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September 17, 2021

Sent Via E-mail: leonida@braunhagey.com; praresponse@braunhagey.com

Ellen Leonida, Esq.
BraunHagey & Borden LLP
351 California Street, 10th Floor
San Francisco, CA 94104

Re: Public Records Act Request (Government Code § 6250, et. seq.)

Dear Ms. Leonida:

This letter is in response to your request for public records received July 23, 2021, requesting renewal of ACLU's two prior requests dated May 13, 2019, and July 29, 2019, and additional records for the time-period 2015 to present.

The County has reviewed the District Attorney office policies and training materials and is providing the attached responsive records. Specific names and addresses have been redacted in the case preparation and evaluation training document as allowed pursuant to Gov't Code Sec. 6254(f) and Gov't Code Sec. 6255(a). This will complete the County's response to your public records request.

Sincerely,

Forrest W. Hansen
Merced County Counsel

Michael E. Profant
Deputy County Counsel

MEP/mes
20400-127/225963
Enclosures: District Attorney Policies and Training Materials

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BRADY DISCOVERY OF LAW ENFORCEMENT EMPLOYEE MISCONDUCT

(INTERNAL POLICY)

December 1, 2015

INTRODUCTION

The following is an "internal" policy that addresses information in the actual possession of the District Attorney's office as opposed to information contained in peace officer personnel files. In order to comply with our discovery obligations, procedures are necessary (1) to ensure that instances of law enforcement employee and expert witness misconduct and credibility issues that come to the attention of the District Attorney's office are reviewed to determine if disclosure is required under *Brady v. Maryland* (1963) 373 U.S. 83, (2) to maintain a depository for such information, and (3) to ensure that deputy district attorneys know of the existence of such information regarding potential witnesses so that disclosure can be provided to the defense.

This policy includes information that may bear on the credibility of peace officer witnesses, as well as other employees of law enforcement agencies and experts, including civilian lab employees of criminal justice agencies, who may be witnesses in criminal cases. As explained below, some of the procedural protections contained in this policy are limited to peace officers and custodial officers, in light of the special legal obligations and protections regarding peace officer and custodial officer personnel records. (Evid. Code §§ 1043-1047; Penal Code §§ 832.5, 832.7.)

I. WHAT CONSTITUTES *BRADY* MATERIAL

A. The District Attorney is obligated to provide the defense in criminal cases with *exculpatory* evidence that is *material* to either guilt or punishment. (*Brady v. Maryland*, *supra*, 373 U.S. 83, 87.) Reviewing courts define "material" as follows: "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." (*People v. Roberts* (1992) 2 Cal.4th 271, 330.) "Exculpatory" means favorable to the accused. This obligation includes "substantial material evidence bearing on the credibility of a key prosecution witness." (*People v. Ballard* (1991) 1 Cal.App.4th 752, 758.) Such impeachment evidence must disclose more than "minor inaccuracies." (*People v. Padilla* (1995) 11 Cal.4th 891, 929, overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

B. Impeachment evidence is defined in Evidence Code section 780, CALCRIM No. 105, and CALJIC 2.20. Examples of impeachment evidence that may come within *Brady* are as follows:

1. The character of the witness for honesty or veracity or their opposites. (Evid. Code § 780 (e).)

2. A *bias*, interest, or other motive. (Evid. Code § 780 (f).)

3. A statement by the witness that is *inconsistent* with the witness's testimony. (Evid. Code § 780 (h).)

4. Felony convictions involving moral turpitude. (Evid. Code § 788; *People v. Castro* (1985) 38 Cal.3d 301, 314.) Discovery of *all* felony convictions is required regarding any material witness whose credibility is likely to be critical to the outcome of the trial. (Penal Code § 1054.1 (d); *People v. Santos* (1994) 30 Cal.App.4th 169, 177.)

5. Facts establishing criminal conduct involving moral turpitude, including misdemeanor convictions. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-297.)

6. False reports by a prosecution witness. (*People v. Hayes* (1992) 3 Cal.App.4th 1238, 1244.)

7. Pending criminal charges against a prosecution witness. (*People v. Coyer* (1983) 142 Cal.App.3d 839, 842.)

8. Parole or probation status of a witness. (*Davis v. Alaska* (1974) 415 U.S. 308, 319; *People v. Price* (1991) 1 Cal.4th 324, 486.)

9. Evidence undermining an expert witness's expertise. (*People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179.)

10. Evidence that a witness has a racial, religious or personal bias against the defendant individually or as a member of a group. (*In re Anthony P.* (1985) 167 Cal.App.3d 502, 507-510.)

11. Promises, offers, inducements or benefits to witnesses (e.g. informants). *US v. Bagley* (1985) 473 US 667*; In re Sassonian* (195) 9 Cal.4th 535.

C. The duty of disclosure applies even to completed cases. (*People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179.) However, it does not apply to cases in which the defendant pled guilty or no contest. (*United States v. Ruiz* (2002) 536 U.S. 622.) Note that the duty of disclosure applies before the first evidentiary hearing of any sort, e.g. Motion to Suppress, Motion to Revoke Probation, Preliminary Hearings; see, e.g. *US v. Barton* (9th cir. 1993) 995 F.2d 931 [Brady applies to MTS re challenge to SW affidavit truthfulness]; *People v. Gutierrez* (1st DCA, 2013) & *People v. Bridgeforth* (2nd DCA 2013) {*Brady* applies at prelim].

D. The government has no *Brady* obligation to "communicate preliminary, challenged, or speculative information." (*United States v. Agurs* (1976) 427 U.S. 97, 109 fn. 16.) However, "the prudent prosecutor will resolve doubtful questions in favor of disclosure." (*Id*. at p. 108.) See also *Kyles v. Whitley* (1995) 514 U.S. 419, 439, which warns prosecutors against "tacking too close to the wind" in withholding evidence.

II. RELATIONSHIP BETWEEN *BRADY* AND *PITCHESS*

A. Criminal defendants may seek disclosure of peace officer and custodial officer personnel records and complaints from the law enforcement agency pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 and Evidence Code sections 1043-1047. The *Pitchess* process operates in parallel with *Brady*. (*City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 14.) The availability of the *Pitchess* procedure does not always satisfy the obligation of the prosecution to provide material exculpatory evidence in the possession or constructive possession of the prosecution. For example, the District Attorney's office has a discovery obligation as to exculpatory information in its actual possession that may not be included in the officer's personnel file. Moreover, Pitchess need only be kept 5 years, but Brady has no age limitation, citing to *Brandon*, supra.

B. In *Pitchess* motions, the prosecuting attorney shall request that the court issue a protective order against disclosure of the material in other cases pursuant to Evidence Code section 1045, subdivisions (d) and (e). (See *Alford v. Superior Court* (2003) 29 Cal.4th 1033.) The *Pitchess*

procedure shall also apply to personnel records of peace officers employed by the District Attorney's office.

C. No discovery will be provided for any information in or from a law enforcement employee's personnel file without the court first examining the materials in camera. If a deputy district attorney is aware of information in a peace officer or custodial officer's personnel file that may qualify for disclosure under *Brady*, the district attorney's office may file a motion for in-camera examination, or defense counsel may be invited to file a *Pitchess* motion.

D. If the Deputy District Attorney is aware of potential *Brady* material that was disclosed through a *Pitchess* hearing that is *more than* five years old, the District Attorney's office may seek in-camera review of the materials to determine if disclosure is required.

E. At the present time, the District Attorney's Office has no legal duty to examine a peace officer's personnel file. It is the policy of the Merced District Attorney's Office to not seek to examine a peace officer's personnel file for Brady purposes. Pursuant to People v Superior Court (Johnson), 7/6/2015, 2015 Cal. Lexis 4647 the District Attorney's Office is relying upon each Law Enforcement agency to notify it of potential Brady issues involving its officers, so that notification can be provided to defendants of the need to file a motion pursuant to Pitchess. The Merced District Attorney reserves the right to examine an officer's personnel file pursuant to Penal code section 832.7 whenever the officer is the target of the investigation. (cross reference III, I, 4. Below)

III. PROCEDURE FOR REVIEW OF POTENTIAL *BRADY* INFORMATION

A. Upon learning of any apparently credible allegation involving law enforcement employee or expert witness misconduct or credibility that may be subject to discovery under *Brady*, deputy district attorneys and district attorney investigators shall timely report this information to their immediate supervisor. For example, evidence of untruthfulness may come to light during a criminal trial, or from credible reports of other law enforcement employees based on sources

other than personnel records. Such allegations must be substantial and may not be limited to a simple conflict in testimony about an event. The notification itself ultimately might be examined in camera and/or be discovered, so carelessness in wording or premature conclusions are to be avoided. If and when such information is obtained, the District Attorney's office will conduct a thorough analysis pursuant to the procedures outlined herein to determine if it is required to disclose the information pursuant to *Brady*.

B. Deputy District Attorneys and district attorney investigators shall also advise their supervisors if they become aware of any of the following information regarding a law enforcement employee or expert witness:

1. Any information available to the attorney regarding the disclosures made pursuant to a *Pitchess* motion, and the existence of any protective or limiting order regarding future dissemination of the information. (See Evid. Code § 1045 (d) & (e).)

2. Criminal convictions of law enforcement employees.

3. Prosecutions initiated against law enforcement employees.

4. Rejections of requests for initiation of prosecution against law enforcement employees.

5. Any administrative discipline imposed against a law enforcement employee that may have a bearing on credibility.

C. Following receipt of such a report, the attorney or investigator's supervisor shall obtain all available information concerning the alleged misconduct, including the transcript of any testimony provided, and shall forward the materials to The District Attorney Administrative Council.

D. The District Attorney Administrative Council shall review and analyze the materials in light of applicable law. In some cases, it may be necessary and appropriate for the District Attorney's office to obtain copies of additional court documents or police reports, or interview witnesses. However, absent extraordinary circumstances, the District Attorney's office will not seek to interview the officer in question or other employees of the employing law enforcement agency.

E. The standard of proof for disclosure of information shall be the "substantial information" standard. Substantial information is defined as facially credible information that might

reasonably be deemed to have undermined confidence in a later conviction in which the law enforcement employee is a material witness, and is not based on mere rumor, unverifiable hearsay, or a simple and irresolvable conflict in testimony about an event.

F. Following the initial review and analysis described above, the District Attorney Administrative Council shall decide, which of the following conclusions is appropriate: (1) the materials do not constitute *Brady* material (see paragraph G, below); (2) it appears that disclosure may be required under *Brady* (see paragraph H, below)*;* or (3) further investigation, including interview of the officer in question or other employees of the employing law enforcement agency, should be undertaken by the employing law enforcement agency (see paragraph I, below).

G. If the District Attorney Administrative Council concludes that based on the initial review, it is clear that the materials do not constitute *Brady* material, the matter shall be closed.

H. If it appears after the initial review that disclosure regarding a peace officer may be required under *Brady*, the officer and the head of the employing law enforcement agency will be invited to provide written comments, objections and/or additional information that may bear on the decision of what information, if any, shall be provided. Given the need to provide prompt discovery to the defense in criminal cases, the opportunity to comment, object or provide information may of necessity be brief.

1. The District Attorney Administrative Council shall evaluate all information received and shall make a recommendation. Recommendations may include but are not limited to the following actions:

    a. No further action based upon conclusion that no *Brady* material exists.

    b. Discovery is required in a specific case only.

    c. Discovery must be provided in additional cases in which the law enforcement employee is or was a material witness. In appropriate cases, a computer search of pending and/or past cases may be conducted so that counsel may be notified.

    d. In some cases, presenting the material to a judge for in-camera review may be an appropriate manner of resolving the discovery issue. (See Section IV, below.)

e. In rare cases, blanket notification to representatives of the Public Defender's Office, Conflict Defense Attorneys, and Merced County Bar Association may be appropriate as a back-up form of notification in situations in which we cannot be confident that we have identified all of the affected parties. Such blanket notification shall be limited to a statement that *Brady* material may exist, with defense counsel to either contact the District Attorney's office and request information regarding a specific identified case, or make a motion for disclosure. Blanket notification shall not be made of information obtained from peace officer personnel files.

2. The District Attorney Administrative Council will determine what disclosure, if any, is appropriate. If the information pertains to the credibility of a peace officer, The District Attorney Administrative Council shall send written notification to the officer and the head of the employing law enforcement agency and shall provide a copy of the materials regarding the officer that will be provided to the defense.

3. The peace officer shall then have 30 days to respond in writing or request a meeting with The District Attorney Administrative Council to discuss the allegation and supporting materials. An attorney or any representative may accompany the officer to the meeting. In the event that the officer requests further time and no urgency exists to complete the evaluation, The District Attorney Administrative Council may extend the time for a written response or meeting for a reasonable period of time. The decision of the DA Administrative Council (after any officer response or the passage of 30 days without any response) is final and will be communicated to the officer and head of the employing agency.

I. In some cases, after the initial review, the District Attorney Administrative Council may conclude that the District Attorney's office is not in possession of sufficient information to conclude that conduct coming within *Brady* has occurred, but that further investigation is appropriate.

1. Absent extraordinary circumstances, the District Attorney's office will not seek to interview the officer or other employees of the officer's agency. In such cases, the

matter shall be referred to the employing law enforcement agency to conduct an investigation in accordance with the Public Safety Officers Procedural Bill of Rights.

2. If, after conducting this investigation, the employing law enforcement agency concludes that the complaint is unfounded, exonerated or not sustained (see Penal Code §§ 832.5, 832.7(c)), then disclosure is not warranted because the information is "preliminary, challenged, or speculative." (*United States v. Agurs, supra.*)

3. If the employing law enforcement agency sustains the complaint, the District Attorney's office shall, when the officer is a material witness in a case, make a motion under *Pitchess* or *Brady* for the court to examine the information in camera and determine whether disclosure must be made. (See section IV, below.)

4. This policy shall not limit the authority of the District Attorney's office to conduct criminal investigations.

IV. IN CAMERA REVIEW

A. The District Attorney's office may submit potential *Brady* evidence to a judge for in-camera review to determine if discovery to the defense is required. (*United States v. Agurs* (1976) 427 U.S. 97, 106; *U.S. v. Dupuy* (9th Cir. 1985) 760 F.2d 1492, 1502.) The option of submitting *Brady* material for in-camera review shall be considered in all cases, in consultation with the District Attorney Administrative Council.

B. If the District Attorney Administrative Council concludes that disclosure of material regarding a law enforcement officer may be required under *Brady*, the in-camera procedure shall be employed regarding the following:

1. Any materials contained in or obtained from a peace officer's personnel file, including information of which the District Attorney's office became aware through a *Pitchess* motion in a different case that was released without a protective order, or which is more than five years old.

2. Material regarding any incident that is the subject of a pending internal investigation by the employing law enforcement agency.

