SUPREME COURT
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Case No.: S243855

In the Supreme Court of the State of California

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent.

LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, *et al.*,

Real Parties in Interest

On Review from the Court of Appeal for the Second Appellate District, Division 8
Civil No.: B280676

After a Writ Proceeding from the Superior Court of Los Angeles County
Judge James C. Chalfant
Case Number BS166063

REAL PARTIES IN INTEREST'S MOTION FOR JUDICIAL NOTICE IN SUPPORT OF REPLY BRIEF ON THE MERITS; [PROPOSED] ORDER

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Real Parties in Interest County of Los Angeles, Los Angeles County Sheriff's Department, and Sheriff Jim McDonnell ("Real Parties") hereby request this Court take judicial notice, pursuant to Evidence Code section 452 of the following documents in support of Real Parties' Reply Brief on the Merits:

1. Los Angeles County District Attorney's Office Legal Policies Manual, Chapter 14, "Disclosure of Exculpatory and Impeachment Information," dated January 19, 2018, a true and correct copy of which is attached hereto as Exhibit "A."

Under Evidence Code section 452, subdivisions (b) and (h), this Court may take judicial notice of the regulations issued by or under the authority of any public entity in the United States, and facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy, respectively. Accordingly, judicial notice of a chapter from the Los Angeles County District Attorney's Office's ("LADA") legal policies manual is appropriate either as a regulation of a public entity, or a proposition not reasonably subject to dispute.

ALADS, in their Answer Brief on the Merits, has cited to the LADA's written policy regarding the handling and maintenance of impeachment information on police officers. (Answer Brief, p. 44.) ALADS further cites to a declaration which expresses one declarant's interpretation of LADA's prior written policy (Answer Brief, p. 64; ALADS' Supporting Documents in Support of Peremptory Writ of Mandate, Vol. 2, pp. 371-372.)

Real Parties request that this Court take judicial notice of the current version of LADA's written policy regarding disclosure of exculpatory and

impeachment information because ALADS repeatedly references LADA's written policy, but the policy itself has never been entered into the record. Furthermore, the written policy is relevant to this Court's understanding as to LADA's current treatment of impeachment evidence on police officers and *Brady* alerts from investigating agencies.

LADA's written policy was not previously presented to the trial court for judicial notice. This particular version of the policy was not adopted/implemented by the LADA until January 19, 2018, after the trial court and Court of Appeal proceedings.

For these reasons, Real Parties in Interest respectfully request that the Court take judicial notice of LADA's written policy manual chapter regarding disclosure of exculpatory and impeachment information, attached hereto as Exhibit "A."

Dated: April 3, 2018 LIEBERT CASSIDY WHITMORE

By: */s/ Alex Y. Wong*
Geoffrey S. Sheldon
Alex Y. Wong
Attorneys for Real Parties in Interest LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, SHERIFF JIM MCDONNELL and COUNTY OF LOS ANGELES

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GOOD CAUSE APPEARING HEREIN, Real Parties in Interest's Motion for Judicial Notice in support of reply brief is hereby GRANTED.

Dated:

Chief Justice

CHAPTER 14

DISCLOSURE OF EXCULPATORY AND IMPEACHMENT INFORMATION

14.01 INTRODUCTION

A California prosecutor's obligation to provide exculpatory and impeachment information arises from the federal Due Process Clause of the Fourteenth Amendment as applied by the United States Supreme Court in *Brady* v. *Maryland* (1963) 373 U.S. 83 (constitutionally-mandated discovery) and California's Criminal Discovery Statute as codified in Penal Code section 1054.1(e) (statutorily-based discovery). Both the federal and state rules require that the prosecution provide evidence favorable to the defendant on the issue of guilt or punishment. Favorable evidence may consist of exculpatory information factually specific to a case (exculpatory evidence) or impeachment information undermining the credibility of a prosecution witness (impeachment evidence).

In *Brady* v. *Maryland*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[1] A failure to disclose *material* favorable evidence to an accused (a *Brady* violation) can result in a dismissal or reversal or modification of a judgment. The rule established in *Brady* (*Brady* rule) is independent of the Criminal Discovery Statute.[2]

In Penal Code section 1054.1, the California legislature set forth a list of discovery materials and information which the prosecution is required to disclose to the defense before trial, including 1054.1(e) ("The prosecuting attorney shall disclose to the defendant . . . any exculpatory evidence.").[3] In enacting Penal Code section 1054.1(e), the legislature codified and expanded the *Brady* rule. In providing for the disclosure to the defense of "[a]ny exculpatory evidence," the legislature broadened the *Brady* rule to mandate California prosecutors to disclose exculpatory evidence to the defense *without regard to materiality.*[4] A failure to disclose *any* exculpatory evidence (a PC 1054.1(e) violation) can result in various discovery sanctions pursuant to Penal Code section 1054.5(b), but generally not in dismissal.[5]

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[1] *Brady* v. *Maryland* (1963) 373 U.S. 83, 87.
[2] *Izazaga* v. *Superior Court* (1991) 54 Cal.3d 356, 378.
[3] The term "exculpatory evidence" as used in Penal Code section 1054.1(e) is a symbolic term used to describe *Brady* evidence and includes impeachment evidence. See, e.g., *United States* v. *Bagley* (1985) 473 U.S. 667, 676 ("This Court has rejected any [constitutional] distinction between impeachment evidence and exculpatory evidence."); *Strickler* v. *Greene* (1999) 527 U.S. 263, 281 ("Thus the term '*Brady* violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence . . . ."); *People* v. *Kasim* (1997) 56 Cal.App.4th 1360, 1381 ("[L]aw enforcement agencies (1) possessed significant exculpatory evidence bearing on the credibility of the key prosecution witnesses."); *Snow* v. *Simmons* (2007) 474 F.3d 693, 711 ("Exculpatory evidence includes impeachment evidence.").
[4] *Barnett* v. *Superior Court* (2010) 50 Cal.4th 890, 901; see also *People* v. *Bowles* (2011) 198 Cal.App.4th 318, 326.
[5] Pen. Code, § 1054.5, subd. (c).

It is the policy of the Los Angeles County District Attorney's Office (LADA) to strictly adhere to the constitutional (*Brady*) and statutory (PC 1054.1(e)) disclosure obligations. A failure to reveal or produce exculpatory and impeachment information pursuant to the *Brady* rule and Penal Code section 1054.1(e) may violate Rules of Professional Conduct, Rule 5-220 ("A member shall not suppress any evidence that the member . . . has a legal obligation to reveal or produce.") and Penal Code section 141 (A prosecutor who intentionally withholds relevant, exculpatory information is guilty of a felony.). Reversal of a judgment based, in whole or in part, on the misconduct of a prosecutor will trigger a report to the State Bar.[6] Therefore, all Los Angeles County deputy district attorneys (DDAs) are required to comply with the law regarding disclosure obligations and to follow the policies and procedures set forth in this Chapter.

Commentary

While this Chapter is consistent with applicable state and federal law, DDAs must not utilize it as a substitute for research of specific legal issues which may arise in an individual case.[7]

14.02 THE *BRADY* RULE

A prosecutor has an affirmative due process duty to disclose to the defendant all favorable material evidence possessed by the prosecution team.[8] This *Brady* rule applies even though there has been no request.[9]

14.02.01 FAVORABLE

Evidence is "favorable" to a defendant if it either helps the defendant or hurts the prosecution.[10] Evidence is favorable to a defendant when it is exculpatory or can be used to impeach the testimony of a material prosecution witness.[11]

Exculpatory Evidence

"Exculpatory" evidence pursuant to *Brady* is information which, if true, could show that a defendant is innocent or less culpable for the crime charged and which must be disclosed to the defendant without request.

Examples of exculpatory evidence include evidence that:

Mitigates punishment;[12]

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[6] Bus. & Prof. Code, § 6068, subd. (o)(7).
[7] DDAs are encouraged to make frequent reference to Pipes & Gagen, *California Criminal Discovery* (4th ed. 2008), an excellent treatise in this area.
[8] *In re Brown* (1998) 17 Cal.4th 873, 879.
[9] *United States* v. *Agurs* (1976) 427 U.S. 97, 107.
[10] *In re Sassounian* (1995) 9 Cal.4th 535, 543-544.
[11] *United States* v. *Bagley* (1985) 473 U.S. 667, 676.
[12] *In re Miranda* (2008) 43 Cal.4th 541, 567-577.

Directly opposes guilt;[13]
Negates an element of a charged offense;[14]

Supports defense testimony;[15]

Supports an affirmative defense;[16] and

Supports a defense motion.[17]

Impeachment Evidence

"Impeachment" evidence pursuant to *Brady* is information about a witness that a fact finder may consider in determining whether that witness is telling the truth.

