agencies”
 - Photos (shoe prints at the scene) in possession of criminalist but unknown to prosecutor until trial were in the possession of prosecutor for *Brady* purposes. But no statutory violation or misconduct because prosecutor did not have possession or know they existed. *People v. Whalen* (2013) 56 Cal 4th 1.

Statutory Discovery

PC 1054.1 Information to be disclosed by prosecution

- (d) Felony conviction of any material witness
 - Not limited to moral turpitude
- (e) Any exculpatory evidence
 - Term “exculpatory evidence” has not been clearly defined
 - Does it include impeachment evidence?
- (f) Relevant statements of witnesses prosecutor intends to call
 - Versus (b) statements of Δ s
 - i.e. scheduling, what to expect, process, etc.

Statutory Discovery

PC 1054.6 work product or privileged information

- 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.

Examples of privileged information:

- Official Information [EC 1040]
- CI [EC 1041]

Statutory Discovery

PC 1054.3(a) disclosure by defense

- (a) The defendant and his 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 report of the statements of those persons, including any report or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons 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.

Reciprocal discovery is a creature of statute. Defense has no like constitutional duty.

Statutory Discovery

Defense discovery of prosecution witness statements

- Δ takes a statement from a Π witness. Must Δ turn over the statement to Π ?

→ No obligation to disclose statements Δ may use to refute the Π case during X

→ Tip: Ask wit to tell you if they give a stmt and let them know they can refresh their recollection about a prior statement

- EC 771: If a wit uses a writing to refresh his memory about a matter to which he testifies, such writing must be produced, otherwise testimony is stricken unless (1) not in possession/control and (2) not reasonably procurable

Statutory Discovery

II rebuttal evidence

- When do you have to disclose your rebuttal witness statements to defense?

→ Once defense discloses wits per 1054.3, prosecutor must disclose rebuttal witnesses it “intends to call” per 1054.1.

- Impeachment evidence of a Δ witness:
 - Prosecutor must have a good faith belief that the Qs would be answered in affirmative or evidence (witness) can be produced to provide a factual basis if denied.
 - Where prosecution does not reasonably anticipate using a rebuttal witness or real evidence to impeach, no statutory discovery obligation to disclose.
 - But did it appear wit would deny? Did prosecutor reasonably anticipate calling a witness to impeach?

Statutory Discovery

PC 1054.7 time for disclosure

- Shall be made at least 30 days prior to the trial, unless good cause is shown.
- Immediately if it becomes known or comes into possession w/in 30 days, unless good cause shown.
- “Good cause” = threats or possible danger to safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement. Request for “good cause” determination can be made in camera.

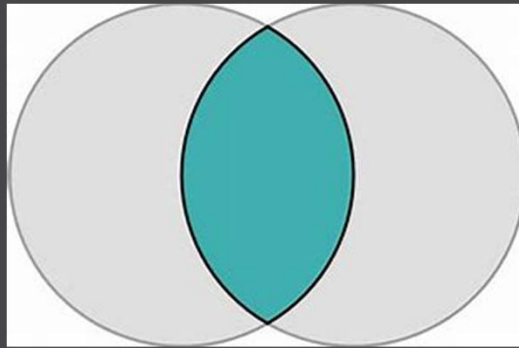
Statutory Discovery

PC 1054.5(c) remedies

- The court can prohibit testimony only if all other sanctions have been exhausted.
 - Immediate disclosure
 - Contempt proceedings
 - Delaying testimony or presentation of evidence
 - Continuance of the matter
 - Advise jury of untimely disclosure
- The court shall not dismiss a charge unless required to do so by the Constitution of the United States.

Constitutional Obligation

The Brady Rule



- Federal due process prohibits the prosecution from **suppressing evidence materially favorable** to the accused. The duty to disclose exists regardless of good or bad faith, and regardless of whether the defense has requested the materials. This obligation is not limited to evidence the prosecutor's office itself actually knows of or possesses, but includes evidence known to others acting on the government's behalf in the case, including the police.
- For Brady purposes, **evidence** is **favorable** if it helps the defense or hurts the prosecution, as by impeaching a prosecution witness.
- **Evidence** is **material** if there is a reasonable probability its disclosure would have altered the trial results. Materiality includes consideration of the effect of the nondisclosure on defense investigations and trial strategies.