3. Material that is remote in time or has questionable relevance to the present case.

4. Any potentially privileged materials.

5. When it is unclear whether the law requires the information be disclosed.

C. Non-sworn employees of law employment agencies have a qualified right to privacy in their personnel files. (Cal. Const., art. I, § 1; *Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 525-526.) Materials contained in the personnel file of a non-sworn employee shall be sought only with consent of the employee or when authorized by a court following in camera review. (Evid. Code §§ 1040, 915(b); see *Johnson v. Winter* (1982) 127 Cal.App.3d 435.)

D. The District Attorney's office shall, in appropriate cases, request that the court issue a protective order limiting or prohibiting the disclosure of the material in other cases.

E. If material regarding the credibility of a law enforcement employee is discovered to the defense pursuant to *Brady* after an in-camera review, the assigned deputy district attorney shall provide the District Attorney Administrative Council with a copy of the material ordered by the judge to be discovered. The District Attorney Administrative Council shall then include this material in the administrative file maintained for that law enforcement employee, unless the court has made a limiting order regarding disclosure of the material. If the materials to be disclosed include materials from an officer's personnel file, the fact that such materials were disclosed shall be noted, but neither the materials themselves nor the substance of those materials shall be retained in the administrative file.

V. ADMINISTRATIVE FILES

A. The materials reviewed and memoranda of conclusions reached shall be maintained in a separate *Brady* administrative file. In those cases where the review determined the misconduct allegations are subject to discovery under *Brady v. Maryland*, a discovery *Brady* packet shall be included in the file for purposes of complying with the discovery obligation in future cases.

B. The information contained in these administrative files shall only be accessed for case-related purposes.

C. Upon written request, the District Attorney's office shall inform any law enforcement employee and/or the employing law enforcement agency whether or not a *Brady* administrative file exists regarding that employee. The employing law enforcement agency, and the affected law enforcement employee and/or his or her attorney or other representative, shall have the right to inspect the officer's *Brady* administrative file at a time mutually convenient to the parties or within 15 days of receipt of a written request for inspection. The District Attorney's office retains the right to exclude from inspection materials protected by the attorney-client, deliberative process, or official information privileges.

D. The District Attorney's office should not retain confidential personnel records from other agencies, and shall not provide such records to the defense absent an in-camera review and a court order. (See Penal Code § 832.7, subd. (a).) The employing law enforcement agency is the appropriate custodian of these records.

VI. PROVIDING *BRADY* DISCOVERY TO THE DEFENSE

A. The office shall maintain a list of law enforcement employees and expert witnesses for whom administrative files have been created based on possible *Brady* material, as described above. The District Attorney Administrative Council shall maintain a separate list ("*Brady* list") of law enforcement employees for whom, based upon the procedures and determinations discussed in this policy, discovery of a *Brady* packet may be required when the officer is a material witness in future cases. The "*Brady* list" will be a read only file, accessible only to attorneys. Deputy District Attorneys must review the "*Brady* list" during trial preparation, prior to any evidentiary hearing (e.g. motion to suppress, to revoke probation, preliminary hearing) or before approval of any search or arrest warrant to determine whether a *Brady* packet exists for each case in which the employee is subpoenaed by or will testify on behalf of the prosecution. See section E.

B. Disclosure of law enforcement employee misconduct is not required in a particular case if the evidence would not impact the employee's credibility in that case. For example, if the misconduct relates to a bias against a particular racial group, discovery may not be required in cases that do not involve members of that group. The District Attorney Administrative Council shall be consulted on all *Brady* issues regarding the credibility of law enforcement employees. If the assigned deputy district attorney is of the opinion that the *Brady* packet shall not be provided in a particular case, after consultation with the District Attorney Administrative Council, this decision shall be documented in the administrative file for that officer. If it is not clear whether disclosure is required in a particular case, the matter shall be submitted to the court for in-camera review.

C. Where discovery to defense counsel regarding law enforcement employee or expert witness misconduct or credibility is required, it shall be made by the deputy district attorney prosecuting the case by providing the *Brady* packet in discovery before trial. Fulfillment of the prosecution's obligation to provide discovery of *Brady* material is the sole responsibility of the individual deputy district attorney assigned to the case and shall be done without a defense request.

D. Whenever *Brady* material is provided to the defense in a case, the District Attorney Administrative Council shall place in the administrative file for that witness a copy of the defense signed discovery sheet that discovery was provided, including the name of the case, case number, name of defense counsel and the date the *Brady* packet was sent to the discovery unit.

E. Deputy District Attorneys reviewing declarations in support of arrest warrants and affidavits in support of search warrants shall consult the "*Brady* list" to determine if the declarant or affiant is an employee for whom the office has determined that *Brady* material must be provided. The attorney shall not approve the arrest warrant or search warrant unless it discloses a summary of the *Brady* material so that the magistrate may consider it in assessing the credibility of the individual.

VII. IMMEDIATE DISCLOSURE REQUIREMENTS

A. The nature of the constitutional obligation created by the *Brady* doctrine and the statutory time limits for trial and for providing of discovery in criminal cases will, in certain instances, require immediate disclosure to the defense of information in the possession of or known to the District Attorney's office. In such instances, it may not be possible or feasible before the information is provided to the defense to conduct the full review procedure described above, to provide the law enforcement officer with advance notice or an opportunity to provide comments, objections, or additional information, or to provide a written response or meet with the District Attorney Administrative Council. In such cases, immediate disclosure may be made to the defense.

B. Immediate disclosure regarding peace officer information shall only be made under the following conditions:

1. With the express consent of the District Attorney Administrative Council or the District Attorney or, if neither of them can be contacted within the time during which discovery is required, with the express consent of a Chief Deputy District Attorney.

2. After the information is submitted to a judge in camera, and the judge determines that disclosure is required.

C. In cases in which "immediate disclosure" is required, peace officers will be afforded a more abbreviated opportunity to be heard if it is feasible to do so. Once the decision to disclose has been made, both the department and the officer will be notified of the disclosure and will be provided with a copy of the materials disclosed.

VIII. CONFIDENTIAL INFORMANT POLICY & PROCEDURE

A. Internal Documentation of Confidential Informants

1. Deputy District Attorney Procedure: When a Deputy District Attorney receives information that a person is a confidential informant, the Deputy District Attorney shall notify a Chief Deputy District Attorney of this information.

2. Chief Deputy District Attorney Procedure: The Chief Deputy District Attorney shall mark the witness as Brady in the case management system and make note of the circumstances known to the CDDA regarding the person's status as a confidential informant.

B Ongoing Cases With Witnesses Who are Confidential Informants

If a Deputy District Attorney discovers that a witness in a pending case is a confidential informant, he or she shall notify a Chief Deputy District Attorney to discuss the appropriate course of action.

See Evidence Code Sections 1041 and 1042, and Penal Code Section 1054.7 for further instruction on the law regarding confidential informants and the disclosure of confidential information. (Section VIII adopted 9/12/17)

IX. AUTHORIZED INVESTIGATION REVIEW POLICY & PROCEDURE

A. Investigators within the District Attorney's Office have the ability to conduct "Authorized Investigations". Authorized Investigations are defined as an investigation that is only accessible to authorized individuals in the office. Unless authorized, Deputy District Attorneys may have no knowledge of the existence of an ongoing investigation of a potential witness, thus preventing disclosure to a defendant.

B. Authorized Investigation Review Policy and Procedure

1. Chief Deputy District Attorney Policy and Procedure: Chief Deputy District Attorneys shall maintain access to Authorized Investigations at all times and will be provided notice of the existence of such by investigators. Upon receiving notice of the existence of an Authorized Investigation, a Chief Deputy District Attorney will review the investigation for potential Brady or impeachable conduct. The CDDA will then notify the Chief Investigator of his or her findings.

   Once a determination has been made that there is Brady or impeachable conduct regarding an individual, the CDDA shall take the following steps:

   a. Mark the suspect "Brady" in the case management system.

   b. Make the following notation in the Brady section: This individual has been marked "Brady" due to his/her involvement with a confidential investigation. Please see Chief Deputy for further information.

2. Deputy District Attorney Policy and Procedure: If an attorney finds that a witness is marked as Brady in the case management system or is the subject of an Authorized Investigation, the attorney will meet with the Chief Deputy District Attorney to decide the appropriate course of action. The Chief Investigator and assigned DA Investigator will be notified of the decision. Proper courses of action include, but are not limited to, the following options:

   a. Disclosure to defense attorney;
   b. Delaying the case until timing of disclosure is appropriate;

c. Disclosing information to Judge for determination of required disclosure or protective order
d. Dismissing the open cases so as not to compromise the ongoing investigations.

*Nothing in this policy is meant to disrupt the normal practices of the Brady Committee within this office. The Committee's practices shall be incorporated as needed.

(Section IX adopted 9/12/17)

X. ADMISSIBILITY OF EVIDENCE

Discovery and admissibility are different and the assigned deputy shall decide if admissibility of matters discovered is to be challenged.

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PITCHESS/BRADY PROCEDURE FOR DISCLOSURE OF MATERIAL FROM LAW ENFORCEMENT PERSONNEL RECORDS

(EXTERNAL POLICY)

May 17, 2013

I. PURPOSE

Law enforcement personnel records are protected from disclosure by the statutory procedure for *Pitchess* motions. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531; Evidence Code sections 1043-1047; Penal Code section 832.7.) Additional important protections regarding personnel records are contained in the Public Safety Officers Procedural Bill of Rights Act (Government Code section 3300 et seq.) and in the right to privacy under the California Constitution (Article I, section 1). At the same time, the District Attorney has a constitutional obligation under *Brady v. Maryland* (1963) 373 U.S. 83, to provide criminal defendants with exculpatory evidence, including substantial evidence bearing on the credibility of prosecution witnesses. In several respects under current law, the scope of the prosecution's obligations under *Brady* exceeds the information available to the defense under *Pitchess*. (*City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 12, 14.)

The prosecution's duty of disclosure extends to evidence in possession of the "prosecution team," which includes the investigating law enforcement agency. (*People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305; *Brandon, supra*, at p. 8; see *Brandon* at p. 12, fn. 2.) In addition, there is federal court authority that police have a due process obligation to disclose exculpatory evidence to the

prosecution. (*Jean v. Collins* (4th Cir. 2000) 221 F.3d 656; *Newsome v. McCabe* (7th Cir. 2001) 256 F.3d 747, 752, *Tennison & Golf v. SF* (9th Cir., 2009) 570 F. 3d 1078)

The District Attorney and Merced County law enforcement agencies are committed to full compliance with the rights of criminal defendants to a fair trial and due process of law. We recognize that effective enforcement and prosecution of crime are jeopardized by failure to comply with discovery law and that such violations may result in the reversal of convictions, sometimes years after the trial is concluded. More importantly, we recognize that the honesty of law enforcement employees is a cornerstone of our criminal justice system. On those rare occasions when a law enforcement employee has engaged in conduct that has a negative bearing upon his or her credibility, we are obligated to disclose this information as required by law.

Because of the small number of officers in Merced County who have *Brady* material in their personnel files, we have determined that repetitive requests to check personnel files each time subpoenas are sent out in a case would create unnecessary paperwork and personnel costs upon law enforcement agencies and the District Attorney. We have also determined that prosecutorial inspection of peace officer personnel records for purposes of *Brady* compliance would be unnecessarily intrusive upon the privacy rights of officers in their personnel files. Instead, pursuant to People v Superior Court (Johnson), 7/6/2015, 2015 Cal. Lexis 4647 we have adopted a procedure in which the law enforcement agencies advise the District Attorney's office of the names of officers who have information in their personnel files that may require disclosure under *Brady.* This advisement is followed by a modified *Pitchess* motion procedure, whereby potential impeachment or exculpatory material is gathered by the agency so it can be reviewed in-camera by a court. This utilizes an appropriate judicial forum to reconcile a defendant's constitutional right to a fair trial with a law enforcement employee's right to confidentiality. The *Pitchess* procedure described herein shall also apply to personnel records of peace officers employed by the District Attorney's office.

This procedure was carefully drafted to protect the privacy interest of peace officers to the extent provided by law, while also ensuring that prosecutors are able to satisfy their constitutional responsibility to provide the defense with evidence favorable to the accused.

It is anticipated that changes in this procedure will be necessary as developments occur in the case law interpreting *Brady*. Also, our experiences with the procedure may lead to the need to make modifications. Prosecutors, law enforcement agencies and peace officer associations will be kept apprised of any changes that are made.

II. BRADY MATERIAL DEFINED

The District Attorney is obligated to provide the defense in criminal cases with exculpatory evidence that is material to either guilt or punishment. (*Brady v. Maryland, supra*, 373 U.S. 83, 87.) Reviewing courts define "material" as follows: "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." (*People v. Roberts* (1992) 2 Cal.4th 271, 330.) "Exculpatory" means favorable to the accused. This obligation includes "substantial material evidence bearing on the credibility of a key prosecution witness." (*People v. Ballard* (1991) 1 Cal.App.4th 752, 758.) Such impeachment evidence must disclose more than "minor inaccuracies." (*People v. Padilla* (1995) 11 Cal.4th 891, 929, overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

The government has no *Brady* obligation to "communicate preliminary, challenged, or speculative information." (*United States v. Agurs* (1976) 427 U.S. 97, 109 fn. 16.) However, "the prudent prosecutor will resolve doubtful questions in favor of disclosure." (*Id*. at p. 108.) See also *Kyles v. Whitley* (1995) 514 U.S. 419, 439, which warns prosecutors against "tacking too close to the wind" in withholding evidence.

Impeachment evidence is defined in Evidence Code section 780 and in CALJIC 2.20. Examples of impeachment evidence that may come within *Brady* are as follows:

1. The character of the witness for honesty or veracity or their opposites. (Evid. Code § 780 (e).)

2. A bias, interest, or other motive. (Evid. Code § 780 (f).)

3. A statement by the witness that is inconsistent with the witness's testimony. (Evid. Code § 780 (h).)

4. Felony convictions involving moral turpitude. (Evid. Code § 788; *People v. Castro* (1985) 38 Cal.3d 301, 314.) Discovery of all felony convictions is required regarding any material witness whose credibility is likely to be critical to the outcome of the trial. (Penal Code § 1054.1 (d); *People v. Santos* (1994) 30 Cal.App.4th 169, 177.)

5. Facts establishing criminal conduct involving moral turpitude, including misdemeanor convictions. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-297.)

6. False reports by a prosecution witness. (*People v. Hayes* (1992) 3 Cal.App.4th 1238, 1244.)

7. Pending criminal charges against a prosecution witness. (*People v. Coyer* (1983) 142 Cal.App.3d 839, 842.)

8. Parole or probation status of a witness. (*Davis v. Alaska* (1974) 415 U.S. 308, 319; *People v. Price* (1991) 1 Cal.4th 324, 486.)

9. Evidence undermining an expert witness's expertise. (*People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179.)