> Evidence impeaching the credibility of a material prosecution witness is different conceptually from other kinds of evidence favorable to a criminal defendant, in that impeachment evidence generally does not concern itself with the question whether the defendant is guilty or not guilty of the charges against him or her. Yet impeachment evidence is subject to the same *Brady* rules of disclosure as any other kind of evidence favorable to the defendant.[18]

Examples of impeachment evidence include:

Felony convictions involving moral turpitude;[19]

Misdemeanor or other conduct that reflects on believability;[20]

Misconduct involving moral turpitude;[21]

False reports by a prosecution witness;[22]

Pending criminal charges against a prosecution witness;[23]

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[13] *Castleberry* v. *Brigano* (6th Cir. 2003) 349 F.3d 286, 293.
[14] *Youngblood* v. *West Virginia* (2006) 547 U.S. 867 (Suppressed note written by alleged sexual assault victims could have supported consensual-sex defense.).
[15] *People* v. *Collie* (1981) 30 Cal.3d 43, 54; *Hobbs* v. *Municipal Court* (1991) 233 Cal.App.3d 670, 688.
[16] *United States* v. *Ross* (9th Cir. 2004) 372 F.3d 1097, 1108-1109 (Evidence supporting entrapment defense is favorable to defendant.).
[17] *United States* v. *Gamez-Orduno* (9th Cir. 2000) 235 F.3d 453, 461; *United States* v. *Barton* (9th Cir. 1993) 995 F.2d 931, 935.
[18] Pipes & Gagen, *California Criminal Discovery* (4th Edition), sec. 1:23:1.
[19] *People* v. *Castro* (1985) 38 Cal.3d 301, 314.
[20] *People* v. *Wheeler* (1992) 4 Cal.4th 284, 295-297; California Criminal Jury Instructions No. 105.
[21] *People* v. *Wheeler* (1992) 4 Cal.4th 284, 297, fn. 7.
[22] *People* v. *Hayes* (1992) 3 Cal.App.4th 1238, 1244.
[23] *People* v. *Coyer* (1983) 142 Cal.App.3d 839, 842.

Parole or probation status of a prosecution witness;[24]

Evidence contradicting a prosecution witness's statements or reports;[25]

Evidence undermining a prosecution witness's expertise (e.g., inaccurate statements or expert opinions);[26]

A finding of misconduct by a Board of Rights or Civil Service Commission that reflects on a prosecution witness's truthfulness, bias or moral turpitude;[27]

Evidence that a prosecution witness has a reputation for untruthfulness;[28]

Evidence that a prosecution witness has a racial, religious or personal bias against the defendant individually or as a member of a group;[29] and

Promises, offers or inducements to a prosecution witness, including a grant of immunity.[30]

Impeachment evidence is favorable to a defendant when it undermines the credibility of a prosecution witness.[31] Evidence impeaching the testimony of a material prosecution witness becomes favorable evidence pursuant to the *Brady* rule only when the witness *testifies* as a *prosecution witness*.[32] It is not evidence favorable to a defendant when the prosecution witness does not testify or when the witness testifies as a defense witness.

14.02.02 MATERIAL

Evidence is "material" if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed.[33]

Material Witness

A prosecution witness is a "material witness" when that witness's testimony is so important that there is a reasonable probability that its absence would affect the outcome of the prosecution's

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[24] *Davis* v. *Alaska* (1974) 415 U.S. 308, 319; *People* v. *Price* (1991) 1 Cal.4th 324, 486.
[25] *People* v. *Boyd* (1990) 222 Cal.App.3d 541, 568-569.
[26] *People* v. *Garcia* (1993) 17 Cal.App.4th 1169, 1179.
[27] Cf. *People* v. *Wheeler* (1992) 4 Cal.4th 284, 293.
[28] Evid. Code, § 780; see *Carriger* v. *Stewart* (9th Cir. 1997) 132 F.3d 463, 479 (Evidence that a prosecution witness has a reputation for manipulation and dishonesty is evidence tending to exculpate the defendant and must be disclosed to the defendant.).
[29] Evid. Code, § 780; *In re Anthony P.* (1985) 167 Cal.App.3d 502, 507-510.
[30] *United States* v. *Bagley* (1985) 473 U.S. 667, 676-677; *Giglio* v. *United States* (1972) 405 U.S. 150, 153-155.
[31] *United States* v. *Bagley* (1985) 473 U.S. 667, 676; *People* v. *Morris* (1988) 46 Cal.3d 1, 30; *People* v. *Phillips* (1985) 41 Cal.3d 29, 46.
[32] See *United States* v. *Haskell* (8th Cir. 2006) 468 F.3d 1064, 1075; *People* v. *Cook* (2006) 39 Cal.4th 566, 589.
[33] *Strickler* v. *Greene* (1999) 527 U.S. 263, 289.

case.[34] Specifically, a "material witness" provides testimony at trial on an important issue which is not cumulative, i.e., testimony which no one else can give on a disputed issue.[35]

Reasonable Probability

A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial.[36] The term should not be confused with, or used interchangeably with, the term "reasonable possibility." "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."[37]

Commentary

This constitutional interpretation of the term "materiality" sharply contrasts with the requirement of Penal Code section 1054.1(e) to disclose exculpatory evidence without regard to materiality,[38] as discussed post.

14.02.03 EVIDENCE

The materiality component requires limiting the *Brady* rule to "evidence."[39]

Commentary

Brady information may be either admissible evidence or information which is likely to lead to admissible evidence.[40] Therefore, DDAs should disclose evidence which is favorable to the defendant even though that evidence itself is inadmissible, because inadmissible evidence can lead to admissible exculpatory or impeachment evidence. In assessing such evidence, however, DDAs must be mindful that information, which is irrelevant, spurious, diversionary, or not probative of the issues before the court, do not advance the purpose of a trial and is not subject to disclosure.

14.02.04 DISCLOSURE

A prosecutor has a duty to disclose favorable material evidence to the defendant even if there has been no defense request.[41] If favorable material evidence is contained in the prosecution

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[34] E.g., *Strickler* v. *Greene* (1999) 527 U.S. 263, 291-296; *People* v. *Williams* (1997) 16 Cal.4th 635, 653; *People* v. *Ruthford* (1975) 14 Cal.3d 399, 406; *Giglio* v. *United States* (1972) 405 U.S. 150, 154-155; *In re Ferguson* (1971) 5 Cal.3d 525, 535.

[35] E.g., *People* v. *Salazar* (2005) 35 Cal.4th 1031, 1049-1051; *Banks* v. *Dretke* (2004) 540 U.S. 668, 700-701; *United States* v. *Fallon* (7th Cir. 2003) 348 F.3d 248, 252; *Bailey* v. *Rae* (9th Cir. 2003) 339 F.3d 1107, 1116-1119.

[36] *Kyles* v. *Whitley* (1995) 514 U.S. 419, 434.

[37] *People* v. *Hoyos* (2007) 41 Cal.4th 872, 917-918, 922, citing *United States* v. *Agurs* (1976) 427 U.S. 97.

[38] *Barnett* v. *Superior Court* (2010) 50 Cal.4th 890, 901; see also *People* v. *Bowles* (2011) 198 Cal.App.4th 318, 326.

[39] *Sledge* v. *Superior Court* (1974) 11 Cal.3d 70, 75.

[40] *People* v. *Gaines* (2009) 46 Cal.4th 172, 182 (A trial court's duty to disclose *Pitchess* discovery from police personnel files encompasses inadmissible evidence which may lead to admissible evidence.).

[41] *United States* v. *Agurs* (1976) 427 U.S. 97, 107; *People* v. *Ruthford* (1975) 14 Cal.3d 399, 406.

attorney's files or office, the prosecutor is in actual possession of it and has a duty to disclose it.[42] Moreover, if the favorable material evidence is contained in the files of an agency connected to the investigation of the case, the prosecutor is in constructive possession of it, and, if the prosecutor has reasonable access to it, the prosecutor has a duty to disclose it.[43] "Courts have . . . consistently decline[d] to draw a distinction between different agencies under the same government, focusing instead upon the 'prosecution team' which includes both investigative and prosecutorial personnel."[44]

Therefore, a prosecutor must disclose favorable material evidence in the possession of the "prosecution team,"[45] including "information possessed by others acting on the government's behalf that [was] gathered in connection with the investigation."[46] The prosecution team includes the prosecutor's office, the investigating agency, and assisting agencies or persons (for example, crime labs[47] and sexual assault response teams [SART][48]) connected to the investigation or the prosecution of the case.[49]

Examples of information possessed by a prosecution team member which must be disclosed include, but are not limited to, a crime lab report generated by a lab, that was part of the investigative team, which contained exculpatory test results;[50] a videotape of a SART examination, initiated by a law enforcement referral in the investigation of criminal conduct, which offered potential evidence impeaching a prosecution expert witness's testimony;[51] notes generated by a victim-witness advocate, who was employed by the prosecuting agency, which contained exculpatory statements;[52] and awareness by a law enforcement agency, which assisted the prosecution by housing a witness in a witness protection program, that the witness committed misconduct.[53] In contrast, a prosecutor has "'no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense.'"[54]

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[42] See *Giglio* v. *United States* (1972) 405 U.S. 150, 154 ("The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government.").
[43] See *People* v. *Lucas* (2014) 60 Cal.4th 153, 274.
[44] *In re Brown* (1998) 17 Cal.4th 873, 879; *People* v. *Prince* (2007) 40 Cal.4th 1179, 1234; *People* v. *Jordan* (2003) 108 Cal.App.4th 349, 358.
[45] However, prosecutors have no duty to search peace officer personnel records, because such records are not possessed by the "prosecution team." See discussion *post*, Section 14.06.
[46] *Strickler* v. *Greene* (1999) 527 U.S. 263, 281 ("In order to comply with *Brady*, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.'"); *Kyles* v. *Whitley* (1995) 514 U.S. 419, 437; *United States* v. *Price* (9th Cir. 2009) 566 F.3d 900, 908; *In re Brown* (1998) 17 Cal.4th 873, 879, 881 ("[T]he crime lab's failure to apprise the prosecution of the worksheet did not relieve the prosecutor of his obligation to review the lab's files for exculpatory evidence.").
[47] *In re Brown* (1998) 17 Cal.4th 873, 879.
[48] *People* v. *Uribe* (2008) 162 Cal.App.4th 1457.
[49] *In re Brown* (1998) 17 Cal.4th 873, 879; *In re Steele* (2004) 32 Cal.4th 682, 697.
[50] *In re Brown* (1998) 17 Cal.4th 873.
[51] *People* v. *Uribe* (2008) 162 Cal.App.4th 1457.
[52] *Commonwealth* v. *Liang* (2001) 434 Mass. 131 [747 N.E.2d 112].
[53] See *United States* v. *Wilson* (7th Cir. 2001) 237 F.3d 827, 832.
[54] *People* v. *Panah* (2005) 35 Cal.4th 395, 460, quoting *In re Littlefield* (1993) 5 Cal.4th 122, 135.