Brady v. Maryland (1963) 373 US 83

- Facts:
 - Δ (Brady) and co- Δ (Boblit) tried separately for robbery murder. Brady went first.
 - Brady requested Boblit's statements before trial. Prosecutor turned over some but not all of Boblit's statements to Brady.
 - At trial, Brady testified he participated but Boblit actually did the killing. [Trying to avoid capital punishment.]
 - Turns out Boblit admitted to the killing. Brady wanted strangle V whereas Boblit wanted to shoot V. Brady learned about statements after trial and appeal.
 - Should Brady get a new trial? [Guilt v. punishment]

Brady v. Maryland (1963) 373 US 83

- Holding:
 - Affirmed – new trial on punishment.
 - It was a violation of 14A to w/hold Boblit's confession from Δ.
 - *We now hold that the suppression by the prosecution of evidence favorable to an accused upon request* violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.*
- * Duty to disclose favorable material evidence is not dependent on a request by the defense. US v. Agurs (1976) 427 US 97

Brady v. Maryland (1963) 373 US 83, 87

Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.

Brady Rule:

- 1. When evidence is suppressed by State
- 2. that is favorable to the accused
- 3. and the accused suffers prejudice (material)

there is a violation of due process

Brady Rule:

We have a duty to turn over information that is in the actual/constructive possession of the prosecution team:

1. Evidence
2. Favorable to the defense
3. Material

Brady Rule:

Is it **evidence**?

- Work product
 - Opinions and mental impressions
 - CCP 2018.030
- Officer's personal opinion about the strength of a case
 - BUT what was opinion based on?
- Rumors or speculation
 - Word on the street
 - Unsubstantiated allegations

Brady Rule:

Is it **favorable** to defense?

- Exculpatory
- Impeaching
- Helps the defense / hurts the prosecution

Brady Rule:

Common examples of favorable evidence:

- Moral turpitude
 - EC 788
 - People v. Castro (1985) 38 Cal 3d 301
 - People v. Wheeler (1992) 4 Cal4th 284
- Promises/inducements (express, tacit, or implied) (attempts)
- Grant of immunity

Brady Rule:

Common examples of favorable evidence:

- V filed a civil suit against the Δ – provides a motive to testify in a manner that is helpful to the civil suit
- Pending criminal charges – may show the witness, by testifying, is seeking favor or leniency
 - May include close family (wife or son recently arrested)
- Probation/parole status – provides a motive to lie so as to avoid revocation regardless of the nature of the underlying conduct

Brady Rule:

Common examples of **favorable** evidence:

- Mental Health
 - Recv'g trmt for mental health problem alone does not call into question credibility
 - Can be relevant if such illness affects the ability to perceive, recall, or describe the events (i.e. delusions, hallucination, cognitive difficulties)
- ETOH/drug use
 - Addiction or expert testimony re effects, is not considered admissible to impeach credibility unless followed by testimony tending to show that wit was under influence while testifying, or when the events occurred, or that his mental faculties are actually impaired by the habit

Brady Rule:

Common examples of **favorable** evidence:

- Illegal Immigrant status – a person unlawfully in the country may be vulnerable to pressure, real or imagined, from the govt or unlawful presence here constitutes fraud
 - EC 351.4:
 - (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.
 - (b) This section does not ... (2) limit discovery in a criminal action.
 - U-Visa, S-Visa, T-Visa

Brady Rule:

Is it **material** evidence?

- 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.*”
 - US v. Bagley (1985) 473 US 667, 682
- Did/would suppression undermine confidence in the outcome?

Brady Rule:

Is it **material** evidence?

Downs v. Hoyt (2000) 232 F3d 1031

- Facts:
 - Δ (mom) convicted of shooting her 3 kids in the trunk of her car (killing 7 yr old Cheryl and seriously wounding 8 yr old Christie and 3 yr old Danny)
 - Christie testified: Δ opened trunk of her car and shot each of the 3 kids
 - Bullets from Δ's home matched casings found at the scene
 - Gun never recovered but last seen in Δ's possession the year before
 - SODDI defense
- Was it a *Brady* violation to withhold police file containing 100 leads?
 - i.e. names/pictures of suspects and notes from callers

Brady Rule:

- Holding:
 - *Brady does not require a prosecutor to turn over files reflecting leads and ongoing investigations where no exonerating or impeaching evidence has turned up.*
 - The most that can be said is that the materials might have provided investigatory leads.

Beware: Is there any evidence linking another person to the actual perpetration of the crime? Or would disclosure lead to discovery of admissible evidence?

Brady Rule:

We now hold that the suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Brady Rule:

Suppressed by the prosecution

- Failure to disclose evidence a reasonable prosecutor would perceive at the time as being material and favorable to the defense

Brady Rule:

Suppressed by the prosecution

- 1. Actual/constructive possession* by “prosecution team” or prosecutor aware the information exists
- 2. Prosecution failed to disclose information
- 3. Information not known to defense and available to them through exercise of reasonable diligence

* Readily accessible (RAPs)

No bad faith required. Either willfully or inadvertently.