10. Evidence that a witness has a racial, religious or personal bias against the defendant individually or as a member of a group. (*In re Anthony P.* (1985) 167 Cal.App.3d 502, 507-510.)

11. Promises, offers, inducements or benefits to witnesses (e.g. informants) *US v. Bagley* (1985) 473 US 667*; In re Sassonian* (1995) 9 Cal. 4th 535

For purposes of this policy, "*Brady* material" in personnel files of law enforcement agency employees is defined to include:

a) Any sustained finding of misconduct within the preceding 5 years that may be construed as exculpatory in nature as defined in Section II of this policy. Examples would include any finding that reflects upon the truthfulness or bias of a witness. A complaint is considered sustained for purposes of this policy when it has been approved by the agency head after a hearing pursuant to *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, if applicable, or when the discipline has been imposed, whichever occurs first. If a sustained complaint has already been overturned by a reviewing body or court based on lack of evidence of misconduct, the incident will not be considered *Brady* material and need not be reported to the District Attorney's office. If a sustained complaint has been overturned based only upon the degree of discipline imposed, it shall still be considered a sustained complaint and shall be reported to the District Attorney's office. If the law enforcement agency has notified the District Attorney's office of *Brady* information and the officer later successfully appeals the sustained complaint to a reviewing body or court, the officer should provide the District Attorney's Office with a copy of the decision on appeal so that the District Attorney's Office may reevaluate the matter.

b) Any past conviction or pending criminal charge for a felony or moral turpitude offense, or any pending criminal charge for any offense (felony or misdemeanor, moral turpitude of not).

c) Any pending administrative case to include: Charges of misconduct filed with any law enforcement agency when the charged misconduct comes within the

definitions of *Brady* material set forth in Section II.A, (i) if the officer resigns or retires after the charges are filed and before the misconduct case is decided, or (ii) if the officer is still active and likely will be called as a witness in a criminal case before the misconduct case is decided. If the complaint of misconduct is later not sustained, the law enforcement agency shall inform the District Attorney's Office and the District Attorney's

Because of this procedure's delegation of part of the prosecutor's affirmative duty to seek out evidence of impeachment material subject to the *Brady* rule, it is essential that the responsibility be carried out by a qualified representative of the law enforcement agency. All parties may best be served when the representative conducting the initial screening process is an attorney employed by County Counsel, the City Attorney, or other qualified counsel with legal training in this specialized area.

III. PROCEDURE FOR JUDICIAL REVIEW

1. In order to meet constitutional *Brady* obligations and to ensure that law enforcement's statutory right to confidentiality is upheld, the District Attorney requests that each law enforcement agency search its records concerning employees of that agency. A personnel file review is requested for all peace officer employees, as well as for all Sheriff's custodial officers, Police Services Officers, criminologists, evidence technicians, dispatchers, and other employees whose job duties may include handling evidence, documenting incidents relating to criminal cases, or who are likely to testify in criminal cases.

2. The District Attorney will not assert a right under Penal Code section 832.7, subdivision (a), to inspect personnel records, due to the delegation to the police agency of the initial determination of substantiveness.

3. The law enforcement agency will designate a records custodian or other representative of the agency, such as the City Attorney or County Counsel, who will review the personnel records of the employees described above for sustained allegations of misconduct, or convictions or past conviction for a felony or moral turpitude offense, or any pending criminal charge for any offense (felony or misdemeanor, moral turpitude or not).

   a. If potential *Brady* materials exist, the agency representative will contact the District Attorney Administrative Council and inform them of the existence of the materials. The response in writing to the District Attorney will state only that there may be *Brady* material regarding the employee (or that a sustained complaint was made against the employee) and the date of the conduct and the date the information was entered in the record.

   b. The law enforcement agency shall provide the same written notification of its findings to the involved employee.

   c. The responsibility to notify the District Attorney's Office of potential Brady material is ongoing. It is incumbent upon each Law Enforcement agency to diligently notify the District Attorney's Office of such matters involving new employees and new matters involving existing employees. Failure to do so, could place criminal convictions in jeopardy. After a notification has been made, if the law enforcement agency learns of additional potential *Brady* material regarding an employee, the agency shall notify the District Attorney's Office of the existence of the additional information.

4. The Office of the District Attorney shall maintain a list of law enforcement employees for whom law enforcement agencies have given notification that possible *Brady* material may exist, as described above. This list will be accessible only to attorneys in a read only format using a shared computer drive. Deputy district attorneys must review the list during trial preparation to determine whether a law enforcement employee who is subpoenaed by or who will testify on behalf of the prosecution is on the list. Upon the request of any employee or former employee of a law enforcement agency, The District Attorney Administrative Council shall immediately advise the employee whether he or she is included on the list.

5. When the District Attorney's office subpoenas or intends to call a law enforcement officer for whom notification of possible *Brady* material has been given, the District Attorney may apply to the court for in-camera review of the records. The request for in-camera review shall be made pursuant to *Pitchess* (see Evidence Code sections 1043, 1045; *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1046) and/or *Brady* (*United States v. Agurs*, *supra*, 427 U.S. at p. 106; *U.S. v. Dupuy* (9th Cir. 1985) 760 F.2d 1492, 1502; *Brandon, supra*, at p. 14). As to non-sworn employees, the request shall be made pursuant to Evidence Code sections 1040 and 915(b). (See *Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 525-526; *Johnson v. Winter* (1982) 127 Cal.App.3d 435.) At the time of application, the defense, the involved employee and the employing law enforcement agency will be notified of the request for in-camera review.

6. If, following in-camera review, the court orders disclosure under *Pitchess* and/or *Brady*, disclosure shall only be made to the defendant's attorney of record (or to defendant if not represented by counsel), to the involved employee, to the employing law enforcement agency, to those members of the District Attorney's Office as needed for handling of the case, and to

the court pursuant to law. The prosecuting attorney shall request that the court issue a protective order against disclosure of the material in other cases pursuant to Evidence Code section 1045, subdivisions (d) and (e). (See *Alford v. Superior Court*, *supra*.) The prosecuting attorney shall also request an order for return of material to the providing agency custodian at the conclusion of the case and any direct appeal, before cite to EC 1045.

7. It is unclear under present law whether court-ordered disclosure to the prosecution of material from peace officer personnel files gives rise to an obligation that the prosecution disclose the information in future cases pursuant to *Brady*. (Compare *Alford, supra*, at p. 1046, fn. 6 (plurality opinion) with p. 1056, fn. 8 (concurring opinion of Baxter, J.). In order to ensure that officers' privacy rights in their personnel files are protected, the District Attorney's office shall not maintain a depository of information obtained from personnel files pursuant to an in-camera hearing. Instead, *Brady/Pitchess* motions will be made in each future case in which the officer is a material witness. However, if court orders disclosure in a case pursuant to Brady, then (after its return to the original custodial agency), on the 5th anniversary of such material, the agency agrees to keep such material and provide to the court after a DA motion in future cases involving that witness or, the agency agrees that the DA may keep such material for longer than the 5th anniversary of the conduct so long as it seeks a modification of any prior court protective order and an in camera hearing before any future disclosure of such material on that witness.

IV. INVESTIGATIONS NOT COVERED BY THIS PROCEDURE

1. California Penal Code section 832.7, subdivision (a), provides that investigations or proceedings concerning the conduct of police officers or a police agency conducted by a Grand Jury or District Attorney's Office or the Attorney General's Office are not subject to the

Evidence Code disclosure procedures. A 1993 opinion of the California Attorney General states, "As long as the investigation of the officer's conduct is a part of the prosecutor's duties. . . a District Attorney need not follow the provisions of Evidence Code Section 1043 in obtaining access to the personnel records in question." (66 Ops. Cal. Atty. Gen. 128.) The Merced County District Attorney's Office will not seek access to peace officer personnel records pursuant to section 832.7(a) except: (a) when the peace officer is a suspect in an investigation and is not merely a witness in a criminal case, or (b) as ordered by the court pursuant to the in-camera review procedure of this policy.

2. The District Attorney's Office sometimes learns of potential law enforcement employee misconduct outside of the procedure described in Section III, above, or outside of an in-camera review procedure. For example, evidence of untruthfulness may come to light during a criminal trial, or from credible reports of other law enforcement employees based on sources other than personnel records. The procedure in such cases in described in a separate memorandum ("Internal Policy").

V. CONCLUSION

The purpose of this policy is to ensure that prosecutors and the defense receive sufficient information to comply with the constitutional requirements of *Brady* while protecting the legitimate privacy rights of law enforcement witnesses. This policy is not intended to create or confer any rights, privileges, or benefits to defendants or prospective or actual witnesses.

Appendix

FORMS APPENDIX

CONTENTS

FORM 1

DISTRICT ATTORNEY
LARRY D. MORSE II

550 W. Main Street
Merced, CA 95340
Phone (209) 385-7381
Fax (209) 725-3669

District Attorney Administrative Council
HAROLD L. NUTT

District Attorney Administrative Council
ROBERT O. CARROLL

Director of Administrative Services
JEANNETTE PACHECO

INVESTIGATIONS
(209) 385-7383

Chief Investigator
PATRICK N. LUNNEY

VICTIM WITNESS
(209) 385-7385

Victim Witness Program Director
LISA DeSANTIS

LOS BANOS DIVISION
445 I Street
Los Banos, CA 93635
Phone (209) 710-6070
Fax (209) 827-2029

Thursday, September 09, 2021

To:
From:
Re: Brady Issue

Dear Officer _____:

The purpose of this letter is to give you the opportunity to provide input as to whether evidence regarding your conduct in the _____ case (_____ Police Department case numbers _____ and _____, Merced County Superior Court case number _____) must be disclosed to the defense pursuant to *Brady v. Maryland* (1963) 373 U.S. 82, in future cases in which you are a prosecution witness.

The United States Supreme Court case of *Brady v. Maryland* requires the prosecution to disclose to the defense all material evidence that is favorable to the defense. This obligation includes "substantial material evidence bearing on the credibility of a key prosecution witness." (*People v. Ballard* (1991) 1 Cal. App. 4th 752, 758.) Moral turpitude conduct, even if it has not resulted in a conviction, may be admissible and discoverable as to the credibility of a witness. (*People v. Wheeler* (1992) 4 Cal. 4th 284; *People v. Lepolo* (1997) 55 Cal.App.4th 85, 89-90.)

In the present case, the information in our possession indicates that you _____. This conduct appears to constitute moral turpitude, which has been defined in the context of discipline of public employees in the context of fitness to perform that vocation. (*Brewer v. Department of Motor Vehicles* (1979) 93 Cal. App. 3d 358, 365.)

Before we make a final decision as to whether the above information constitutes *Brady* evidence, we are giving you and the _____ Police Department the opportunity to provide any written comments, objections, and/or additional information that may bear on the decision of what information, if any, shall be provided. (See Internal Brady Policy, enclosed) If you have any input, I request that you respond to me in writing by [Date (30 days)].

Very Truly Yours,

LARRY D. MORSE II
District Attorney

By: _____
John Smith
Deputy District Attorney

DISTRICT ATTORNEY
LARRY D. MORSE II

550 W. Main Street
Merced, CA 95340
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LISA DeSANTIS

LOS BANOS DIVISION
445 I Street
Los Banos, CA 93635
Phone (209) 710-6070
Fax (209) 827-2029

Thursday, September 09, 2021

To:
From:
Re: Brady Issue

Dear Officer:

The purpose of this letter is to provide you with the opportunity to provide input as to whether your conduct on (date) must be disclosed to the defense pursuant to *Brady v. Maryland* (1963) 373 U.S. 82 in cases in which you may be a prosecution witness.

We have reviewed report number _____ which states _____-

Brady v. Maryland requires that in a criminal case, the prosecution disclose material exculpatory evidence to the defense. The *Brady* obligation requires disclosure of "substantial material evidence bearing on the credibility of a key prosecution witness." (*People v. Ballard* (1991) 1 Cal.App.4th 752, 758.)

Based on our review of your case, it appears that we may be required under *Brady v. Maryland* to disclose this incident to the defense in cases in which you are a material witness.

The Merced County District Attorney's Office has adopted a policy for analyzing incidents or complaints of peace officer misconduct to determine whether disclosures are required in cases in which the officer will be a prosecution witness. A copy of the policy is enclosed. The policy includes the opportunity for the affected officer and the employing agency to provide input. (Internal Brady Policy) If the District Attorney's Office determines that *Brady* evidence exists regarding an officer, the officer's name is placed on a *Brady* list, and disclosures are made to the defense when that officer is a prosecution witness.

Pursuant to our policy, before we make a final decision as to whether the above information constitutes *Brady* evidence, we are providing you with the opportunity to provide any written comments, objections and/or additional information that may bear on the decision of what information, if any, shall be provided. You may wish to consult with legal counsel and/or your peace officers association. We request that you respond to us by __[Date 30 days)]__. If you have any questions, please call _____.

Very Truly Yours,

LARRY D. MORSE II
District Attorney

By: _____
John Smith
Deputy District Attorney

FORM 3

DISTRICT ATTORNEY
LARRY D. MORSE II

550 W. Main Street
Merced, CA 95340
Phone (209) 385-7381
Fax (209) 725-3669

District Attorney Administrative Council
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LISA DeSANTIS

LOS BANOS DIVISION
445 I Street
Los Banos, CA 93635
Phone (209) 710-6070
Fax (209) 827-2029

Thursday, September 09, 2021

To:
From:
Re: Brady Issue

Dear Officer _____:

This letter is to advise you of our determination that we are required under *Brady v. Maryland* (1963) 373 U.S. 82, to disclose to the defense your conduct in the _____ incident in cases where you are a prosecution witness.

On ___(date)___, I wrote to you to advise you of our tentative determination that the information must be disclosed, and inviting written comments, objections and/or additional information by ___(date)___. Copies of the letter were sent to your attorney, _____, and to _____ Police Commander _____. We have not received a response from any party. (if so).

Pursuant to our Internal Brady Policy, you have 30 days to respond in writing or to request a meeting with District Attorney Administrative Council _____ to discuss the allegations and to provide any supporting materials. However, if you will be called as a prosecution witness in cases in the near future, we must make notification now as to those cases even if there is a request for a meeting. If you wish to schedule a meeting, please call _____ at our office.

Very Truly Yours,

LARRY D. MORSE II
District Attorney

By: _____
John Smith
Deputy District Attorney

FORM 4

DISTRICT ATTORNEY
LARRY D. MORSE II

550 W. Main Street
Merced, CA 95340
Phone (209) 385-7381
Fax (209) 725-3669

District Attorney Administrative Council
HAROLD L. NUTT

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LISA DeSANTIS

LOS BANOS DIVISION
445 I Street
Los Banos, CA 93635
Phone (209) 710-6070
Fax (209) 827-2029

Personal and Confidential

Thursday, September 09, 2021

[Full Name of Defense Attorney]
[Name of Law Firm]
[Street Address]
[Line 2 of Street Address]

Re: _____ Police Officer _____

Dear Mr. _____:

We have carefully reviewed and considered your letter of __[Date]___. While I understand the explanations offered on behalf of Officer _____, the fact remains that he/she [briefly state misconduct]. We have determined that we are required under *Brady v. Maryland* (1963) 373 U.S. 82, to disclose this information to the defense in cases in which he is a prosecution witness.