Commentary

Prior to trial, DDAs should meet with their investigating officer (IO) to review the IO's entire file to make certain that they are in possession of every document relevant to the case.

The *Brady* rule does not require the disclosure of impeachment evidence before a defendant pleads guilty or no contest.[55] In contrast, information establishing the factual innocence of a defendant or that is otherwise materially exculpatory must be disclosed when it becomes known. Plea waivers "cannot be deemed 'intelligent and voluntary' if 'entered without knowledge of material information withheld by the prosecution.'"[56]

Prosecutors need not reveal their personal assessment of the credibility of witnesses.[57] Their opinions regarding trial issues are "opinion work product" and not discoverable pursuant to *Brady*.[58]

In contrast, prosecutors have a duty to immediately correct any testimony of its own witnesses which they knew was false or misleading.[59] This duty applies not only to false or misleading testimony regarding substantive evidence, but also to false or misleading testimony regarding impeachment evidence.[60] Furthermore, this duty applies to testimony prosecutors later learn is false or misleading.[61]

14.03 PENAL CODE SECTION 1054.1(e)[62]

Penal Code section 1054.1 provides:

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

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[55] *United States* v. *Ruiz* (2002) 536 U.S. 622. However, *Bridgeforth* v. *Superior Court* (2013) 214 Cal.App.4th 1074, *People* v. *Gutierrez* (2013) 214 Cal.App.4th 343, Penal Code section 1054.1(e), and the LADA policy may require disclosure of impeachment information before a defendant pleads guilty or no contest. See discussion *post*, Section 14.04.02.

[56] *Sanchez* v. *United States* (9th Cir. 1995) 50 F.3d 1448, 1453, quoting *Miller* v. *Angliker*, (2nd Cir. 1988) 848 F.2d 1312, 1319-20, *cert. den.*, (1988) 488 U.S. 890; see also *In re Miranda* (2008) 43 Cal.4th 541, 581-582.

[57] *People* v. *Seaton* (2001) 26 Cal.4th 598, 647-648.

[58] *Morris* v. *Ylst* (9th Cir. 2006) 447 F.3d 735, 742.

[59] *People* v. *Morales* (2003) 112 Cal.App.4th 1176, 1193, citing to *In re Jackson* (1992) 3 Cal.4th 578, 595 (The prosecution has the "basic duty . . . to correct any testimony of its own witnesses which it knew . . . was false or misleading."); *United States* v. *Alli* (9th Cir. 2003) 344 F.3d 1002, 1007, citing to *United States* v. *LaPage* (9th Cir. 2000) 231 F.3d 488, 492.

[60] *United States* v. *Alli* (9th Cir. 2003) 344 F.3d 1002, 1007, citing to *Napue* v. *Illinois* (1959) 360 U.S. 264, 269-270 (The government's obligation to immediately take steps to correct known misstatements of its witnesses applies regardless of whether the government solicited the false testimony or whether the false testimony only goes to the credibility of the witness, not to substantive evidence.).

[61] *United States* v. *Rodriguez* (9th Cir. 2014) 766 F.3d 970, 970; *United States* v. *Houston* (9th Cir. 2011) 648 F.3d 806, 814.

[62] General office policies for the management of discovery pursuant to Penal Code section 1054 et seq. are set forth in the LADA Legal Policies Manual (April 2005), sections 9.02 and 11.01.

(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.

Subdivision (e) codifies the *Brady* rule. As used in that subdivision, the phrase "exculpatory evidence" includes both exculpatory and impeachment evidence.[63] Subdivision (e) also expands the *Brady* rule. Its language requires a prosecutor to disclose to the defendant *any* exculpatory evidence, not just *material* exculpatory evidence.[64] A failure to disclose *any* exculpatory evidence (PC 1054.1(e) violation) can result in various discovery sanctions pursuant to Penal Code section 1054.5(b), but generally not in dismissal.[65]

14.04 POLICIES REGARDING DISCLOSURE OF EXCULPATORY AND IMPEACHMENT INFORMATION, GENERALLY

14.04.01 ASSIGNED DDA RESPONSIBLE FOR DISCLOSURES

The fulfillment of the prosecution's obligation under the *Brady* rule and Penal Code section 1054.1(e) to provide exculpatory and impeachment evidence is the sole responsibility of the individual DDA assigned to a case and shall be done without a defense request.

To ensure compliance with the *Brady* rule, the United States Supreme Court on more than one occasion has urged the "careful prosecutor" to err on the side of disclosure.[66] "[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure."[67] It is the policy of the LADA that DDAs will resolve doubtful questions in favor of disclosing any potentially exculpatory or impeaching information:

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[63] The United States Supreme Court has rejected any constitutional distinction between exculpatory evidence and impeachment evidence and has specifically stated that "impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule" (*United States* v. *Bagley* (1985) 473 U.S. 667, 676). Similarly, the California Supreme Court has rejected any distinction between the phrase "exculpatory evidence" as utilized in Penal Code section 1054.1(e) and the prosecutor's *Brady* disclosure duty under the Due Process Clause (*Izazaga* v. *Superior Court* (1991) 54 Cal.3d 356, 372).

[64] *Barnett* v. *Superior Court (People)* (2010) 50 Cal.4th 890, 901.

[65] Pen. Code, § 1054.5, subd. (c).

[66] *Kyles* v. *Whitley* (1995) 514 U.S. 419, 440.

[67] *United States* v. *Agurs* (1976) 427 U.S. 97, 108; see also *Kyles* v. *Whitley* (1995) 514 U.S. 419, 439 (Warning prosecutors against "tacking too close to the wind" in withholding evidence.).

> In the end, the trial judge, not the prosecutor, is the arbiter of admissibility, and the prosecutor's *Brady* disclosure obligations cannot turn on the prosecutor's view of whether or how defense counsel might employ particular items of evidence at trial. "It is not the role of the prosecutor to decide that facially exculpatory evidence need not be turned over because the prosecutor thinks the information is false. It is 'the criminal trial, as distinct from the prosecutor's private deliberations' that is the 'chosen forum for ascertaining the truth about criminal accusations.'"[68]

Commentary

To ensure full compliance with the Brady rule and the LADA policy, DDAs must disclose facially exculpatory or impeaching information even when they believe that the information is inadmissible or false.

Disclosure of Impeachment Evidence from Criminal Offender Record Information

As referred to *ante*, the *Brady* rule imposes a constitutional duty upon a prosecutor to disclose to the defense evidence impeaching the credibility of a material prosecution witness. *Brady* impeachment evidence includes, inter alia, felony convictions involving moral turpitude, misdemeanor or other conduct that reflects on believability or involving moral turpitude, pending criminal charges, and parole or probationary status of a prosecution witness. At the same time, Penal Code section 1054.1(d) imposes a broader statutory duty upon a prosecutor to disclose to the defense, not just felony convictions which involve moral turpitude, but *all* felony convictions of a material witness. This duty to disclose felony convictions extends to those which have been expunged pursuant to Penal Code section 1203.4.[69]

Criminal offender record information, i.e., rap sheets, are records and data compiled by criminal justice agencies for the purpose of identifying criminal offenders and of maintaining as to each offender a summary of, inter alia, arrests, pretrial proceedings, disposition of criminal charges, and sentencing.[70] Although a criminal offender record itself is not discoverable,[71] impeachment information found therein about a prosecution witness's felony convictions, misdemeanor or other conduct that involve moral turpitude, pending criminal charges, and parole or probationary status, constitutes evidence to which the defendant is entitled. Since criminal offender records are "reasonably accessible" to prosecutors, DDAs are held to a duty to disclose information from those records which impeach the credibility of material prosecution witnesses.[72] In executing this duty, DDAs should never give a witness's criminal offender record itself to the defense.[73] Instead, DDAs should restrict the release of

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[68] *In re Miranda* (2008) 43 Cal.4th 541, 577.

[69] *People* v. *Martinez* (2002) 103 Cal.App.4th 1071, 1079 ("Irrespective of the expungement's effect on the convictions' admissibility at trial, the prosecution still bore the burden of investigating and divulging the existence of such convictions."); Evid. Code, § 788, subd. (c) (Expunged convictions are inadmissible.).

[70] Pen. Code, § 13102.

[71] *People* v. *Roberts* (1992) 2 Cal.4th 271, 308.