Brady Rule:

Suppressed by the prosecution

- “Prosecution team”
 - Investigating agency
 - Persons who acted on the govt’s behalf (i.e. forensic examiner)
 - BUT, no clear test
- Members of the prosecution team generally perform investigative duties and makes strategic decisions about the prosecution of the case.
 - Actively investigate the case?
 - Acts under the direction of the prosecutor?
 - Aids the prosecution in crafting trial strategy?

Brady Rule:

Suppressed by the prosecution

- The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the govt's behalf in the case.
- Information possessed by an agency that has no connection to the investigation or prosecution of the criminal charge against the Δ is not possessed by the prosecution team, and the prosecutor does not have a duty to search for or to disclose such material.

Brady Rule:

IAR Systems Software Inc v. Superior Court (2017) 12 CalApp5th 503

- Facts:
 - Δ (CEO) embezzled from IAR. IAR hired “Valla & Associates” and filed a civil suit against Δ. DA charged Δ with embezzlement days before the civil suit started.
 - FCPD did independent investigation.
 - DA told Valle the case could not be proven w/o a financial auditor and neither DA nor FCPD could hire one. IAR hired a financial auditor who testified at the PH.
 - Valla asked FCPD for the criminal charges and then provided a copy of Δ’s disposition.
 - Valla provided DA with cases/statutes addressing a defense theory.
 - Δ subpoenaed Valla for emails b/t DA and Valla and moved Valla be ordered to provide *Brady* material. Court ordered Valla disclose *Brady* material.
- Q: Is Valla part of the prosecution team?

Brady Rule:

IAR Systems Software Inc v. Superior Court (2017) 12 CalApp5th 503

- Holding:
 - 1. J. Scott erred in requiring Valla comply with *Brady*, which is a nondelegable prosecution obligation.
 - 2. Valla was a cooperating witness only.
 - Court declined to find that Vs cannot be part of the prosecution team as a matter of law.
- Analysis:
 - Valla shared a handful of legal citations and some analysis based on research the firm already did for the civil action (5-10 min)
 - Expert worked independently for IAR, sent his report to Valla, and designated as an expert in the civil trial. Did not consider his work to be at the direction of the DA.
 - Valla asked for PCs but no evidence Valla asked Δ questions at deposition at direction of FCPD.

Brady Rule:

- Timing?

→ Due Process

Ethical Obligations

B&P Code 6068

- It is the duty of an attorney to support the Constitution and law of the United States and of this state.

B&P Code 6106

- A violation of discovery statutes can be an act of moral turpitude.
- The commission of any act of moral turpitude ... constitutes a cause for disbarment or suspension.

Ethical Obligations

Cal Rule of Professional Conduct rule 3.4(b)

- A lawyer shall not counsel or assist another person to ... suppress evidence that the lawyer ... has a legal obligation to reveal or to produce.

Cal Rule of Professional Conduct rule 3.8

- The prosecutor in a criminal case shall:
 - (a) not institute or continue to prosecute a charge that the prosecutor knows is not supported by probable cause;
 - (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonable 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;

PC 1424.5

- 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 of nolo contendere plea, or, if identified before conclusion of trial, seriously limited the ability of a defendant to present a defense.

PC 141(c)

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

Miscellaneous

- CP
 - PC 1054.10 protective order
- Pitchess Motions
 - Peace officer personnel records (3P records)
 - PC 832.7 confidentiality
 - EC 1043 & 1046
 - CPRA (Govt Code 6250 et seq)
- Juvenile Files
 - WI 827 (3P records)
 - Cal Rule of Court rule 5.552

Miscellaneous

- Probation revocation hearings
 - PC 1054 does not apply [Jones v. Superior Court (2004) 115 CalApp4th 48]
 - Due Process requires disclosure of evidence against Δ
- Evidence collection/preservation
 - Due process duty to preserve material evidence [Trombetta/Youngblood]
 - No general duty to collect particular items of evidence
 - Raw notes: once case is charged, they become statements of witnesses

Typical Discovery

- Police reports relating to the investigation
- Witness statements (oral, recorded, and/or written)
- Defendant's statements (oral, recorded, and/or written)
- Reports relating to collection/testing of evidence collected
- Real evidence to be introduced at trial (photos, surveillance tapes, checks, etc)
- Witness impeachment materials
- Defendant's criminal history
- Any other exculpatory evidence

The prudent prosecutor will resolve doubtful questions in favor of disclosure.

- US v. Agurs (1976) 427 US 97, 108

If you are not providing info, tell Δ not providing it and why.

Just b/c evidence is discoverable, does not mean it is admissible.