Pursuant to our Internal Brady Policy, you have 30 days to respond in writing or to request a meeting with The District Attorney Administrative Council to discuss the allegations and to provide any supporting materials. However, if Officer _____ will be called as a prosecution witness in cases in the meantime, we must make notification now as to those cases even if there is a request for a meeting. If you wish to schedule a meeting, please call our office.

Very Truly Yours,

LARRY D. MORSE II
District Attorney

By: _____
John Smith
Deputy District Attorney

FORM 5

DISTRICT ATTORNEY
LARRY D. MORSE II

2222 M Street
Merced, CA 95340
Phone (209) 385-7381
Fax (209) 725-3669

District Attorney Administrative Council
HAROLD L. NUTT

District Attorney Administrative Council
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445 I Street
Los Banos, CA 93635
Phone (209) 710-6070
Fax (209) 827-2029

Personal and Confidential

Thursday, September 09, 2021

[Full Name of Defense Attorney]
[Name of Law Firm]
[Street Address]
[Line 2 of Street Address]

Dear [Mr./Ms.] [Name of Defense Attorney]:

[NAME OF DEFENDANT], [CASE NUMBER]

[Opening paragraph includes officer's identifying information, i.e. agency, rank, full name, badge/serial/employee number, and consists of a brief description of the Brady impeachment evidence.]

The District Attorney's Office is disclosing this information to defense counsel who are representing or who have represented defendants either in pending cases in which [rank and last name of officer] is a material witness or in cases closed on or after the initial date of [rank and last name of officer]'s misconduct in which [he/she] was a material witness at trial on the issue of guilt or punishment.

Our Records indicate that you represent or represented [name of defendant] in the matter of *People v.* [*full name of defendant*], [case number], in which [rank and last name of officer]is a material witness or testified as a material witness at trial. This information is being provided to you so that you may take whatever action you deem appropriate.

Very Truly Yours,

LARRY D. MORSE II
District Attorney

By: _____
John Smith
Deputy District Attorney

Case Prep/Evaluations Misdemeanors

I. Filing Stage
   a. Evaluation:
      i. Elements of the Crime
      ii. Necessary Witnesses/Evidence to prove elements
      iii. Priors/Relevant Criminal History
      iv. Check Defendant's open cases, if any
   b. Preparation:
      i. Marking witnesses in karpel
      ii. Marking case type in karpel
      iii. Noting any evidence that will need to be ordered

II. Offers
   a. Goal: Reach a fair and just result that serves the best interests of the People of the State of the California.
   b. Evaluation
      i. Factors:
         1. Nature & Seriousness of the Case
            a. Not all DUI's are the same, not all DV cases are the same. Is there something about the facts of this case that makes it stand out for other cases? Injuries, conduct, etc?
         2. Strength of the Evidence
            a. Jury instructions/elements of the crime
               i. Evidence comes in different forms. EX: 273.6 – mere contact could be violating the order, but if the defendant is yelling at the victim, seeking them out specifically, a witness sees the conduct & knows of the order – this is evidence that make the proof stronger.
         3. Defendant's record
            a. Repeat offender
            b. Type of record
               i. Violent?
               ii. Drug Use? Does the defendant have a substance abuse problem that is contributing to their behavior?
               iii. Same offense repeatedly
         4. Victim/witness input
            a. One factor to consider. Must do what is the best interest of the People, this is something to take into account, but is not determinative.
      ii. Rules of Court (see attached)
      iii. Immigration Consequences

1. We are required to consider to avoidance of adverse immigration consequences in the plea negotiation as one factor in an effort to reach a just resolution (PC 1016.3(b)
2. If you ever have any concern that adverse immigration consequences may result from a plea, make sure that the court tells the defendant that he or she *will* be deported as a consequence of the plea (PC 1016.5).

III. Trial Stage
   a. Evaluation
      i. New evidence (defense or otherwise)
         1. Cases can develop over time. Witnesses may come forward you didn't know about before or defense may product affirmative evidence to consider. Evaluate whether or not this changes the strength of your case. Remember – just because there is a possible defense
         2. Over time, as stated above, the value of a case may change. Also, what the defendant is willing to accept may change as well. Be sure to be cognizant of both when making offers. A case can get better or get worse and a defendant can become more or less recalcitrant.
      ii. Strengths & Weaknesses of case (chart it out—see attached)
   b. Preparation
      i. Checklist (see attached)
      ii. To Do List (see attached)
      iii. Visit scene if possible

<u>To-Do List:</u>

1. Pre-Trial:
   a. Trial Checklist
   b. Witness List
   c. Disclose civilian criminal history
   d. Order Transcripts
   e. Road Map
2. For Trial:
   a. Jury Instructions
   b. Exhibits / Transcripts

        i. Contact officer about picking up evidence & send email to evidence tech and officer confirming the evidence you need and what day you need it (usually best to have it first day and pre-mark with all other exhibits)
    c. MIL
    d. Voir Dire
    e. Opening
    f. Direct Examinations
        i. Witness One
        ii. Witness Two
    g. Cross Examinations
        i. Witness One
        ii. Defendant
    h. Closing Arguments

<u>Road Map</u>:

1. Witness One
    a. Testify to element one
    b. Exhibit 1
    c. Jurisdiction
2. Witness Two
    a. Testify to elements two and three
    b. Exhibits 2 – 4
    c. ID defendant

<u>In Trial Checklist</u>:

___ ID

___ Jurisdiction

___ Exhibits

____ 1 (overhead map)

____ 2 (PAS LOG)

___ Element 1

___ Element 2

___ Element 3

Trial Prep Checklist

- Audio
- Video
- Body Cam
- Dash Cam
- 911 tapes
- 911 log
- PAS/EPAS logs (agency/doj)
- Fingerprints
- DNA
- Photos
- Diagrams , maps of the scene, etc.
- SW's
- Priors
    - Strike
    - 969b
    - 1101/1108/1109
    - RAP
    - Police reports
- Gang
    - Reports/FI
    - Audio/Video
    - Photos
    - Predicates
- Forensic (DOJ)
    - Report
    - Notes
    - Photos
    - Resumes
    - Chain of custody form
- Medical records (including RIGGS)
- SART exam
    - Notes
    - Photos
- MDIC
- Expert Resume
- Civilian RAPs
- Coroner Report
- Outside agency reports (other LE, fire, jail) on defendant, witness, etc.
- Witness List

- Jail records: calls/booking/jail medical/jail visitor
- DMV information—CLETS, certified packet
- Forensic phone analysis, other device analysis
- Social media evidence
- Loss prevention officer reports
- Probation/parole records
- EDR evidence in serious vehicle accident cases

THE GOOD	THE BAD

• D is at the house ([redacted]) on May 29th AND 30th -- he is there two days in a row and he claims he doesn't live there?
  ○ May 29: Deputy [redacted]
  ○ May 30: Deputy [redacted] Deputy [redacted]
• Stolen property is a CREDIT CARD with someone else's NAME on it--def knew it was stolen
• D's admissions
  ○ "Yes, that is my bedroom."
  ○ located a CC in his sister's room and took it from her & put it in his room
  ○ he thought it was stolen due to it being in someone else's name
  ○ RE: ammo in closet--it originally wasn't his room, hasn't been his room for that long, (Deputy [redacted] points out he's a convicted felon) he says he knew he should not have them
• mail addressed to him at [redacted]
• D's mother, Annette, says that D likes to collect bullets, that's why he has them
• other stolen checks in D's room
	• GF will say he was living with her at the time--[redacted]
	  ○ moved in 2/2012
	• Brother, [redacted], will say D was not living there at [redacted]
	• he was just picking up card from sister's room
	• no gun--who cares if he has ammo??
	• the police were there to search for Adam

- transitory possession--*just picked up card from sister's room*
- innocent purpose--only *collecting* ammo, no gun

- covering for Adam who was on probation
    - objected to them coming in the house??
- Annette is trying to protect her son
    - *she doesn't know that he's not supposed to be in possession--she lies to separate officers?*

HE WAS CAUGHT, HE ADMITTED IT, JUST TRIED TO MINIMIZE HIS CULPABILITY.

****MOM HAS NO MOTIVE TO LIE TO THE POLICE

DISCOVERY

Who does it apply to? What is discovery? Why is it important? When do I discover? When do I not discover? What about discovery regarding police officers? What happens if I don't discover?

1. What does discovery apply to?

The Criminal Discovery Act (1990) – Penal Code §1054 – 1054.8
Enacted when voters passed Proposition 115 in 1990 and is found at Penal Code sections 1054 through 1054.9. Discovery should be reciprocal between the prosecution and defense.

What does the Act apply to?

Proceeding	Act Apply?	Source of discovery?
Adult felony prosecution	Yes	
Adult misdemeanor prosecution	Yes	
Juvenile proceedings	Yes for all practical purposes; "optional" up to the court	
Competency proceedings (1368)	No	Civil Discovery
Mentally disordered offenders	Yes, along with Civil Discovery Act	
Sexually violent predator proceedings	No	Civil Discovery Act

(California Criminal Discovery 5th Edition)

1054. Purpose

This chapter shall be interpreted to give effect to all of the following purposes:

(a) To promote the ascertainment of truth in trials by requiring timely pretrial discovery.

(b) To save court time by requiring that discovery be conducted informally between and among the parties before judicial enforcement is requested.

(c) To save court time in trial and avoid the necessity for frequent interruptions and postponements.

(d) To protect victims and witnesses from danger, harassment, and undue delay of the proceedings.

(e) To 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.

2. <u>What is discovery? What must be discovered? When should it be discovered?</u>

The “prosecuting attorney” must disclose to the defense an enumerated list of “materials and information”.

§ 1054.1. Prosecuting attorney; disclosure of materials to defendant

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.

Let's break this down a bit:

So what does this section actually mean – "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?

- If the material is in the **actual possession** of the office it is discoverable – regardless of if the DDA has personal knowledge of it (such as an unread report in the case file)

- Also applies to **investigative agencies** – if the DDA knows that a law enforcement agency has materials and information that is in the agency's possession - it is discoverable. (Officer body camera videos, photographs, supplemental reports, etc)

    - Investigative agencies mean law enforcement agencies which investigated or prepared the case against the defendant (PC §1054.5(a))

    - Any other persons or agencies which the prosecuting attorney or investigative agency may have employed to assist them in performing their duties. (PC §1054.5(a)

- Includes materials and information that are "reasonably accessible" to the DDA. (providing information for impeachment purposes for testifying witnesses / running raps)

(a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.

- Prospective witnesses – anyone that the prosecutor reasonably intends to call as a witness at trial (PC §1054.1(a)

    - Incudes all witnesses in the case-in-chief (30 days before trial; unless court orders differently)

    - Rebuttal witnesses (once defense discloses prospective witnesses)

- Addresses – 30 day rule

- Relevant written or recorded statements – 30 day rule – What is a statement?

    - Witness's words whether recorded electronically or by someone writing them down

        - Includes non-verbal conduct if intended as substitute for oral or written verbal expression

        - Includes anything a victim or witness said to you. You must disclose this information whether or not you have taken any written notes.

- Reports of statements – 30 day rule (police reports, victim "drop charges" request)

- Expert witness reports or statements – 30 day rule (DOJ reports, medical reports)

(b) Statements of all defendants.

- Must be disclosed whether or not the statements are inclupatory, exculpatory, or neither. (*People v. Jackson*, 129 Cal.App.4th 129)

    - Includes jail calls – if you are listening to jail calls, you must discover all jail calls to defense.

(c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged. – 30 day rule

- Note – special rules apply to child porn cases

(d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial. – 30 day rule; also prior to preliminary hearing if called to testify

- Any felony conviction – even if witness has not yet been sentenced

- Crimes of moral turpitude / probation status

- **NOTE:** Do NOT give the RAP to the defense. Instead provide a summary of conviction(s) which may also include case numbers, or police report numbers.

(e) Any exculpatory evidence. – 30 day rule; prior to preliminary hearing (see also *Brady v. Maryland*, 373 US 83 (1963))

- Negates the defendant's guilt or supports an affirmative defense

- Impeachment

3. When does disclosure need to occur?

- Materials and Information – possessed by prosecution must be disclosed at least 30 days prior to trial (PC §1054.7)

- Information that becomes known to, or comes into possession of a party within 30 days of trial – must be disclosed ***immediately!***

- Generally – discover materials and information as soon as you receive it!

4. When or what not to discover?

As a general rule, assume everything should be discovered, however, there are exceptions. "Under California's discovery statutes, information is discoverable if it unprivileged and is either relevant to the subject matter of the action or reasonably calculated to reveal admissible evidence. " *Schnable v. Superior Court*, 5 Cal.4th 704, 1(993)

"Privilege"- can be a basis for opposing discovery

- Communications between and attorney and his/her client (some exceptions can apply)

- Attorney work product (but note that sometimes defense may be entitled to it) PC §1054.6

- Communications between a psychotherapist and client (such as between a victim and the victim's therapist). Some examples include:

    - Persons authorized to practice medicine who devote a substantial portion of their time to the practice of psychiatry

    - Licensed psychologists

    - Credentialed school psychologists

    - Licensed clinical social workers and licensed marriage and family therapists or any counselors working under such therapists

    - Licensed registered nurses who possess a master's degree in psychiatric-mental health nursing or are certified as a clinical nurse specialist practicing psychiatric-mental health nursing.

- Identity of confidential informants (if this arises talk to your supervisor for guidance)

- Personnel records of law enforcement and custodial officers (Pitchess motions – see below)

5. Discovery regarding police officers

Pitchess Motions – what are they?

Pitchess v. Superior Court of Los Angeles County, 11 Cal. 3d 531 (1974) PC §1043 - 1047

The privilege attached to the personnel records of law enforcement officers and custodial officers does not preclude their discovery - however in order to discover these records certain procedures must be followed. The information typically included in law enforcement personnel files can include citizen complaints against officers along with the citizen's name.

Pitchess Motions:

- Written motions must:
    - Identify:
        - Proceeding in which the discovery is being sought
        - Party seeking the discovery
        - Officer(s) whose records are sought
            - Records are material to the case
        - Government agency having custody or control over those records
    - Set the time and place for a hearing on the motion
    - Describe with some specificity the type of records or information being sought
- Affidavit or declaration showing "good cause" must accompany the motion

Pitchess Hearing (typically the attorney for the law enforcement agency will respond to the motion and argue at the hearing)

- Court will hold a hearing on the motion if it is properly noticed and served
- If Pitchess is brought by defense the prosecution is entitled to receive notice of the hearing and with the court's permission **may** participate in the hearing.
- If court grants the motion then an *In Camera* review will be held

- Court will review the officer(s)' personnel records – usually with the agency's custodian of records in chambers

- Court will review for information that is relevant to the subject matter involved in the pending case

- If after an *In Camera* review the court orders information is to be disclosed the court will order the agency possessing the records to disclose the relevant information to the moving party.