[72] *People* v. *Little* (1997) 59 Cal.App.4th 426, 433.

[73] See General Office Memorandum (GOM) 09-03, "Disclosure of Rap Sheets," for a full discussion.

information to the name of the crime, the date and place of arrest and/or conviction,[74] and the case number, if available.

Practically speaking, however, peace officer witness criminal offender records are not "reasonably accessible" to the prosecution without the officer's date of birth, i.e., information contained in the peace officer's personnel files. Birth date information contained in a peace officer's personnel file is confidential and may be disclosed to the prosecution by the officer's employing agency only by means of a *Pitchess* motion.[75] To ensure compliance with the *Brady* rule and Penal Code section 1054.1(d) and to avoid the respective burdens placed on the law enforcement agencies' custodians of record, the courts, and the LADA by repetitive *Pitchess* motions, all law enforcement agencies in Los Angeles County have agreed to the following procedure:

- Whenever a law enforcement agency employee, e.g., peace officer or expert, who has testified for the prosecution in the past or who the agency reasonably and in good faith believes will testify as a witness for the prosecution in the future, is arrested for, or convicted of a crime, the employing agency shall provide the following information to the LADA Bureau of Investigation (BOI) on-duty personnel at the LADA Command Center:

  - Employee Name
  - Employee Number

  For arrests:
  - Arrest Date
  - Arresting Agency Name
  - Arresting Agency File Number (e.g., DR Number, URN Number)
  - Booking Number
  - Charge(s)

  For convictions:
  - Conviction Date
  - Court Case Number
  - Crime(s) Convicted of

- The Command Center on-duty personnel shall forward the information to the LADA BOI lieutenant assigned to the Justice System Integrity Division (JSID), who shall procure potential impeachment information therefrom.

- The JSID lieutenant shall forward the potential impeachment information, along with accompanying arrest reports, when available, to the Discovery Compliance Unit for evaluation and inclusion in the Officer and Recurrent Witness Information Tracking System (ORWITS). The ORWITS database and DDA disclosure of information therefrom are discussed in detail *post.*

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[74] GOM 09-03.

[75] *Garden Grove Police Department* v. *Superior Court* (2001) 89 Cal.App.4th 430; *People* v. *Superior Court (Johnson)* (2015) 61 Cal.4th 696.

14.04.02 TIMING OF DISCLOSURES

Felonies

Exculpatory and impeachment evidence, which is material to a probable cause determination, must be disclosed before preliminary hearing.[76] The appellate decisions which established this rule have expanded the prosecutor's obligations beyond the statutory requirements set forth in Penal Code section 1054.7, which allows the prosecution to provide any exculpatory and impeachment evidence 30 days before trial, well after the preliminary hearing. The materiality of exculpatory and impeachment evidence can seldom be predicted accurately early in the litigation process. Therefore, the LADA shall disclose *any* potentially exculpatory and/or impeachment evidence before preliminary hearing. This evidence includes impeachment evidence of a witness whose statements are being presented at a preliminary hearing pursuant to Proposition 115. The LADA shall also disclose any potentially exculpatory and/or impeachment evidence learned after the preliminary hearing as soon as it becomes known.

Commentary

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

Misdemeanors

The LADA will disclose any potentially exculpatory and/or impeachment evidence before any substantive hearing or at least 30 days before trial. If the evidence is not known or reasonably accessible until less than 30 days before trial, it is to be disclosed as soon as it becomes known or obtained. "Substantive hearing" means a hearing in which the granting of a defendant's motion would weaken the prosecution's case against the defendant or reduce the defendant's exposure to punishment, e.g., a Penal Code section 1538.5 hearing.

Continuing Duty Through Trial

A prosecutor must continue to comply with the *Brady* rule and Penal Code section 1054.1(e) during the trial, so any exculpatory and/or impeachment evidence discovered after the trial begins must be provided to the defense.[77] Therefore, the LADA will provide any potentially exculpatory and/or impeachment evidence discovered after the trial begins as soon as it becomes known.

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[76] *Bridgeforth* v. *Superior Court* (2013) 214 Cal.App.4th 1074; *People* v. *Gutierrez* (2013) 214 Cal.App.4th 343.
[77] See *United States* v. *Jordan* (11th Cir. 2003) 316 F.3d 1215; *In re Lawley* (2008) 42 Cal.4th 1231, 1246.

Post-Trial Duty

The *Brady* rule is based on due process and exists to ensure a defendant a fair trial.[78] However, if, after the trial ends, a prosecutor acquires information which casts doubt upon the correctness of a conviction, the ethical code of the legal profession requires the prosecutor to disclose the information.[79] Therefore, the LADA will promptly disclose to the defendant new, favorable evidence which is learned post-trial.

14.05 POLICIES REGARDING ACCESS TO POTENTIAL IMPEACHMENT INFORMATION ABOUT RECURRENT PEOPLE'S WITNESSES IN ACTUAL POSSESSION OF THE LADA

In no area has the prosecution's obligation to disclose impeachment evidence been more difficult in its application than in the analysis of information regarding peace officer conduct. Allegations of peace officer misconduct come to the attention of the LADA in a number of ways. For example, filing requests are submitted where a peace officer is a suspect in a crime. DDAs, during the course of case review or litigation, may develop concerns about whether certain observed, reported, or documented peace officer conduct constitutes potential impeachment information. Bench officers may issue findings of fact or comment that a peace officer's testimony was untruthful. Defendants also routinely allege peace officer misconduct as part of their efforts to avoid criminal liability.

A determination of whether allegations of peace officer misconduct constitute potential impeachment evidence can be challenging. This challenge is compounded by the fact that at stake are not only the legitimate due process rights of the defendant, but also the legitimate privacy rights of, and career consequences to, the involved peace officers. It is the intent of this policy to balance these interests, while simultaneously ensuring compliance with our constitutional duty pursuant to the *Brady* rule and our statutory duty pursuant to Penal Code section 1054.1(e).

14.05.01 DISCOVERY COMPLIANCE UNIT

The Discovery Compliance Unit (DCU) is responsible for ensuring consistency in the LADA's compliance with its *Brady* and statutory disclosure obligations of impeachment evidence known to the LADA regarding recurrent People's witnesses. The term "recurrent People's witnesses" includes peace officers, experts, and other witnesses who the People reasonably expect to testify in multiple independent prosecutions. DCU DDAs maintain the Officer and Recurrent Witness Information Tracking System (ORWITS) and notify individuals directly affected by an entry into that system, e.g., the peace officer whose name was entered into the ORWITS and the head

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[78] *Weatherford* v. *Bursey* (1977) 429 U.S. 545, 559; *Brady* v. *Maryland* (1963) 373 U.S. 83, 87.

[79] *Imbler v. Pachtman* (1976) 424 U.S. 409, 427, n. 25; *In re Lawley* (2008) 42 Cal.4th 1231, 1246; Rules Prof. Conduct, rule 5-220 ("A member shall not suppress any evidence that the member . . . has a legal obligation to reveal or produce.").

of the peace officer's employing agency. DCU DDAs are available for consultation regarding this policy, as well as impeachment-related issues involving recurrent People's witnesses.

14.05.02 OFFICER AND RECURRENT WITNESS INFORMATION TRACKING SYSTEM

Constitutional disclosure requirements "apply to a prosecutor even when the knowledge of the exculpatory evidence is in the hands of another prosecutor."[80] The United States Supreme court has strongly suggested that large prosecution offices establish procedures and regulations "to insure communication of *all relevant information* on each case to every lawyer who deals with it."[81] Therefore, to ensure that relevant impeachment information which comes to the attention of the LADA can be made known to all DDAs, the Officer and Recurrent Witness Information Tracking System or "ORWITS" has been created. "Relevant impeachment information" means information which has a "tendency in reason"[82] to potentially impeach, or is likely to lead to[83] evidence to potentially impeach, the testimony of a recurrent People's witness.

Confidential Nature of ORWITS

The ORWITS is a secure computer database of summaries of potential impeachment information, as well as information likely to lead to potential impeachment information, regarding recurrent People's witnesses. It is maintained by the DCU, which reviews information involving recurrent People's witnesses and determines whether or not to enter it into the ORWITS.[84] The DCU also maintains files containing the underlying documents for each ORWITS entry, which are available for DDA review upon request.
The DCU's conclusions, reflected in the form of ORWITS summaries, are privileged work product pursuant to Code of Civil Procedure section 2018.030(a). These conclusions and summaries are made available to DDAs to assist them in the discharge of their constitutional and statutory obligations and in the preparation of their cases. These conclusions and summaries are not discoverable via Penal Code section 1054[85] or via California Public Records

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[80] *Benn* v. *Lambert* (9th Cir. 2002) 283 F.3d 1040, 1053.
[81] *Giglio* v. *United States* (1972) 405 U.S. 150, 154, emphasis added.
[82] See, Evid. Code, § 210 ("'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any *tendency in reason* to prove or disprove any disputed fact that is of consequence to the determination of the action." [Emphasis added.]); Evid. Code, § 780 ("The court or jury may consider in determining the credibility of a witness any matter that has any *tendency in reason* to prove or disprove the truthfulness of his testimony at the hearing, including . . . His character for honesty or veracity or their opposites. . . The existence or nonexistence of a bias, interest, or other motive . . . ." [Emphasis added.]).
[83] *People* v. *Gaines* (2009) 46 Cal.4th 172, 182 (A trial court's duty to disclose *Pitchess* discovery from police personnel files encompasses inadmissible evidence which may lead to admissible evidence.).
[84] Reviews of DDA referrals of potential impeachment information involving recurrent People's witnesses are conducted by the Director of the Bureau of Prosecution Support Operations, who determines whether or not to enter the information into the ORWITS. See "DDA Referrals of Potential Impeachment Information to the DCU," "DDA Referrals," *post*.
[85] See Pen. Code, § 1054.6 ("Work product privilege. Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined in subdivision (a) of Section 2018.030 of the Code of Civil Procedure, or which are privileged pursuant to an express statutory provision, or are privileged as provided by the Constitution of the United States.").

