

CHAPTER 14

DISCLOSURE OF EXCULPATORY AND IMPEACHMENT INFORMATION

14.01 INTRODUCTION

A California prosecutor's obligation to provide exculpatory and impeaching information arises from the federal Due Process Clause of the Fourteenth Amendment, as applied by the United States Supreme Court in *Brady v. Maryland* (1963) 373 U.S. 83, and California's Criminal Discovery Statute, as codified in Penal Code § 1054.1(e). Additionally, Rule 3.8 (Special Responsibilities of a Prosecutor) of the California Rules of Professional Conduct requires that prosecutors timely disclose all evidence or information that tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when relieved of this responsibility by a protective order of the court.

The failure to provide exculpatory and impeaching information may violate Rule 3.4 (Fairness to Opposing Party and Counsel) of the Rules of Professional Conduct, Penal Code § 141(a), and trigger a report to the State Bar if the reversal of a judgment is based in whole, or in part, on prosecutorial misconduct. Moreover, the United States Supreme Court has indicated that the prudent prosecutor should resolve doubtful questions in favor of disclosure.

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

14.02 THE *BRADY* RULE

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

Examples of exculpatory evidence include information that:

- Directly opposes guilt;
- Negates an element of a charged offense;
- Supports defense testimony;
- Supports an affirmative defense;
- Supports a defense motion;

Mitigates punishment;

Examples of impeaching evidence include:

Felony convictions involving moral turpitude;

Misdemeanor or other conduct that reflects on believability;

Misconduct involving moral turpitude;

False reports by a prosecution witness;

Pending criminal charges against a prosecution witness;

Parole or probation of a prosecution witness;

Evidence contradicting a prosecution witness's statements or reports;

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

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

Evidence that a prosecution witness has a reputation for untruthfulness;

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

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

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

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

Occasionally, deputies may learn that a peace officer's personnel file contains potentially impeaching information when, for example, they find out a peace officer is placed on

administrative leave. In those circumstances, deputies shall inform the defense of the possible existence of impeaching information and may file a Pitchess motion to access the information.

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

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

Commentary

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

14.03 PENAL CODE § 1054.1

Penal Code § 1054.1 provides:

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

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

- (e) Any exculpatory evidence.
- (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.

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

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

Commentary

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

14.03.01 JUVENILE PROCEEDINGS

Although discovery in juvenile proceedings is governed by California Rules of Court, Rule 5.546, it is the policy of the Office that the requirements set forth in Penal Code §§ 1054 to 1054.10 shall govern discovery protocols for all juvenile proceedings.

For juvenile proceedings, deputies shall disclose any potentially exculpatory and/or impeaching information, if available, at arraignment or prior to any substantive hearings, including *Gladys R.*, *Dennis H.*, or *William M.* hearings. If the information is not known at the time of any of these proceedings, it shall be disclosed as soon as it becomes known.

14.04 TIMING OF DISCLOSURE

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

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

During trial or juvenile adjudication, a deputy shall continue to comply with *Brady* and Penal Code § 1054.1(e)'s discovery obligations and provide potentially exculpatory and/or impeaching evidence as soon as it becomes known. After trial or juvenile adjudication, a deputy who acquires information which casts doubt upon the correctness of a conviction or sustained juvenile petition shall promptly disclose to the defense the new, favorable evidence.

Commentary

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

14.05 DISCOVERY COMPLIANCE SYSTEM

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

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

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

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

which tracks every inquiry. Misuse of this system may subject an employee to disciplinary action.

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

Commentary

Deputies reviewing matters for filing should check the DCS before filing complaints or juvenile petitions, if practical. Deputies presenting cases to the Grand Jury should check the DCS before eliciting testimony from a recurrent witness. If practical, deputies reviewing declarations in support of arrest warrants and affidavits in support of search warrants should check the DCS before approval. If a declarant or affiant is listed in the DCS, deputies should consider using another peace officer as a declarant or affiant or disclosing a summary of the potential impeachment material for the magistrate's consideration.

14.05.01 **BRADY DATABASE**

The *Brady* database shall contain all exculpatory and impeaching information of recurrent witnesses that is discoverable per se. This includes felony and misdemeanor convictions or other misconduct that reflects on the credibility of a witness. This information shall be disclosed to the defense without a protective order even if the recurrent witness will not be called to testify.

14.05.02 **ORWITS DATABASE**

ORWITS is an informational database that contains material on recurrent witnesses that may be constitutionally or statutorily discoverable depending on the facts of the case. The ORWITS database is comprised of information obtained from a variety of sources including, but not limited to, the media, public records, JSID declinations, a branch or area office declination involving a law enforcement officer, and deputy referrals.

Commentary

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

14.06 **DISCLOSURE OF INFORMATION OBTAINED FROM DCS**

Deputies shall note the information learned from the DCS database in the DA file and, where appropriate, make certain the information remains confidential. Use or disclosure of confidential material beyond what is necessary to prosecute the case shall be avoided. Disclosure of DCS information shall be made on the record or in writing and noted in the DA file. A protective order and consultation with a supervisor are not necessary when disclosing publicly available information, such as information from a court record, a news article, a JSID declination, or a branch or area office declination involving a law enforcement officer. A deputy disclosing confidential information, such as information from a deputy referral, shall request the court to

issue a protective order limiting the use of the information to the case before it is provided to the defense. A template for a protective order can be found in the Lotus Notes database under the DCS icon.

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

14.07 ENTRY INTO DCS AND THE REVIEW PROCESS

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

14.07.01 CONFIDENTIAL NOTIFICATION TO RECURRENT WITNESS AFFECTED BY DCS ENTRY

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

14.07.02 ENTRY INTO THE *BRADY* DATABASE

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

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

14.07.03 ENTRY INTO THE ORWITS DATABASE

Entries of recurrent witnesses into ORWITS shall not be reviewed except in cases of mistaken identity. Recurrent witnesses may, however, submit documentation to the DCU to address their

entry into the database. The submitted documents shall be included as part of the recurrent witness's ORWITS entry and accessible to all deputies carrying out their official functions. In certain circumstances, the DCU may transfer a recurrent witness from ORWITS into the *Brady* database when additional information is received indicating such a transfer is warranted. When a transfer occurs, the DCU shall notify the recurrent witness and their agency head by confidential correspondence.

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

14.08 DEPUTY REFERRALS OF POTENTIALLY IMPEACHING INFORMATION

Deputies shall refer potentially impeaching information regarding recurrent witnesses to the Bureau of Prosecution Support Operations Bureau Director. The referral process to be followed is described in LPM § 14.08.01. Entries based upon information contained within a deputy referral are considered attorney work product and confidential. Deputies have the discretion, in consultation with their supervisor, to determine whether to disclose information obtained from a deputy referral. Deputies shall summarize the entry and seek a protective order when disclosing this information. The Deputy Referral itself shall not be turned over to the defense.

14.08.01 DEPUTY REFERRALS

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

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

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

When the BPSO Bureau Director determines that a referral involves potential criminal conduct of a peace officer, the BPSO Bureau Director shall forward the memorandum to the Head

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

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

14.08.02 FILINGS AND DECLINATIONS

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

14.09 DISCOVERY COMPLIANCE SYSTEM MANUAL

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