6. What is BRADY

What is the Brady rule? (Brady v. Maryland, 373 US 83, (1963) (Skinner v. Sitzer, 562 US 524 (2011) The prosecution violates the defendant's federal, constitutional right to due process when:

- Evidence "favorable to the accused"

  - Evidence if favorable if it hurts the prosecution or helps the defense

  - Evidence can be of minimal value

  - Can be exculpatory or impeachment

  - Note: prosecution should disclose material, favorable evidence whether or not it is likely to be admitted at trial. It's better to disclose the evidence and fight to keep it out than not disclose it

- Is "suppressed" by the prosecution

  - Prosecutor or members of the prosecution team subjectively know about, whether or not they possess the evidence

  - Prosecutor or members of the prosecution team possess, whether or not the prosecutor subjectively know of that possession

  - Exception: due diligence (but don't necessarily rely on this – it's better to discover the evidence)

    - Defense has access to the evidence
      and

    - Defense in exercise of due diligence could have expected to seek out that evidence

- "Prejudice" ensues because the suppressed evidence is "material either to guilt or to punishment"
    - The greater the evidentiary impact of favorable evidence on the totality of the evidence presented to the trier of fact or on the defense strategy, the more likely that evidence is material

7. <u>What happens if I don't discover?</u>

See Evidence 1054.5

- The court can give a jury instruction about late disclosure of evidence. (Calcrim 306)
- The court can prohibit testimony if other sanctions have been exhausted.
- Court sanctions
- Continuance of the case or any other lawful orders
- In certain circumstances, YOU can become the defendant! PC 141(c) – an intent to withhold is required.

VOIR DIRE OUTLINE

1. The Process
    a. Pre-voir dire conference to go over ground rules (sometimes) (CRC 4.200)
    b. The court calls jurors into the courtroom, the court clerk gives the attorneys a juror list, the jurors enter the courtroom, the judge gives a brief introduction about the process.
    c. The court (aka judge) questions jurors about hardships
        i. Hardships – See CRC 2.1008
    d. The court conducts an initial examination of jurors (CRC 4.201; CCP 223)
    e. The attorneys questions the jurors (CCP 223)
        i. The judge shall permit "liberal and probing examination calculated to discover bias or prejudice . . . the scope of the examination shall be within reasonable limits . . . the trial judge shall not impose specific unreasonable or arbitrary time limits or establish an inflexible time limit policy" (CCP 223(b)).
    f. Challenges for cause (CCP 227-230)
        i. Amount: unlimited
        ii. Reasons: Bias, set forth in CCP 229
            1. Definition: "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party."
            2. Examples: tough to keep an open mind because of the nature of the case, bias against a group involved in the case, settled opinions about issues in the case, good chance that extraneous matters will enter into the decision making process, opinion on guilt or innocence, might refer to matters other than the law or evidence to decide the case.
        iii. Procedure:
            1. If you do not have any, then you "pass for cause."
            2. If you have some, you simply tell the judge that you do, the judge asks for you to approach, and then you discuss them at the bench so the jurors cannot hear.
            3. Note: in order to preserve the denial of a
    g. Peremptory challenges (CCP 231)
        i. Amount:
            1. Life case: 20 per side
            2. Felony case: 10 per side
            3. Misdemeanor case: 6 per side
            4. Co-defendant case: more (CCP 231(a), (b))
        ii. Reasons:
            1. Any, so long as it is not a forbidden reason based on a protected class (*Batson/Wheeler)*
        iii. Procedure:

1. You announce in open court: "the People would like to thank and excuse the juror seated in seat #_"

h. Selection of the Jury
   i. Each side either exercises a peremptory challenge or passes. The challenges are aimed only at jurors 1-12 (whereas for cause challenges are aimed at everyone who has been questioned). If both sides pass, one after another, then the jury is seated.
   ii. If, after some jurors are challenged, there are less than 12 jurors 'in the box,' then the court calls more jurors, questions them, and the process repeats itself until both sides pass and have settled on a jury.
   iii. After the jury is selected, the court reads some admonitions and pre-instructs the jury on same basic legal principles applicable to the case.

2. <u>What to do during the Court's voir dire:</u>
   a. Listen, be professional, observe jurors (clothes, books, magazines, demeanor, responses to questions, etc).
   b. Take notes using a note-taking/jury tracking system that works for you.
      i. Post-it notes are very useful and popular, for example, because you can move them around when the jurors move around.
3. <u>What to do during the defense's voir dire</u>
   a. Listen, be professional, observe jurors (clothes, books, magazines, demeanor, responses to questions, etc).
   b. Continue taking notes
   c. Object if necessary:
      i. Questioning is calculated to discovery bias or prejudice with regard to the circumstances of the particular case or the parties before the court. The judge should permit questions that are not "improper" (CCP 223(b)).
      ii. "Improper" questions attempt to precondition the jurors to a particular result or indoctrinate the jury (CCP 223(b)(3)).
4. <u>What to do during breaks/recesses</u>
   a. Be professional, do not interact with the jurors, do not discuss the case with anyone within earshot of any jurors.
   b. Observe the jurors when possible in the hallway
   c. You can do outside research on jurors so long as you don't contact them or attempt or appear to attempt to influence them
5. <u>What to during the prosecution's voir dire:</u>
   a. Goals:
      i. Gain information about jurors through questioning
         1. Get them talking! Encourage open, honest discussion.
      ii. Educate the jurors as much as possible about some of the issues in the case and about the process without attempting to indoctrinate them
   b. Questions:

i. Pick several questions to ask – the amount and the type will vary, depending on the type of case, the issues involved, and the amount of time the judge allows for voir dire.
ii. Some questions you ask of every single member of the jury, in order to learn about them, others you can ask of the panel as a whole, those are the questions designed more to educate them (but not indoctrinate!).
iii. The list of potential questions and techniques is vast, so refer to accompanying materials for ideas.

6. <u>Peremptory Challenges</u>
    a. Excuse unfavorable jurors
        i. Ideas about good/bad prosecution jurors are included later in this section.
        ii. You need 12 jurors who you can trust with your case.
    b. *Batson/Wheeler*
        i. The parties (prosecution and defense) can exercise a peremptory challenge against any juror for any reason *except* for a forbidden reason (CCP 231.5).
            1. The objecting party must show that it is more likely than not that the peremptory challenge was based on impermissible group bias.
                a. Examples of groups (Gov Code 11135):
                    i. Sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation.
            2. These challenges should be made outside of the presence of the jury.
        ii. The process:
            1. The objecting party must make a prima facie case by showing that the totality of the facts gives rise to an inference of discriminatory purpose.
                a. Note: even if the court finds no prima facie case, the best practice is to state your reasons anyway to preserve your case on appeal.
                b. Note: state your opinions on the record, do not simply give a number from some scoring system, state the specific reasons for the exercise of the challenge.
            2. If the prima facie case is made, the objected-to party must offer a race (or other group)-neutral explanation for the challenge.
                a. Examples of neutral explanations: see attached materials.

        i. They include: hostile looks, prior hung jury, inability to focus on evidence, relative with criminal conviction, own criminal conviction, bad feelings about the police, skepticism about the fairness of the criminal justice system, overwhelmed by outside stress, manner of dress, relative in prison, etc.
3. Even if a race (or other group)-neutral explanation is offered, the court must determine whether there has been discrimination.
    a. The court may look behind the purported neutral reasons at other factors:
        i. Disparate questioning: asking members of protected group different/more questions than others
        ii. Comparative analysis: kick juror from protected group for reason X but do not kick another juror for the same reason
        iii. Bottom line: your reasons for excusing a juror must be neutral, sincere, and persuasive.
4. Remedies:
    a. Dismiss the entire jury venire, reseating the excused juror, impose monetary sanctions, allowing the aggrieved party additional challenges.

Charging Outline

I. **The Basics**

A. Remember: when making a charging decision, we are affecting people's lives. This is probably one of, if not the, most important decision we make.

B. Use CALCRIM or crime finder to see what elements you must meet in order to file on a particular charge.

C. Your case usually isn't going to get any better than at the time of filing

D. When you file a case, you should feel comfortable enough to be able to take it to trial the next day, provided that you request and get the evidence you need (e.g., body cams, dash cams, 911 calls, toxicology results)

1. In certain circumstances, you can request the evidence in order to make a filing decision.
2. If it's an important case, you can request investigation.
    a. If we send a case back for investigation to the agency, chances are we aren't going to get that back.
3. Remember, anything you file, we have to be able to prove it beyond a reasonable doubt at trial.
4. Keep in mind that it's easier to explain when we have made a decision not to file something rather than have to explain why we are dismissing later on down the road.
5. Juries make decisions with their hearts and justify those decisions with their minds. If a case doesn't appeal to them, or they otherwise don't like it, you can still get a NG, even though it is a technical violation of the law.

E. Add and check the witnesses needed for motions, preliminary hearing, and trial at the time of filing.

F. Include a short description of the facts AND an offer in the case file at the time of filing.

1. If you see problems with the case, potential 1538s, Serna issues, please note those in the file.
2. The less time you spend having to re-read the file, the better.

G. When filing a case, or setting it for trial, check the witness screens to see if the officer is *Brady* listed. Several in our county are *Brady* listed and some are still active duty police officers.

H. If you are unsure about filing complaint on a police report, feel free to ask any other attorney. The attorneys are usually more than willing to answer questions and help. You can also bring the police report to a round table discussion and see what others think. If you have questions or concerns, call up the officer to get clarification.

I. If a police report comes in and the arrest and/or circumstances of the crime have made the news in some fashion, let management know. Management may want to review it themselves to make a filing decision and to list an offer in Karpel if filed. If you ever speak to a reporter, let management know immediately.

J. Talk to your victims and witnesses, especially if the case gets set for trial. However, either have someone else present while speaking with them or limit the specific details they give you regarding the crime. Anything they tell you about the crime, you have to discover to the defense and if they testify differently from what they told you, you can become a witness. While prepping them for trial, ensure you tell them to always tell the truth, if an objection is made wait until the Judge rules before you answer, and if you don't understand the question please say that, don't try to answer if you don't understand the question. If they mention a defense investigator/attorney wishes to speak to them, and the witness seeks your advice, the response is, the decision is entirely yours. Sometimes it is a benefit if you speak to the investigator as they realize your testimony can obtain a conviction, sometimes if you say something different from what you said before the interview, they will use that against you.

K. We have a victim-witness department. If necessary, we can ask that a V-W advocate be assigned to a case to help provide resources, information, and support to victims.

L. Be aware of your potential time limits if a defendant does not enter a general time waiver.

1. I/C- 30D from arraignment
2. Out of custody- 45D from arraignment
3. Out of custody- 30D from any other hearing
    a. **This can cause problems if you filed a case without having everything you need to prove it at a hearing or trial.

II. **Diversion**

A. Some people have little to no criminal history and therefore qualify for some sort of diversion. Please consider this when filing less serious misdemeanor crimes, such as petty theft, public intoxication, etc. and file the appropriate PES/Diversion form along with the complaint.

III. **DV cases**

A. If it is a dv case, with prior police reports, then file written notice and discover the prior police reports over ASAP. This makes it a lot easier if you do it at the time of charging because notice and reports need to be given 30 days before trial, exception if there is not 30 days before the trial when it is set.

B. If a report comes in listing 242/240 charges and it is dv case don't file a 242, file a 243el or 273.5. A 242 on a rap sheet doesn't indicate it is a dv case, and will be more challenging to use as a prior.

C. If it is a he said/she said case, no witnesses and no injuries, don't file it. You won't be able to prove it at trial. If it is a he said/she said and both have injuries, don't file it. You won't be able to prove who started the fight. If both parties are listed in the police report as victims and both are listed defendants, don't file. If the police can't figure out who started it a jury sure won't be able to.

D. Consider calling the victim before making a filing decision to see where he or she is now at. But see “G.” above.

IV. **Drug charges**

A. You need to review the case and defendant for DEJ/Prop eligibility and then file a DEJ/Prop 36 eligibility form along with the complaint.

V. **Misdemeanor forgery or bad check crimes aka “paper” cases**

A. Make sure you have all of the pertinent documentations, video/audio, and statements from appropriate witnesses.

MERCED COUNTY DISTRICT ATTORNEY'S OFFICE

POLICIES AND PROCEDURES MANUAL

FOR ATTORNEY EMPLOYEES

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MERCED COUNTY DISTRICT ATTORNEY'S OFFICE
POLICIES AND PROCEDURES MANUAL
FOR ATTORNEY EMPLOYEES

I. *GENERAL*

1.01. RESPONSIBILITIES OF A PUBLIC PROSECUTOR

The responsibility of a public prosecutor differs from that of the usual advocate; his or her duty is to seek justice, not merely to convict. The District Attorney has a duty to act with honor and dignity in service to those who elected him and to all people in the State of California. The prosecutor who is employed by the District Attorney has the same duties and obligations.

Every attorney in the Merced County District Attorney's Office should find his or her employment rewarding and challenging. The professionalism, quality, and capability of our staff are the keys to our success; therefore, we carefully select our employees. In turn, we expect employees to contribute to the continued success of the office. Highly qualified, motivated, and professional attorneys and staff in the District Attorney's Office best serve the citizens of Merced County.

The policy and procedures manual includes the obligations, duties, and conduct expected and required of all employees. The manual may be supplemented by memoranda issued by the District Attorney throughout the year which will amend the existing policies. A hard copy of the initial document will be provided to each attorney to read and each attorney will be required to sign an acknowledgment of receipt and agreement to follow. Each attorney is responsible for knowledge of its contents.

1.02. CONFIDENTIALITY.

The District Attorney's Office is a law office, and its business is of a confidential nature. Confidential District Attorney matters should not be discussed outside the office except in the normal course of business.

Discussion of cases within the office should be engaged in with a view toward productive and effective prosecution. Idle gossip wastes time and trivializes cases, and shows a lack of respect for the important business of the office. This policy should not be construed to discourage the free flow of ideas, opinions and suggestions among office personnel.

1.03. CONDUCT AND DECORUM IN DISTRICT ATTORNEY'S OFFICE

The District Attorney's Office is a professional law office. Professional and appropriate behavior and dress is expected at all

times. Because attorneys may be called to court at any time, they must dress appropriately for court at all times, including Fridays. Appropriate dress in a law office means business attire which includes, at a minimum, coats and ties for men and dresses or business suits for women. As a guide to selecting clothing, attorneys should keep in mind that professional attire is usually conservative in nature, and is selected with a view toward the effective advocacy of one's professional position.