Act (CPRA) requests.[86] The exemption from CPRA disclosure is not waived when a DDA, in the discharge of his or her legal obligations, provides defense counsel with potential impeachment information learned from the ORWITS, because its disclosure is required by law.[87]

Entries into the ORWITS

The DCU will enter information into the ORWITS if it has a tendency in reason to potentially impeach, or is likely to lead to evidence to potentially impeach, the testimony of a recurrent People's witness. Information based on mere rumor, speculation, or unverifiable hearsay will not be entered into the ORWITS.

The Deputy-in-Charge (DIC) of the DCU has the primary responsibility to make entries into, or deletions from, the ORWITS. Once a recurrent People's witness has been included in the ORWITS, whether and when the witness will be removed from the ORWITS will be determined on a case-by-case basis by the DIC.[88] The removal decision will depend on several factors, including, but not limited to, a finding of frivolous, unfounded, or exonerated as defined in Penal Code section 832.5(d), the reason for the witness's inclusion, judicial rulings as to the admissibility of the witness's conduct, and changes in the law.

ORWITS entries are accompanied by the following disclaimer statement:

> Entry of information into this database is not an endorsement of the validity of an allegation of misconduct. The purpose of the database is to facilitate the distribution of information to DDAs. The relevance and evidentiary value of this information will be resolved on a case-by-case basis during the pendency of any case by the assigned DDA, in consultation with the DDA's supervisor, and, if necessary, the court.

Confidential Notification to Individuals Affected by an ORWITS Entry

Whenever the DCU enters an allegation of misconduct involving a peace officer or expert witness into the ORWITS, the DIC of the DCU shall simultaneously notify the subject peace officer or expert witness, as well as the affected employing agency head by confidential correspondence of the entry and of the reason therefor.[89] If the basis for the entry is a pending

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[86] Gov. Code, § 6254, subd. (k) ("6254. Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following: . . . (k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.").

[87] Government Code section 6254.5, subdivision (b) provides that, while, in general, any public disclosure of a record constitutes a waiver of applicable exemptions, disclosure of a record "[m]ade through other legal proceedings or as otherwise required by law" does not.

[88] But see "DDA Referrals of Potential Impeachment Information to the DCU," "DDA Referrals," *post,* regarding Bureau of Prosecution Support Operations Director's responsibility to make the removal decision for DDA referrals.

[89] Government Code section 6254.5, subdivision (e), provides that government records need not be disclosed to a member of the public if the records were given by one agency to another "which agrees to treat the disclosed material as confidential. Only persons authorized in writing by the person in charge of the agency shall be permitted to obtain the information." Consequently, records marked "confidential" should not be released pursuant to the CPRA.

misdemeanor charge for a non-moral turpitude crime and for which Evidence Code sections 1101(b) (Evidence of Character to Prove Conduct) and 1103(a) (Character Evidence of Crime Victim to Prove Conduct) are inapplicable, the correspondence shall also contain an advisement regarding automatic removal of the entry upon termination of probation for that charged violation.

If reconsideration of the DCU's decision to enter an allegation of misconduct into the ORWITS is desired, the subject peace officer, expert, and/or his or her employer may review the documents underlying the DCU's decision and may submit an objection letter to the DIC of the DCU. The objection letter may be submitted at any time and must include the reasons for the objection. Additional information in support of the objection may also be attached to the objection letter. The objecting party will be notified that all materials submitted for review may be discoverable. Within 60 calendar days of the date of the objection letter, the DIC of the DCU will review the objection letter and accompanying documentation, if any, make a decision as to whether or not the individual's entry will remain in the ORWITS, and inform the affected party or parties in writing of his or her decision. The DIC of the DCU will remain open to reviewing new information at any time thereafter. If the DIC of the DCU decides that the individual will remain in the ORWITS, the affected party or parties may seek final review by a special panel comprised of three head deputies designated by the legal bureau directors.

Notification to DA Supervisors of Cases Potentially Affected by an ORWITS Entry

If, upon the decision to include a recurrent People's witness in the ORWITS, there is a reasonable possibility that a reviewing court could find the potential impeachment information material to the outcome of a proceeding within the meaning of the *Brady* rule (see subsection 14.02.02 Material, *ante*), the DCU staff will generate a PIMS Ad Hoc run of all cases in which the individual is listed as a witness and will analyze the run for any specific cases potentially affected by the witness's inclusion in the ORWITS. However, if the decision to include a recurrent People's witness in the ORWITS is based on information which is preliminary or challenged,[90] the DCU staff will not generate a PIMS Ad Hoc run or conduct an analysis of potentially affected cases.

Supervisors of offices which are handling or handled potentially affected cases will be given a list of their respective cases and requested to determine, for pending cases, whether the individual will testify as a witness for the prosecution, or, for closed cases, whether the individual was a material witness for the prosecution, and, if so, to notify attorneys of record or defendants who appeared in propria persona of the potential impeachment information. Supervisors need not send notification letters in closed cases where the defendant pled guilty or no contest where the individual did not testify.[91] PIMS Ad Hoc runs will not be generated when a recurrent People's witness is included in the ORWITS based solely upon information likely to lead to potential impeachment information, e.g., information regarding a successful *Pitchess* or *Pitchess/Brady* motion and information learned from news media sources.

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[90] See *United States* v. *Agurs* (1976) 427 U.S. 97, 109, fn. 16.
[91] *United States* v. *Ruiz* (2002) 536 U.S. 622. See *Bridgeforth* v. *Superior Court* (2013) 214 Cal.App.4th 1074; *People* v. *Gutierrez* (2013) 214 Cal.App.4th 343.

Commentary

In practice, when a PIMS Ad Hoc run is generated and analyzed as discussed in this section, the DCU's notifications to the subject recurrent witness and his or her employing agency head of the ORWITS entry are made before its notifications to DA supervisors of specific cases potentially affected by that ORWITS entry. The notifications to a subject recurrent witness and his or her agency head are made at the same time the entry is input into the ORWITS. The notifications to DA supervisors are made sometime after the entry is input into the ORWITS, because the PIMS Ad Hoc run analysis for specific cases potentially affected by the entry is time-consuming.

Recognizing that DA supervisors, who manage offices in the geographic area in which a recurrent witness is currently assigned, have an immediate need to know of that witness's entry into the ORWITS, the DIC of the DCU shall notify those supervisors, if identifiable, as well as the Hardcore Gang Division head deputy, of that recurrent witness's inclusion in the ORWITS at the same time the witness and his or her agency head are notified. Once the DCU completes the PIMS Ad Hoc run analysis of specific cases potentially affected by the witness's inclusion in the ORWITS, supervisors of all impacted offices will be notified.

DDA Referrals of Potential Impeachment Information to the DCU

DDAs shall refer potential impeachment information regarding recurrent People's witnesses to the DCU as follows:

Officewide Filings and Declinations

All offices shall forward a copy of all filings and declinations which list a recurrent People's witness as a defendant or suspect to the DCU. The filing packet sent to the DCU must include a copy of the complaint and any supporting documentation.

DDA Referrals

A DDA who learns of information constituting potential impeachment information regarding a recurrent People's witness shall promptly inform his or her supervisor. If the only information available to the DDA is that a recurrent People's witness is under investigation or on administrative leave, that fact shall be discussed with the supervisor to determine what course of action, if any, needs to be pursued.

Note that there is no obligation to disclose complaints about peace officer misconduct where the only evidence of such misconduct is defense testimony at an unrelated criminal trial.[92] The prosecution is not required to catalog the testimony of every defense witness in every criminal trial, cull out complaints about peace officers, and disclose them whenever that officer is a witness in another case.

> Defense attacks upon the integrity of a police officer are a common feature of criminal trials. Given that the proponent of the evidence has a strong incentive to avoid conviction, such complaints do not immediately command respect as trustworthy or

[92] *People* v. *Jordan* (2003) 108 Cal.App.4th 349, 362.

indicate actual misconduct on the part of the officer. . . [e]ven if the unrelated trial results in acquittal . . . .[93]

When a supervisor is informed by a DDA that he or she has learned of information constituting potential impeachment information regarding a recurrent People's witness, the supervisor shall be preliminarily responsible for assessing the potentially impeaching information to check that its source is reliable and its substance believable. If the supervisor determines that the information is reliable and believable and that the information constitutes potential impeachment information, the DDA shall prepare a referral memorandum addressed to his or her Bureau Director, through the chain of command, detailing the information and setting forth the reasons why the DDA and the supervisor believe that the information constitutes potential impeachment information.[94] Supporting documentation, if any, should be attached to the memorandum. Referrals should be worded carefully and premature conclusions should be avoided.