Courtesy to the public and co-workers is required. Swearing and other forms of offensive expression are never acceptable.

1.04. PRIVATE USE OF PHOTOCOPY EQUIPMENT, OFFICE SUPPLIES, AND DISTRICT ATTORNEY LETTERHEAD.

We are government employees, and the equipment and supplies we use belong to the taxpayers. Anything more than the incidental use of office photocopy equipment, fax machine, cell phones, or other electronic equipment for matters which are not the subject of one’s employment is prohibited unless otherwise authorized.

The purpose of District Attorney letterhead stationary or system generated logo is to communicate business matters of the District Attorney’s Office. It may not be used to conduct personal business or to give the appearance of representing the office or that the office is involved with or endorsing some unrelated matter by its use. It is recognized that occasionally attorneys or investigators may be asked to write letters of recommendation or congratulations which, while not related to a particular case being handled by the attorney, is not unrelated to office business. This is an exception to the policy set forth above, and one that should be exercised with caution and with prior permission from a supervisor, to ensure there is an office related purpose to the correspondence and that all such communications are appropriate.

II. INTERNAL AFFAIRS AND PERSONNEL POLICIES.

2.01. ATTORNEY PROMOTIONS

All attorney promotions are awarded based on merit, at the discretion of the District Attorney, unlike step increases, which are automatic, based upon satisfactory tenure. Promotion from Attorney I to II, Attorney II to III and Attorney III to IV will be made by the District Attorney with consultation from the management team.

Any attorney seeking promotion to Attorney IV must submit a written application. The application form is available from the Office Administrator. The application for promotion to Attorney IV should be provided to the District Attorney and the applicant's direct supervisor. The attorney applying will be given an opportunity

to meet with management and discuss his or her application. The decision regarding promotion will be made by the District Attorney with consultation from the management team and will be solely based on merit. Length of service in the office is just one of many factors which will be considered. Factors given great weight will include trial ability and trial preparation techniques; the number of difficult and complex felony jury trials completed and their success; the ability to strategize and successfully prosecute difficult and complex cases; the ability of the attorney to handle a case with minimum guidance and no creation of side issues; the willingness to go to trial on difficult cases and a demonstrated dedication to the office. Reasons for the denial of promotion to Attorney IV will be provided in written form to the attorney.

Motions are an integral part of any successful prosecution and the quality and creativity of such motions will also be evaluated. Additionally, willingness to learn and effectively utilize the computerized case management system is a skill that may be evaluated.

The office may formulate alternative requirements for promotion for those attorneys assigned to special functions, such as consumer or environmental protection or research.

Differential pay or “Super 4” pay, as it is commonly known, is designated for attorneys who are expert trial attorneys who handle the most complex and intricate cases, including major high profile cases. The office has a limited number of differentials. While handling complex litigation in high profile cases is a prerequisite to receiving the differential, the fact that any attorney does so will not automatically entitle him or her to the differential. The designation is discretionary with the District Attorney and may be re-designated as appropriate. The fact that an attorney receives “Super 4” pay does not mean that he or she always will continue to receive it or has any form of entitlement to it. The District Attorney may re-designate who receives the “Super 4” pay, consistent with his discretion, the needs of the office, the limited number of slots available and the desire to reward those doing that level of work.

2.02. IDENTIFICATION CARDS, BUSINESS CARDS, AND BADGES.

The profession of a public prosecutor often requires that the attorney be able to identify him or herself as such. Personalized District Attorney identification cards, business cards and District Attorney badges should be used only within the scope of an employee’s official duties and any use of such identification method beyond the scope of employment is generally discouraged. Prosecutors are not peace officers, and should keep in mind that displaying a badge or other identification with the intent to convey the impression that he or she is a peace officer is a misdemeanor. (Penal Code §538d.) See, generally, CDAA's "Professionalism, A Sourcebook of Ethics and Civil Liability for Prosecutors," Chapter III, Section XI, "Duty Not to Misuse Official Position."

Specific prohibitions on the use of these items include the following:

1. Using any District Attorney identification method outside the scope of employment in a manner that may result in intimidation.

2. Using the card or badge to seek preferential treatment, either expressly or implied, by other agencies in the criminal justice system.

3. Using the card or badge as a means of gaining entry to any location which one is not otherwise authorized to enter.

An exception to the prohibitions may occur when an employee is required to confirm employment by the District Attorney. For example, use of the identification card in response to requests by merchants or bank employees for proof of employment is not prohibited.

At the completion of one's employment, the personalized identification card, unused business cards, and badge must be turned in to a supervisor or the Office Administrator.

2.03. EMPLOYEE CONDUCT -- GENERAL PRINCIPLES.

The District Attorney is the attorney for the People of the State of California and has the obligation to prosecute public offenses on behalf of the People. Because of this obligation, and its importance to the criminal justice system, members of the general public have the right to expect, and do expect, that all employees of the District Attorney’s Office will conduct their official and personal business in a fair, legal and ethical manner on all occasions. All attorney employees are required, at a minimum, to be familiar with and to follow the Rules of Professional Conduct of the State Bar of California.

All employees are expected to conduct themselves professionally in their dealings with members of the public. The responsibility to act professionally extends to all aspects of behavior, and includes contacts with personnel from other departments or agencies as well as interactions with other members of the District Attorney staff.

Each employee of the District Attorney’s Office, regardless of assignment or position, has the responsibility to maintain the positive image, reputation and credibility of the office.

The public is exposed to the District Attorney's Office through its interactions with individual attorney members both within and outside the office. The credibility of the office as a whole depends greatly upon the observation by the public of the actions of its members. Such members are aware of the high public visibility of their jobs and of their actions whether they are on the job or on

their own time, a visibility which they knowingly and willingly accept upon assuming a position in the office. Criminal prosecutions carried out by the office would be substantially hindered if a member were to either engage in illegal conduct or permit such conduct to occur or continue in his or her presence. In the latter case, where a criminal wrongdoer or a third party is aware that a member of the office even passively condones the activity, that person's respect for the requirements of the law will be effectively diminished.

All employees of the District Attorney's Office must take enhanced precautions against being in situations in which illegal drugs are or may be used. While we recognize that marijuana may be used by a person acting pursuant to a physician's recommendation, as permitted by Proposition 215, because such situations can be subject to alternative interpretations and may create the appearance of impropriety, employees are encouraged to use caution in such situations.

As noted above, every Deputy District Attorney must be particularly sensitive to the public perception of his or her activities. This is particularly true in situations which may endanger the safety of other persons. For example, the District Attorney is acutely aware that driving under the influence constitutes a danger to the safety and security of our community. As a consequence, Deputy District Attorneys are particularly warned to take enhanced precautions against being in such situations.

Any contact with a law enforcement or administrative investigative agency, whether as a witness to or the subject of an investigation or an arrest, must be reported by the employee to the employee's immediate supervisor or other member of the management team. Such report must be made no later than the next working day.

All employees, regardless of assignment or position, have the responsibility of maintaining a positive work environment. Creating and maintaining such an environment includes the maintenance of cordial interactions between all employees. Rudeness, abusive, violent or threatening behavior by one employee towards another will not be tolerated. Where disputes occur between employees or where work related issues arise, such issues must be resolved in a professional, nonthreatening manner. Wherever possible, such issues should be resolved by the concerned employees themselves. Management stresses the importance of first attempting to resolve work related issues in a constructive manner at the individual level without the involvement of third parties. Where employees are unable to resolve these issues at their own level they should advise their supervisors and use their chain of command to resolve the problem. Formal dispute resolution procedures should be used only after informal procedures have been exhausted.

2.04. SICK LEAVE, ABSENCES, VACATIONS AND TIME CARDS.

When an attorney is going to be out of the office due to illness or other unanticipated absence, he or she must notify others of that fact and make arrangements for coverage, if possible, as follows.

a). Every attorney must speak to a supervisor, preferably, or his or her secretary if he or she will be out of the office. Notice should be given as early as practicable, but no later than the start of business at 8:00 a.m. of the morning on which the attorney will be absent.

b). Vacations are an important balance to the hard work that everyone puts in, and it is District Attorney policy to enable employees to take their vacations at their preferred times. However, the office must always have enough attorneys on duty to carry out its essential functions.

Most vacations are taken during the summer months and the Christmas holidays, which result in substantial competition for available time periods. For this reason, and as a general rule, vacations will be approved on a "first come, first served" basis. Vacation requests are to be made to one's immediate supervisor for approval. They will then be checked against the vacation calendar to determine if the request can be granted. The attorney should refer to the office calendar prior to requesting a vacation date, which will show all the vacations approved as of that date. If conflicts are already evident, the attorney should try to work with others who have requested the same time periods to see if an accommodation can be reached. Certain kinds of requests cannot be granted and should not be requested. A request for a date more than a year in advance generally cannot be approved. Multiple, individual dates (e.g., every Friday) cannot be granted. A date that conflicts with an upcoming trial cannot be approved. An attorney may not block out more time than he or she plans to use for a vacation, even if the exact dates are not yet known, as this may prevent other requests from being granted.

The attorney's duties to the office and to the management of his or her own cases come first. It is the responsibility of the attorney to arrange for coverage for his or her assignment during a vacation, working together with his or her supervisor. The attorney shall arrange for coverage no later than a week prior to going on vacation. After approval by a supervisor, the attorney must notify all appropriate parties, including staff.

c). Office hours are generally defined from 8:00 am to 5:00 pm daily, the noon hour as lunch. Attorneys are expected to be in their offices and working as close to 8:00 am as possible.

d). Although attorney staff are considered salaried employees, completion of biweekly time cards is required for general accounting and grant-funding purposes. Time cards are automatically generated each pay period and distributed to staff by the department's payroll clerk. Time cards must account for a minimum of 80 hours each pay period for full-time staff. Completed, signed time cards must be submitted to supervisors for their review and signature in sufficient time to meet the deadline for the payroll clerk. This deadline is modified only when official holidays impact payroll processing; staff will be advised via e-mail when there are changes.

As stated earlier, time cards should account for 80 hours each pay period for full time-staff, through a combination of hours worked or other paid leave. Attorney staff need to total hours at the bottom of each column, as well as across, entering the biweekly total in the first week column only. Time cards should be completed legibly.

e). All Attorneys are required to fill out a monthly time study form. Attorneys assigned to grant-funded programs or performing other reimbursable activities should record those hours on the time study, separate from general hours worked. Eligible time should be rounded to the nearest quarter hour. Time studies must be maintained during the month and then completed and turned in to Fiscal as soon after the end of the month as possible and in any event, no later than the tenth of the next month.

2.05. PROFESSIONAL DEVELOPMENT.

It is the policy of this office to provide each attorney with the training and expertise necessary for that person to excel as a trial attorney. Pursuant to the Attorney's MOU, each attorney has $1200.00 per year to spend on training, books or materials. Any request for attendance at an out of town training program presented by either CDAA or NDAA, must be approved by the Attorney's supervisor in writing and the approval presented to Fiscal no later than three weeks prior to the date of training, in order to allow sufficient time to prepare checks and payment. Occasionally, training is provided in office. Management reserves the right to make local training mandatory and to pick out of town training based upon what management determines to be most appropriate for the individual attorney. All requests for training are granted on a first come first served basis and the request for a particular training may be denied based upon staffing requirements of the office.

2.06. PERSONAL INVOLVMENT IN CRIMINAL PROSECUTIONS

District Attorney employees should avoid conflicts of interest at all times. When an attorney is related to or knows a defendant or

a victim in a case that is currently being prosecuted by the office, that employee must not try to influence the outcome of the case in anyway.

When an attorney assigned to a case is contacted by any District Attorney employee who is either related to or knows a defendant or victim, the assigned attorney shall report the contact to a Chief Deputy immediately.

2.07. OUTSIDE EMPLOYMENT

Attorneys may hold outside employment as long as they are able to meet the performance standards of their job with the District Attorney's Office. All employees will be judged by the same standards and will be subject to the District Attorney's Office scheduling demands, regardless of any existing outside work requirements.

No attorney shall engage in any employment activity or enterprise for compensation which is inconsistent, incompatible or in conflict with his/her duties as an employee of the District Attorney's Office. Attorneys may not engage in the private practice of law, whether or not for compensation. Attorneys are allowed to handle personal legal matters for themselves or their family as long as such matters do not conflict with their job as a Deputy District Attorney. An attorney must notify his/her supervisor if those legal matters will involve court appearances.

If it is determined that an attorney's outside work interferes with performance or the ability to meet the requirements of the District Attorney's Office, the employee may be asked to terminate the outside employment.

Prior approval by the District Attorney is required before acceptance of outside employment.

2.08. COUNTY PERSONNEL POLICIES.

In addition to the policies set forth in this manual and added or amended from time to time, the attorney's terms and conditions of employment are also subject to those policies adopted by the County of Merced which are made applicable to District Attorney employees.

2.09. VIOLATIONS OF POLICIES.

These policies are designed to create a professional work environment and to aid the attorney in becoming a successful prosecutor. The violation of one or more of the policies in this manual by an attorney may result in appropriate discipline, from a verbal warning up to and including termination of employment, subject to H.R. rules and regulations.

III. TRIAL OPERATIONS AND RELATED POLICIES

3.01. ATTORNEY COVERAGE ISSUES

Subject to more specific policies set forth in sections 2.04 and 3.02 of this manual, each attorney is responsible for covering his or her own court or other assignment obligations. If an attorney is not able to make a court appearance, or other obligation, due to a conflict, an emergency or a vacation, it is that attorney's obligation to arrange coverage of the matter. Once coverage is arranged, the attorney must convey the arrangements to his or her supervisor in a timely manner.

3.02. CALENDAR CALL.

The District Attorney's Office may assign a felony Calendar Deputy to each felony courtroom. That attorney will make appearances for other attorneys whenever possible. The Calendar Deputy shall handle all arraignments, settings, non-contested motions to continue, pleas, etc. Only in an unusual situation will the attorney assigned to the case, appear in calendar court. This will avoid the waste of attorney time in court.

To enable the Calendar Deputy to perform competently on all matters, the assigned attorney shall annotate the calendar prior to the start of court, unless other arrangements are made.

Attorneys in grant positions will continue to make court appearances as mandated by the grant. However, they should attempt to minimize court time by utilizing the Calendar Deputy where it is consistent with their grant.

3.03. PLEA OFFERS.

Attorneys are encouraged to make fair and just offers in most cases. In some cases, justice requires that no offer be made. On some occasions, a supervisor may make an offer in a particular Attorney's case. That offer may not be changed or modified without prior approval by a supervisor.