Commentary

The supervisor's preliminary assessment should include, when appropriate, consulting with the head of the recurrent witness's employing agency.

A referral to the Bureau Director should not be made if the supervisor's preliminary assessment determines that the potentially impeaching information is the result of the recurrent witness's innocent mistake or misunderstanding of law or procedure.

If the supervisor and the DDA disagree on whether a referral of the information should be made, the supervisor and the DDA shall prepare separate memoranda addressed to their Bureau Director, through the chain of command, detailing the information and setting forth their respective reasons why they believe that the information does or does not merit referral. Both memoranda shall be transmitted to the Bureau Director at the same time, along with a cover memorandum prepared by the supervisor which states that the memoranda are being submitted pursuant to the Disclosure of Exculpatory and Impeachment Information policy to resolve a DDA referral conflict.

The Bureau Director shall make the final decision whether or not to submit referral memoranda to the Director of the Bureau of Prosecution Support Operations (PSO Bureau Director). The Bureau Director shall also be responsible for notifying the supervisor and the DDA of his or her decision and, if applicable, for forwarding the referral memoranda to the PSO Bureau Director.

The PSO Bureau Director shall be responsible for reviewing the referral memoranda and determining how they should be processed. If the PSO Bureau Director determines that a referral involves potential criminal conduct of a peace officer, he or she shall forward the memorandum to the Head Deputy of the Justice System Integrity Division (JSID). If the PSO Bureau Director determines that a referral involves potential criminal conduct of a recurrent People's witness other than a peace officer, he or she shall forward the memorandum to the appropriate Line Operations supervisor. In addition, if the PSO Bureau Director also determines that, pending a filing decision by JSID or Line Operations, the referral information should be

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[93] *People* v. *Jordan* (2003) 108 Cal.App.4th 349, 362.

[94] If the supervisor determines that the information constitutes potential criminal misconduct of a peace officer, see Legal Policies Manual, section 3.06.02, for additional notification requirements.

entered into the ORWITS, he or she shall forward the memorandum to the DIC of the DCU, along with a written directive which authorizes the DIC of the DCU to enter the information into the ORWITS and which includes the PSO Bureau Director's basis or bases therefor. If the PSO Bureau Director determines that a referral does not involve potential criminal conduct, but nevertheless involves potential impeachment information which must be entered into the ORWITS, he or she shall forward the memorandum to the DIC of the DCU, along with a written directive which authorizes the DIC of the DCU to enter the information into the ORWITS and which includes the PSO Bureau Director's basis or bases therefor.

If the subject recurrent witness and/or his or her employing agency head requests reconsideration of the PSO Bureau Director's determination to enter information regarding that witness into the ORWITS, the objection letter procedure set forth in the subsection entitled "Confidential Notification to Individuals Affected by an ORWITS Entry," *ante,* shall be followed. Within 60 calendar days of the date of the objection letter, the DIC of the DCU will review the objection letter and accompanying documentation, if any, and make a recommendation to the PSO Bureau Director as to whether or not the witness's entry should remain in the ORWITS. The PSO Bureau Director shall convey his or her decision to maintain the entry in, or to delete it from, the ORWITS to the DIC of the DCU, who shall inform the affected party or parties in writing of the decision. If the PSO Bureau Director decides that the entry will be maintained in the ORWITS, the affected party or parties may seek final review by a special panel comprised of the three Assistant District Attorneys.

If the PSO Bureau Director determines that the referral information neither constitutes potential criminal conduct nor potential impeachment information which must be entered into the ORWITS, he or she shall provide the referring Bureau Director with written notification of that determination, along with the reasons therefor.

Investigation of Potential Impeachment Information before ORWITS Entry

Upon receipt of potential impeachment information regarding a recurrent People's witness, the DIC of the DCU or, for DDA referrals, the PSO Bureau Director, in consultation with the DIC of the DCU, may refer the information to the relevant law enforcement or employing agency for investigation. All referrals for investigation shall be addressed to the head of the law enforcement or employing agency and shall be transmitted electronically to his or her business e-mail account.

While it is preferable that such information be investigated before entry into the ORWITS, experience has shown that the potential impeachment value of the information often can be determined upon initial presentation to the DCU for review. In addition, defendants' speedy trial rights often foreclose the ability to conduct an investigation before disclosure is required. Consequently, the DIC of the DCU or, for DDA referrals, the PSO Bureau Director, in consultation with the DIC of the DCU, shall be responsible for determining whether to enter an individual into the ORWITS pending further investigation and, if appropriate, to remove that individual from the ORWITS upon receipt of additional information.

14.05.03 ORWITS USER GUIDE

DDA Access to the ORWITS Permitted Only as Necessary to Perform Duty

DDAs and paralegals under the supervision of a DDA are authorized to access the ORWITS only as necessary to perform their official duties. A security log built into the ORWITS is maintained by the Systems Division. The log tracks every ORWITS inquiry. Misuse of this system may subject an employee to disciplinary action.

Through an icon on their computer workstations, DDAs and paralegals may conduct a search in the ORWITS by entering either a DR number, court case number, or DA case number and a recurrent People's witness's name or employee number.

Commentary

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

ORWITS Interfaced with Subpoena Management Systems

The ORWITS is interfaced with the Adult and Juvenile Subpoena Management Systems, which are programmed to notify a handling DDA, via the Master Witness List, and the DDA's supervisor, via an e-mail, whenever a subpoenaed recurrent People's witness is listed in the ORWITS. This interface program serves as a backup system and does not eliminate the need to conduct manual ORWITS checks in accordance with this Chapter. Handling DDAs shall access the ORWITS whenever the Master Witness List indicates "Check ORWITS" alongside a subpoenaed recurrent People's witness's name. (DDAs shall not make any disclosures based solely on the notification on the Master Witness List.) Thereafter, whenever the handling DDA adds a new recurrent People's witness to the witness subpoena list or corrects information therein, he or she shall simultaneously check the ORWITS for an entry associated with that individual, if any. After receiving an ORWITS notification e-mail, a supervisor should confer with the handling DDA to ensure compliance.

Commentary

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

Decision to Disclose Information from the ORWITS Rests with Assigned DDA

The ORWITS is intended to assist DDAs in fulfilling one aspect of their constitutional and statutory disclosure obligations by maintaining a database of *potentially* discoverable impeachment information regarding the specified witnesses. Reasonable minds may differ on whether a particular allegation constitutes potential impeachment information. Similarly, the relevance of potential impeachment information to the particular facts of a case can vary greatly. The passage of time since the occurrence of the alleged conduct can also affect the decision to disclose. The decision not to call a witness listed in the ORWITS can obviate the need for disclosure as well. Therefore, a case-by-case determination of whether disclosure is required must be made. The decision whether to disclose ORWITS information must be made early in the case so that any disclosure can be made before preliminary hearing and, for misdemeanors, before any substantive hearing.

Commentary

It is not mandated that information in the ORWITS be disclosed in every case. The decision whether to disclose information from the ORWITS to the defense rests with the assigned DDA, in consultation with his/her supervisor and, if necessary, the DCU. Importantly, the decision to disclose ORWITS information to the defense does not foreclose DDAs from making appropriate objections to the admissibility of the information pursuant to Evidence Code section 352 or other appropriate provisions of law. Prosecutors must comply with their disclosure obligations without regard to the perceived impact on the successful prosecution of the case. Disclosure of potential impeachment information does not mean that successful prosecutions cannot be obtained.

DDA Disclosure of Information from the ORWITS

Information learned from the ORWITS shall be noted in the DA case file. Care must be taken to maintain the confidentiality of information obtained from the ORWITS. Use or disclosure of the material beyond that necessary to prosecute the case at hand shall be avoided. Disclosure of ORWITS information must be made on the record or in writing. Detailed documentation of the manner of disclosure must be made in the DA case file. Generally, the disclosing DDA must request a protective order[95] limiting use of the information to the case at bar before the information is conveyed to the defense.[96]

If the reason the witness is in the ORWITS is based upon criminal charges pending against the witness, the probationary status of the witness, or a criminal conviction of the witness involving moral turpitude, the DDA shall provide the defense with the case number and the charges or convictions. If the reason the witness is in the ORWITS is based upon an allegation involving moral turpitude which has been investigated, the DDA shall provide the defense with the police report number and/or a description of the allegation; if the allegation has not been investigated, the DDA shall provide the defense with a description of the allegation.

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[95] A protective order template may be accessed on the ORWITS database Main Page in Lotus Notes.

[96] Protective orders are not necessary for allegations gleaned from public sources, e.g., public records, newspapers, television, radio, Internet.

14.06 POLICIES REGARDING ACCESS TO POTENTIAL IMPEACHMENT INFORMATION ABOUT RECURRENT PEOPLE'S WITNESSES NOT IN ACTUAL POSSESSION OF THE LADA

14.06.01 PEACE OFFICER PERSONNEL RECORDS

DDA Access to Peace Officer Personnel Records Is Limited

Several cases upholding the confidentiality of peace officer personnel files lead to the conclusion that such files are not in possession of the prosecution team, so routine inspections for potential *Brady* impeachment evidence by a prosecutor are not required. In rejecting an argument that the prosecution is entitled to the fruits of a successful defense *Pitchess* motion, the Supreme Court, in *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1045, characterized the custodian of peace officer personnel records as a "third party custodian," and the *Pitchess* process of discovering peace officer personnel records as "what is essentially a third party discovery proceeding." In *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1475, the court rejected the defendant's argument that the prosecutor must review peace officer personnel records for *Brady* evidence, holding that prosecutors do not possess or have the right to possess officer personnel records on prosecution witnesses.

The foregoing principles were reinforced by the California Supreme Court in *People* v. *Superior Court (Johnson)* (2015) 61 Cal.4th 696 (*Johnson*) which held that "the prosecution does not have unfettered access to confidential personnel records of police officers who are potential witnesses in criminal cases. Rather, it must follow the same procedures that apply to criminal defendants, i.e., make a *Pitchess* motion, in order to seek information in those records."[97] The Court found that criminal defendants and the prosecution have equal ability to seek information in confidential personnel records.[98]

DDA Notified that Peace Officer Personnel Records May Contain Potential Impeachment Information

DDAs are occasionally put on notice that a peace officer witness's personnel file may contain potential impeachment information when, for example, they learn that the peace officer has been placed on leave pending an administrative investigation, or, pursuant to a legally valid written policy, a law enforcement agency notifies the LADA that a peace officer employee's personnel file contains potential impeachment information.[99] Under these circumstances, DDAs must

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[97] *People* v. *Superior Court (Johnson)* (2015) 61 Cal.4th 696, 705.
[98] *People* v. *Superior Court (Johnson)* (2015) 61 Cal.4th 696, 705.
[99] See __ Ops.Cal.Atty.Gen. __ (Oct. 13, 2015) (Attorney General opinion discussed a specific policy proposed by the California District Attorneys Association to govern the review by the California Highway Patrol [CHP] of its peace officer personnel files for potential *Brady* information in order to create a "*Brady* list" of the names of those officers whose personnel files contain such information and found that Penal Code section 832.7(a) does not preclude the CHP from providing the *Brady* list to a district attorney for the purpose of *Brady* compliance); *City of Richmond* v. *Superior Court* (1995) 32 Cal.App.4th 1430, 1440 (The provision of Penal Code section 832.7 which makes peace officer personnel records confidential has the effect of creating a privilege against their disclosure.); *Davis* v. *City of Sacramento* (1994) 24 Cal.App.4th 393, 401, and *San Francisco Police Officers' Association* v.

bring the possible existence of impeachment evidence to the attention of the defense.[100] DDAs also have a right, but not an obligation, to bring a *Pitchess* motion.

Commentary

If, after a DDA notifies the defense attorney of the possible existence of impeachment evidence in a peace officer witness's personnel file, the attorney opts not to file a Pitchess motion, but leaves open the possibility that s/he would cross-examine the peace officer witness regarding the possible impeachment evidence, the DDA may inform the peace officer of options if confronted on cross-examination: (1) answer the defense questions or (2) refuse to answer the defense questions, assert the Penal Code section 832.7 privilege, [101] *and request that the court conduct an Evidence Code section 915 (Disclosure of Privileged Information) hearing.* [102] *If, after it conducts a section 915 hearing, the court determines the information is not privileged and the peace officer refuses to answer the defense questions, the court will likely strike the officer's testimony from the record and the prosecution's case will have to be re-evaluated.*

If the defense files a successful *Pitchess* motion, the prosecutor may suffer a disadvantage, as any information ordered disclosed to the defense retains its peace officer personnel record confidentiality and no authority exists to compel the defense or the court to share it with the prosecution.[103] Therefore, to defend against a surprise defense attack against a prosecution peace officer witness, it is recommended that DDAs file their own *Pitchess/Brady* motion,[104] as discussed below.

DDA Access to Peace Officer Personnel Records

***Pitchess/Brady* Motion**

Pitchess motions alone are inadequate to satisfy the *Brady* rule, because the scope of the court's in camera review is temporally restricted. Evidence Code section 1045, subdivision (b)(1), restricts the court's review to complaints occurring less than five years before the event that is

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Superior Court (1988) 202 Cal.App.3d 183, 189 (The confidentiality privilege relating to peace officer personnel records created by Penal Code section 832.7 is held jointly by the individual officer and by the law enforcement agency holding those records.); see Evid. Code, §912, subd. (b) (Where there are two or more joint holders of a privilege, a waiver of the right of a particular joint holder to claim the privilege does not affect the right of another joint holder to claim the privilege.).

[100] *People* v. *Superior Court (Johnson)* (2015) 61 Cal.4th 696, 705, 715, 716, 722 ("The prosecution need not do anything in these circumstances beyond providing to the defense any information it has regarding what the records might contain . . . .").

[101] Penal Code section 832.7 enacted a conditional confidentiality privilege for peace officer personnel records and provides, in pertinent part: "Peace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code."

[102] Evidence Code section 915 authorizes an in camera hearing to enable the court to rule on a claim of privilege.

[103] *Alford* v. *Superior Court* (2003) 29 Cal.4th 1033, 1046.

[104] *People* v. *Superior Court (Johnson)* (2015) 61 Cal.4th 696, 719 ("The prosecution also has a statutory right to bring a *Pitchess* motion and might want to do so sometimes for its own reasons. . . .[But] we hold . . . that it is not constitutionally required to do so.").

the subject of the litigation. The *Brady* rule by contrast has no temporal limitation. Recognizing this disharmony, the California Supreme Court in *City of Los Angeles* v. *Superior Court (Brandon)* (2002) 29 Cal.4th 1, 13-14, held that the statutory five-year time limit is not an absolute bar to disclosure of complaints that are older than five years, since the *Pitchess* process "operates in parallel with *Brady*" and *Pitchess* does not prohibit the disclosure of *Brady* information. Whenever information exists to believe that a material peace officer witness's personnel files may contain potential impeachment evidence, DDAs may access those files for that information by means of a *Pitchess/Brady* motion.

The *Pitchess/Brady* motion shall conform to the requirements set forth in Evidence Code section 1043 and shall request that the court review the information provided by the agency's custodian of records in camera, ex parte, pursuant to Evidence Code section 1045 and the *Brandon* case, to determine whether to disclose any information.[105] If the court discloses any information, the DDA shall ensure that it does so with a protective order pursuant to Evidence Code section 1045, subdivision (e), limiting the disclosure and use of the information to the particular case in which the motion was made.[106]

If the court releases information and issues a protective order, the DDA shall inform the DCU, in writing, only that disclosure of potential impeachment information was made and that a protective order was issued. To comply with the court's order, the DCU shall *not* be informed of the specific information disclosed. The DDA should also attach copies of the People's moving papers to the memorandum sent to the DCU.

While a defense attorney has no obligation to share the fruits of a successful *Pitchess* motion with the prosecutor, the prosecutor must share potential impeachment evidence disclosed by a *Pitchess/Brady* motion with the defense.[107]

If the defense files a *Pitchess* motion and if the People have not already filed a *Pitchess/Brady* motion, DDAs should consider filing a People's *Pitchess/Brady* motion. The justification is that California Constitution, article I, section 29, guarantees the People due process of law to prepare and defend the People's case against attacks by a defendant, and that, if the court determines that there is good cause for disclosure to the defendant of information from peace officer personnel records which is material to the pending litigation, disclosure of the same information to the People is essential for the preparation of its case against the defendant.

If the *Pitchess/Brady* motion is successful and the court releases information with the requisite protective order, the DDA shall inform the DCU, in writing, only that disclosure of potential impeachment information was made and that a protective order was issued. To comply with the court's order, the DCU shall *not* be informed of the specific information disclosed. The DDA should also attach copies of all moving papers to the memorandum sent to the DCU.

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[105] A *Pitchess/Brady* motion template may be accessed on the ORWITS database Main Page in Lotus Notes.
[106] *Alford* v. *Superior Court* (2003) 29 Cal.4th 1033, 1042 (The language "may not be used for any purpose other than a court proceeding pursuant to applicable law" means the "statutory *Pitchess* scheme.").
[107] See *Alford* v. *Superior Court* (2003) 29 Cal.4th 1033, 1046.

Maintaining Confidentiality of Peace Officer Personnel Records

It is important to note that the "disclosure of peace officer personnel records in violation of Penal Code section 832.7 may constitute a crime pursuant to the terms of Government Code section 1222 . . . ."[108] Therefore, before disclosure of such information, DDAs must abide by the confidentiality rules which apply pursuant to Evidence Code section 1045, subdivision (e), or any other applicable provision of law. After disclosure and as soon as the information is no longer needed by the handling DDA, it should be secured in a sealed envelope and placed in the DA file.[109] The sealed envelope should be labeled with identifying case information and the notation "Protected Evidence Code 1043 Discovery Information."

AUSA Access to Peace Officer Personnel Records of District Attorney Investigators for Potential *Giglio/Brady* Information

A District Attorney investigator (DAI) may become a material witness in a federal case prosecuted by the United States Attorney's Office (USAO). The Assistant United States Attorney (AUSA) handling the case may, pursuant to *Giglio* v. *United States* (1972) 405 U.S. 150 and *Brady* v. *Maryland* (1963) 373 U.S. 83, request to review the DAI's personnel records for potential impeachment information. Under federal law there is no privilege for peace officer personnel records and no procedure analogous to the *Pitchess* process. Therefore, when the LADA is confronted with such a request, the following procedure is to be followed.