In felony cases, offers should be made prior to preliminary hearing. If the offer is rejected by the defendant, the offer should be withdrawn and not made again. Unless further investigation reveals evidence problems or unknown circumstances occur, Attorneys should prepare to go to trial or make another offer that is significantly more severe than the previous offer. This will ensure that cases settle before the preliminary hearing thus avoiding the waste of resources.

3.04. DISCOVERY POLICY.

The District Attorney's Office's discovery policy is expressed by the law as set forth in Brady v. Maryland and Penal Code Section 1054. Any questions, including those relating to the safety of a witness or an ongoing investigation, should be directed to one's supervisor.

3.05. TRIAL PRACTICE.

Motions are an important part of every prosecutor's trial work. It is encouraged that any prosecutor going to trial in a felony case will make appropriate motions in limine in a timely manner. Prosecutors going to trial in a misdemeanor case will attempt to do so whenever practicable.

In any felony case resolved by a trial in which the defendant is convicted, the trial prosecutor is encouraged to file a written memorandum in aid of sentencing, unless one's supervisor directs otherwise. The memorandum should address the facts of the case, the factors in aggravation or mitigation, the sentence the prosecution is seeking, including case law and factual matters which support the requested sentence. Some cases resolved short of a jury trial may still benefit from the filing of a memorandum in aid of sentencing. In such a case, a sentencing memorandum is expected. In addition, prosecutors should be aware of Penal Code Section 1203.01 and file such statements wherever appropriate.

3.06. COURTROOM ETIQUETTE.

All attorneys are expected to observe proper etiquette in all their appearances before judges and commissioners alike. This includes, but is not limited to the following:

a) Attorneys must always treat judicial officers with respect.
b) Attorneys should address their comments to the judicial officer and not to opposing counsel.
c) After the court has definitively ruled upon any matter, attorneys are to act professionally and accept the ruling respectfully.

3.07. RELEASE OF POLICE REPORTS

The District Attorney's Office does not release police reports except in unusual circumstances, to be determined by a supervisor. All requests for police reports should be referred to the Court Clerk's Office where the reports relating to filed cases are public record. In all other situations, including those in which no charges are filed, the law enforcement agency involved shall act on requests for release of reports.

3.08. PEREMPTORY CHALLENGES OF JUDGES.

A peremptory challenge of a judge under the provisions of Section 170.6 of the Civil Code of Procedure is a serious and important action that has a direct impact on the relationship between the courts and the District Attorney's Office, and should be limited to those cases in which there is an overriding and compelling need. For that reason, the use of a peremptory challenge deserves careful consideration.

Accordingly, the authority to invoke the provisions of Section 170.6 of the Civil Code of Procedure is restricted to the District Attorney or other supervisor. A prosecutor must seek approval to challenge a judge as expeditiously as possible, and not wait until such time as the matter cannot be given the full reasoned attention it deserves.

3.09. RULES OF COURT – LOCAL.

All attorneys must be familiar with Merced County Rules of Court, which are incorporated as policy for this office.

3.10. SIGNIFICANT CASES.

The District Attorney and direct supervisor should be notified of any significant cases in the office. Significant cases include, but are not limited to, cases which have received or can be expected to receive media attention, three strike cases, cases which may substantially impact a significant portion of the community, cases with unusually large amounts of drugs or weapons, etc. It is anticipated that a prosecutor will have sufficient professional experience to recognize such cases when they present themselves. Offers in significant cases shall be made by a supervisor and no significant case may be dismissed without prior supervisor approval.

3.11. THREE STRIKES POLICY.

If strike priors have been filed in a case, they may not be stricken and must be defended in court, unless permission is sought from a supervisor.

IV. VICTIMS, WITNESSES AND THE PUBLIC

4.01. PRESS POLICY.

As public officials, prosecutors have a duty to provide information to the public about the administration of criminal justice. In releasing information to the media on a specific case,

prosecutors must consider individual privacy rights, the defendant's right to a fair trial, and whether dissemination of the information fulfills a public policy.

In deciding what information to release, the prosecutor should refer to Rule 5-120 of the California Rules of Professional Conduct and Rule 3.6 of the American Bar Association Model Rules of Professional Conduct. Prosecutors should also be familiar with the California District Attorneys' Association Prosecutor's Notebook, Volume XXIII, entitled "The Media," and Volume XXVII, entitled "Professionalism, A Sourcebook of Ethics and Civil Liability for Prosecutors."

Written press releases should be provided to the press while the subject is still timely. They require prior approval of the District Attorney and should therefore be submitted for approval as soon as possible. Other verbal communications with the press do not require prior approval, but should be conducted in the manner set forth in this policy provision. At a minimum, phone calls from the press must be returned as soon as possible. If there is a reason why information cannot be disclosed, that fact should be given. Notice should be given to the District Attorney immediately after any communication with the press.

4.02. TELEPHONE CALLS AND E-MAIL COMMUNICATIONS.

The District Attorney's Office needs to be responsive to the community, including law enforcement officers, private citizens and defense attorneys as well as District Attorney staff. To ensure that we make every effort to communicate in a timely manner with others, every attorney must listen to his or her voice messages and read e-mails as often as possible. Voice mail boxes should never be full, and should be emptied as often as possible. As far as it is practicable, telephone calls and e-mails are to be responded to within twenty-four hours.

4.03. VICTIMS' RIGHTS; RESTITUTION.

a). It is the Legislative intent under Penal Code Section 679 to ensure that all victims and witnesses of crimes are treated with dignity, respect, courtesy and sensitivity. Victims and witnesses of crimes rely on us to inform them of their rights and ensure those rights are honored and protected. Those rights should be honored and protected no less vigorously than the protections afforded criminal defendants. Some of those rights are highlighted below:

1. The right to be notified as soon as feasible that a court proceeding to which he or she has been subpoenaed as a witness will not proceed as scheduled, providing the prosecuting attorney determines that the witness' attendance is not necessary. (Penal Code Section 679.02(a)(1)).

2. The right to be notified of all sentencing proceedings, and of the right to appear and reasonably express his or her view. (Penal Code Section 689.02(a)(3)).

3. The right to be notified by the District Attorney's Office where the case involves a violent felony, as defined in subdivision (c) of section 667.5, or in the event of a homicide, the victim's next of kin, of a pending pretrial disposition before a change of plea is entered before a judge. (Penal Code Section 679.02(a)(12)). Note that this last section ((a)(12)) means that certain victims have the right to be notified before any plea bargain is accepted in court. The intent, of course, is that if a victim objects, they may make those objections to the court in an effort to prevent the judge from accepting the plea. Each of us needs to remember our obligation in this area and contact victims before we enter into negotiated dispositions.

Equally important, we must fully utilize our Victim Assistance Unit. They are there to assist us in developing and maintaining relationships with our victims and also ensuring that the victims receive the services to which they are entitled.

b). Whenever a case involves a victim, pursuant to Penal Code Section 1202.4(f), restitution to the victim for actual losses must be requested, or restitution to the State Board of Control to the extent claims are paid by the Victims of Crime Program. Restitution issues are best resolved at sentencing. Contact with victims should be made as early in the case as possible to coordinate receipt of loss information. The attorney should utilize the Restitution Specialist or the Probation Department, to contact victims and facilitate collection and submittal of loss information.

Where a restitution amount cannot be set at the time of sentencing, a "Restitution Reserved" order shall be imposed by the court, directing that restitution be determined at the direction of the court. Where appropriate, the matter should be set for a Restitution Hearing. Adequate notice should be given to the victim, including sufficient time to calculate and provide proof of loss.

The California Constitution and Penal Code Section 1202.4 provide for the victim’s right to restitution. It is the responsibility of the District Attorney’s Office to request restitution on behalf of the victim. If restitution fines and orders requested by District Attorney staff are denied, set aside, waived, reduced, stayed, etc., the file should be documented to reflect the court’s rationale for such actions.

4.04. POTENTIAL LIABILITY ISSUES.

Questions concerning witness safety, threats of violence, and similar matters may arise which could invoke the liability of the office or the individual attorney for a particular act or omission.

Attorneys should review relevant case law on this subject, as well as Chapters II and IV of the CDAA publication "Professionalism, A Sourcebook of Ethics and Civil Liability for Prosecutors." The office has several copies of this book available. Additionally, such matters should always be discussed with the attorney's supervisor as early as possible.

4.05. WITNESS IMMUNITY.

In the event a witness either informs a Deputy District Attorney or the attorney assigned anticipates a witness he or she will call, in either a felony or misdemeanor case, will refuse to answer a question on the grounds he may be incriminated thereby, the attorney shall contact his or her supervisor to determine if an immunity order should be sought. If the decision is that immunity should be given, the attorney, in a felony case, will prepare the necessary order and declaration pursuant to Penal Code Section 1324. In misdemeanor cases, immunity may be granted through voluntary compliance; see generally, Penal Code §1324.1. In no case, should Transactional Immunity be granted without prior approval by a supervisor. Attorneys should always seek Use Immunity as a general rule.

4.06. WITNESS RELOCATION PROGRAM

The Merced County District Attorney's Office participates in the California Witness Relocation and Assistance Program (CalWRAP). CalWRAP is a state program administered by the California Department of Justice. The CalWRAP provides relocation and assistance services for witnesses in criminal proceedings where there is evidence of substantial danger of witness intimidation or retaliatory violence.

The Chief of Investigations is in charge of CalWRAP and is responsible for the witness relocation activities within the District Attorney's Office. The District Attorney's Office will follow the procedures and directives as mandated by Penal Code Section 14020-14033, as well as the policies and procedures set forth below.

If an attorney identifies a victim or witness that they feel is in need of services under CalWRAP, they will immediately notify their supervisor. The Chief Deputy District Attorney will review the situation and if they also feel that a witness protection program is necessary, they will contact the Chief Investigator.

Threat of danger and program eligibility shall be assessed and determined by the Chief Investigator. **Attorneys are not authorized to offer any form of participation in the CalWRAP program to any person, nor shall they make any promise or representation that may impose financial obligation on the department.**

V. MISCELLANEOUS

5.01. POLICY CONCERNING USE OF CLETS.

Nearly all District Attorney's Office employees have access to confidential criminal record information, confidential Department of Justice and National Crime Information Center data, and/or Department of Motor Vehicle record information which is controlled by statute. Misuse of such information may adversely affect the individual's civil rights and violates the law. Penal Code Section 502 prescribes the penalties relating to computer crimes. Penal Code Sections 11105 and 13300 identify who has access to criminal history information and under what circumstances it may be released. Penal Code Sections 11140-11144 and 13301-13305 prescribe penalties for misuse of criminal history information. Government Code Section 6300 prescribes the felony penalties for misuse of public record and CLETS information. Penal Code Sections 11142 and 13303 state:

> "Any person authorized by law to receive a record or information obtained from a record who knowingly furnishes the record or information to a person not authorized by law to receive the record or information is guilty of a misdemeanor."

California Vehicle Code Section 1808.45 prescribes the penalties relating to misuse of Department of Motor Vehicle record information.

The Office Administrator will designate certain District Attorney employees who will be authorized to operate the CLETS (California Law Enforcement Telecommunications System) terminals within the District Attorney's Office. All staff authorized to use CLETS will be trained in the use of CLETS and will be issued a CLETS personal password code and use no one else's code but their own. No person or employee other than those authorized may operate CLETS terminal located within the District Attorney's Office.

Any employee who is found to be responsible for misuse of confidential records or CLETS are in violation of this policy, and are subject to disciplinary action, up to and including termination. Violation of the laws mentioned in this policy may also result in criminal and/or civil action.

5.02. FILE RETENTION AND DESTRUCTION POLICY.

The file retention policy for the District Attorney's Office, by file type, is as follows:

a). Felony files. All felony files are to be destroyed after ten years, with the following exceptions, where files are to be retained until specific case-by-case decisions are made to destroy them:

1. Cases Involving Death: Penal Code §§187(a), 192(a), 192(b), 192(c), etc.

2. Any case in which a sentence longer than ten years is imposed.

3. Family Protection cases. Felonies, misdemeanors and rejected family protection cases should be retained for 10 years from the date of the offense. This evidence is deemed admissible pursuant to Evidence Code Section 1109 for 10 years.

b). Misdemeanors. All misdemeanor case files (except for family protection cases) are to be destroyed after five years.

c). Juvenile Offenses. All juvenile cases are to be destroyed after the minor turns 21 years of age. Exceptions to the rules are as follows:

1. If the juvenile was sentenced to the California Youth Authority.

2. Strike cases, but only if the minor was at least 16 years of age at the time of the offense.

d). Civil Cases. Case files in civil consumer and environmental protection matters shall be retained until identified for destruction by the attorneys assigned to the civil unit.

5.03. VEHICLE IMPOUND AND STORAGE.

The District Attorney's Office may be responsible for storage costs of any vehicle seized as evidence during an investigation in a criminal case. The charges to our office begin to accrue once a case is filed and continue until disposition of the case or the vehicle is released. If the storage is done at the direction of a prosecutor, this office is responsible for the fees, even if no charges are filed. Because of substantial bills which have accrued in the past, no vehicle may be requested to be seized and stored without the approval of a supervisor. If a vehicle has already been seized, the filing deputy must discuss the vehicle storage issues with their supervisor as soon as possible. Evidentiary examination must be requested and completed as expeditiously as possible, and the vehicle released as soon as practicable.

5.04. EXTRADITIONS.

It is the policy of the Merced County District Attorney’s Office to proceed with extradition upon the location of an absconded subject. All extradition decisions will be made by a supervisor.

The following factors will be considered in the interest of uniformity:

1. The remoteness and significance of the underlying case;
2. The amount of punishment available and remaining to be imposed;
3. The present custody status of the offender and the possible long term incarceration of the defendant in another institution;
4. The verified rehabilitation of the offender;
5. The expense of extradition when considered in light of factors 1 through 4, above.

5.05. STATE BAR CONTACTS.

Correspondence or reference to correspondence or communications with the State Bar of California, complaining about an attorney's misconduct, are to be considered serious. Such referrals from the District Attorney's Office will obviously be given careful review by the State Bar, because they have been made in the name of the Merced District Attorney's Office. Therefore, if a Deputy District Attorney wishes to make such a referral or detail the potential of such a referral in any official office correspondence, the prior approval of the District Attorney is required. If an attorney feels a referral or reference to the potential of a referral is warranted, a memo shall be prepared setting forth the underlying facts along with the reasons reference to the California State Bar Association is deemed warranted.

This policy is also intended to apply to all communications concerning State Bar discipline proceedings, including any comments concerning proposed or imposed discipline.

In the event that an Deputy District Attorney is the subject of a State Bar investigation or proceeding, that attorney must immediately report this fact to the District Attorney.

This policy does not apply to requests from the Judicial Nominees Evaluation Committee of the State Bar for the purpose of evaluating judicial nominees. Whenever possible, attorneys are urged to cooperate with the JNE Commission in the interests of having the best candidates selected.