To avoid unauthorized disclosure in violation of California's peace officer personnel records privilege (Penal Code section 832.7), all requests pertaining to a filed federal prosecution from the USAO for potential impeachment information contained in the personnel records of DAIs must be made by means of a *subpoena duces tecum* (SDT) issued by the federal court and directed to the Captain of the Administration Division (Captain) of the Bureau of Investigation (BOI) as the custodian of records. When the SDT process is unavailable because the federal prosecution has not yet been filed, the USAO must submit a written request for the potential impeachment information to the Captain. The written request must contain a representation that the USAO will seek a protective order before disclosure to the defense of any information provided by the LADA. Upon receipt of the SDT or written request, the Captain shall forward copies to the subject DAI and to the Chief of the BOI.

In responding to the SDT or written request, the Captain shall conduct a preliminary review of the personnel records of the subject DAI for potential *Giglio/Brady* impeachment information and, if found, shall deliver the personnel records file(s) containing such information to the DIC of the DCU for review. After review, the DIC shall provide copies of any responsive documents to the Captain. The documents shall be enclosed in a sealed envelope with the text of a proposed protective order affixed to the outside of the envelope. The DIC shall also return the personnel files to the Captain.

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[108] 82 Ops.Cal.Atty.Gen. 246 (1999). Gov. Code, section 1222, states: "Every willful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision is made for the punishment of such delinquency, is punishable as a misdemeanor."

[109] In the future, confidential documents may also be scanned and uploaded to the access restricted "Z" section of the case file using the e-folder application in PIMS.

If the request is by SDT, the Captain, as the custodian of records, shall follow the instructions on the SDT, provide the responsive documents to the federal court **under seal**, and request that the federal court issue a **protective order** limiting the disclosure and use of the information to the particular case in which the subpoena was issued. If the request is by written request, the Captain shall provide the responsive documents to the USAO.

If documents containing potential impeachment information are provided to the federal court or the USAO, the DCU shall enter into the ORWITS the fact that information was provided, but not the specific information disclosed. The DCU shall maintain a file containing the SDT or written request and, in a sealed envelope, the documents disclosed.

DDA Access to Peace Officer Personnel Records to Investigate Criminal Allegations

Penal Code section 832.7, subdivision (a), specifically allows a DDA access to peace officer personnel records in "investigations or proceedings concerning the conduct of peace officers . . . or an agency or department that employs those officers . . . ." The LADA will use this right of access as necessary when it is involved in investigations of specific allegations of suspected criminal wrongdoing by peace officers.[110]

14.06.02 EXPERT WITNESS PERSONNEL RECORDS

DDA Access to Publicly-Employed Expert Witness Personnel Records

Non-sworn employees of public entities have a qualified right to privacy of their personnel files.[111] Information contained in the employee's personnel file is protected by the official information privilege.[112] It is the policy of the LADA that, whenever information exists to believe that a publicly-employed expert witness's personnel file may contain potential impeachment evidence, access to that file for the information will be made only by means of the consent of the public entity or its authorized representative, or, absent its consent, by means of a court order following an in camera review pursuant to an Evidence Code section 915 (Disclosure of Privileged Information) motion. If the court releases any information, the DDA shall ensure that it does so with a protective order limiting the disclosure and use of the information to the particular case in which the motion was made. In addition, the DDA shall inform the DCU, in writing, only of the facts that disclosure of potential impeachment information was made and that a protective order was issued. To comply with the court's order, the DCU shall *not* be informed of the specific information disclosed. The DDA should also attach a copy of the People's moving papers, if any, to the memorandum sent to the DCU.

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[110] "Checking for *Brady* material is not an investigation for these purposes. A police officer does not become the target of an investigation merely by being a witness in a criminal case." *People* v. *Superior Court (Johnson)* (2015) 61 Cal.4th 696, 714.

[111] Cal. Const., Art. I, § 1; *Board of Trustees* v. *Superior Court* (1981) 119 Cal.App.3d 516, 525-526.

[112] Evid. Code, § 1040.

DDA Access to Privately-Employed Expert Witness Personnel Records

The prosecution of a case may at times require the retention of an expert witness who is employed by a private organization. Whenever information exists to believe that a privately-employed expert witness's personnel file may contain potential impeachment information, access to that file for the information will be made only by means of the consent of the expert witness, or, absent his or her consent, by means of an SDT directed to the employing agency pursuant to Penal Code sections 1326 and 1327. DDAs shall obtain a protective order limiting the disclosure and use of the information to the particular case in which the SDT was issued. In addition, the DDA shall inform the DCU, in writing, only of the facts that disclosure of potential impeachment information was made and that a protective order was issued. To comply with the court's order, the DCU shall *not* be informed of the specific information disclosed. The DDA should also attach a copy of the People's moving papers, if any, to the memorandum sent to the DCU.

14.06.03 POLICE INFORMANT RECORDS

A "police informant" is an individual who provides useful and credible information to a law enforcement agency regarding criminal activity in exchange for a benefit, e.g., financial compensation, leniency in a pending criminal case. Police informants have played major roles in the investigation and prosecution of a wide variety of crimes, especially in the area of drug enforcement. However, police informants are often paid for their cooperation and routinely possess criminal histories. If not properly vetted, undisclosed impeachment information from the background of a police informant can result in a *Brady* or Penal Code section 1054.1(e) disclosure violation.

Therefore, prior to relying on information from a police informant as a witness, the assigned DDA must review the police informant's criminal history (rap sheet) and examine the police informant's file maintained by the handling law enforcement agency for potential impeachment information.[113] Access to the file should be available through the informant's handler.[114] If the police informant's file contains potential impeachment information, the DDA shall inform the DCU, in writing, only of that fact. Information regarding police informants shall be maintained separately from the ORWITS in the Leniency/Immunity, Jailhouse Informant, and Perkins tracking databases (collectively referred to as "LIS").[115]

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[113] If the police informant is also a jailhouse informant, see Legal Policies Manual, Chapter 19, "Jailhouse Informants," for additional policies and procedures regarding their use.
[114] DDAs must be mindful of law enforcement's privilege to protect a *confidential* informant's identity pursuant to Evidence Code sections 1041 and 1042. Before disclosing any information about a confidential police informant, DDAs must coordinate with handlers to preserve the confidentiality of the informant's identity.
[115] DDAs are required to run informants through LIS. See Special Directive 16-08.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: **6033 West Century Boulevard, 5th Floor, Los Angeles, California 90045.**

On **April 3, 2018**, I served the foregoing document(s) described as **REAL PARTIES IN INTEREST'S MOTION FOR JUDICIAL NOTICE IN SUPPORT OF REPLY BRIEF ON THE MERITS; [PROPOSED] ORDER** in the manner checked below on all interested parties in this action addressed as follows:

Elizabeth Gibbons The Gibbons Firm, P.C. 811 Wilshire Blvd., 17th Floor Los Angeles, CA 90017 Tel: 323.591.6000 Email: gibbons@thegibbonsfirm.com ***Attorneys for Petitioner Association for Los Angeles Deputy Sheriffs (ALADS)***	Douglas G. Benedon Judith E. Posner Benedon & Serlin, LLP 22708 Mariano Street Woodland Hills, CA 91367-6128 Tel: 818.340.1950 Fax: 818.340.1990 Email: douglas@benedonserlin.com judy@benedonserlin.com ***Attorneys for Petitioner Association for Los Angeles Deputy Sheriffs (ALADS)***
Court of Appeal, State of California Second Appellate District Division Eight 300 S. Spring St.,2nd Floor N. Tower Los Angeles, CA 90013 ***Appellate Court***	California Attorney General 300 S. Spring Street, #1700 Los Angeles, CA 90013 Telephone: (213) 897-2000 ***Attorney General's Office***
Hon. James Chalfant Los Angeles Superior Court 111 North Hill Street, Dept. 85 Los Angeles, CA 90012-3117 Telephone: (213) 830-0785 ***Respondent Trial Court***	Frederick Bennett, P. Nguyen Superior Court of Los Angeles County 111 North Hill Street, Room 546 Los Angeles, CA 90012 Telephone: (213) 633-8598 Facsimile: (213) 625-3964 Email: fbennett@lacourt.org Pnguyen1@lacourt.org ***Respondent Superior Court of Los Angeles County***

☐ **(BY U.S. MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **(BY FACSIMILE)** I am personally and readily familiar with the business practice of Liebert Cassidy Whitmore for collection and processing of document(s) to be transmitted by facsimile. I arranged for the above-entitled document(s) to be sent by facsimile from facsimile number 310.337.0837 to the facsimile number(s) listed above. The facsimile machine I used complied with the applicable rules of court. Pursuant to the applicable rules, I caused the machine to print a transmission record of the transmission, to the above facsimile number(s) and no error was reported by the machine. A copy of this transmission is attached hereto.

☑**(BY OVERNIGHT MAIL)** By overnight courier, I arranged for the above-referenced document(s) to be delivered to an authorized overnight courier service, FedEx, for delivery to the addressee(s) above, in an envelope or package designated by the overnight courier service with delivery fees paid or provided for.

☐ **(BY ELECTRONIC SERVICE)** By electronically mailing a true and correct copy through Liebert Cassidy Whitmore's electronic mail system from bprater@lcwlegal.com to the email address(es) set forth above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☐ **(BY PERSONAL DELIVERY)** I delivered the above document(s) by hand to the addressee listed above.

Executed on **April 3, 2018**, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ Beverly T. Prater
Beverly T. Prater