5.06. HARASSMENT POLICY.

It is the policy of the Merced County District Attorney's Office to promote an employment environment free from harassment having the effect, either directly or indirectly, of discriminating against a County employee or applicant on the basis of race, color, creed, religion, national origin, ancestry, disability, medical condition (cancer related and genetic characteristics), marital status, sex, sexual orientation, age (over 18), pregnancy, gender, veteran status, or any other non-merit factor, and to take reasonable steps to prevent such harassment from occurring in the employment practices environment.

Harassment includes but is not limited to verbal harassment, e.g., epithets, derogatory comments or slurs on a basis enumerated in the foregoing paragraph; physical harassment, e.g., assault, impeding or blocking movement, or any physical interference with normal work or movement when directed at an individual on a basis enumerated in the foregoing paragraph; visual forms of harassment, e.g., derogatory posters, cartoons or drawings on a basis enumerated in the foregoing paragraph; or sexual advances, including but not limited to sexual advances which condition an employment benefit upon an exchange of sexual favors. For the purposes of this procedure, discrimination is further defined in County Rules and Regulations.

It is the policy of the Merced County District Attorney's Office that such harassment shall not be tolerated, condoned or trivialized, and any harasser, if a County employee, manager, official, volunteer, contractor or vendor, shall be subject to appropriate discipline, including possible dismissal, as determined by the employee's department head.

5.07. INFORMATION TECHNOLOGY

(a) Case Management System

The integrity of the computerized case management system is extremely important and every employee should make sure that they put accurate and comprehensive information into the system. Errors, inaccuracies and incorrect information should be brought to the case management administrator’s attention as soon as possible.

Every attorney is responsible for recording accurate case disposition information in the case management system in every matter they handle. This includes the cases assigned to them as well as cases they dispose of which they handle for other attorneys. In order to insure competency, each attorney is responsible for learning and understanding case charging procedures, case disposition procedures and day to day event entry procedures.

(b) Computer use.

Office computers are public property and are to be used primarily for official District Attorney business. The standards below define computer usage for the District Attorney’s Office:

1. E-mail is a valuable resource for the communication of information that is necessary to conduct the mission of the District Attorney’s Office. Limited, occasional or incidental use of the e-mail systems for personal purposes may be acceptable, if done in a professional and appropriate manner that does not interfere with business use or the performance of the employee’s duties.

2. Our computers are equipped with a standardized set of software and hardware components that have been extensively tested for compatibility. This standard set of software and hardware allows the department to maintain this system with a small staff of technicians. No software or hardware may be loaded or installed on your office computer without specific approval. If you have special needs for different or additional software or hardware, approval must be obtained from the Automation Systems Analyst and your supervisor.
3. Computer games are not to be loaded on your computer, downloaded from the Internet, or any other source. Computer games are not to be played on office computers. The playing of games on the computers of a prosecutorial agency is inconsistent with our public safety mission.
4. Access to the Internet is provided to all members of the attorney staff for business use. Occasional or incidental use of the Internet for personal purposes may be acceptable, if done in a professional and appropriate manner. Accessing pornographic materials and online gambling do not serve a legitimate business use. Excessive or prolonged Internet access for personal matters is not appropriate.
5. The Internet may be used to access generally recognized news media sites when it does not interfere with assigned duties. The radio feature of the Media Player software may not be used for streaming audio or video. Streaming audio or video slows the entire network for all staff and is prohibited for personal use.
6. Every member of the staff is responsible for the safekeeping and care of their assigned computers. Repeated or careless damage or loss to expensive public property such as our computers may be charged to the staff member.
7. There is no right to privacy for any information you enter into your office computer. Because of the need to safeguard data, everything entered into an Office computer is automatically saved. This data and internet use may be audited at random at the direction of the District Attorney. Violation of these computer use policies will subject an attorney to discipline.

(c) Social Networking

This section is intended to address issues associated with employee use of social networking sites and to provide guidelines for the regulation and balancing of employee speech and expression with the legitimate needs of the department. Nothing in this section is intended to prohibit or infringe upon any employee’s communication, speech or expression that has been clearly established as protected or privileged.

This section applies to all forms of communication including, but not limited to, film, video, print media, public or private speech, use of all Internet services, including the World Wide Web, email, file transfer, remote computer access, news services, social networking, social media, instant messaging, blogs, forums, video and other file sharing sites.

Public employees occupy a trusted position in the community, and thus, their statements have the potential to contravene the policies and performance of this department. Due to the nature of the work and influence associated with the District Attorney's Office, it is necessary that employees of this department be subject to certain reasonable limitations on their speech and expression. To achieve its mission and efficiently provide service to the public, the Merced County District Attorney's Office will carefully balance the individual employee's rights against the department's needs and interests when exercising a reasonable degree of control over its employees' speech and expression.

Employees should consider carefully the implications of their speech or any other form of expression when using the Internet. Speech and expression that may negatively affect the safety of the Merced County District Attorney's Office employees, such as posting personal information in a public forum, can result in compromising an employee's home address or family ties. Employees should therefore not disseminate or post any information on any forum or medium that could reasonably be anticipated to compromise the safety or privacy of any employee, an employee's family or associates.

5.08. SPEECH AND EXPRESSION

To meet the department's safety, performance and public trust needs, the following is prohibited:

(a) Speech or expression made pursuant to an official duty that tends to compromise or damage the mission, function, reputation or professionalism of the Merced County District Attorney's Office or its employees;

(b) Speech or expression that, while not made pursuant to an official duty, is significantly linked to, or related to, the Merced County District Attorney's Office and tends to compromise or damage the mission, function, reputation or professionalism of the Merced County District Attorney's Office or its employees;

(c) Speech or expression of any form that could reasonably be foreseen as creating a negative impact on the safety of the employees of the department. For example, a statement on a blog that provides details of a search warrant could reasonably be foreseen as potentially jeopardizing employees by informing criminals of pending special operations details.

(d) Speech or expression that is contrary to the California Rules of Professional Conduct;

(e) Use or disclosure, through whatever means, of any information, photograph, video or other recording obtained or accessible as a result of employment with the department for financial or personal gain, or

any disclosure of such materials without the expressed authorization of the District Attorney (Penal Code § 146g);

(f) Posting, transmitting or disseminating any photographs, video or audio recordings, likenesses or images of department logos, emblems, badges, patches, equipment or other material that specifically identifies the Merced County District Attorney's Office on any personal or social networking or other website or web page, without the express written permission of the District Attorney;

(g) Failure to take reasonable and prompt action to remove any content that is in violation of this policy and/or posted by others from any web page or website maintained by the employee (e.g., social or personal website).

VI. Office Expense Procedures.

6.01 Travel and Expense Reimbursement Procedures.

District Attorney employees who are required to travel on official business may receive reimbursement for meals, transportation, lodging, and incidental expenses in accordance with the County of Merced's travel and expense reimbursement guidelines and in accordance with the procedures outlined below.

One Day Travel

Travel must be approved by your supervisor.

Method of Travel:

Department vehicle
(Should be used for all travel.)

County Fleet Vehicle
(These vehicles are more costly than department vehicles, so they must be picked up the day of or late the day before your travel begins and they must be turned in immediately upon your return or first thing on the morning after your return to avoid additional charges. Reservations for County Fleet vehicles must be made by Edie Lough in the DA Fiscal Unit.)

Personal Vehicle
(Employees should NOT use their personal vehicles without prior special approval by your supervisor prior to your

travel. Request for mileage reimbursement should reflect to and from primary destination with REASONABLE mileage added if necessary to travel to a secondary location. Optional side trips or excess personal travel will not be reimbursed. Mileage must be recorded on the County's Personal Car Usage mileage log and approved by your supervisor.)

Meal Reimbursement – Meals for non-overnight day travel will be reimbursed at actual cost up to the maximum allowable expense reimbursement in accordance with the County guidelines. Original receipts must be provided.

Meals that are not associated with overnight travel and are part of regular job requirements are taxable. Reimbursement for taxable meals will be added to your pay check as taxable wages.

Overnight Travel

Travel must be approved by your supervisor.

Allow a minimum of three weeks for processing of your travel request.

Method of Travel:
Department vehicle
County Fleet Vehicle
Personal Vehicle
For all vehicle travel, see One Day Travel above; same rules apply.

Air Travel
(All flight arrangements will be made by Edie Lough in the DA Fiscal Unit. County policy states that the method of transportation must be the most economical means available. If you wish to travel by air, contact Edie Lough at the DA Fiscal Unit for rates.)

Meal Reimbursement – Daily limit $34.00 (breakfast $6.00, lunch $10.00, dinner $18.00). Advances are limited to 75%.

Meals are based upon the time your travel begins and ends, using the following guideline:

Initial Journey
Breakfast – when your travel begins at or before 7:00 a.m.

Lunch – when your travel begins at or before 11:00 a.m.

Dinner – when your travel begins after 4:00 p.m. and before 6:00 p.m.

Return Journey
Breakfast – when you return after 9:30 a.m.

Lunch – when you return after 2:00 p.m.

Dinner – when you return after 7:00 p.m.

Travel/Training Time – Job-related training sessions are considered to be "optional" and you will not receive additional compensation for overtime, including travel time to and from the training.

Receipts – Receipts are required for lodging, registration fees, and airfare. Receipts are also required for parking if it is not included on the hotel receipt. Receipts are not required for meals for overnight travel.

Expense Reimbursement – Claims for reimbursement (25% per diem, parking fees not advanced, etc.) must be submitted to the Auditor's Office within 10 days after returning. The DA Fiscal Unit will require two days to process the claim so it is important that you submit your receipts for reimbursement the next business day after your return.

How to make an overnight travel request:

Complete a Travel Request Form three weeks prior to your travel date.

Make hotel reservations (this may require a personal credit card to guarantee the room, but the hotel will be paid prior to your arrival). Be sure to mention the conference sponsor or ask for the government rate. Hotel reservations should be made as early as possible. It is easier to cancel reservations than try to make them last minute.

If you are driving, check on the availability of a department vehicle with Linda Jones at DA Investigations. Use of personal vehicles will only be approved when a department vehicle is not available.

Send the Travel Request Form, conference registration form, the hotel confirmation information, and ALL training

information to Edie Lough at the DA Fiscal Unit. The Travel Request Form must be complete and signed by your supervisor.
Edie will make travel arrangements, ensure payment of lodging and registration, and obtain a check for the 75% advance for your meals.

Out-of-State Travel

Out-of-state travel must be approved by the District Attorney.

Out-of-state travel must also be authorized and approved by the Board of Supervisors prior to the travel and when possible, should be included in the department's budget requests at the beginning of each fiscal year.

You must complete and submit a Travel Request Form six weeks prior to your travel outside the State of California.

Discuss all out-of-state travel with the District Attorney before making any travel plans. Any costs incurred by an employee, such as prepaid airline tickets or hotel reservations, may not be reimbursed if the Board does not approve the out-of-state travel in advance.

6.02 Case Related Expenditures Procedure.

No employee will be reimbursed for an expense without prior written authorization. To obtain authorization, an Expenditure Request Form will be completed. All expenditure requests related to criminal cases must be reviewed and approved by the District Attorney, the Assistant District Attorney or a Chief Deputy District Attorney.

Witness Fees

Payment of witness fees and/or mileage is considered only when the witness requests a fee. All District Attorney employees should avoid making unnecessary representations regarding witness fees and/or expenses. A subpoena is a judicial order to appear. The noncompliance can result in criminal and civil sanctions.

Inquiries regarding this section should be directed to the Witness Coordinator. Any questions from witnesses concerning payment of witness fees or expenses should also be referred to the Witness Coordinator.

In-County Witnesses/Witnesses Residing Within 150 Miles

A witness who is employed and whose salary is not paid by his or her employer during the time he or she is absent from work will be paid a witness fee. The witness fee will be $18.00 for each day's actual attendance with an additional fee for mileage to and from the court at the rate of $.20 per mile.

A witness who is employed and whose salary is paid by his or her employer during the time he or she is absent from work will not be paid a witness fee, but may be reimbursed for mileage to and from the court at the rate of $.20 per mile.

All other witnesses will be paid a witness fee of $12.00 per day for each day's actual attendance with an additional fee for mileage to and from the court at the rate of $.20 per mile.

If a witness under this section requests witness fees, he or she must complete the Witness Fee Declaration Form. This form must be verified by the requesting prosecutor and forwarded to the Witness Coordinator.

Out-of-County/Out-of-State Witnesses

Determining the necessity of an out-of-state witness in this category should be discussed with your supervisor. No arrangements will be made under this section for out-of-state witnesses without prior written approval from a Chief Deputy District Attorney, or the District Attorney.

The Penal Code allows for payment of the necessary expenses of a witness. Non-witness expenses will not be paid. If transportation or other expenses are required for attendants of minors or disabled witnesses, special approval must be obtained from a Chief Deputy District Attorney or the Assistant District Attorney.

Necessary in-state witnesses residing beyond 150 miles from Merced County are generally expected to travel by surface and are reimbursed at the rate of $.20 per mile if the travel is by vehicle or the actual cost if the travel is by bus or train. If the witness is traveling by bus or train, contact the Witness Coordinator for reservations and payment of travel. If the witness pays for bus and/or train fare, we cannot provide reimbursement without a receipt.

Necessary out-of-state witnesses are provided air transportation. When a prosecutor issues instructions to subpoena a witness from out-of-state, a Witness Expense Request Form must be prepared by the issuing prosecutor, approved by a Chief Deputy District Attorney or the Assistant District Attorney and forwarded to the Witness Coordinator. *Air travel reservations must be made two weeks or more in advance*. All air travel reservations must be made by the Witness Coordinator and/or Edie Lough in the DA Fiscal Unit, not by the witness.

Other Expenses Paid

- Lodging;
- $20.00 per day for each day the witness is required to travel and attend as a witness.

Non-Reimbursable Expenses

Telephone calls, alcoholic beverages, other incidental expenses and any expense of a non-witness electing to travel with the subpoenaed witness will not be reimbursed.

Advances

Witness fees will be advanced in a case of hardship where a witness requires an advance for mileage or travel expenses in order to comply with the subpoena. Advances should be requested on the Witness Expense Request Form and approved by a Chief Deputy District Attorney or the District Attorney.

Expert Witnesses Retained by District Attorney's Office

Prior to submitting an expenditure request to retain an expert, the case prosecutor will:

Obtain concurrence from a Chief Deputy District Attorney or the District Attorney.

Contact the DA Fiscal Unit (Edie Lough or Jeannette Pacheco) to determine if the expert has been retained in any other case.

Contact the expert and obtain an estimate of the expert's fee at the lowest hourly rate for the expert to prepare, consult and testify in the case.

The case prosecutor will prepare and submit the Expenditure Request Form to a Chief Deputy District Attorney or the District Attorney. Following approval, the Expenditure Request Form will be forwarded to the DA Fiscal Unit.